UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

RESOLVING DIFFERENCES BETWEEN THE MINERAL RIGHTS HOLDERS AND COMMON LAW SURFACE RIGHTS HOLDERS IN SOUTH AFRICA: AN ANALYSIS OF THE MANDATORY DISPUTE SETTLEMENT MECHANISMS OF THE MPRDA 2002

By

NDIAFHI DAVHANA

(Student No. U20800712)

Submitted in partial fulfilment of the requirements for the degree

LLM IN EXTRACTIVE INDUSTRY LAW IN AFRICA

Prepared under the supervision of

Adv. Leonardus J. Gerber

Department of Public Law

Faculty of Law

University of Pretoria

March 2022

DECLARATION

Full names of student: ……

Student number: ……

The topic of work: ……

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.
2. I declare that this mini dissertation is my original work. Where other people's work has been used (either from a printed source, Internet, or any other source), this has been properly acknowledged and referenced by departmental requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
4. I have not allowed, and will not allow anyone, to copy my work to pass it off as his or her work.

SIGNATURE …….

ABSTRACT

In terms of the MPRDA, mineral resources in South Africa fall under the custodianship of the state and should be managed as the common heritage of the people of the Republic of South Africa. Both natural and juristic persons, inclusive of the state, are entitled to apply for prospecting or mineral rights from the Department of Mineral Resources and Energy.

In terms of the MPRDA, an applicant can be awarded rights to the mineral resources on land held in private ownership. As a result, when the interests of the mineral rights holders and surface rights holders compete or clash, such clash triggers dispute settlement mechanisms provided for under MPRDA which ultimately may lead to compensation for loss or damage to the land of the surface rights holders because of invasive nature of the mining operations.

This study will examine the dispute settlement mechanism and mandatory statutory remedies which are available to both mineral rights holders and surface rights holders alike under the MPRDA. In particular, the study will consider dispute settlement under common law, the old order, and new order rights and whether the provisions of the MPRDA favour mining rights holders over common law surface rights holders in its provisions of dispute settlement mechanism between these parties. The study further considers informal surface rights holders, and the lack of communal consent for deprivation of the informal surface rights holders' interest in their land, which leads to the dispute.

The findings of the research suggest that Section 54 must be exhausted to balance the rights of the prospecting or mining rights holders and surface rights holders. The provision of section 54 provides for a speedy dispute resolution process that is premised on parties reaching some sort of agreement through mediation. It also provides that if parties fail to reach an agreement, then they may approach a court. Therefore, a mining rights holder should not be entitled to mine until the section 54 process is finalized. A Section 54(5) contemplates that if negotiations between the affected parties and the mining right holder are deadlocked, and the Regional Manager concludes that any further negotiations may detrimentally affect the objects of the MPRDA, he or she may recommend to the Minister that the land be expropriated in terms of section 55.

The provisions of MPRDA do favour mining rights holders over common law surface rights holders even though at common law surface rights holders do not have the right to veto the granting or exercise of prospecting or mining rights. The prospecting or mining rights holders must notify, obtain consent, and consult with owners of land or lawful occupier of the land in respect of the use of the surface of the land in question. Accordingly, is only under IPILRA and not MPRDA that the 'consent' of most of the community is required before a prospecting or mining right is granted.

ACKNOWLEDGEMENTS

My deepest and most sincere gratitude goes to Adv Leonardus J Gerber for his supervisory role and guidance executed throughout the Extractive Industry Law in Africa master's programme for two years academic years whenever l faltered.

I extend my special heartfelt gratitude to my mother for both moral and financial support that kept my head high at the worst times of my career.

I have a heartfelt love for my wife for affording me proper family support structure and for believing in me when l was slowly losing the momentum of my strength and for my three wonderful daughters for reminding me of the purpose of life.

I further wish to extend an expression of my gratitude to Mr Tau Phalane, Executive Director of Tau Phalane Incorporated Attorneys, for taking me under his wings and igniting my passion for ongoing learning, he unreservedly encouraged training and studying.

Lastly, many thanks to Riaan Klopper, a former Director, and my principal at Phalane and Kloppers Incorporated for being a good principal at the time while l was a candidate attorney under his direct supervision.

LIST OF ACRONYMS

DMR	Department of Mineral Resources
DMRE	Department of Mineral Resources and Energy
IPILRA	Interim Protection of Informal Land Rights Act
MA	Minerals Act
MTRA	Mining Titles Registration Act
MTRAA	Mining Titles Registration Amendment Act
MPRDA	Mineral and Petroleum Resources Development Act
MPRDAA	Mineral and Petroleum Resources Development Amendment Act
NEMA	National Environmental Management

KEYWORDS

Acquisition, creation of servitude, consultation, deprivation, informal rights holders, consent, loss or damage, and compensation thereof.

TABLE OF CONTENTS

CHAPTER 1:

INTRODUCTION, BACKGROUND AND RESEARCH METHODOLOGY

1.1. Background to the research

According to South African common law, the owner of the land is the owner (*dominus*) of the whole of the land, including the air space above the surface and everything below it.[1] However, following the introduction of the Mineral and Petroleum Resources Development Act (MPRDA), this position was amended to one where the State is the custodian — but not the owner — of the minerals underneath the land.[2] Accordingly, only the State is afforded the discretionary statutory powers to grant the right to prospect and to mine.[3]

Consequently, the South African legal system has given rise to disputes between the interests of the holders of mineral rights, and the surface rights holders by allowing the separation of the title to the land from that of the mineral rights in the very same land.[4] The problem arises when the respective claims of mineral rights holders and surface rights holders compete and leave no room for the concurrent exercises of their rights.[5] In most cases, minerals are prospected and mined by mineral rights holders on land which they do not own, either by title deeds or lawful occupation.[6] This position was confirmed by the court in the case of *Agri SA v Min of Minerals and Energy,*[7] particularly the position that the right to minerals in the property of another constitutes quasi-servitude over that property.[8]

The informal customary surface rights holders by the indigenous communities have little or no power over who is entitled to obtain prospecting or mining rights in respect of their land. They

---

1. *Anglo Operations Ltd v Sandhurst Estates* (Pty) Ltd *(2007) 2 All SA 567 (SCA), 2007 (2) SA 363 (SCA)* para 16, stating that it is not possible to divide ownership of land into separate layers and that a right to minerals in the property of another is in the nature of a quasi-servitude over that property [hereafter "*Anglo Operations Ltd v Sandhurst Estates"*].
2. See the Preamble of the MPRDA,2002, which reads: "acknowledging that South Africa's mineral and petroleum resources belong to the nation and that the state is the custodian thereof."
3. S 3(2) of the MPRDA,2002.
4. BLS Franklin & M Kaplan: The Mining and Mineral Laws of South Africa (Durban Butterworth,1982) at 113.
5. Idem, at 114. Further, see *Hudson v Mann and another 1950 (4) SA 48 (T) at 488D.*
6. *Maledu & others v Itereleng Bakgatla Mineral Resources (pty) ltd & another (as amicus curia) 2019 (I) BCLR 53 (CC), para 19,* in the High Court the respondents accepted that a mining right itself does not extinguish other surface rights, including ownership on the land to which the right relates. The owner or other person in whom surface rights vest is at liberty to enjoy his or her surface rights subject to the limited real right of the mining holder.
7. *Agri SA v Min of Minerals and* Energy; Van Rooyen V Minister, Minerals and Energy. (2010) JOL 25436 (GNP).
8. See *supra* n.7, para 8, at 7.

simply have rights over the surface of their land,[9] but any mineral underneath the land that they own is held by the state on behalf of the people of South Africa.[10]

These mineral rights which are granted to mineral rights holders are regarded as limited real rights in terms of section 5(1) of the MPRDA,[11] which requires registrations of servitudes using a notarial deed of servitude at the Deeds Office for mineral rights holders to gain access over the surface of the land upon which minerals are to be prospected or mined.[12]

Disputes under normal circumstances can arise between mineral rights holders and common law surface rights holders because of mining activities. This is even though section 5(1)(3)(a) of the MPRDA provides that "the holder of mineral rights may, enter the land to which the rights relate together with his or her employees, bring onto the land any plant, machinery or equipment and build, construct or lay down any surface or underground infrastructure which may be required for mining or prospecting".[13]

1.2. Problem Statement

Based on the discussion in the preceding section, the separation of title to land and rights awarded for minerals may result in disputes between different rights holders. This was presumably foreseen by the drafters of the MPRDA, as the Act provides for statutory dispute settlement mechanisms. However, what is unclear is whether the process is 'balanced' or whether it may inadvertently bias a particular party.

1.3. Aims and objectives of the study

1.3.1. Research aim

This study seeks to examine the dispute settlement mechanism and mandatory statutory remedies provided for by sections 54 and 55 of the MPRDA.

---

9. *P J Badenhorst & H Mostert (2004*), Mineral and Petroleum Law of South Africa, chapter 13-5 'The cuius est solum rule in terms of the common law, which implies that a landowner is the owner of the minerals of the land, may have been abrogated by the section 3(1) of MPRDA'.

10. Section 3(1) of MPRDA provides that, "Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans," and these mineral and petroleum resources vests on the state by operation of law. Also, see *supra* n.2.

11. In terms of section 5(1) of MPRDA "A prospecting right, mining right, exploration right or production right granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967, (Act No. 16 of 1967), is a limited real right in respect of the mineral or petroleum and the land to which such right relates".

12. See Section 65(1) of the Deeds Registries Act 47 of 1937.

13. S 5(1)(3)(a) of the MPRDA,2002.

1.3.2. Research objectives

To achieve the aim of this study, certain objectives must be met. These objectives will be addressed consecutively in the substantive chapters of this study, and will include:

- Analysing the manner and prescripts associated with the obligations for mineral rights holders to determine if informal surface rights holders are entitled to be notified or consulted for consent during the application processes for prospecting or mining rights,
- Examining the statutory and common law remedies available between prospecting or mineral rights holders and informal surface rights holders to determine when and how the dispute settlement mechanism in terms of sections 54 and 55 applies, and
- Analysing whether the dispute settlement mechanism provisions of MPRDA favour a particular rights holder.

1.4. Research questions

1.4.1. Primary question

The primary question to be dealt with is whether the provisions of the MPRDA favour mining rights holders over common law surface rights holders, in its provisions of dispute settlement mechanism between these parties.

1.4.2. Secondary questions

To come to a satisfactory answer to the primary question above, the following secondary questions will be investigated in the substantive chapters of this study:

- What is the legal nature of prospecting and mining rights, and what are statutory and common law obligations of mineral rights holders towards informal surface rights holders?
- Are the informal surface rights holders entitled to be notified or consulted for consent during the application for prospecting or mineral right?
- How were disputes between mineral rights holders and informal surface rights holders resolved in terms of common law and MA and how are differences between mineral rights holders and common law surface rights holders resolved under MPRDA?
- Do the provisions of the dispute settlement mechanism in the MPRDA favour mining rights holders over common law or informal surface rights holders?

1.5. Research Methodology

1.5.1. Methodology

The proposed research methodology shall entail a desktop legal study of primary and secondary sources. The former includes the Constitution of the Republic of South Africa, 1996;[14] the Mineral and Petroleum Resources Development Act, 2002,[15] Arbitration Act,1965,[16] Interim Protection of Informal Land Rights Act,1996,[17] the Minerals Act, 1991,[18] as well as applicable case law. Interpretation and analyses of these sources will be supported by secondary sources, including books, journal articles, and legal commentary.

1.6. Relevance of the study

Mining activities are conducted by mineral rights holders within the communities and against the communities or individual rights of lawful surface rights holders. The relevancy of this study is necessitated by the fact that mining activities are conducted on land which may not necessarily be the land owned by the mineral rights holders, and as such disputes between mineral rights holders and common law surface rights holders may happen.

1.7. Chapter Overview

The mini dissertation will comprise five chapters, with the first setting out the background to the research, the research questions and the methodology that will be followed in addressing the research problem.

In chapter 2, the study will explore and analyse the manner and prescripts associated with the obligations for mineral rights holders to determine if informal surface rights holders are entitled to be notified or consulted for consent during the application processes for prospecting or mining rights in terms of the established legal framework.

In chapter 3 the study will examine the statutory and common law remedies available between prospecting or mineral rights holders and informal surface rights holders to determine how the dispute settlement mechanism in terms of sections 54 and 55 applies.

---

14. The Constitution of the Republic of South Africa Act 108 of 1996.
15. Mineral and Petroleum Resources Development Act 28 of 2002.
16. Arbitration Act 42 of 1965.
17. Interim Protection of Informal Land Rights Act 31 of 1996
18. Minerals Act 50 of 1991.

In chapter 4 the study will analyse whether the dispute settlement mechanism provisions of MPRDA favour mining rights holders over common law or informal surface rights holders.

The study will conclude in Chapter 5 by summarising the findings of the research and addressing the primary research question.

CHAPTER 2:

HOW DISPUTES ARISE BETWEEN PROSPECTING OR MINERAL RIGHTS HOLDERS AND INFORMAL SURFACE RIGHTS HOLDERS

2.1. Introduction

The objective of this chapter is to analyse the manner and prescripts associated with the obligations of mineral rights holders. Particularly to establish whether the informal surface rights holders are entitled to be notified or consulted for consent during the prospecting or mineral right application processes in terms of the established legal framework.

The Regional Manager cannot accept an application for a prospecting right if there is a prior application which has already been accepted for the same mineral on the same land. This can be the ground for possible disputes between the prospecting, mining, and surface rights holders during the application process.

Accordingly, section 2.2 will consider the legal nature of prospecting, and mining rights by analysing the provisions of sections 5(1) and 5(1)(3) of the MPRDA, and section 2(4) of the Mining Titles Registration Act (MTRA).[19] This analysis is important because section 5(1)(3)(a) grants mineral rights holders' 'wide discretionary entitlements' to prospect or mine upon the land on which rights have been awarded. As such disputes may arise in the instance where they do not own the land or there is no form of some agreements between mineral rights holders and surface rights holders. Section 2.3 will consider the obligation of prospecting and mineral rights holders to notify or consult for consent with surface rights holders. A lack of notification or consultation for consent during application processes under MPRDA and Interim Protection of Informal Land Rights (IPILRA) may result in disputes between prospecting or mining, and informal surface rights holders. The chapter will conclude in Section 2.4.

[19] Mining Titles Registration Act 16 of 1967 (hereinafter 'MTRA'), which provides that "the registration of a right in terms of this Act in the Mineral and Petroleum Titles Registration Office shall constitute a limited real right binding on third parties".

2.2. Creation of limited real rights of servitude and registration thereof

The legal nature of prospecting and mining rights is regarded as limited real rights in respect of the mineral and the land to which such rights relate.[20] These rights are created statutorily in terms of section 5(1) of the MPRDA which provides that a "… prospecting right, mining right, exploration right or production right granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967, (Act 16 of 1967), is a limited real right in respect of the mineral or petroleum and the land to which such right relates".[21]

The above proviso expressly states that these rights become limited real rights upon registration. Registration is necessary for these limited real rights to become enforceable against the third parties,[22] these rights, must be registered in the Mineral and Petroleum Registration Office within 30 days calculated from the date of entering into such an agreement.[23] The above section regards prospecting and mining rights as limited real rights because they subtract from the dominium of ownership of the land.

According to PJ Badenhorst and CN Van Heerden,[24] under the MPRDA regime, the state awards prospecting or mining rights and not the surface rights holder. It follows that subtraction from the dominium ownership occurs when the mining rights holder acquires occupational rights enjoyed by the surface rights holders. Therefore, it is only the awarding of limited real rights to land, for example, servitudes by surface rights holders that constitutes subtraction from the dominium ownership and not the awarding of mining rights by the state.

Section 2(4) of the MTRA[25] provides that it is the registration of a right in terms of the MTRA in the Mineral and Petroleum Titles Registration Office which constitutes a limited real right binding on third parties. In *Trojan Exploration Company (Pty) Ltd & Another v Rustenburg Platinum Mines Ltd & others,*[26] the court held that the nature of rights to minerals that had been separated from the ownership of the land were real rights.[27]

[20.] Section 5 of the MPRDA,2002.
[21.] Section 5(1) of the MPRDA, 2002. See *supra* n.10 for reference to this section.
[22.] S 2(4) of the MTRA,1967.'
[23.] S 11 (4) of the MPRDA,2002.
[24.] P J Badenhorst & C N Van Heerden, "Conflict Resolution between holders of prospecting or mineral rights and owners (or occupiers) of land or traditional communities: What is not good for the goose is good for the gander", (*2019) 136 SALJ 303, at 311.*
[25.] The Mining Titles Registration Act 16 of 1967.
[26.] *Trojan Exploration Company (Pty) Ltd & Another v Rustenburg Platinum Mines Ltd & others 1996 4 All SA 121 (A).*
[27.] See *supra* n.26, at 126.

In the case of *Minister of Minerals and Energy v Agri SA,*[28] the court held that the right to minerals in the property of another constitutes quasi-servitude over that property.[29] The Supreme Court of Appeal in the case of *The Minister of Mineral Resources & others v Mawetse (SA) Mining Corporation (Pty) Limited,*[30] examined the judgment of Schutz JA *in the Trojan Exploration Co (Pty) Ltd case* where the legal nature of the mining right was accepted as follows:

> *"Innes CJ in Van Vuren and Others v Registrar of Deeds 1907 TS 289 at 294 as being the entitlement 'to go upon the property to which they relate to search for minerals, and, if he (the holder) finds any, to sever them and carry them away. As these rights could not be fitted into the traditional classification of servitudes with exactness - they were not praedial as they were in favour of a person, not a dominant property - they were not personal as they were freely transferable - they had to be given another name, and the Chief Justice dubbed them quasi-servitudes, a label that has stuck. They are real rights"* [author's emphasis].[31]

In case of an irreconcilable differences between the interests of the surface rights holder and the mineral rights holder, the interest of the surface rights holder is subordinated.[32] It is the established common-law principle that minerals below the surface belong to the surface rights holder, it is only when minerals are extracted that they are owned by the mining right holder.[33]

The holder of prospecting and or mining right is entitled to enter the land to prospect or mine, together with his or her employees, and bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or undersea infrastructure which may be required for prospecting or mining.[34] The right to enter in terms of section 5(3)(a) of the MPRDA should be read and interpreted subject to the compensation provision of section 54 of the MPRDA, which shall be discussed in chapter 3 herein.[35]

The prospecting or mining right holder is entitled to prospect and/or mine mineral or petroleum for his or her account on or beneath the land where the right has been granted.[36] The prospecting or mining right holder can remove, and dispose of any mineral found during prospecting or mining.[37] In

---

28. *Minister of Minerals and Energy v Agri SA 2012 (9) BCLR 958 (SCA).*
29. See *supra* n. 28, at 976.
30. *The Minister of Mineral Resources & others v Mawetse (SA) Mining Corporation (Pty) Limited 2016 (1) SA 306 (SCA*).
31. See supra n.30, at 284.
32. Van Vuren and others v Registrar of Deeds 1907 TS 289 at 295.
33. Ibid.
34. S 5(3)(a) of the MPRDA,2002. See *supra* n.13.
35. See *infra* subsection 3.4., at 30-33.
36. S 5 (3) (b) of the MPRDA, 2002.
37. S 5(3) (c) of the MPRDA,2002.

R v Boshoff and Others,[38] the Court held that nominees of owners of alienated state land were not regarded as mere agents but rather assignees that were free to exercise the right for the nominee's benefit.

The limited real right extends to the minerals, and to the land which is subject to prospecting or mining.[39] The land refers to the surface of the land and the sea[40] in respect of which the prospecting or mining right has been granted.

According to BLS Franklin and M Kaplan, the mineral right holder can sink boreholes, erect shafts, and use the surface for mining,[41] these entitlements can cause irreconcilable disputes between the mining rights holders and surface rights holders.

2.3. Disputes arising from lack of notification and consultation for consent during the application process

2.3.1. Consultation with common law surface rights holders

The MPRDA requires notification and consultation with common law surface rights holders during application process for prospecting and mining rights.[42] Section 16(1) of the MPRDA provides that any person who wishes to apply for a prospecting right must simultaneously apply for an environmental authorisation and must lodge the application at the office of the regional manager,[43]in whose region the land is situated.[44] The application must be lodged in the prescribed manner,[45] together with the prescribed non-refundable application fee.[46] The application for prospecting rights must be accompanied by a prospecting work programme.[47]

The regional manager is obliged to accept an application for a prospecting right if the requirements of section 16(1) (a)–(c) above have been met.[48]There should be no other person

38. *R v Boshoff and Others* 1938 AD 464 at 472-473.
39. S 5 (3) (a), (b), (d) and (e) of the MPRDA,2002.
40. Chapter 1, Definition's "land" includes the surface of the land and the sea, where appropriate.
41. See BLS Franklin and M Kaplan (1982), *supra* n.4, at 131-132.
42. See *infra* s 10 of the MPRDA,2002, subsection (a)-(b).
43. See Definition of "regional manager" means the officer designated by the Director-General in terms of section 8 as a regional manager for a specified region.
44. S 16(1)(a).
45. S 16(1)(b).
46. S 16(1)(c).
47. The prescribed requirements in the regulation relate to technical aspects and include, the full particulars of the applicant, the plan showing the land to which the application relates, and the mineral or minerals to prospect, see reg 7 of the MPRDA,2002.
48. S 16(2)(a).

holding a prospecting right, retention permit, mining permit or mining right for the same mineral and land.[49]

The Regional Manager cannot accept an application for a prospecting right if there is a prior application for a prospecting or mining right, mining permit or retention permit which has already been accepted for the same mineral on the same land and which remains to be granted or refused.[50] The provisions of section 22 of the MPRDA in respect of mining rights application and section 27 of the MPRDA in respect of the mining permit application process have similar provisions to section 16 of the MPRDA.[51]The Regional Manager must notify the applicant in writing within 14 days after accepting the application for prospecting right, mining right or mining permit to;

(a) to submit relevant environmental reports required in terms of Chapter 5 of the National Environmental Management Act,1998 (NEMA) within 60 days of the date of the notice; and

(b) to consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the results of the consultation in the relevant environmental reports; and include the results of consultation together with environmental reports.[52]

The regional manager must make it known, in the prescribed manner, that an application for prospecting or mining rights has been accepted,[53] and must call upon interested and affected persons to submit their comments.[54] If any person objects to the granting of the right, the objection must be referred to the Regional Mining Development and Environmental Committee (REMDEC) to consider the objections and advise the minister on the objections.[55] Prospecting or mining that commences in the absence of a written notice to the landowner or lawful occupier of the land is illegal and prohibited.[56]

In *Bengwenyama Minerals (Pty) Ltd & another v Genorah Resources (Pty) Ltd & others,*[57] the constitutional court held that the granting and execution of prospecting rights is a grave invasion of a property owner's rights and that the purpose of the statutory requirement of consultation with landowners, was to provide landowners with the information necessary

49. S 16(2)(b).
50. S16(2)(c).
51. Sections 22 (1) and (2) and section 27(1) to section 27 (3).
52. Sections 16(4)(a), (b) and (5) ,22 (4) (a), (b) and (5), and 27(5).
53. S 10(1)(a).
54. S 10(1)(b).
55. S 10(2).
56. S 5A(c).
57. *Bengwenyama Minerals (Pty) Ltd & another v Genorah Resources (Pty) Ltd & others (2010) JOL 26501 (CC).*

to make an informed decision on how to respond to the application.[58]

According to the facts of the case the Department of Mineral Resources and Energy (DMRE) had awarded prospecting rights to Genorah Resources Pty Ltd (the 1st respondent herein) over five properties, despite 1st respondent's failure to consult with interested and affected members of the community.[59]

The applicants had resided in one of these two properties for over a century. The applicants had previously lodged objections with the DMRE against granting prospecting rights because they were interested in acquiring prospecting rights as a community.[60] Although the applicant had left prescribed consultation forms with the community leader regarding the prospecting application, which forms were never signed by any member of the community, however, no consultation attempt was ever made.[61] The applicants formed Bengwenyama Minerals Pty Ltd which lodged two prospecting rights applications to the DMRE. The 1st application was not accepted by the DMRE due to a lack of production of the title deed and because the prospecting right on the third property had already been awarded to someone. The 2nd application regarding the farms was accepted and the DMRE acknowledged that the application complied with s 16(2) of the MPRDA and cautioned the applicant to consult interested and affected parties.[62]

Three months later the DMRE informed the applicants that their application for prospecting rights on the farms had been refused because such has been awarded to applicants who brought their applications earlier. The applicant approached the court for a review of the DMRE's decision.[63]

One of the questions before the court was whether there was proper consultation by 1st respondent with the applicants in terms of the MPRDA. The court held that the 1st respondent had failed to comply with section 16 (4) (b) requirements of the MPRDA. The court held further that there was no consultation at all regarding the Eerstegeluk property.[64]

According to PJ Badenhorst *et al;*[65] the Constitutional Court in the Bengwenyama case confirmed the position that awarding and executing prospecting rights is a grave and considerable invasion of the

58. See *supra* n.57, para 63.
59. Idem, para 7, at 5.
60. Ibid.
61. See *supra* n.57, paras 67, and 68, at 41-42.
62. See *supra* n.57, paras 14, and 15, at 8-9.
63. See supra n.57, para 18, at 11.
64. See *supra* n.57, para 68.
65. PJ Badenhorst, NJJ Olivier & C Williams "The Final Judgment "TSAR 2012 at 113.

rights of usage and enjoyment of the surface by the surface rights holder, this is so because neither the state nor the surface rights holder is the owner of minerals beneath the surface, the state is the custodian.[66]

Badenhorst *et al*; emphasized that the drafters of the MPRDA have presumably foreseen the rights of landowners and lawful occupiers, particularly because sections 10(1) and (2) and section 16(4)(b) of the MPRDA provide for obligations on the prospecting or mining right holder to consult with lawful occupiers, interested and affected parties.[67] Moreover, the authors noted that the purpose of notifications and consultation relates to a "grave and considerable "invasion of the rights of the landowners because of the granting of the prospecting rights.[68] In the same vein, the Constitutional Court stated that:[69]

> *"The consultation process and its result is an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process to determine whether the consultation was sufficient to render the grant of the application procedurally fair."* [70]

According to Tlale,[71] the Constitutional Court decision in the Bengwenyama case has confirmed that, during the consultation, communities must be provided with full details of the proposed mining, including, the time and duration of mining, and its impact on the surface of the landowner. Consultation should not be the ticking of boxes to obtain signatures for consent.[72]

2.3.2. Consultation with informal surface rights holders

The MPRDA must be read in conjunction with IPILRA as far as legal requirements for consultation are concerned. The Interim Protection of Informal Land Rights Act (IPILRA)[73] provides that no person may be deprived of any informal right to land without his or her consent.[74] Deprivation of informal rights to land without the consent of the informal right holder can happen formally in terms of the Expropriation Act or any other law which allows for formal deprivation of the right to land. Deprivation of the informal rights to land without necessary consent can spark disputes between

66. Ibid.
67. *Ibid.*
68. *Idem*, at 114.
69. *Ibid.*
70. See Bengwenyama Mineral case *supra* n.57, para 66, at 40-41.
71. MT Tlale "Conflict levels of engagement under the Interim Protection of Informal Land Rights Act and the Minerals and Petroleum Development Act: A closer look at the Xolobeni community dispute" PER/PELJ 2020 (23) at 15.
72. Ibid.
73. IPILRA Act,31 of 1996.
74. S 2(1) of IPILRA,1996.

mining rights and informal rights holders during the application process.[75]Furthermore, IPILRA provides for the deprivation of land or interest in land according to custom and usage of the community which holds the land or interest in such land.[76]

The decision to deprive informal rights holders of the right to land can only be taken by most of the informal rights holders in a meeting convened for the disposal of an informal right to land. The informal rights holders should be given sufficient notice and a reasonable opportunity to participate and must either be present or represented at that meeting.[77]

In *Maledu & Others, v Itereleng Bakgatla Mineral Resources (Pty) Ltd & Another (Mdumiseni Dlamini and Another as Amici Curiae)*[78]applicants were the occupiers of land which was registered in the name of the Minister of Rural Development and Land Reform and held by the minister in trust on behalf of the Community. Two companies (respondents herein) were granted a mining right over the land. The respondents obtained a court order evicting and restraining applicants from entering the land. The applicants opposed both court orders and contested that they were lawful occupiers of the land and were neither consulted by the respondents nor consented to be deprived of their informal rights to the land. Neither the arguments nor leave to appeal to the High Court and Supreme Court of Appeal were successful, which prompted the applicants to bring an application to the Constitutional Court for leave to appeal against the High Court decision granting the respondent's application.

Firstly, inter *alia, the Court* analysed the importance of the requirements relating to notification and consultation with affected parties as explained in the *Bengwenyama case* along the following lines:

> *"These different notice and consultation requirements are indicative of serious concern for the rights and interests of landowners and lawful occupiers in the process of granting prospecting rights. It is not difficult to see why: the 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…"* [79]

The Court further explained the purpose of consultation as follows:

[75.] See supra n.74.
[76.] S 2(2) of IPILRA, 1996.
[77.] S 2(4) of IPILRA, 1996.
[78.] *Maledu & Others, v Itereleng Bakgatla Mineral Resources (Pty) Ltd & Another (Mdumiseni Dlamini and Another as Amici Curiae) 2019 (1) BCLR 53 (CC).*
[79.] See *supra* n.78, para 78, at 77.

"One of the purposes of consultation with the [lawful occupier] must surely be to see whether some accommodation is possible between the applicant for a [mining] right and the [lawful occupier] insofar as the interference with the [lawful occupier's] rights to use the property is concerned."[80]

An inference that can be drawn from the passage above is that even though consent of the surface rights holders or lawful occupiers is not a requirement for awarding of the prospecting, mining rights or permits, the MPRDA requires notification and consultation during application processes.[81]

In the case of *Maledu & Others*, one of the legal questions that the Court was confronted with was whether the awarding of the mining right to the respondents constituted a deprivation of informal rights to the land. The Court held that because the respondents said that it was not possible to exercise their mining rights whilst applicants are in the land, therefore applicants will be deprived of the informal rights to land if an eviction order was allowed to stand.[82]

According to the facts in *Baleni & others v Minister of Mineral Resources & others*,[83] the applicants and their ancestors had lived at uMgungundlovu for centuries. The applicants held informal rights to the land and occupied the land by their law and custom. *Transworld Energy and Mineral Resources (SA) Pty Ltd* (fifth respondent herein) had applied for a mining right to mine titanium-rich sand deposits. Many of the applicants who lived within the vicinity of the proposed mining area opposed mining because they had family graves for their private and community rituals and used the land for the cultivation of crops and grazing for their livestock.[84]The awarding of mining rights to the fifth respondent had divided the community which led the applicants to seek several declaratory reliefs.

One of the declaratory reliefs sought was in terms of IPILRA read with MPRDA that the Minister of the Department of Minerals Resources (DMR) is obliged to obtain the full and informed consent of applicants and the community before awarding mining rights to the fifth respondent.

Basson J observed that the enactment of IPILRA played an important role in redressing the shameful history of South Africa,[85] and referred to the historical summary in the Constitutional

80. Ibid, para 79.
81. See section 16(4) (b) of the MPRDA,2002.
82. See *supra* n.78 and n.79, para 102.
83. *Baleni & others v Minister of Mineral Resources & others 2019 1 All SA 358 (GP*).
84. See *supra* n.83, para 6, at 362.
85. Idem, para 48, at 375.

Court case of *Mashavha v President of the Republic of South Africa & others.*[86] In particular:

> "*Our history is well known. It is one of colonisation, apartheid, economic exploitation, migrant labour, oppression, and Balkanisation. Gross inequalities were deliberately and legally imposed as far as race and geographical areas are concerned. Not only were there richer and poorer provinces, but there were 'homelands', which by no stretch of the imagination could be seen to have been treated on the same footing as 'white' South Africa, as far as resources are concerned."*[87]

The court in *Baleni & others* dealt with the definition of a "community" in terms of IPLRA[88] and confirmed the position that the uMgungundlovu community constitute such a community as defined. The court stated that IPILRA recognises that many informal rights are not held individually but as a community [89]consistent with the communal consent[90] required.[91]

The Court held that IPILRA affords protection to informal rights holders concerning land owned in terms of customary law[92] and further recognises that collective decision in terms of customary law may override the decision of the individual if the decision is made according to the custom and usage of that community.[93]

The Court further held the IPILRA and MPRDA must be read together.[94] Under IPILRA the applicants have the right to consent to deprivation of informal rights to land and where the land is owned by a community, the community must consider the proposed deprivation of informal rights to land and take a communal decision in terms of their custom on whether they consent or not to the proposed disposal of their informal rights to their land.[95]

According to PJ Badenhorst and CN Van Heerden,[96]communal consent by most of the members of the community is the requirement for awarding prospecting or mining right over land owned by the community and may not be deprived of their right or interest to land without their consent. PJ

---

86. *Mashavha v President of the Republic of South Africa & others 2005 (2) SA 476 (CC) [also reported at 2004 (12) BCLR 1243 (CC) - Ed*].
87. See *supra* n.83, n.84, and n.85, para 48, at 375.
88. S 1 Definition of "community" means any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group;.
89. S 1 of IPILRA, Definitions "person" includes a community or a part thereof.
90. See discussion *supra* subsection 2.3.2, at 19.
91. See *supra* n.83, para 54-56.
92. S 1(1)(a)(I) of IPILRA,1996.
93. S 2(2) of IPILRA,1996, See also *supra* n.83 for Court decision, para 73, at 385.
94. Idem, para 83, at 389.
95. Ibid.
96. See *supra* n.24.

Badenhorst observed that informal rights holders enjoy the protection that surface rights holders do not enjoy under IPILRA.[97]

The surface rights holders are entitled to be notified, consulted for comment or objections to an application for prospecting or mining rights, but do not have the right to veto the granting or exercise of prospecting or mining rights, including but not limited to the use of the surface of the land. Owners' Consent or lawful occupier's consent is not a requirement for the awarding of prospecting or mining right, equally so the owners of the common law land are devoid of the right to decide what happens with their land should prospecting or mining takes place under MPRDA.[98] Although there can be many reasons for disputes, lack of consultation is a potential for dispute that can trigger the application of the dispute settlement mechanism as provided for in terms section 54 of the MPRDA.

2.4. Chapter Conclusion

The objective of this chapter was to analyse the manner and prescripts associated with the obligations of mineral rights holders. Particularly to establish whether the informal surface rights holders are entitled to be notified or consulted for consent during the prospecting or mining right application processes.

A review of the legislative framework in section 2.2 illustrated that prospecting and mining rights are regarded as limited real rights in respect of the mineral and the land to which such rights relate. These rights are created statutorily in terms of section 5(1) of the MPRDA. Section 2(4) of the MTRA demonstrated that it is the registration of a right in terms of the MTRA in the Mineral and Petroleum Titles Registration Office which constitutes a limited real right binding on third parties.

The discussion in Section 2.3 demonstrated that prospecting or mining rights holders must notify or consult for consent with common law surface rights holders. According to the Constitutional Court in *Bengwenyama Minerals (Pty) Ltd & another,* the Court held that the awarding and execution of prospecting rights is a grave invasion of a property owner's rights, and that the purpose of the statutory requirement of consultation with landowners, was to provide landowners with the information necessary to make an informed decision on how they respond to the application.

---

97. P J Badenhorst "conflict resolution between owners of land and holders of rights to minerals: a lopsided triangle?", *TSAR 2011-2, at 333*.

98. See PJ Badenhorst and CN Van Heerden (2019), *supra* n.24 at 326.

Accordingly, section 2(1) of the IPILRA provides that no person may be deprived of any informal right to land without his or her consent. As such, section 2(2) of IPILRA highlighted that a person may be deprived of such land or right in land by the custom and usage of that community provided the land is owned on a communal basis.

Moreover, the common law surface rights holders, informal surface rights holders or lawful occupiers of land have little or no power over who is entitled to obtain prospecting or mining rights in respect of their land. The surface rights holders (informal surface rights or lawful occupiers thereof) simply have rights over the surface of their land. For prospecting, mining rights or permits to be issued in terms of MPRDA the consent of surface rights holders is not required.

In the following chapter, the study will examine the common law and statutory remedies available between prospecting or mining rights holders and informal surface rights holders to determine how the dispute settlement mechanism in terms of the established legal framework applies.

CHAPTER 3:

DISPUTE SETTLEMENT IN TERMS OF OLD ORDER AND NEW ORDER RIGHTS

3.1. Introduction

The findings in chapter 2 demonstrated that the surface rights holders are entitled to be notified and consulted for comment or objections to an application for prospecting or mining rights, but do not have the right to veto the granting or exercise of prospecting or mining rights, including but not limited to the use of the surface of the land in question. owners' consent or lawful occupier's consent is not a requirement for the granting of prospecting or mining right, equally so the owners of the common law land are devoid of the right to decide what happens with their land should prospecting or mining takes place under MPRDA. It is only under IPILRA that consent for the deprivation of informal land rights is a requirement.

The objective of this chapter is to examine the statutory and common law remedies which may kick in at the instance of a dispute caused by a lack of consent, between prospecting or mining rights holders, and informal surface rights holders to determine how the dispute settlement mechanism in terms of sections 54 and 55 applies. Accordingly, Section 3.2 will consider how disputes between prospecting or mining right and surface rights holders were resolved under the common law because of the irreconcilable differences between these parties. Section 3.3 will consider how disputes between prospecting or mining right and surface rights holders were resolved under the Minerals Act (old order rights) because of the irreconcilable differences between the mining right and surface rights holders. Section 3.4 will consider how disputes are resolved between the prospecting or mining right holders under the MPRDA because of irreconcilable differences between the mining rights and informal surface rights holders in terms of the relevant legislative framework. The chapter will conclude in Section 3.5 by summarising the research findings and addressing the question of how disputes between mining rights and surface rights holders were historically resolved in comparison to the provisions under the MPRDA.

3.2. Dispute settlement position in terms of common law

The MPRDA specifically provides that where the common law is inconsistent with the MPRDA, the MPRDA shall prevail.[99] The point of departure is that the enactment of the MPRDA did not oust common law principles still applicable in respect of the ownership of the land.

[99] Section 4(2) of the MPRDA,2002.

The surface rights holder under the Minerals Act[100] had to apply to the authority for a right to prospect unsevered precious metals from the land, equally so the holder of the right to precious metals which had been severed from the land had to apply for a right to prospect. Third parties were required to obtain written permission from the holder of the right to precious metals. The permission was subsequently incorporated into a prospecting contract used to be registered at the Deeds Office in terms of the Deeds Registries Act,[101]thus rendering it enforceable against third parties.[102]

Per the common law, the owner of the land is the owner (*dominus*) of the whole of the land, including the air space above the surface and everything below it.[103] This principle is derived from the Latin maxim *cuius est solum eius est usque ad coelum et ad infernos*.[104] Under the MPRDA the State is the custodian (but not the owner) of the minerals underneath the land and only the State is having discretionary statutory powers to grant the right to prospect and to mine.[105]

The South African legal system, as recognised by common law has given rise to disputes between the interests of the holders of mining rights and the surface rights holders by allowing for the separation of the title to the land from that of the mining rights in the same land.[106] The problem arises when the respective claims of mining rights and surface rights holders compete and leave no room for the concurrent exercises of their rights.[107]

In *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*,[108] the respondent owned a farm known as Brakfontein 117 measuring 850 hectares in Mpumalanga. The appellant held all rights to coal by a notarial cession of mineral rights over this farm. In the High Court, the appellant had applied for permission to conduct open cast mining on the part of the property. The court upheld the respondent's objections and refused the application. The respondent appealed with leave of court.[109]

The Court noted that the appellant's rights arose from two cessions that neither expressly forbid nor provide for open cast mining. This raised the question of what the default position in

---

100. Minerals Act 50 of 1991.
101. The Deeds Registries Act 47 of 1937.
102. BLS Franklin & M Kaplan, (1982), *supra* n.4 at 113
103. See *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd supra*, n.1.
104. See *supra* n.4 at 113.
105. See *supra*, n.3 and n.9 for the authorities.
106. BLS Franklin & M Kaplan, (1982), *supra* n.4, at 113.
107. Ibid. See *supra* n.4.
108. See *supra* n.1 for citations.
109. Ibid. Para 1, at 568.

common law is where open cast mining is not expressly regulated by the grant of mineral rights. The court cited the following passage by Malan J in *Hudson v Mann.*[110]

> *"The principles underlying the decisions appear to be that the grantee of mineral rights may resist interference with a reasonable exercise of those rights either by the grantor or by those who derive title through him. In case of irreconcilable conflict, the use of the surface rights must be subordinated to mineral exploration"*[111]

The Court held that the fundamental principle of South African law is that the owner of the land is the owner of everything that is adherent to the surface, whether above or below the surface.[112]The Court further held that because minerals are usually found under the surface of the land, therefore mineral right holders excavates the land, the impact of which is damaging the surface and depriving surface rights holder of their rights to use the surface.[113] The Court noted that open cast mining should be allowed if is reasonably necessary and must be determined according to the facts. The Court, therefore, concluded that the appellant was entitled to conduct open cast mining. [114]

PJ Badenhorst[115] noted that the common-law principles regarding the exercise of rights to minerals also apply to rights to minerals granted by the minister of minerals in terms of section 3(2)(a) of the MPRDA. As per the common law, the holder of the mineral rights would not be under any obligation to pay compensation to the surface rights holder for damage caused during prospecting or mining, in the absence of express contractual terms obliging the mineral right holder to pay such compensation, save that the mineral right holder reasonably exercises quasi-servitude rights *civiliter modo.*[116]

In the case of Transvaal Property & Investment Co, Ltd. and Reinhold & Co. v S.A. Townships Mining & Finance Corp, Ltd., The Administrator,[117]Schreiner J remarked that parties to this case have the right

---

110. Hudson v Mann 1950 (4) SA 485 (T) at 488B-H.
111. See *supra* n.1, and n.108, para 7, at 570.
112. Idem, para 16, at 573.
113. Idem, para 19, at 574.
114. Ibid.
115. See Badenhorst (*TSAR 2011-2), supra n.97,* at *340.*
116. In Tvl Property & Investment Co Ltd and Reinhold & Co v SA Townships Mining & Finance Corporation Ltd & the Administrator 1938 TPD 512, the question of compensation for damage to crops and improvements "including, presumably, buildings" had been specifically provided for in the certificates themselves (see 519). In *Nolte v Johannesburg Consolidated Investment Co Ltd 1943 AD 295, Zuurbekom Ltd v Union Corporation Ltd 1947 1 SA 514 (A), Douglas Colliery Ltd v Bothma 1947 3 SA 602 (T), Hudson v Mann 1950 4 SA 485 (T).*
117. Transvaal Property & Investment Co, Ltd., and Reinhold & Co. v S.A. Townships Mining & Finance Corp, Ltd., and The Administrator *1938 TPD 512.*

to use the surface and that there is thus a measure of competition between their rights. In the absence of any present or immediately contemplated prospecting or mining operations at any place, the surface owner could cultivate the land or even erect buildings thereon. He cited the authority of *Nolan v Barnard*, [118] which held the view that the rights of the *dominus* are not to be unduly interfered with. He conceded that the issue of damage or resolution of the dispute over competing rights between mineral rights holders and common law surface rights holders are contained in certificates themselves. He further held that the rights of the applicants are intended to take priority, but compensation must be paid for damage to crops or improvements, including, presumably, buildings.[119]

In *West Witwatersrand Areas Ltd v Roos,*[120] Curlewis, A.C.J concurred that the court has considered the principles laid down in English Courts judgements as to when an implied term will be read into a contract and cited the case of *Administrator (Transvaal) v Industrial Commercial Timber & Supply Co. 1912 AD 25* where WESSELS, A.C.J said:

> *"*It is clear law that the Court will not presume that a term or condition is implied in a contract or grant unless the contract itself and the surrounding circumstances clearly show that both parties must have entered into the transaction on the understanding that the implied term formed part of the contract or grant…"[121]

He then borrowed the words of Bowen, L.J in *The Moorcock*[122]that "such an implied term is sometimes called an implied warranty and sometimes a covenant in law depending on the nature of the transaction" The Court held that the damaging impact that may be caused to the owners of the company, is minor compared with the operation of digging and mining. [123]

According to BLS Franklin and M Kaplan,[124] the South African legal System allows minerals to be severed from the bare dominium and that triggers the clash of interests between the surface owner and the holder of mining rights in respect of the use of the surface of the land. No dispute can arise when the common law surface rights holders and prospecting or mining rights holders can enjoy their rights without a clash of interests. Disputes may arise when these parties' interests compete rendering it impossible to exercise their rights simultaneously.

---

118. *Nolan v Barnard 1908 TS 142.*
119. See *supra* n.116, at 159.
120. *West Witwatersrand Areas Ltd v Roos 1936 AD 62*, at 77.
121. Idem, at 74.
122. The Moorcock *(14 PD 67).*
123. Ibid, at 75.
124. See BLS Franklin & M Kaplan, *supra* n.4, at 113-114.

According to PJ Badenhorst and CN Van Heerden,[125]common law rules of conflict resolution in case of competing ownership and prospecting rights have been summarised as follows:

> *'The common-law principles regarding the exercise of rights to minerals or transitional rights to minerals…entail that in a case of irreconcilable conflict between the owner of the land and holder of rights to minerals, the surface rights must be subordinated to mineral exploration".*[126]

A holder of mining rights must exercise his rights reasonably, in good faith, in a manner least injurious to the interest of the surface rights holder and civiliter *modo*. Per common law, the mining right holder is not under obligation to compensate surface rights holder for damage caused during prospecting or mining.[127]

3.3. Dispute Settlement provisions in terms of Minerals Act 50 of 1991

The old order rights had dispute settlement provisions that encourage prospecting or mining rights holders to compensate the common law surface rights holder in case of a loss, damage, disturbance, or obstruction of the prospecting, or mining area.[128]

The owner of the land would be compensated for the loss upon writing and satisfying the Minister that he suffered a loss. The Minister could investigate whether the owner is likely to suffer damage or has suffered damages due to disturbance caused by mining,[129]or any obstruction established on land by any person entitled to mine on such land for any mineral.[130] The owner should have made all reasonable efforts to negotiate a settlement to compensate for the damage. The owner of the land shall not be entitled to recover any further compensation for damages suffered if such compensation has already been paid to the owner or his predecessor in title, however, compensation for any further disturbances or subsidence may still be recovered.[131]

The owner of the land who suffered damage shall not be compensated where the right to establish obstruction to the land was acquired using a reservation of rights at the time when the mineral rights were severed from the ownership of the land[132] or the right to establish such obstruction was

---

125. PJ Badenhorst and CN Van Heerden *supra*, n.24, (*2019) 136 SALJ 303 at 315 - 316*.
126. Ibid.
127. Ibid
128. S 42(1) (e) (i) (aa) and (bb) of Minerals Act,1991.
129. S 42(1)(e) (i) (aa)
130. S 42(1)(e) (i) (bb)
131. S 42(1)(e) (i).
132. S 42 (1) f(ii)(aa).

acquired by the person entitled to mine on such land by servitude or otherwise.[133] According to Ratsheko, "… section 42 supplemented the common law principles with regards to mining by providing certain remedies to protect surface rights holders"[134]

3.4. Dispute Settlement Provisions in terms of MPRDA

Under the MPRDA regime, the common law principles which relate to the exercise of the mining rights are consistent with the provision of the MPRDA, section 54 of the MPRDA supplemented the common law principles. Even though section 42 of the Minerals Act supplemented the common law principles regarding certain remedies to protect surface rights holders, it was not incorporated into the MPRDA.[135]

According to Badenhorst and Van Heerden[136], "to resolve a dispute of a conflicting exercise of rights to the land, the respective parties must make use of section 54 administrative procedures of the MPRDA which may lead to the following results:

(a) conclusion of a compensation agreement between the owner or occupier of the land and the holder of prospecting and mining rights;
(b) determination of compensation by arbitration or court if a compensation agreement cannot be reached by the parties;
(c) expropriation of the ownership of the land, if further negotiations between the parties would be detrimental to the objectives of the MPRDA; or
(d) prohibition of prospecting or mining operations, if failure to reach an agreement is the fault of the holder of the prospecting or mining right".

Section 54 of the MPRDA has provisions intended to resolve differences between prospecting or mining right holders, common law surface rights holders and informal surface rights holders in South Africa.[137] Accordingly, the holder of a prospecting right or mining right must notify the Regional Manager if he is prevented from prospecting or mining because the owner or the lawful occupier of the land denies him to enter the land,[138] places unreasonable demands in return of access to land,[139] or cannot be found to apply for access.[140]

---

133. S 42 (1)f (ii)(bb).
134. 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), at 44.
135. See Badenhorst (*TSAR 2011-2), supra n.97 at 333-334*.
136. See PJ Badenhorst & CN Van Heerden, *supra* n.24, (2019) 136 SALJ 303, at 326 -327.
137. S 54 of MPRDA,2002.
138. S 54 (1) (a) provides that the holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or

After receipt of notice by the aggrieved prospecting or mining right holder about the conduct of the owner or lawful occupier of land, the Regional Manager must call upon the owner or lawful occupier of the land to make representations within 14 days from the date of such notice,[141] regarding the issues raised by the holder of the prospecting or mining right,[142] and to inform the holder of a prospecting or mining right in terms of the MPRDA.[143]The Regional Manager should set out the provisions of the MPRDA which are contravened by the surface rights holder by preventing the prospecting or mining rights holder from exercising their rights,[144] and lastly, the Regional Manager should inform the owner or occupier of the land of the steps which may be taken should he or she persist in contravening the provisions of MPRDA.[145]

After the Regional Manager considers the issues raised by the holder of prospecting or mining right and any written representations by the surface rights holder or the lawful occupier of the land, the Regional Manager must conclude that the owner or occupier has suffered or is likely to suffer loss or damage because of the prospecting or mining operations. The Regional Manager must request the parties concerned to try to reach an agreement for the payment of compensation for such loss or damage.[146]

Upon failure of the parties to reach an agreement, compensation must be determined by arbitration with the Arbitration Act[147] or by a competent court.[148] Arbitration only happens if the parties agree to such arbitration.[149] The land may be expropriated in terms of section 55 of the MPRDA if further negotiations may detrimentally affect the objects of the MPRDA.[150]

---

conducting any reconnaissance, prospecting, or mining operations because the owner or the lawful occupier of the land in question refuses to allow such holder to enter the land;

139. S 54(1) (b). provides that the holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting, or mining operations because the owner or the lawful occupier of the land in question places unreasonable demands in return for access to the land; or

140. S 54 (1) (c). provides that the holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting, or mining operations because the owner or the lawful occupier of the land in question cannot be found in order to apply for access.

141. S 54 (2).

142. S 54 (2) (a).

143. S 54 (2) (b).

144. S 54 (2) (c).

145. S 54 (2) (d).

146. S 54 (3).

147. Arbitration Act 42 of 1965.

148. S 54 (4).

149. Section 54(4) is silent on who has an election to subject parties to the arbitration or Competent Court.

150. S 54(5), for the objects of the MPRDA relevant to this provision, see infra n.161.

Upon determination by the regional manager that the failure of the parties to reach an agreement or to resolve the differences is due to the fault of the holder of the prospecting or mining right, the regional manager may in writing prohibit the holder of prospecting or mining right from exercising their rights until the dispute has been resolved by arbitration or by a competent court.[151] The owner or lawful occupier of the land must notify the Regional Manager of damage suffered or future possible loss or damage because of the prospecting or mining operations. [152]

The Constitutional Court in the case of Maledu *& others*[153] in considering the question of whether the respondents were under a duty to exhaust the internal process under section 54 of the MPRDA before approaching the High Court for eviction and Interdict of applicants. Petse A J said that when Section 54(1) provides that the holder of a mining right or permit:

> *"Must notify the relevant Regional Manager if that holder is prevented from commencing or conducting . . . mining operations because the owner or the lawful occupier of the land in question . . . refuses to allow such holder to enter the land."*[154]

The above provision employs mandatory language.[155] Petse AJ said that the High Court's reliance on the case of Joubert *v Maranda Mining Company (Pty) Ltd,*[156] *particularly on the legal position* that it is not necessary to exhaust the section 54 process before approaching a court for an interdict, was misplaced. In *Maranda,* the mining right holder was denied access to the land by the landowner despite several approaches by both the mining right holder and the Regional Manager. The landowner was intentionally refusing consent and was not prepared to negotiate with the mining right holder. Thus, the landowner's conduct was found to be obstructive and subversive of the objects of the MPRDA.[157]

The Court in *Maranda* held that in those circumstances the landowner cannot complain that he had not been consulted. The court concluded that "it would be absurd for the MPRDA to permit an unreasonable refusal of access based on a clear objective to frustrate the legitimate endeavours of a permit holder.[158]

---

151. S 54 (6).
152. S 54 (7).
153. See *supra* n.78.
154. See *supra* n.78 and n.153, para 85, at 78.
155. Ibid, para 86.
156. Joubert V Maranda Mining Company (Pty) Ltd 2010 (1) SA 198 (SCA).
157. See *supra* n.153, para 87.
158. Ibid. Para 88.

In *Meepo v Kotze*[159] the High Court held that the MPRDA provided for due consultations between a landowner and the holder or applicant for a permit to "alleviate possible serious inroads being made on the property right of the landowner" and that section 54 must be exhausted to ensure the MPRDA's purpose of balancing the rights of the mining and surface rights holders. The Court rejected the submission that mining right holders would unjustifiably be prevented from exercising their mining right if section 54 must be exhausted before an interdict can be sought and warned that it overlooks the fact that section 54 provides for a speedy dispute resolution process to reach an agreement through mediation. It also provides that if parties fail to reach an agreement, then they may approach a court. Allowing mining right holders to mine will undermine the purpose of section 54 and the MPRDA, which is to strike a balance between the interests of the mining and the surface rights holders. The Court mentioned that section 54(5) contemplates that if negotiations between the affected parties and the mining right holder are deadlocked, and the Regional Manager concludes that further negotiations may detrimentally affect the objects of the MPRDA, he or she may recommend to the Minister that the land be expropriated in terms of section 55. However, it should be noted that section 54 only applies where the occupation is lawful.[160]

3.5. Chapter Conclusion

The objectives of this chapter were to examine statutory and common law remedies available between prospecting or mineral rights holders and informal surface rights holders, particularly to determine how the dispute settlement mechanism in terms of sections 54 and 55 applies. Section 4(2) of the MPRDA specifically provides that where the common law is inconsistent with the MPRDA, the MPRDA shall prevail.

The conclusion that can be drawn from this provision is that the enactment of the MPRDA did not oust common law principles still applicable in respect of land ownership. As per common law, the owner of the land is the owner (*dominus*) of the whole of the land, including the air space above the surface and everything below it. Under MPRDA the State is the custodian (but not the owner) of the minerals underneath the land and only the State is having discretionary statutory powers to grant the right to prospect or to mine.

In this light, the discussion of the dispute settlement in terms of the common law in section 3.2 revealed that as per the common law, the holder of the mineral rights would not be under any obligation to pay compensation to the surface rights holder for damage caused during prospecting

159. Meepo V Kotze 2008 (1) SA 104 (NC).
160. See Maledu case *supra* n.78, at paras 92–93 citing Meepo V Kotze *supra* n.159.

or mining, in the absence of express contractual terms obliging the mineral right holder to pay such compensation, save that the mineral right holder reasonably exercises quasi-servitude rights *civiliter modo*. This conclusion is confirmed by court decisions in *Tvl Property & Investment Co Ltd and Reinhold & Co v SA Townships Mining & Finance Corporation Ltd & the Administrator* where the question of compensation for damage to crops and improvements "including, presumably, buildings" had been specifically provided for in the certificates themselves.

Following on from this, the discussion of section 42 of the Minerals Act in 3.3 above, has demonstrated that the owner of the land would be compensated for the current and possible future loss or damages caused by mining operations, or any obstruction established on land by the mining rights holders. The owner should have made all reasonable efforts to negotiate a settlement for the payment of compensation for the damage.

The discussion of the dispute settlement in section 3.4 confirmed that section 54 of the MPRDA is intended to resolve differences between prospecting or mineral right holders, common law surface rights holders and informal surface rights holders in South Africa. Accordingly, the holder of a prospecting right or mining right must notify the Regional Manager if he is prevented from exercising his prospecting, or mining rights by the conduct of the surface rights holder as discussed above. The Court decision in *Maledu* confirmed that the internal administrative remedy of section 54 of the MPRDA must be exhausted in trying to resolve a dispute between prospecting or mining and surface rights holders before approaching the court

In the following chapter, the discussion will proceed to analyse whether the dispute settlement mechanism of MPRDA discussed in this chapter, may favour mining rights holders over common law or informal surface rights holders.

CHAPTER 4:

ANALYSIS OF WHETHER THE DISPUTE SETTLEMENT MECHANISM PROVISIONS OF MPRDA FAVOUR MINING RIGHTS HOLDERS OVER COMMON LAW OR INFORMAL SURFACE RIGHTS HOLDERS.

4.1. Introduction.

The findings in Chapter 3 have revealed that, as per common law, the holder of the prospecting or mining rights would not be under any obligation to pay compensation to the surface rights holder for damage caused during prospecting or mining. The obligation to pay compensation arises only if it is expressly stated in the contract, on the condition that the mineral right holder reasonably exercises quasi-servitude rights *civiliter modo.* Under the Minerals Act, section 42 has demonstrated that the owner of the land would be compensated for the current and possible future loss or damages caused by mining operations, or any obstruction established on land by the mineral rights holders. The owner should have made all reasonable efforts to negotiate a settlement for the payment of compensation for the damage. Accordingly, under section 54 of the MPRDA, the holder of a prospecting right or mining right must notify the Regional Manager if he is prevented from exercising his prospecting, or mining rights by the conduct of the surface rights holder. The Court decision in *Maledu* confirmed that the internal administrative remedy of section 54 of the MPRDA must be exhausted in resolving a dispute between prospecting or mineral right holders and surface rights holders before approaching the court.

Following the above, the objective of this chapter is to analyse whether the dispute settlement mechanism provisions of the MPRDA may favour mining rights holders over common law or informal surface rights holders. Accordingly, section 4.2 will analyse whether section 54 of the MPRDA is impartial towards mining rights holders over common law or informal surface rights holders in its dispute resolution. Section 4.3 will provide analyses.

4.2. Analysing the impartiality of MPRDA dispute settlement mechanisms

To strike a balance of the disputes between prospecting, mining right holders and common law or informal surface rights holders, the dispute resolution must be weighed against the provisions of

sections 24 and 25 of the Constitution of the Republic of South Africa and the objects of the MPRDA.[161]Section 25(1) of the Constitution[162] provides that:

> *"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property"*

Although section 5(3)(a) of the MPRDA provides that the holder of a prospecting or mining right may be:

> "*Entitled to enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for prospecting or mining*" [163]

These entitlements are discretionary by the construct of this section 'may' and the exercise of these entitlements by prospecting or mining rights holders is balanced by section 5(1) of the MPRDA which provides that:

> *"A prospecting right, mining right, exploration right or production right granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967, (Act No. 16 of 1967), is a limited real right in respect of the mineral or petroleum and the land to which such right relates"*[164]

The fact that the prospecting or mining right, after registration at the Mining Registration office becomes a limited real right as opposed to an absolute right is a balance between prospecting or mining rights and surface rights holders, however, the provision is silent on the nature of the mining permits.[165] The right to enter in terms of section 5(3)(a) should be read and interpreted as subject to the compensation provision of section 54 of the MPRDA.

Section 54 of the MPRDA has provisions intended to resolve differences between prospecting or mining right holders, common law surface rights holders and informal surface rights holders by

---

161. The objectives of the MPRDA relevant herein are in the ones in sections 2(c) to promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa, section 2(d) substantial and meaningful expansion of the opportunities for historically disadvantaged persons, which includes women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources, section 2(f) to promote employment and advance the social and economic welfare of all South Africans, and section 2(g) which is to provide for the security of tenure in respect of prospecting, exploration, mining and production operations.

162. Section 25 of the Constitution of the Republic of South Africa, 1996.

163. See supra n.13.

164. See *supra* n.11.

165. See *supra,* Subsection 2.2, at 14-16.

providing for payable compensation to surface rights holders under certain circumstances.[166] Section 54 (1) of the MPRDA provides:

> *"The holder of a prospecting right or mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any …prospecting or mining operations because the owner or the lawful occupier of the land in question refuses to allow such holder to enter the land, places unreasonable demands in return for access to the land, or cannot be found in order to apply for access"*[167]

The prospecting or mining right holder is prevented from exercising his prospecting, or mining rights because the owner or the lawful occupier of the land denies him to enter the land for prospecting or mining. Accordingly, the above provision assumes that a dispute settlement mechanism between the prospecting or mineral rights holders and common law surface rights holders is triggered when the surface rights holder denies the prospecting or mining right holder to enter the land,[168] places unreasonable demands in return for access to land,[169] or cannot be found to apply for access.[170]

Section 54 (2) of the MPRDA continues to provide that prospecting or mining right holder must report the conduct of the owner or lawful occupier of land to the Regional Manager who is obliged to call upon the owner or lawful occupier for representation regarding the issues raised by the holder of the prospecting or mining right.[171]

Section 54 (3) of the MPRDA provides that if regional manager:

> *"…concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting, or mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage"*[172]

It is apparent from the construction of section 54(3) above presume that the landowner or lawful occupier must be compensated for losses and damages suffered because of prospecting or mining activities on the surface of their land.

---

166. See *supra* n.137.
167. See *supra* n.138, at 30.
168. See *supra* n.138 and n.167.
169. See *supra* n.139.
170. See *supra* n.140.
171. See discussion of s 54(2) *supra* n.141.subsection 3.4, at 31.
172. See *supra* n.146.

Section 54(4) provides that upon failure of the parties to reach an agreement, compensation must be determined by arbitration or by a competent court. Arbitration cannot happen if prospecting or mining right holder and surface rights holders do not agree to arbitration. [173] Section 54(5) of the MPRDA paves the way for a recommendation to the Minister of the expropriations of the land in terms of section 55 of the MPRDA if further negotiations may detrimentally affect the objects of the MPRDA.[174]

Furthermore, section 54(6) of the MPRDA provides that if the failure of the parties to reach an agreement or to resolve the differences is the fault of the holder of the prospecting or mining right, the regional manager may prohibit the holder of prospecting or mining right from exercising their rights until the dispute has been resolved either by arbitration or by a court.[175] By construct of this provision, the regional manager has wide discretion to stop the operation or suspend the operation pending resolution of the dispute at hand by arbitration or the court.

Lastly, section 54(7) of the MPRDA obliges the owner or lawful occupier of the land to notify the Regional Manager of damage suffered or future possible loss or damage because of the prospecting or mining operations. [176]

PJ Badenhorst submits that protection of the surface rights holders from loss or damage occasioned by prospecting or mining right holders due to mining activities will ensure a smoother operation of mining activities. He submits that such protection of surface rights holders can be ensured by recognising statutory claims for compensation from loss or damage to the land of the surface rights holders. According to Badenhorst failure by the legislature to include the statutory claim in the MPRDA explains the "lop-sidedness" of the MPRDA. He submits further that prospecting or mining right holders, or the state should compensate the landowners for loss or damages caused by mining because mining rights holders make profits from mining and the state benefits from royalties. Furthermore, because MPRDA has changed the granting of mining rights by landowners or their predecessors and the landowners or their predecessors no longer forms part of the granting of prospecting or mining rights in their land as it was in the past.[177]

Accordingly, PJ Badenhorst has drawn an inference that section 54 protects prospecting or mining rights holders and the state as the custodian of minerals over the surface rights holders. The author states that the provision of section 54 of the MPRDA is "lopsided" in favour of the mineral rights

[173.] See *supra* n.148.
[174.] See *supra* n.150 and 161.
[175.] See *supra* n.151.
[176.] See *supra* n.152.
[177.] PJ Badenhorst "Right of access to land for mining purposes: *on terra firma at last? Joubert V Maranda Mining Company (Pty) Ltd (296/2008) (2009) ZASCA 68 (29 May 2009) (May 3,2010)":* Vonnisse at 326

holders and the state because it encourages access to the land of the surface rights holders to secure prospecting or mineral rights holders and advance state objectives.[178]However, according to the Constitutional Court decision in the case of Maledu, section 54 of MPRDA provides for a speedy dispute resolution process between prospecting or mining rights holders and surface rights holders to reach an agreement through mediation and must be exhausted to ensure the MPRDA's purpose of balancing the interest of the mining right holders and surface rights holders. The court further held that section 54 of the MPRDA provides that if parties fail to reach an agreement, they may approach a court.[179] Over and above that the court held that allowing the mining right holder to mine pending finalization of section 54 undermines the purpose of balancing the interests of the mining right holder and the surface rights holder.[180]

4.3. Analysis

The analysis in this research has revealed that the MPRDA requires notification and consultation with common law surface rights holders.[181] Although the MPRDA provides for consultations during an application for prospecting or mining rights, still surface rights holders do not have the right to veto the granting or exercise of prospecting or mining rights. Owners' Consent or lawful occupier's consent is not a requirement for the awarding of prospecting or mining right, equally so the owners of the common law land are devoid of the right to decide what happens with their land should prospecting or mining takes place under MPRDA.[182]

Accordingly, the Bengwenyama case has illustrated the importance of the consultation as it confirmed that awarding and execution of prospecting rights invade the rights of the property owners, particularly the rights to use and enjoy their properties without any disturbance.[183]The purpose of consultation is to inform the landowner to prepare how he will respond to the application for prospecting or mining right .[184] Moreover, this was presumably foreseen by the drafters of the MPRDA as the Act provides for notification and consultations with landowners, lawful occupiers as well as interested and affected parties.[185]MPRDA must be read in conjunction with IPILRA where consent are being sought from the informal surface right holder, this is to protect the

178. See *supra* n.97, at 340.
179. See Maledu case supra n.78, paras 92- 93 respectively.
180. *Ibid.*
181. See *Supra* n.42 and s 10 of the MPRDA,2002 as discussed in subsection 2.3.
182. See supra n.98.
183. See Bengwenyama case Supra n.57, para 63.
184. Ibid.
185. See Badenhorst *et al supra n.67, at 113 and sections 10 (1) and (2), s 16 (4) (b) of MPRDA,2002, as discussed in subsection 2.3.1.*

rights or interest in land of the informal surface right holder.IPILRA provides that no person may be deprived of any informal right to land without his or her consent.[186]

In the case of Maledu & others, the court confirmed the legal position of various notices and consultation as a protection for the rights and interests of landowners and lawful occupiers during the application processes because of the invasive nature of prospecting or mining activities.[187] Furthermore, the case of Baleni & others has confirmed that whilst IPILRA and MPRDA must be read together, it is a must to obtain the full and informed consent of the informal rights holder before awarding mining rights during the application processes, this is so because IPILRA protects informal rights holders on the land held in terms of the customary law.[188]

IPILRA emphasise the requirement of communal consent by most of the members of the community which holds the informal rights to the land contrary to notice and consultation processes envisaged by MPRDA.[189]

4.4. Chapter conclusion

The discussion in section 4.2 has revealed that section 54, which is dispute settlement mechanism provisions of MPRDA does favour mining rights holders over common law or informal surface rights holders. It is indeed lopsided in favour of the mining rights holders over surface rights holders. This is so despite the Constitutional Court decision in Maledu, which confirmed that the dispute settlement provision in section 54 of the MPRDA intends to evenly balances the interest of mining rights holders and surface rights holders.

186. See *supra* n.74, s 2(1) of IPILRA,1996, as discussed in subsection 2.3.2.
187. See Maledu case *supra* n.78, para 78, at 77.
188. See supra n.83, at 21.
189. See Badenhorst supra n.96, subsection 2.3.2, at 22.

CHAPTER 5:

CONCLUSION AND RECOMMENDATION

5.1. Summary of the research findings.

This study aimed to determine the dispute settlement mechanism and mandatory statutory remedies provided for by sections 54 and 55 of the MPRDA. Based on the discussion in this study, the separation of title to land and rights awarded for minerals may result in disputes between different rights holders. This was presumably foreseen by the drafters of the MPRDA, as the Act provides for statutory dispute settlement mechanisms. However, what was unclear was whether the process is 'balanced' or whether it may inadvertently bias a particular party. According to section 5(1) of the MPRDA, the Prospecting and mining rights are regarded as limited real rights in respect of the mineral and the land to which such rights relate. Section 2(4) of the MTRA demonstrated that it is the registration of a right in terms of the MTRA in the Mineral and Petroleum Titles Registration Office which constitutes a limited real right binding on third parties. The prospecting or mining rights holders must notify or consult for consent with common law surface rights holders. According to the Constitutional Court in *Bengwenyama Minerals (Pty) Ltd & another,* the Court held that the granting and execution of prospecting rights is a grave invasion of the rights of the property owners, particularly the rights to use and enjoy their property without any disturbance. The court further held that the purpose of the statutory requirement of consultation with landowners, was to provide landowners with the information necessary to make an informed decision on how to respond to the application.

According to the provision of section 2(1) of the IPILRA, no person may be deprived of any informal right to land without his or her consent. As such section 2(2) of the IPILRA highlighted that a person may be deprived of such land or right in land by the custom and usage of that community if the land is held on a communal basis.

Moreover, the common law surface rights holders, informal surface rights holders or lawful occupiers of land have little or no power over who is entitled to obtain prospecting or mining rights in respect of their land. The surface rights holders (informal surface rights or lawful occupiers thereof) simply have rights over the surface of their land. For prospecting rights, mining rights or mining permits to be issued in terms of MPRDA the consent of surface rights holders is not required.

Section 4(2) of the MPRDA specifically provides that where the common law is inconsistent with the MPRDA, the MPRDA shall prevail. The conclusion that can be drawn from this provision is that the

enactment of the MPRDA did not oust common law principles still applicable in respect of land ownership. As per common law, the owner of the land is the owner (*dominus*) of the whole of the land, including the air space above the surface and everything below it. Under MPRDA the State is the custodian (but not the owner) of the minerals underneath the land and only the State is having discretionary statutory powers to grant the right to prospect and to mine.

In this light, the discussion of the dispute settlement in terms of the common law has revealed that the holder of the prospecting or mineral rights would not be under any obligations to pay compensation to the surface rights holder for damage caused in the cause of the prospecting or mining operation in the absence of express contractual terms obliging the mineral right holder to pay compensation, save that the mineral right holder reasonably exercises quasi-servitude rights *civiliter modo*. This conclusion is confirmed by court decisions in *Tvl Property & Investment Co Ltd and Reinhold & Co v SA Townships Mining & Finance Corporation Ltd & the Administrator* where the question of compensation for damage to crops and improvements "including, presumably, buildings" had been specifically provided for in the certificates themselves.

Following on from this, the discussion of section 42 of the Minerals Act has demonstrated that the owner of the land would be compensated for the current and possible future loss or damages caused by mining operations, or any obstruction established on land by the mineral rights holders. The owner should have made all reasonable efforts to negotiate a settlement for the payment of compensation for the damage.

The discussion of the dispute settlement mechanism under the new order rights has confirmed that section 54 of the MPRDA is intended to resolve differences between prospecting or mineral right holders, common law surface rights holders and informal surface rights holders in South Africa. Accordingly, the holder of a prospecting right or mining right must notify the Regional Manager if he is prevented from exercising his prospecting, or mining rights by the conduct of the surface rights holder as discussed above. The Court decision in *Maledu* confirmed that the internal administrative remedy of section 54 of the MPRDA must be exhausted in trying to resolve a dispute between prospecting or mineral right holders and surface rights holders approaching the court. The Court's decision further confirmed that the dispute settlement provision in section 54 of the MPRDA intends to evenly balance the interest of the mining rights holders and surface rights holders.

5.2. Concluding Remarks

The conclusion that can be drawn from the discussion of the dispute settlement mechanism under the new order rights has revealed that the provisions of MPRDA favour prospecting or mining rights holders over common law surface rights holders despite the purpose of the MPRDA to balance the rights of the prospecting or mining rights holders and surface rights holders. The above conclusion is arrived at because at common law surface rights holders do not have the right to veto the granting or exercise of prospecting or mining rights. The prospecting or mining rights holders must give notice and consult with surface rights holders during application stage for prospecting or mining right. The surface rights holders consent is not a requirement for the granting of prospecting or mining right, equally so the owners of the common law land are devoid of the right to decide what happens with their land should prospecting or mining takes place under MPRDA. The granting and execution of prospecting rights was held to be a grave invasion of a property owner's rights, the purpose of 'consultation' with landowners, was held solely to provide landowners with the information necessary to make an informed decision on how to respond to the application, *not to veto the granting or exercise of prospecting or mining right*.

Accordingly, is only under IPILRA and not MPRDA that the 'consent' of most of the community is required before a prospecting or mining right is granted. According to common law compensation for damage caused in the cause of the prospecting or mining operation was only payable to the common law surface rights holders provided it was a clause expressed in the contract, prospecting or mineral rights holders were only required to exercise a degree of care and element of reasonableness.

BIBLIOGRAPHY

Primary sources

Case law

Administrator (Transvaal) V Industrial Commercial Timber and Supply Co.1912 AD 25.

Agri SA V Minister of Minerals and Energy (Centre for Applied Legal Studies as Amicus Curiae 2012 (1) BCLR 16 (GNP)

Anglo Operations Ltd V Sandhurst Estates (Pty) Ltd (2007) 2 AII SA 567 (SCA), also reported on 2007 (2) SA 363 (SCA)

Baleni & Others V Regional Manager: Eastern Cape Department of Mineral Resources & Others (Centre for Applied Legal Studies as Amicus Curiae (2020) 4 All SA 374 (GP)

Baleni & Others V Minister of Mineral Resources & Others (2019) 1 All SA 358 (GP)

Bengwenyama Minerals (Pty) Ltd & Others v Genorah Resources (Pty) Ltd & Others (Bengwenyama-ye-Maswazi Royal Council Intervening) 2011 (4) SA 113 (CC)

Douglas Colliery Ltd v Bothma 1947 3 SA 602 (T)

Hudson v Mann & Another 1950 (4) SA 485 (T)

Joubert & Others v Maranda Mining Company (Pty) Ltd 2010 (1) SA 198 (SCA)

Mashavha v President of the Republic of South Africa & Others 2005 (2) SA 476 (CC), also reported as 2004 (12) BCLR 1243 (CC-Ed).

Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Limited & Another (Mdumiseni Dlamini & Another as amici curiae)2019 (1) BCLR 53 (CC)

Meepo v Kotze 2008 (1) SA 104 (NC)

Minister of Minerals and Energy v Agri South Africa (Centre for Applied Legal Studies as amicus curiae) 2012 (9) BCLR 958 (SCA)

Minister of Mineral Resources & Others v Mawetse (SA) Mining Corporation (pty) limited 2016 (1) SA 306 (SCA)

Nolan v Barnard 1908 TS 142

Nolte v Johannesburg Consolidated Investment Co Ltd 1943 AD 295.

R v Boshoff & others 1938 AD 464

Trojan Exploration Company (pty) Ltd & Another v Rustenburg 1996 4 AII SA 121 (A)

Tvl Property and investment Co Ltd & Reinhold & Co v SA Township Mining & Finance Corporation Ltd & the administrator 1938 TPD 512

West Witwatersrand Areas Ltd v Roos 1936 AD 62.

Zuurbekom Ltd v Union Corporation Ltd 1947 1 SA 514 (A)

Legislation

Expropriations Act 63 of 1975

Final Constitution of the Republic of South Africa, Act 108 of 1996

Interim Protection of Informal Land Rights Act 31 of 1996

The Minerals Act 50 of 1991

The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)

Secondary Sources

Books

Badenhorst P J & Mostert H (2004), Mineral and Petroleum Law of South Africa: Commentary and Statutes Lansdowne (South Africa), Juta.

Dale M O (2005), South African Mineral and Petroleum Law Durban, LexisNexis.

Franklin B L S & Kaplan M (1982), The Mining and Mineral Laws of South Africa Durban, Butterworth.

Journals

Badenhorst PJ & Van Heerden CN "Conflict resolution between holders of prospecting or mining rights and owners (or occupiers) of land or traditional communities: what is not good for the goose is good for the gander" (2019) 136 South African Law Journal 303.

Badenhorst PJ, Olivier NJJ & Williams C "The Final Judgment "TSAR 2012 at 106-129.

Badenhorst PJ “conflict resolution between owners of land and holders of rights to minerals: a lopsided triangle?”, *TSAR 2011-2, 326-340*.

Badenhorst PJ “Right of access to land for mining purposes: on terra firma at last? Joubert V Maranda Mining Company (Pty) Ltd (296/2008) (2009) ZASCA 68 (29 May 2009) (May 3,2010)”: Vonnisse ,318-328.

Tlale MT “Conflict levels of engagement under the Interim Protection of Informal Land Rights Act and the Minerals and Petroleum Development Act: A closer look at the Xolobeni community dispute” PER/PELJ 2020(23).

Dissertations

Ratsheko TT, ‘A critical analysis of the extent to which SA law protects the surface rights of landowners over whose property mining rights have been granted (Unpublished LLM Mini-dissertation, University of Pretoria, 2018).