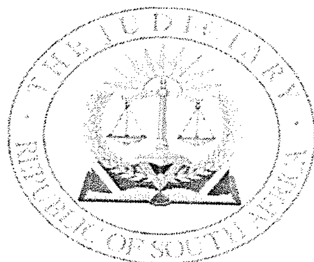
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 73768/2016

In the matter between:

DUDUZILE BALENI	First Applicant
MAKATI NDOVELA	Second Applicant
MABHUDE DANCA	Third Applicant
GCINAMANDLA MTHWA	Fourth Applicant
MDUMISENI DLAMINI	Fifth Applicant
MALIYEZA DENGE	Sixth Applicant
122 OTHERS LISTED IN ANNEXURE A TO THE NOTICE OF MOTION	7th to 128th Applicants
BENCH MARKS FOUNDATION	129th Applicant

and

MINISTER OF MINERAL RESOURCES	First Respondent

DIRECTOR-GENERAL-DEPARTMENT OF MINERAL RESOURCES Second Respondent

DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION DEPARTMENT OF MINERAL RESOURCES Third Respondent

REGIONAL MANAGER: EASTERN CAPE DEPARTMENT OF MINERAL RESOURCES Fourth Respondent

TRANSWORLD ENERGY AND MINERAL RESOURCES (SA) PTY LTD Fifth Respondent

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM Sixth Respondent

DIRECTOR-GENERAL – DIRECTOR OF RURAL DEVELOPMENT AND LAND REFORM Seventh Respondent

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JUDGMENT

AC BASSON, J

[1] The Constitutional Court in *Daniels v Scribante & Another*[1] has added its voice to the recognition of the fundamental link between the dignity of African people and communities with their land – their "most treasured possession"[2] - by commencing its

[1] 2017 (4) SA 341 (CC).
[2] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41: "[2] That since ancient times land has been the most treasured possession to all and sundry throughout all generations is a truism that brooks no argument to the contrary. Currently, in South Africa, the clamour for redistribution of land has not only heightened interest in land but has also put at the centre stage the socio-political discourse raging on in the country."

judgment with a quote from the passionate and painful words uttered by an old man, Mr Petros Nkosi:

> "The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it. When the whites took our land away from us, we lost the dignity of our lives: we could no longer feed our children; we were forced to become servants; we were treated like animals. Our people have many problems; we are beaten and killed by the farmers; the wages we earn are too little to buy even a bag of mielie-meal. We must unite together to help each other and face the Boers. But in everything we do, we must remember that there is only one aim and one solution and that is the land, the soil, our world."

[2] On the Wild Coast there is an area called Umgungundlovu. It is a coastline area of immense natural beauty. The sands on this beautiful coastline are also rich in titanium. Several hundred people (the applicants) and their ancestors have lived on this land according to their customs and traditions for centuries. Living in this area are about 70 to 75 households known in isiMpondo as "imizi" comprising of more than 600 individuals. These imizi include approximately 307 adults and 315 children. The applicants include representatives of 68 of these imizi comprising of 128 adults.

[3] It is not in dispute that the applicants hold informal rights to the land as defined by the Interim Protection of Informal Land Rights Act ("IPILRA")[3] and that they occupy their land in accordance with their law and custom. The applicants' account of the "living customary law" applicable in respect of this land is also not disputed by the respondent parties.

<u>The parties</u>

[4] An Australian Mining Company (the Fifth Respondent – Transworld Energy and Mineral Resources (SA) Pty Ltd - "TEM") wants to mine the titanium-rich sands under the Xolobeni Mineral Sands Project. To this end TEM has applied for a mining right for titanium ores and other heavy minerals in the Xolobeni area, Eastern Cape. The disputed area (the proposed mining area) comprises of some 2 859 hectares and

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[3] Act 31 of 1996.

comprises a strip of land over a coastal land of some 22 kilometres long and 1,5 kilometres inland from the high water mark. The vast majority of the applicants, together with their families live within or in close proximity of the proposed mining area.

[5] TEM intends to conduct open-cast mining activities on some 900 hectares of land within the mining area. The mode of excavation will require the establishment of a number of plants and operations including wet separation plants and the accompanying slimes dams and tailing dams. The rest of the area will be taken up by power lines, access roads, offices, stores, accommodation for a number of employees and the like.

[6] This application is currently the subject of an eighteen-month moratorium imposed by the Minister of Mineral Resources (the first respondent – "the Minister") in terms of section 49(1) of the Minerals and Petroleum Resources Development Act[4] ("MPRDA"). The moratorium came into effect on 9 June 2017 and has the effect of suspending the obligations of the Minister and the Department of Mineral Resources. The Minister's motivation for imposing the moratorium is the "social and political climate at Xolobeni and the social disintegration and highly volatile nature of the current situation in the area". The other respondents are the Director- General-Department of Mineral Resources (the second respondent): the Deputy Director-General: Mineral Regulation Department of Mineral Resources (the third respondent); the Regional Manager: Eastern Cape-Department of Mineral Resources (the fourth respondent); the Minister of Rural Development and Land Reform (the sixth respondent) and the Director-General – Director of Rural Development and Land Reform (the seventh respondent).

<u>Background facts</u>

[7] Most of the affected imizi in the area are related by blood or by marriage and have lived in this area for generations. The overwhelming majority of these families have family graves in the area and are considered to be essential sites for family and community rituals. The Umgungundlovu community is therefore made of the collection and intertwined relationships between the living and the dead.

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[4] Act 28 of 2002.

[8] This community is no stranger to adversity and in earlier years this community was also faced with attempts to remove them from their land and to relocate them. They have successfully resisted these attempts precisely because of the fact that such a relocation would result in them leaving behind the graves of their ancestors.

[9] The Umgungundlovu community enjoys a rich cultural life and are proud of their membership of the greater Amadiba Traditional Community and the amaMpondo nation. They take pride in their long history of occupying, owning and using their land. According to the papers, the history of this community stretches as far back to the early 1800's when their forebears established settlement on this land after they had emigrated from Zululand to escape the conquests of the Mfecane that sought to subdue and incorporate autonomous territories into Zulu domain. It was since these early days that this community has continued to pay observance to and application of the precepts of their customary law in respect of their everyday lives. The customary law that can be traced back to their forbearers, is passed on from one generation to the next through oral tradition and practice and continues to be sacrosanct to the life of this community.

[10] Land, according to this community's customary law, accrues to persons by virtue of them being members of the Umgungundlovu community. In order to protect their continued way of life on this sacred land, land applications by outsiders are subjected to robust assessment processes in order to preserve and protect the interests of this community. Decisions according to the customary law of the Mpondo community, typically does not take place on a majoritarian basis and decisions are seldom taken on the basis of a majority vote: Often a higher degree of consensus and circumspection is required to pass a decision in respect of issues that has the potential of conflict and division.

[11] The applicants (the community of Umgungudlovu) do not want TEM to mine on their ancestral land. Apart from the fact that several hundred people live within or near to the proposed mining area, the land that comprises the proposed mining area is an important resource and central to the livelihoods and substance of the applicants. Many of the applicants utilise the land for grazing for their livestock and for the

cultivation of crops and depend on the water supply. The products of their labour are used to sustain their families. Any surplus is sold to generate a cash income. The natural resources harvested from this area are therefore used for housing and other purposes.

[12] A significant number of the community also rely on tourism and tourist-related activities taking place within the proposed mining area. The growth potential in tourism has, however, not realised as a result of the repeated prospecting and mining right applications brought by TEM. According to the applicants, this serves as a deterrent to investment in tourism and eco-tourism which are contingent upon the preservation of the area's natural beauty and ecological diversity.

[13] The networks of mutual support and dependence between imizi relating to the sharing of food and other natural resources are thus critically important to this community. These reciprocal relationships play an important role in sustaining the individual imizi and the community during times of hardship and shortages. This way of life in this community is instilled by the social and economic inter-connectedness of the community.

[14] The community further strongly opposes this proposed mining on the basis that they fear the disastrous social, economic and ecological consequences of mining. The community also strongly opposes the influx of outsiders coming to live in their community and is concerned that they will overwhelm their way of life and that they may introduce social ills that are often associated with mining activities.

[15] In the context of the dispute before the Court, the applicants explain that a decision to approve mining operations without the consensus of the community will trigger massive conflict between those community members who may benefit from the mining activities and those who will be severely prejudiced by such activities. As already pointed out, the applicant's assertion before this Court is that, in light of the complex decision making processes that exist in this community, even in circumstances where the majority of community members would support mining activities, it would not be sufficient ground to consent to mining on their land under customary law. The applicants do, however, state that, despite this complex process

of consensus seeking, it does not follow that it will be impossible to approve and consent to mining on their land: if those community members who will be negatively affected by the proposed mining activities were guaranteed compensation that will be sufficient and acceptable to them to make up for any harm and/or loss that they will suffer as a result of mining and, provided that they are willing to be displaced and resettled elsewhere, they may consent to mining activities. Any such decision can, however, only be taken if the community has been furnished with detailed and accurate information regarding the proposed mining activities and the possible impact of such activities on their land.

[16] In summary: the communal land and the residential plots ("umzi") of each imizi forms an inextricable and integral part of this community's way of life. In the context of this community, a residential plot represents far more than merely a place to live: it is a symbol of social maturity and social dignity. Each residential plot further serves as a critical conduit for the preservation of relations of inter-linkage and mutual dependence between the living and the dead and it is critically important for the wellbeing of each imizi. The Constitutional Court in *Agri South Africa v Minister for Minerals and Energy*[5] recognised this attachment to land as follows:

> "[45] Many people have an attachment to land for its own sake and would prefer not to see the surface of their land disturbed through the exploitation of minerals…".

[17] I have endeavoured to highlight some important aspects of the way of life of the Umgungundlovu community and the fundamental attachment that this community has with its land. This brief exposition in no way purports to do justice to the rich history of this proud community. It is merely intended to contextualise the concerns that this community has if mining is allowed to continue on their ancestral land without their consent.

[18] The community of Umgungundlovu is therefore strongly opposed to the proposed mining activities of TEM on the basis that it will not only bring about a physical displacement from their homes, but will lead to an economic displacement of

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[5] 2013 (4) SA 1 (CC).

the community and bring about a complete destruction of their cultural way of life. They further tell the Court that the proposed mining activities of TEM threatens to tear their community apart and leave them divided, insecure and vulnerable. Even before mining has commenced, this community already feels threatened and vulnerable and left out by the process which culminated in the awarding of mining rights to TEM. According to the applicants, TEM has made no effort at all to present a proposal to the community as to how they plan to mitigate the impacts of the proposed mining activities on individual families and the community. In the absence of any cogent, considered and concrete proposals from TEM as to how these potential catastrophic impacts will be mitigated or compensated, this community further tells the Court that they cannot consent to mining on their land. (I will return to the issue of consent.)

[19] Their fears are not without merit. It is well documented that customary communities such as the applicants, tend to suffer disproportionately from the impacts of mining activities as they are directly affected by the environmental pollution, air borne diseases, loss of their farm land and grazing land, forced displacement and the loss of community amongst other things. The 129th respondent (Mr John Capel) is the Executive Director of the Bench Marks Foundation NPC ("the Foundation"). The Foundation is an independent non-governmental organisation established to promote ethical corporate social responsibility and socially responsible investment and, in doing so, they are mandated to monitor the practices of multinational corporations to ensure that they respect human rights, protect the environment and generally to ensure that they conduct their businesses in a manner where profit is not made at the expense of the poor and the marginalised.

[20] Whilst recognising that mining can provide benefits to communities, the Foundation tells the court that, in their experience and in light of various studies in respect of mining on communities, communities are vulnerable to grievous harm that often outweighs any gains. For this reason, they hold the view that communities should be empowered to determine whether mining should take place on their land. To this extent the Foundation associates itself with the international movement to require free, prior and informed consent before mining activities may occur on community land. I will return to a brief discussion of international law hereinbelow.

Divisions within the community

[21] I have already mentioned the volatile situation that exists in this community as a result of the granting of mining rights to TEM. This opposition by some of the community members has created friction within the community. Under the umbrella of an association called the Amadiba Crisis Committee, the community opposes the mining and the mining rights application. It was also as a result of these tension that a moratorium was placed on the application.

[22] The divisions within the community is perpetuated by the allegations that iNkosi Lunga Baleni ("Baleni") who was once a staunch opponent of the proposed mine, now supports the proposed mining. He has, according to the papers, accepted a vehicle belonging to TEM and is a director of XolCo and TEM respectively. Baleni's subsequent turnabout has served to intensity conflict and dissatisfaction in the community. When directors of XolCo and their associates tried to gain access to the proposed mining site in 2015, violence erupted. On 28 May 2015 an interim interdict was granted against certain XolCo directors and their associates preventing them from intimidating, victimising, threatening and assaulting members of this community and from bringing firearms to community meetings. This interdict was subsequently discharged. Violence again erupted in December 2015 when a group of mining opponents were assaulted by a group of mining supporters.

[23] On 3 February 2016 the community received a redacted copy of the mining right application from TEM's attorneys. An objection in terms of section 10 of the MPRDA was thereafter filed. The community thereafter got word that drilling would commence on 22 February and that if access was not allowed, force would be used. Drilling did, however, not commence apparently in an attempt to "hose down any potential violent confrontation between pro and anti-mining lobby groups".[6] In March 2016 word got out that there was a hit list of mining opponents. That same evening a certain Mr Radebe was shot and killed by two unknown assassins which gave rise to speculation amongst the community about the motives for the killing.

The dispute

[6] https://www.fin24.com/Companies/Mining/wild-coast-anti-mining-leader-murdered-20160323.

[24] The applicants and the community within which they live have not consented to mining activities. This issue in respect of prior consent lies at the heart of this case: Who gets to decide whether mining activities can take place on this area - the community which has lived there for centuries or the TEM.

[25] The applicants rely on IPILRA to justify their view that their consent is required in terms of section 2(1) of IPILRA before they may be deprived of their land. They further argue that such consent must be free and informed.

[26] TEM does not recognise that the applicants have a right to consent prior to the grant of a mining right. The first to fourth respondents (the government parties) likewise also refuse to acknowledge that the applicants have a right to consent to a mining right. These parties rely on the provisions of the MPRDA in terms of which it is merely required that the community must be consulted before the Minister awards a mining right to an applicant. The respondents further argue that the MPRDA trumps IPILRA and maintain that, in terms of the MPRDA, no owner can have a right to refuse consent to mining.

[27] The applicants reject this interpretation on the basis that it fails to appreciate the differences between customary communities like the applicants and common-law owners. The applicants also submit that such an interpretation fails to appreciate the fundamental fact that communities like the applicants are vulnerable and that their way of life is intrinsically linked to the land. Without free, prior and informed consent, they are at real risk of losing not only rights in their land, but their very way of being. The applicants also refer to international law in support of their contention that mining rights may only be granted if the traditional communities who have rights in land as contemplated in terms of IPILRA, grant their consent. Such consent as contemplated in section 2(1) of IPILRA must further be free, granted prior to deprivation and be informed.

Declaratory relief

[28] The applicants seek declaratory relief in the following terms:[7]

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[7] Notice of Motion.

"1. It is declared that the First Respondent lacks any lawful authority to grant a mining right in terms of section 23, read with section 22 of the *Mineral Petroleum Resources Development Act* 28 of 2002, over land anywhere in the Republic of South Africa owned or occupied under a right to land in terms of any tribal, customary or indigenous law or practice of a tribe, as defined by the *Interim Petroleum of Informal Rights to Land Act* 31 of 1996, unless the provisions of *Interim Protection of Informal Right to Land Act* 31 of 1996 have been complied with.

2. It is declared that the First Respondent lacks any lawful authority to grant a mining right to the Fifth Respondent in terms of section 23, read with section 22 of the *Mineral Petroleum Resources Development Act* 28 of 2002, unless the First, Sixth and Seventh Respondents have complied with the provisions of the *Interim Protection of Informal Rights to Land Act* 31 of 1996.

3. It is declared that in terms of the *Interim Protection of Informal Land Act* 31 of 1996, the First Respondent is obliged to obtain the full and informed consent of the Applicants and their community, the Umgungundlovu Community, as holder of rights in land, prior to granting any mining right to the Fifth Respondent in terms of section 23, read with section 22 of the *Mineral Petroleum Resources Development Act* 28 of 2002.

4. It is declared that the applicants, members of the Umgungundlovu Community, and the Umgungundlovu Community itself, are holders of rights in land (including informal rights) as defined in section 1 of the *Interim Protection of Informal Rights Act* 31 of 1996.

5. It is declared that the Umgungundlovu Community is a community as defined in section 1(1)(ii) of the Interim Protection of Informal Rights Act 31 of 1996.

6. It is declared that any decision to grant a mining right would constitute a deprivation of rights (including informal rights) in land as provided for in section 2 of the *Interim Protection of Informal Rights Land Act* 31 of 1996.

7. It is declared that the First Respondent may not deprive the applicants of any of their rights in land without complying with the living customary law of the Umgungundlovu Community and of the amaMpondo People, which law is protected by sections 211 and 212 of the Constitution.

8. In regard to paragraph 3 above, the following declaratory orders are granted: -

8.1. In terms of the customary law of the Umgungundlovu Community, any deprivation of rights in land requires meaningful consultation with the affected individual households and the Umgungundlovu Community.

8.2 In terms of the customary law of the Umgungundlovu Community, any deprivation of rights in land in communal areas only take place with the consensus if the individual members of the community or substantial consensus of the affected members of the Umgungundlovu Community itself.

9. In the *alternative* to the above:

9.1 It is declared that the First Respondent may not grant a mining right over the land held by the Applicants or the Umgungundlovu Community unless or until the compensation, the nature and amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a competent court or through arbitration alternatively;

9.2 It is declared that any mining right granted by the First Respondent will not come into effect until compensation, the nature and amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a competent court or through arbitration.

10. Further and/or alternative relief.

11. The costs of this application are to be paid, jointly and severally by any Respondent opposing it."

[29] The applicants contend that the declaratory relief sought is in the public interest and will have a significant impact on communities affected by mining operations throughout South Africa. TEM disagrees and argues that the application is premature and brought before their internal remedies have been exhausted. The applicants disagree and submit that this view is mistaken as they do not seek to review any decision and therefore they are not required to exhaust internal remedies: they seek declaratory relief to which different principles apply.

[30] This court has a wide discretion to decide whether or not to grant declaratory relief. In this regard the court in *Cordiant Trading CC v Damler Chrysler Financial*

Services (Pty) Ltd[8] confirmed a two-stage approach in considering whether or not to grant declaratory relief: (i) the first is that the court has to be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; (ii) once the court is satisfied of the existence of such a condition, it will exercise a discretion either to refuse or grant the order sought.[9] Declaratory orders are discretionary[10] and flexible as the Court pointed out in *Rail Commuters Action Group and Others v Transnet Ltd T/A Metrorail and Others*:

> "[107] It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances." [11]

[31] Having regard to the context of the dispute, I am in agreement that declaratory relief in the present circumstances is appropriate particularly in light of the history around the contestation of this mining right and the high levels of tension that is present in the area regarding this issue. Returning to the two-stage approach of *Cordiant*: Firstly, I am satisfied that there is a live dispute between the parties. I do not intend repeating the facts as set out above. There exists a fundamental dispute as to the interpretation and interaction between IPILRA and the MPRDA regarding the consent requirement. Secondly, in exercising a discretion whether or not to grant declaratory relief, various factors should be taken into account. The Court in *Minister of Finance v Oakbay Investments (Pty) Ltd and others*[12] referred to some of the factors must be taken into account in exercising the discretion whether or not to grant declaratory relief:

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[8] 2005 (6) SA 205 (SCA).
[9] *Cordiant*: "[18]."
[10] *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) at 525A.
[11] 2005 (2) SA 359 (CC).
[12] 2018 (3) SA 515 (GP).

"[59] *Herbstein & Van Winsen* extrapolates from decided cases factors courts have taken into account to determine whether judicial discretion should be exercised positively or negatively in an application for declaratory relief. These include (i) the existence or absence of a dispute; (ii) the utility of the declaratory relief and whether, if granted, it will settle the question in issue between the parties; (iii) whether a tangible and justifiable advantage in relation to the applicant's position appears to flow from the grant of the order sought; (iv) considerations of public policy, justice and convenience; (v) the practical significance of the order; and (vi) the availability of other remedies."

[32] Whether the consent of the applicants is required in terms of IPILRA is central to the dispute and, while it may be possible for the applicants to review the eventual decision to grant a mining right without the applicants' consent, the applicants fear that that it is possible that mining will commence whilst they pursue their internal remedies and possibly rendering the consent meaningless. Discretion in favour of granting declaratory relief is therefore appropriate in this matter.

Context in the interpretation of legislation

[33] This matter requires a consideration of the provisions of IPILRA and the MPRDA in respect of the level of engagement that must be achieved prior to the grant of a mineral right: "Consent" as oppose to "consultation". It further requires a consideration of the potential conflict between the requirement of "consent" under IPILRA *vis à vis* the requirement of "consultation" under the MPRDA prior to the grant of a mineral right.

[34] Section 39(2) of the Constitution gives guidance to courts interpreting legislation and', in doing so, courts "must promote the spirit, purport and objects of the Bill of Rights".[13] Courts are furthermore "bound to read a legislative provision through the prism of the Constitution".[14] This obligation is "activated" whenever "the provision under construction implicates or affects rights in the Bill of Rights".[15]

[35] The importance of considering the broader social and historical context within which a particular piece of legislation operates was highlighted by the Constitutional

[13] Act 108 of 1996.
[14] *Makate v Vodacom (Pty)* 2016 (4) SA 121 (CC) at para [87].
[15] *Makate* at para [88].

Court in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*:

> "[53] It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing "as a result of past racially discriminatory laws or practices" in its setting of section 2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous." [16]

[36] See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* where the Constitutional Court likewise stressed the importance of considering the social and historical background of legislation:

> "[90] The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in Thoroughbred Breeders' Association v Price Waterhouse, the SCA has reminded us that:
> 'The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning. As was said in University of Cape Town v Cape Bar Council and Another 1986 (4) SA 903 (A) at 914D - E:
> "I am of the opinion that the words of s 3(2)(d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-

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[16] 2007 (6) SA 199 (CC).

matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature."

The well-known passage in the dissenting judgment of Schreiner JA in Jaga v Dönges NO and Another; Bhana v Dönges NO and Another 1950 (4) SA 653 (A) at 662G - 663A was also quoted with approval. It is of course clear that the context to which reference is made in the latter case must include the long title and chapter headings. (Compare Swart en 'n Ander v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A) at 202C.'

[91] The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights'. In Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) (2000 (10) BCLR 1079) at para [21] this Court explained the meaning and the interpretive role of s 39(2) in our constitutional democracy as follows:

'This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."[17]

[37] The applicants have also referred extensively to international and comparative law in giving context to the preferred interpretation of IPILRA and the MPRDA. I will return to these submissions. For the moment it is accepted that international law plays an important role in interpreting statutes. Section 233 of the Constitution provides that "every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". Also, in terms of section 39(1)(b) of the Constitution, a Court "must" consider international law when interpreting the Bill of Rights. In terms of

[17] 2004 (4) SA 490 (CC).

section 39(1)(c) a Court must likewise consider foreign law when interpreting the Bill of Rights.

[38] Against this broad discussion of the manner in which legislation must be interpreted, I will now turn to the dispute between the parties.

[39] The dispute between the parties is complex because it involves a consideration of the interaction between the MPRDA and IPILRA and more specifically whether the consultation requirement contained in the MPRDA applies to the exclusion of the consent requirement contained in IPILRA. The applicants strongly argued for a harmonious reading of the two acts and for the acceptance that consent under IPILRA is required for the granting of a mining right under the MPRDA.

[40] Both these acts, however, have in common that they were enacted to redress our history of economic and territorial dispossession and marginalisation in the form of colonisation and apartheid. Both acts seek to restore land and resources to Black people who were the victims of historical discrimination: they must therefore, in my view, be read together.

The Mineral and Petroleum Resources Development Act

[41] It is accepted that mining activities form a crucial cornerstone of our national economy. The MPRDA is a radical departure from the past dispensation in terms of which the common law owner of land owned everything above and below the land - including minerals. As a result, the owner had the right to mine any minerals on his or her land and could dispose of such minerals for his or her own account. Most importantly, the owner had the right to sell the mineral rights to a third party thereby severing the mining rights from landownership, but could also decide not to sell the mineral rights. Where the owner decided not to mine or to sell the mineral rights it had the effect of "sterilising" the minerals to the exclusion of everyone else.

[42] In terms of the MPRDA the State, and no longer the common law owner of the land, becomes the custodian of all mineral resources on behalf of the people of

South Africa.[18] The aim of the MPRDA is succinctly described by the Constitutional Court in *Bengwenyama* as follows:

> "[31] In broad terms the Act seeks to attain its transformation and empowerment aims by making the State the custodian of the country's mineral and petroleum resources, and by placing control of the exploitation of these resources under the control of the State, acting through the minister. Various provisions in the Act then seek to give specific effect to the object of expanding opportunities in the industry to historically disadvantaged persons. Of particular relevance to this matter are the provisions giving preference in the consideration of applications for prospecting rights to historically disadvantaged persons and to communities who wish to prospect on communal land." [19]

Mogoeng CJ echoed these sentiments in *Agri SA v Minister for Minerals and Energy*:[20]

> "[1] South Africa is not only a beauty to behold but also a geographically sizeable country and very rich in minerals. Regrettably, the architecture of the apartheid system placed about 87% of the land and the mineral resources that lie in its belly in the hands of 13% of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry."

[43] Whilst bringing about a radical change in the ownership of South Africa's mineral and petroleum resources by placing it in the hand of the nation with the State as its custodian, the MPRDA also recognises the need to promote local and rural development and the social upliftment of communities affected by mining.[21] Herein lies the conundrum to which I have already referred: whether consent (as referred to

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[18] Section 3 of MPRDA.
[19] *BengwenyamaMinerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC).
[20] 2013 (4) SA 1 (CC).
[21] Preamble to the MPRDA.

in IPILRA) is necessary for the granting of a mining right over land held in terms of customary law? Or, will consultation in terms of the MPRDA suffice in a customary law setting? This question must be considered against the background of what the Constitutional Court recently said in *Maledu*:

> "[5] Mining is one of the major contributors to the national economy. But there is a constitutional imperative that should not be lost from sight, which imposes an obligation on Parliament to ensure that persons or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices are entitled either to tenure which is legally secure or to comparable redress.[22] Accordingly, this case implicates the right to engage in economic activity on the one hand and the right to security of tenure on the other.

[44] Various sections in the MPRDA set out the procedures that must be followed in applying for a mineral right. Briefly, an application is made to the Regional Manager and", if it meets certain requirements, the application must be accepted.[23] Once the application is accepted, the Regional Manager must inform the parties to conduct an environmental impact assessment and notify and "consult" with interested and affected parties within 180 days from the date of the notice.[24] Simultaneously, the Regional Manager must publish the application and invite interested an affected parties to submit their comments regarding the application.[25]

[45] The importance of consultation in terms of section 22(4)(b) of the Minerals Act was recognised by the Constitutional Court in *Bengwenyama* particularly in light of the impact a mineral right has on surface rights. This judgment makes it clear that consultation is not merely a formal exercise – although it does not include reaching an agreement – but nonetheless involves the active participating of the landowner in respect of possible interference with her rights in respect of the property. There the Court said that:

[22] See section 25(6) of the Constitution.
[23] Section 22(2) of the MPRDA.
[24] Section 22(4) of the MPRDA.
[25] Section 10(2) of the MPRDA.

"[65] One of the purposes of consultation with the landowner must surely be to see whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's rights to use the property is concerned. Under the common law a prospecting right could only be acquired by concluding a prospecting contract with the landowner, something which presupposed negotiation and reaching agreement on the terms of the prospecting contract. The Act's equivalent is consultation, the purpose of which should be to ascertain whether an accommodation of sorts can be reached in respect of the impact on the landowner's right to use his land. Of course the Act does not impose agreement on these issues as a requirement for granting the prospecting right, but that does not mean that consultation under the Act's provisions does not require engaging in good faith to attempt to reach accommodation in that regard. Failure to reach agreement at this early consultation stage might result in the holder of the prospecting right having to pay compensation to the landowner at a later stage. The common law did not provide for this kind of compensation, presumably because the opportunity to provide recompense for use impairment of the land existed in negotiation of the terms of the prospecting contract.

[66] Another, more general, purpose of the consultation is to provide landowners or occupiers with the necessary information on everything that is to be done, so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures of the application goes against them and whether to take the administrative action concerned on review. The consultation process and its result are 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 in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair.

[67] The consultation process required by s 16(4)*(b)* of the Act thus requires that the applicant must: *(a)* inform the landowner in writing that his application for prospecting rights on the owner's land has been accepted for consideration by the regional manager concerned; *(b)* inform the landowner in sufficient detail of what the prospecting operation will entail on the land, in order for the landowner to assess what impact the prospecting will have on the landowner's use of the land; *(c)* consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and *(d)* submit the result of the consultation process to the regional manager within 30 days of receiving notification to consult."

[46] In terms of section 23(1) of the MPRDA the Minister for Mineral Resources is afforded the power to grant mineral rights if the listed conditions in this section have been met. If all the conditions are the Minister "must" issue the mineral right but may impose whatever terms and condition it sees fit under which the right may be exercised. In granting a mineral right, the State awards limited real rights in respect of the land to which such mining relates.[26]

[47] I have already alluded to the fundamental difference between the MPRDA and IPILRA pertaining to the granting of a mineral right: In terms of the MPRDA consultation is required before the granting of a mineral and not consent as provided for under IPILRA. This has fundamental implications - the most important which is that in regard to a common law owner of land, the Minister (provided that there was consultation), may grant a mining right against the will of the land owner. At best for the landowner, he or she is entitled to 21 days' notice prior to the commencement of operations.[27]

IPILRA

Introduction

[48] The promulgation of IPILRA played an important role in redressing our shameful history – a history that was summarized by the Constitutional Court in *Mashavha v President of the Republic of South Africa and Others* as follows:

> "[51] ... Our history is well known. It is one of colonialisation, apartheid, economic exploitation, migrant labour, oppression and balkanisation. Gross inequalities were deliberately and legally imposed as far as race and also 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..."[28]

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[26] Section 5(1) of the MPRDA.
[27] Section 5A(c) of the MPRDA.
[28] 2005 (2) SA 476 (CC).

[49] Section 25(6) of our Constitution gives recognition to the need to redress these gross inequalities of the past particularly in respect of the unequal access to land and security of tenure:

> "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."

[50] The applicants' tenure, like many other communities across the country, was made insecure by apartheid racist and exclusionary treatment of customary land and rights. It is a shameful historical fact that many communities were forced into insecure access to land.

[51] With the advent of the new constitutional order, the democratic parliament has adopted various pieces of legislation to address the historical inequalities and more in particular the insecure tenure that these communities had: the Extension of Security of Tenure Act[29] was enacted to protect farm dwellers. The Land Reform (Labour Tenants) Act[30] was promulgated to protect labour tenants. The Prevention of Illegal Eviction and Unlawful Occupation of Land Act[31] was adopted to protect urban occupiers. The Restitution of Land Rights Act was enacted for those who were dispossessed by racists law.[32] Lastly, IPILRA was adopted to protect those who held insecure tenure because of the failure to recognise customary title.

[52] The short title of IPILRA sets out that it is the purpose of this act to provide temporary protection "of certain rights to and interests in land which are not otherwise adequately protected by law; and to provide for matters connected therewith."

[53] IPILRA came into operation on 21 June 1996. Although the initial intention was for this act to lapse on 31 December 1997, the act was repeatedly extended in terms of section 5(2) of IPILRA and most recently until 31 December 2018.

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[29] Act 63 of 1997.
[30] Act 3 of 1996.
[31] Act 19 of 1998.
[32] Act 22 of 1994.

[54] Section 1 of IPILRA defines a "community" as "any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group". The Umgungundlovu community is such a community. They are also regarded as such in terms of the MPRDA.[33] This is not disputed by TEM.

[55] IPILRA is mainly concerned with the protection of informal rights[34] in land of those communities (such as the applicants) as defined in the act. In terms of section 2(1) of IPILRA, the consent of the holder of an informal right is required before he or she may be deprived of property:

> "**Deprivation of informal rights to land**
>
> 2. (1) Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the

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[33] Section 1 of the MPRDA defines a community as: "a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law."

[34] Section 1 defines "informal right to land" as:

"(a) [T]he use of, occupation of, or access to land in terms of—
- (i) any tribal, customary or indigenous law or practice of a tribe;
- (ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in—
  - (aa) the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936);
  - (bb) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971); or
  - (cc) the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei;

(b) the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office;

(c) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997; or

(d) the use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991), although he or she is not formally recorded in a register of land rights as the holder of the right in question."

(e) any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature; and

(f) any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier".

expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.

(2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community.

(3) Where the deprivation of a right in land in terms of subsection (2) is caused by a disposal of the land or a right in land by the community, the community shall pay appropriate compensation to any person who is deprived of an informal right to land as a result of such disposal.

(4) For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate."

[56] IPILRA recognises that many informal rights are not held individually but as a community and provides that a "person" includes a community. Consistent with the aforegoing, section 2(2) requires that communal consent in the circumstances quoted above.

Does the grant of a mineral right constitute a "depravation"?

[57] The applicants contend that the grant of the mineral right constitutes a "deprivation" as contemplated by section 2(1) of IPILRA and therefore the consent of the community was required. IPILRA does not provide any definition as to what is meant by the term "deprivation" but it appears from the judgment in *First National Bank t/a Wesbank v Minister of Finance*[35] that there must be some kind of "interference" with the use of the land:

> "[57] The term 'deprive' or 'deprivation' is, as *Van der Walt* (1997) points out, somewhat misleading or confusing because it can create the wrong impression that it invariably refers to the taking away of property, whereas in fact
>
> > 'the term "deprivation" is distinguished very clearly from the narrower term "expropriation" in constitutional jurisprudence worldwide'.

[35] 2002 (4) SA 768 (CC).

In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If s 25 is applied to this wide *genus* of interference, 'deprivation' would encompass all species thereof and 'expropriation' would apply only to a narrower species of interference. *Chaskalson and Lewis*, using a slightly different idiom and dealing with both the interim and 1996 Constitutions, put it equally correctly thus:

> 'Expropriations are treated as a subset of deprivations. There are certain requirements for the validity of all deprivations.'"

[58] Without repeating what the applicants have submitted in this court regarding the impact the mining operations would have on their land, I am satisfied the granting of a mining right amounts to a "depravation". A plain reading of section 5[36] of the MPRDA also makes it clear that the holder of a mining right – which is a limited real right[37] - may engage in far reaching activities in furthering its mining activities all of which have the potential of interfering with the use or enjoyment of land. In this regard I am in agreement with the sentiments expressed by the Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan* Municipality[38] that, whether or not there has been a depravation is a matter of degree and depends on the extent of the interference and that "*at the very least, substantial interference or limitation that goes*

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[36] Section 5 of the MPRDA provides:
"(1) 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.

(2) The holder of a prospecting right, mining right, exploration right or production right is entitled to the rights referred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law.

(3) Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may—

> (a) 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 the purpose of prospecting, mining, exploration or production, as the case may be;
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> . . .
>
> (b) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted;
>
> . . .
>
> (e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act."

[37] Section 5(1) of the MPRDA.

[38] 2005 (1) SA 530 (CC).

beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."

[59] I am satisfied that, in light of the facts that were placed before the Court and the nature of the mining operations (especially open cast mining operations) contemplated on the applicants' land, that those operations will interfere substantially with their agricultural activities and general way of life. Section 5[39] of the MPRDA further entitles the holder of mining right to engage in invasive activities on the lands including but not limited to using the water on the property. As pointed out, the applicants tell this court that their means to provide for themselves and others in the community will be severely affected by the mining activities or in the words of the recent Constitutional Court judgment in *Maledu:* "Thus, strip someone of their source of livelihood, and you strip them of their dignity too."[40] I am therefore satisfied that the grant of the mineral right would constitute a "depravation" for purposes of IPILRA and for purposes of section 25 of the Constitution.

[60] The Constitutional Court in *Maledu* has also recently pronounced on the meaning of "depravation" in the context of awarding a mining right:

> "Did the award of the mining right constitute a deprivation of informal rights to land?
> [98] A somewhat curious feature of IPILRA is that whilst it provides that no person may be deprived of any informal right to land without consent, it does not itself spell out

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[39] Section 5(3) of MPRDA reads as follows:
"(3) Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may-
(a) 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 the purpose of prospecting, mining, exploration or production, as the case may be;
(b) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted;
(c) remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be;
(cA) subject to section 59B of the Diamonds Act, 1986 (Act 56 of 1986), (in the case of diamond) remove and dispose of any diamond found during the course of mining operations;
(d) subject to the National Water Act, 1998 (Act 36 of 1998), use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land; and
(e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act."

[40] *Maledu* at para [1].

what constitutes a deprivation. The Concise Oxford English Dictionary defines the verb "deprive" as meaning: "Prevent (a person or place) from having or using something".[41] The noun "deprivation" is defined as: "The damaging lack of basic material benefits; lack or denial of something considered essential". This, to my mind, is the definition that should be adopted for purposes of section 2 of IPILRA.

[99] Whether there has been a deprivation in any given case, said Yacoob J in *Mkontwana,* depends —

> "on the extent of the interference with or limitation of use, enjoyment or exploitation... . at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."

[100] Before *Mkontwana,* this Court had earlier, in the context of section 25(1) of the Constitution, said that:

> "In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned."

As noted above, the MPRDA confers on the holder of a mining right a limited real right in respect of the mineral or petroleum and the land to which such right relates. Moreover, and significantly, it grants to the holder a right of access to the land, even against the wishes of the landowner. The mining right holder is free to enter the land and do everything necessary in the exercise of her right, including constructing or laying down any surface or underground infrastructure, which may be required for the purpose of the mining rights holder's rights.

[101] Before this Court, counsel for the respondents sought to argue that whilst the award of a mining right under section 23 of the MPRDA does not equate to expropriation in the ordinary and conventional sense of that term, its practical effect is tantamount to expropriation as it has the effect of depriving a landowner or occupier of the land to which it relates of certain incidents of his or her rights of ownership or occupation.

[102] *Accordingly, given the invasive nature of a mining right, there can be no denying that when exercising her rights, the mining right holder, would intrude into the rights of the owner of the land to which the mining right relates.*[42] And the more invasive the mining operations are the greater the extent of subtraction from a landowner's dominium will it entail. On their own version, the respondents accept that it is not

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[41] Fowler & Fowler (eds.) *The Concise Oxford Dictionary* 12 ed (Oxford University Press, 18 August 2011) at 468.

[42] Emphasis added.

possible for them to undertake their mining operations whilst the applicants remain in occupation of the farm. It must follow from this that the applicants will be deprived of their informal rights to the farm if the order evicting them from the farm were allowed to stand."

[61] Having accepted that the granting of a mineral right constitutes a "depravation" the consent requirement provided for in section 2(1) of IPILRA for such a deprivation appears to have been triggered. I will now briefly turn to this section in more detail.

[62] In terms of section 2(1) of IPILRA, the requirement of consent in the event of a "depravation" is made subject to the provisions of the "Expropriation Act or any other law which provides for the expropriation of land or rights in land".

[63] Must this section be read to mean that the MPRDA is "any other law" and therefore the MPRDA applies to the exclusion of IPILRA? The applicants submit that, properly interpreted, the phrase "rights in land" attaches to expropriation and therefore IPILRA and not the MPRDA applies. It was further submitted that the purpose of section 2(1) would be entirely defeated if the consent requirement was subjected to "any law which provides for rights in land". I agree. I am not persuaded that, on a plain reading of section 2(1) it can be inferred that the reference to "any other law" is a reference to the MPRDA for the following reason: Section 2(1) of IPILRA is concerned with expropriation in terms of the Expropriation Act or any other law "which provides for the expropriation of land or rights in land". Is the MPRDA such a law? It is clear that the context of section 2(1) is to provide for expropriation. The Constitutional Court in *AGRI SA v Minister for Minerals And Energy*[43] made it clear that the granting of a statutory mineral right under the MPRDA does not constitute expropriation:

> "[67] Sebenza was deprived of components of its mineral rights in that the MPRDA brought about a substantial interference and limitation that went beyond the normal restrictions on the use or enjoyment of its property found in an open and democratic society. Although expropriation is a species of deprivation, there are additional requirements that set expropriation apart from mere deprivation. They are (i)

[43] 2013 (4) SA 1 (CC).

compulsory acquisition of rights in property by the state, (ii) for a public purpose or in the public interest, and (iii) subject to compensation.

[68] The MPRDA is the legal instrument through which Sebenza was deprived of its coal rights. This therefore is a compulsory deprivation. The custodianship of this and other mineral and petroleum resources is, in terms of the MPRDA, vested in the state on behalf of the people of South Africa. The critical question is, however, whether this deprivation, the assumption of custodianship and the power to grant others what could previously have been granted only by holders, means that the state acquired ownership of rights to these mineral and petroleum resources. The answer is no. Unlike in the case of the state (i) acquiring land for governmental projects such as road infrastructure, industrial development or other purposes, and (ii) acquiring mineral rights so that it could exploit them, in this case the state did not acquire any mineral rights, including those of Sebenza, at the commencement of the MPRDA. The state, as the custodian of these resources, is not seeking or supposed to be a co-contender with people or business entities for the right to prospect for or mine these minerals. It is a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised.

[69] A contention that, although the state has admittedly not acquired Sebenza's rights to own and to exploit minerals, it has nevertheless expropriated these rights is without merit. The deprivation in this matter evidently has no known comparable expropriation-equivalent that could be cited by Agri SA. An assertion by Agri SA that the state has in terms of the correct interpretation of s 25 expropriated the mineral rights, is an overly liberal one. It disregards the public interest and constitutional imperative to transform and facilitate equitable access to our mineral and natural resources, to which courts are enjoined to have regard when construing s 25.

[70] Agri SA's contention that because the Minerals Act treated or classified the forced exploitation of privately owned mineral rights as compensable expropriation, so should the MPRDA, misses the point. The previous legislation regulated access to minerals and their exploitation within the context of the apartheid regime which was all about the exclusion of black people from access to private landownership and the exploitation of mineral and natural resources, and the protection of the privileges of their white compatriots. An important difference-maker in this case is s 25 which could never before have been a factor in interpreting the minerals legislation in relation to expropriation. Now, unlike before, private mineral ownership rights are not to be over-emphasised at the expense of the urgent and critical need to open up equitable access to, and promote economic development through the exploitation of our mineral and petroleum resources."

What is the interaction between IPILRA and the MPRDA

[64] Whereas the MPRDA is primarily concerned with the promotion of equitable access to South Africa's reach mineral resources to all South Africans,[44] IPILRA sets out to protect communities who were the victims of past discrimination and who have deep cultural and religious connection to their land.

[65] In the case of the MPRDA, the State is the custodian of the nation's mineral and petroleum resources and may award mineral rights within the legislative constraints of the MPRDA and may award such rights to an applicant after consultation with the land owner.[45]

[66] Section 4(2)[46] of the MPRDA states that the MPRDA prevails in so far as the common law is inconsistent with the act. Although customary law enjoys equal constitutional status to common law, the MPRDA does not contain a similar provision in respect of customary law and therefore does not specifically subject customary law to the provisions of the MPRDA in the event of an inconsistency (or conflict) with the MPRDA. This act does, however, refer to communities who owns land and who are directly affected by mining on their land, and does, to some extent, recognise the historical injustices suffered by these communities. The MPRDA defines a "community" as –

> ".. a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community

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[44] Section 2 of the Act sets out the various objects of the MPDRA.

[45] An owner is defined by the MPDRA "in relation to-
(a) land-
(i) means the person in whose name the land is registered; or
(ii) if it is land owned by the State, means the State together with the occupant thereof".

[46] Section 4 of the MPRDA reads as follows: "Interpretation of Act
(1) When interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects.
(2) In so far as the common law is inconsistent with this Act, this Act prevails."

shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community."

[67] In terms of section 23(2A) of the MPRDA, the Minister may impose such conditions as she considers necessary to promote the rights and interests of communities including requiring the participation of the community.

[68] Can it be said in light of the fact that the MPRDA only refers to the common law and not customary law that communities who have informal rights in land should be treated differently from common law owners? TEM takes issue with the applicants' take on this point and argues that the effect of the applicants' argument amounts to the creation of a special category of right in land that enjoys heightened protection against an adverse grant of mining rights. They further submit that IPILRA intends to give informal land rights an equal status to formal land rights i.e. it requires them to be treated as if they were formal rights. It does so by prohibiting deprivations of informal rights without consent, just as formal rights have this protection under the common law. But, so they argue, just as formal rights are capable of statutory depravation, so too are informal rights.

[69] Before turning to this question, the importance of customary law in our new constitutional dispensation, needs to be restated as was done by the Constitutional Court in *Bhe v Khayelitsha Magistrate*:[47]

> "[41] It is important to appreciate the distinction between the legal framework based on section 23 of the Act and the place occupied by customary law in our constitutional system. Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. Sections 30 and 31 of the Constitution entrench respect for cultural diversity. Further, section 39(2) specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. In similar vein, section 39(3) states that the Bill of Rights does not deny the

[47] 2005 (1) SA 580 (CC).

existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights. Finally, section 211 protects those institutions that are unique to customary law. It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.

[42] It is for this reason that an approach that condemns rules or provisions of customary law merely on the basis that they are different to those of the common law or legislation, such as the Intestate Succession Act, would be incorrect. At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution."

[70] This status of customary law has likewise been acknowledged and endorsed by the Constitutional Court case in *Alexkor Ltd and Another v Richtersveld Community and Others*[48] where the following was stated:

"[51] While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights. Our Constitution

. . .

"does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights]."

It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result,

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[48] 2004 (5) SA 460 (CC).

indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law."

[71] The court in *Alexkor* highlights the fact that customary law was marginalised in the past and allowed to be "alienated from its roots in the community". On a basic level, this is precisely what IPILRA seeks to protect: informal rights in land, the use, occupation or access of which is in terms of "any tribal, customary or indigenous law or practice of a tribe".[49] This it seeks to do by providing that these informal land users (or communities) may not be deprived of their informal land rights without his or her consent except where the land is expropriated in terms of the Expropriation Act or any other act ... "Consent", as was made clear in the *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*[50] cannot be equated with "consultation". The former contemplates an agreement whilst the latter envisages a process of consensus seeking that may not necessarily result in an agreement.

[72] Apart from the above, the Constitution in various sections specifically recognises the status of rights conferred in terms of customary law - a body of law equal to the common law.[51] Moreover, section 211(3) specifically enjoins the courts to apply "customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law". The Supreme Court of Appeals in *Malibongwe David Gongqose and Others v Minister of Agriculture, Forestry and Fisheries & Others*[52] recognises the important status of customary law as follows:

> "[23] These provisions make three things clear. First, customary law 'is protected by and subject to the Constitution in its own right.' Thus, the adjustment and development of customary law may be necessary to align its provisions with the Constitution, or to promote the 'spirit, purport and objects of the Bill of Rights', as required by section 39(2). Second, the legislative authority of Parliament to pass laws dealing with customary law has not been ousted. And third, the injunction to apply customary law is not rendered subject to any legislation generally, but only to 'legislation that specifically deals with customary law'."

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[49] Definition of "informal land".
[50] 2011 (4) SA 113 (CC).
[51] Section 39(3) of the Constitution.
[52] 2018 (5) SA 104 (SCA).

[73] IPILRA, as already indicated, protects informal rights to land including rights held in terms of customary law.[53] It further recognises that collective decision may, in terms of customary law, override the decision of the individual where such decision is made "in accordance with the custom and usage of that community".[54]

[74] More importantly, the MPRDA does not purport to regulate customary law at all. I have already referred to the import of section 4(2) of the MPRDA that only refers to the common law in the event of a conflict and not to customary law (which is a law with equal status). In contrast, IPILRA specifically deals with customary law. It can further, in my view also be said that there are other indications that, even in the context of the MPRDA, common law owners are treated differently in terms of the MPRDA from communities which have rights in a particular area of land in terms of customary law: Firstly, the MPRDA, as already pointed out, does not subject customary law to the MPRDA in the event of a conflict in the same way it does with common law. Secondly, whereas it is clear from the MPRDA that the Minister must grant a mineral right if certain conditions have been met (and may do so against the will of the common law owner), the MPRDA requires consultation with "interested and affected persons"[55] but not separately with land owners: they fall within the broad category of interested and affected persons. Communities with rights in land are, however treated differently. Section 10 of the MPRDA specifically provides that these communities must be consulted. Moreover, in terms of section 23(2A) of the MPRDA the Minister has the right to impose certain conditions in order to ensure the participation of these communities.[56] I am in agreement with the submission that section 23(2A) speaks to the greater interests of the community by seeking to ensure that they are fully protected.

[75] Lastly, having regard to the overall purpose of the two acts and taking into account the historical context within which these two acts operate, it is evident that the

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[53] Section 1(1)(a)(i) of IPILRA.
[54] Section 2(2) of IPILRA.
[55] Section 10 of the MPRDA.
[56] Section 23(2A) of the MPRDA: "If the application relates to the land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community."

two acts purport to serve different purposes: The MPRDA sets out to regulate mining activities in South Africa for the benefit of all South Africans whereas IPILRA was enacted to "provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law; and to provide for matters connected therewith". The Constitutional Court in *Maledu* explains:

> "[63] The general principles of statutory interpretation canvassed above have three implications for how IPILRA must be read and understood. First, the purpose of IPILRA, which must be scrutinised, is not hard to find for IPILRA itself spells it out. It is to provide for the protection of informal rights to and interests in land that were not adequately protected by the law because of racially discriminatory laws of the past. Second, the provisions of IPILRA have to be interpreted benevolently in order to afford holders of informal rights to land the fullest possible protection. Third, during the interpretative exercise the mischief that IPILRA seeks to remedy must be kept uppermost in the mind. Allied to this is the constitutional imperative to construe legislation in a manner that is consistent with the Constitution."

[76] Having regard to the overall purpose of the two acts and given the status now afforded to customary law under the new constitutional dispensation, I can see no reason why the two acts cannot operate alongside one another. Moreover, having regard to the special protection granted to traditional communities in terms of IPILRA, I am of the view that communities such as the applicants are, as they must be for the reasons set out above, afforded broader protection in terms of IPILRA than the protection afforded to common law owners (as contemplated under the MPRDA) when mining rights are considered by the Minister. This is not to say that the MPRDA does not apply. It does, but so does IPILRA which imposes the additional obligation upon the Minister to seek the consent of the community who hold land in terms of customary law as oppose to merely consulting with them as is required in terms of the MPRDA. Granting this community special protection is not in conflict with the provisions of the MPRDA and especially section 23(2A) where it is made clear that protecting community rights to land is part of the purpose of the MPRDA.

[77] In the recent Constitutional Court in *Maledu*, the Court expressly considered the submission that the MPRDA and IPILRA are not in conflict with one another and

that they should therefore be "interpreted and read harmoniously".[57] More in particular, that court, with reference to the clear purpose of IPILRA, recognises the right of communities to decide what should happen to their land and that their consent is required before they may be deprived of their land:

> "[95] Mindful of our past, which was characterised by oppression, deprivation of a significant segment of our society and deep-rooted inequalities, our Constitution places a high premium on the absolute need to redress the injustices of that shameful past. In relation to those members of society who were denied equal access to land and security of tenure, section 25(6) of the Constitution sets out to redress the attendant inequalities. It provides in unequivocal terms that any "person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to tenure which is legally secure or to comparable redress". As is manifest from its preamble, IPILRA seeks to provide for the protection of certain rights to and interest in land that were previously not otherwise protected by law. To provide such protection, IPILRA ensures that communities have a right to decide what should happen to land in which they have an interest. It offers communities legal protection to assume control over and deal with their land according to customary law and usages practiced by them.
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> [96] Most significantly, IPILRA provides that no person may be deprived of any informal right to land without his or her consent.[58] Where land is held on a communal basis, a person may be deprived of such land or right in land in accordance with the custom or usage of the community concerned, except where the land in question is expropriated.[59]
>
> [97] However, in instances where land is held on a communal basis, affected parties must be given sufficient notice of and be afforded a reasonable opportunity to participate, either in person or through representatives, at any meeting where a decision to dispose of their rights to land is to be taken.[60] And this decision can competently be taken only with the support of the majority of the affected persons having interest in or rights to the land concerned, and who are present at such a meeting."

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[57] *Maledu* at para [68].
[58] Section 2(1) of IPILRA.
[59] Section 2(2) of IPILRA.
[60] Section 2(4) of IPILRA.

[78] Lastly, granting special protection to these communities by requiring consent as oppose to mere consultation is in accordance with international law. Multiple international instruments require that communities such as the applicants have the right to grant or refuse their free, prior and informed consent to any mining development that will significantly affect them. In terms of the *General Recommendation No. 23: Indigenous Peoples issued in terms of the* Convention on the Elimination of All Forms of Racial Discrimination it is recognised that:

> "3. The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized."

[79] In recognition of this fact, the following recommendation is made to States, with particular reference to the indigenous peoples right that no decision will be taken affecting their rights without their informed consent:

> "4. The Committee calls in particular upon States parties to:
> (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
> (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
> (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
> (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent; ...
> 5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is

for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories."

[80] In terms of the International Covenant on Economic Social and Cultural Rights[61] it was similarly held in its 2009 General Comment 21 that –

> "[36] .... States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories."

[81] The Human Rights Committee, in terms of the International Covenant on Civil and Political Rights, held in a matter that served before it *Angela Poma Poma v Peru,* that it constituted a violation to culture and religion where the indigenous Aymara peoples consent was not obtained prior to depriving them of access to water. It held that –

> "7.6 In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members."

[82] Lastly, although the African Charter does not expressly provide for the concept of free, prior and informed consent,[62] the bodies responsible for the interpretation of the Charter (the African Commission on Human and People's Rights and the African

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[61] Ratified by South Africa.
[62] *Maledu* at para [72].

Court on Human and People's Rights) have held that, having regard to the provisions of the African Charter, no decisions may be made about people's land without their free, prior and informed consent. [63]

Conclusion

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

Order

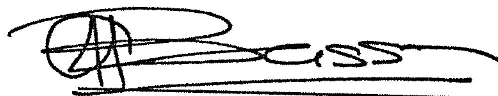
[84] In the event the following order is made:

1. It is declared that the First Respondent lacks any lawful authority to grant a mining right to the Fifth Respondent in terms of section 23, read with section 22 of the Mineral Petroleum Resources Development Act 28 of 2002, unless the First, Sixth and Seventh Respondents have complied with the provisions of the Interim Protection of Informal Rights to Land Act 31 of 1996.

2. It is declared that in terms of the Interim Protection of Informal Land Act 31 of 1996, the First Respondent is obliged to obtain the full and informed consent of the Applicants and the Umgungundlovu Community, as holder of rights in land, prior to granting any mining right to the Fifth Respondent in terms of section 23, read with section 22 of the Mineral Petroleum Resources Development Act 28 of 2002.

[63] See *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya ACHPR Communication* 276/2003 and *African Commission on Human and People's Rights v Republic of Kenya Application* No 006/2012,

3. The costs of this application are to be paid, jointly and severally by the first, second, third, fourth and fifth respondents.



AC BASSON

JUDGE OF THE HIGH COURT

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