

Conflicting 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



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Abstract

The South African customary land tenure system is currently administered in terms of the *Interim Protection of Informal Land Rights Act* 31 of 1996 (IPILRA). As the name suggests, this is a temporary measure to protect vulnerable customary land rights while awaiting permanent communal land tenure legislation. In terms of section 2(1) of the IPILRA, no person may be deprived of any informal right to land without his or her consent. This provision is subject to subsection (4) of the IPILRA, the *Expropriation Act* 63 of 1975 or any other law that provides for the expropriation of land rights. Accordingly, section 2(4) states that no one may be deprived of his or her informal rights in land unless it is through the *Expropriation Act*, any valid land expropriation legislation or through custom that is endorsed by a majority of the community members.

Nevertheless, the Department of Mineral Resources (DMR) and mineral right applicants habitually contravene this consent provision by not including the beneficiaries of the IPILRA in the mineral right application process. The DMR awards licences without the consent of communities because the *Mineral and Petroleum Resources Development Act* 28 of 2002 (MPRDA) authorises it to act as the custodian of mineral resources on behalf of all South Africans. When an application for mineral rights is received, it is the DMR's duty as a custodian to ensure that all the requirements of the MPRDA have been complied with. These levels of engagement, consent under the IPILRA and consultation in terms of the MPRDA, form the basis of the analysis of the decision of *Baleni v Minister of Mineral Resources*. Although the court decided that the acceptable level of engagement is consent in terms of the IPILRA, this article argues that consultation and consent are not mutually exclusive, and hence require reading the two pieces of legislation together.

Keywords

Customary land rights; consultation; consent; custodianship; Xolobeni community.

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1 Introduction

Patterns of land ownership and interests in land in South Africa are to a great extent remnants of the racial discrimination that characterised the South African apartheid regime.¹ During apartheid, black people were prevented from owning or occupying land in particular parts of South Africa.² Soon after apartheid, the Constitution,³ followed by other pieces of legislation, essentially sought to remedy the injustices of the apartheid regime. The advent of constitutional democracy introduced a new era in which black South Africans could occupy any land in South Africa.

The Constitution recognises the injustices of the past and honours those who suffered for justice and freedom in South Africa.⁴ In terms of section 25(9) of the Constitution, Parliament is mandated to enact legislation that gives effect to section 25(6), which in turn provides that any person or community whose tenure in land is legally insecure due to apartheid laws and practices is entitled either to tenure which is legally secure or to comparable redress. Currently, South African customary land rights are informal. Thus, in the absence of permanent legislation to safeguard customary landholding, the *Interim Protection of Informal Land Rights Act*⁵ (hereinafter the IPILRA) fills this gap. As the name suggests, this is a temporary measure to protect customary land rights and other informal land

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¹ Pienaar *Land Reform* 85-86; Terreblanche *History of Inequality in South Africa* 25; Kloppers and Pienaar 2014 *PELJ* 681; Hoffman 2014 *J South Afr Stud* 707; Claassens 2014 *J South Afr Stud* 762.

² Pienaar *Land Reform* 82-83; Mostert, Pienaar and Van Wyk "Land" 1-21; Kloppers and Pienaar 2014 *PELJ* 681; Hoffman 2014 *J South Afr Stud* 707. This article acknowledges the influence of colonialism on landholding patterns in South Africa, but an accurate analysis of earlier history in this context has already been dealt with extensively by Pienaar *Land Reform* ch 3; Terreblanche *History of Inequality in South Africa* 25.

³ *Constitution of the Republic of South Africa*, 1996 (the Constitution).

⁴ Preamble to the Constitution.

⁵ *Interim Protection of Informal Land Rights Act* 31 of 1996 (IPILRA).

rights.⁶ Section 2(1) of the IPILRA provides that no person may be deprived of any informal right to land without his or her consent.⁷

Equally, the *Mineral and Petroleum Resources Development Act*⁸ (MPRDA) was introduced in 2004 as the new minerals and petroleum legislation. The MPRDA places the control of minerals and petroleum in the South African state.⁹ One of the objectives of the MPRDA is to promote local and rural development and the social upliftment of communities affected by mining.¹⁰ In ensuring this objective, the Department of Mineral Resources (DMR) has an obligation to ensure that all mineral right applicants comply with the provisions of the MPRDA. Notwithstanding, there is an alarming number of disputes that appear before the courts, indicating that the DMR is failing to uphold the abovementioned objective.

Against this background, the first section of the article briefly sets out the custodianship principle insofar as it relates to mineral and petroleum rights in South Africa.¹¹ Thereafter, the judgement of *Baleni v Minister of Mineral Resources*¹² is discussed to illustrate the inconsistent provisions of the MPRDA and the IPILRA. In the next section, the levels of engagement with community members as envisaged in terms of the respective Acts, namely consent and consultation, are analysed to determine whether they are in

⁶ Pienaar *Land Reform* 167. There have been numerous failed attempts to promulgate communal land legislation in South Africa. In 1998 the Department of Land Affairs drafted the Land Rights Bill that was expected to go before Parliament by the end of 1999 but never did. This Bill proposed a category of "protected rights" created by law to secure the basic rights of rural people in the former Bantustans. In 2001 the then Minister introduced a new bill named the Communal Land Rights Bill (GN 1423 in GG 23740 of 14 August 2002 (Communal Land Rights Bill, 2002), later the Communal Land Rights Bill B67-2003, in the conviction that the 1999 version would be demanding in its implementation. This 2002 version came about as a result of the frustration of different stakeholders who appealed that an adequate amount of time had not been allocated to give proper public commentary on the Bill. However, this version was also criticised heavily for confusing administrative structures. It was later re-drafted, but certain provisions were omitted. Thereafter, this version was rushed through Parliament without any meaningful contribution by those directly affected by it. At the time of writing, the latest attempt, the Communal Land Tenure Bill, 2017 (Gen N 510 in GG 40965 of 7 July 2017) is awaiting Parliamentary approval. Also see Tlale *Critical Evaluation of the South African Land Tenure Policy* 99-100.

⁷ Section 2(1) of the IPILRA is subject to s 2(4), which provides that a deprivation is effective only if it is prompted by valid expropriation legislation, or by custom, that is endorsed by a majority of the community members.

⁸ *Mineral and Petroleum Resources Development Act* 28 of 2002 (MPRDA).

⁹ Section 3 of the MPRDA provides that all mineral and petroleum resources are the heritage of all the people of South Africa and that the state is the custodian thereof. The control of minerals is thereby entrusted to the Department of Mineral Resources. Preamble to the MPRDA.

¹⁰ Preamble to the MPRDA.

¹¹ The custodianship principle is discussed in 2 below.

¹² *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP).

conflict with one another. This discussion will lead to an examination of the constitutional implications of the failure to conform to the proper procedure in mineral right applications. The final part of the article concludes and recommends possible ways forward in the mining communities' quagmire.

2 The custodianship principle in South Africa

Section 24 of the South African Constitution provides a basis upon which the MPRDA and other environmental legislation embody the custodianship principle.¹³ Section 24 further endows the relevant authorities with stewardship powers to facilitate the enjoyment of the environment by the present and future generations.¹⁴ This constitutional provision provides a basis upon which section 3 of the MPRDA vests the control of all rights in minerals in the state. Therefore, the state, through the Department of Mineral Resources (hereinafter the DMR), is the custodian of all mineral and petroleum resources "for the benefit of all South Africans".¹⁵

Van der Schyff questions whether the MPRDA intentionally incorporated the custodianship principle in the South African law, and if so, what the legal implications of including such a notion are.¹⁶ In her enquiry she adopts custodianship as an exhibition of stewardship. She defines stewardship as "... the careful and responsible management of something entrusted to one's care".¹⁷ Accordingly, in the minerals context, the idea behind stewardship is for the state to hold and care for those minerals for the benefit of all South Africans.¹⁸ Inasmuch as it is the holder's responsibility to hold with care, everybody who interacts with the resource must observe the fiduciary relationship between the resource and the beneficiaries. This is

¹³ The custodianship principle is also found in the *National Environment Management Act 107 of 1998 (NEMA)* and the *National Environmental Management: Integrated Coastal Management Act 24 of 2008*. See further Mostert and Pope *Principles of the Law of Property* 271.

¹⁴ Van der Schyff has confirmed that the principles of custodianship and stewardship can be used interchangeably. Van der Schyff 2013 SALJ 373.

¹⁵ Section 3(2)(a) MPRDA; *De Beers Consolidated Mines v Regional Manager, Mineral Regulation Free State Region: DME 2008 ZAFSHC 40* (15 May 2008) para 6.

¹⁶ *Minister of Minerals and Energy v Agri South Africa 2012 5 SA 1* (SCA); Van der Schyff 2013 SALJ 373; Van der Schyff *Property in Minerals and Petroleum* 177.

¹⁷ Van der Schyff 2013 SALJ 372; Van der Schyff *Property in Minerals and Petroleum* 230; *HTF Developer (Pty) Ltd v Minister of Environmental Affairs and Tourism 2007 4 All SA 1108* (SCA) para 19; Legal Resources Centre 2016 <https://bit.ly/2vYrCNU>.

¹⁸ Environmentalists use the stewardship concept often, as it is closely linked with sustainability and conservation. Bennett *et al* 2018 *Environ Manage* 598. Also see s 1 of the MPRDA, which defines sustainable development as "the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that mineral and petroleum resources development serves current and future generations."

arguably the true essence of section 24 of the Constitution.¹⁹ The custodianship principle therefore sets a standard against which all the provisions of the MPRDA must be interpreted. The custodianship principle places a duty on the state to ensure that minerals and petroleum are used sustainably within the context of national environmental policies, norms and standards, while simultaneously promoting social and economic development for the benefit of society as a whole. In the performance of its role as a custodian, the state controls and issues rights and permits, and determines levies and fees incidental to the extraction of minerals and petroleum.²⁰

Although the benefits of mining are not the primary focus of this article, the discussion of the custodianship principle, which is purposed "for the benefit of all South Africans", has revealed the need to at least highlight them. In very general terms, mining activities benefit not only the community on which mining takes place but also the members therein and the country at large:

- (a) The mining community
 - (i) Employment- is one of the key benefits that the community members and the community at large derive when a mine begins its activities.²¹ Over and above this, upon closure of the mine, the employees are left with skills they did not have before mining ensued. In addition to direct employment, beneficiation²² has the potential of contributing immensely to the South African economy.
 - (ii) Community development- through infrastructure, roads, installation of electricity and water, building of schools, clinics and other businesses.²³ This in turn leads to reduced cost of living

¹⁹ Van der Schyff 2013 *SALJ* 372; Winks 2013 <https://bit.ly/30hisbr>; Legal Resources Centre 2016 <https://bit.ly/2vYrCNU>.

²⁰ Section 3(2) of the MPRDA.

²¹ Curtis 2009 <https://cutt.ly/6yWokaG>.

²² Beneficiation is defined as the process of adding value from the granting of a mining right through to the final fabrication of a consumer branded product. This process ensures that labour is not exported from South Africa to other countries for the processing of metal that has been mined locally. Baxter 2005 https://www.lbma.org.uk/assets/2c_baxter_lbma2005.pdf.

²³ Fedderke and Pirouz date unknown <https://cutt.ly/qyWoaLZ>; Curtis 2009 <https://cutt.ly/6yWokaG>.

because the community members do not have to travel far to access these vital services.²⁴

- (b) The nation, and impliedly, all South Africans
- (i) Revenue - When mining companies extract natural resources on community land, they pay revenue to the state. This revenue comes in different forms, namely bonuses, rents, royalties,²⁵ or fees and penalties.²⁶ Since mining accounts for up to 60% of exports in South Africa, this is vital for bringing cash into the country and translates into the overall development of South Africa.²⁷
 - (ii) International relations - It goes without saying that bonds are formed between exporters of minerals and the importing countries. These relations in turn create a space for South Africa and the importing countries to trade in other sectors of the economy outside mining.²⁸
 - (iii) Foreign investment - There are a number of determinant factors²⁹ to foreign investment, but mining attracts a lot of investment since it is one of the largest contributors to South Africa's gross domestic product.³⁰

All the above factors purportedly benefit all South Africans, since the money generated by mining goes into the state's purse. This is what the MPRDA intended by placing the minerals in the custody of the state. Although the custodianship principle is ideally meant to benefit all South African citizens, it has a somewhat opposite effect on customary landholders, especially if one considers the extent to which consultation is not readily part of the

²⁴ Fedderke and Pirouz date unknown <https://cutt.ly/qyWoaLZ>; Curtis 2009 <https://cutt.ly/6yWokaG>.

²⁵ Sections 1 and 11 of the MPRDA.

²⁶ Section 99 of the MPRDA.

²⁷ In 2006 South Africa produced 53 different minerals from 1,212 mines and quarries, of which 47 produced gold, 33 platinum group minerals, 89 coal and 240 diamonds. Curtis 2009 <https://cutt.ly/6yWokaG>.

²⁸ Curtis 2009 <https://cutt.ly/6yWokaG>.

²⁹ Sound and secure land policies; clear, efficient and transparent investment regulations and stable fiscal regimes, among others. Vivoda "Determinants of Foreign Direct Investment in the Mining Industry" 22.

³⁰ Vivoda "Determinants of Foreign Direct Investment in the Mining Industry" 25.

mineral right application process.³¹ This assertion is illustrated by case law below.

3 *Baleni v Department of Mineral Resources*³²

Only a handful of cases have challenged the procedural aspects of the MPRDA in South Africa, yet these cases are sufficient to suggest that there are anomalies in the mineral rights application system. There are various reasons why many customary community grievances do not go as far as the national courts. Most notably, the customary communities often lack the financial muscle to challenge the rich, giant mining companies. The playing field is therefore not level. Nevertheless, the Xolobeni community did not shrink from fighting for their land rights against third parties who were awarded mineral rights without the community's consent. This case is a remarkable exhibition of conflicting levels of engagement in terms of the IPILRA and the MPRDA.

3.1 *Background facts*

The Xolobeni community is a village in Umgungundlovu area on the Wild Coast, Eastern Cape. Based on its location, the Xolobeni community (hereinafter the community) is administered in terms of customary law. In this matter, Duduzile Baleni represented the community in her capacity as the headwoman of the Umgungundlovu area. The community resisted mining activities on its land for over 10 years, starting from 2008.³³ In 2008 a mineral licence was awarded to an Australian company, Transworld Energy and Minerals (TEM). However, the community was neither notified nor consulted before the licence was awarded. During investigation, the community engaged in an unsatisfactory exchange of correspondence which culminated with the DMR's maintaining its decision to grant mineral rights to TEM. The community lodged a number of internal appeals in an effort to resolve this matter, to no avail.³⁴ In its final internal appeal, the community's major concern was that TEM had not obtained the requisite environmental and labour authorisations.³⁵ The fact that this information

³¹ See 4.4.1 on the discussion of the consultation procedure.

³² *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) (hereinafter *Baleni*).

³³ The Amadiba Crises Committee (ACC) was created in 2007 in response to the anticipated significant changes to the traditional way of life brought about by the mining project. Anon 2018 <https://bit.ly/2NhmdKq>.

³⁴ The internal appeals were informed by s 96 of the MPRDA. Anon 2018 <https://bit.ly/2NhmdKq>.

³⁵ According to s 37 of the MPRDA and s 2 of the NEMA a mining rights applicant must give effect to the approved environmental management programme and pay the prescribed retention fees. Also see s 48 of the *National Environmental Management:*

was missing implied that TEM had failed to consult in the manner prescribed by the MPRDA, since the community had not been given an opportunity to express any opinions about the proposed mining.³⁶

In 2015 TEM once again successfully applied for a mineral rights licence, but it was not able to comply with any consultation requirements because the community did not allow them access to the community property. Thereafter the DMR made a decision to block all mineral right applications for a period of 18 months (effective from June 2017).³⁷ However, this did not resolve the community's objection to the granting of mineral rights licences on its land without its consent. Consequently, the community approached the North Gauteng High Court seeking an order declaring that:

- a) In terms of the IPILRA, consent is a precondition in a mineral rights application.³⁸
- b) Compensation must be determined and paid before mineral rights can be exercised.³⁹
- c) The MPRDA is unconstitutional insofar as it does not apply subject to the consent requirement under the IPILRA or prohibits the determination of compensation before mining activities take place.⁴⁰

Protected Areas Act 57 of 2003 where mining will be allowed only if both the Minister of Environment, Forestry and Fisheries and Mineral Resources give written consent. Similarly, Regulation 46 of the MPRDA (GN R527 in GG 26275 of 23 April 2004) provides that a social labour plan must form part of the mining application documents. A social labour plan is the only way to ensure that the holders of mining or production rights contribute towards the socioeconomic development of the areas in which they are operating as well as the areas from which the majority of the workforce is sourced. Section 2(i) of the MPRDA. DMR 2010 <https://bit.ly/2P3dVrM>.
³⁶ The major concern was that TEM consulted only the local traditional leader and a few others around him. Anon 2018 <https://bit.ly/2NhmdKq>; See the consultation procedure in 4.1 below.

³⁷ GN 1014 in GG 40277 of 15 September 2016 (Prohibition or Restriction of Prospecting or Mining in terms of Section 49[1] of the Mineral and Petroleum Resources Development Act, 2002 [Act No 28 of 2002]).

³⁸ *Baleni* paras 24 and 25.

³⁹ In regard to the claim for compensation, the applicants argued that as part of the discretion vested in the Minister in terms of s 23(2A) of the MPRDA (which section authorises the Minister to impose conditions on the award of the right when it is necessary to protect the community's interests), there should be a precondition that compensation should be determined before, as opposed to after, the granting of mineral rights. See *Baleni* para 46.

⁴⁰ *Baleni* para 27.

3.2 *The issue before the court*

The central issue before the court was whether consent in terms of section 2 of the IPILRA was required before a mineral right application is approved.⁴¹ According to section 2(1) of the IPILRA, no one may be deprived of any informal right to land without his or her consent. This provision is subject to subsection 2(4) of the IPILRA, the *Expropriation Act*, or any other law that provides for the expropriation of land or rights. In turn, subsection 2(4) of the IPILRA provides that it shall form part of the custom and usage of communities that the decision to dispose of informal land rights be taken by the majority of the right holders or their representatives. The right holders must therefore be given sufficient notice and a reasonable opportunity to participate in the decision-making process. For these reasons, the applicants (the Xolobeni community) relied heavily on this provision to substantiate their argument that mining activities could not ensue on their land without their consent.⁴²

Furthermore, the respondents (DMR, TEM and others) argued that the MPRDA clearly sets out that landowners or occupiers must be consulted, but they do not necessarily have to consent before mineral rights are awarded.⁴³ To allow the community to consent, stated the respondents, would mean inserting unintended words into the MPRDA: consent comes into play only once the mineral right has been awarded and the implementation phase begins. The respondents further argued that it would create a bad precedent if customary communities seemed to have more rights than other common law owners in the same circumstances.⁴⁴ In driving their point home, the respondents argued that the MPRDA trumps the IPILRA and this implies that no landowner can resist mining.⁴⁵ Inasmuch as the DMR emphasised that consultation is the only required level of engagement, it failed to produce written proof of the consultation procedure from TEM.⁴⁶

In response, the applicants averred that the MPRDA provides for the granting of mineral rights, and that these mineral rights are land rights, as

⁴¹ *Baleni* para 32.

⁴² *Baleni* paras 24 and 25.

⁴³ *Baleni* para 26.

⁴⁴ *Baleni* para 27.

⁴⁵ *Baleni* para 26.

⁴⁶ The report from the Regional Manager indicated that "... notification and consultation with interested and affected parties have taken place and that no objection has been raised in respect of the application."

contemplated by section 2 of the IPILRA.⁴⁷ In addition, that the MPRDA does not fall within the listed exceptions under section 2(4) of the IPILRA, namely that it is not the *Expropriation Act* or expropriation legislation,⁴⁸ and the majority of the community had not agreed to dispose of their rights in land.⁴⁹ To prove that a deprivation of property occurs when community land is awarded to third parties, the applicants argued that:

- a) Based on the *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance*⁵⁰ a deprivation had occurred since:

... any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned.⁵¹

Consequently, the applicants contended that a deprivation is present whenever the interference with the use, enjoyment and exploitation of property is significant enough to have a legally relevant impact on the rights of the affected party.⁵² They illustrated that if mining activities were allowed on their land, the activities would displace hundreds of

⁴⁷ *Baleni* para 71.

⁴⁸ The Constitutional Court has established that the granting of mineral rights does not constitute expropriation. See *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) paras 67-71.

⁴⁹ *Baleni* para 15.

⁵⁰ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) (hereinafter *FNB*).

⁵¹ *FNB* para 57. The definition in *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 65 was considered where it was held that whether or not there had been a deprivation is a matter of degree and depends on the extent of the interference and "at the very least, substantial interference or limitation that goes beyond the normal restriction on property use or enjoyment ..." will be recognised as a deprivation of property. Van der Walt expresses the opinion that the decision in *Mkontwana* is an indication that the procedural fairness of a deprivation can be evaluated on a similar basis as the test for procedural fairness under administrative action. This implies that procedural arbitrariness under s 25(1) of the Constitution presumably closely resembles procedural fairness under ss 3 and 4 of the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA). Van der Walt 2012 *Stell LR* 89. See further Van der Sijde *Reconsidering the Relationship between Property and Regulation* 224-226.

⁵² *FNB* para 100; Van der Walt 2012 *Stell LR* 89; Van der Walt *Constitutional Property Law* 268.

community members, destroy and disrupt their culture, vegetation and water streams, and erode their livelihoods.⁵³

- b) The applicants maintained that an award of a statutory mineral right in terms of the MPRDA satisfied the subtraction from the *dominium* test because section 5 of the MPRDA provides that a mineral right is a limited real right that stems from the landowner's or occupiers' real rights.⁵⁴ They maintained further that an award of a mineral right subtracts from a landowner's *dominium*,⁵⁵ since it authorises the holder to engage in invasive activities on the land.⁵⁶ In response, the respondents argued that the granting of a mineral right does not constitute a deprivation in the "traditional sense" since the MPRDA is a law envisaged by section 2(4) of the IPILRA and is therefore a valid exception to section 2(1) and therefore automatically excludes the consent requirement.⁵⁷

⁵³ *Baleni* paras 11, 12, and 59. See also *Daniels v Scribante* 2017 4 SA 341 (CC) para 2; *Maledu v Itireleng Bakgatla Mineral Resources (Pty) Ltd* 2018 ZACC 41 (25 October 2018) (hereinafter *Maledu*).

⁵⁴ See s 2 of the MPRDA, where the nature of the custodianship principle is discussed.

⁵⁵ In *Ex Parte Geldenhuys* 1926 OPD 155 it was held that a condition in a will to pay a sum of money to other beneficiaries did not amount to a real right that could be registered in the deeds registry. Similarly, in *Lorentz v Melle* 1978 3 SA 1044 (T) 1052D the issue was whether the condition (already registered), which laid down the obligation to pay a sum of money to someone, amounted to a subtraction from the *dominium*. The court found that the condition amounted to a subtraction in a sense that the parties intended to establish it, but the obligation did not affect the use and enjoyment of the land in the "physical sense" and could therefore not be a real right. *Pearly Beach Trust v Registrar of Deeds* 1990 4 SA 614 (C) in turn confirmed that the payment of money to a third party amounted to a limited real right because it placed a burden on what the owner could do with his/her property. More recently, in *Willow Waters Homeowners Association (Pty) Ltd v Koka* 2015 5 SA 304 (SCA) the issues for determination were whether a condition of title in a title deed of immovable property which prohibited the transfer thereof without a clearance certificate or the consent of a homeowner's association constituted a real or personal right. Similarly, the court had to decide whether the embargo remained binding on the Master and trustees of the property owners in sequestration. The court relied on *Cape Explosives Ltd v Denel (Pty) Ltd* 2001 3 SA 578 (SCA) and *Lorentz v Melle* 1978 3 SA 1044 (T) to conclude that the right created by the embargo is a personal right that does not subtract from the *dominium* of the property.

⁵⁶ This argument fails to acknowledge that the limited real right status of prospecting and mining rights remains a limited real right even when it is the landowner himself who extracts the minerals. Prospecting and mining rights are rights *sui generis* in that, once severed from the ground, they are separated from the ownership of the land. This characteristic makes them different from the traditional limited real rights because an owner cannot possess limited real rights in his/her own property. Badenhorst 2017 SALJ 363; Van der Walt and Pienaar *Introduction to the Law of Property* 332; Van der Schyff *Property in Minerals and Petroleum* 328-330.

⁵⁷ *Baleni* para 26.

3.3 *Decision of the court*

In this ground-breaking decision, the North Gauteng High Court noted with caution that many communities in South Africa, such as the Xolobeni, continue to face issues with mining companies and the DMR.⁵⁸ For this reason the declaratory orders were granted as sought. It was important for the court to declare that the Xolobeni community was indeed a "community" in terms of section 1 of the IPILRA. Being recognised as such implied that the community was the lawful landholder. Basson J particularly emphasised that the Minister of the DMR lacked authority to grant mineral rights unless the relevant provisions of the IPILRA had been complied with.⁵⁹ The court professed that, in terms of section 2(1) of the IPILRA, the DMR was obliged to obtain full and informed consent from the community before granting any mineral rights to TEM.⁶⁰

The court also found that a deprivation had occurred under both section 2(1) of the IPILRA and section 25(1) of the Constitution.⁶¹ This decision has therefore set the standard of consent, as opposed to consultation, in the award of mineral applications. It also illustrates how the DMR occasionally allows mineral right applicants to circumvent certain legislative provisions in favour of the MPRDA. Unfortunately, whether aware or not of the mineral applicant's misdemeanours, the DMR will be held accountable for its decisions to award licences without due regard for the correct legislative procedures.

One would expect that the DMR as the custodian of mineral resources would celebrate this trailblazing decision. As illustrated in Part 2 of this paper, a custodian holds something with care for another's benefit. In this case, mineral rights are protected to benefit South African citizens, predominantly those who are victims of historical discrimination.⁶² However, despite the positive outcome in this case, the DMR intends to appeal against

⁵⁸ *Maledu; Baleni; Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC); *Meepo v Kotze* 2008 1 SA 104 (NC) para 13 etc.

⁵⁹ *Baleni* para 84.

⁶⁰ It is unclear whether Basson J appreciated that the DMR is not a party to the consultation or consent proceedings. The DMR's role is to ensure that consultation by an applicant meets the required standard under the MPRDA. S 27(5)(b) of the MPRDA provides that a mining applicant must notify in writing and consult with the land owner and submit the result of the said consultation within 30 days from the date of the notice.

⁶¹ *Baleni* para 59.

⁶² *Baleni* para 40.

this decision, claiming that it usurps the authority to issue mineral licences from the state to communities, and that this will "create chaos".⁶³

The next part of the article attempts to reconcile the different levels of engagement under the IPILRA and the MPRDA, consent and consultation respectively. Although the courts have omitted to divulge how this can be done, it has been accepted that the two statutes must be read together.⁶⁴

4 Legislative approaches to the consent and consultation principles

4.1 Consultation and consent

Several policies and legislation that govern the extraction of minerals aim to attract enormous investments to the detriment of local communities, and this brings about serious social and economic challenges.⁶⁵ The Xolobeni community refused to allow mining on their land because it is home to several hundred people and because the land is an important resource, central to the livelihoods and substance of the community members.⁶⁶ Among other uses, the land is utilised for livestock and the cultivation of crops. A significant number of the community members rely on tourism and tourist-related activities which take place within the proposed mining area. Accordingly, the proposed mining activity has a potential to deter investment in tourism and eco-tourism, which are contingent upon the preservation of the area's natural beauty and ecological diversity.⁶⁷

4.1.1 Consultation

The MPRDA provides that applicants for mineral rights are not required to obtain consent from the occupiers of the land who could potentially be

⁶³ This statement was made at the 25th Mining Indaba held in Cape Town, in February 2019. Soon after the decision in *Baleni* was laid down, the Minister attempted to engage with the Xolobeni community on several occasions, under the guise of further discussions on integrated and sustainable economic development in the community, but the community was not interested in anything the Minister had to say. His last visit to Xolobeni in January 2019 was interrupted by community demonstrations. The DMR has since announced the imminent commencement of an independent survey to determine whether mining should go ahead in Xolobeni. The survey is said to be in line with one of the outcomes of the court judgment. In April 2019 the community resisted the Minister's visit on the grounds that there was no basis for the visit while an appeal was pending against them.

⁶⁴ *Baleni* para 40.

⁶⁵ *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 39.

⁶⁶ *Baleni* para 12.

⁶⁷ *Baleni* para 12.

affected by the mining. Instead, the mineral right applicants must consult with the land occupiers to the satisfaction of the DMR. Consultation is defined as taking advice and seeking information. It does not imply reaching an agreement.⁶⁸ Froneman J accurately summed up the purpose of consultation as being:

... to determine if it is possible for a landowner to accommodate the applicant of a prospecting right and the landowner insofar as the interference of the use of their property is concerned.⁶⁹

For instance, in *Bengwenyama Ye-Maswazi Pty Ltd, v Genorah Resources (Pty) Ltd*⁷⁰ (hereinafter *Bengwenyama v Genorah*) it was established that, for consultation to be meaningful, the following factors must be established:

- (a) The landowner must be informed about the mineral right application in relation to his/her land. Although the court did not set out a clear procedure for effecting this mandate, the landowner must actually be aware that there is a pending application before the DMR.
- (b) The applicant of a mining right must provide the landowner with enough information regarding the mining. This information should not be superficial but must actually inform the landowner of how the mining will affect him/her.⁷¹
- (c) Consultation should be done in good faith. This requires that the mineral right applicants should recognise and be prepared to deal with the negative impact that the mining activities will have on the land. An agreement must be reached on the best way to manage the anticipated disruptions on a landowner's property.

⁶⁸ *Metal and Allied Workers Union v Hart Ltd* 1985 6 ILJ 478 (IC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 237. Also see *Meepo v Kotze* 2008 1 SA 104 (NC) (para 13), where it was held that the purpose of consultation under the MPRDA is to alleviate possible serious inroads being made on the property right of the landowner.

⁶⁹ Walsh "Evolving Relationship between Property and Participation" 264. Walsh argues that owners and interest-holders must be given "a voice" in decision-making processes that affect their property. In this way, the decision-makers are forced to consider possible competing claims to the entitlement and decide what regulatory measure would strike the appropriate balance between the private and the public interest. In the process, these participation rights become a source of potential protection for property rights as well as other property interests. Also see Van der Sijde *Reconsidering the Relationship between Property and Regulation* 232.

⁷⁰ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) (*Bengwenyama*).

⁷¹ This stage involves even the smallest details like the drilling of holes, their position, the operation times and the anticipated pollution (noise, water etc) on the land.

Over and above these factors, for consultation to be judicious the communities must be furnished with full details about what the mining entails. For instance, how and when it will happen as well as what its impact on the land will be.⁷² The Constitutional Court confirmed this position in the case of *Bengwenyama v Genorah*, where it was decided that mining companies must provide potential mining communities with full information about mining and its potential impact on the land and how it will affect the community members. This is to say that the mining company should not simply try to obtain signatures to confirm that a community does not object to mining, since the consultation process is not just about ticking boxes. Therefore, all the necessary information must be furnished and the mining company must pay attention to the concerns raised by communities and respond accordingly. Thus, if the mining company fails to provide this information, they are deemed not to have consulted. Equally, giving false information while consulting is a punishable criminal offence under the MPRDA.⁷³

The case of *Doe Run Exploration SA (Pty) Ltd v Minister of Minerals and Energy*⁷⁴ (hereinafter *Doe Run*) further illustrates the critical role that the consultation exercise plays before prospecting for minerals begins. In this case the applicant, a registered South African mining exploration company, applied for prospecting rights from the DMR but the application was denied. The applicant was later informed that their application had been approved but only in respect of a portion of the property. The issue before the court therefore was whether the prospecting right applicant had failed to notify and consult the landowner or occupier about their application at the DMR in terms of section 16(4) of the MPRDA. This section provides that upon acceptance of the application for prospecting rights, the Regional Manager must notify the successful applicant to submit an environmental management plan and also notify and consult with the landowner, in writing. As a consequence, the company failed to furnish proof of the notification or the consultation proof as required. The court held that this provision is

⁷² Before a company starts mining, it must prepare a social and labour plan. A social labour plan contains information about employment opportunities and the steps the company will take to develop the skills of mineworkers. It may also include infrastructure development and poverty eradication projects (beneficiation). DMR 2010 <https://bit.ly/2P3dVrM>.

⁷³ Section 98(b) of the MPRDA; Badenhorst 2016 *SALJ* 39.

⁷⁴ *Doe Run Exploration SA (Pty) Ltd v Minister of Minerals and Energy* 2008 ZANHC 3 (8 February 2008) (hereinafter *Doe Run*).

peremptory, since the notification and consultation procedure is meant to protect the land occupiers' rights.⁷⁵

4.1.1.1 The consultation procedure in mineral right applications

The abovementioned cases are indicative of how crucial the consultation procedure is in mineral right applications. In terms of section 22(1) of the MPRDA, an applicant for a mineral right must lodge an application at the office of the Regional Manager in whose region the land is situated. If the Regional Manager is satisfied that all the requirements have been met, and that there are no simultaneous mineral right applications in respect of the same land, he must accept the application.⁷⁶ Within 14 days of the acceptance of a mineral right application, the Regional Manager must then notify the applicant to submit an environmental management plan.⁷⁷ By the same token, it is the Regional Manager's duty to instruct the applicant to "notify and consult" with the land occupiers or any other affected persons. The results of this notification and consultation must be submitted within 30 days from the date of the notice.⁷⁸

As shown by the case law above,⁷⁹ during this notification and consultation process the applicant is required to inform the landowner or occupier in sufficient detail of what the mining activities will entail, to allow the latter the opportunity to determine the impact of the mining on his land.⁸⁰ Should there be any objections from the land occupiers, the Regional Manager must inform the Regional Mining Development and Environmental Committee.⁸¹ In addition to the notification and consultation process above, land occupiers have another opportunity at a mandatory consultation subsequent to the award of the mineral right licence, but just before the mining activities begin. This second consultation should be about how the successful applicant will access the land and how the land occupiers will be

⁷⁵ *Doe Run* para 39.

⁷⁶ Section 22(2)(a)-(b) of the MPRDA. If the application requirements fall short, the RM must notify the applicants in writing within 14 days of the application informing them of the outcome. S 22(3) of the MPRDA.

⁷⁷ Section 22(4)(a) of the MPRDA; *Bengwenyama* para 62. The notice must be published in either (i) the provincial Gazette, (ii) the magistrate's court or (iii) a local or national newspaper circulating in the area where the land to which the application relates is situated.

⁷⁸ Section 2(4)(b) of the MPRDA.

⁷⁹ *Bengwenyama* and *Doe Run*.

⁸⁰ Sections 10(1) and 22(4) of the MPRDA; See *Baleni* para 15; Also see *Bengwenyama* para 67.

⁸¹ The MPRDA is silent on what should happen after the Committee advises the RM and what factors must be taken into account when an objection to mining is under internal review.

compensated. These are actually two separate opportunities to be consulted, but in practice mining companies often consult only once.⁸² Inasmuch as the "consent" factor that was available in the previous mining legislation⁸³ has been rescinded under the MPRDA, this does not in any way imply that the consultation requirement has been discarded with it.

In a nutshell, consultation provides land occupiers with the necessary information about all the activities that will take place on the land. This enables them to make an informed decision in relation to the representations to be made. On this basis, the consultation process and its outcomes are fundamental in determining fairness or the lack thereof, because the decision to accept or refuse a mineral right application by the DMR cannot be reasonable if there are insufficient details in the consultation process.⁸⁴ Therefore, the different notice and consultation requirements are indicative of a serious concern for the rights and interests of land occupiers in the process of granting mineral rights, since the granting and execution of these rights represent a considerable intrusion on the use and enjoyment of one's land.⁸⁵

4.1.2 Consent

Under common law, a mining right could be acquired only by concluding a contract with the landowner, which presupposed negotiation and reaching an agreement on the terms of the contract.⁸⁶ A central element of free, prior and informed consent⁸⁷ in the mining context is genuine inclusion, disclosure, and respect for peoples' decision-making processes. The right

⁸² Section 54(3) of the MPRDA; *Bengwenyama* para 62.

⁸³ Section 5 of the *Minerals Act* 50 of 1991 (repealed).

⁸⁴ This is important in determining whether the consultation was sufficient to render the grant of the application procedurally (un)fair.

⁸⁵ *Bengwenyama* para 65.

⁸⁶ The common law principle of the *cuius est solum* principle states that the property owners own everything above and below the ground. This principle was transplanted into section 5 of the *Minerals Act* 50 of 1991 (repealed); Bradbrook 1988 *Adel L Rev* 464; *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA); *Bengwenyama* para 65; *Baleni* para 34.

⁸⁷ Free, prior and informed consent (FPIC) is a specific right that pertains to indigenous peoples and is recognised in the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) (UNDRIP). Consent is free if it is given voluntarily and without coercion, intimidation or manipulation. It must be sought sufficiently in advance of any authorisation or commencement of activities. Consent is informed when the nature of the engagement and type of information is provided before seeking consent and as part of the ongoing consent process. Once given, consent can be withdrawn at any stage. Therefore, FPIC enables the indigenous peoples to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated. Portalewska 2012 <https://bit.ly/2Nh9uY6>.

to free, prior and informed consent is protected by a number of international instruments, to all of which South Africa is a signatory. These include but are not limited to the *International Convention on the Elimination of All Forms of Racial Discrimination*,⁸⁸ the *International Covenant on Economic, Social and Cultural Rights*,⁸⁹ the *International Covenant on Civil and Political Rights*,⁹⁰ and the *African Charter on Human and People's Rights*.⁹¹ Collectively, these instruments call on State parties to:

... ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.⁹²

As a result, these instruments place great value on the public partaking in decisions that affect them, not only as citizens of the state, but also as a special category of customary (or indigenous) right holders. The consent aspect of this section will be described in terms of the practical example of the MPRDA and the IPILRA to elucidate that a reconciliation of the MPRDA and other statutes is possible.

4.2 IPILRA vs MPRDA

The Constitution, the MPRDA and the IPILRA collectively recognise the need to rectify the injustices of the past racial laws. Despite this noble objective, the MPRDA enables mineral right holders to mine for minerals on community land without the community members' consent.⁹³ As discussed earlier, section 2(1) of the IPILRA provides that no person may be deprived of any informal right to land without his or her consent. This provision is subject to section 2(4) of the IPILRA, the *Expropriation Act*⁹⁴ or any other law that provides for the expropriation of land or rights in land. Accordingly, section 2(4) provides that it shall form part of the custom and usage of communities that the decision to dispose of informal rights in land is taken by the majority of the right holders or their representatives. The right holders must be given sufficient notice and a reasonable opportunity to participate

⁸⁸ *International Convention on the Elimination of All Forms of Racial Discrimination* (1965).

⁸⁹ *International Covenant on Economic, Social and Cultural Rights* (1966).

⁹⁰ *International Covenant on Civil and Political Rights* (1966).

⁹¹ *African Charter on Human and People's Rights* (1981).

⁹² *Committee on the Elimination of Racial Discrimination General Recommendation 23: Rights of Indigenous Peoples* UN Doc A/52/18 (1997).

⁹³ The acceptable level of engagement in terms of the MPRDA is consultation.

⁹⁴ *Expropriation Act* 63 of 1975.

in the decision-making process. In such a case, appropriate compensation shall be payable to any person so deprived.⁹⁵

Cousins believes that if the MPRDA is applied subject to the IPILRA, the consent requirement would be a prerequisite in all mineral right applications.⁹⁶ In this way, communities could select which activities to allow on their land and which to decline.⁹⁷ Although the state's custodianship of mineral rights seems to be diminishing the landowners' control over their property, the MPRDA is not intended to trump all other rights and interests in land.⁹⁸

For example, the Constitutional Court in *Maccsand (Pty) Ltd v City of Cape Town*⁹⁹ decided that the application of the MPRDA does not override other statutes. In this case, the issue before the court was whether a holder of a mineral right could exercise mineral rights in an area where the *Land Use Planning Ordinance* (LUPO) was applicable, without getting a permit from the City of Cape Town. Confirming the decisions of the courts *a quo*,¹⁰⁰ the Constitutional Court held that it was wrong to assume that the DMR possessed overriding powers against other government authorities.¹⁰¹ This decision infers that LUPO and the MPRDA can and should operate alongside each other.¹⁰² Reading LUPO and the MPRDA together creates

⁹⁵ Section 2(3) of the IPILRA.

⁹⁶ Cousins 2018 <https://bit.ly/33JuNHv>. The High Level report has made recommendations that the MPRDA must be amended in order to force mining companies to comply with IPILRA as a pre-condition for the grant of mining-related rights. Mothlanthe Commission 2017 <https://bit.ly/2TK7oRs> 502. Some scholars believe that making IPILRA permanent would strengthen the customary communities' position. Its permanence is expected to reinforce its legal and practical protection of informal rights while also raising its awareness and strengthening its enforcement mechanisms. However, this argument fails to consider that despite its "interim status", the IPILRA is an Act of Parliament and therefore already has a force similar to that of permanent legislation.

⁹⁷ Mothlanthe Commission 2017 <https://bit.ly/2TK7oRs>; Cousins 2018 <https://bit.ly/33JuNHv>.

⁹⁸ *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 17; s 16 of the *Land Use Planning Ordinance* 15 of 1985 (LUPO).

⁹⁹ *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) (hereinafter *Maccsand*).

¹⁰⁰ In the High Court decision (*City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC). *Maccsand* was interdicted from commencing or continuing with mining operations on the property in question unless and until the provisions of LUPO and NEMA had been complied with. Similarly, the Supreme Court of Appeal (*Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA)) held that the MPRDA and LUPO must operate alongside each other because they have different objects and each did not purport to serve the purpose of the other. As a result, there was no merit in the assertion that LUPO would usurp the functions of the MPRDA.

¹⁰¹ *Baleni* para 40; *Maccsand* para 51. Also see *Maledu* para 5.

¹⁰² *Baleni* para 40; *Maccsand* para 51. Also see *Maledu* para 5.

the expectation that the MPRDA and the IPILRA can potentially be read in conjunction with each other. This would mean that the communities would have to be consulted under the MPRDA, but they would first have to consent to the mining in terms of the IPILRA.¹⁰³

The case of *Maledu v Itireleng-Bakgatla Mineral Resources (Pty) Limited*¹⁰⁴ has particularly reinforced the position that the MPRDA must be read in conjunction with the IPILRA. In this case, the issue was whether the applicants had consented to being deprived of their informal rights in land under section 2(1) of the IPILRA. In arriving at the conclusion that the respondents (DMR and Itireleng-Bakgatla) had no right to evict the applicants, the court noted that the existence of a mineral right does not in itself extinguish the rights of a landowner or occupier.¹⁰⁵ Therefore, the cases of *Baleni v Minister of Mineral Resources*, *Maledu v Itireleng-Bakgatla* as well as *Maccsand v City of Cape Town* have strengthened the legal position that an alliance of the MPRDA and other legislation is not only constructive but it is also practical. The next section illustrates the potential constitutional consequences of failing to consult and obtain consent from land occupiers as required by legislation and case law.

5 Constitutional consequences of non-conformity with the consultation procedure

5.1 Administrative action

The *Promotion of Administrative Justice Act*¹⁰⁶ (PAJA) was promulgated to give effect to section 33 of the Constitution.¹⁰⁷ Section 33(1) provides that everyone has a right to administrative action that is lawful, reasonable and procedurally fair. Against this constitutional background, section 1(a) of the PAJA defines administrative action as any decision taken or failure to take a decision by an organ of state while exercising a power or performing a public function authorised by any legislation. This decision must adversely affect the rights of any person and must have a direct and external legal

¹⁰³ *Maledu* para 103. Also see *Baleni* para 28.

¹⁰⁴ *Maledu v Itireleng Bakgatla Mineral Resources (Pty) Ltd* 2018 ZACC 41 (25 October 2018).

¹⁰⁵ *Maledu* para 103.

¹⁰⁶ *Promotion of Administrative Justice Act* 3 of 2000 (PAJA).

¹⁰⁷ In terms of s 33(1) of PAJA, everyone has a right to administrative action that is lawful, reasonable and procedurally fair. Similarly, anyone whose rights have been adversely affected by an administrative action has a right to be given reasons in writing.

effect to qualify as an "administrative decision".¹⁰⁸ Accordingly, the Constitutional Court¹⁰⁹ has identified the seven distinct elements of administrative action as follows: (a) A decision; (b) by an organ of state; (c) exercising a public power or performing a public function; (d) in terms of legislation; (e) that adversely affects rights; (f) that has a direct, external legal effect; (g) and does not fall under any of the listed exclusions.¹¹⁰

As a result, if the abovementioned elements are applied in the context of the Xolobeni community, this would mean that:

(a) A decision; (b) by the DMR through the Regional Manager; (c) to grant a mineral right licence without any kind of proof of consultation; (d) in terms of section 22 of the MPRDA; (e) could interfere with the lives and livelihoods of members of the community; (f) and could amount to arbitrary deprivation of property; and (g) does not fall under the exceptions listed under section 1(aa)-(ii) of PAJA.

Under normal circumstances it is enough to show the presence of administrative action and claim remedies under section 8 of the PAJA. However, to strengthen their case the Xolobeni community could go further to show the severity of the breach of their administrative rights. In terms of section 4 of the PAJA, where an administrative action materially and adversely affects the rights of the public, the administrator must decide whether to hold a public enquiry,¹¹¹ to follow a notice and comment procedure,¹¹² or to follow a procedure that is fair but different.¹¹³ These measures are available to ensure that effect is given to the right to a procedurally fair administrative action.¹¹⁴ Similarly, section 6(1) of the PAJA also recognises that any administrative processes taken in terms of the MPRDA must be timeous, lawful, reasonable and procedurally fair.

¹⁰⁸ Section 1 of PAJA; Hoexter *Administrative Law* 197; s 6 of the MPRDA provides that any administrative process conducted or decision taken in terms of the MPRDA must be conducted or taken within a reasonable time and in accordance with the principles of *lawfulness, reasonableness and procedural fairness* (italics added).

¹⁰⁹ Hoexter *Administrative Law* 197; *Minister of Defence and Military Veterans v Motau* 2014 5 SA 69 (CC) para 33.

¹¹⁰ Hoexter *Administrative Law* 197; Quinot *Administrative Justice* 78.

¹¹¹ Section 4(1)(a) of the PAJA.

¹¹² Section 4(1)(b) of the PAJA.

¹¹³ Section 4(1)(d) of the PAJA.

¹¹⁴ Hoexter *Administrative Law* 197; Quinot *Administrative Justice* 78. Three elements that flow from the procedural fairness provision are that it (a) affects any person (or public); (b) has material and adverse effects; and (c) affects rights or legitimate expectations.

Based on the standard of consultation set by case law and sections 10, 22 and 27 of the MPRDA as analysed above, it can be inferred that the consultation measures set therein were not followed in the *Baleni* case. It must therefore be determined whether the decision to grant a mineral rights licence by the DMR, without proof of meaningful consultation by TEM, was procedurally fair to the community. Van der Sijde asserts that procedural fairness plays two vital roles in realising a variety of constitutional objectives and improving administrative decision-making in general.¹¹⁵

- a) Firstly, it has the potential of ensuring that all relevant considerations are brought to the attention of the administrator before a decision is made.
- b) Secondly, having proper regard to the link between procedural fairness, especially participation, and the dignity of persons who stand to be affected by the decision can encourage the development of a rich concept of procedural fairness in the hope of realising the ideal of administrative justice and supporting other constitutional rights and values.¹¹⁶

If all these factors are applied to the Xolobeni community dispute, it is apparent that the Minister's decision to grant the mineral rights licence to TEM was procedurally unfair because he was authorised to act as an administrator, but failed to comply with the mandatory and material procedure set out in the MPRDA. This renders his decision procedurally unfair, because the community was not in a position to make a decision about the proposed mining. Hence, a decision that could clearly affect the community materially was made without them.

Accordingly, section 6(2)(b) of the PAJA authorises any persons to institute proceedings in a court if a mandatory and material procedure or condition prescribed by the empowering provision was not complied with. In this situation the court can grant any order that is just and equitable, prohibit the administrator from acting in a particular manner,¹¹⁷ set aside the administrative action,¹¹⁸ declare the rights of the parties,¹¹⁹ or in exceptional

¹¹⁵ Van der Sijde *Reconsidering the Relationship between Property and Regulation* 221; Van der Walt 2012 *Stell LR* 89; Van der Walt *Constitutional Property Law* 268-269.

¹¹⁶ Mostly applicable in the realisation of socio-economic rights. For instance, the right of access to adequate housing under s 26 of the Constitution.

¹¹⁷ Section 8(1)(b) of the PAJA.

¹¹⁸ Section 8(1)(c) of the PAJA.

¹¹⁹ Section 8(1)(d) of the PAJA.

circumstances direct the administrator to pay compensation.¹²⁰ As a result, these options were available to the Xolobeni community but were unfortunately not explored during the court case.

5.2 *The right to property*

In terms of section 25(1) of the Constitution, no one may be deprived of property except in terms of law of general application, and no law may permit the arbitrary deprivation of property.¹²¹ Likewise, section 2(1) of the IPILRA provides that no person may be deprived of any informal right to land without his or her consent.¹²² Informal rights in land are defined as the use, occupation or access to land in terms of any tribal, customary or indigenous law or practice of a tribe.¹²³ The Xolobeni community identifies as a community as envisioned by section 1 of the IPILRA. Therefore, their informal rights in land are "property" for the purposes of section 25 of the Constitution.

The courts in *Baleni and other v Minister of Mineral Resources and Maledu v Itireleng-Bakgatla* cases, as discussed in section 4, accepted the definitions of deprivation as demonstrated in *First National Bank of South Africa Ltd t/a Wesbank (FNB) v Minister of Finance*¹²⁴ and *Mkontwana v Nelson Mandela Metropolitan Municipality*.¹²⁵ *FNB* defines deprivation as "any interference with the use, enjoyment or exploitation of private property".¹²⁶ *Mkontwana* adds that whether or not there has been a deprivation is a matter of degree and depends on the extent of the interference and

¹²⁰ Section 8(1)(c)(ii)(bb) of the PAJA.

¹²¹ Section 25(1) of the Constitution closely resembles s 2(1) of the IPILRA, at least in a legal sense. These sections are both to the effect that deprivations of property are not valid unless effected in terms of law of general application, which does not permit arbitrary deprivations.

¹²² Section 2(1) of the IPILRA is subject to s 2(4) of the IPILRA, which provides that the decision to dispose of informal rights in land must taken by the majority of the right holders or their representatives and that this shall form part of the custom and usage of communities. The right holders must be given sufficient notice and a reasonable opportunity to participate in the decision-making process.

¹²³ Section 1(1)(i) of the IPILRA; *Baleni* paras 54-56; *Maledu* paras 60-61.

¹²⁴ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) (hereinafter *FNB*).

¹²⁵ *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC).

¹²⁶ *FNB* para 57; Van der Walt 2012 *Stell LR* 89; also see Van der Walt *Constitutional Property Law* 264-270 and Van der Sijde *Reconsidering the Relationship between Property and Regulation* 224-226.

... at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use, or enjoyment found in an open democratic society.¹²⁷

The case of *Maledu v Itireleng-Bakgatla* used the Oxford dictionary definition of deprivation to elucidate it as "the damaging lack of basic material benefits or lack or denial of something considered essential."¹²⁸ Therefore, applied in the mineral rights context, the central issue in the abovementioned cases was whether an award of mineral rights constituted a deprivation of informal rights in land. The applicants in *Baleni* argued that they were being deprived of their property rights because there was no legal justification for the loss of their property. They based this claim on the argument that the MPRDA did not fall within any of the listed exceptions under section 2(4) of the IPILRA.¹²⁹ In arriving at the decision that a grant of mineral rights amounted to a deprivation of property, the Constitutional Court in *Maledu* articulated that:

... given the invasive nature of a mining right, there can be no denying that when exercising her rights, the mining right holder, would intrude into the rights of the owner of the land to which the mining right relates. The more invasive the mining operations are the greater the extent of subtraction from a landowner's dominium will it entail.¹³⁰

Therefore, case law has rightly established that whenever applicants apply for mineral rights they must produce written evidence of consultation and they must further obtain consent from the land occupiers since mining activities interrupt an occupier's enjoyment of their property. This goes a long way towards securing informal customary land rights in South Africa. In these circumstances, I argue that consent and consultation are not mutually exclusive since one cannot consent to something unless one has been consulted.

Therefore, the DMR is always under an obligation to ensure that mineral right applicants comply with the legislative standards of consultation before they can approve mineral right applications. This is because failure to do so opens the door to liability insofar as administrative and property rights are concerned. Although the DMR is not a party to the consultation process, it must ensure that all the requirements of the MPRDA are met.¹³¹ Section 22 requires that proper consultation must be in writing: This was the missing

¹²⁷ *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 65.

¹²⁸ *Maledu* para 98-99.

¹²⁹ Exceptions to the consent requirement are analysed in 4.2 above.

¹³⁰ *Maledu* para 102; *Baleni* para 102.

¹³¹ See 4.1.1.1 above.

link in the case of *Baleni*. TEM claimed to have consulted in terms of section 22(4) of the MPRDA but still failed to produce any kind of proof of that consultation.

6 Conclusion

One of the Constitution's primary roles is to redress the injustices of the past that left Black people without land and secure tenure over it. The implementation of this objective is facilitated by various pieces of legislation that seek to secure the land tenure of previously dispossessed people. One such piece of legislation is the IPILRA, which was enacted to secure informal land rights. Nonetheless, the custodianship principle under section 3 of the MPRDA somewhat undermines the IPILRA by failing to involve the customary land occupiers before mineral rights are granted. Although the DMR holds mineral rights on behalf of and for the benefit of all South Africans, it exacerbates the already insecure land tenure rights of customary communities by enabling mineral right applicants to by-pass the consultation requirements of the MPRDA.

In balancing the economic rights of mining against land tenure security, the courts have decided in favour of the latter. Notwithstanding, the DMR can still be held liable for its failure to act as a true custodian of mineral rights. The DMR acted negligently by awarding mineral rights without proof that consultation as required by the MPRDA had taken place. This (in)action by the DMR led to its liability for the potential loss of property rights and, as argued in this article, this inaction can be extended further to liability for a breach of administrative rights.

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List of Abbreviations

ACC	Amadiba Crises Committee
Adel L Rev	Adelaide Law Review
DMR	Department of Mineral Resources
Environ Manage	Environmental Management
FPIC	Free, prior and informed consent
IPILRA	Interim Protection of Informal Land Rights Act 31 of 1996
J South Afr Stud	Journal of Southern African Studies
LUPO	Land Use Planning Ordinance
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
PAJA	Promotion of Administrative Justice Act 3 of 2000
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
TEM	Transworld Energy and Minerals

UNDRIP

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Indigenous Peoples (2007)