UNIVERSITY OF KWAZULU NATAL

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# A critical analysis of the protection of informal rights in land against mining related land deprivations

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# Abstract

In South Africa, land issues have always been a source of conflict. The recent years have seen the rise of conflict between the holders of informal rights in land and mining companies. These conflicts occur when the holders of these rights in land must be dispossessed of their rights in land to make way for mining. The process of dispossession creates a problem because the holders of informal rights contend that they cannot be removed from the land they possess without their consent. On the other hand, mining companies argue that they are only required to consult with the holders of informal rights in land, and getting their consent is not a requirement.

These two conflicting positions were created by the two pieces of legislation that regulate these fields. The Interim Protection of Informal Rights in Land (IPILRA) which caters for the protection of informal rights requires that holders of informal rights in land cannot be dispossessed of their rights in land without obtaining their consent. On the opposite, the mining industry is regulated by the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) which instructs mining companies to consult with people who will be affected by the mining.

The contestation between the parties has been recently decided by courts of law. In the case of *Maledu* and *Baleni,* it was decided that the Acts are not in conflict with one another therefore holders of informal rights in land must be consulted and they must give their consent before deprivation of their rights in land. This is the current legal position regarding this issue, however, there have been serious issues raised against the ruling on both judgments.

The purpose of this thesis is to thoroughly discuss the position taken by these judgments. It will look at how they enhance the protection of informal rights in land as required by even the Constitution. It was viewed as a victory for holders of informal land rights, hence it is necessary to interrogate the position in terms of its sustainability as IPILRA is a temporary Act that is renewed yearly. If the Act is replaced by another one that does not offer the consent requirement, everything will suddenly change.

The thesis will further engage the criticism levelled against the decision of the courts. The rulings are criticised on the basis that they erode the powers of the State as the custodian of minerals to grant mining and prospecting rights. It further elevates holders of informal rights

in land above those with formal rights in land. This creates an unfair inequality between the two forms of rights in land. Another important issue is surrounding the practical implementation of the consent requirement. This is based on the challenges that will arise in the process of obtaining consent from the people. As a result, a foreign jurisdiction's legal position will be investigated to get some possible solutions to this issue.

**Keywords**

Informal rights in land, mining rights, prospecting rights, mineral custodianship,

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## CHAPTER ONE: BACKGROUND AND OUTLINE OF THE RESEARCH PROBLEM.

### 1.1. Introduction.

In South Africa, mining is one of the important industries that contribute immensely to the economy.[1] Although the industry is no longer the dominant force of the economy, it is still crucial in job creation.[2] However, the industry bears a huge disadvantage in that it adversely affects the rights in land as it requires the deprivation of the land before mining can commence. The deprivation occurs when holders of prospecting or mining rights want to exercise their mineral rights which results in serious conflict between them and surface land occupiers.[3] The surface land occupiers resist the deprivations citing that it causes huge social disruptions and other negative impacts to them.[4] As a result, they view the discovery of natural resources as a curse that brings them conflicts and unending troubles.[5]

There are plenty of reasons that inform the decision of the surface land occupiers to fight against mining related land deprivations. The main reason for the conflict is that surface land occupiers feel attached to their land and prefer to keep occupying it.[6] For them, land is not an asset that they can dispose of because it is something they identify themselves with.[7] The surface land occupiers therefore prefer to make income through means that will ensure that they keep the land. Those are traditional ways which include amongst other things agriculture, the keeping of livestock, and other related activities.[8] These reasons and others encourage the surface land occupiers to fight against the idea of mining the land they possess.

Although South Africa is rich in minerals some land possesses more minerals than others. These recent years have seen more minerals being discovered in the areas that were previously

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[1] LN Maqutu "The concept of labour in South African law" *Fundamina: A Journal of Legal History,* vol 26 (1) 2020, 42.
[2] I Godfrey *Legacy of the mine* (2013) 10.
[3] PJ Badenhorst, CN Van Heerden "Conflict resolution between holders of prospecting or mining rights and owners (or occupiers) of land or traditional communities: What is not good for the goose is good for the gander" 2019 *SALJ* 303.
[4] T Murombo (2013) "Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation," *Law, Environment and Development Journal*, 9(1), 37.
[5] M Langton & J Longbottom (eds) 2012, Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom, Taylor & Francis Group, London. Available from: ProQuest Ebook Central. 24.
[6] *Agri South Africa v Minister for Minerals and Energy* (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR (CC) at para 57.
[7] D Mailula "Customary (communal) land tenure in South Africa: Did Tongoane overlook or avoid the core issue? (2011) 4 *CCR* 73.
[8] F Nelson (ed.) 2010, Community Rights, Conservation and Contested Land: The Politics of Natural Resource Governance in Africa, Taylor & Francis Group, London. Available from: ProQuest Ebook Central, at 1.

classified as Bantustans and are mainly rural areas with informal rights in land.[9] As a result many mining operations are situated in these areas which are mostly under traditional leadership.[10] The traditional leadership is sometimes considered the guardian of the land hence they attend to all matters concerning land.[11] As mining is also about land, this easily places traditional leadership as negotiators on behalf of people with mining companies.

The behaviour of traditional leaders when engaging with mining companies has been sometimes criticised by community members on the basis that they fail to act in the best interest of the community. The traditional leadership has been accused of receiving incentives from mining companies and then pushing for mining while disregarding the concerns of the community.[12] It has been said that this is the reason why many traditional leaders openly support the mining industry.[13] These accusations are concerning because they are an indication that the rights in land of these affected communities are under threat and vulnerable, especially after the discovery of minerals in their areas.

The accusations against traditional leaders add fuel to the conflict between communities and mining companies. These conflicts arise due to laws that appear to be providing different dimensions about the route to be followed when dispossessing land for mining purposes. It is argued that the laws in the country are not clear about whether consultation or consent should be obtained from the community with informal rights in land before the dispossession of their land rights for mining purposes.[14] This has been laid bare in the cases that have been brought to our courts, thus far, concerning the conflicts between holders of informal land rights and mining companies. The holders of informal rights in land always argue that they cannot be dispossessed of their rights in land without their consent whilst on the other side mining companies argue that only consultation is required.

The consent requirement as argued by the communities emanates from the fact that they have informal rights in land. Informal rights can summarily mean those who use, occupy or access land in terms of customary laws or practices and beneficial occupation.[15] It further covers the

[9] L Leonard 'Traditional leadership, community participation and mining development in South Africa: The case of Fuleni, Saint Lucia, KwaZulu Natal' *Land Use Policy* 86 (2019) 290.
[10] Leonard (note 9 above; 290).
[11] T Weinberg "Communal land tenure after 20 years of democracy in South Africa" 2014/15 (1) SADC 164.
[12] Leonard (note 9 above; 290).
[13] Leonard (note 9 above; 290).
[14] Leonard (note 9 above; 292).
[15] Weinberg (note 11 above)

land vested in the South African Development Trust or the former Bantustans, or any other kind of trust established by statute.[16] On the other side, mining companies contend that consultation with the affected people is adequate.

These arguments are advanced based on two pieces of legislation in the form of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). The MPRDA was enacted to make provision for equitable access to and sustainable development of the country's mineral and petroleum resources and to provide for related matters.[17] The Act provides, amongst other things, that all mineral and petroleum resources belong to the nation, and the State is the custodian thereof.[18] As the custodian of the mineral and petroleum resources, the State, through the Minister of Mineral Resources and Energy must award mineral rights to suitable applicants.[19] The Acts stipulate the procedures to be followed when granting mineral rights which includes consultation with the landowner.[20]

According to section 10 of the MPRDA the Regional Manager, after accepting an application, must call upon interested and affected persons to submit their comments regarding the application. Section 22 focuses specifically on the mining right applicant and states that after acceptance of their application, they must notify and consult with interested parties.[21] Although the Act is clear about the need for consultation, there are accusations that mining companies fail to properly consult with the people.[22] The accusations are rife that mining companies enter into corrupt deals with traditional leadership which exclude ordinary people on the ground.[23] Failure to even conduct proper consultation appears to be the reason why people are pushing for consent.

Land is very important to the people, and they are justified when they are defending their rights in land. South Africa has a long history of land dispossession and that is the reason section 25 (6) of the Constitution protects people whose tenure is legally vulnerable because of past

[16] Ibid.
[17] Mineral and Petroleum Resources Development Act 28 of 2002.
[18] MPRDA (note 17 above).
[19] Ibid Section 3.
[20] Ibid Section 10.
[21] MPRDA (note 17 above).
[22] Leonard (note 9 above; 292).
[23] Weinberg (note 11 above)

racially discriminatory laws and practices.[24] Following that, the Interim Protection of Informal Land Rights was enacted to provide temporary protection to informal rights in land as they are vulnerable and not properly protected by law.[25] It is important in a democratic country to offer protection to vulnerable groups and individuals in matters concerning land.

The protection offered by IPILRA is through section 2, which requires that holders of informal rights in land must give their consent before deprivation of their rights in land. This can be exempted only subject to the Expropriation Act or any law providing for expropriation or custom and usage of the community.[26] A decision based on such custom and usage of the community may only be taken by a majority of holders of such informal land rights present or represented at a meeting convened for such disposal.[27] In addition, sufficient notice must be given in which they have had a reasonable opportunity to participate.[28]

The conflict between holders of informal rights in land and mining companies has resulted in various court applications. The Constitutional Court in the case of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC) (hereafter *Maledu*) had to decide on a similar issue. As per the facts of the case, the applicants were members of the Lesethleng village community, which is under the Bakgatla traditional authority in the North West province.[29] They argued that their forebears bought the farm in 1919, based on a decision taken by the Lesethleng community in 1916.[30] Due to racially discriminatory laws of the past, the farm could not be registered under the names of the purchasers as joint owners.[31] Consequently, the ownership of the farm was passed to the Minister, who held it in trust for the community.[32] The title deed of the property reflected that the Minister held it in trust on behalf of the entire Bakgatla-Ba-Kgafela Community, this was the case because Lesethleng Community was not recognised as an autonomous entity.[33] Applicants contended that this was done with a clear understanding that only members of the

[24] The Constitution of the Republic of South Africa 1996.
[25] Interim Protection of Informal Land Rights 31 of 1996.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC) at para 12.
[30] *Maledu* at para 12.
[31] *Maledu* at para 12.
[32] *Maledu* at para 12.
[33] *Maledu* at para 12.

Lesethleng Community who had contributed to the purchase price had a legal interest in the farm and not all members of the community.[34]

The first respondent was Itereleng Bakgatla Minerals Resources (PTY) Limited (IBMR), a mining company that was awarded mining rights over the farm by the Department of Mineral Resources and Energy around the year 2008.[35] It then concluded a surface lease agreement with the Bakgatla-Ba-Kgafela Tribal Authority and the Minister in respect of the farm.[36] In the year 2014, the preparations for full-scale mining operations on the farm commenced.[37] At that moment, the applicant was disturbed from peacefully occupying the farm.[38] The litigation process then commenced as the applicants attempted to prevent deprivation of their right in land, and it went all the way to the Constitutional Court.[39]

Amongst the issues discussed in the Constitutional Court, this research will focus on whether the applicants had consented to be deprived of their informal land rights.[40] The applicants argued that they were holders of informal rights to the farm as contemplated in IPILRA, therefore according to section 2 (1), they could not be deprived of such informal rights without their consent.[41] Mindfully, respondents had agreed with the Bakgatla-Ba-Kgafela Tribal Authority and the Minister, but not with the applicants directly.[42] This can be attributed to the fact that the title deed reflected that the Minister held the land on behalf of the entire Bakgatla-Ba-Kgafela community not directly the applicants.

The respondents argued that the applicants had been consulted and such consultation was adequate in terms of section 22(4) of the MPRDA.[43] According to section 22 (4), if the Regional Manager accepts the application, he/she must communicate in writing with the applicants that they must notify and consult with the interested and affected parties. Respondents therefore argued that the award of a mining right was not reliant upon them obtaining consent from the applicants.[44] They further asserted that a mining right should be

[34] *Maledu* at para 12.
[35] *Maledu* at para 14.
[36] *Maledu* at para 14.
[37] *Maledu* at para 14.
[38] *Maledu* at para 14.
[39] *Maledu* at para 14 to 25.
[40] *Maledu* at para 42.
[41] *Maledu* at para 64.
[42] *Maledu* at para 14.
[43] *Maledu* at para 74.
[44] *Maledu* at para 74.

considered above the rights in land of surface land occupiers.[45] This meant that the rights of the landowner must yield to those of the mining right holder in cases where there is a conflict between these competing rights.[46]

The court held that there was no conflict between the MPRDA and IPILRA, therefore, both Acts must be allowed to further their objectives.[47] These two Acts were supposed to be read together as they were compatible.[48] Consequently, the award of a mining right does not nullify occupational rights under IPILRA.[49] Therefore, the holders of informal rights in land cannot be deprived of their land rights without giving their consent.

In another related case of *Baleni and others v Minister of Mineral Resource* 2019 (2) SA 453 (GP) (hereafter *Baleni),* which was based on the infamous Xolobeni community saga.[50] The applicants were seeking declaratory relief based on the grounds that the Minister does not have the authority to grant mining rights over land held through informal rights in land without the consent of the holders as per IPILRA.[51] The court declared in their favour and held that the Minister cannot lawfully grant a mining right unless there has been compliance with the provisions of IPILRA.[52] As a result the community's consent, not just consultation with the community, is necessary before a mining right can be granted.[53] It is trite to note the difference between these cases in the sense that in the *Baleni* case, the applicants were looking to prevent the granting of a mining right through declaratory relief.[54] On the other side, in the *Maledu* judgment, a mining right had already been granted,[55] and the informal land occupiers were appealing against an eviction order.[56]

Both these cases were important in providing solutions to the conflict between mining companies and communities with informal rights in land. They addressed the interplay between

[45] *Maledu* at para 75.
[46] *Maledu* at para 75.
[47] *Maledu* at para 106.
[48] *Maledu* at para 106.
[49] *Maledu* at para 106.
[50] 2019 (2) SA 453 (GP).
[51] *Baleni* at para 28.
[52] *Baleni* at para 28.
[53] Y Meyer "*Baleni* v *Minister of Mineral Resources* 2019 2 SA 453 (GP): Paving the way for formal protection of informal land rights, *Potchefstroom Electronic Law Journal*, volume 32 (1) 2020, 2.
[54] *Baleni* at para 28.
[55] *Maledu* at para 14.
[56] *Maledu* at para 18.

the MPRDA and IPILRA and concluded that both Acts must be read together.[57] According to these judgments, consent must be obtained from the holders of informal rights in land. This position enhances the protection of informal rights in land, especially against the powerful mining companies.[58] In many instances, the holders of informal rights in land are rural people who are not well equipped to defend their rights in land.[59] Therefore, the protection of their rights in land is very important.

However, IPILRA which offers protection to informal rights in land is not permanent and this raises serious questions about the future. If the Act is not renewed, the protection offered to holders of informal rights in land would fall away.[60] Furthermore, in the case of common law ownership the consultation as required by the MPRDA is still applicable and that creates inequality between the two forms of rights in land.[61] The Minister of Mineral Resources and Energy raised another concern that the judgment in *Baleni* takes away the authority of the State to grant mining rights as the consent of the people will have to be obtained first.[62] As a result, that will be detrimental to the mining and economic development of the country.[63]

Another issue is that it would be difficult to obtain genuine consent from the informal land occupiers. This concern is based on the fact that men are dominant figures in the community, and they would easily undermine the views of vulnerable groups like women and children.[64] Consent will mostly likely reflect the views of the powerful people in society. In addition, there may be problems regarding identifying the exact holders of informal rights in land that are supposed to give their consent to mining.[65] These arguments advance the point that the courts in both judgments erred by deciding that consent of the holders of informal rights in land must be obtained.

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[57] Meyer (note 53 above; 9).
[58] Ibid 2.
[59] A Van Schalkwyk "Living in the land: An Oiko-Theology response to the Amadiba crisis committee of Xolobeni's struggle for Ubuntu, land and ecology" *Missional: Southern African Journal of Mission Studies*, volume 47 (1) 2019, 42.
[60] Badenhorst (note 3 above).
[61] Ibid.
[62] Van Schalkwyk (note 59 above; 47).
[63] Ibid.
[64] S Mahanty, CL McDemmott 'How does 'Free, Prior and Informed Consent' impact social equity? Lessons from mining and forestry and their implications for REDD+' *Land Use Policy*, volume 35 (2013), 407.
[65] L Barrera-Hernandez, B Barton, L Godden, A Lucas, A Ronne, 2016, "*Sharing the costs and benefits of energy and resource activity"* 1st edn, Oxford University Press, United Kingdom, 77.

This thesis will critically analyse the current legal position regarding the protection of informal rights in land against deprivation of their rights in land for mining related activities. It intends to show how the courts' decisions in both *Maledu* and *Baleni* enhance the protection of vulnerable informal rights in land although there are some concerns surrounding these judgments. Therefore, this research intends to support the decisions taken in both cases. This would be done by looking extensively at the history of mining and informal rights in land. In that vein, it will analyse the causes of conflict between the two rights. It will then critically discuss the current legal position by looking at the legislation and cases that shaped it.

### 1.2. Rationale for the study.

South Africa was previously engulfed with unjust land dispossession and insecure land tenure.[66] This unpleasant history resulted in the Constitution protecting those people whose tenure is legally insecure due to previous laws that were racially discriminating. Further to that IPILRA affords protection albeit temporary to certain rights and interests in land which are not adequately protected by law. Although these laws are bold and clear, there have been challenges to the protection of informal rights in land against mining related land deprivation.

It has been discovered that traditional leaders assist mining companies in bypassing the required procedures of engaging ordinary people.[67] Therefore, communities are forced to organise themselves and fight to protect their informal rights in land against deprivation. Organising to oppose mining has become unsafe with rising intimidation, threats and attacks on those community members who oppose mining.[68] In addition, the communities do not have the necessary resources to fight against mining companies.[69] Therefore the judgment in *Maledu* and *Baleni* enhances protection of informal rights in land through the requirement of consent as provided by IPILRA. An analysis of the current position regarding the protection of informal rights in land against mining related deprivation is important because it will assist in eliminating concerns surrounding the judgments of *Maledu* and *Baleni*. It will also offer some possible solutions to key questions that arise regarding both judgments. By so doing, this

[66] I Mukhovha ''Informal Land Rights: What does this mean for holders of mining rights?" *Without Prejudice* February 2019 available at https://www.withoutprejudice.co.za/free/article/6351/view, accessed on 20 April 2020.
[67] Leonard (note 9 above; 291).
[68] Ibid.
[69] Van Schalkwyk (note 59 above; 42).

research will contribute to a quest to minimise the costly conflict, especially on the side of holders of informal rights in land against mining companies.

### 1.3. Key questions to be asked.

The main question to be answered by this thesis is, what is the impact of the *Maledu* and *Baleni* judgments on the protection of informal rights in land against mining related deprivations? This question will be answered by engaging the following sub-questions:

- What is the history of informal rights in land and IPILRA?
- What is the history regarding the development of mining laws in the country?
- What is the current legal position regarding the protection of informal rights in land as articulated in the cases of *Maledu* and *Baleni*?
- How do foreign jurisdictions fare when dealing with the protection of informal rights in land against deprivations associated with minerals extraction?
- What are the possible solutions to ensure that both formal and informal rights in land are permanently protected?

### 1.4. Research methodology

This research is intended to be conducted through desktop research. It will gather and analyse the information that is already available, which includes the Constitution, legislation, cases, articles, and online sources.

### 1.5. Chapter outline

This thesis will be divided into six chapters, which will all contribute to answering the questions asked.

Chapter One

This will be an introductory chapter that will provide the background for the study. It will introduce all the aspects that will be discussed in the study and the necessity of this thesis. In a nutshell, this chapter is meant to set the ball rolling for the whole study and give direction.

Chapter Two

This chapter will cover the literature reviewed on the subjects. It will provide the views of other scholars on the topic and surrounding issues.

Chapter Three

This chapter will discuss the history and circumstances that led to the creation of informal rights in land in South Africa. It is aimed at providing clarity on why these rights are unsecured rights, hence they deserve more protection.

Chapter Four

In this chapter, the thesis will discuss the history relating to the development of mining laws in the country including changes made by the MPRDA in that regard. The aim is to show the causes of the conflict between mining companies and Informal land rights holders.

Chapter Five

The chapter will analyse the current legal position relating to the protection of informal land rights against mining deprivation. It will critically analyse the implications of the case of *Maledu* and *Baleni*. It shall further discuss how other foreign jurisdictions deal with the issue of protecting informal rights in land against deprivation caused by mining. It will further look in terms of how consent is applied specifically focusing on Kenya.

Chapter Six

This chapter will provide an analysis of the whole thesis. It will propose some of the available options that can be taken regarding enhancing the protection of informal rights in land. Above all, this chapter will serve as a conclusion of the study.

## CHAPTER TWO: LITERATURE REVIEW

### 2.1. Introduction

This chapter will analyse the information that has been previously written on this subject. The chapter will further show some of the gaps in the knowledge shared by other authors and further suggest possible options to close those gaps. It will start by looking at the creation of informal rights in land and proceed to look at the development of mining laws in the country. This chapter will further discuss the current legal position regarding the protection of informal rights in land against mining related deprivation. That will include scholars who are in support and authors who are against the current position. This chapter is critical in understanding the reason behind the specific author's decision to support or criticise the *Maledu* and *Baleni* decisions. It will further highlight the position in a foreign jurisdiction specifically Kenya.

### 2.2. Creation and history of informal rights in land

Informal rights in land is an umbrella term that consists of various incidents that fall under this term. IPILRA definition groups together all these incidents that form informal rights in land. According to IPILRA informal rights in land are defined to cover the following aspects:

> "(a) the use 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:
>
> (bb) The government of any area for which a legislative assembly was established in terms of Self-Governing Territories Constitution Act, 1971:
>
> (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 of functionary established or appointed by or under an Act of Parliament or 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,
>
> (d) The use of occupation by any person of an erf as if he or she is, in respect of erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991, although he or she is not formally recorded in a register of land rights as the holder of the right in question."

Informal rights in land have a very long history of insecurity which was created deliberately by the previous government regime. The insecurity of these land rights today is strongly associated with the previous system of Bantustans. Weinberg posits that these unsecured rights in land came about as a result of the creation of the Bantustan system which was meant to exclude native South Africans from the country, group them based on their ethnicity and grant them a right to govern themselves.[70] The article by Weinberg further points out that although the Bantustans were given independence, the government interfered with their affairs and imposed communal land tenure on the people even in instances where they wanted to exercise other forms of land tenures.[71] It can be argued that the imposition of communal tenure complicated things regarding the tenure that can be adopted by people. Maybe things would have been different if people were allowed to choose a form of land tenure that was suitable for them.

It appeared that the colonial and Apartheid governments imposed a communal land tenure system to pursue their interests. Weinberg argues that the reason a communal land tenure system was imposed on people was to elevate traditional leadership to be the undisputed decision-makers.[72] Leanard further explains that the government was in turn controlling traditional leaders which allowed them to be in charge of black people through a proxy whilst keeping them excluded from the country.[73] According to Weinberg, there were instances where black people wanted to have individual land tenure but the State forced them to accept communal land tenure.[74] An article by Mason supports this assertion by stating that the Colonial and Apartheid governments wanted to bind black people on tribal land and control them as the government wished.[75] These arguments show that the intentions of the government for the Bantustans were never bona fide; instead, it was meant to maliciously control black people and to some extent it did achieve success.

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[70] Weinberg (note 11 above).
[71] Ibid.
[72] Ibid.
[73] L Leonard (note 9 above; 292).
[74] Weinberg (note 11 above).
[75] A Manson 'Mining and 'traditional communities' in South Africa's 'platinum belt': Contestations over land, leadership and assets in North – West province c. 1996 – 2012' *Journal of Southern African Studies*, volume 39 (2) 2013, 409.

During that period, the law was the major tool used by the previous government to assert control over the majority of black people in the Bantustans. According to Du Plessis and Pienaar, from 1913 to 1991, many pieces of legislation were passed to ensure that land tenure in Homelands was in line with the government's dictates.[76] This research will later discuss these laws and the impact they had in shaping the current position which effectively continues the insecurities of rights in land for the former Bantustan. Weinberg articulates further that the government ensured that their policies were followed by offering financial and military support to their agents being the traditional leadership and such support was necessary to shoot down any rebellion from the ordinary people.[77] This research asserts that informal rights in land were intentionally created to ensure that previous governments had control of these communities.

**2.3. Protection of informal rights in land under the new dispensation.**

The process of providing security to informal rights in land was started a long time ago and it is still being pursued by the government. It all started with the Constitution providing in section 25 (6) that people who had an insecure land tenure due to previous laws or practices had to have their tenure secured through Acts of Parliament. Delius and Beinart lament that, despite the clear mandate from the Constitution, the government has struggled to add an enabling Act to this section which passes constitutional muster.[78] Weinberg agrees with this observation and states that the State has failed to ensure the security of informal land tenure in this democratic dispensation.[79]

Some factors hinder the State from developing permanent legislation that would secure the informal rights in land. Du Plessis and Pienaar attribute the failure of securing land rights to the legacy of Apartheid.[80] They further assert that the characteristics of communal tenure itself make it impossible to find a solution of how security can be offered through an Act.[81] This is because it has conflicting elements of individualism and communalism, making it difficult to infuse these elements together.[82] This reason has been the main contributor to delaying the

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[76] W Du Plessis, J Pienaar "The more things change, the more they stay the same: The story of communal land tenure" *Fundamina: A Journal of Legal History,* volume 16 (1) 2010, 76.
[77] Weinberg (note 11 above)
[78] P Delius, W Beinart 'Securing the Land: From customary land tenure to registered titled land?' available at: *https://mistra.org.za/wp-content/uploads/2021/01/MISTRA-Land-Delius_Beinart.pdf*, accessed on 23 October 2023.
[79] Weinberg (note 11 above)
[80] W Du Plessis (note 76 above; 89).
[81] Ibid.
[82] Ibid.

process of transferring the land from the State to the people as that land also forms part of the informal land.[83] At this stage, the State still holds vast land in trust for the people and the transfer of the land to people has stalled.[84]

The protection of informal rights in land is currently offered temporarily through IPILRA. Weinberg acknowledges that currently, the Interim Protection of Informal Rights in Land (IPILRA) is the only Act that offers protection for informal rights in land albeit being a temporary Act.[85] This Act was introduced earlier after the dawn of democracy.[86] Du Plessis and Pienaar explain that the Act protects by endorsing that people cannot be deprived of rights in land without their consent.[87] The consent requirement ensures that individuals have to be engaged first and they will accede to the proposal if it is appealing to them, therefore that offers protection. As this was a temporary Act, there were attempts to enact a permanent Act and so far, those attempts have failed. These attempts are detailed in the following chapters.

Instead of pushing for securing the land rights of ordinary individuals, it appears that the State is placing more power on traditional leadership. Weinberg is critical that traditional leadership is again given more power to make critical decisions regarding land.[88] According to Weinberg, this is a problem because traditional systems mostly exclude women and children when it comes to decision-making.[89] The argument is therefore that if traditional leadership is given more power, it will exclude the less powerful groups in society. Leonard supports this view and posits that the government is now proposing regulations that extend the authority of traditional leaders.[90] Leonard refers to the Traditional and Khoisan Leadership Bill and argues that it gives traditional leaders more power whilst it is silent on the participation of ordinary people in decision-making.[91] The reason behind this move is the desire to gain votes from rural areas.[92] This is understandable considering that traditional leaders are influential in their areas.

Placing trust in traditional leaders regarding the protection of land rights can be very risky as they have been accused of sometimes placing their interests before serving the interests of their

[83] Weinberg (note 11 above).
[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Du Plessis (note 76 above; 83).
[88] Weinberg (note 11 above).
[89] Ibid.
[90] Leonard (note 9 above; 292).
[91] Ibid.
[92] Weinberg (note 11 above)

community. Leonard is critical of traditional leaders and argues that most of the time they act against the interest of the people and they are used by the government to promote mining.[93] Delius and Beinart further raise serious concern about traditional leaders and state that in some mining areas in KwaZulu Natal and North West province, they played a critical role in approving mining by siding with the government.[94] Manson concludes that even though the elevation of traditional leadership is undesirable it will not end soon.[95]

It is important to note that the criticism of traditional leaders is mainly based on how they behave once they are given power not on the system itself. According to Leonard, the traditional leadership structure is generally based on including the participation of ordinary members when making a decision, however, the colonial government distorted that and created leaders as only decision-makers.[96] The pure system of traditional leadership can be accepted as it includes public participation, however, the problem starts when traditional leaders are given too much authority to make decisions on their own as they cannot be always trusted.

The elevated status of the traditional leadership is appreciated by mining companies when it comes to conducting consultation with the community as required by MPDRA. According to Weinberg, the elevation of traditional leadership is convenient for mining companies because they only approach a traditional leader and negotiate with them, rather than engaging the community at large.[97] Delius and Beinart further argued that mining companies also negotiate with traditional leaders and give them some personal benefits as it transpired in the Bafokeng and Bapo areas to induce them to support mining projects.[98] After all, traditional leaders are still held in high regard by communities therefore this study aims to discuss the possible solution of ensuring that the voices of ordinary people living under traditional authorities are being heard.

Up to this day, the government continues to try to get a permanent Act to protect informal rights in land. The last attempt has been through the gazetted Communal Land Tenure Bill which aims to provide for the transfer of communal land to communities.[99] The Bill recognises the

[93] Leonard (note 9 above; 292).
[94] Delius (note 78 above).
[95] Manson (note 75 above; 410)
[96] Leonard (note 9 above; 291).
[97] Weinberg (note 11 above).
[98] Delius (note 78 above)
[99] South Africa. Department of Rural Development and Land Reform. (Notice 510 of 2017). *Communal Land Tenure Bill*. Government Gazette, 40965. 7 July 2017.

need for the State to transfer ownership of the land it holds in trust to its rightful owners and to acquire more land as communal land.[100] The Bill further aims at ensuring that communal land is registered.[101] In a nutshell, the Bill is aimed at ensuring that communal land is registered under the names of rightful owners and they are protected.

At this stage, the promulgation of the Bill has stalled and there are signs that it will face a similar fate as the previous Bills or Acts which were aimed at solving this problem. A thesis by Deochand argues that the Bill has not been promulgated due to disputes around an entity that should govern communal land and the elevated role that it provides to traditional leadership.[102] As mentioned above, traditional leadership has questionable credentials when it comes to administering the affairs of their people since many of them were puppets of the Apartheid government. Furthermore, there have been accusations against them based on that they receive bribes from the mining companies to support mining while disregarding ordinary members as discussed above. The thesis posits that it has been found that even in a democratic era traditional leadership still does not serve the interest of the people, but they are easily bought by mining companies to endorse the land dispossession of their subjects.[103]

Although there are some questions raised about the Bill, it does propose some positive ideas. Deochand commends it on the basis that it offers a community a chance to choose any structure they want to run their land affairs and it does not impose a traditional leadership.[104] This can be viewed as a good intervention considering that the chosen structure will always acknowledge that they are accountable to the people and if they act contrary to their ambitions, they can be replaced. Furthermore, that is in line with the Constitution which advocates for democracy and equality for all citizens. Traditional leadership systems cannot be said to be democratic as they offer one family or clan a right to rule the community.

[100] Ibid.
[101] Ibid.
[102] E Deochand "*Seeking tenure security: An analysis of the Communal Land Tenure Bill and its purported promise to give effect to section 25(6) of the Constitution"* (LLM Thesis, University of KwaZulu-Natal, 2022), 53.
[103] Ibid 54.
[104] Ibid 57.

## 2.4. Regulation of the mining industry.

The mining industry has been operating in South Africa for over a century. The essence of mining is based on the extraction of minerals from the land and use of them for various purposes. At this stage some parts of the land that used to be mineral rich currently no longer possess minerals. Weinberg pointed out that minerals in the country are now mostly available in areas that were part of the Bantustans.[105] As it has been pointed out before, people in these areas have informal rights in land which are currently protected by IPILRA, therefore, provisions of this Act are triggered when land is being dispossessed.

On the other hand, mining in South Africa is governed by the MPRDA. Van der Vyver[106] points out that this Act abolished the ownership of mineral resources by the landowners and placed all the minerals under the custodianship of the State. According to Cawood,[107] before the introduction of the MPRDA, the role of the State was very limited in private agreements between parties, and the State was not supposed to receive any compensation besides taxes. Cawood further explains that the State had another duty of issuing licences and ensuring that all protocols were observed by the holders of prospecting or mining rights which included the health, safety, and environmental requirements.[108]

The MPRDA places upon the State the powers of granting rights to minerals as a custodian thereof. According to Section 5 of the MPRDA, prospecting and mineral rights granted by the State are limited real rights. The article by Tlale explains that the reason behind the State custodianship of minerals was based on ensuring that minerals in the country are exploited in an orderly manner and all laws are observed. The State is a powerful entity and better suited to deal with mining companies compared to individuals who can be easily overpowered. The article further argues that the custodianship by the State is aimed at improving social and economic development in the country. Mining creates job opportunities and improves

[105] Weinberg (note 11 above).
[106] JD Van der Vyver 'Nationalisation of mineral right in South Africa' *De Jure*, volume 45 (1) 2012, 125.
[107] FT Cawood 'The Mineral and Petroleum Resources Development Act of 2002: A paradigm shift in mineral policy in South Africa' *Journal of the Southern African Institute of Mining and Metallurgy* volume 104 (1) 2004, 58.
[108] FT Cawood (note 107 above; 59).

infrastructure, and those aspects are more fulfilled when the mining companies are commanded by the State to do so. Furthermore, mining is a main contributor to the exports of the country.[109]

Although the State custodianship of minerals has positive intentions, it also has yielded some negative effects, especially on landowners. According to Humby, it diminished the ownership of minerals by the landowners.[110] This meant that landowners lost the leverage to directly profit from minerals in their land if discovered. Humby further observes that landowners lost the right to consent to their dispossession for mining purposes.[111] This was because the State determines who gets the mining or prospecting rights. Furthermore, Badenhorst argues that landowners also lost a chance to negotiate the extent of mining and damages that can be done to their land.[112] It can be observed now that the State has taken over from the landowners as the custodian of minerals.

As the State has taken over from the landowners, this means that their role has changed from the previous position. Badenhorst articulates the current role of the landowner that now they have to be consulted and notified about the mining activities that will take place on their land.[113] The article further argues that during the consultation, they would also be made aware of the extent of the upcoming mining.[114] It can be seen that the consultation process is limited to ensuring that landowners are fully updated by the whole process unfolding in their area so that they are prepared for the consequences thereof. In a nutshell, it is meant to assist with relocation arrangements if necessary.[115]

Although consultation is less demanding when compared to soliciting consent from the community, it must be carried out sincerely. Tlale stipulates that during the consultation process, mining companies must appreciate the consequences that mining will have on the surface land occupiers and the land they possess.[116] Bearing that in mind, they must be able to

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[109] MT Tlale 'Conflict levels of engagement under the Interim Protection of Informal Land Rights Act and the Minerals and Petroleum Development Act: A closer look at the Xolobeni community dispute' *Potchefstroom Electronic Law Journal*, volume 23 (1) 2020, 6.
[110] T Humby "The *Bengwenyama* trilogy: Constitutional rights and the fight for prospecting on community land" *Potchefstroom Electronic Law Journal*, volume 15 (4) 2012, 168.
[111] Ibid.
[112] Badenhorst "Conflict resolution between owners of land and holders of rights to minerals: A lopsided triangle?" *Journal of South African Law*, (2) 2011, 328.
[113] Ibid
[114] Ibid
[115] *Bengwenyama Minerals (Pty) (Ltd) and Others v Generoh Resources (Pty) (Ltd) and Oth*ers 2011 (4) SA 113 (CC) at para 65.
[116] Tlale (note 109 above; 15).

reach an agreement regarding how to deal with those consequences. The most common consequence is the removal of people, therefore under those circumstances an agreement must be reached about where people would be allocated to. There are other things as well that should be considered like noise, and pollution.

Consultation must be accompanied by detailed information of the upcoming mining project. Tlale posits that people must be provided with comprehensive information about the proposed mining project.[117] This aspect was dealt with by the court in the case of *Bengwenyama v Genorah* where the court held that supplying pamphlets to community members to tick whether they agree or not to mining was not sufficient to be considered as consultation.[118] This case highlights the failures of mining companies to conduct proper consultation. It was clear that people were not furnished with adequate information regarding the extent of mining and even if they were willing to engage, it was going to be difficult due to lack of that important information.[119] Even the manner used to engage people was not appropriate as it did not grant them an opportunity to have follow-up questions.[120]

Mining can have serious implications for the rights in the land of the surface occupiers. Van der Schyff emphasises that acquiring mineral and prospecting rights over the land of another individual infringes on their rights to own their land freely.[121] Therefore it is understandable that landowners sometimes resist allowing the holders of prospecting rights or mineral rights to access their land. Van der Schyff further points out that the refusal to grant access is attributable to a lack of proper engagement between landowners and the holders of mineral or prospecting rights.[122] Failure to conduct proper consultation causes uncertainty amongst landowners and occupiers about what will happen to them and their land once mining commences. This uncertainty makes it necessary and easier for them to organise against mining.

The duty to consult lies with mining companies and there have been accusations that they are not conducted properly. Humby observes that consultations are not conducted following the

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[117] Tlale (note 109 above; 16).
[118] *Bengwenyama*, para 68.
[119] Humby (note 110 above; 182).
[120] Ibid.
[121] E Van der Schyff 'The right to granted access over the property of others in order to enter prospecting or mining areas: Revisting Joubert v Maranda Mining Company (Pty) Ltd 2009 4 ALL SA 127 (SCA)' *Potchefstroom Electronic Law Journal*, volume 22 (1) 2019, 2.
[122] Ibid 4.

requirements as land owners are sometimes not given sufficient notice of pending applications.[123] Furthermore, they are not furnished with the necessary information regarding the application.[124] Van Schalkwyk notes that mining companies are profiting yet they fail to respect the rights of the communities affected by their operation.[125] These are serious allegations considering that rights in land are fundamental to the communities and they must equally be respected.

The surface land occupiers are less capable of defending their rights against the powerful mining companies. Van Schalkwyk argues that these are rural communities that do not have much access to structures that can assist them in defending their rights.[126] In addition to that, Van Schalkwyk accuses the government of having an interest in mining and that results in them pushing for mining at the expense of the landowner's rights.[127] The role of the government under such conditions should be to ensure that everyone is treated fairly whether it is the poor mining communities or the rich mining companies.

The reasons behind the government's decision to support mining projects can be innocent or mala fide in some instances. On the one hand, the government puts its weight behind mining on the basis that it will create job opportunities and improve infrastructure. The government is expected to perform those tasks and so far, it appears to be struggling hence it is more willing to get assistance from the mining companies. On the other hand, the support of mining activities by the government can be due to mala fides in instances where officials are bribed to push for mining. This must be fought at all costs as it undermines the rights of the poor mining communities due to selfish government officials.

The surface land occupiers are not always innocent when it comes to failure of consultation. The article by Van der Schyff states that a breakdown in engagement in some instances is caused by landowners when they make unrealistic demands.[128] This may be caused by bitterness since, although they own the land, minerals found in the land do not belong to them. It can further be attributed to the fact that people become attached to their land, and it is difficult to relocate. Van der Schyff laments that in the previous regime, problems like this did not occur

[123] Humby (note 110 above; 182).
[124] Ibid.
[125] Van Schalkwyk (note 59 above; 50).
[126] Ibid 42.
[127] Ibid 44.
[128] Van der Schyff (note 121 above; 4).

considering that the agreement was between the landowner and the mining company or prospecting right holder.[129] The surface land occupiers are frustrated because they are no longer in charge of minerals.

### 2.5. Conflict between informal rights in land and mining or prospecting rights.

The MPRDA demands consultation with landowners, and it is silent about what should happen to those people with informal rights in land. IPILRA as highlighted above protects holders of informal rights in land through that they must give consent before dispossession of their rights in land. This composition has been a source of conflict between mining companies and communities who held their land through informal land tenure. The conflict between the two parties is not ideal considering that they are not equal in terms of many aspects.

The mining companies are financially stable, and they are more advantaged than the surrounding communities. Thambi argues that communities affected by mining are ravaged by poverty and poor infrastructures; as a result, they are disadvantaged when it comes to dealing with mining companies.[130] The article by Thambi further argues that all the communities are the same across the country.[131] The vulnerability of these communities raises a serious need for their protection, especially in those areas with mineral resources. Once an area has been identified as having minerals, mining companies would understandably persist in mining.

The government as a custodian of minerals bears a duty to ensure that all protocols are observed by mining companies including consultation. However, there have been concerns surrounding whether the government is properly discharging its duty. Tlale is critical of the role played by the Department of Mineral Resources and Energy and argues that it is failing to discharge its duty of ensuring that mining companies properly consult with the community and this is based on the rising number of court applications.[132] The State bears the onus of ensuring that all the requirements are followed before granting mineral rights and those requirements include consultation with affected parties.[133] Therefore, the State must ensure that the mining company

[129] Ibid 6.
[130] Thambi, K '*Baleni v Minister of Mineral Resources*: A fait accompli' The Journal of the Southern African Institute of Mining and Metallurgy, volume 122 (9) September 2022, 528.
[131] Ibid.
[132] Tlale (note 109 above; 3).
[133] Ibid 4.

has properly consulted with the people before granting mineral rights.[134] This argument suggests that if the government was effectively playing its role, there would be no reason for people to approach courts. The article further states that there are so many other cases that do not reach court because communities do not have the financial means to do so.[135]

The most prominent cases that highlight the disputes between communities with informal rights in land and mining companies are the cases of *Baleni* and *Maledu.* Both cases deal with the dilemma between the provisions of IPILRA and MPRDA. The basis of the debate was that the MPRDA provided for consultation of landowners whilst IPILRA states that holders of informal rights in land must give their consent before they are deprived of their rights in land. The courts in both cases held that both Acts can be applied together which means that holders of informal rights in land must be consulted and they have to give their consent. Tlale summarises the process and states that an applicant for mining and prospecting rights must now submit the written notes of consultation and consent from the holder of an informal right in land.[136]

The decision by the courts in both cases was a very important step when it comes to the protection of informal rights in land. Meyer commended the judiciary that they are playing a critical role in protecting the land rights held informally through maintaining the high standard of obtaining consent rather than consultation.[137] Tlale further supported this argument by asserting that this judgment will ensure that informal rights in land are secured.[138] The essence of this argument is based on the fact that mining companies would need to present an enticing offer that would appeal to the holders of informal rights in land for them to give their consent. This would ensure that their rights in land are deprived based on their terms and further encourages the mining companies to pay more attention when consulting.

Although the judgments have been praised, some concerns have been raised about the longevity of this protection. Badenhorst and Van Heerden are concerned that IPILRA is a temporary Act renewed each year and if it is not renewed, the protection will fall away.[139] This argument should be viewed in a light that consent might be difficult to obtain and that might prompt the government not to renew the Act and enact another Act that will provide for a lesser form of

[134] Ibid 4.
[135] Ibid 7.
[136] Ibid 20.
[137] Meyer (note 53 above; 4).
[138] Tlale (note 109 above; 25).
[139] Badenhorst (note 3 above).

protection. As a result, Meyer proposed that to ensure permanent protection, IPILRA must be permanently adopted.[140] The argument is based on keeping protection through the requirement of consent.

Informal rights in land by their definition can be formalised and ceased to be covered under IPILRA. Badenhorst and Van Heerden raise another concern that the type of protection given to informal rights in land would easily fall away if these rights in land were upgraded to formal land rights. This is a genuine concern considering that once there is a change of status, such rights in land would not be protected by IPILRA and they would be dealt with through the consultation requirement of the MPRDA. Now, holders of informal rights in land enjoy an elevated position through their consent rights as provided by IPILRA compared to formalised rights of landholders who are only supposed to be consulted. It raises a serious question of whether land reforms should be pursued, or whether the State should only focus on protecting informal rights in land through Acts like IPILRA.

The protection offered to holders of informal rights in land has created inequality between them and holders of formal rights in land. This is because informal rights holders will have to give their consent as provided by IPILRA whilst on the other side formal rights holders are only consulted with as per the MPRDA. Badenhorst and Van Heerden state that these inequalities between the two types of land rights can be justified through the fact that informal rights in land were previously not secured.[141] The literature reviewed does not articulate whether such reason is sufficient to justify the advantage that is given to informal rights in land compared to formal rights, as a result, this study aims to expand on that aspect.

Although informal rights in land exist, it is important to have an act like IPILRA that offers protection by allowing the holders to give their consent to deprivation. Odhiambo argues that even international law guarantees free prior and informed consent of indigenous people.[142] In the South African context, people with informal land rights are mostly indigenous people. Odhiambo further argues that the consent requirement plays a critical role in eliminating unnecessary conflict and ensures that all parties involved understand each other.[143] Berrera-

[140] Meyer (note 53 above; 14).
[141] Badenhorst (note 3 above).
[142] R O Odhiambo 'Sustainable exploitation of natural resources in Kenya: A case for communities' free, prior and informed consent in oil and gas project' (2019) 7 (1) *ANULJ* 1.
[143] Ibid.

Hernandez et al support the requirement of consent and state that it provides some elements that are not catered for by consultation even if it is properly done.[144] Understandably so, consent requires that parties must ensure that at the end of the day, they agree with each other while that is not the case with consultation. Moreover, Mahanty and McDermott argued that consent advocates for fair treatment of the indigenous people.[145]

The practical implementation of the consent requirement is also a source of concern on the basis that it is a difficult task to fulfil. It is almost impossible to get one voice from a group of individual people as individuals might have different views. Berrera–Hernandez et al ease that concern by stating that it is not necessary for the community to unanimously consent to the project as it is natural amongst the people to have others who are dissenting.[146] Mahanty and McDermott further raise another concern that people who are powerful in the community might dominate others in the process of giving consent.[147] In response to that, Ruwhiu and Carter argue that the responsibility lies with mining companies to ensure that they get the voices of every land right holder in the community even those people who are destitute.[148] It might not be possible to reach everyone but they must not cut the corners.

The continued existence of IPILRA indicates that the dispossession cannot happen in the case where holders of informal rights in land are refusing to give their consent. Thambi points out that the judgments in both *Maledu* and *Baleni* failed to address the issue of what would happen in the case where people refused to give their consent.[149] Thambi further posits that the judgment altered the right of the Minister to grant mineral and prospecting rights in land occupied through IPILRA.[150] This is based on the fact that the Minister's hands would be tied if people refused to give consent. This research intends to look into whether it would be sustainable to allow holders of informal rights in land to consent to land deprivation while the State on the other side must authorise the mining of minerals in the same land.

The struggle for the protection of informal rights in land against mining companies is not a South African problem only, other jurisdictions in the continent are also seized with the same

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[144] Barrera-Hernandez (note 65 above; 78).
[145] Mahanty (note 64 above; 407).
[146] Barrera-Hernandez (note 65 above; 78
[147] Mahanty (note 64 above; 407).
[148] D Ruwhiu, L Carter 'Negotiating 'meaningful participation' for indigenous peoples in the context of mining' *Corporate Governance*, volume 16 (4) 2016. 641
[149] Thambi (note 130 above; 530).
[150] Ibid.

issue. This study aims to look at how other foreign jurisdictions deal with the issue of protecting informal rights in land when confronted with land deprivation caused by mineral extraction. The focus will be on Kenya. This is an African country that has similar issues with informal rights in land. In Kenya, they are facing issues relating to local communities resisting mining operations. Odhiambo analyses the situation in Kenya and observes that there are confrontations between mining communities and mining companies.[151] These conflicts are caused by the fact that communities are overlooked during negotiations regarding proposed mining.[152] This occurs although Odhiambo asserts that communities have a right to participate in decision-making regarding their land and that right is entrenched in the Kenyan Constitution and international law.[153]

### 2.6. Conclusion

The literature review has shown that informal land rights in South Africa have been unprotected for a long time since the period of colonialism. The insecurity of these rights was created intentionally by the previous government to further their intentions. As a result, the new democratic government had the task of ensuring the protection of informal rights in land as they were previously unsecured. However, they have failed to enact an Act that would permanently provide protection. Currently, IPILRA is the only Act that gives protection to informal rights in land, and it is not permanent. This Act requires that holders of informal rights in land must give their consent before dispossession.

The kind of protection provided by IPILRA has been a source of conflict in scenarios where dispossession is caused by mining. The mining industry is regulated through the MPRDA and it requires the consultation of landowners before dispossession. These two conflicting aspects have been a cause of contestation that has been settled in courts. The courts have resolved that the holders of informal rights in land must be consulted and give their consent to dispossession. Although this has been hailed as a massive step to ensure the protection of informal rights in land, there are some concerns raised. This dissertation is aimed at addressing those concerns to support the position taken by courts. There is a gap in the literature regarding the justification

[151] Odhiambo (note 142 above).
[152] Ibid.
[153] Ibid.

of different treatment between informal and formal rights in land. This study will investigate whether the advantaged position given to informal rights in land is justified or not.

## CHAPTER THREE: THE HISTORY OF INFORMAL RIGHTS IN LAND.

### 3.1. Introduction

This chapter will discuss the history of informal rights in land. The discussion will first unpack the definition of informal rights in land, then its history which will cover all the surrounding circumstances that led to the creation of these informal rights in South Africa. It will further show the reasons why these land rights are insecure compared to common law rights in land. Many attempts to secure informal rights in land have been tried through bills and legislation but thus far such attempts have been futile. This chapter will therefore discuss the history of the previous failed attempts to secure these rights in land. The aim of this is to show the vulnerability of informal rights in land which justifies the need for strong protection especially when confronted with the powerful mining industry.

### 3.2. Definition of informal rights in land

Informal rights in land is the term used to define those land rights which are not protected by law.[154] In the South African context, informal rights in land cover various instances as defined in the Interim Protection of Informal Land Rights Act (IPILRA). According to section 1 of IPILRA, the term can be defined to mean:

> "(a) the use of, occupation of or access to land in terms of:
>
> (iii) Any tribal, customary or indigenous law or practice of a tribe,
>
> (iv) The custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in:
>
> (cc) The South African Development Trust established by section 4 of the Development Trust and Land Act 1936:
>
> (dd) The government of any area for which a legislative assembly was established in terms of Self-Governing Territories Constitution Act, 1971:
>
> (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 of functionary established or appointed by or under an Act of Parliament or holder of a public office.

[154] B Cousins 'Diagnostic report on land reform in South Africa' *Institute for Poverty, Land and Agrarian Studies University of Western Cape*, September 2016.

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

(d) The use of occupation by any person of an erf as if he or she is, in respect of erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991, although he or she is not formally recorded in a register of land rights as the holder of the right in question."

Section 1 of the Act specifically excludes rights that do not qualify as informal rights in land. Those are contractual rights that include a tenant, labour tenant, and sharecropper. It also excludes any right or interest based purely on temporary permission granted by the owner or lawful occupier of land in question on the basis that such permission may at any time be withdrawn by such owner or lawful occupier.

The definition of informal land rights largely covers the land that is governed on a communal basis and that is the reason why it has been sometimes referred to as communal land rights. Communal land can be loosely defined to mean that land is owned by the whole community not by individuals. However, this definition is contested on the basis that it seems to misjudge the fact that there are some elements of individual and family rights to some types of land.[155] Furthermore, communal land and indigenous law are so closely intertwined, hence it is almost impossible to deal with one without dealing with the other.[156] As a result, the words 'customary', 'communal', and 'traditional land' tend to be used interchangeably although they do not necessarily have the same meaning.[157] This study intends to stick to the word informal rights in land as provided by IPILRA.

### 3.3. History

#### 3.3.1. History of land dispossession and unsecured land tenure in pre-democratic South Africa.

[155] B Cousins, 'Potential and pitfalls of communal land tenure reform: Experience in Africa and implications for South Africa', *World bank conference on land governance in support of the MDGs: Responding to new challenges,* Washington D.C, USA, 9 – 10 March 2009.
[156] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC), para 88.
[157] Cousins (note 155 above).

The land topic has been a contentious issue from old, the previous regimes interfered strongly with land ownership.[158] Colonial conquest and later Apartheid dispossessed the land of the majority of black African people and left them owning a small portion of land compared to their minority white counterparts.[159] These previous repressive regimes further imposed discriminatory methods to ensure that Africans did not fully own the land they occupied.[160] Black Africans were only limited to customary land rights or statutory land rights which was based on giving them a permit to occupy the land.[161] The main intention was to ensure that the land tenure of black Africans was unsecured.[162] Unsecured land tenure was convenient for the government in case it decided to dispossess land and it further ensured that black Africans were kept at the government's mercy. This previous arrangement resulted in a situation where currently, a minority of the people own vast land under secured tenure whilst the majority still have insecure tenure in the meagre land they occupy.[163]

During those dark days of our history, the dispossessions of land were justified by laws that were enacted to serve that very purpose. One of the most notable and first Acts of dispossession was the Black Land Act of 27 of 1913[164] (Native Land Act), which formalised limitations on black land ownership.[165] Although land dispossession had occurred before on small scales in some parts of the country, the Act had proven to be a major occurrence of dispossession which confirmed the existence of all other minor dispossessions.[166] Black people were expelled from their land and forced into crowded reserves[167] which consisted of an estimated meagre 8% of

[158] Du Plessis (note 76 above; 76).
[159] A C Horn 'The identity of land in the Pretoria District, 19 June 1913: Implications for land restitution' *South African Geographical Journal,* Volume 80 (1) 1998. 669.
[160] Report of the high level panel on the assessment of key legislation and the acceleration of fundamental change, November 2017. Available at: https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf. Accessed on 21 July 2023.
[161] M Clark, N Luwaya 'Communal land tenure 1994 – 2017: Commissioned Report for High Level Panel on the assessment of Key Legislation and the Acceleration of Fundamental Change, an initiation of the Parliament of South Africa' *Land and Accountability Research Center,* June 2017.
[162] Ibid.
[163] NJJ Olivier 'Communal Land Rights Acts 11 of 2004: Overview, institutional arrangements and implementation guidelines' Volume 27 (2) 2006. 304.
[164] Du Plessis (note 76 above; 74).
[165] HJ Kloppers, GJ Pienaar 'The historical context of land reform in South Africa and early policies' *PER/PELJ* volume 17 (2) 2014, 680.
[166] R Hall 'The legacies of the Natives Land Act of 1913' *Scriptura,* Volume 113 (1) 2014. 1.
[167] Ibid.

land.[168] The Act not only dispossessed Africans of their land but it was further meant to prevent them from owning land and to further dictate the form of land tenure they must possess.[169]

The Native Land Act of 1913 was the first step towards the separation of people according to their race,[170] hence it was a precursor for Apartheid.[171] Although there were many reasons behind this Act it is clear that it was driven by a misbelief that the white race is superior hence it must be separated from black people.[172] It was inevitable that black Africans would try to fight against dispossessions caused by this Act, notably the attempts of the South African Native National Congress (SANNC) delegation that went to England to persuade the British parliament to overrule this Act.[173] Unfortunately, those attempts were futile and the South African government continued to implement the Act.

Although the Act remains one of the darkest spots in our history, some people question the veracity of the information provided based on the influence it had on the lives of black African people. The impact of the Act is sometimes overstated by contemporary scholars.[174] Thousands of Africans managed to utilise the exception clause and acquired above 300 farms and lots, hence the percentage of land owned by Africans increased.[175] The impact of the Act may not be properly articulated but it cannot be disputed that it dispossessed black Africans of their land.

After a passage of time, it became clear that the land given to black people was not enough and the Development and Trust Land Act 18 of 1936 was enacted to further release 6.5 percent of the land.[176] The Act established the South African Native Trust to increase the land for black people by purchasing land in surrounding areas or within land that was already allocated for black people.[177] Unsurprisingly, the Trust mainly acquired land that was in the hands of private

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[168] Kloppers (note 165 above; 682).
[169] Du Plessis (note 76 above; 76).
[170] Kloppers (note 165 above; 683).
[171] Hall (note 166 above; 1).
[172] Kloppers (note 165 above; 683).
[173] Hall (note 166 above; 3).
[174] NPC Phuhlisani 'The role of land tenure and governance in reproducing and transforming spatial inequality' July 2017. Available at: https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Spatial_Inequality.pdf. Accessed on 20 June 2023.
[175] Ibid.
[176] H Michelle 'Buying Naboth's Vineyard: The challenges of land transfer under the 1936 Native Trust and Land Act' *African Studies*, Volume 71 (3) 2012, 361.
[177] Michelle (note 176 above; 361).

black individuals who were unable to pay their bonds.[178] Therefore, it can be argued that the Act did not offer more land to black people, instead, it took the land of other black people that were individually owned and placed it under the Trust. It further ensured that black people did not individually own land by subjecting them to trust tenure, where the Trustee had the discretion of taking whatever decision they wished to take about the land.[179] For instance, if a person was absent from his land for a period above one year, his land would be forfeited and given to another person.[180]

The land held by the Trust was strictly reserved for black people only.[181] Any black person who wanted to get the land was required to get permission from the Bantu Affairs Commission and such permission would only be given after engaging the tribal leadership of the area.[182] However, the land was not adequate to satisfy all black people because the Trust had a limit on the land that could be acquired for them.[183] As a result, black people were not satisfied with the arrangements of the Trust, and there were frequent quarrels within the Trust.[184]

The segregation based on land was further pursued through the Group Areas Act 41 of 1950. This Act was utilised by the government to evict other races in areas that they presumed to be favourable for the settlement of white people.[185] The gist of this Act was based on grouping people into three categories being white people, native people, and coloured people.[186] Individuals were required to reside in areas that were designated for their particular group.[187] It was prohibited for a person of a particular racial grouping to occupy land in an area of another group without a permit.[188] Later on, the Group Areas Act 36 of 1966 was promulgated to strengthen the structure of group areas and to further give guidance with the acquisition of land in these area groupings.[189]

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[178] Ibid.
[179] *Tongoane* para 15
[180] *Tongoane* para 19.
[181] *Tongoane* para 15.
[182] *Tongoane* para 20.
[183] *Tongoane* para 14
[184] Michelle (note 176 above; 362).
[185] HJ Kloppers (note 165 above; 684).
[186] Ibid.
[187] Ibid 685.
[188] Ibid 687.
[189] Ibid 688.

The land designated for black people was further balkanised through the formation of Bantustans.[190] This division was conducted through the Bantu Authorities Act 68 of 1951 which created ten homelands or Bantustans for black Africans based on ethnicity.[191] Following that, the Promotion of Black Self Government Act 46 of 1959 was enacted to further encourage the establishment of Bantustans by providing them financial support and powers to make decisions on their own.[192] Black South Africans were then forced to become citizens of a Bantustan designated for their ethnicity through the passing of the Bantu Homelands Constitution Act 26 of 1970.[193] Pass laws were accordingly stiffened to ensure that people remained in their designated homelands.[194]

The intention of forming these Bantustans was to eliminate black Africans from South Africa and confine them in these homelands.[195] That idea was underpinned by the desire to ensure that South Africa only belongs to white people and caters to their needs only.[196] The implementation of the homeland policy met various challenges including resistance from organizations representing the aspirations of the African majority, hence it was moving slowly and only four achieved complete independence,[197] namely Transkei, Bophuthatswana, Venda and Ciskei.[198] Transkei became the first homeland that achieved full independence in 1976 and it took 25 years after the passing of the Bantu Authorities Act in 1951.[199] Many other homelands were not fully independent from South Africa as some parts of their areas were mixed with the South African land.[200]

Almost eight million black people were stripped of their South African citizenship between 1960 and 1984.[201] Around 3,5 million people were forcefully removed from their land and sent to live in these overcrowded Bantustans.[202] In these homelands, most of the land was held by

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[190] Weinberg (note 11 above)
[191] Phuhlisani (note 174 above) .
[192] Ibid.
[193] Ibid.
[194] Ibid.
[195] Weinberg (note 11 above)
[196] M Turshen "Health and human rights in South African Bantustan" *Social Science Medicine*, Volume 22 (9) 1986. 886.
[197] W Beinart "Beyond 'homelands': Some ideas about the history of African rural areas in South Africa" *South African Historical Journal*, Volume 64 (1) 2012. 5.
[198] Turshen (note 186 above; 886.)
[199] W Beinart (note 197 above; 5).
[200] Ibid.
[201] Turshen (note 196 above; 887).
[202] Ibid.

the government in trust, with tribal chiefs acting as the guardians and decision-makers over the land.[203] Privately owned land was very minimal, hence in the early 1990s it was discovered that only one percent of people in homelands had full ownership of land.[204] The majority were overcrowded and also living in poverty in these homelands.[205] Adding to their misery was further that the rule of law was disregarded in these Bantustans.[206]

To put it bluntly, the Bantustans were puppet regimes ruled by traditional chiefs or headmen who were appointed at the behest of the South African government.[207] Some of them were handpicked and they had no traditional genealogy.[208] Some authors have indicated that legitimate traditional leaders were deposed in favour of compliant stooges and that the very kingships themselves.[209] Furthermore, these traditional leaders were given legislative and executive powers to run the Bantustans whilst suppressing other relevant institutions.[210] It can therefore be argued that traditional leaders were serving the interests of the oppressing government hence that would be the reason why they are distasteful to some people.

The institution of traditional leadership had been tainted by its association with colonialism and Apartheid.[211] These previous South African governments ensured that traditional leaders were protected against any structures that threatened their power.[212] They were given support whenever it was necessary which included financial support which was more enticing to the traditional leadership.[213] It must be accepted that the system of traditional authority was severely tampered with to align it with Apartheid policies. Consequently, even today they must be treated with caution when it comes to trusting them with the protection of land rights of their subjects.

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[203] Phuhlisani (note 174 above)
[204] Ibid.
[205] Beinart (note 197 above; 6).
[206] Turshen (note 196 above; 887).
[207] Ibid 888.
[208] Ibid.
[209] J Peires "History versus customary law – Commission on traditional leadership: Disputes and claims" SA crime quarterly, Volume 49 (2014), 7.
[210] Turshen (note 196 above; 888).
[211] Peires (note 209 above; 7).
[212] Weinberg (note 11 above).
[213] Turshen (note 196 above; 889).

Up to this day, there are almost 17 million people who reside in the former Bantustans, which is a substantial portion of the country's population.[214] Although it has been nearly 30 years since the abolishment of Bantustans their impact can still be recognised in rural areas.[215] People living in rural areas are still struggling to get secure rights in land.[216] The democratic government has failed to develop a proper plan to secure rights in the land of communities who possess their land through communal tenure.[217] Furthermore, economic instability is still high and traditional leadership is still exercising unfettered power.[218]

Looking at the history of land dispossession in South Africa, the land tenure of black people was intentionally made to be insecure by the previous repressive regimes. They were further left with limited pieces of land hence they were congested in the areas they occupied.[219] All these injustices were carried through a legal system which was tailored to serve the desires of the ruling minority.[220] This legal system was moulded for a very long time to ensure that it achieved its purpose.[221] The new democratic government had a huge task of changing laws that perpetuated landlessness and insecure tenure.[222]

### 3.3.2. Attempts to secure informal rights in land by post-Apartheid government.

Towards the end of Apartheid, one of the moves by the government to signal its intention to change was the promulgation of the Abolition of Racially Based Land Measures Act 108 of 1991. This Act was enacted on the 30th of June 1991, to abolish the land Acts.[223] The long title of the Act stated that it was promulgated to repeal or amend certain laws and to abolish certain restrictions based on race or membership of a specific population group on the acquisition and utilisation of rights to land.[224] It further aimed to provide for the rationalization or phasing out of certain racially based institutions and statutory and regulatory systems.[225] The Act

[214] Clark (note 161 above).
[215] B H King, B Mccusker 'Environment and development in the former South African bantustans' *The Geographical Journal*, Volume 173 (1) 2007, 6.
[216] Clark (note 161 above).
[217] Ibid.
[218] King (note 215 above; 7).
[219] *Tongoane* para 25.
[220] M Clark (note 161 above)
[221] Ibid.
[222] Ibid.
[223] Kloppers (note 165 above; 687).
[224] Abolition of Racially Based Land Measures Act 108 of 1991.
[225] Ibid.

specifically repealed the Natives Land Act, Natives Trust and Land Act.[226] It further provided a mechanism to transfer land from the Trust to other relevant institutions.[227]

Although on paper all the laws that promoted ownership of land on racial bases were abolished, practically the patterns of that arrangement remain.[228] Considering that, the new Constitution had to ensure that it protected those landholders who were affected by the previous repressive laws. Accordingly, the Constitution, in section 25(6) provides that "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practises is entitled, to the extent provided by an Act of parliament, either to tenure which is legally secure or to comparable redress".[229] Section 25(9) of the Constitution then gives a directive to the parliament to enact legislation as referred by section 25(6).

However, enacting permanent legislation that would give protection to informal land rights has been proven difficult. The Interim Protection of Informal Land Rights (IPILRA) which was introduced in 1996 remains the only hope for protecting informal rights in land.[230] This Act was meant to provide a temporary solution, however, it has been extended each year.[231] The protection provided by this Act to informal land rights is through section 2(1) which mandates that informal land rights holders must give their consent before being deprived of their rights in land.[232] Section 2(2) further explains that if the land is held communally, individuals can only lose their rights in the land if such deprivation is implemented according to a particular custom of that specific community.[233] Section 2(4) further demands that the decision by a community to dispose of other individual's rights in land through custom must be supported by a majority.[234] It further explains that such a decision can only be taken in a meeting organised for that purpose and also the affected people or person must be notified timeously and allowed to participate.[235]

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[226] Kloppers (note 165 above; 687).
[227] Ibid.
[228] B Xulu, B Maharaj "Land restitution during Apartheid's dying days: The struggle for restoration and resolution in Roosboom" *Africa Insight*, Volume 34 (2/3) 2004, 48.
[229] The Constitution of the Republic of South Africa 1996.
[230] Tlale (note 109 above; 2).
[231] Weinberg (note 11 above)
[232] Tlale (note 109 above; 4).
[233] Interim Protection of Informal Land Rights Act 31 of 1996.
[234] Ibid.
[235] Ibid.

The fact that the Act is interim, places holders of informal rights in land in a precarious position considering that the government can choose not to return the Act anytime it wants.[236] Therefore, permanent legislation is very necessary to offer protection that can be relied upon hence attempts have been made before. The government initially attempted to enact permanent legislation through the Land Right Bill in 1998.[237] This Bill aimed to recognise customary rights in land whilst allowing them to continue existing in their form.[238] Therefore, it was going to ensure protection for those many people living in the former homelands without forcing them to change anything as far as exercising their rights in land.[239]

Although the Minister of Agriculture, Land Reform and Rural Developments was still going to continue to be regarded as the owner of the land, such power was going to be legally reduced and holders of the land rights would be given authority over the land.[240] The Bill was open to the possibility of registering these rights in land but it further allowed that they can still exist without registration.[241] The protected rights were going to vest in those people who occupy, use or access the land and to those who are accepted by the group rules. [242] The Bill endeavoured to lay the necessary procedures to elect institutions that would lead them when it comes to decision-making related to land.[243] However, the minister of Land Affairs decided against the Bill on the basis that it was confusing and required too much effort from the State to ensure the support of land rights holders.[244]

In 2004, the Communal Land Rights Act 11 of 2004 (CLARA) was enacted to provide solutions, however, the Act was coupled with controversies.[245] The purpose of the Act was to secure the tenure of those communities which were insecure as a result of previous discriminatory laws and also to address the issue of redress.[246] In attending to these issues, the

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[236] PJ Badenhorst, CN Van Heerden 'Conflict resolution between holders of prospecting or mining rights and owners (or occupiers) of land or traditional communities: What is not good for the goose is good for the gander' 2019 *SALJ* 303.
[237] Clark (note 161 above).
[238] Ibid.
[239] Cousins (note 154 above).
[240] Ibid.
[241] Clark (note 161 above) .
[242] Cousins (note 154 above).
[243] Ibid.
[244] Clark (note 161 above).
[245] Ibid.
[246] H Mostert 'South Africa's Communal Land Rights Act: A plea for restraint in reform" Journal of African Law, Volume 54 (2) (2010), 299.

Act dealt with the characteristics and vesting of rights to communal land and the roles of the structures tasked with looking after the communal land.[247] This was done by providing for the transfer of land title from the State to communities on conditions that such communities met specified requirements.[248] One of those conditions was that a community would have to register its rules and be recognised as a juristic person with the capacity to own land.[249] Members of the community as individuals were supposed to be given a deed of a communal land right which is capable of being upgraded to freehold title on condition that the whole community accepts such.[250]

Furthermore, before land can be transferred to a community, the boundaries of that community must be clear and registered and further be ensured that other existing rights within the land are taken care of.[251] The community was also supposed to have rules which would be guiding principles on issues of land and those rules were required to be applied by the land administration committee, which would be responsible for the land affairs of the community.[252] However, the problem was that the Act did not give clear directions about how the land administration committees should be elected.[253] As a result, there was a strong belief that land administration committees were only reserved for traditional councils.[254] The Department of Land Affairs stated that people must be allowed to choose the structure they preferred, in contrast, the Act in other relevant sections appeared to automatically bestow traditional councils as land administration committees.[255]

It can be argued that traditional councils were directly or indirectly imposed as land administration committees onto people. Unsurprisingly, the Act was contentious especially the provisions that gave traditional leaders authority to administer land on behalf of the people and also as to the protection and inclusion of women.[256] The authority of traditional leaders was challenged due to their unpleasant history of corruption when it came to land administration.[257]

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[247] Ibid 246.
[248] Cousins (note 154 above).
[249] Ibid.
[250] Ibid.
[251] Ibid.
[252] Ibid.
[253] Ibid.
[254] Ibid.
[255] Ibid.
[256] Ibid.
[257] Ibid.

As a result, the view was that traditional institutions should not play any role in the allocation and administration of land.[258] The Act was in force for more than five years, however, it was never implemented and then its constitutionality came under scrutiny in the case of *Tongoane and others v Minister of Agriculture and Land Affairs and Others.*[259]

In the case of *Tongoane*, four communities challenged the constitutionality of CLARA based on two aspects.[260] The case first dealt with the procedure that was followed in enacting this legislation. The question was whether the public was properly included in the process of enacting the Act as required by the Constitution.[261] In the second part, the case looked at whether the provisions of the Act place the security of tenure in a more precarious position rather than improving it.[262] It was concerning to communities that the Act was seemingly forcing them to abandon their indigenous laws of administering land in favour of the system advocated by CLARA.[263] This was going to hinder the development of indigenous law which has always been their cornerstone when it comes to the regulation of land-related matters.[264] The further concerning issue was the power granted to traditional councils, which were viewed as incapable of administering land following the interest of the people.[265]

The Constitutional Court concluded that CLARA was unconstitutional because required procedures were not followed when it was enacted.[266] The court further stated that there was no reason to decide on the substantive challenges against the Act because it was already found to be unconstitutional in its entirety.[267] It would have been more interesting if the court had decided on the substantive challenges that were put forward against the Act. The failure to do so took away a perfect opportunity for the legislature to have a proper guide in future when they decide to enact another piece of legislation. Another point highlighted by the challengers of the Act was that it would be unfortunate if they have to put another legal fight in the future in case the legislators decide to enact a new similar Act.[268]

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[258] Olivier (note 163 above; 208).
[259] Mostert (note 246 above; 309).
[260] *Tongoane* para 4.
[261] *Tongoane* para 3.
[262] *Tongoane* para 3.
[263] *Tongoane* para 33.
[264] *Tongoane* para 33.
[265] *Tongoane* para 33.
[266] *Tongoane* para 110.
[267] *Tongoane* para 115.
[268] *Tongoane* para 114.

The province of KwaZulu-Natal has its unique Act that deals with communal land in the form of Ingonyama Trust Act KZ4 of 1994 (Ingonyama Trust Act).[269] The former KwaZulu Legislative Assembly passed this Act which came into operation on 24 April 1994,[270] just a few days before the first democratic elections.[271] The Act established the Ingonyama Trust to receive the land transferred from the former KwaZulu government.[272] The trust holds the land on behalf of Ingonyama (the Zulu Monarch) as the sole trustee who in turn should ensure that the land benefits the people and communities under the monarch.[273] In 1997, the amendment to the Act created the Ingonyama Trust Board (ITB) which is tasked to deal with the administration of the land.[274]

The Act ensures the protection of the rights in land of the beneficiaries.[275] The said protection can be seen to be advanced through clauses that promote accountability. The Act vigorously provides that Ingonyama cannot make major decisions about the land like alienation of land, without obtaining the consent of the traditional authority or the affected community.[276] The Act is adamant that the rights in land of people are solid.[277] Regardless of these progressive clauses, the Trust has attracted negative comments from people who are of the view that it is not adhering to the requirements of the Act.[278] This accusation stems from the fact that in some circumstances, the Trust makes major decisions about land without consulting the people from the ground and soliciting their consent.[279]

This has been largely pointed out in instances where the Trust concludes deals with mining companies.[280] Mining deals involve a lot of money, therefore when concluding them people are excluded from the process because their inclusion might jeopardise the chances of concluding the deal. [281] As a result, in 2017 the report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change recommended

[269] Report of the high level panel (note 160 above).
[270] Clark (note 161 above)
[271] Report of the high level panel (note 160 above).
[272] Ibid.
[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] M Clark (note 160 above).
[277] Ibid.
[278] Ibid.
[279] Report of the high level panel (note 160 above).
[280] Clark (note 161 above).
[281] Ibid.

the abolishment of the Ingonyama Trust.[282] Such a decision would ensure that the land tenure in the province is similar to other provinces and also ensure that communities are protected from the sometimes corrupt dealings of the Trust.[283] Furthermore, there are serious issues with the accountability of the Trust, hence its abolishment will put to rest these concerns and replace it with a democratically elected structure.[284] Currently, the trust owns almost 2.5 million hectares of land in the province of KwaZulu-Natal.[285]

The case of *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others* highlighted some of the misdeeds of the trust. The Ingonyama Trust decided to cancel the Permission to Occupy (PTO) and held that people with those rights would have to sign a lease and pay rent to the trust.[286] The PTO rights are by definition part of informal rights in land and are protected by IPILRA therefore, if there was deprivation, consent had to be obtained from the holders.[287] Instead, consent was not obtained but the trust pushed for the replacement of the PTO rights with the lease agreement.[288] This case presented an interesting aspect considering that the holders of PTO rights were not removed from their land but their rights were changed to lease agreements.

The applicants were holders of the PTO rights and they approached the court for declaratory relief based on the fact that the action of the trust was unlawful and unconstitutional.[289] The court held that as the applicants were holders of PTO rights which are protected by IPILRA and they were part of the tribes under the trust, therefore their dispossession should have been done according to section 2 of IPILRA which requires consent.[290] The court further confirmed that the actions of the trust were unconstitutional.[291]

Another important aspect of the case was the attitude of the chairperson of the trust Mr Jerome Ngwenya. The court was not pleased with his submission which was summarised as follows:

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[282] Report of the high level panel (note 160 above).
[283] Ibid.
[284] Ibid.
[285] Clark (note 161 above)
[286] *Council for the Advancement of the South African Constitution and others v Ingonyama Trust and Others* 2021 (8) BCLR 866 (KZP) at para 45.
[287] *Council for the Advancement of the South African Constitution* at para 42.
[288] *Council for the Advancement of the South African Constitution* at para 48.
[289] *Council for the Advancement of the South African Constitution* at para 45.
[290] *Council for the Advancement of the South African Constitution* at para 203.
[291] *Council for the Advancement of the South African Constitution* at para 203.

> "Before getting into the factual background and the merits of this matter, I deem it appropriate to address disturbing aspects of the affidavit of the Chairperson of the Board, Mr Sipho Jerome Ngwenya ('Mr Ngwenya'), delivered in support of the Trust's and the Board's opposition to this application. It is unfortunate and saddening to note that Mr Ngwenya regards this application as an 'attack or affront to the institution of ubukhosi under the democratic order' rather than as the exercise by the applicants of the right to seek protection of constitutional rights and protecting their property rights. Secondly, I would like to express our displeasure at Mr Ngwenya's scathing attack launched on Mr Parmananda Lawson Naidoo's ('Mr Naidoo') and Professor Thandabantu Nhlapho's integrity and person. Mr Naidoo is the executive secretary of CASAC, and is the deponent to the applicants' founding affidavit. Mr Ngwenya went on to describe what Mr Naidoo has asserted in his founding affidavit as '[Mr] Naidoo's racist slant.' Professor Nhlapho is an expert of African Customary Law and African Customary Law Systems of Governance. He deposed to an affidavit in support of the application. The attack is unwarranted, inappropriate, and unacceptable."[292]

It transpired that Mr Ngwenya was not happy with the application made by the applicants in court. What was disturbing is that he called it an attack on the authority of the trust. This can be interpreted as showing the attitude of those leading the trust in that they do not want to be challenged or questioned about the decisions they make. As the court highlighted above, there was no need for such submission as the applicants were using the correct platform to exercise their rights against a decision, they deemed unlawful. The submission by the chairperson appears to be more unreasonable considering that the court ruled in favour of the applicants. Behaviour of this nature especially from the chairperson of the trust raises serious doubts about the ability of the Ingonyama Trust to fairly administer land affairs. It further proves right those people who have been calling for the trust to be dissolved.

Another Act that caters for specific areas of land is the Transformation of Certain Rural Areas Act (TRANCRAA) 94 of 1998. This Act was introduced to facilitate the transfer of almost 18 000 square kilometres of land to the ownership of people living in rural areas in four provinces.[293] These are areas that were exclusively occupied by Khoi, San and European descent, to preserve their identity and avoid dispossession.[294] The State later took ownership

[292] *Council for the Advancement of the South African Constitution and others v Ingonyama Trust and Other*s 2021 (8) BCLR 866 (KZP) at para 25.
[293] P Wisborg, R Rohde 'TRANCRAA and communal land rights: Lessons from Namaqualand' *PLAAS,* Volume 4 (2003), 1.
[294] Cousins (note 154 above).

of this land and used it as labour reserves.[295] The Apartheid regime regulated these areas through the Coloured Rural Areas Act of 1963 and the Rural Areas Act 9 of 1987.[296]

The basis of TRANCRAA is to ensure that rights in land of people living in these areas are protected and to democratise the institutions that govern these lands.[297] The Act further aims to transfer the ownership of the land to either municipalities, community property associations or other institutions authorised by the minister.[298] Mostly, what is important is that communities have a right to choose the structure they prefer where their land must be transferred.[299] The transfer of land applies to common areas and also those lands which are held in trust by the State excluding township areas.[300]

This Act furthered the aspirations of the Constitution by eradicating permit-based land rights and also the State control over the land.[301] People are given the necessary right to decide their future land ownership.[302] The Act provides practical solutions to be followed when resolving conflict and ensures that the processes are conducted smoothly by offering resources to record various types of existing land rights which include family and individual rights to use land.[303] It therefore recognises the existence of a diversity of rights in land rather than forcing a certain form of land rights onto people.[304] The Act went further and offered mechanisms for municipalities to account to land rights holders in cases where land is transferred to the municipality.[305] Besides these good interventions by the Act, the troubling issue is that it does not have a proper implementation strategy.[306]

On a national level, the quest to secure informal rights in land was recently attempted in 2017 through the gazetted draft of the Communal Land Tenure Bill. This Bill does not refer to "informal rights in land" but it uses the word "communal land", however, the definition is the same. The long title of the Bill states that:

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[295] Ibid .
[296] Ibid.
[297] Ibid.
[298] Wisborg (note 293 above; 1).
[299] Cousins (note 154 above).
[300] Wisborg (note 293 above; 2).
[301] Ibid.
[302] Ibid .
[303] Ibid 3.
[304] Ibid .
[305] Ibid.
[306] Ibid.

> "To provide for the transfer of communal land to communities; to provide for the conversion into ownership of land rights in communal land to communities that own or occupy such land; to provide for the transfer of ownership to communities and community members of land acquired by the State to enable access to land on an equitable basis; to provide for the right to use by community members of land owned by the State; to provide for registration of communal land; to provide for conditions of registration of communal land; to provide for general plans for communal land; to provide for the award of comparable redress; to provide for land rights enquiries; to provide for acquisition of more land for use as communal land; to provide for the choice on the administration of communal land; to provide for the establishment of households forums by communities; to provide for community rules; to provide for the establishment of communal land boards; to provide for dispute resolution mechanisms; to provide for the provision of municipal services on communal land; to amend and repeal certain laws; and to provide for matters incidental thereto." [307]

According to the preamble, the bill recognises the injustices that occurred in the past, especially the dispossession of African people's land by the previous undemocratic regimes which subjected them to landlessness that persists today. It further notes that the land tenure of Africans is unsecure hence there is a duty on the government to offer security of tenure or redress when necessary. Also, the State must transfer the land from its name to rightful owners and further make more land available as communal land. The Bill is determined to secure land tenure particularly land that belongs to communities and further develop land in those communities.

The Bill defines communal land as "land which is contemplated in section 4, owned, occupied or used by members of a community subject to shared rules norms and customs of that community". It further includes the land under the ownership of the State but occupied by communities as communal land. According to section 4, this Bill applies to:

"

(a) Communal land which is vested in the State or which at any time vested in-
    (i) a government contemplated in the Self-Governing Territories Constitution Act.
    (ii) the governments of the former Transkei, Bophuthatswana, Venda, Ciskei.
    (iii) the South African Development Trust
(b) land restituted to a community in terms of Section 26(7) of the Constitution.
(c) land in respect of which equitable access to land is provided to a community as contemplated in section 25(5) of the Constitution.

[307] GN 510 of GG 40965, 07 July 2017.

(d) land in respect of which the Minister has, by notice in the Gazette, determined that this Act applies."

Looking at the definition of communal land as expressed by this Bill and the definition of Informal rights in land as per IPILRA, they are almost the same. If this Bill is passed, it would replace IPILRA and bring a different dimension of protection to informal rights in land. According to section 2 of the Bill, the Act would offer protection by changing into ownership those unsecured rights in land held through communal means. This will include transferring land owned by the State to communities. Members of a community would be further granted a right to individual or community use land that belongs to the State.

The section further states that the Act will regulate the management of the communal land and further ensure that the land is developed and taken good care of in all aspects. Most important is that the Act will offer protection against unfair dispossession of the land and further envisage acquiring more land to form part of communal land. The protection offered by the Bill is in line with IPILRA as it also requires that people must give consent to the disposal of their land, but the Bill is more specific about that 60% of the people must give their consent.[308] According to Section 3, the people would have the discretion to choose an entity that would administer land on their behalf. This is a major improvement considering that in many instances traditional leadership has been imposed as the decision-making entity in matters concerning land.

Although the Bill seems to be progressive in many aspects some issues raise some concerns. The Bill appears to offer a choice between traditional councils and Community Property Associations (CPAs) as the bodies that govern land, however, it does not specify mechanisms for exercising such a choice.[309] This uncertainty can be a source of conflict amongst the people, especially in instances where major decisions must be made about land. One of those decisions can be in circumstances where people must negotiate with mining companies considering that such negotiations can involve a lot of money.

Furthermore, it does not identify the characteristics of communal land and it fails to recognise that titling communal land is a very difficult exercise.[310] It can be seen from the discussion above that the legislature has tried before on numerous occasions to come up with a system of titling communal land, but it has been proven to be a difficult exercise. Communal land is

[308] GN 510 of GG 40965, 07 July 2017, Clause 13.
[309] Cousins (note 154 above).
[310] Ibid.

unique and cannot be easily dealt with just like other scenarios. Further to that, the Bill does not give solutions to the problem where people are fighting over boundaries.[311] The issue of boundaries and jurisdiction can also cause a conflict between community members therefore it must be properly articulated. It is not clear from the Bill how various processes should be implemented regarding sequence.[312] The bill came with good initiatives, but it would be a challenge to utilise them due to uncertainty about which shall come first.

### 3.4 Conclusion.

It can be concluded that informal rights in land in this country are so vulnerable and the South African government has failed to enact legislation that would provide permanent protection to them. This is due to many factors which are mostly influenced by our unpleasant history. The current protection of informal rights in land is provided by the Act that is temporary and there have been further attempts through the Bill. The protection offered against dispossession by these Acts is based on the fact that people should give consent before being dispossessed of their land. This trajectory is very progressive considering that most of the people who are living in these areas are not well-equipped to defend themselves against entities that may unfairly dispose of their land. The Bill further offers for the registration of these lands to the name of the people or entities of their choice.

There are so many challenges that threaten the protection of informal rights in land as envisaged by IPILRA or the proposed Bill. The most popular challenge comes with mining companies that wish to dispossess people of their land for mining purposes. The problem with this issue is that mining generates a huge income hence the push for mining tends to supersede the need for protection of informal rights in land. Furthermore, the mining industry is regulated by another Act in the form of the MPRDA and the mining companies tend to lean more on what is required by this Act and disregard other applicable laws. The following chapter will discuss the mining laws in South Africa and later juxtapose them with the laws that protect informal rights in land.

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[311] Ibid.
[312] Ibid.

The land question is deeply political considering its history, hence it presents lawmakers with the difficult task of crafting legal solutions to deeply political challenges.[313] Moreover, the characteristics of communal tenure and their dual dimension which entails some individual elements and some communal elements, contribute negatively to the quest to enact proper legislation.[314] To ensure that legal interventions are accepted as legitimate, they should be crafted with sensitivity to the realities that people face on the ground.[315] One of those realities is that replacing customary tenure with registered individual land titling is not seen as an appropriate policy.[316] So far it seems as if the government accepts that stance looking at what is offered by the proposed bill discussed above. The Bill allows for the continuation of communal land albeit being registered in the community's name, therefore, such a position confirms that there would be no uniformity with the common law land tenure which is based on individual registered land ownership. Therefore, people in communal land may still be manipulated by their leadership structure, thus, there is room for different treatment when it comes to the protection of these land rights.

[313] Clark (note 161 above).
[314] Du Plessis (note 76 above; 79).
[315] Clark (not 161 above).
[316] Cousins (note 155 above).

## CHAPTER 4: THE DEVELOPMENT OF MINING LAWS IN SOUTH AFRICA

### 4.1. Introduction

The mining industry has been operating in South Africa for over a century and through that period, various laws have been enacted to regulate the industry. This chapter seeks to trace the development of mining laws in the country which was sometimes influenced by political factors. South Africa has a long history of discrimination and the mining industry was not an exception to that, it was designed in favour of the white minority supported by the system at the time. This discussion is important because it will lead to an understanding of the reasons behind the changing of the laws after the fall of Apartheid.

The mining industry is currently regulated by the MPRDA, which brought significant changes from the previous laws. Although the Act was accepted by some people it created some dissatisfaction for other people. This chapter shall discuss the changes brought by the Act from positive to negative. This discussion will lead to an understanding of the reasons behind the unending legal battles between the mining companies and surrounding communities. These battles emanate from that exercising of mining and prospective rights hugely affects surface land occupiers or owners to an extent that they are sometimes dispossessed of their rights in land.

### 4.2. History of mining laws.

The history of mining in South Africa is intertwined with the history of land ownership. Only people who owned land were able to participate and benefit from mining in this country. The common law provided that the owner of the land was also the owner of everything that is found on his or her land including the minerals.[317] This position gave landowners complete freedom to make decisions about everything in their land, even mining-related decisions. The ownership of minerals was totally under the control of the landowners; they would decide whether they would mine themselves or give authority to other people to mine on their land and get compensation.[318]

Considering that mining is a very big project which demands sophisticated machinery and financial means, many landowners were unable to conduct it themselves. As a result, it became

[317] Van der Vyver (note above 106; 126).
[318] *Baleni* at para 41.

a general practice for landowners to grant authority to other people to access their land and look for minerals or conduct mining, and that exercise was labelled as granting mineral rights.[319] Mineral rights was an umbrella word that covered an authority to search and mine for minerals.[320] The gist of this was that the separation of mineral rights from land ownership would happen with the approval of the landowner.

These mineral rights were regarded as financially valuable, and it was important to secure them against any kind of unfair loss. The security of these rights was catered through the development of law which introduced their registration in the Deeds Office.[321] The registration also meant that mineral rights were transferable to another person, hence they were called quasi-servitudes. [322] They were treated as assets and formed part of the estate of an individual.[323]

The State played a minimal role in the process of acquiring or dispossessing mineral rights by private individuals. The State was only responsible for ensuring that all other laws were followed before commencing mining and further issuing permits.[324] These duties of the State ranged from ensuring that all safety measures were complied with and other environmental requirements were met.[325] The State would further come in to collect taxes from the parties.[326] Besides these tasks, the State was not part of the deals concluded between the parties regarding the granting of mineral rights, which was left in the hands of private individuals. However, it should also be remembered that the State also owned land, therefore it was amenable to conclude similar deals with other people on the land it owned.[327]

Although it has been argued that the role of the State was minimal in the deals, another argument is that the State had a significant role as it had to give authority for the commencement of any mining-related activity. Private individuals with mineral rights were supposed to comply with the terms set by the State and get permission before they exercise

[319] Van der Vyver (note 106 above; 126).
[320] Ibid.
[321] *Agri South Africa v Minister for Mineral Resources and Energy* 2013 (7) BCLR 727 (CC) at para 8
[322] *Agri SA*, para 25.
[323] *Agri SA*, para 9.
[324] *Agri SA*, para 12.
[325] Van der Vyver (note 106 above; 127).
[326] Cawood (note 107 above; 63).
[327] Ibid.

their rights.[328] If the State decided against granting authorisation for whatever reasons, mining was not going to commence, and holding mineral rights was rendered futile. Therefore, the State was placed as a final decision maker in the entire process of mining. Individuals had to ensure that they followed whatever requirements set by the State before they got the approval.

Various legislation was previously passed in the country to cater for mining and in their approach they differentiated between categories of land and types of minerals they dealt with.[329] These laws were sometimes passed regionally and there was no uniformity in their application.[330] Around the 1960s, these Acts were merged into four, and one of them was The Precious Stones Act 73 of 1964 which regulated the mining of diamonds and other precious stones.[331] The Act reserved the rights to mine and dispose of diamonds to the State, although it was not absolute as there were exceptions.[332] This shows that the idea of the State controlling the mining industry has always existed.

Another one was the Mining Rights Act 20 of 1967 which provided for the regulation of prospecting and mining of precious metals, base minerals, and natural oil.[333] The precious metals were defined in the Act as metals gold, silver, platinum, and iridium.[334] This Act allowed landowners to possess mineral rights but gave the State the authority to administer mining operations.[335] Again under this legislation, the State had a critical role in giving a go-ahead for mining operations. On the other side, the Mining Titles Registration Act 16 of 1967 catered for the registration of mining titles.[336] The Atomic Energy Act 90 of 1967 dealt with the regulation of prospecting, mining, and all other aspects of nuclear and atomic energy and radio-active nuclides.[337]

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[328] *Agri SA*, para 19.
[329] Van der Vyver (note 106 above; 126).
[330] Ibid.
[331] T Mathebula 'Transitioning Old Order Mining Rights into New Mining Rights: A Critical Analysis' (2023) PER 7, 2.
[332] Ibid.
[333] Mining Rights Act 20 of 1967.
[334] Ibid.
[335] E Van der Schyff 'South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals' *Boloka Institutional Repository*. 2012, Available at: https://repository.nwu.ac.za/bitstream/handle/10394/7021/No_64%282012%29_6_Van_der_Schyff.pdf?sequence=1&isAllowed=y. Accessed on 20 August 2023.
[336] Ibid.
[337] Ibid.

The change happened in 1991 with the enactment of Minerals Act 50 of 1991 (Minerals Act) which combined all the existing laws under one umbrella.[338] By so doing, the Minerals Act got rid of the exhausting differentiations between types of minerals and land and ensured that there was the necessary uniformity.[339] The preamble of the Minerals Act stated as follows:

> "To regulate the prospecting for and the optimal exploitation, processing and utilisation of minerals; to provide for the safety and health of persons concerned in mines and works; to regulate the orderly utilisation and the rehabilitation of the surface of land during and after prospecting and mining operations; and to provide for matters connected therewith."

The Minerals Act stated that it was dealing with minerals and it did not categorise but gave a broad definition of minerals. Minerals were defined as "any substance, whether in solid, liquid or gaseous form occurring naturally in or on the earth, in or under water or in tailings and having been formed by or subject to geological process, excluding water, but including sand, stone, rock, gravel, and clay, as well as soil other than topsoil."[340] This definition was efficient in covering the whole mining industry compared to previous Acts which were based on categories.

The Minerals Act maintained the system that allowed the land owners to own the minerals in their land unless mineral rights were severed from the ownership of land.[341] This attracted criticism for the Act on the basis that it was not transformative as it failed to take into consideration that the majority of landless black people were excluded from participating in the mining industry.[342] The stance taken by the Act was not surprising considering that it was passed during the Apartheid era albeit during its final years. The government at the time wanted to protect the interests of the minority white people who owned the land. It was too much asking to expect that it would pass an Act that would cater to the oppressed whilst minimising the benefits enjoyed by the minority white landowners at the time.

Although the Minerals Act appeared to favour landowners who at the time also had control of minerals in their land it also confirmed the role of the State as a key player in the mining industry. The holders of prospecting and mining rights were required to get authorisation from

[338] Ibid.
[339] Mostert (note 246 above; 300).
[340] The Minerals Act 1991.
[341] Van der Schyff (note 335 above).
[342] Mostert (note 246 above).

the government before exercising their rights.[343] The authority was acquired through applications and further payment of the application fee.[344] Applications had to meet other requirements before they were approved. This proves that the role of the State was not minimal and ensured the protection of other people who may be affected by mining.

In Section 6 the Minerals Act details the procedures that must be followed when applying for prospecting rights. Applications were required to be accompanied by proof of the rights to minerals in that land. Furthermore, the applicants were supposed to give detailed information about how they intend to do prospection and the rehabilitation of land after concluding their process. Section 8 accordingly prohibited the removal of minerals during the prospecting process unless taking samples for analysis. The samples could only be taken during the prospecting process and would lapse when the prospecting ceased.

Section 9 of the Minerals Act provided for mining applications, and it had stricter requirements compared to prospecting applications. An application had to have details about the mining scale and the process of land rehabilitation. The applicant had to show that they possessed the ability to mine the said mineral safely and be able to rehabilitate the land. A sketch plan regarding the area where mining would take place was also required and some other necessary aspects. These strict requirements were very necessary taking into consideration the serious implications of mining and the need to protect people who were not part of the deals.

Through Section 14 the Minister was allowed to cancel or suspend permits granted if the holder failed to comply with the requirements. This section allowed the State to play an active part by monitoring the progress of the mining or prospection and take drastic action if things are not done accordingly. Without this clause, holders of mining or prescriptive rights would have easily behaved differently after getting authority. It further proves that the role of the State was very significant in the whole process although individuals owned mining and prospective rights. In a nutshell, the State was involved not to dictate but to ensure that everything was done accordingly.

The Minerals Act further gave the State special powers to investigate minerals in the land of private individuals. According to Section 18, the Minister was allowed to write to the owner of

[343] The Minerals Act 1991.
[344] Ibid.

the land or holder of the prospective permit or mining authority and inform them about the State's intention to investigate whether there is a specific mineral in the land and the nature and extent thereof. The Minister had to prove that the investigation was in the national interest. The notice had to be in writing and sent 30 days before the parties concerned. The Act further stated that affected parties had to be compensated by the Minister.

Overall, the right of the landowner to make decisions about minerals in their land, offered them protection, in the sense that they were the decision-makers in their land and they could only be dispossessed according to their terms. As highlighted before, the negative implication of this position was that only landowners could benefit from mining deals and there was no way that those who did not own the land could enjoy the same.[345] The majority of black people who were previously dispossessed of their land as discussed above, were not able to benefit from the minerals of this country. Their exclusion was not going to be in harmony with the principles of a democratic government, therefore change was necessary to ensure that everyone benefitted from the minerals of this country. The need for change was further necessitated by the Constitution of the country which advocates for equality.[346]

### 4.3. Discussion of the Mineral and Petroleum Resources Development Act (MPRDA).

The Mineral and Petroleum Resources Development Act of 2002 was enacted to address the economic imbalance that existed between the races as a result of the previous injustices.[347] The objectives of the MPRDA included the promotion of equitable access to minerals of the country.[348] The Act further aims to increase opportunities of entering the mining industry for those who were previously disadvantaged including women.[349] It can be noted that the MPRDA was more concerned about the inclusion of black people in the mining industry as their exclusion was created by landlessness which was caused by the previous regimes as discussed above. Taking from the objectives of the MPRDA, it can be further observed that it was a radical step towards changing the imbalances in the country relating to the mining industry.

[345] *Agri SA*, para 1.
[346] Humby (note 110 above; 168).
[347] *Agri SA*, para 2.
[348] Section 2, MPRDA
[349] Section 2, MPRDA.

To effect the necessary change, the MPRDA placed the state as the custodian of all minerals in the country and the State was responsible for issuing mining and prospecting rights to people who required them.[350] Section 3 of the MPRDA which dealt with the issue of custodianship of minerals provided as following:

> " 3. (l) Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.
>
> (2) As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may:
>
> (a) grant, issue, refuse, control, administer and manage any reconnaissance 35 permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and
>
> (b) in consultation with the Minister of Finance, determine and levy, any fee or consideration payable in terms of any relevant Act. of Parliament. 40
>
> (3) The Minister must ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development."

The Department of Mineral Resources and Energy was tasked to act on behalf of the State and take all the necessary decisions as the custodian of the mineral resources.[351] It was incumbent upon the Department to ensure that minerals are disposed of in a manner that benefits the citizens of this country and also ensure that the mining industry follows all the other requirements.[352] The MPRDA through various sections details all the procedures that the department must follow when issuing mining and prospecting rights. The land owner is no longer entitled to minerals discovered in their land, instead, the State is now in charge of ensuring that even those without land benefit from the minerals of the country.

When the MPRDA came into operation some people held old-order mineral rights that were unused. The MPRDA immediately blocked the selling or ceding of old order rights and demanded that they must be converted to mining or prospecting rights within certain periods based on each category.[353] Holders of unused old-order mining rights were given one year, for

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[350] MPRDA, Section 3.
[351] Tlale (note 109 above; 4).
[352] Ibid.
[353] *Agri SA*, para14.

prospecting rights it was two years, and for old-order mineral rights, it was five years.[354] Failure to convert those rights within a required period resulted in the owner losing them without any recourse and this caused a lot of complaints among the holders of old order rights.[355] The MPRDA was very strict about this and did not entertain any late applications and this was a great source of concern to those who were against the MPRDA.[356]

It was not a surprise that the holders of old order rights were not happy to lose their rights in this manner considering that it amounted to financial loss to them. They further criticised the State that it did not furnish them with clear information about the process to follow to convert these rights.[357] Although this concern sounded very serious it may be that it was raised to discredit the changes brought by the MPRDA. On the other side, if this averment was true, it would be concerning that the state failed to efficiently discharge its duties.

Furthermore, the period granted to convert old order rights was also criticised on the basis that it was not sufficient.[358] The basis of this argument was that not everyone was aware of the changes brought by the MPRDA, hence a longer period was required to give them a chance to get the information and start their application.[359] This criticism again suggests that the state should have been more active in ensuring that people were informed of the proposed changes and also grant sufficient periods to make applications. These concerns open questions of whether the state failed to act reasonably or whether the concerns were unfairly raised to oppose changes brought by MPRDA.

The custodianship of minerals by the State was not a unique thing to the South African context but many countries are using the same method.[360] The majority of the countries are using the same approach which allows the State to own the minerals in the country.[361] It can be argued that as the State represents the people of the country, if minerals are placed in their custody that would ensure that everyone benefits from those minerals. Everyone must benefit due to when minerals are extracted, several people can be affected for instance by dust, noise, damage

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[354] Mathebula (note 331 above; 5).
[355] *Agri SA*, para 3.
[356] Mathebula (note 331 above; 5).
[357] Ibid.
[358] Ibid.
[359] Ibid 6.
[360] MPRDA, Section 2.
[361] J Otto 'Mining Royalties: A Global Study of their Impact on Investors, Government and Civil Society' *Directions in Development, Energy and Mining*. Washington DC: World Bank. 2006.

to roads, etc. Therefore, it would be unfair to only allow the owner of the land to benefit whilst the burden of the mining is also carried by other citizens.

The placing of minerals under the custodianship of the State raised questions about whether it amounted to expropriation or not. The basis of this question was that if it amounted to expropriation, laws that catered for expropriation should be followed. Expropriation laws allow for compensation of the owner. In the case of *Agri SA,* the central question was whether the MPRDA expropriated the mineral rights that existed before it came into effect.[362] A company called Sebenza (Pty) Ltd had previously acquired coal rights which they effectively registered under their name.[363] They did not use their rights until the MPRDA came into effect and they further failed to exercise them within one year after the commencement of the Act.[364] As a result, their mineral rights were extinguished. They then approached the courts seeking for recourse under the pretext that their mineral rights were expropriated by the MPRDA.

The matter went all the way to the Constitutional Court which rejected their argument. The court held that state custodianship of the mineral did not mean that the state was acquiring the rights for itself, but it was holding it on behalf of the people. This did not amount to expropriation as the State did not acquire ownership of mineral rights. However, this decision was criticised on the basis that it failed to consider that the Act extinguished the mineral rights of Sebenza and the State was not required to pay for the loss of those rights.[365] The fact that the State was saved from paying, means that the State benefited and this was in contrast to the position under the Minerals Act.[366] The further argument was that the State was going to benefit in the future when it granted this right to another person.[367]

The change in terms of custodianship of minerals to the State was not well received by those who owned major parts of land at the time when the Act was introduced.[368] This was understandable considering that the MPRDA diminished their role over minerals in their land which translated to their capabilities to make money through those minerals. To make matters

[362] *Agri SA*, para 24.
[363] *Agri SA*, para 13.
[364] *Agri SA*, para 14.
[365] EJ Marais 'When does State Interference with Property amount to Expropriation? An Analysis of the *Agri SA* Court's State Acquisition Requirement' *PER* 2015. Volume 18 (1), 2997.
[366] Ibid.
[367] Ibid 2998.
[368] *Agri SA*, para 3.

worse the MPRDA did not provide for any payments of the landowners for prospecting or mining rights purposes except for expropriation.[369] Therefore, landowners were not going to get anything if they were dispossessed of their land through mining.

It has been argued that the custodian of minerals by the State was not surprising looking at the developments in laws governing the industry. Mining laws have always been developed around the idea that a right to mine should be authorised by the State.[370] Although landowners would own their minerals, removing them from the ground required the intervention of the State by granting the authority to commence.[371] The State was therefore placed as a decision maker regarding whether the mining of the minerals could happen or not.

### 4.4. The challenges brought by the custodianship of minerals by the State.

Although the MPRDA brought much-needed change, it also created some unintended challenges to the protection of surface landowners. Minerals are found underneath the land and extracting them has huge implications for the land rights of surface landowners.[372] In many instances, the surface landowners have to vacate the land before the commencement of mining and the mining companies are required to follow the procedures of removing people as set by the MPRDA. This creates a situation where the holder of mining or prospecting rights has to exercise their right as granted by the State, on the other side the land owner has a right to protection of their property including land as provided by Section 25 of the Constitution.[373] During the era of previous Acts, it was the opposite considering that the land owner was in charge of giving authority to the commencement of mining in their land and now that power has diminished.[374] Under the MPRDA, the State is now more in charge when it comes to negotiating with potential mining companies although they must take decisions that are in the interest of the people.

In the case of *Meepo v Kotze and Others 2008 (1) SA 104 NC* (referred to as *Meepo*) the court had to explain the manner that should be considered when interpreting the MPRDA and said the following:

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[369] *Meepo* , para 8
[370] *Agri SA*, para 9.
[371] *Agri SA*, para 19.
[372] *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA), para 19.
[373] *Anglo operations*, para 19.
[374] Van der Schyff (note 335 above).

> "Firstly. We agree that Chapter 2 of the MPRDA contains the fundamental principles subjacent to the legislative approach to the development and regulatory regime of the mineral and petroleum resources of the Republic of South Africa. It is our view that the provisions of the act should be interpreted with due regard to the constitutional rights, norms and values the legislature sought to encapsulate, protect and advance in the act. The more prominent rights, norms and values appear to be the custodial role of the State over the mineral and petroleum resources of the nation and the concomitant disposal of the traditional concept of State and/or individual rights to unexploited minerals (sec. 3(1) of the MPRDA), the State's obligation to protect the environment for the benefit of the present and future generations (sec. 24 of the Constitution and the preamble to the MPRDA); the right to equitable access to the natural resources of the country (sec. 25(4)(a) of the Constitution); and the right not to be deprived of property arbitrarily (sec. 25(1) of the Constitution)."[375]

This manner of interpretation as discussed in the above paragraph was based on finding the balance between the opposing rights. All these are equally important aspects that must be considered, if not properly done an injustice will happen.

The drafters of the MPRDA considered the diminished role of landowners which could easily render them vulnerable. It then made provision that applicants for mining and prospecting rights cannot proceed with their applications without notifying and consulting with the landowner or lawful occupiers of land.[376] Section 16 of the MPRDA which deals with applications for prospecting rights states the following about consultation:

> "(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing-
>
> (a) to submit an environmental management plan; and
>
> (b) to notify in writing and consult with the landowner or lawful occupier and any other affected party and submit the result of the consultation within 30 days from the date of the notice."

Concerning applications for mining rights, Section 22 of the MPRDA states the following regarding consultation:

> "(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing-
>
> (a) to conduct an environmental impact assessment and submit an environmental management programme for approval in terms of section 39, and

[375] *Meepo* at para 9.
[376] MPRDA, Section 5.

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

This is intended to protect surface landowners against mining companies. However, it has been established that people who are affected by mining are not well acquainted with the Act,[377] therefore they cannot exercise their rights as provided by the Act. In this instance, they need to be aware of the consultation requirement and be able to place their grievances if consultation was not conducted or was not done properly. Under those circumstances, mining companies can easily undermine the obligations placed on them by the Act.

There have been several reports that landowners are not properly informed about the pending applications and that the consultation process is not conducted properly.[378] It can be accepted that dealing with a community can be a very tricky situation, considering that many people have different views. However, this does not justify that mining companies should avoid what is required from them by the MPRDA. Mining companies value making a profit more than respecting the rights of community members or land owners.

The case of *Bengwenyama Minerals (Pty) Ltd and Others V Genorah Resources (Pty) Ltd and others (*referred to as *Bengwenyama*)*[379]* highlighted the failure of a mining company to conduct a proper consultation process. A mining company called Genorah intended to apply for prospecting rights over land owned by a community and their traditional leader.[380] On the 3rd of February 2006, they sent a representative to inform the traditional leader that the company intends to talk to him about their application.[381] The representative left a form that required the community to indicate whether they had an objection to the application or not by ticking 'yes' or 'no'.[382] If there was any objection, a five-line space was provided on the form to explain the basis for such objection.[383] The traditional leader and his people did not comply with the requirements of the form.[384]

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[377] C M A Ntui, "What is law without people? A review of mining legislation and communities " *Environmental Development and Sustainability* , 2017, Volume 19 (4) 1539–1555. Available at: https://doi.org/10.1007/s10668-016-9797-4. Accessed on 20 September 2023.
[378] Humby (note 110 above; 169).
[379]*Bengwenyama Minerals (Pty) Ltd and Others V Genorah Resources (Pty) Ltd and others 2011 (4) SA 113 (CC)*
[380] *Bengwenyama*, para 9.
[381] *Bengwenyama* , para 9.
[382] *Bengwenyama*, para 9.
[383] *Bengwenyama*, para 9.
[384] *Bengwenyama*, para 9.

On the other side, the community had the intention of obtaining a prospecting right over the land. This was clearly articulated in the response of the traditional leader to the mining company. The leader in his response said the following:

> "Your letter notifies us or rather consults us about your interests in our land has been received. As your letter requires us to enable you to comply with relevant provisions of the Act, as well as completion / filling of the form attached, we would like to advise that Bengwenyama-ya-Maswati would do that, once we know each other. For now, we don't know each other well. The form that requests us to complete, seems to be more binding as it does not fall within the definition of our standard letter that we give to companies that applies for similar rights.
>
> Bengwenyama-ya-maswati has an interest in the property you applied for. We submitted an application for prospecting on three farms including Nooitverwacht 324 KT. The good luck wished to ourselves and other companies in attempt of getting similar rights are also wished to your company." [385]

Besides the mentioned actions of Genorah, there was no further consultation between the two parties.[386] The company submitted their application and indicated that they approached the traditional leadership of the community and introduced themselves but they did not get any feedback from them.[387] On the 20th of February 2006, the company's application was accepted for processing and they were instructed to do other certain things which included consulting with landowners and briefing the Regional Manager about consultation outcomes.[388] The company did not consult with the community despite these clear instructions.

Consulting with the landowner is necessary to arrange the issue of accommodation for them before exercising the prospecting rights.[389] Under those circumstances, consultation would require more engagement between the parties to ensure that the consequences of mining are not severe for the landowners. In the *Bengwenyama* case, the visit by the official who left the form for completion remained the only attempt to consult with the community by the mining company. Considering the purpose of consultation, this was not sufficient as nothing was discussed about what was going to happen to the community once the company commences mining. The fact that parties did not even know each other as highlighted by the traditional leader in the letter, shows that proper consultation was not conducted.

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[385] *Bengwenyama*, para 10.
[386] *Bengwenyama*, para 13.
[387] *Bengwenyama*, para 12
[388] *Bengwenyama*, para 13.
[389] *Bengwenyama*, para 65.

Under normal circumstances, Genorah as applicants should have been more interested in getting a chance to effectively consult with the community. However, it was interesting that the traditional leader wrote a letter that encouraged further engagement, but the letter was ignored. Their attitude shows that they had no intention of fulfilling the consultation requirements, but they were just ticking the box. The fact that the community had their ambitions of acquiring prospective rights did not mean that Genorah must not consult with them. Maybe the fact that Genorah knew that the community also wanted to make their own application discouraged them from further engaging the community. However, such reason cannot justify their omission.

On the other side, the community went ahead with their application for prospecting rights through the company called Bengwenyama Minerals.[390] Despite facing serious challenges, their application was also accepted and they were required to consult with the affected parties and they were further informed that Genorah had also applied for the same rights.[391] Later in the year, prospecting rights were awarded to Genorah under questionable circumstances. Some of the procedures were not properly complied with, like financial guarantees were only submitted after the decision to award was taken. The community was informed after a few months about the decision to award rights to Genorah and this was surprising considering that they were always in contact with the department but it was never mentioned. The reason for overlooking the Bengwanyama Minerals was that Genorah had applied first for the prospecting rights.

The State is required by the Act to transform the mining industry and commit to equitable access.[392] The way the whole situation was handled by the Department was not at all in furtherance of the said objective. It appears as if Genorah was preferred over other applicants regardless that their application did not meet all the requirements. To grant the community prospecting rights would have ensured transformation considering that the community consisted of African people who were previously prevented systematically from participating in the mining industry. For a very long period, the dominant practice in the mining industry has been that big mining companies would go to the land and do as they please to owners or

[390] *Bengwenyama* Para 14.
[391] *Bengwenyama* Para 15.
[392] MPRDA, preamble.

occupiers of the land. Transformation of the industry would have meant that the community is granted the chance to mine on their land.

The community should have been allowed to have the first preference as the owners of the land. The MPRDA provides for the preferent rights in Section 104 (1) as follows:

> "Any community who wishes to obtain the preferent right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must lodge such application to the minister."

Section 104 (4) states that a preferent right cannot be granted to the community if the prospecting right has been granted. This places an obligation to inform the community about pending prospecting applications on their land and the implications of granting the prospecting rights to the applicant.[393] Therefore the community in this case should have been informed of Section 104 before granting Genorah prospecting rights. The inclusion of Section 104 in the Act shows that there was an intention to give the owners of the land more advantage than other applicants. This is important to ensure that they are protected as well against big mining companies who are driven by a desire to make a profit and disregard the interests of the poor communities. Even if the community does not have an intention to pursue their application the presence of this section can be influential to motivate the mining companies to consult properly with the people fearing that they can make their application and they have an advantage empowered by this section.

The way the Department and its representatives handled the whole situation in this case raises serious concern about whether the government can be trusted to carry out its mandate as required by the Act. Although there was no proof of corruption, the way Genorah was granted the prospecting rights was questionable. Mining involves a lot of money and there are possibilities that individuals can be bribed as well to seal the deal. The courts are then left with a mammoth task of dealing with applications in cases where individuals are not satisfied with a decision. It is concerning that the courts are left with this task considering that litigation is very expensive and some groups and individuals might fail to pay legal fees. Under those circumstances, being poor would mean that your rights can be violated without any recourse.

[393] *Bengwenyama*, para 20.

Another important aspect that can lead to leniency towards big mining company's applications is political connections. In the dying days of the Apartheid, mining companies roped in some black politically connected individuals.[394] These mining companies were aware that the end of Apartheid would mean that they must also change their leadership to align themselves with the requirements of the new dispensation. The inclusion of black individuals was going to ensure that they remained relevant even after Apartheid. Targeting the politically connected people was aimed at ensuring that those individuals could smooth deals with the new government. Therefore, mining companies also have political connections and that can go a long way to guaranteeing them deals through government even though they have not followed all the procedures in some instances.

In the *Bengwenyama* case, the court did rule in favour of the community and stated that the consultation was not conducted and the order to grant Genorah was set aside.[395] This was a very important victory for the community but it is concerning that the matter went all the way to the constitutional court as not all the communities in this country can be able to mount a fight like that considering the high costs of litigation.

### 4.5. The capacity of the State to discharge duties entrusted by the MPRDA.

The custodianship of the minerals by the State places a duty on the State to protect the rights of all stakeholders involved in the industry. The State must make sure that all procedures are correctly followed so that the rights of others are not violated. The failure of the State to exercise its duties can be very costly to the parties involved. If mining companies are given authority wrongfully by the State, they could meet resistance from the community which might force them to enter a long unprepared legal battle. If at the time they have started the process, they may be forced to abandon operations which will incur unnecessary costs. On the other side, surface land occupiers also suffer through expensive court processes which also divide their communities as other members support the mining idea whilst others are against it.

The consequences of the failure of the State to discharge its duties properly were laid bare in the case of *Aquilla Steel Limited v Minister of Mineral Resources* (referred to as *Aquilla*

[394] M Nxele "Crony capitalist deals and investment in South Africa's Platinum belt: A case study of Anglo American Platinum's scramble for mining rights, 1995 – 2019" Review of African Political Economy, *Taylor & Francis Journal*. 2022. Volume 49, 395.
[395] *Bengwenyama*, para 68.

*Steel*).[396] The State awarded two companies prospecting rights over a similar land.[397] A company called ZIZA held an old order right and they applied to convert those rights using the grace period of one year as provided by the Act. However, their application was not properly done as they did not submit a comprehensive map. Another company called Aquilla Steel Limited later applied for prospecting rights on similar land and it was difficult for the State to pick up this mistake due to an improper map submitted by ZIZA.[398] The Department allowed ZIZA to update their maps from time to time until they got it correct and that is when the department was aware of the problem after four years.[399]

Besides the improperly drafted map, there were other defects in the application of ZIZA which included that they did not show any technical ability to conduct the operations and also lack of financial ability.[400] An application that does not meet all the requirements can be returned by the Regional Manager as per Section 17(1) of the MPRDA but in this case, it failed to do so.[401] The court held that the fact that the ZIZA application was defective when it was submitted and when it was accepted meant that it was unlawful to grant ZIZA prospecting rights and the court set it aside.[402]

This case dealt with the application of the grace period which was granted to holders of old order rights. The court clarified that the grace period was provided to achieve a balance between the objectives of the MPRDA and the protection of the rights of people who had the old order rights.[403] The grace period allowed the holders of old order rights to apply to convert their rights without any interruption. The department must first deal with the application of holders of old orders before it entertains other applicants.[404] The application must be complete and cover all the requirements as specified by the MPRDA.[405] After the lapse of the grace period, other applicants can apply but their applications cannot be considered before the department has dealt with that of old order rights applicants.[406]

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[396] *Aquilla Steel (Pty) Ltd v Minister of Mineral Resources and Others* 2019 (3) SA 621 (CC).
[397] *Aquilla Steel*, at para 3.
[398] *Aquilla Steel*, para 42.
[399] *Aquilla Steel*, para 45.
[400] *Aquilla Steel*, para 48.
[401] *Aquilla Steel*, para 51.
[402] *Aquilla Steel*, para 53.
[403] *Aquilla Steel*, para 80.
[404] *Aquilla Steel*, para 78.
[405] *Aquilla Steel*, para 71.
[406] *Aquilla Steel*, para 78.

### 4.6. The interchange between the MPRDA and NEMA.

Mining projects are very complex and involve various aspects which are regulated by other laws. Mostly, mining affects the environment and that has an adverse effect on the rights to the environment that is not harmful to health as enshrined in the Constitution.[407] The National Environmental Management Act 107 of 1998 (NEMA) gives effect to the rights to an environment that is not harmful. This Act was enacted to provide a decision-making framework for matters affecting the environment. It was further intended to establish institutions that would co-ordinate environmental functions performed by state organs.

The driving force behind this Act was the principle that every person must live in an environment that is not harmful to their health and well-being. Furthermore, it ensures that the State advances equality for everyone when it comes to social, economic, and environmental rights. The State possesses the necessary resources to enforce laws that protect the environment as individuals can never be trusted that they would preserve the environment without State intervention. The environment must be protected so that it can be preserved for generations to come.

Both NEMA and MPRDA work hand in hand toward the same goal of protecting the environment. NEMA places a duty to the Minister of the Department of Water and Environment Affairs to oversee the implementation of the Act and to work with the Minister of the Department of Mineral Resources and Energy to ensure that the objectives on the Act are achieved in the mining industry.[408] The Act provides clear details of how this should be conducted. NEMA's objectives must be followed before granting any authorisations to commence mining activities.[409] In addition, all other relevant State departments responsible for administering environmental laws must be consulted.[410]

On the other side, the MPRDA places a duty on the Minister of the Department of Mineral Resources and Energy to consult with a minister responsible for the implementation of NEMA

[407] *Mfolozi Community Environmental Justice Organisation and Others v Tendele Coal Mining (Pty) Ltd and Others* (2023) 3 ALL SA 768 (KZP), para 7.
[408] *Mccasand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC), para 11.
[409] *Mccasand*, para 12.
[410] *Mccasand*, para 13.

when considering applications.[411] This exchange between the two Acts ensures the protection of the environment which is of utmost importance to the constitutional rights of others.

### 4.7. Conclusion.

The mining industry was previously regulated under the premise that the owner of the land was also the owner of the mineral resources found on his or her land. This arrangement created mineral rights which were sometimes severed from the land ownership and formed part of an individual estate and they were transferable to another person. The State played a passive role in terms of dealing with mineral rights. However, it had a critical role of granting authority before an individual could exercise their mineral rights. The State used to set guidelines that were followed before authority could be obtained and an authority could be revoked if not properly exercised.

Only landowners were able to benefit from the mining and the majority who were landless were excluded. The democratic dispensation had the task of reversing the previous injustices and the mining industry was not an exception. The MPRDA was promulgated as a vehicle for change, and it placed all the mineral resources under the custody of the State. It further included clauses that were aimed at transforming the industry by prioritising people who were previously disadvantaged. The State must ensure that they grant mining and prospecting rights to people according to guidelines set by the Act.

The MPRDA requires people who are applying for mining rights to consult with landowners. There have been concerning incidences where consultation was not properly conducted and that has led to numerous court cases which include the *Bengwenyama* case. Furthermore, the State has been accused of favouring mining companies that do not respect the provisions of the Act. This has led to serious doubts levelled against the State regarding its capacity to discharge duties as mandated by the Act.

The changes brought by the Act were very necessary, but it also created some of the unintended results. By placing the mineral resources under the custody of the State, the Act limited the protection of rights in land. This created a serious debate regarding mining rights and the right not to be deprived of land. This debate is even more intense when it comes to the protection of

[411] *Mccasand*, para 8.

informal rights in land as their deprivation requires consent as per the Protection of Informal Rights in Land Act (IPILRA). The following chapter will dwell more on the debate regarding the protection of informal rights in land against mining and prospecting rights.

## CHAPTER FIVE: CURRENT LEGAL POSITION REGARDING THE PROTECTION OF INFORMAL RIGHTS IN LAND AGAINST MINING-RELATED DEPRIVATION.

### 5.1. Introduction

This chapter contains a discussion about the current position on the protection of informal rights in land when facing deprivation caused by mining. It critically discusses the cases that shaped this position. The chapter further looked at the advantages and disadvantages of the current position. In this chapter, foreign jurisdiction is discussed which also covers the lesson that can be learned from Kenya which is using the consent requirement.

### 5.2. Discussion of the current legal position

In the introductory chapter, it was discussed that informal rights in land are currently protected by IPILRA which provides in Section 2 that the holders must give consent before they are deprived of their rights in land.[412] The protection of these rights is very important as it derives from the Constitution in section 25 (6) as discussed above in chapter one. Mining-related deprivation places the protection of informal rights in land in a very tricky position considering that the mining industry is also required to blossom to boost the economy of the country. The mining industry is governed by the MPRDA which provides in Sections 16 and 22 respectively that affected parties must be consulted by mining companies applying for mining and prospecting rights. IPILRA and the MPRDA provide two differing approaches, understandably so because they are pursuing different objectives.

The two concepts of consultation from MPRDA and consent emanating from IPILRA have caused a serious conundrum in terms of the approach that should be followed when people are deprived of informal rights in land for mining purposes. The holders of informal rights in land do not want to be easily deprived of their land rights and they rely on that they must give their consent before the deprivation. On the opposite side, mining companies oppose the argument that consent should be solicited and argue that consultation should take place as per the MPRDA. This has resulted in court battles in the instances where holders of informal rights in land are refusing to vacate their land and state that the mining companies must get their consent

[412] IPILRA, section 2.

first. There are so many dynamics that exacerbate the conflict between these two parties, and some shall be discussed later in this chapter.

### 5.2.1. *Intervention by the Constitutional Court.*

The conflict between the two parties has even escalated to the courts of law which have been tasked to decide on this subject. The case of *Maledu* in the Constitutional Court set a precedent about the route to be followed in this conundrum. The applicants in the case including Grace Maledu who appears on the name of the case, were members of a community called Lesethleng whose forebears bought a farm in 1919.[413] Due to previously racially discriminatory laws, they were unable to register the farm under their ownership held jointly.[414] The farm was registered under the Minister who in turn held it in trust for the entire community of Bakgatla-Ba-Kgafela of whom the Lesethleng community is a part.[415] The reason behind that was that the Lesethleng community was not recognised as an independent entity because it formed part of the Bakgatla-Ba-Kgafela which was bigger and recognised as a community.[416] The arrangement was done with a clear understanding that the Lesethleng community as the buyers of the farm were the owners and not the whole community of the Bakgatla-Ba-Kgafela community.[417] The respondents in the matter were Itereleng Bakgatla Mineral Resources (Pty) Limited (IBMR) which was the first respondent and Pilanesberg Platinum Mines (Pty) Limited the second respondent, both respondents were awarded mining rights over the farm in question.[418]

After the respondents were awarded mining rights, IBMR proceeded to sign a surface lease agreement with the Minister and the Bakgatla-Ba-Kgafela Tribal Authority on 28 June 2008.[419] The reason for not to specifically engaging the Lesethleng community can be easily seen in that it was because the land was not registered in their name. As the respondents were preparing for full-scale mining, the applicants decided to approach the court and obtain a spoliation order to stop the mining.[420] The respondents retaliated by seeking an eviction order in the high court and further sought an interdict against the applicants restraining them from entering the farm.[421]

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[413] *Maledu* at para 12.
[414] *Maledu* at para 12.
[415] *Maledu* at para 12.
[416] *Maledu* at para 12.
[417] *Maledu* at para 12.
[418] *Maledu* at para 11.
[419] *Maledu* at para 14.
[420] *Maledu* at para 14.
[421] *Maledu* at para 15.

The respondents argued in court that they consulted with the affected parties as required by the MPRDA.[422] Their argument was based on the fact that they had fulfilled their duty as required from their side.

The applicants challenged the application and asserted that they were the owners of the farm because they had informal rights in land as provided by IPILRA.[423] As a result, the respondents were compelled by section 2(1) to get their consent before depriving them of their rights to land and that did not happen.[424] The High Court rejected the submission by the applicants and stated that they were not the owners of the land as it was registered under the Minister's name and held in trust for the Bakgatla-Ba-Kgafela community.[425]

The High Court further accepted that consultation was conducted between the parties as required by the MPRDA. It was held that the respondents had consulted with the entire Bakgatla-Ba-Kgafela community, and the applicants were part of that community.[426] The said consultation meeting took place on the 28th of June 2008 at a Kgotha Kgothe where the community consented to the mining.[427] As discussed above, this is the same day when the lease agreement was signed. The court held that it was not required that consent be obtained from each person with informal rights in land, it was sufficient that consent was given by the community in a meeting at which the applicants were present.[428] The High Court granted the eviction order to the respondents and further issued the interdict against the applicants from entering the farm.[429]

The decision by the High Court was appealed to the Constitutional Court and there were two issues that the court had to deal with. The second issue was relevant to this research being whether the applicants did consent to the deprivation of their informal rights in land as required by IPILRA.[430] When dealing with this issue, the court emphasised that when interpreting the legislation, the objects, spirit, and purports of the Bill of Rights must be considered.[431] It was

[422] *Maledu* at para 15.
[423] *Maledu* at para 16.
[424] *Maledu* at para 16.
[425] *Maledu* at para 17.
[426] *Maledu* at para 17.
[427] *Maledu* at para 17.
[428] *Maledu* at para 21.
[429] *Maledu* at para 18.
[430] *Maledu* at para 42.
[431] *Maledu* at para 44.

further necessary that the court consider the purpose of the legislation in its entirety and the international law.[432] This case triggered two provisions of the Constitution that were to be considered during the interpretation. It was firstly section 25(6) which provides for the security of tenure for land that is insecure due to previous racially discriminatory laws.[433] Secondly, it was section 211 which recognises the authority of traditional leadership and customary law subject to that they pass constitutional muster.[434] These provisions guided the court to reach its conclusion.

In addressing this issue, the court had to look at the objectives of both statutes being the MPRDA and IPILRA. The main objectives of the MPRDA were highlighted as to place minerals under the custodian of the State, in turn, the State would hold the minerals on behalf of the people.[435] The State had to ensure that minerals were exploited following the requirements of the Act which included amongst other things consultation with landowners, lawful occupiers, and affected or interested people.[436] The Act further requires that mining rights holders comply with all the applicable provisions and other statutes that cater for relevant issues.[437]

IPILRA, which is a temporary Act, was enacted to serve an obligation placed by the Constitution. In summary, the court highlighted that the Act was enacted to protect informal rights in land as they are not adequately protected.[438] It is provided by Section 2 of the Act that a person cannot be deprived of their right to land without their consent. In the case where land is held on a communal basis, deprivation can happen based on the custom or usage of that community.[439] This section offers protection to informal rights in land as mandated by the constitution.

Both parties made their submissions before the court to support their position on the case. The applicants submitted that as they were the descendants of the purchasers of the farm, they should have been consulted specifically not the entire village of Bakgatla-Ba-Kgafela.[440] It was

[432] *Maledu* at para 44 and 46.
[433] *Maledu* at para 47.
[434] *Maledu* at para 48.
[435] *Maledu* at para 50.
[436] *Maledu* at para 53.
[437] *Maledu* at para 54.
[438] *Maledu* at para 60.
[439] *Maledu* at para 62.
[440] *Maledu* at para 65.

further argued that although the farm was not registered in their name that did not extinguish the fact that they were the true owners of the farm.[441] The applicants emphasised that they had informal rights in land therefore the respondents were supposed to get their consent first before depriving them of their rights in land as per IPILRA.[442]

The respondents countered the arguments of the applicants and made submissions in favour of consultation. They argued that the applicants were consulted, and they did not object to the mining, instead, they agreed.[443] This argument was based on the meeting and subsequent consent they obtained from the entire village of Bakgatla-Ba-Kgafela. They further contended that it is not dependent on the surface land occupiers to give their consent before mining rights can be awarded, hence consultation is sufficient.[444] Furthermore, the respondents stressed that mining rights are superior to surface land rights therefore they should prevail in case there is a conflict between the two.[445]

The issue of ownership of the farm was avoided by the court. The court held that it was not prudent to determine whether the applicants were owners of the farm as that matter was still pending in another court.[446] It was decided by the court that IPILRA should be viewed on an equal footing as the MPRDA.[447] Turning to the issue of IPILRA and the MPRDA the court held there was no conflict between the Acts, therefore they can apply concurrently.[448] The court further concluded that the resolution of the meeting at Kgotha Kgothe was not sufficient to meet the consent requirement as per IPILRA therefore consent was not obtained.[449] In rejecting the resolution, the court reasoned as follows:

> "In short, the respondents submitted that the *kgotha kgothe* of 28 June 2008 deprived the applicants of their informal land rights in terms of the customs and usages of the Bakgatla as contemplated in section 2(2) and (4) of IPILRA. In support of this contention, the respondents relied on a resolution adopted by the Bakgatla Ba Kgafela at the *kgotha kgothe* of 28 June 2008. But this resolution does no more than merely indicate that it was adopted and signed by Kgosi Pilane and a representative of Barrick.[95] Thus, there is no

[441] *Maledu* at para 65.
[442] *Maledu* at para 67.
[443] *Maledu* at para 74.
[444] *Maledu* at para 74.
[445] *Maledu* at para 75.
[446] *Maledu* at para 83.
[447] *Maledu* at para 106.
[448] *Maledu* at para 106.
[449] *Maledu* at para 108.

shred of evidence to substantiate the respondents' assertions that the applicants were deprived of their informal land rights in conformity with the prescripts of section 2(4) of IPILRA."[450]

The case of *Maledu* was groundbreaking on this issue of conflict between mining companies and holders of informal rights in land. It further settled a debate on whether granting of mineral rights does constitute a deprivation of land. In answering this question, the court quoted the case of *Mkontwana v Nelson Mandela Metropolitan Municipality* where it was held that deprivation occurs when there is an interference with the use or enjoyment of the property which goes beyond normal.[451] In this case, the court held that the fact that mining operations were not going to proceed whilst the applicants were occupying the land meant that there would be a deprivation of their rights in land as required to relocate.[452]

### 5.2.2. *Baleni v Minister of Mineral Resources.*

The case of *Baleni v Minister of Mineral Resources* was seized with an almost similar issue, hence the *Maledu* judgment was largely used as a point of reference. The applicants were members of the community, and they were seeking a declaratory relief which included that the minister cannot grant mining rights over land held through informal rights land without getting consent from holders as per IPILRA.[453] The main respondents consisted of the Minister of Mineral Resources and Transworld Energy and Mineral Resources (SA) PTY LTD a mining company. This case was also precise about the proper manner that should be followed before deprivation of informal rights in land being whether holders should give their consent, or they must just be consulted.[454] Although there were so many other issues, the issue of consent versus consultation took centre stage.

The community had informal rights in land and they were arguing that they must consent to deprivation of their land as required by IPILRA.[455] The respondents opposed the argument by the community stating that consultation was sufficient as per the MPRDA.[456] The respondents further submitted that the MPRDA must be placed above IPILRA considering that people with

[450] *Maledu* at para 108.
[451] *Maledu* at para 99.
[452] *Maledu* at para 102.
[453] *Baleni* at para 28.
[454] *Baleni* at para 33.
[455] *Baleni* at para 25.
[456] *Baleni* at para 26.

informal rights in land cannot refuse mining.[457] In addressing this issue, the court highlighted that section 4(2) of the MPRDA offers that the Act will prevail when in conflict with the common law.[458] The court held that the Act is silent about customary law and that proves that it is not subject to customary law under the MPRDA in case of conflict between the two Acts.[459] It can be clearly seen that the court took an approach that it was not an accident that customary law was omitted by the MPRDA, instead it wanted to give equal status in cases of conflict. The court further confirmed that both IPILRA and the MPRDA should be allowed to operate together as both Acts are catering for important aspects.[460] This meant that mining companies must consult with holders of informal rights in land and obtain their consent.

Although this judgment was viewed as a victory for the protection of informal rights in land, it was not welcomed by the State. The Department of Mineral Resources and Energy stated that they wanted to appeal the judgment due in that it diminishes their role as decision-makers for mining licences.[461] Although this statement might be true, it can be submitted that the State fails to appreciate the reasons behind the introduction of IPILRA. The Act was introduced to offer protection to unsecured land rights, and the constitution offers for the same. Furthermore, it should have also considered the financial gap between communities and mining companies.

### 5.2.3. Other relevant case law

The issues relating to consent as provided by IPILRA were further dealt with in the case of *Community Environmental Justice Organisations Mfolozi and Others v Minister of Minerals and Energy and others.* The applicants were entities which included those who advocate for the protection of mining communities and human rights.[462] The respondents included Tendele Coal Mining which operates as a mining company and the traditional leadership of the surrounding communities.[463] What is unique about this case is that the mining company was already operating, and they wanted to expand to other surrounding areas.[464]

The case also dealt with various issues, but this research will look only at the issue of consent and consultation. The applicants contended that Tendele did not consult with the community

[457] *Baleni* at para 26.
[458] *Baleni* at para 66.
[459] *Baleni* at para 66.
[460] *Baleni* at para 76.
[461] Tlale (note 109 above; 12).
[462] *Mfolozi Community Environmental Justice Organisations and Others v Minister of Minerals and Energy and Others* 2022 ZAGPPHC 304, at para 2.
[463] *Mfolozi Community Environmental Justice Organisations* at para 3.
[464] *Mfolozi Community Environmental Justice Organisations* at para 5.

and they further did not obtain their consent.[465] They further argued that it was not contested by the mining company that consent was never solicited from the community as they had informal rights in land.[466] The applicants further highlighted in their submission that Tendele relied on the consent that was given to them by the traditional leadership and they argued that it did not have authority to grant such consent on behalf of the whole community, their argument was stated as follows:

> " Finally, MCEJO contends that the traditions and customs of the community do not allow the Inkosi to made decisions that concern the households without involving or talking to the members of the individual households." [467]

The mining company opposed the argument of the applicants and submitted that they followed all the procedures required of them. They argued that they obtained the consent from the community as required by IPILRA and such consent was given to them by the traditional leadership.[468] According to Tendele, it was not necessary to obtain consent from each community member as traditional leaders has done so on their behalf.[469] They submitted the documents that supported their stance which were explained as follows in court:

> "Tendele placed two documents before this court. They are: (i) A Resolution of the MTC signed by the late Inkosi Mzokhulayo Mayson Mkhwanazi, (late Inkosi); and (ii) an affidavit deposed to by a Mr Musawenkosi Qhina Mkhwanazi (Mr MQM), a member of MTC. Mr MQM served as the deputy chairperson of the MTC when the consent was granted to Tendele to mine in Areas 4 and 5, on 7 February 2013. The MTC, as I had earlier mentioned, functions as the MTA and is constituted by 30 iziNdunas of 30 communities in Mpukunyoni area, representing about 220 000 community members. I shall soon refer to the content of the affidavit. "[470]

These documents were meant to prove that Tendele had obtained consent from the community as needed. However, the mining company further made a submission that appeared to be in contrast with their previous submission. They argued that granting mining rights does not extinguish the rights in land hence it does not qualify as deprivation, therefore consent was not necessary.[471]

The court was not pleased with the submission by Tendele that granting of mineral rights does not constitute deprivation and protection by IPILRA was not activated. The court held that this

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[465] *Mfolozi Community Environmental Justice Organisations* at para 39.
[466] *Mfolozi Community Environmental Justice Organisations* at para 39.
[467] *Mfolozi Community Environmental Justice Organisations* at para 39.
[468] *Mfolozi Community Environmental Justice Organisations* at para 41.
[469] *Mfolozi Community Environmental Justice Organisations* at para 41.
[470] *Mfolozi Community Environmental Justice Organisations* at para 40.
[471] *Mfolozi Community Environmental Justice Organisations* at para 43.

interpretation was not in the spirit of the constitution, especially Section 25(6) which offers protection to the rights in land that were previously not protected.[472] Furthermore, the court found it disturbing that Tendele argued that they were not required to get consent yet they submitted that they did get consent from the traditional authority.[473]

Turning to consent, the court further raised some issues about how consent was obtained from the traditional leadership. The resolution submitted of the meeting when consent was given did not show important details including dates, venue, people who attended the meeting information about what transpired when consent was given, and further other necessary information.[474] The only information provided was that the traditional leadership grants Tendele consent to start the mining process.[475] The court therefore rejected the consent obtained by Tendele on the basis that it lacked the necessary components to be accepted as proper consent. The court reasoned as follows when rejecting the consent granted to Tendele:

> " I now deal with the third reason why, in spite of the resolution and the affidavit, Tendele's defence must fail. Assuming that this court were to accept the affidavit as evidence of an official record of the MTC, contrary to what the law provides, then the question is, what did the Inkosi or the MTA consent to? Was the consent preceded by material information about the proposed mining activities, such as, environmental impacts. Certainly, the affidavit makes no reference to such. That a geologist spoke to those present in the meeting does not say they were provided with material information. A decision to grant consent to mine has far reaching consequences in so far is the mining operations ability to interfere with the occupiers' and landowners' rights. It is not just another allocation for a farm dwelling or cattle grazing." [476]

The court accordingly concluded that the awarding of mining rights to Tendele was invalid, although it was not set aside.[477] The applicants escalated the matter as they were seeking for an interdict against Tendele to stop mining activities.[478] This case highlighted the lack of willingness from the mining companies to ensure that they properly engage with the community before depriving them of their rights to land. They instead communicated with the traditional leadership and managed to get their consent. The consent given by traditional leadership was further not properly obtained. Furthermore, their submission that they did not need to get consent from the community as they did not deprive them of their rights in land shows that they did not care at all about engaging the community.

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[472] *Mfolozi Community Environmental Justice Organisations* at para 52.
[473] *Mfolozi Community Environmental Justice Organisations* at para 57.
[474] *Mfolozi Community Environmental Justice Organisations* at para 40.
[475] *Mfolozi Community Environmental Justice Organisations* at para 66.
[476] *Mfolozi Community Environmental Justice Organisations* at para 67.
[477] *Mfolozi Community Environmental Justice Organisations* at para 84.
[478] *Mfolozi Community Environmental Justice Organisation* at para 1.

The behaviour of the traditional leadership also raises some concern considering that they appeared to be on the side of the mining company. They gave documentation that was in support of the mining company although it was clear as the court pointed out that some valuable information was missing. This triggered the court to explain that even if it accepts that the traditional leadership has consented, it is not clear about what it has consented to because there is no proper information about how consent was obtained.[479] The decision by the traditional leadership to support mining under such circumstances raises serious questions about what motivated them.

These cases place IPILRA on an equal footing with the MPRDA. They play a very important role when it comes to the protection of informal rights in land against mining-related land deprivation. Currently, the holders of informal rights in land must consent to the deprivation of their land rights and this position provides them with a meaningful chance to engage mining companies. The position taken in these cases is also very important in ensuring accountability from traditional leaders when handling the mining matters as now people had to give their consent.

### 5.3. Implementation of consent requirement.

IPILRA does not clarify what should constitute proper consent from the holders of informal rights in land. It is not clear about the aspects that should be considered when consenting for instance whether compensation should be also part of the things consented to. Without a framework, it can be difficult to determine whether consent was properly obtained or not and this can open future litigation. This will further keep courts inundated with cases of this nature and poor communities will still be at a disadvantage in seeking legal assistance.

The communities consist of various groups of people which are not entirely equal in many aspects. It is important for consent granted to cover the aspirations of every person affected by mining regardless of their status.[480] The big issue is how it can be ensured that those people who are marginalised in communities can add their voices when such decisions are taken. This can include poor people, children, and women. Moreover, traditional leaders as dominant

[479] *Mfolozi Community Environmental Justice Organisations* at para 67.
[480] D Ayoude "Towards 'Free, Prior, Informed Consent' in Natural Resources Development Projects" *South African Year Book of International Law, 2019,* Volume 44. Accessed on 20 November 2023. Available at: https://doi.org/10.25159/2521-2583/7292, Accessed on 20 December 2023.

figures may be bribed to give consent or push for consent whilst neglecting the views of ordinary people.[481] The inequality that exists in society might have a major effect when decisions relating to consenting to mining projects are taken.

IPILRA allows for consent to be obtained following the custom of the people if land is held through communal means. Section 2(2) of the Act states as follows:

> "Where land is held on 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."

The intention of this provision can be noted as that it was meant to allow communities to operate according to their ways of doing things without interference when consenting to the deprivation. However, the community customs cannot always be trusted when it comes to dealing with important matters such as land because they cannot be fair sometimes.[482] Further to that, there will be a problem of ensuring that those customs are within the constitutional framework or not.

### 5.4. Unequal treatment between formal and informal rights in land.

Informal rights now enjoy advanced protection compared to formal rights in land and this creates a conundrum considering that if they are changed to formal rights that would mean they lose such protection.[483] The big question now is whether there is any need to change informal rights to formal rights as they are more protected now. Under the circumstances, it is possible that the holders of informal rights in land would refuse to have their rights in land formalised because that would mean subjecting themselves to consultation rather than consent as per IPILRA.

The decisions in the cases discussed above confirmed that holders of informal rights in land must consent before they are deprived of their land for mining purposes. This is different from what formal rights in land are subjected to as they are required to be consulted as per the

[481] Ibid.
[482] Ibid.
[483] Badenhorst (note 3 above)

MPRDA. Formal rights in land consist of the instance where the landowner has a title deed that confirms that indeed they own that land.[484] What exacerbates the problem is that the holders of informal rights in land can have a choice to refuse mining whilst the formal rights do not enjoy the same. The different treatment between the two raises serious questions of whether it is justified or not.

There is already a concern that allowing informal land rights holders to consent to deprivation related to mining will offer them an advantage compared to formal rights in land. In the *Baleni* case, the mining company as respondent argued that maintaining this form of protection would create a special category of rights in land which would hinder mining projects.[485] They emphasised that IPILRA should be interpreted to give informal rights in land equal status with formal rights in land.[486] It was clear from their submissions that they wanted to maintain consultation which is much easier than consent.

The informal rights in land were unsecured for a very long period and that necessitated drastic changes which were brought by IPILRA which provided for consent before deprivation. As highlighted, consent offers an advantage over consultation, and that inequality seems to be justified only by the previous insecurity of informal rights in land.[487] It can be accepted that previously, lack of protection demanded serious action which would ensure that such an unfortunate event does not occur again. Further to that the Constitution demanded the protection of informal rights in land and that can be used as another justification of strong protection given to informal rights in land.[488] The protection of informal rights in land through consent seems to be justified, however, the question of different treatment with formal rights in land is not fully answered.

The protection of informal rights in land through the consent requirement is not unique to South Africa, however, it is catered for by international law. In the case of *Baleni*, the court justified the advantage given to informal rights in land by citing that international law provides for the

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[484] E Sjaastad, B Cousins "Formalisation of land rights in the South: An overview" *Land use Policy*, 26(1) 1-9, January 2009. Available at: https://www.sciencedirect.com/science/article/pii/S0264837708000690?via%3Dihub. Accessed on 10 January 2023.
[485] *Baleni* at para 68.
[486] *Baleni* at para 68.
[487] PJ Badenhorst (note 3 above).
[488] Ibid.

consent requirement before land deprivation. [489] The court quoted the General Recommendation No. 23: Indigenous Peoples issued in terms of the Convention on the Elimination of All Forms of Racial Discrimination, which acknowledges that indigenous people previously suffered and still suffer from injustice which includes deprivation of their land.[490] Accordingly, it requires the States to ensure that every decision concerning indigenous people's rights or interests is taken with their informed consent.[491]

The court in *Baleni* further looked at the International Covenant on Economic Social and Cultural Rights (ICESCR) which concluded in General Comment 21 of 2009 that the States must ensure protection of communal land and if deposed without their consent such land must be returned.[492] This covenant was signed by South Africa in 1994 and the decision to ratify it was taken in 2012.[493] The court further looked at the decision of the Human Rights Committee where it was held as follows:

"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-

> "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." [494]

[489] *Baleni* at para 78.
[490] *Baleni* at para 78.
[491] *Baleni* at para 79.
[492] *Baleni* at para 80.
[493] F Viljoen, N Orago "An argument for South Africa's accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the light of its importance and implications" Potchefstroom Electronic Law Journal, volume 17 (6) 2014. Available at: https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812014000600010. Accessed on 11 January 2023.
[494] *Baleni* at para 81.

Even on the continent, the requirement for prior and informed consent has been provided for the protection of rights in land for indigenous people. The entities entrusted with interpreting the African Charter have emphasised that decisions concerning land must never be made without the prior and informed consent of those people.[495] Although the right to consent to land deprivation is recognised internationally, some governments are still reluctant to appreciate it.[496] This is concerning looking into the fact that the government must be at the forefront when it comes to protection of rights in land for the vulnerable citizens. However, it is not surprising because the government makes profits from the mining projects.[497]

IPILRA operates temporarily, and it can be discontinued or changed at any time. The chances are that if the Act ceased to exist, another Act would be enacted to take over and provide protection to holders of informal rights in land. However, the big question is whether that Act will still advocate for the consent of holders' informal rights in land before the deprivation. This has resulted in the calls to make IPILRA a permanent Act to ensure the protection of informal rights in land through consent.[498] The importance of consent has been discussed above and the only issue now is based on what should happen with the formal rights in land. This question will be answered when discussing the foreign jurisdiction.

Consent can be viewed as the highest manner that offers protection to informal rights in land. It can also be said that consultation if done properly can also be effective when it comes to enhancing the protection of informal rights in land. For proper consultation, community members must be furnished with all the information pertaining to the proposed mining project so that they will be able to engage mining companies during consultation.[499] Mining companies must address all the questions raised by the community during the consultation and avoid doing consultation as a tick box.[500] Giving inaccurate information during a consultation is criminally punishable.[501] It can be seen that consultation has to be done in good faith and with the intention of finding a solution to any obstacle that may arise during the engagement.

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[495] *Baleni* at para 82.
[496] Ayoude (note 480 above).
[497] Ibid.
[498] Meyer (note 53 above; 14)
[499] Tlale (note 109 above; 15).
[500] Tlale (note 109 above; 15).
[501] Ibid.

The characteristics of the people with informal rights in land are further used as a justification to offer them strong protection through consenting to the deprivation of their rights in land. It can be accepted that people with this form of land rights are more vulnerable and financially unstable.[502] It is therefore important to ensure that their rights in land are well protected and everything is clear just to avoid unnecessary yet expensive court battles. Foreign jurisdiction can be very important in trying to get solutions to our problems in this matter.

### 5.5. Discussion of foreign jurisdiction.

The mining industry is operating in many countries across the globe, and it contributes immensely to their economies. Even though the mineral resources can vary from each country, the implications of mining are almost the same. Protection of rights in land for the surrounding communities affected by the mining is not guaranteed as the governments are more interested in investments.[503] As a result, they pass laws that will make things easier for mining companies to attract investments while placing communities in a disadvantaged position.[504]

#### Kenya

Kenya is an African country that has some similarities with South Africa concerning the mining industry. The Kenyan Constitution offers protection to people who may face the risk created by the extractive sector.[505] The Constitution further obliges the State to ensure that minerals are exploited sustainably and there is an equitable distribution of the benefits of mineral resources.[506]

The mining industry in Kenya is regulated by the Mining Act 12 of 2016.[507] Just like the MPRDA in South Africa, this Act places the minerals of the country under the custodianship of the State. Section 6 of the Act deals with the ownership of minerals and states as following:

> "PART 11—OWNERSHIP OF MINERALS
>
> 6. (1) Every mineral— in its natural state in, under or upon land in Kenya; in or under a lake, river, stream, or water courses in Kenya; in the exclusive economic zone and an area covered by the

[502] Ayoude (note 480 above)
[503] O B Igbayiloye, D Bradlow "An assessment of the regulatory legal and institutional framework of the mining industry in South Africa and Kenya for effective human rights protection: Lessons for other countries" *African Human Rights Law Journal*, 2021, 363.
[504] Ibid.
[505] Ibid 364.
[506] Ibid 365.
[507] Ibid 364.

> territorial sea or continental shelf, is the property of the Republic and is vested in the national government in trust for the people of Kenya.
>
> (2) Subsection (1) applies despite any right or ownership of or by any person in relation to any land in, on or under which any minerals are found.
>
> (3) The national government's control over minerals vested in it shall be exercised in accordance with the provisions of this Act."

This Act further sets the procedures that must be followed by the State when governing the minerals of the country as subsection 3 above obliges the State to exercise their responsibility according to the Act. The above section further emphasises that the government is in charge of the minerals on behalf of the people of the country not for itself. This approach is similar to the South African stance as the State is also tasked with being a custodian of minerals on behalf of the citizens of the country.

The State as a custodian bears a duty to deal with the granting of mineral rights. The Cabinet Secretary as a representative of the State deals with granting or revoking of mineral rights.[508] The procedures that are required by the Act before granting mineral rights include engaging the surface landowners. According to Section 37 of the Act, mineral rights cannot be granted over private land without obtaining the consent of the registered owner. However, the owner shall not unreasonably refuse to consent.[509] For consent to be properly obtained, the owner of the property must enter into a binding agreement with the applicant or government to proceed with mining or prospecting operations.[510] Furthermore, there must be an agreement regarding the payment of adequate amounts to the owner.[511] If there is a change of land ownership after consent has been granted, the arrangement will remain as agreed.[512]

The Act further catered for the instances where land was held by the community. Regarding a community, mineral rights shall be granted by obtaining consent from the authority tasked with administering that community land or the National Land Commission if the land is not registered.[513] The requirements for valid consent are the same as in the case of privately-owned land. There is no difference in treatment between the land that is privately owned and the land

[508] Mining Act 12 of 2016 (Kenya), Section 32.
[509] Ibid Section 37.
[510] Ibid Section 37.
[511] Ibid Section 37.
[512] Ibid Section 37.
[513] Ibid Section 38.

owned by the community or unregistered land. In Kenya, they have preferred to go for consent compared to consultation on all kinds of land.

Although consent is required for the deprivation of land, there is a limitation to this right. Consent cannot be unreasonably refused and if that happens, the State can acquire that land on behalf of the government.[514] This can further happen when the State considers that the refusal to consent was against the national interest.[515] The right to consent in this context means that it is not entirely on the people to refuse mining but the mining companies must engage people thoroughly to ensure that they are satisfied about the proposed project.[516]

The approach of Kenyan law is different from the South African jurisdiction. In Kenya, they treat all the types of rights in land equally and use a blanket approach when they are being deprived for mining purposes. This is different to the South African context because holders of formal rights in land or common law landowners are consulted whilst those with informal rights in land must give their consent. This unequal treatment has raised some questions as discussed above, whilst in Kenya those questions cannot arise as the treatment is the same across. It further creates certainty on the basis that is easier for mining companies to understand what is required from them, but in the South African context, they will also need to know whether land is held as formal or informal before engaging the community.

The consent requirement has been credited with offering protection to informal rights in land as mentioned above. As mentioned in some of the discussed cases, mining companies sometimes try to bypass communities and those with formal rights in land can be subjected to such behaviour regarding consultation. It is therefore important that even those with formal rights in land can be protected through the consent requirement as it happens in Kenya. At the end of the day, holders of formal rights in land are ordinary people who can be mistreated like others.

Allowing people to give their consent to deprivation can be very disadvantageous to the mining industry as people can refuse easily. The industry is very important for boosting the economy of the country hence there is a need for it to proceed as well. The limitation on the consent by Kenyan legislation was meant to keep the industry going which is also for the importance of

[514] Ibid Section 40.
[515] Ibid Section 40.
[516] Igbayiloye, (note 503 above; 364).

the country. Without such limitation, people can easily refuse consent without a good reason which in turn will affect the mining industry negatively.

The Kenyan legislation further offers more clarity about what should constitute proper consent. Although it might not be sufficient, the Act does state some of the elements of consent. IPILRA does not state what would be proper consent, it only outlines the procedure to be followed when consenting in communal land. Components of proper consent can be necessary to clarify the target for mining companies before embarking on seeking consent.

### 5.6. Conclusion

The conflict between holders of informal rights in land and mining companies has been escalating to courts in recent years. Holders of informal rights in land brought these matters to court to ensure that they enforce the protection of their rights in land through IPILRA which provides that they must give their consent before deprivation. On the other side, mining companies oppose these court cases on the basis that consultation, as provided by the MPRDA, is sufficient before the deprivation of informal rights in land.

In these cases, the courts have decided that both Acts should apply concurrently and holders of informal rights in land must consent before deprivation. Although these cases have been lauded as a victory for mining communities with informal rights in land, some questions have been also raised against them. There has been a serious concern about the inequality that has been created between formal and informal rights in land. Furthermore, the government has raised concerns that their role in granting mineral rights will the diminished. However, courts have justified that inequality on the basis that even international law supports the consent requirement before the deprivation of informal rights in law. It is further applicable in other jurisdictions. The only unresolved issue is that IPILRA is temporary, and it might be changed anytime, and another approach might be adopted instead of consent.

The discussion on the foreign jurisdiction of the Kenyan model appears to be helpful and gives some possible solutions to some problems faced by South Africa. It was discovered that Kenya adopted consent rather than consultation with the difference that the owner shall not unreasonably refuse to consent, and this applies to all landowners. However, they have limitations in place to avoid abuse of power by surface land occupiers. Furthermore, the consent requirement applies to everyone in the country regardless of any form of right in land they possess.

# 6. CHAPTER SIX: RECOMMENDATIONS AND CONCLUSION

## 6.1. Introduction

Protection of informal rights in land can be considered an important duty imposed on the State as it is enshrined in the constitution. IPILRA was enacted to conduct that task and offers protection by requiring consent before the deprivation of rights in land. Although the Act was enacted to be temporary, it has been renewed yearly. The State has attempted previously to enact permanent legislation, but it has proven to be a difficult task. Even now there are still attempts to enact permanent legislation.

There are serious aspects that are making it difficult to enact a permanent Act that will regulate informal rights in land. As previously discussed, those aspects are mainly related to how informal rights in land are structured. Informal rights in land are extremely broad and multi-dimensional which makes it difficult to regulate through legislation. This has resulted in keeping a temporary Act which is used to buy time until the legislature passes a permanent one.

In recent years, the mining industry largely operates in areas with informal rights in land that are protected by the IPILRA. The mining industry is regulated by the MPRDA which places all the minerals under the custodianship of the State. The Act has created two stakeholders in the land, being the State as the custodian of minerals underneath the land and the surface landowners or occupiers. In cognisance of that situation, the Act provided that the surface landowners must be consulted before deprivation of their rights in land for mining purposes.

Both IPILRA and the MPRDA deal with land but offer two contrasting processes being consent or consultation before deprivation, this has led to a serious conundrum. Conflicts have ensued between two holders of informal rights in land and mining companies relating to whether consultation or consent should prevail before deprivation of land. The courts in *Maledu* and *Baleni* resolved this issue by concluding that there is no conflict between the two Acts therefore they can operate concurrently. As a result, the current legal position is that the holders of informal rights in land must be consulted, and they must give their consent before deprivation.

## 6.2. The consequences of the current legal position.

The MPRDA is clear about formal rights in land and states that holders must be consulted by mining companies before deprivation of their rights in land. As previously discussed, there is

a different treatment between formal and informal rights in land. It can be argued that this situation will create a very tricky scenario for mining companies before they embark on the land deprivation processes. The mining companies will now need to establish first whether people occupying the surface land have formal or informal rights in the land. Once that question is answered, they will then know if should they consult, or seek consent.

Furthermore, there is a possibility now that holders of formal rights in land might want to also enjoy the same benefit of consenting to the deprivation of their rights in land. It appears now that the MPRDA renders formal rights in land insecure as the mineral rights can be granted anytime by the State and only consultation is needed by the mining companies.[517] This might open another possible unnecessary court battle. Under such circumstances, it can be recommended that uniformity amongst these rights in land is needed. When achieving that uniformity, the strong sense of protection for informal rights in land must not be compromised as it is enshrined in the constitution.

Without a doubt, permanent legislation is needed to ensure that there is stability. Although there have been attempts to enact permanent legislation to cater for informal rights in land, the attempts have been unsuccessful. Even recently, there is an ongoing process to get new legislation in place. At this stage, it is difficult to predict what is going to happen in the future as the Act might not be renewed. Although another Act will come into place, the issue will be whether consent requirements will be included in that new Act.

The current legal position as articulated in the case of *Baleni* and *Maledu* is mainly based on IPILRA as the source of consent requirement. If the Act is not renewed or replaced with another that caters for consent, both cases will be irrelevant and that will mean that the litigators especially holders of informal rights in land wasted their time and resources.[518] This again raises the importance of finding a permanent solution to the issue of informal land rights because delaying might be very costly to all parties involved.

The protection offered to informal rights in land through IPILRA is superior to that of formal rights relating to mining deprivation. The justification behind this is the history of vulnerability and the international treaties that support their protection through consent.

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[517] Badenhorst (note 3 above).
[518] Meyer (note 53 above; 4).

### 6.3. The diminished role of the State as a custodian of mineral resources.

The MPRDA placed all the minerals under the custodianship of the State, which is supposed to ensure that they are utilised for the benefit of the people. The State issues mineral rights to applicants and ensures that all other procedures are followed. There is a concern that the courts by allowing holders of informal rights in land to consent to mining deprivation, failed to consider the role of the State as a custodian of minerals charged with a duty of granting mineral rights.[519] The basis of this argument is that if holders of informal rights in land refuse to grant consent, the State will be unable to issue mining or prospecting rights over that land.

It was highlighted previously that many mineral resources are discovered on the areas that have informal rights in land. The current legal position as articulated in *Baleni* and *Maledu* means that many possible chances of mining will be affected if consent is withheld. As a result, a proper way of balancing the conflicting interests is needed in the circumstances. What should be guarded against is placing mining interests above the rights of people living in areas where minerals have been discovered.

The MPRDA further requires the State to ensure equitable access to mineral resources. To give holders of informal rights in land authority to veto mining will limit the state in providing equitable access.[520] This is a very critical role for the State, and they require to be given a clear chance to execute it. Under the circumstances, it will be difficult to do so as they will not be able to know if a particular mining company will be able to get consent from the community. The State might prefer a certain mining company or group, but the community might not like that company and refuse their consent.

The consent requirement is important to force mining companies to sufficiently engage community before deprivation. However, there must be a proper manner of dealing with a situation where there is an unreasonable refusal to grant consent. Kenya created their way of managing this situation by stating that the State can take the land if consent is refused unreasonably or it is in the interest of the country. It can be recommended that South Africa follows a model adopted by Kenya. The MPRDA can be amended and require consent from the surface occupiers before deprivation of their rights in land. The Act should not differentiate

[519] Thambi (note 130 above; 530).
[520] Ibid.

between formal or informal rights in land, and the owner shall not unreasonably refuse to consent. Furthermore, a reliable model must be created of ensuring that there is a fair limitation to this right to consent. By so doing, the country will be able to ensure protection of informal and formal rights in land against mining related deprivation. It will also be able to further their objective of equitable access to mining by addressing unreasonable refusal to consent through limitation clause.

### 6.4. Possibility of obtaining genuine consent.

Consent must be based on the desires of the holders of informal rights in land. Affected people must be able to raise their views during the process of obtaining consent but it does not mean that all of them must agree to mining.[521] Allowing everyone to participate meaningfully in the process is very important in legitimising the process. Mining companies must approach the process with good intentions, and they must be ready to accept if consent is refused.

Mining companies must avoid the temptation of cutting corners by obtaining consent from traditional leadership. Engaging traditional leadership makes the task of obtaining consent easier, however such consent can lack authority of the ordinary people. The *Tendele* case discussed above stands as an example where the traditional leadership and mining company did not follow the correct procedures of obtaining consent as the documentation submitted to court to prove such lacked the necessary information.[522] The traditional leadership supported the mining company although it was clear that adequate information was not acquired. Their support to the mining company which did not give all details to them, shows that traditional leadership can be lured to the side of mining companies. It is therefore important that mining companies facilitate engagement with the whole community to avoid obtaining consent that represents few people especially traditional leadership.

Although the requirement of consent appears to be more demanding on the side of mining companies, it must be viewed on a positive light. The mining communities are vulnerable and financial unstable as previously mentioned. Consenting to deprivation of their rights in land offers them protection. The discussion above has also shown that mining companies have in some instances flouted the consultation processes and that makes it necessary to have the

[521] Barrera-Hernandez (note 65 above; 79).
[522] Mfolozi Community Environmental Justice Organisation and Others V Minister of Minerals and Energy and Others 2022 ZAGPPHC 305 at para 68.

requirement of consent by the holders of informal rights in land before deprivation. In conclusion, it would be important to continue with the right to consent and extend it to formal rights in land holders. Land is particularly important to all people and protection of their rights in land is paramount and also promotes the values of the Constitution.

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Mr Senzeka Mntambo (215032070)
School Of Law
Howard College

Dear Mr Senzeka Mntambo,

**Original application number:** 00014850
**Project title:** A critical analysis of the protection of informal rights in land against mining related land deprivations.

## Exemption from Ethics Review

In response to your application received on 17 November 2021 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

**PLEASE NOTE:**
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

**Mr Simphiwe Peaceful Phungula**
**obo Academic Leader Research**
**School Of Law**