IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: 265/17

In the matter between:

GRACE MASELE (MPANE) MALEDU	**1ST APPLICANT**
SHIMANKE RASEPAE	**2ND APPLICANT**
OBAKENG MATSHEGO	**3RD APPLICANT**
NKASHE MATSHEGO	**4TH APPLICANT**
DONNY MATSHEGO	**5TH APPLICANT**
MMAPULA PILANE	**6TH APPLICANT**
PHOPHO KOTSEDI	**7TH APPLICANT**
THERO MMALE	**8TH APPLICANT**
JACOB MOALOSI RASEPAE	**9TH APPLICANT**
NTUTU RASEPAI	**10TH APPLICANT**
GOPANE REASEPAE	**11TH APPLICANT**
MANTIRISI RASEPAI	**12TH APPLICANT**
MPHO RAMFATE	**13TH APPLICANT**
MOTHLAGODI PILANE	**14TH APPLICANT**
JOSEPH SITISI THLASE	**15TH APPLICANT**
ISAAC RAMAFATSHE PALAI	**16TH APPLICANT**
VICTOR KOTSEDI	**17TH APPLICANT**
KUTLWANO MATSHEGO	**18TH APPLICANT**
DANIEL MAUGOLE MALEBYE	**19TH APPLICANT**
MOSES TSHWEU MALEBYE	**20TH APPLICANT**
ALBAUES RAPULA MMALE	**21ST APPLICANT**
EVA MALEBYE	**22ND APPLICANT**
GERTRUIDE PILANE	**23RD APPLICANT**
SETWE MANNETJIE PILANE	**24TH APPLICANT**
INOLOFATSENG RAMFATE	**25TH APPLICANT**

ELIAS BAFYE RASEPAE	**26TH APPLICANT**
MAKUBESELE DORIS SENOELE	**27TH APPLICANT**
MAUDRIES GERTSOU RASEPAE	**28TH APPLICANT**
MOGOTSI LEVY RASEPAE	**29TH APPLICANT**
MESU RASEPAI	**30TH APPLICANT**
TSHOSE DANIEL RASEPAE	**31ST APPLICANT**
MMAKOMO MARIA MATABEGE	**32ND APPLICANT**
MMAMMU DOIEEAH THLASI	**33RD APPLICANT**
MMAMMUSI ELIZABETH PALAI	**34TH APPLICANT**
MOGAPI KAISER MATSHEGO	**35TH APPLICANT**
MOTLHEGODI JOSEPH MATSHEGO	**36TH APPLICANT**
OLAOTSE THLASI	**37TH APPLICANT**
LESETLHENG VILLAGE COMMUNITY	**38TH APPLICANT**

and

ITERELENG BAKGATLA MINERAL RESOURCES (PTY) LTD	**1ST RESPONDENT**
PILANSBERG PLATINUM MINES (PTY) LTD	**2ND RESPONDENT**

APPLICANTS' WRITTEN SUBMISSIONS

TABLE OF CONTENTS

INTRODUCTION AND OVERVIEW 1
FACTUAL BACKGROUND 3
THE APPEAL IN THIS COURT 7
Leave to appeal 7
Constitutional matters and points of general public importance 8
Interests of justice 9
THE APPLICANTS' RIGHTS TO WILGESPRUIT 10
Ownership of Wilgespruit 11
The applicants' rights in terms of IPILRA 14
VALIDITY OF THE MINING RIGHT AND LEASE AGREEMENT 17
The validity of the mining right 17
The validity of the lease agreement 30
EVEN IF THE RESPONDENTS HAD A VALID MINING RIGHT OR LEASE, THEY MAY STILL NOT PROCEED TO MINE 31
Section 5(4)(c) 31
Section 54 36
Maranda can be distinguished 36
Should Maranda not be distinguishable, then it is wrong 39
WILGESPRUIT'S ZONING SCHEME 42
CONCLUSION 49

INTRODUCTION AND OVERVIEW

1 In 1916, 13 families decided to buy the farm Wilgespruit 2 JQ in the district of Rustenburg ("**Wilgespruit**" or "**the farm**"). It took them about three years to pay off the purchase price and eventually, in 1919, they became the owners of the farm. Because these families were black and it was in 1919 and not 1994, the farm could not be registered in their names. The farm was registered in the name of the Native Commissioner who held it on behalf of the Chief of the Bakgatla-Ba-Kgafela tribe ("**the Bakgatla**") and not only on behalf of the 13 families as was the original intention of the families. These 13 families and the descendants of these families farmed on the farm continuously and without interruption until 2008, when a mining company succeeded in obtaining the mineral rights to the farm.

2 The respondents, who claim the right to mine on the farm, succeeded with an eviction application in the High Court, North West Province ("**the High Court**").[1] It is against this eviction order[2] that the 1st to 37th applicants ("**the applicants**") now seek to appeal. It is submitted that it is in the interest of justice to hear appeal as it deals with important issues pertaining to land rights. The applicants are not the only black community in South Africa to have this particular history relating to the ownership of land and the consequences of mining companies riding roughshod over their rights.

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1 Volume A, High Court Judgment handed down on 16 February 2017.

2 *Ibid*, ppA45 – A46, para 87.

3 This is an application fore leave to appeal against the judgment and order of the High Court, per Gutta J. We submit that the judgment of the High Court misinterpreted the import of the applicants' legitimate contention that they are the true owners of the farm and as such they cannot be evicted to allow mining operations to continue without the respondents properly consulting with them. The result of the eviction order is that the respondents must continue with their mining operations thus arbitrarily depriving the applicants of their right to property.

4 In our submission, the respondents' approach to arbitrarily depriving the applicants of their right to property should not be countenanced. Our submissions on this are structured as follows: First, we deal with the factual background of this matter as well as the litigation history; second, we submit why this Court should grant leave to appeal; third, we make submissions on the ownership of the farm; fourth, we make submissions on the informal rights of the Applicants to the farm in terms of relevant legislation; fifth, we deal with the validity of the respondents' mining right and lease agreement; sixth, we submit that the respondents have not complied with the consultative requirements of section 5(4)(c) of the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**"); seventh, make submissions on the proper interpretation of section 54 of the MPRDA; and finally, we submit that the relevant municipal council has not zoned the farm for mining operations.

5 We submit, in summary, that leave to appeal should be granted, and that the appeal should succeed, with costs. In what follows, we shall address each of the issues set out above, in turn.

FACTUAL BACKGROUND

6 The applicants are members of a community who regard Lesetlheng Village as their traditional home. This community is a constituent part of the Bakgatla. Most of the applicants currently reside in Lesetlheng Village.[3]

7 Around 1916 the community at Lesetlheng decided to buy a farm on which to conduct crop farming operations as the farm that the village is situated on, Kruidfontein 40 JQ, is not suitable for farming. Furthermore, the decision to buy rather than rent or enter into some other arrangement such as sharecropping was motivated by the fact that it would afford the community security of tenure at a time when access to farming land of black people was severely restricted. Having decided on the farm and having concluded an agreement of sale with its then owners, the community proceeded to raise the purchase price from several of its members who could contribute.[4]

8 The protracted process of raising the purchase price was recorded. Contributions, with the name of the contributor were recorded in an old exercise book, now referred to as the "Old Preserved Book" ("**the Book**"). Eventually 13 clans

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[3] Volume 6, p585, para 2.1; p587 para 2.6.

[4] Volume 6 p585, para 2.2; p 586 paras 2.3 – 2.4; Record Volume 9, p845, para 9 and further.

(*dikgoro* - singular-*kgoro*) from the Bakgatla community at Lesetlheng contributed to the purchase price.[5]

9 The purchase price was raised in full by 1919 and transfer took place. Because at the time black people and a black community like the community at Lesetlheng could not formally own land, the land was registered in title to the State, which held it in Trust for the community. As the community was not recognized as a separate entity by government the records show that the state held the land in trust on behalf of the whole of the Bakgatla.

10 Despite this formal registration, the intention at the time was that neither the state nor the broader Bakgatla, but only those *dikgoro* of the Bakgatla-Ba-Kgafela community at Lesetlheng who contributed to the purchase price would in fact become owners of the land. This understanding was formally confirmed at the time by the then *Kgosana* (headman) of the Lesetlheng Village, Riyana Pilane and recorded in the Book under the heading "*Molao oa Polasa sa* Wilgespruit" ("The Law of the Farm Wilgespruit").[6]

11 Since 1919 when the transfer of Wilgespruit took place, the 13 *dikgoro* have conducted farming on Wilgespruit as owners of the farm. The farm was divided into 13 portions (*dipanka* – singular *panka*) for each of the *kgoro*. Each *panka* was further divided into portions (*diakere* – singular *akere*) for different families and each *kgoro* and the 13 *dikgoro* and their constituent families assumed exclusive control of their various *dipanka* and *diakere* and so farmed as a "community" on

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5 Volume 6, page 587 paragraph 2.7; Volume 9 page 847 paragraph 9.6.2.

6 Volume 6, page 588 paragraphs 2.8 and 2.9.

the farm Wilgespruit. Over time the families also erected shacks or small houses on the farm for themselves or their workers. Kraals, pig pens and other farming structures were also erected as well as a water piping system constructed by the community.[7]

12 Although at times grazing and other rights were temporarily allocated to persons who were not members of the 13 *dikgoro*, this was done by the 13 *dikgoro* and not the broader tribe. Until mining interest in Wilgespruit commenced in 2004 when a prospecting right was awarded to the first respondent ("**IBMR**"), no one else but the members of the 13 *dikgoro* had the right to decide about access to, use of and allocation of rights to the farm.[8]

13 In 2012, the descendants of the original 13 *dikgoro,* having organised themselves into the Lesetlheng Village Community (the 38th applicant), instituted a claim in terms of the Land Titles Adjustment Act 111 of 1993 for the title deed of Wilgespruit to be amended to reflect them as owners of the farm. This application is still pending.[9]

14 Mining interest in Wilgespruit commenced in 2004 when IBMR obtained a prospecting right to the farm. In 2008, a mining right to Wilgespruit was granted to IBMR; in 2012 a portion of this mining right (that applying to the so-called Sedibelo-West portion of Wilgespruit) was excised from IBMR's mining rights in favour of the second respondent ("**PPM**") and cession of the mining right to the

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7 Volume 6 page 588 paragraph 2.10 and page 590 paragraph 2.15 and 2.16.

8 Volume 6 page 589 paragraphs 2.11 and 2.12 and page 590 paragraphs 2.14, 2.15 and 2.16.

9 Volume 6 page 592 paragraph 2.20

remainder of the Wilgespruit to PPM is currently in process. IBMR also entered into a surface lease agreement with the Bakgatla-Ba-Kgafela Tribal Authority.[10]

15 The mining activities progressively conducted on Wilgespruit in terms of these various rights have over time eroded the applicants' ownership of Wilgespruit. Mining on the said Sedibelo-West portion of Wilgespruit commenced towards the end of 2013 and the applicants have since then irrevocably lost all use and occupation of that portion of the farm.[11]

16 Activity and preparation for mining on the remainder of Wilgespruit commenced in 2014. This severely disrupted the applicants farming activity and their use of the farm. In response the applicants sought and obtained a spoliation order against the respondents in 2015, restoring to them the possession of the remainder of Wilgespruit.[12]

17 The respondents allege that, both in the process of applying for the mining right to Wilgespruit and in the subsequent processes intended to lead to commencement of mining, they consulted with the owners and lawful occupiers of Wilgespruit in the various ways required by the Mineral and Petroleum Resources Development Act 28 of 2002 ("**the MPRDA**").

18 The applicants deny they have done so. Despite asserting their ownership of Wilgespruit repeatedly so that the respondents were aware of it, the applicants were

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10 Volume 6 page 592 paragraph 2.22

11 Volume 6 page 592 paragraph 2.23

12 Volume 6 page 593 paragraph 2.23.

not once in the entire process notified or consulted in their capacity as owners of Wilgespruit in the manner required by the MPRDA.

19 Toward the end of 2015 the respondents instituted an application for the eviction of the applicants from the remainder of Wilgespruit in the North West Division of the High Court.

20 At the same time they instituted an application for the eviction of a number of employees of various of the applicants who permanently reside on Wilgespruit in terms of the Extension of Security of Tenure Act 62 of 1997. This application is still pending before the Land Claims Court.

21 Shortly before hearing of the eviction application before the Court *a quo*, it came to light that the respondents, despite holding the mining right to the remainder of Wilgespruit, do not have the necessary consent for mining of the farm from the local authority in terms of the applicable zoning scheme.

THE APPEAL IN THIS COURT

Leave to appeal

22 Leave to appeal to this Court will be granted where the intended appeal raises constitutional matters;[13] and it is in the interests of justice for such leave to be granted. This Court may also grant leave to appeal on the ground that the matter

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[13] Jurisdiction is established in terms of section 167(3)(b)(i) of the Constitution.

raises an arguable point of law of general public importance which ought to be considered by this Court.[14]

Constitutional matters and points of general public importance

23 This appeal raises the following constitutional matters, alternatively, arguable points of law of general public importance:[15]

23.1 the dispute between the parties relates to the proper interpretation of section 54 of the MPRDA in the light of the decision of the Supreme Court of Appeal ("**the SCA**") in ***Joubert v Maranda Mining Company* 2010 (1) SA 198 (SCA)** ("***Maranda***"). This Court is thus requested to provide clarity on the correctness of the SCA's decision in ***Maranda*** in the light of the facts of this application;

23.2 this Court is requested to acknowledge the applicants' right of ownership in Wilgespruit in spite of historical laws that prevented the applicants from becoming the registered owners of the Farm;

23.3 whether the respondents have a valid mining right and surface lease agreement that enjoins them to evict the applicants from the Farm despite the applicants' contention that both the mining right and surface lease agreement are invalid because of the deficiencies in the consultation process between the respondents and the applicants in compliance with the terms of the MPRDA. Pursuant to the deficiencies in the consultation

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14 Section 167(3)(b)(ii) of the Constitution.

15 Volume 14, CC FA, pp1347 – 1348, paras 2.1 – 2.4.

process, the applicants resisted the eviction application brought by the respondents. They did so in exercise of their constitutional rights against arbitrary deprivation of property and the right to equitable access to land (section 25 of the Constitution) as well as their right to administrative justice (section 33 of the Constitution); and

23.4 whether the respondents can proceed with mining activities despite the fact that the Farm has been zoned for agricultural purpose in accordance with the relevant zoning scheme.

Interests of justice

24 The constitutional issues and matters of public importance raised by this application require resolution. At its core, this matter pertains to whether it is competent for a private mining company to proceed with mining operations on a farm owned by a community without first adequately consulting with the affected community who are true owners of the property. The High Court found that there was adequate consultation and the private mining company could thus proceed with its mining operations.

25 Furthermore, the respondents seek to deprive the applicants of the use of their property by continuing with mining operations in spite of the respondents' failure to adequately consult with the applicants who are the true owners of the Farm. This cannot be allowed to happen.

26 The High Court, per Gutta J, has misapplied the principles set by this Court in ***Biowatch Trust v Registrar Genetic Resources and Other*s 2009 (6) SA 232 (CC)** ("***Biowatch***") when it awarded costs against the applicants. If the appeal were to be upheld it would confirm that the High Court's interpretation of this Court's judgment in ***Biowatch*** flouted the clear terms of the order and judgment. The judgment of this Court in ***Biowatch*** made it clear that where a dispute between parties involves the protection and assertion of a party's constitutional rights, that party cannot be saddled with a cost order in the event that its application is unsuccessful.

27 As a consequence, it is respectfully submitted that it is in the interests of justice that leave to appeal be granted.

THE APPLICANTS' RIGHTS TO WILGESPRUIT

28 We submit that the applicants hold rights to Wilgespruit, on the basis of which the respondents were required to consult with them prior to the grant of their mining right and, once that right had been granted, before mining on Wilgespruit could commence in terms of it. The applicants are in the first place owners of Wilgespruit; should this Court hold that they are not, then, in the alternative they hold informal rights in terms of the Interim Protection of Informal Land Rights Act 31 of 1996 ("**IPILRA**").

Ownership of Wilgespruit

29 The applicants lay claim to Wilgespruit, although it is registered in name of the Government in trust for the Bakgatla-ba-Kgafela.[16] The applicants say that only those families that contributed to the purchase price of the farm has any rights to the farm. They rely on the "Book" where it was specifically recorded that they are the only ones with rights to the farm.[17]

30 The applicants version is corroborated by an article by Dr Mnwana and Dr Capps, part of research to investigate the impact of new mining activity on evolving forms and relations of communal land, traditional authority and corporate community in mineral-rich rural areas of Southern Africa.[18]

31 We submit there can be no doubt that the applicants version of how they came to be owners of Wilgespruit is correct. There is no evidence on the papers that the book is not authentic or that the recording in the Book that the farm will be held on behalf of the families who contributed to the purchase price is not correct.

32 There is no evidence to counter the research done by Dr Mnwana and Dr Capps as reflected in their writing. The Respondents say that the article cannot be admitted as evidence because it is not supported by confirmatory affidavits from the writers and the content is hearsay. The Respondents do not dispute that the research was done and that the article was written. A confirmatory affidavit would therefore serve no purpose. The admissibility of hearsay evidence is dealt

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16 Volume 1 page 38 para4.4

17 Volume 6 page 588 para 2.8 and 2.9

18 Volume 7 page 658

with in the Law of Evidence Amendment Act 45 of 1988 and it is for this Court to place a value on the evidence.

33 In contrast to the real evidence produced by the applicants, the respondents attach an affidavit from the very person that stands to gain the most out of the respondents version that Wilgespruit belongs to the whole tribe and not only to the applicants. According to Kgosi Pilane the property was purchased with contributions made by members the Bakgatla Community from all the various villages to be utilized for the benefit of the whole community.[19] He does not explain how it came about that the farm was used by only those thirteen families that contributed to the purchase price. He also does not say where he got this information from as it is clearly hearsay and not supported by any real evidence.

34 If the applicants' arguments in relation to the MPRDA is accepted, it matters not in theory whether the applicants are "owners" or "occupants". The two classes of interested parties are regarded as equal under the act. However, the facts of this case illustrates clearly the difference in practice between the two classes of interests. On the one hand the "owner" is offered shares in the mining operation and a lease agreement worth millions is entered into. On the other hand the "occupants" are offered R12 000 and a small plot somewhere without any security of tenure.

35 There is a more important reason why the applicants' ownership of the land must be acknowledged. The history of the dispossession of land and its devastating

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[19] Volume 5 page 477 para 3.8

effect on our nation is well documented.[20] The importance of acknowledging land rights can in this light not be overemphasized. It goes to the heart of the applicants' right to dignity and equality.

36 Real rights in land can be acquired either through original methods such as prescription or derivative acquisition as a result of a bilateral transaction involving the co-operation of a predecessor in title.

37 In our law the transfer of a real right, in this case ownership, gives effect to the contract entered into and as such is a separate legal action. In general the following requirements must be met for transfer of ownership to be completed:[21] the thing must be in commerce; the transferor and transferee must have the legal capacity to effect the transfer; both parties must have the intention to effect and receive transfer respectively; a *justa causa* is sometimes required as the basis of the act of transfer; delivery in case of movables and registration in the case of immovable.

38 In this case the transferee did not have the legal capacity to receive transfer and the registration requirement was not fulfilled. The requirements could not be met due because black South Africans were precluded from holding rights in land. Does this mean that because of a lack of registration the applicants cannot be recognized as the true owners of the property? We submit not. The impediment has now been removed and it is submitted that the applicants are

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20 This Court dealt with this in *Daniels v Scribante and Another* 2017 (4) SA 341 (CC).

21 See Van der Merwe *Sakereg* 1989 at 301-305.

now entitled to have the land registered in their name. An application has been submitted in this regard.

39 It is unthinkable that the law will not recognise their ownership simply because of a lack of formal registration. This is so especially seeing that the South African system of registration is not absolutely negative or positive by nature.[22] In any event, the whole concept of ownership is slowly changing to accommodate the prescripts of the Constitution.[23]

The applicants' rights in terms of IPILRA

40 The applicants submit that, as an alternative to ground their claim of ownership of Wilgespruit, they possess an informal right to the farm as provided for in IPILRA. ILPRA has as its aim to provide for the temporary protection of certain rights to and interests in land, which are not otherwise adequately protected by law.[24]

41 In terms of section 1 of IPILRA informal right to land means:

> "*(a) the use of, occupation of, or access to land in terms of-*
>
> *(i) any tribal, customary or indigenous law or practice of a tribe;*
>
> *(ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in-*

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22 *Ex parte Menzies et Uxor* 1993 (3) SA 799 (C) 805-806

23 1990 STELL LR 43

24 *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) at p52.

(aa) the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936)

42 Section 2 of IPILRA deals with the deprivation of informal rights to land:

"2. (1) Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.

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

...

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

43 What can be discerned from the above sections of IPLIRA is that the applicants have, since purchasing Wilgespruit in 1918, possessed an informal right to occupy the farm (since 1919) by means of a tribal, customary or indigenous law or practice of a tribe. The particular plots that the individual members of the applicants make use of were allocated to them on the basis of an initial community agreement.[25] We submit that this initial community agreement constitutes a practice by the tribe where members of a community are allowed to make use of (or occupy) land after having concluded such an agreement.

44 The only way that the applicants can be deprived of their rights to the Farm, other than by means of the Expropriation Act 63 of 1975 ("**the Expropriation Act**"), is if the applicants consent to such a deprivation. From the facts of this case, it is clear that they have not consented to this.

45 As the applicants are the true owners of Wilgespruit or alternatively as they possess the informal right to use and occupy the land pursuant to the initial community agreement, the lease agreement that the Bakgatla concluded, purportedly on behalf of the applicants, is not valid.[26] The Bakgatla did not have authority to conclude such a lease agreement on the applicants' behalf without first obtaining consent from the applicants as required by section 2 of IPILRA.

46 The applicants did not sign the lease agreement nor were the majority of the applicants present or even represented (by their selected representative) at the meeting (*Kgotha Kgothe)* convened for purposes of signing the lease agreement

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25 Volume 7, HC AA, para 5.5, p620.

26 Volume 7, HC AA, p624, para 5.11(b).

to dispossess them of their rights. The decision taken to sign the lease agreement, without the applicants being properly represented (at the *Kgotha Kgothe*) or even consulted was invalid.

47 Nowhere in their papers do the respondents demonstrate that the majority of the applicants were consulted with prior to and when the lease agreement was concluded. The respondents contend that the Bakgatla were consulted and resolved to sign the lease agreement. The applicants submit that in spite of it having been integrated into the broader Bakgatla tribe, this integration was only limited to social and governance purposes as part of the Bakgatla, but ownership (as well as informal use and occupation) of Wilgespruit vested in the applicants and not the Bakgatla.[27]

48 The respondents thus consulted with the wrong community and as such any decision taken to deprive the applicants of their informal right to use and occupy the farm is invalid.

VALIDITY OF THE MINING RIGHT AND LEASE AGREEMENT[28]

The validity of the mining right

49 On 20 June 2008 IBMR was granted a mining right over the remaining extent of the farm.[29] However the granting of this right was and remains invalid because

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27 Volume 6, HC AA, p591, para 2.19.

28 In this section we argue that the mining right is not valid because firstly the respondents did not consult with the applicants in their capacity as owners of the farm and secondly because the consultation process with the applicants fell far short of what is required under the Act.

the applicants, as the true owners of Wilgespruit, were not adequately consulted with prior to grant of the right, as required by section 22(4)(b) of the MPRDA.[30]

50 As set out above, the applicants are indeed the *de facto* owners of Wilgespruit. Pursuant to the conclusion of the Deed of Sale of the Farm in 1918[31] ("**the Deed of Sale**"), the 13 *dikgoro* who bought and paid for Wilgespruit[32] and those who were granted access through the 13 *dikgoro,* have farmed on Wilgespruit from 1919 to this day.[33] However since mining commenced on the Sedibelo-West portion of Wilgespruit towards the end of about 2013, the applicants have lost all use and occupation of that portion of Wilgespruit. Ultimately, the mining activities conducted on Wilgespruit have over time eroded the applicants' ownership of the land.

51 Although Wilgespruit was nominally owned by the state and held in trust for the broader Bakgatla tribe, the applicants were recognised as the *de facto* owners.[34] Flowing from this recognition, the applicants formed a discrete community for purposes of its ownership and control of Wilgespruit. It controlled access to Wilgespruit to the exclusion of everyone else. This is in spite of the applicants having been integrated into the broader Bakgatla tribe. This integration was only

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29 Volume 1, HC FA, p42, para 5.2.1 (see also Record Vol 2, pp114 – 25, annexure FA11); and Volume 7, HC AA, p618, para 5.2(a).

30 Volume 7, HC AA, para 5.2(a), p618 and para 7.5, p629.

31 Volume 1, HC FA, para 4.5.1, p39.

32 Volume 6, HC AA, para 2.10, p588.

33 Volume 6, HC AA, para 2.15, p590.

34 Volume 9, HC RA, para38.2, p865. See also Volume 2, annexure FA21, p170.

limited to social and governance purposes as part of the Bakgatla,[35] but ownership of Wilgespruit always vested in the applicants.

52 The Bakgatla did not have authority to apply for and be granted a mining right without first consulting with the applicants as the true owners of Wilgespruit. As interested parties in Wilgespruit and as interested parties in the mineral rights in Wilgespruit, the applicants ought to have been consulted before any applications for mineral rights were concluded. The applicants should have been consulted and given an opportunity to submit their comments on the applications. On the facts of the present case, the applicants were not consulted. It is for this reason that we submit that the grant of the mining right was flawed.

53 The respondents contend that given the nature of this application, the assertion raised by the applicants is inappropriate. The respondents submit that the applicants ought to have taken the decision to grant the mining right on internal appeal (in terms of section 96 of the MPRDA) and if unsuccessful then they should have launched judicial review proceedings.[36]

54 While it is admitted that this route would have been the more appropriate route to follow, the reason why it was not adopted is because the applicants only became aware that the Bakgatla held a mining right over Wilgespruit on 9 November 2011, when the intended process of carrying out mine activities on

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35 Volume 6, HC AA, para 2.19, p736.

36 Volume 15, CC AA, para 15, pp1459 – 1460.

Wilgespruit was advertised in the newspapers.[37] This was over 3 (three) years after the mining right had been granted. Indeed upon learning this, the applicants submitted their objection to the Department of Mineral Resources ("**the DMR**") against carrying out of the mining activities.[38] By that point the horse had already bolted as the mining right had been granted some three 3 (three) years before.

55 Had the applicants been aware of the application for a mining right when it occurred in 2008, they would have appealed it. The reason why they did not appeal it is because the Bakgatla did not consult them, when the application was made. As a result of this they did not get an opportunity to raise their objections or provide input relating to the application.

56 The application and the subsequent grant of the mining right were finalised without the applicants having been consulted. As the true owners of Wilgespruit the applicants ought to have also been consulted when an application for a mineral right was made. However, this was not done and a right was granted over the applicants' land without their knowledge.

57 The court *a quo* erred in holding that the Respondents had complied with the consultative requirements of the MPRDA prior to granting of the mining right and that the decision to grant the mining right and to approve its cession are not

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37 Volume 4, HC FA, annexure FA38, p343.

38 *Ibid*.

invalid for unlawfulness and procedural fairness.[39] The consultation required of a mining right applicant before decision of its application is determined by section 22(4)(b) and 22(5) of the MPRDA. These sections require a Regional Manager, having accepted an application for a mining right, to notify the applicant of its duty to consult with the 'landowner, lawful occupier and any interested and affected party' and include the results of such consultation in its environmental reports. Once having received the results of the consultation, the Regional Manager must forward it to the Minister for consideration as part of the application. The Minister may only grant an application, if among other things, he is convinced the applicant complied with all requirements of the MPRDA.[40]

58 The content of a mining right applicant's duty to consult in terms of section 22(4)(b) can be determined by analogy with reference to *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) ("***Bengwenyama***"). There, this Court considered the almost exactly similar consultative requirement imposed on an applicant for a prospecting right by section 16(4)(b) of the MPRDA. It was held that, given the egregious impact that grant of a prospecting right has on the surface rights of landowners or occupiers, one purpose of the required consultation is for the applicant to attempt in good faith to reach accommodation with landowners or occupiers regarding the impact of the application on their rights to use the land

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39 Judgment *a quo* paragraph [52], Volume A, p A31.

40 Section 23(1)(g) and (h) of the MPRDA.

in question.[41] A further purpose is to provide the landowner or occupiers with sufficient information about the application that they are able to make an informed decision on whether to object to it or to take a grant of the application on review. The consultation process and its result was further described by this Court as an 'integral part of the fairness' of any eventual administrative decision in the application process.[42]

59 This Court concluded that the section 16(4)(b) consultation process in this light requires that the applicant inform the landowner or occupier a) that its application for a prospecting right had been accepted and b) with sufficient detail what the impact of prospecting would be on the land for the landowner or occupier to assess what the impact on its use of the land would be; and c) that the applicant consult with the landowner/occupier with a view to reaching "*an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation*".[43] Given that the rationale for this interpretation – the adverse impact a prospecting right has on surface rights – applies so much the more in the context of an application for a mining right, this interpretation of section 16(4)(b) must also apply, but with greater force, to section 22(4)(b).

60 The court *a quo* relied for its conclusion that the Respondents had complied with their section 22(4)(b) consultative duty on only one instance of purported

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41 *Bengwenyama* above, paragraph 65.

42 *Bengwenyama* above, paragraph 66.

43 *Bengwenyama* above, paragraph 67. See also *Bengwenyama-Ya-Maswazi Community and Others v Minister for Mineral Resources and Others* 2015 (1) SA 197 (SCA).

consultation: 'a meeting … held at Lesetlheng village on 21 April 2007 regarding the proposed mining.'[44] Three facts about this meeting indicate that it cannot constitute compliance with the Respondents' section 22(4)(b) duties of consultation.

61 First, the meeting was clearly with the Applicants as holders of surface rights to Wilgespruit. Instead, the attendees are addressed as 'you as Bakgatla-ba-Kgafela' and it is explicitly stated that the intention was to meet 'not only with farmers but also the whole community of people'.[45] Second, the meeting was arranged on the mistaken assumption that those holding rights to Wilgespruit had merely been allocated those rights in terms of customary law, rather than that they were *de facto* owners: the minutes state that the intention was to meet with the community as those 'who were allocated the land at *Modimo Mmalle*'.[46] In this light, the meeting was constituted on a deliberate denial of the Applicants' claim both that they are a discrete group within the Bakgatla and that they, distinct from the broader group of which they form a part, hold rights of ownership to Wilgespruit. As such, it cannot be regarded as consultation <u>in good faith</u>.

62 Third, even were it so that the meeting was properly directed at the Applicants as landowners/occupiers, it did not amount to a good faith attempt to reach an accommodation with them about the impact that mining would have on their

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44 Judgment *a quo* paragraph [49.3], Volume A p A29.

45 Annexure FA21, Record Volume 2 p 170.

46 Annexure FA21, Record Volume 2 p 170.

surface rights. At the outset in the minutes it is stated that one of the purposes of the meeting is to explain to those present 'the process and progress' and 'how you are going to be affected' '[i]f the mining project goes ahead'.[47] However, in the 'explanation' by Dr von Welligh that then follows, very little information is provided about either of these issues. Instead, Dr von Welligh states that the applicant for the mining right 'need[s] understanding of how different people are affected by the project' and that they 'are going to talk about whether compensation, when necessary, should be individual or community'.[48] As is clear from the list of question under the heading 'Issues, Questions and Contributions', this raised only questions with those present about how they stood to be affected, and elicited concerns.[49] At the meeting, no answers are provided to these questions. There is also no follow-up meeting to answer questions and concerns raised.

63 As such, this meeting simply is not at all a good faith attempt to reach an accommodation about the impact that mining would have on surface rights (there is no clarity reached about what that impact is); nor consultation through which those present are sufficiently informed about what lies ahead to enable them to assess their options for objecting or challenging the process. This renders the decision of the Minister of 19 May 2008 to grant the mining right, which rests in part on the respondents having consulted properly, invalid for unlawfulness and

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47 Annexure FA21, Volume 2 p 170.

48 Annexure FA21, Volume 2 p 170 - 171.

49 Annexure FA21, Volume 2 p 171.

procedural unfairness and reviewable in terms of section 6(2)(b) and (c) of the Promotion of Administrative Justice Act 3 of 2000 ('**the PAJA**').

64 The applicants have not challenged this administrative decision on review and accordingly has also not as yet been set aside by a court on review. This prompted the Court *a quo* to hold that, even were the decision to grant the mining right invalid, the applicants could not raise its invalidity in defence against the application for their eviction.[50] It erred in this respect.

65 Ordinarily, in light of the holding in ***Oudekraal Estates (Pty) Ltd v City of Cape Town*** **2004 (6) SA 222 (SCA)** ("***Oudekraal Estates***") that invalid administrative action remains in force and has valid legal consequences until set aside by a court on review,[51] the fact that the applicants have not had the decision to grant the mining right set aside would indeed mean that the respondents may in their eviction application rely on the invalid administrative act as basis of their clear right, despite its invalidity and that applicants cannot raise the invalidity as a defence to the application for their eviction unless that decision has been set aside on review. However, the applicants raised the invalidity of the decision to grant the mining right as defence by way of a 'collateral' challenge.[52] This obviates the need for them to have challenged the decisions on review in separate proceedings.

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50 Judgment *a quo* paragraph [17], Volume A p A15.

51 *Oudekraal Estates* para [26]. See, for an application of this principle in the context of the exercise of a prospecting right *Coal of Africa Limited and Another v Akkerland Boerdery (Pty) Ltd* (38528/2012) [2014] ZAGPPHC 195 (5 March 2014) at para [62] *et seq*.

52 The term commonly used is 'collateral challenge', but see C Hoexter *Administrative Law in South Africa* (2d ed 2012) at 519, using the terms 'indirect', 'defensive' and 'collateral' interchangeably.

66 In *Oudekraal* a collateral challenge was described as follows: *"[W]here the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act ... that subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a ... 'collateral' challenge to the validity of the administrative act*."[53] The motivation for allowing this kind of indirect reliance on the invalidity of an administrative decision lies in the principle of rule of law: 'the rule of law dictates that the coercive power of the state cannot generally be used against the subject unless the initiating act is legally valid'.[54]

67 The applicants' difficulty is that a collateral challenge can only be raised against the exercise of public power and is ordinarily not available as defence in a dispute between private parties where the one party in the exercise of private power relies on the existence of an antecedent administrative act. In this matter the respondents are private mining concerns and not organs of state.

68 However, section 1 of the PAJA determines that 'natural or juristic persons' other than organs of state can perform administrative action and are subject to judicial review, if they 'exercise a public power or perform a public function in terms of an empowering provision'.[55] On this basis it should be possible to raise

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53 At para [32].

54 At para [37].

55 Section 1 of PAJA defines administrative action in relevant part as a decision taken also by 'a natural or juristic person, other than an organ of state, exercising a public power or performing a public function in terms of an empowering provision...'. For a discussion of what a public power or a public function entails, see *Chirwa v Transnet Ltd & Others* 2008 (4) SA 376 (CC) at para 186 *et seq*; and *Calibre Clinical Consultants (Pty) Ltd & Another v National Bargaining Council for the Road Freight Industry & Another* 2010 (5) 457 (SCA) at para 36.

a collateral challenge to any coercive exercise of public power based on an invalid initiating act, whether exercised by an organ of state or a private person.

69 In seeking to commence mining in conflict with the surface rights of the applicants, and in seeking to evict them in order to do so, the respondents, although private entities are exercising public power - the 'coercive power of the state' - against the applicants.

70 The grant of a mining right amounts to expropriation of those surface rights of the occupier or owner of the land concerned that are incompatible with the exercise of the mining right.[56] Those surface rights held by the lawful occupier or owner that are incompatible with the conduct of mining operations are extinguished by the grant of the mining right, while the holder of the mining right acquires those rights to the surface of the land concerned that are necessary to conduct mining operations.[57]

71 Expropriation entails a series of decisions: the decision to expropriate itself; the decision of the extent and nature of the expropriation (e.g. which portion of a property will be expropriated; which rights with respect to property will be

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[56] Dale *et al South African Mineral and Petroleum Law* (2016 – SI 20) p MPRDA-133 para 92.2.5; p MPRDA-130-133 para 92.2.4.

[57] See Gildenhuys and Grobler's definition of expropriation as 'deprivation of a right from the expropriatee, the appropriation by the expropriator of the particular right and the abatement or extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right' (*LAWSA* Vol 10(3) para 1 p 1).

expropriated; to what extent and in which manner); and the decision of what compensation to pay for the expropriation.[58]

72 Ordinarily this whole process performed by the public authority/organ of state that initiates the expropriation. However, in the case of award of a mining right, only the initial decision to commence expropriation is taken by an organ of state – when the Minister takes the decision to award a mining right, that decision is also a decision to commence expropriation of the necessary surface rights.

73 Once that decision has been taken, the holder of the mining right acquires the rights in section 5 of the MPRDA, in essence to do *whatever is reasonably necessary* to commence with and conduct mining operations on the land concerned. This right at that stage is a right in outline only: what exactly it entitles the holder of the mining right to do and in other words what exactly that right is, must then be determined by that holder.

74 On the flip side the surface rights of the relevant lawful occupier or owner are also expropriated when the mining right is granted, but also only in outline or in the abstract. Which particular rights of the lawful occupier or owner are extinguished, in which way and to what extent again falls only then to be determined by the holder of the mining right in accordance with what is required for it to commence and conduct mining.

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58 Gildenhuys & Grobler *LAWSA* Vol 10(3) para 1 p 1: 'An expropriation is a legal fact with legal consequences being the destruction of a right in the hands of the expropriatee, the unilateral acquisition or vesting of a right in the hands of the expropriator or a third party and *the vesting of a right to compensation in favour of the expropriatee*'. (emphasis added)

75 Determination of compensation is also left to the holder of the mining right. Although the MPRDA makes no explicit provision for determination of compensation, the provision made in section 54 for a process of dispute resolution through which to determine relevant compensation should the parties be unable to come to an agreement necessarily implies the existence of a duty on the holder of the mining right to attempt to determine compensation in consultation with the holder of the surface rights.

76 Whereas in the ordinary course of expropriation an offer of compensation is usually made in the initial expropriation notice already, in this case both the determination and payment of compensation is left in the hands of the holder of the mineral right. It is only when that holder is unable to reach agreement, proceed with payment and commence mining that the regional manager may in terms of section 54 again become involved to try to resolve any impasse between the parties, including by then in the ordinary manner expropriating the surface rights concerned.

77 In effect then, the process of expropriation initiated by the Minister is completed by the holder of the mining right. In doing so, it is submitted, the holder of a mining right clearly exercises public power in a coercive fashion against the holder of the surface rights when it proceeds to commence mining, as the Respondents have sought to do here.

78 The power to expropriate is pre-eminently a public power and expropriation in all of its facets is administrative action subject to judicial review, both in its

direct and its indirect or collateral sense.[59] It follows that when the holder of a mining right proceeds to exercise that mining right by determining the extent of impact that its exercise would have on the surface rights concerned (when it determines the extent of expropriation of the surface rights) and when it determines the amount of compensation to be paid for that expropriation, it is exercising a public power.

79 Despite being private entities, the respondents in seeking to exercise their mining right and in bringing their eviction application to do so, are exercising the 'coercive power of the state' against the respondents on the basis of an invalid 'initiating act', so that the applicants may raise the invalidity of the grant of the mining right as a collateral challenge to their application for their eviction

The validity of the lease agreement

80 For the same reason that the mining right is invalid so too is the lease agreement. When the lease agreement was concluded, the applicants as the true owners of the Farm were not consulted. As the true owners of the Farm the applicants ought to have been the ones that concluded and negotiated the lease agreement. The Bakgatla and/or IBMR had no authority to negotiate and execute the lease agreement.

81 In any event, the lease agreement flows from the grant of an invalid mining right, as a result the lease agreement is also invalid. It was concluded based on an invalid mining right and furthermore it was concluded by a community that is

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[59] Gildenhuys & Grobler *LAWSA* Vol 10(3) para 12.

not the true owner of Wilgespruit. The applicants, as the true owners of Wilgespruit were unaware of this and the result is that they will be deprived of the use and enjoyment of their property without them having been informed. In the circumstances and for the same reasons why the mining right is invalid, the lease agreement is equally invalid.

EVEN IF THE RESPONDENTS HAD A VALID MINING RIGHT OR LEASE, THEY MAY STILL NOT PROCEED TO MINE

82 We submit that, even were this Court to hold that the respondents held a valid mining right to Wilgespruit and/or a valid lease, they would still not be able to proceed mining and evict the applicants, as a) they have failed to comply with the consultative requirements imposed by section 5(4)(c) of the MPRDA; b) the remedy provided for in section 54 of the MPRDA has not been exhausted; and c) Wilgespruit's zoning in terms of the applicable zoning scheme does not allow for mining.

Section 5(4)(c)

83 The court *a quo* erred in holding the respondents had complied with their duties in terms of the erstwhile section 5(4)(c) of the MPRDA to notify and consult the Applicants prior to commencing mining on Wilgespruit.

84 It is unclear from the papers when exactly the respondents decided to commence mining and on Wilgespruit, but on their own version they sought to exercise the entitlements conferred by their mining right in conflict with the surface rights of

the respondents at least as early as August of 2009.[60] At that time and until 27 June 2013,[61] commencement of mining was subject to compliance with section 5(4) of the MPRDA. Section 5(4)(c) in particular determined that mining operations could not commence unless and until the holder of the mining right had notified and consulted with the owner or lawful occupier of the land in question.

85 In ***Meepo v Kotze & Others* 2008 (1) SA 104 (NC)** ('***Meepo***') it was held that section 5(4)(c) should be interpreted to achieve "*a rational balance between inter alia the rights of a holder of a prospecting right on the one hand and the property rights of a land owner on the other hand*"[62] and that it should be "*widely construed*".[63] The purpose of the notification and consultation section 5(4)(c) required was to enable the holder of the mining-related right and the owner or occupier to alleviate the consequences that exercise of such rights (there a prospecting right) will have on the surface rights of the owner or occupier of the land concerned.[64]

86 In *Maranda* this understanding of the interpretation and purpose of section 5(4)(c) was endorsed by the Supreme Court of Appeal in the context of exercise

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60 Such a decision must have been taken before the *Kgotha Kgothe* of 28 June 2008 where the applicants allege that what they refer to as respondents' informal rights to Wilgespruit were purportedly terminated through a resolution of the Bakgatla traditional council. Also, the applicants contend that they commenced mining already in August of 2009 when Barrick, as appointed contractor of IBMR proceeded with preparatory mining activities.

61 Section 5(4)(c) was deleted from the MPRDA by section 4(d) of Act 49 of 2008, but only with effect from 7 June 2013, so that it remained in force until then.

62 *Meepo* at para [12].

63 *Meepo* at para [13.2].

64 *Meepo* at para [13.1].

of a mining permit.[65] The applicants submit that it clearly also pertains in the context of exercise of a mining right, as is the case here. These holdings are reinforced by this Court's holdings on consultation in the MPRDA in *Bengwenyama*, set out above.

87 In this light section 5(4)(c) imposes a duty on a mining right holder to consult with surface rights holders before commencing mining, in good faith, to reach an accommodation that would achieve a balance between its own and the surface rights holders' interests and would alleviate the impact that mining activity would have on the surface rights holders' rights.

88 The court *a quo* held that the respondents had complied with this duty through the *Kgotha Kgothe* of 28 June 2008, where it was resolved that a surface lease agreement should be concluded between the Bakgatla Community and IBMR; and through consultation that occurred during the subsequent implementation of the relocation process that commenced in March 2013 through two consulting firms, Managing Transformation Solutions (Pty) Ltd ('**MTS**') and 'Synergy'.[66]

89 These instances of purported consultation with the Applicants do not qualify as good faith attempts to reach reasonable accommodation about the impact commencement of mining would have on their rights. The *Kgotha Kgothe* of 28 June 2008 was not a meeting between IBMR, the holder at the time of the mining right and the applicants, the holders of the surface rights, as a discrete group or community. It was simply a meeting of the Traditional Council, that is,

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65 *Maranda* at para [12].

66 Judgment *a quo* at para [49.4] to [52].

of the broader Bakgatla community's governing council. The fact that certain members of the smaller and discrete Applicant community were present at this meeting by virtue of their membership of the Traditional Council does not convert the meeting into a consultation between the holder of the mining right (IBMR) and the actual holders of the surface rights (the applicant community).

90 The *Kgotha Kgothe* was also not aimed at reaching a good faith accommodation with respect to the impact that exercise of the mining right would have on the holders of the surface rights. Its purpose was instead to seek the approval of the traditional council of the surface lease agreement: a prior conclusion reached without involvement of the applicants, namely that the surface rights of the applicants would be wholly extinguished through conclusion of the surface rights lease, was given effect.

91 The various instances of 'consultation' that occurred thereafter during implementation of the relocation process were similarly flawed. The relocation process that commenced in March 2013 was not a good faith consultative process in terms of which an accommodation was attempted with respect to the impact of the exercise of the mining right on the holders of the surface rights (the applicants). The process was instead simply the implementation of a unilateral decision of the respondents that the mining right would in effect extinguish the surface rights of the applicants, so that they would have to vacate Wilgespruit and be relocated on terms also unilaterally determined by the respondents. That is, the applicants were through these 'consultations' informed that they would

have to relocate and the details of their relocation (when and to where) were determined.

92 Also, in none of the alleged consultative processes were the applicants in good faith treated as owners. All of these processes were concluded on the erroneous basis that they were merely holders of informal occupation rights, held at the pleasure of the Traditional Council and since extinguished through a decision of the Traditional Council. Negotiations were instead conducted with the Bakgatla-Ba-Kgafela, not directly with the applicants and the applicants were simply *ex post facto* informed of decisions taken and expected to acquiesce in them.

93 This failure to comply with section 5(4)(c) should be seen against the background of the complete lack of consultation with the applicants in their own right as surface right holders to Wilgespruit during the process of application for the mining right. The net effect is that the respondents now stand to have their rights to Wilgespruit in effect completely extinguished, without ever having had the opportunity to negotiate with the applicants to reach accommodation to mitigate the impact of the exercise of the mining right on their surface rights and their incidents.

94 To this must be added the fact that the respondents' potential loss of Wilgespruit will affect not only their land rights. Wilgespruit has been used in the same way by the respondents' families in expression of their cultural practices and as an act of political defiance against the apartheid system for almost 100 years. It holds enormous cultural, political and historical significance for the respondents. Its

loss would consequently impact significantly also on their constitutional rights in this respect. This manifestly frustrates the purpose of the consultative processes required in the MPRDA described above on the basis of *Meepo* and *Bengwenyama*, to achieve a rational balance between the rights of the holder of the mining right and the rights of holders of surface rights, such as the applicants. In this light the Respondents are not yet entitled to commence mining operations on Wilgespruit and as such are also not entitled to an order for the Applicants' eviction to allow them to do so.

Section 54

95 The court *a quo* held that the respondents were entitled to proceed with mining and for that purpose to evict the applicants, despite that they had initiated a dispute resolution process in terms of section 54 of the MPRDA, but the process of negotiation to achieve agreement about compensation for the applicants' loss of their surface rights required by section 54 had not even yet commenced. For this conclusion, the court *a quo* relied on the decision of the Supreme Court of Appeal in *Maranda* (above).[67]

96 We submit first that this reliance is misplaced, as *Maranda* can be distinguished from this matter; and second that, should this Court hold that *Maranda* can indeed not be distinguished, *Maranda* was wrongly decided.

Maranda can be distinguished

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[67] Judgment *a quo* paragraph 41, Volume A, p A25.

97 Section 54 creates a formal mechanism through which holders of mining rights and surface rights may resolve disputes that arise from attempts by the mining right holder to commence mining in conflict with surface rights. The process can be initiated by either by the mineral right or the surface rights holder through notifying the relevant Regional Manager of the Department of Mineral Resources of the dispute. Once initiated, the process comprises two stages.

98 The first stage is directed at resolving the dispute through negotiation between the parties:

98.1 Once notified, the Regional Manager informs the surface rights holder of the dispute, invites representations, and informs the surface rights holder of the mineral rights holders' rights, the manner in which the surface rights holder stands accused of contravening the MPRDA and the consequences should those contraventions persist.

98.2 If the Regional Manager, having considered any representation from the surface rights holder, concludes that the surface rights holder is likely to suffer loss or injury due to commencement of mining, she must request the parties to attempt agreement about compensation for that loss or injury.

99 The second stage commences if an impasse is reached in the negotiations, or further negotiation is inappropriate. In this stage – the deadlock-breaking phase - three possible options apply:

99.1 If the parties fail to reach agreement, compensation must be determined through arbitration in terms of the Arbitration Act 43 of 1964, or by a competent court.

99.2 If the Regional Manager concludes that failure to reach agreement was the fault of the mineral right holder, she may prohibit that holder from commencing mining pending determination of compensation through arbitration or by a competent court.

99.3 If the Regional Manager concludes that any further negotiation would frustrate the objectives set out in sections 2(c), (d), (f) or (g) of the MPRDA, she may recommend to the Minister that the land in question be expropriated.

100 The Respondents have requested the Regional Manager to intervene, but nothing has happened since: the first, negotiation stage of the section 54 process has been initiated, but it has not even commenced yet.

101 In *Maranda* the holder of a prospecting right, having been prevented by the owner from entering the land to which its right applied, had approached the Regional Manager in terms of section 54(1) to intercede. Only after various attempts at negotiation by both the Regional Manager and the holder of the prospecting right had failed (the owner refused to negotiate) – that is, only after the first, negotiating phase of section 54 had failed - did the holder of the prospecting right approach the court for access.

102 The owner then submitted that the prospecting right holder's recourse to court is precluded by the fact that the Regional Manager had not yet initiated the process in terms of section 54(5) to expropriate the owner and determine compensation. The SCA held only that, where the negotiating phase had failed and the deadlock-breaking phase had commenced, access to court was not precluded by the failure of the Regional Manager to initiate the section 54(5) expropriation to break the deadlock.

103 This holding has no bearing on the facts of this case, where the section 54 process as a whole has only as yet been initiated, but the first, negotiating phase has not even commenced. On these facts, the Respondents' right to approach a court for the Applicants' eviction remains suspended.

Should Maranda not be distinguishable, then it is wrong

104 Should this Court hold that *Maranda* cannot be distinguished from this case, and that it is indeed authority for the proposition that the fact that the section 54 negotiation remedy has not been exhausted does not suspend the respondents' right to commence mining and to evict the applicants for that purpose, the applicants submit that *Maranda* was wrongly decided.

105 The applicants submit that pending completion of at least the first, negotiation stage of the section 54 process, the respondents' right to commence mining is suspended, so that they have no clear right upon which to rely for their application for an interdict to evict the applicants – in short, it is not open to the Respondents to approach a court with an application for the applicants' eviction

to enable them to commence mining until they have exhausted this first stage of the section 54 process.

106 From the perspective of mining rights holders, section 54 provides an internal remedy through which to resolve through regulated negotiation an impasse where the surface right holder 'prevent[s] [it] from commencing or conducting any … mining operations'.[68] As with any internal administrative remedy, its purpose is precisely to be an inexpensive, efficient, less adversarial *alternative* to recourse to court. It would make no sense to allow the respondents, having initiated this alternative remedy, to approach a court for relief while its resolution is pending.

107 From the perspective of a surface rights holder section 54 provides a remedy through which to exact compensation for any injury that is likely to arise from commencement or conducting of mining.[69] It would likewise make no sense to allow that injury to occur – that is, in this case to allow the respondents to evict the applicants - before the process through which to agree on such compensation has been concluded. Stated differently, the surface rights holder's only bargaining chip through which to try to exact compensation in the first, negotiating stage of the section 54 process is its ability to continue to prevent commencement or conducting of mining until the negotiations have been concluded. If that is taken away, the process is rendered wholly ineffective to protect the surface rights holder.

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68 Section 54(1). See also *Bengwenyama* (above) at para [38].

69 *Bengwenyama* (above) at para [38].

108 Section 54 must also be considered in the context within which it usually operates and is usually invoked: a powerful, well-resourced multi-national mining concern seeking to enforce its rights against a group of impoverished, marginalised, economically powerless people, as is the case in this matter. It must be interpreted in a manner that renders it an effective remedy for surface rights holders such as the applicants, as it is most often the only remedy they have at their disposal through which to protect not only their economic and land interests and rights, but often their way of life, their existence as a community, their history – in short, their constitutionally protected human dignity.

109 This is particularly so where, as here, there was no opportunity provided the surface rights holders to protect their rights by exacting compensation through consultation prior to granting of the mining right in terms of section 22(4)(b) of the MPRDA; or subsequent to the grant, in terms of section 5(4)(c). In such cases – in this case – section 54 is indeed their only remedy, as this Court indeed acknowledged in *Bengwenyama*.[70]

110 The conclusion that the holder of the mining right is precluded from approaching a court to enforce its right to commence or conduct mining while the negotiation phase of the section 54 process is pending is further supported by the wording and structure of section 54 read as a whole. Section 54 does of course allow for relief being sought outside the parameters of its negotiating process in the form of recourse either to arbitration or the courts; or expropriation of surface rights

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[70] *Bengwenyama* above paragraph 65.

through the offices of the Minister. However, all of these alternative modes of recourse become available only once the attempt at reaching agreement in the first stage has failed or if the Regional Director concludes that continued negotiation would be inconsistent with the purposes of the MPRDA. The structure of the section understood thus would be undermined should a mining right holder be able simply to bypass the section 54 negotiation process through direct recourse to court.

111 Finally on this point, section 54(6) allows the Regional Manager, having concluded that failure to reach agreement is the fault of the mining right holder, to prohibit the mining right holder in writing from commencing mining until the dispute has been determined through arbitration or a competent court. This provision would be rendered meaningless if the mining right holder could in any event simply commence or conduct mining and approach a court for an order enabling it to do so, before the negotiation phase of section 54 has been concluded and has failed and before the Regional Manager can determine whose fault that failure was.

WILGESPRUIT'S ZONING SCHEME

112 In terms of section 23(6) of the MPRDA, the respondents' mining right and so the clear right on which they rely for the interdict they seek is subject to compliance with the MPRDA itself, the terms and conditions of their mining

right, any further prescribed terms and conditions, and 'any relevant law'.[71] It is trite that 'any relevant law' includes applicable land use regulation through provincial ordinances and related land planning schemes.[72] A mining right may thus be exercised only in compliance with and if permitted by the applicable land use regulation. A lessor of land is also bound in this way.

113 Wilgespruit's use is regulated by the Town-Planning and Townships Ordinance 15 of 1986 (Transvaal) ('**the Ordinance**'), through the Moses Kotane Town-Planning Scheme, 2005 ('**the Zoning Scheme**') read with the Town Planning Scheme Map, 2005 ('**the Map**').[73] Wilgespruit's zoning in terms of the Zoning Scheme and Map prohibits mining: it is currently zoned as 'Agricultural';[74] this zoning permits use of the farm only for 'agriculture building' and 'residential' purposes';[75] mining is permitted only with the special consent of the Moses Kotane Municipal Council; and no such consent has been applied for or obtained.[76] The court *a quo* nevertheless held that the respondents' mining, including their attempt to extend mining to the 'remainder' of Wilgespruit, is lawful.[77]

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71 Section 23(6): 'A mining right is subject to this Act, <u>*any relevant law*</u>, the terms and conditions stated in the right and the prescribed terms and conditions …'.

72 *Maccsand v City of Cape Town* 2012 (4) SA 181 (CC) ('***Maccsand***') para [44]. See also, more recently *Jacobs and Another v Transand (Pty) Ltd* (11554/2014) [2014] ZAWCHC 172 (14 November 2014) ('***Transand***').

73 Annexures LDPB1 and LDPB2 respectively to the second supplementary affidavit of Ms Louise du Plessis; Volume 10 pp 959 and 1000 respectively.

74 Annexure LDP1 to the first supplementary affidavit of Ms Louise du Plessis, Volume 10 p 947; Schedule 2 to Annexure LDPB1, Volume 10 p 987.

75 Annexure LDP1, Volume 10 p 947.

76 Annexure LDP3, Volume 10 p 950.

77 Judgment *a quo* paragraph [78], Volume A p A43.

114 Clause 4(7) of the Zoning Scheme read with section 43 of the Ordinance allows a land user to continue using land in a manner that is unlawful in terms of the current Scheme, as long as (a) it has used the land in the same manner continuously since at least two months prior to commencement of the current Scheme; and (b) its use of the land, although now unlawful, was lawful before the commencement of the current Scheme.[78]

115 The respondents conducted prospecting continuously from at least 2004 – two years before the current Zoning Scheme commenced. They continued prospecting until they commenced mining in terms of their mining right in 2008 and have since then continuously conducted mining on Wilgespruit.[79] The court *a quo* held that their prospecting was lawful prior to commencement of the current Scheme.[80] It further held that this prospecting is indistinct from their current mining activity, so that the current mining was simply a continuation of the prospecting.[81] It concluded that mining is currently permitted on the basis of clause 4(7) and section 43, despite the fact that Wilgespruit's current zoning prohibits it.[82] It erred here in two ways.

116 First, it erred in holding that the prospecting prior to commencement of the current Scheme was lawful. It held thus, because this prospecting was

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78 Judgment *a quo* paragraph [74], Volume A p A42.

79 Judgment *a quo* paragraph [77], Volume A p A42.

80 Judgment *a quo* paragraph [78], Volume A p A43.

81 Judgment *a quo* paragraph [77], Volume A p A43.

82 Judgment *a quo* paragraph [79], Volume A p A43.

conducted in terms of a valid prospecting right.[83] But the validity of the respondents' prospecting right does not on its own render their prospecting before commencement of the current Scheme lawful. To satisfy clause 4(7) and section 43, their prospecting must have been lawful prior to commencement of the current Scheme, *in terms of the land use regulatory scheme that applied then*.

117 Before the current Scheme, Wilgespruit's land use was regulated in terms of the Rustenburg District Council Town Planning Scheme, 2000 ('**the previous Scheme**'). In terms of the previous Scheme, Wilgespruit was also zoned for 'Agriculture'. Any use of the farm other than 'Agriculture building' and 'Residential' was, absent special consent, prohibited. No special consent for prospecting was applied for or obtained. Accordingly the prospecting on Wilgespruit prior to commencement of the current Scheme *was unlawful*.

118 Second, the court *a quo* erred in holding that the respondents' current mining is a continuation of the prior prospecting. The use in terms of the current Scheme that the court *a quo* regularised through reliance on clause 4(7) and section 43 is 'mining industry'. 'Mining industry' is defined in the Scheme as 'mining minerals from the ground'. Although neither the Scheme nor the Ordinance define 'prospecting', it is clear that prospecting is regarded as a use distinct from 'mining'. Section 21(1)(b) of the Ordinance, for example, determines that a local authority shall not prepare a town planning scheme with respect to land 'on

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83 As above.

which prospecting, digging *or* mining operations are being carried out' (emphasis added).

119 The MPRDA also distinguishes the two activities. 'Mining' is not defined in the MPRDA. 'Mine' is defined as a verb, but the definition is circular – 'to mine' is defined as 'to mine any mineral'. However, 'mining area' is defined as 'the area on which the extraction of any mineral is authorised', which would indicate that 'mining' is the extraction of any mineral. 'Prospecting' in turn is defined, as 'intentionally *searching for* any mineral by means of any method'.

120 The two terms are kept distinct throughout the MPRDA. In section 2(g), for example, one of the objects of the Act is described as providing 'security of tenure in respect of *prospecting*, exploration, *mining* and production activities.'

121 Two distinct regimes are provided for obtaining and exercising a prospecting right (sections 16-21) and a mining right (sections 22 to 30). The regime with respect to prospecting is far less exacting than that with respect to a mining right. A prospecting right is granted only for a period not exceeding 5 years,[84] while a mining right may be granted for a period not exceeding 30 years.[85]

122 Significantly, in terms of section 20, a holder of a prospecting right may remove minerals from the ground only for purposes of testing or to analyse or identify it; and must obtain the Minister's written consent to remove minerals extracted in the course of prospecting for own account.

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84 MPRDA section 17(6).

85 MPRDA section 23(6).

123 The distinction made in the MPRDA, the Ordinance and the Zoning Scheme correlates with the ordinary meaning of the terms. 'To mine' is to 'obtain (metal etc.) from mine; dig in (earth etc.) for ore etc.'. A 'mine' is an '[e]xcavation in earth for metal, coal, salt etc.'. To 'prospect' is in turn to '[e]xplore region (for gold etc.)'.[86]

124 Against this background it is clear that 'mining industry', for purposes of the Ordinance and the Zoning Scheme is conceptually distinct from prospecting: mining is the extraction of minerals from the ground with the aim to remove it for own account, whereas prospecting is searching for any mineral and deciding whether it is worthwhile to proceed mining for it. It is also clear that, although many actual mining and prospecting activities are the same, mining is far more permanently invasive with respect to the land on which it is conducted than prospecting. This militates against any interpretation in the land use regulation context that would allow mining to commence simply as a continuation of prior prospecting: in short, granting consent for mining is a far more serious matter than doing so for prospecting.

125 The court *a quo* thus erred in holding that the respondents' current mining, although prohibited in terms of Wilgespruit's zoning, is regularised by virtue of clause 4(7) and section 43. The respondent's prospecting prior to commencement of the current Scheme was neither lawful at that time, nor can their current mining be seen as a continuation of that prospecting. The

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86 Fowler & Fowler (eds) *The concise Oxford dictionary of current English* (4th ed 1959) p 755 & 965 respectively.

Respondent's current mining on Wilgespruit, including their attempt to extend that mining to the 'remainder' of the farm is in contravention of 'any other law' in the form of the Ordinance and the Zoning Scheme. Accordingly, they have no clear right on which to base their interdict for the applicants' eviction.

126 It is of course open to the applicants now to approach the Council to obtain the requisite rezoning or special consent. However, it would be inappropriate for this Court in anticipation of this happening to grant the interdict the applicants seek, but to suspend its operation pending resolution of any rezoning or special consent process, for three reasons.

127 First, in terms of section 40(2) of the Ordinance, use of land in contravention of zoning and permitted uses is an offence. In *Transand* (above), where an application for an interdict to prohibit the respondent mining company to proceed with mining activity was at issue, the court refused to suspend the operation of that interdict pending resolution of an application for alteration of use of the land concerned on grounds that to do so would be 'to countenance an illegality'.[87] To grant the interdict the applicants seek but suspend its operation until rezoning or use permission processes have been completed would similarly 'countenance illegality'.

128 Second, to do so would render the outcome of rezoning application or special consent application a foregone conclusion and so place this Court in the position

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87 *Transand* at para [71], citing *Lester v Ndlambe Municipality* [2014] 1 All SA 402 (SCA) at para 21 to 28; *United Technical Equipment* Co *(Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T) at 347F-H; *lntercape Ferreira Mainliner ((Pty) Ltd* & *Others v Minister of Home Affairs* & *Others* 2010 (5) SA 367 (WCC); and *410 Voortrekker Road v Minister of Home Affairs* 2010 (4) SA 414 (WCC).

that it prescribes to the Council the outcome of its pending administrative decision. This would create precisely the situation that this Court was so careful to avoid in *Maccsand* – that a decision taken by one sphere of government in one context (the Minister of Minerals and Energy in terms of the MPRDA) would intrude upon and render superfluous the decision-making power of another sphere of government in another context (the Council in terms of the Ordinance).[88]

129 Third, for this Court to so grant but suspend the interdict would reward what has been a train of unlawful and now illegal conduct of the applicants in this matter with precisely the outcome they have sought to achieve with that unlawful conduct: to remove the respondents from their property without complying with applicable requirements of consultation and negotiation through which they could properly safeguard their interests.

CONCLUSION

130 For the reasons above, we submit that the applicants, as the true owners of the farm Wilgespruit, should not be evicted from the farm where they and their forebears have been farming for nearly a hundred years.

131 It is on this basis that the applicants submit that this application should succeed and costs should be awarded in favour of the applicants including costs of three counsel.

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88 *Maccsand* at paras [48] – [49].

A DE VOS SC

JFD BRAND

M MUSANDIWA

Counsel for the Applicants

Chambers:

Cape Town, Pretoria and Sandton

20 April 2018

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: 265/17

In the matter between:

GRACE MASELE (MPANE) MALEDU	**1ST APPLICANT**
SHIMANKE RASEPAE	**2ND APPLICANT**
OBAKENG MATSHEGO	**3RD APPLICANT**
NKASHE MATSHEGO	**4TH APPLICANT**
DONNY MATSHEGO	**5TH APPLICANT**
MMAPULA PILANE	**6TH APPLICANT**
PHOPHO KOTSEDI	**7TH APPLICANT**
THERO MMALE	**8TH APPLICANT**
JACOB MOALOSI RASEPAE	**9TH APPLICANT**
NTUTU RASEPAI	**10TH APPLICANT**
GOPANE REASEPAE	**11TH APPLICANT**
MANTIRISI RASEPAI	**12TH APPLICANT**
MPHO RAMFATE	**13TH APPLICANT**
MOTHLAGODI PILANE	**14TH APPLICANT**
JOSEPH SITISI THLASE	**15TH APPLICANT**
ISAAC RAMAFATSHE PALAI	**16TH APPLICANT**
VICTOR KOTSEDI	**17TH APPLICANT**
KUTLWANO MATSHEGO	**18TH APPLICANT**
DANIEL MAUGOLE MALEBYE	**19TH APPLICANT**
MOSES TSHWEU MALEBYE	**20TH APPLICANT**
ALBAUES RAPULA MMALE	**21ST APPLICANT**
EVA MALEBYE	**22ND APPLICANT**
GERTRUIDE PILANE	**23RD APPLICANT**
SETWE MANNETJIE PILANE	**24TH APPLICANT**
INOLOFATSENG RAMFATE	**25TH APPLICANT**
ELIAS BAFYE RASEPAE	**26TH APPLICANT**

MAKUBESELE DORIS SENOELE	**27TH APPLICANT**
MAUDRIES GERTSOU RASEPAE	**28TH APPLICANT**
MOGOTSI LEVY RASEPAE	**29TH APPLICANT**
MESU RASEPAI	**30TH APPLICANT**
TSHOSE DANIEL RASEPAE	**31ST APPLICANT**
MMAKOMO MARIA MATABEGE	**32ND APPLICANT**
MMAMMU DOIEEAH THLASI	**33RD APPLICANT**
MMAMMUSI ELIZABETH PALAI	**34TH APPLICANT**
MOGAPI KAISER MATSHEGO	**35TH APPLICANT**
MOTLHEGODI JOSEPH MATSHEGO	**36TH APPLICANT**
OLAOTSE THLASI	**37TH APPLICANT**
LESETLHENG VILLAGE COMMUNITY	**38TH APPLICANT**

and

ITERELENG BAKGATLA MINERAL RESOURCES (PTY) LTD	**1ST RESPONDENT**
PILANSBERG PLATINUM MINES (PTY) LTD	**2ND RESPONDENT**

APPLICANTS' SUPPLEMENTARY HEADS OF ARGUMENT

STATUS OF LAND TITLE ADJUSTMENT APPLICATION

1. The Applicants lodged an application for a land title adjustment in 2012 which was duly gazetted. Mr. Ramatobane Amon Maodi was appointed as the Commissioner tasked to conduct investigations and compile a report. See annexures "**W1**" and "**W2**" of the Government Gazettes relating to the lodgment

of the application and the appointment of the Commissioner.

2. The Applicants submitted inputs to the Commissioner, the Department of Rural Development and Land Reform issued draft terms of reference for the Commissioner and meetings were scheduled. See annexures "**W3**" and "**W4**".

3. The process was supposed to be finalized within six (6) months; however, sometime in mid-2013 the Applicants were informed that Mr. Maodi was no longer the Commissioner on the matter. No report was compiled as anticipated and no other Commissioner was subsequently appointed. The Applicants have since tried to follow up with the Department on the status of the application to no avail.

STATUS OF LAND CLAIMS COURT APPLICATION

4. At the same time that the High Court application was issued, the Respondents issued a parallel application in the Land Claims Court for the eviction of those persons permanently residing on the farm Wilgespruit 2 JQ with rights in terms of the Extension of Security of Tenure Act ("ESTA"). These ESTA occupiers were employed to attend to and/or oversee the farming activities of some of the Applicants.

5. The Respondents have not pursued the application any further since the filing of their replying affidavit on 7 June 2016. As such, a letter was sent to the attorneys

of the Respondents on 7 November 2017 to ascertain if they intend to proceed with the application. It was always understood that in spite of the High Court order an eviction order in the Land Claims Court still needs to be sought against the ESTA occupiers. However, in response to our enquiry the attorneys of the Respondents stated that the decision to pursue the Land Claims Court application will rest on "*the outcome of the application for leave to appeal to the Constitutional Court*". A copy of this correspondence is attached as annexures "**W5**" and "**W6**" respectively.

A DE VOS SC

JFD BRAND

M MUSANDIWA

Counsel for the Applicants

Chambers:

Cape Town, Pretoria and Sandton

20 April 2018

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 265/17
SCA Case No: 755/2017
Case number *a quo*: M495/2015

In the matter between:

GRACE MASELE (MPANE) MALEDU	1st Applicant
SHIMANKI RASEPAE	2nd Applicant
OBAKENG MATSHEGO	3rd Applicant
NKASHE MATSHEGO	4th Applicant
DONNY MATSHEGO	5th Applicant
MMAPULA PILANE	6th Applicant
PHOPHO KOTSEDI	7th Applicant
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JOSEPH SITSI TLHASI	15th Applicant
ISAAC RAMAFATSHE PALAI	16th Applicant
VICTOR KOTSEDI	17th Applicant
KUTLWANO MATSHEGO	18th Applicant
DANIEL MAUGOLE MALEBYE	19th Applicant
MOSES TSHWEU MALEBYE	20th Applicant

ALBAUES RAPULA MMALE	21st Applicant
EVA MALEBYE	22nd Applicant
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MOTLHEGODI JOSEPH MATSHEGO	36th Applicant
OLAOTSE THLHASI	37th Applicant
LESETLHENG VILLAGE COMMUNITY	38th Applicant
and	
ITERELENG BAKGATLA MINERALS RESOURCES (PTY) LTD	1st Respondent
PILANESBERG PLATINUM MINES (PTY) LTD	2nd Respondent

FIRST AND SECOND RESPONDENTS' WRITTEN ARGUMENT

TABLE OF CONTENTS

Introduction 1

Background 2

Who is IBMR? 2

Who is PPM? 5

Who are the Appellants? 7

The Nature of the Appellants' rights in respect of Wilgespruit 8

Introduction 8

The Appellants' allegation that they are the true owners of the farm 10

The legal effect of granting of a mining right on informal land rights 16

The alleged invalidity of the mining right and the lease 20

The Appellants' case that the mining right is invalid 20

Consultation prior to the granting of the Mining Right 21

The collateral challenge 24

The alleged invalidity of the lease agreement 28

The argument that the Mining Respondents are not entitled to mine even if they have a valid mining right and lease 33

Section 5(4)(c) 33

Alleged need to exhaust section 54 35

The Appellants' arguments based on the land use scheme 38

Costs 48

Conclusion 48

INTRODUCTION

1. The Appellants[1] seek leave to appeal to this Court and, if granted, an order setting aside the eviction order granted by the Court *a quo* on 16 February 2017.

2. In their heads of argument, the Appellants immediately capture the attention by referring to the alleged purchase of Wilgespruit 2 JQ by thirteen families who became the "*owners*" of the farm in 1919 and "*who continuously and without interruption until 2008*", farmed on the farm when "*a mining company*" succeeded in obtaining the "*mineral rights to the farm*." They submit that the Appellants are not the only black community to have this particular history relating to the ownership of land and the consequences of mining companies "*riding roughshod*" over their rights. As shown below, the Mining Respondents did not in any way ride "*roughshod*" over the Appellants' rights and the allegation as well as the identity of the so-called "*true owners*" of the farm, are shrouded in controversy and disputes.

3. These heads are structured under the following main headings, broadly following the structure of the Appellants' heads: (1) Introduction, (2) Background, (3) The Nature of the Applicants' Rights to Wilgespruit; (4) The Alleged Invalidity of the Mining Right and the Lease Agreement; (5) The Argument that the Mining Respondents are not entitled to mine despite a valid Mining Right and Lease; (6) The Argument based on the Land Use Scheme, and (7) Costs.

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[1] In these heads of argument, the 1st to 38th Applicants, who were the 1st to 38th Respondents *a quo*, will for the sake of convenience be referred to herein as "the Appellants". The 1st and 2nd Respondents will be referred to as the "Mining Respondents".

BACKGROUND

4. This matter is about the rights to use the farm Wilgespruit 2 JQ, North West Province held by the Mining Respondents on the one hand, and the Appellants on the other hand.

5. **Who is IBMR?**

5.1 A company called Itereleng Bakgatla Minerals Resources (Pty) Ltd ("IBMR") holds the right to mine platinum group metals and associated minerals (PGMs) in respect of the "remainder" of the farm Wilgespruit.[2] IBMR was the first applicant in the court *a quo* and is the first respondent in this court. No mining operations are being conducted on this part of the farm.

5.2 IBMR is a company that was formed by the Bakgatla Community as a vehicle to exploit the platinum resource on *inter alia* Wilgespruit.[3] IBMR was thus the Bakgatla Community.

5.3 In 2004, IBMR successfully applied for a prospecting right under the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA").[4] At the time, IBMR was 100% held by the Bakgatla Community. IBMR partnered with a company called Barrick Platinum SA (Pty) Ltd for purposes of conducting prospecting, because IBMR did not have the necessary capital

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[2] The farm Wilgespruit has not been subdivided, but two separate mining rights are currently held in respect of, respectively, the western portion of the farm (a triangular portion of land known as, and referred to herein as, "Sedibelo West") and the larger eastern portion (herein referred to as the "remainder" of the farm).

[3] FA, vol 1, p 49, par 6.4.

[4] FA, vol 1, p 41, par 5.1.2 and p 49, par 6.5 and Kgosi Pilane Affidavit, vol 5, pp 478-479, paras 3.14 and 3.15.

and expertise.[5] The Bakgatla Community transferred 15% of its shares in IBMR to Barrick in the process. The farm was successfully prospected. Barrick later withdrew and the Bakgatla Community then bought back the 15% shareholding.[6]

5.4 IBMR subsequently applied for a mining right which was granted to it on 19 May 2008 in respect of *inter alia* the whole of the farm Wilgespruit.[7] This mining right (333MR) took effect on 20 June 2008. IBMR's environmental management programme ("EMP") was approved in terms of section 39 of the MPRDA on 20 June 2008[8]. This is admitted by the Appellants.[9] The statement in the very first paragraph of the Appellants' heads in this Court that the 13 families and their descendants farmed without interruption until 2008, "when *a* mining company succeeded in obtaining the mining rights", is thus less than frank inasmuch as it is not disclosed that it was the Bakgatla Traditional Community's own company established for purposes of exploiting the platinum reserve under the land that obtained the mining right in 2008; indeed some of the directors on the board of IBMR were residents of Lesetlheng[10]. It is also not mentioned that this company, IBMR, had already obtained a prospecting right in 2004 and was prospecting on the farm. At that stage, there were very few persons conducting farming activities.[11] Prior to 2002 there were less than 10 farmers crop farming at Wilgespruit. By

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[5] FA, vol 1, p 41, par 5.1.3 and p 49, par 6.6 and Kgosi Pilane Affidavit, vol 5, p 479, par 3.15
[6] FA, vol 1, p 50, par 6.10 and Annexure FA23, vol 2, p 177, par 2.
[7] FA11 p 114-125; annexure FA par 5.2, pp 42-43.
[8] FA, vol 1, pp 42-43, paras 5.2.1-5.2.3; FA12, vol 2, p 126.
[9] AA, vol 7, p 629, par 7.5.
[10] See Affidavit of Kgosi Pilane, vol.5, par 18.1, p 499.
[11] See Affidavit of Kgosi Pilane, vol 5, pp 477-478, paras 3.11-3.12.

2004 when prospecting commenced, farming ceased all together.[12] There is furthermore no evidentiary basis for the gratuitous statement in the second paragraph of the heads that the Mining Respondents is or was *riding roughshod over their rights.* Indeed, the evidence is to the contrary as set out below.

5.5 On 28 June 2008, the Bakgatla Community resolved at a *Kgotha Kgothe* to enter into a lease with IBMR for purposes of conducting mining operations on Wilgespruit. IBMR subsequently entered into the (surface) lease agreement in respect of the whole of the farm with the Minister of Rural Development & Land Reform and the Bakgatla Community.[13] The Deed of Lease was notarially executed on 17 April 2012 and registered in the Deeds Office on 3 October 2012.[14] The Minister of Rural Development & Land Reform (as registered owner) ratified the resolution taken by the Bakgatla Community to lease the whole of Wilgespruit to IBMR and approved the lease agreement between the Bakgatla Community, IBMR and the said Minister.[15]

5.6 In April 2012, the IBMR mining right was amended in terms of section 102[16] to excise (only) the Sedibelo West area (i.e. the undivided western portion of the farm). The PPM mining right in respect of neighbouring farms was simultaneously amended to include Sedibelo West.[17] Insofar as the lease in respect of the Sedibelo West area is concerned, where PPM holds the

[12] See Affidavit of Kgosi Pilane, vol.5, par 3.12, p 478.
[13] FA, vol 1, pp 51-52, paras 6.12-6.13; FA24, vol 2, pp 179-201.
[14] FA, vol 1, p 55, par 6.24; FA30, vol 3, pp 221-241.
[15] FA, vol 1, pp 54-55, par 6.22; FA29, vol 3, p 220.
[16] The section 102 process is dealt with at FA par 5.4 p 44 – 45.
[17] FA, vol 1, pp 44-45, paras 5.4.1-5.4.3; FA16, FA17, FA18 and FA19, vol 2, pp 144-164.

mining right, IBMR entered into a sub-lease agreement with PPM.[18]

5.7 IBMR, however, retained the mining right and remained the lessee in respect of the remainder of the farm Wilgespruit. The Appellants are occupying this part of the farm which forms the subject of the present proceedings.

6. **Who is PPM?**

6.1 The platinum resource on Wilgespruit forms part of a wider resource that also occurs in, on and under *inter alia* the neighbouring farms, Tuschenkomst and Witkleifontein.[19]

6.2 Pilanesberg Platinum Mines (Pty) Ltd ("PPM") holds the right to mine and has been conducting full scale mining operations on these neighbouring properties by way of open pit mining. On Sedibelo West, open pit mining started in the last quarter of 2013.[20] This is common cause. PPM wishes to extend the mine eastwards onto the remainder of Wilgespruit. If the mine is not so extended, the whole mining operation will become uneconomical in 2018 and will have to close.[21]

6.3 IBMR, the Bakgatla Community and PPM entered into negotiations and concluded a series of transactions in terms of which the Bakgatla Community obtained a 26% share interest in Sedibelo Platinum Mines (the holding company of PPM) in exchange for their shares in IBMR. [22] The

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[18] FA, vol 1, pp 56-57, par 6.26; FA31, vol 3, pp 242 – 280.

[19] FA6 and FA7, vol 2, pp 102-103.

[20] FA, vol 1, p 33, par 3.2.1; pp 43-44, par 5.3; pp 47-48, par 5.6; FA15, vol 2, pp 131-143; AA, vol 7, p 618, par 5.2: "the content of paragraph 3.2.1 is admitted".

[21] FA, vol 1, pp 91-92, par 9.

[22] FA, vol 1, pp 18-19, par 2.3; p 83, par 8.9.1.

Bakgatla Community thereby obtained a 26% interest in Sedibelo's wider mining operations with concomitant infrastructure including a further mining right in respect of the farms Rooderand, Legkraal and a portion of Koedoesfontein. It follows that the Bakgatla Community accordingly also holds a 26% indirect interest in the extension of the existing mine onto the remainder of Wilgespruit where the so-called East Pit is to be developed. The prospecting of Wilgespruit and the mining right granted to IBMR as well as the subsequent transactions with PPM and Sedibelo Mines were the direct result of the business acumen of the Bakgatla Community.

6.4 PPM is in the process of taking transfer of this mining right from IBMR and obtained ministerial consent for such transfer, in terms of section 11 of the MPRDA, in February 2014.[23] The cession has not yet been registered and has not yet taken effect. Pending registration of the transfer, PPM has been appointed as IBMR's contractor in terms of section 101 of the MPRDA and is acting in its own name for and on behalf of IBMR to exercise this mining right.[24]

6.5 By virtue of holding the abovementioned mining right and approved EMP in respect of the remainder of the farm Wilgespruit and having notified and consulted with the landowner and lawful occupiers, the Mining Respondents (IBMR as principal and PPM as its section 101 contractor) are entitled to mine and exercise the rights set out in section 5(3) of the MPRDA on the

[23] FA, vol 1, p 33, par 3.2.2; p 43, par 5.2.5; FA13 and FA14, vol 2, pp 127-130.
[24] FA, vol 1, pp 33-34, par 3.2.2; p 43, par 5.2.6; FA4, vol 1, p 98.

remainder of Wilgespruit. [25]

6.6 The Mining Respondents intend to commence full-scale mining activities on the remainder of the farm but are precluded from doing so by the Appellants' refusal to vacate the farm. This is common cause. [26]

7. **Who are the Appellants?**

7.1 The Appellants are holders of informal land rights within the meaning of the Interim Protection of Informal Land Rights Act, 1996 ("IPILRA") in respect of the remainder of Wilgespruit. None of them reside on the land.[27] They use the land for cattle farming and occupy the land through herders who tend to their cattle.[28] They are not the registered owners of the farm but claim to be the true owners thereof.[29]

7.2 As is evident from what follows below, the Appellants have been frustrating the efforts of the Mining Respondents for a prolonged period to gain possession of Wilgespruit in order to proceed with the mining. The herders who still remain on Wilgespruit are for the most part faceless and they hide their identity closely from the Mining Respondents – the evidence is that they are prohibited by the 1st to 38th Appellants to negotiate with the Mining Respondents for their relocation.[30] Furthermore, aggressive and violent

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[25] FA, vol 1, pp 45-46, par 5.5.1.

[26] FA, vol 1, pp 34-35, paras 3.3 and 3.5; AA, vol 7, pp 620 and 621, paras 5.4 and 5.6; pp 645-646, par 9.2: "It is admitted that the continued presence of the Respondents would preclude the Applicants' planned mining activities, as such activities would render the remainder of Wilgespruit (un)inhabitable."

[27] AA, vol 7, p 624, par 5.11(a) – relied on by the appellants in the alternative

[28] AA, vol 6, p 589, par 2.12

[29] AA, vol 6, p 568, par 2.5

[30] FA, vol 1, p 34-35, par 3.4

conduct and intimidation are used to keep the employees and contractors of the Mining Respondents away from the mining area on Wilgespruit, even to the extent of attacking them with stones.[31]

7.3 Although the Mining Respondents have done everything required from them by law and reason by the book, their efforts to gain possession of the farm have been to no avail.

7.4 It seems that the Mining Respondents are helplessly tied into the internal disputes between the faction consisting of the 1st to 38th respondents on the one hand and the Bakgatla Community and Traditional Authority on the other, although the Mining Respondents have all the rights required by law to mine on Wilgespruit. No commercial mining can take place under these circumstances unless the rule of law is abided.

THE NATURE OF THE APPELLANTS' RIGHTS IN RESPECT OF WILGESPRUIT

8. **Introduction**

8.1 The farm Wilgespruit is registered in the name of the Government of South Africa in trust for the Bakgatla-ba-Kgafela Community by virtue of Deed of Transfer 1230/1919.[32]

8.2 As stated, the Appellants do not reside on the farm as contemplated in the Extension of Security of Tenure Act 62 of 1997 ("ESTA") and it is common

[31] RA, vol 9, pp 869-876, paras 46.5-46.12; RA6, vol 9, pp 891-903 (obscene and threatening sms's at pp 898-903); RA7(1)-RA7(3), vol 10, pp 904-906.
[32] FA, vol 1, pp 38-39, par 4.4; FA8, vol 2, pp 104-110.

cause that ESTA is not applicable on them.[33] They reside in Bakgatla villages.[34]

8.3 The Appellants use the farm Wilgespruit to conduct cattle farming on parcels of land, either personally or through herders in their employ. Huts and kraals have been erected on the farm for use when tending to the cattle.[35] A number of the Appellants' herders reside on the farm as contemplated in ESTA. The Mining Respondents terminated these herders' rights to reside there as contemplated in section 8 of ESTA and brought a separate application in the Land Claims Court for their eviction.[36] The application has not been advanced by the Mining Respondents, in anticipation of the final result of the eviction application against the Appellants. The present application thus only concerns the Appellants (or farmers), their cattle and effects.

8.4 The First Appellant alleged in prior litigation that the Appellants hold *informal rights to land* in respect of Wilgespruit as contemplated in IPILRA. "*Informal rights to land*" are defined in section 1 of IPILRA as *(a) the use of, occupation of, or access to land in terms of (i) any tribal, customary or indigenous law or practice of a tribe*.

8.5 The Mining Respondents therefore accepted in their founding papers in this

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[33] AA, vol 7, p 623, par 5.9 (last line). It is common cause that ESTA is therefore not applicable to them.

[34] FA, vol 1, p 36, par 3.9; Appellants 'confirmatory affidavits, vol 8-9, pp 708-824, par 1.1 of each confirmatory affidavit.

[35] AA, vol 6, p 589, par 2.12; FA3, vol 1, p 97: huts of the respondents are indicated in red and numbered as mentioned above. The huts indicated in blue have been moved and are no longer there.

[36] FA, vol 1, p 36, par 3.8; RA, vol 9, p 860, par 27.1

matter that the Appellants are holders of informal rights to land in respect of Wilgespruit and showed that these rights had been deprived in terms of customary law as contemplated in IPILRA, or is now burdened with the mining right as a real right granted in terms of the MPRDA.

8.6 The Appellants in their answering affidavit in this matter initially denied reliance on IPILRA and claimed that they are the *de facto* owners of the farm.[37] These allegations are dealt with below.

8.7 The Appellants, however, alleged later that they also rely on informal rights as contemplated in IPILRA in the alternative.[38] This is also their stance in this court. The effect of the granting of a mining right on the Appellants' informal land rights is also dealt with below.

9. **The Appellants' allegation that they are the true owners of the farm**

9.1 The Appellants claim that they are the *true owners* of the farm Wilgespruit.

9.2 As the law stands, the Appellants are not the registered owners of the farm.

9.3 Whether they are entitled to obtain title to the land is subject to a process under the Land Titles Adjustment Act 111 of 1993, which has not yet been concluded.

9.4 In the answering affidavit[39] reliance is placed on "the Old Preserved Book" where the individual contribution of each household to the purchase price of Wilgespruit was recorded "so that it is possible today to see exactly who

[37] AA, vol 6, p 593, par 2.24; vol 7, p 620, par 5.5; RA, vol 9, pp 844-845, par 9.1.
[38] AA, vol 7, p 624, par 5.11(a).
[39] AA, vol 6, p 587, par 2.7.

contributed to the sale price and how much". Copies of the **relevant pages of the book** in which the entries are reflected are attached as annexure JDM3[40]. However, the relevant pages also reflect contributions in respect of various farms bought by the Bakgatla:[41] Koedoesfontein, Rhenosterkraal, Wildebeeskraal, Zandfontein, Kruidfontein, and Wilgespruit. It is to be noted that although monetary contributions are recorded with respect to all these farms, "ownership" is only alleged by the Appellants in respect of Wilgespruit. The contributions towards the purchase prices of the other farms, is consistent with what Kgosi Pilane says, namely that all the villages contributed to the purchase of the Bakgatla farms. This also holds true with respect to Wilgespruit, as is evident from the book:

9.4.1 The purchase price of Wilgespruit was 15 /- per morgan for 3467 morgan and 63 square roods. This translates to a purchase price of £2600/6/6.[42]

9.4.2 However, the contributions recorded in the book for Wilgespruit amounts to only £379.[43]

9.4.3 As stated above, the "relevant pages" of the book is alleged to reflect all the contributions. That means that the balance of the purchase price was most probably contributed by other villages. This accords with the version of Kgosi Pilane who states that not only Lesetlheng contributed to the

[40] Annexure JDM3, vol 8, p 702.

[41] See for example vol 8, p 704.

[42] See contract of sale Annexure FA9, vol 2, p 111 and cf. deed of transfer 1230 of 1919; Annexure FA8, vol 2, p 104 at p 106.

[43] See old book Annexure JDM3, vol 8, p 702 and JDM4 p 704 – it may be £70 less as it seems that one contribution of £70 at p 704 was withdrawn.

purchase price, but also other villages.[44]

9.5 Furthermore, the so-called Law of the farm Wilgespruit as reflected in Annexure JDM4[45] was only partly quoted by the Appellants. The first part states: "*The law of the farm Wilgespruit, of the £86.0.0 paid by Kgosi Littake Pilane.*[46] *The Bakgatla bought the land*." It proceeds to state that, if someone bought (contributed to) this farm only, he will be awarded in relation to the money he contributed. In the second part of the "Law" it is stated that he, Raiyane Pilane, demarcated the farm. The clans that did not contribute should not come to the Kgosi if they are chased out of the farm. It will not be the Kgosi's problem.[47]

9.6 It is to be noted that:

9.6.1 This "Law" does not restrict the contributors to the clans of Lesetlheng.

9.6.2 Indeed, it records that the Bakgatla bought the land, that the land will be awarded commensurate with every person's contribution, and that those who did not contribute, will not be awarded land.

9.6.3 The "Law" would thus also apply to contributors from other villages.

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[44] See Affidavit of Chief Pilane, vol 5, par 3.8, p 477.

[45] Annexure JDM4, vol 8, at p 705.

[46] This seems to indicate that Kgosi Littake paid the £86 towards the purchase of the farm Wilgespruit on certains conditions (called *molao*).

[47] Although p 705 is difficult to read, the text seems to read as follows:

"Molao ea Polasa ea Wilgerspruit oa £86.0.0 liviling [lefileng] ke Kgosi Littake Pilane. Bakgatla ithekeleng Naga. Ge monna a i iteketse ge Polasa e fela o tla segeloa ba go le kaneng chelete ea gagoe.

Motsoarelli Raiyane Pilane. May 1919.

Ke le segela Polasa. Ka le kgoro o sa rekang, ge baabo ba mokoba. Molato ga se oa Kgosi.

Raiyane Pilane."

According to Kgosi Pilane,[48] 13 clans or family groups, were awarded land from the nearby Lesetlheng, Lekulung, Ramasedi and Ramatshaba villages.

9.7 In the answering affidavit the Appellants stated that they lodged an application in terms of the said Act in order to get title to Wilgespruit[49], but no application was annexed, and no particulars were given as to the content, progress and status thereof, except to state that a Commissioner was appointed, with reference to Annexure JDM9 Extraordinary Provincial Gazette 7138 of 26 July 2013.[50] From the Appellants' supplementary heads of argument, it is clear that the farm was designated in terms of section 2(1) of Act 111 of 1993 in Government Gazette 36066 dated 18 January 2013. In Annexure JDM9, the Commissioner invites persons who claimed to have acquired a right "through hereditary" [sic] or otherwise to submit to the Commissioner an application for allocation and transfer within a period of two months from 26 August 2013. A date for oral applications was set on 24 August 2013 at Lesetlheng village, at 11h00.

9.8 In a "working paper" dated March 2015 of the Ford Foundation, annexed as JDM2 to the answering affidavit[51] the progress of this application is discussed.[52]

9.9 In the working paper it is pointed out that when the Commissioner required validation of the claims by demonstration of who the original buyers were in

[48] Affidavit of Kgosi Pilane, vol 5, p 477, par 3.10.
[49] AA, vol 6, pp 591-592, paras 2.20-2.21.
[50] Annexure JDM9, vol 9, p 828 at 829 where Notice 333 of 2013 is reflected.
[51] Vol 7, pp 656 – 701.
[52] Vol 7, pp 677-679, par 2.3.

each family, and how the claimants were each related to the members of the original land buying group, the application got bogged down in a mire of divisions, splits and disagreement amongst the claimants:[53]

9.9.1 Not every family that was ploughing on Wilgespruit descended from the original buyers. They were excluded.

9.9.2 Splits developed amongst the families who descended from the original thirteen clans who bought the farm. Disputes arose as to which families or households were to submit claims on behalf of each clan and who would submit a claim on behalf of each clan.

9.9.3 The actual families who originally bought, were described as *dibeso*. Landless immigrant families adopted by *dibeso*, were granted rights by these families, but they (*bakgotsi*) were in effect adopted as labour tenants who had to perform labour for *dibeso* as counter performance for being allocated cultivation plots by that family: are they also entitled to be claimants?

9.9.4 The concept of *dibeso* gave rise to tensions and it is contested by some of the community members.

9.9.5 Disputes also arose as to whether women were eligible to be claimants. According to custom women did not inherit land and they were excluded by the elders. The dispute was handed over by the Commissioner to individual clans to decide.

9.9.6 Some women are still excluded. Three categories of women are excluded

[53] Vol 7, p 677-678.

and differentiated:

(a) Those who joined clans through marriage;

(b) *Ngwetsi* (daughters in law) and Widows;

(c) Daughters and grand-daughters of original buyers who married into families of non-buyers.[54]

9.9.7 None of these problems is mentioned either in the answering affidavit or in the supplementary heads of argument although these facts formed part of the record and the working paper is relied upon by the Appellants.

9.9.8 It is thus clear that the application for adjustment of the land title has been halted by divisions, disagreements and splits amongst the Lesetlheng claimants. This happened when the commission sought to validate the claim. There is nothing to suggest that this application has progressed any further from the description in the working paper. The applicants verbally state that the farm was originally bought by the thirteen clans, but who are entitled to be the "real owners" today? This is still shrouded in controversy and disagreement. **It is impossible to determine who the "real owners" are,** even if the hypothesis that the 13 clans are all within Lesetlheng is accepted.

9.10 In any event, if the Appellants are eventually successful in acquiring title to the farm Wilgespruit, they will become the registered owners of a farm that is burdened by a mining right.

[54] Vol 7, pp 678-679.

10. **The legal effect of the granting of a mining right in respect of informal land rights**

10.1 The juristic nature of the Mining Respondents' right to mine is described in section 5(1) of the MPRDA as follows:

> "A … mining right … granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967 (Act No. 16 of 1967), is a limited real right in respect of the mineral … and the land to which such right relates."

10.2 The holder of the mining right thus holds a limited real right (*ius in re aliena*) in respect of the land concerned.[55] This limited real right, [56] which is in the nature of a quasi-servitude, constitutes a subtraction from the dominium of the owner of the land and of the informal rights of the Appellants.

10.3 The principal rights of the holder of the right to mine under section 5 of the MPRDA (as was the case with a common law mineral right) is to go upon the property and search for minerals and, if he finds any, to sever them and carry them away. The rights to the minerals by definition include all such rights to the surface as are reasonably necessary or incidental to mine the minerals on such land. This was the position at common law,[57] and it is still

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[55] Although the source of a mining right is a grant by the state in terms of the MPRDA and the source of a common law mineral right was (mostly) a grant by the landowner, the juristic nature of the right concerned granted is the same vis-à-vis the owner or lawful occupier of the land (whether it is a common law mineral right or a statutory mining right). As stated in *Anglo Operations v Sandhurst Estates* 2007 (2) SA 363 SCA at 371E-F (in respect of a common law right to coal), "[i]n accordance with what has now become a settled principle of our law, a right to mineral in the property of another is in the nature of a quasi-servitude over that property."

[56] Dale et al *South African Mineral and Petroleum Law* p MPRDA-140, par 96.2 s.v. "limited real right".

[57] Malan J in *Hudson v Mann and Another* 1950 (4) SA 485 (T) at 488B-H held as follows: I have been referred to a number of decisions from which the rights of the holder of mineral rights appear reasonably well defined. Such a holder . . . is entitled to go upon the property, search for minerals and if he finds any to remove them. In the course of his operations he is

the position under the MPRDA as appears from sections 5(2) and 5(3) of the MPRDA.[58]

10.4 The surface rights of the holder of the mining right (as set out in section 5(3) above) are thus limited real rights which burden the use of the property by the owner and informal land rights holder alike. The grant of the mining right by the Minister accordingly diminishes (i.e. subtracts from) the surface rights of the owner and informal land rights of the respondents. Both are deprived of any right to contrary use of the surface. That deprivation is an expropriation from the landowner or other right holder, by the Minister, of the limited real right in favour of the mining right holder, which takes place when the mining right is granted.[59] Compensation for that expropriation is to be paid by the mining right holder in terms of section 54 of the MPRDA inasmuch as the owner / occupier can show that he/she suffered loss.[60]

10.5 The consequence of the expropriation by the grant of a mining right is the

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entitled to exercise all such subsidiary or ancillary rights, without which he will not be able effectively to carry on his prospecting and/or mining operations." See also West Witwatersrand Areas Ltd v Roos 1936 AD, 62; In *Trojan Exploration Company v Rustenburg Platinum Mines Limited,* 1996 (4) SA 499 (A), 520D-E, it was held that: "A reservation or grant of mineral rights by implication includes all ancillary rights incidental to the grant, being those that are directly necessary to the enjoyment of the thing granted"; Badenhorst *LAWSA* (reissue) vol 18, par 9.

[58] Dale et al *South African Mineral and Petroleum Law* p MPRDA-144, par 98 s.v. "Section 5(3): Right of holders of rights".

[59] Dale et al *South African Mineral and Petroleum Law* p MPRDA-133 par 92.2.5 and also par 92.2.4 at p MPRDA-130-133.

[60] Expropriation of rights in land for the benefit of a third party is well-known in our law. See for eg. section 3 of the Expropriation Act 63 of 1975; sections 22(2). 23, 28(1) and 28(2) of the Land Reform (Labour Tenants) Act 3 of 1996 (as to which, see *Khumalo v Potgieter* [2000] All SA 456 LCC); and sections 127, 129 and 130 of the National Water Act 36 of 1998 read with Schedule II. Note that in the last two examples the statutes do not use the word "expropriation" but refer to an *award* of the land or rights. See further Gildenhuys *Onteieningsreg* p 14 s.v. "Regterlike metode van onteining"; *LAWSA* Vol 10, part 3 par 3 at p 7. In both instances, compensation is paid by the person on whose behalf the expropriation is effected. Similarly, compensation has to be paid by the mining right holder in terms of section 54 of the MPRDA for the expropriation of surface rights in his favour.

vesting of the limited real right over the land and minerals as described in section 5(1) of the MPRDA.

10.6 The effect of the grant is that the holder of the mining right enjoys preference over the surface rights of the owner and the informal land rights holder in the same way as the mineral rights enjoyed preference over the surface rights of the owner.[61]

10.7 Because the holder of the right to mine also enjoys these rights to the surface of the land, a conflict can arise between the respective interests of the landowner and the holder of the right to mine. In a series of decisions dating back to 1910 the courts have laid down the principles according to which such conflicts are resolved. Broadly speaking, the cases lay down that the holder of the mineral rights (now called mining rights) enjoys a preference over the owner of the freehold, not only in regard to his underground mining operations but also in regard to the use of the surface for all purposes necessary to enable him to carry our his prospecting and mining operations effectively, provided that such rights are exercised in a reasonable manner which is least injurious to the property of the freehold owner.

10.8 A succinct summary of the main general principles[62] to be derived from the decisions of our courts prior to 1950 appears in the judgment of Malan J in *Hudson v Mann and Another* (*supra*) at 488E-G:

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[61] Dale et al *South African Mineral and Petroleum Law* p MPRDA-144, par 98.1.1. See Badenhorst and Mostert Mineral and Petroleum Law of South Africa p 13-22 to 13-33; Badenhorst 2011 TSAR 329-330, 332 and 340.

[62] Franklin and Kaplan *The Mining and Mineral Laws of South Africa,* Chapter III, par II pp 114-141.

> "In case of irreconcilable conflict the use of the surface rights must be subordinated to mineral exploration. The solution of a dispute in such a case appears to me to resolve itself in a determination of a question of fact, viz, whether or not the holder of the mineral rights acts *bona fide* and reasonably in the course of exercising his rights. He must exercise his rights in a manner least onerous or injurious to the owner of the surface rights, but he is not obliged to forego ordinary and reasonable enjoyment merely because his operations or activities are detrimental to the interests of the surface owner. The fact that the use to which the owner of the surface rights puts the property is earlier in point of time cannot derogate from the rights of the holder of the mineral rights."

10.9 The SCA more recently confirmed these principles in the matter of *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 SCA which concerned a conflict between the surface owner and the holder of the rights to coal in respect of the same land who wanted to exploit the coal by opencast methods.[63]

10.10 It is submitted that these principles remain applicable to rights granted under the MPRDA,[64] and that they apply whether the rights to the surface are rights of ownership or informal land rights within the meaning of IPILRA.

10.11 It is common cause in the present case that the Appellants' continued use of the farm within the proposed open pit or within close proximity of active open-cast mining operations would be impossible from a health and safety point of view and thus irreconcilable with the ordinary and

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[63] At 372E-373H, paras 19-23.

[64] Dale et al *South Afrjcan Mineral and Petroleum Law* p MPRDA-144, par 98.1.1 s.v. "Conflicts between holders of mineral rights and surface owners".

reasonable exercise by the Mining Respondents of their mining rights.[65]

10.12 It follows that the Appellants have to be relocated to alternative land so that the Mining Respondents can commence operations at East Pit. As set out below, the Appellants accepted this during consultations with them prior to the grant of the mining right.

ALLEGED INVALIDITY OF THE MINING RIGHT AND THE LEASE AGREEMENT

11. **The Appellants' case that the mining right is invalid[66]**

11.1 The Appellants contend[67] that the grant of the mining right to IBMR with effect from 20 June 2008 was and remains invalid because the Appellants, as the true owners of Wilgespruit, were not adequately consulted prior to the grant, as is required by section 22(4)(b) of the MPRDA. Later it is alleged that the right was granted "without their knowledge".[68]

11.2 The Appellants recognize[69] that it would have been more "appropriate" to have appealed the grant and, if unsuccessful, instituted review proceedings of the grant of which they say became aware on 9 November 2011. However, they submit[70] that they are entitled to raise the invalidity of the decision to grant the mining right as a defence by way of a collateral challenge.

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[65] FA, vol 1, p 78, par 8.2.

[66] Application for leave, vol 14, pp 1356-1357, par 26.1; p 1358-1373, paras 28 and 30 to 59; pp 1354-1355, paras 18-19.

[67] Heads of argument CC: p 17, par 49.

[68] Heads of argument CC: p 20, par 56.

[69] Heads of argument CC: p 19, par 54.

[70] Heads of argument CC: p 25, par 64 ff.

12. **Consultation prior to the granting of the Mining Right:**

12.1 Section 22(4) of the MPRDA[71] required an Applicant for mining right to notify and consult with interested and affected parties within 180 days from having been so notified by the Regional Manager after of acceptance of the application.

12.2 The application for the mining right was lodged by IBMR in 2007[72]. The consultation in terms of section 22(4) took place at a meeting held on 21 April 2007 at the Lesetlheng Village. The minute of the meeting is annexed as FA21[73]:

12.2.1 The purpose of the meeting was explained by Mr. Kobedi Pilane (not the Kgosi) as *inter alia* to meet the farmers and the Lesetlheng Community who were allocated the land at Modimo-Mmale (the local name for Wilgespruit). The purpose was furthermore to explain the process and progress and to assess how these persons will be affected "as owners of that land" if the mining proceeds. The process had passed prospecting and was now in the Environmental Impact Assessment stage. Mr. Phillip Von Wieligh explained that the "permission to mine" had not been granted by the Government yet and that they had to understand how different people would be affected by the mining project. He also explained that they were going to talk about whether compensation, where necessary, should be individual or to the Community.

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[71] Before amendment by section 18(e) of Act 49 of 2008 with effect from 8 December 2014.
[72] See Supplementary Replying Affidavit, vol 11, par 41.11, p 1022.
[73] See vol 2, p 170.

12.2.2 Under the heading ISSUES, QUESTIONS AND CONTRIBUTIONS, *inter alia* the following was minuted:

- "We would like our kids to get jobs in the mine."
- "I think that the mine is going to be a good helpful partner because currently Barrick had assisted us with water on the farm."
- "You need to know that we want and support the establishment of the mine. At the same time, we agreed that Bakgatla be considered first for jobs and contracts."
- "We hope that with the coming of the mine, our lives should be better."
- "When development comes here, we would like to benefit."
- Questions were asked on assistance with the community's development, assistance to build a clinic, assistance with roads electrical infrastructure and water.
- Concerns were expressed on whether farming could continue while the mining operation was going on, whether their operation would not be affecting the field negatively, whether there will be compensation if the land is going to be taken as the land belongs to "all of us" in the Village.
- The contributions were concluded with a statement of praise and hope: "The mine has arrived, we shall eat."

12.3 No objection to the granting of the mining right was voiced during this consultation; indeed, the mining project was supported. It is also to be noted that the consultation was with the farmers and the people to whom the use of Wilgespruit was allocated. This was a direct consultation with the right holders in respect of Wilgespruit.

12.4 This consultation was one as prescribed by the MPRDA and it was held with "the owners". The Appellants are therefore wrong to submit that the consultation preceding the grant of the mining right was defective in that it was not held with them in their capacity as "owners". They had the

opportunity to object against the granting of the mining right, but they did not do so. Instead they supported the mining project.

12.5 In any event, it matters not for purposes of consultation under the MPRDA, whether they were owners or lawful occupiers – the consultation requirements with owners and lawful occupiers under the MPRDA are exactly the same.[74] It is furthermore noted that the granting of a mining right is not dependent on ownership or consent by the owner.[75] Thus, even if the Appellants were the owners, the granting of the mining right to the Mining Respondents would not be invalid merely because they did not give consent for the granting of the right. Also, the fact that the Appellants may have benefitted differently from a surface lease agreement, had they been the owners or regarded as the owners, would similarly have made no difference to the consultation process that was conducted by the Mining Respondents.

12.6 The learned judge *a quo* accordingly correctly held that a separate meeting was held on 21 April 2007 before the mining right was granted regarding the proposed mining[76], and that the consultation was one envisaged by section 22(4)(b) of the MPRDA. She also correctly found that the Appellants do not deny that they attended the meeting.[77]

13. **The collateral challenge**

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[74] Sections 10(1)(b): "interested and affected persons" may comment; s 16(4) and 22(4): "consult… with the landowner, lawful occupier and interested and affected party"; 54(7): "the owner of lawful occupier of land on which … mining operations will be conducted must notify the Regional Manager if that owner of lawful occupier has suffered or is likely to suffer any loss or damage as a result of the … mining operations, in which case this section applies with the changes required by the context".

[75] Section 23 of the MPRDA which lists the requirements for the grant of a mining right.

[76] See Judgment *a quo*, vol A, Par 49.3, p A29.

[77] *Ibid.*

13.1 The collateral challenge launched by the Appellants, is an advocate's point for the first time made in argument *a quo*. The point was not taken or canvassed in the papers. The record of the decision does not form part of the papers.

13.2 The Appellants contend that they are entitled to raise a collateral challenge of invalidity of the mining right against the private party-respondent seeking to exercise its mining right, on the basis that the Mining Respondents are enforcing a public power of expropriation of the Appellants' surface rights that stems from an invalidly granted mining right.

13.3 In the well-known decision of *Oudekraal*[78] the Supreme Court of Appeal held that a collateral challenge to the validity of an administrative act will avail a person:

> "… where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. A collateral challenge to the validity of the administrative act will be available, in other words, only 'if the right remedy is sought by the right person in the right proceedings'. Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of principles of the rule of law."

13.4 The Appellants base their submission that they are entitled to mount a collateral challenge against the validity of the mining right, on the novel and, with respect, incorrect, thesis that the exercise of the mining right by

[78] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA)245G-246A at para 35; See also *Merafong City v Anglogold Ashanti Ltd* 2017 (2) SA 211 (CC) at 230A-231B, paras 41 – 44; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC); *Swart v Starbuck and Others* 2017 (5) SA 370 (CC) at 382D-E.

IBMR/PPM amounts to the completion of the expropriation of their surface rights and therefore the exercise of a public power. The so-called public power in turn is based on an invalid initiating act, namely the award of the mining right.

13.5 This argument is, with respect, misconceived. As shown above, once a mining right has been granted, the administrative act has been completed and there vests in the holder thereof, in terms of section 5(2) of the MPRDA, a limited real right in respect of the mineral and the land to which the right relates.

13.6 The Appellants, with respect, confuse the exercise of the power in section 3(2)(a) of the MPRDA to grant a mining right (which is the administrative action) with the mining right itself which is the product of the grant and held by the holder after and as a result of the grant. It is also evident that the Appellants confuse the *civiliter modo* exercise of the conferred real right, with the exercise of a public power.

13.7 It is the exercise of the public power in terms of section 3(2)(a) which forms the subject of an application for review or in applicable circumstances, a collateral challenge. Once the public power is exercised, the Minister is *functus officio* and no public power vests in the holder of the resultant mining right i.e. IBMR/PPM.

13.8 Moreover, the contents of this limited real right or *ius in re aliena*, is described in section 5(3) of the MPRDA and it includes the right to enter the land to which such right relates: the expropriation of the surface rights from

the owner or occupier[79] is completed when the mining right is granted and the limited real right vests in the holder of the mining right. The *ius in re aliena* can therefore be exercised by the holder thereof (subject to other provisions of the MPRDA) and no public power whatsoever is vested in the holder or exercised by him.

13.9 The requirement of consultation with owners and occupiers after the grant of a mining right[80], is not the exercise of a public power by IBMR to determine the extent of the conferred limited real right, but is a mechanism to attain the *civiliter modo* exercise of the limited real right.

13.10 The decision in V*&A Waterfront Properties Ltd v Helicopter and Marine Services (Pty) Ltd*[81] and *Helicopter and Marine Services (Pty) Ltd v V&A Waterfront Properties Ltd* is instructive.[82] In that matter, V&A Waterfront Properties took action to interdict Helicopter and Marine Services (Pty) Ltd and its associate to comply with a grounding order issued by the South African Civil Aviation Authority. Helicopter and Marine Services (Pty) Ltd and its associate raised a collateral defence against V&A's application on the basis that the grounding order was invalid and reviewable and, thus, an unlawful administrative action with which they need not have complied. This Court confirmed the Supreme Court of Appeal's finding that the interdict sought did not amount to the Authority's enforcement against Helicopter and

[79] Such as in the case of ESTA or the Land Reform (Labour Tenants) Act, 3 of 1996.

[80] Which was required in terms of section 5(4) of the MPRDA prior to its deletion by Act 49 of 2008 and substitution by section 5A(c) as from 7 June 2013.

[81] 2006 (1) SA 252 (SCA).

[82] 2006 3 BCLR 351 (CC); 2005 JDR 1400 (CC). See also the application of these principles in *Absa Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd* 2014 (1) SA 550 (GSJ) at 572G-573D.

Marine Services (Pty) Ltd and its associate of the grounding order or a review by them against the Authority's order and, consequently, that a collateral challenge was therefore not available to Helicopter and Marine Services (Pty) Ltd and its associate.

13.11 Similarly, the Mining Respondents are not executing the Minister's decision to grant the mining right (i.e. the administrative act concerned). They are enforcing the consequences of the already granted mining right, in seeking interdictory relief for the Appellants' eviction. It is thus not a case of the private party-Mining Respondents seeking to enforce an administrative decision against the private party-Appellants and in doing so is exercising a public power. The challenge to the lawfulness of the grant of the mining right is not "*by the right actor in the right proceedings*". For rule-of-law reasons, the grant of the mining right still stands.[83] The Court *a quo* correctly applied the *Oudekraal* decision in this regard.

13.12 The administrative action of granting the mining right, occurred in May 2008. It is now ten years since the grant of the mining right and the Mining Respondents have expended many millions of rand on the basis of this mining right. No proper reason is advanced why the Appellants did not appeal in terms of section 96 of the MPRDA, and if unsuccessful, did not apply for the review of the grant of the mining right. This delay and lack of explanation is also pertinent to the purported collateral challenge.

13.13 No collateral challenge is thus available to the Appellants against the

[83] See *Merafong City v Anglogold Ashanti Ltd* 2017 (2) SA 211 (CC) at paras 41-44.

exercise and enforcement of the mining right by the Mining Respondents. The Appellants' theoretical thesis in this regard is with respect fatally flawed.

14. **The alleged invalidity of the lease agreement**

14.1 The Appellants contend[84] that the lease agreement is invalid. It is contended that the Appellants' informal land rights could only be deprived by way of the lease agreement if they had consented thereto, but they did not consent because-

14.1.1 they did not sign the lease agreement;

14.1.2 the majority of the Appellants were not present or represented at the meeting convened for purposes of signing the lease agreement; and

14.1.3 they were not even consulted.

14.2 As to the signing of the lease agreement: The lease agreement is a long term notarial lease registered against the title deed of the property. The Appellants are not the registered owners of the property and the lease agreement could not have been entered into with them. Furthermore, and as set out above, the identity of the "true owners" as alleged, has not been determined and is shrouded in uncertainty, controversy and disagreement even amongst themselves. They could therefore not have properly signed a lease agreement. The lease had to be entered into with the registered owner in order to be registered and binding on successors in title and third parties.

[84] Heads of argument in CC: pp 16-17, paras 44-48.

Whether they would be entitled to a portion of the rental, has to be decided between them and the Kgosi and his Bakgatla Traditional Council.

14.3 It is submitted that the respondents' residual informal land rights were deprived in June 2008 in accordance with the customs or usage of the Bakgatla community as contemplated in section 2(2) of IPILRA.

14.4 Against the background of prior consultations and meetings,[85] a resolution was taken by the Bakgatla Community at a *Kgotha Kgothe*[86] held on 28 June 2008 in accordance with the customs or usage of the Bakgatla to ratify, confirm and approve the conclusion of a surface lease agreement between the Bakgatla and IBMR in terms of which IBMR would conduct mining operations on the farm Wilgespruit.[87]

14.5 Kgosi Pilane's evidence is that sufficient notice was given of the meeting and that people of Lesetlheng were present or duly represented through community structures.[88]

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[85] FA, vol 1, pp 48-51, paras 6.3-6.11; Affidavit of Kgosi Pilane, vol 5, pp 478-480, paras 3.13 - 3.21; See also Kgosi Pilane's affidavit at Vol 10, pp 909-911.

[86] A *Kgotha Kgothe* is a community meeting open for attendance by all adult members of the Bakgatla-ba-Kgafela Traditional Community. It is a meeting at which important community decisions are taken, including decisions in respect of land, communally owned / occupied by the community, in terms of the customs of the Bakgatla. The meeting is convened and chaired by the *Kgosi*. In convening a *Kgotha Kgothe* and considering the decisions to be taken, regard is had to the customs of the Bakgatla Community as well as to legislative requirements of IPILRA. FA, vol 1, p 52, paras 6.14 - 6.16; Affidavit of Kgosi Pilane, vol 5, pp 481-482, paras 3.23-3.25 (as read with his affidavit at Vol 10, pp 909-911). The respondents admit these allegations – AA, vol 7, p 635, par 7.27. See also see para 46 of *Mmuthi Kgosietsile Pilane and Another v Nyalala John Molefe Pilane and the Traditional Council of the Bakgatla-Ba-Kgafela Traditional Community* 2013 (4) BCLR 431 (CC).

[87] FA, vol 1, p 51, par 6.12; Affidavit of Kgosi Pilane, vol 5, pp 480-481, par 3.22. See also Kgosi Pilane's affidavit filed in this application at Vol 10, pp 909-911.

[88] FA, vol 1, p 52, par 6.17; Affidavit of Kgosi Pilane, vol 5, p 482, par 3.26; Vol 10, pp 909-911.

14.6 The respondents admit that this resolution[89] reflects that the *Kgotha Kgothe* adopted the resolution in the terms described in paragraph 6.12[90] of the founding affidavit. They say, however, that there is no indication in the founding papers whether any of the members of "our community" were present at the meeting.[91] In response to the Kgosi's allegation[92] that all the formalities for convening such a meeting were followed and that the people of the Lesetlheng village were either present or represented through the community structures, the respondents content themselves with a statement that the Mining Respondents failed to provide proof of the fact that the Wilgespruit farmers either were present or were represented through community structures.[93] These are facts within the Appellants' knowledge and a positive denial that they had notice and that they were in attendance is notably absent. It is submitted that this evasive response does not create a *bona fide* dispute of fact on the papers.

14.7 In any event, it is meaningful that the Appellants do not deny that sufficient notice was given of the meeting[94] as contemplated in section 2(4) of IPILRA.[95] Having received sufficient notice, they could thus have attended and would have had a reasonable opportunity to participate in the meeting as contemplated in section 2(4) of IPILRA. If they did not attend, despite having received notice, it was by choice. It is accordingly submitted that the

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[89] FA24, vol 2, p 179.
[90] FA, vol 1, p 51.
[91] AA, vol 7, p 635, par 7.25.
[92] FA, vol 1, p 52, par 6.17.
[93] AA, vol 7, pp 635-636, par 7.28.
[94] As described in FA, vol 1, p 52, par 6.16.
[95] AA, vol 7, p 635, par 7.28; RA, p 867, par 43.

requirements of section 2(4) of IPILRA were complied with and that the Appellants' informal land rights were duly deprived by a community decision which binds all members of the community.

14.8 It was specifically resolved[96] (par 3) at the meeting that the Bakgatla Community would conclude a surface lease agreement with IBMR on the terms and conditions as per the draft copy attached to the resolution marked 'A'. The draft Notarial Agreement of Lease[97] provides that the Bakgatla undertakes to provide all reasonable assistance to the Lessee for ensuring that all necessary relocations occur where such relocations are required in order for the Lessee to be able to use the Lease Property in the manner and for the purposes provided for in the Agreement.[98] Clause 11 *inter alia* provides that if the Lessee wishes to establish any infrastructure, the Lessee shall compensate any farmer adversely affected thereby and shall pay reasonable compensation to those persons to enable them to be relocated elsewhere in suitable accommodation within residential or agricultural areas.

14.9 It is accordingly submitted that the resolution[99] which was so taken, had the effect that the surface of the farm was to be used for mining purposes and that any use of informal rights contrary thereto was thereby deprived in terms of customary law, at least for the duration of the lease.[100]

14.10 This resolution was subsequently implemented and the processes[101] to

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[96] FA24, vol 2, p 179.
[97] At vol 2, p 180.
[98] At vol 2, p 186, clause 4.6.
[99] FA24, vol 2, p 179.
[100] FA, vol 1, pp 51-52, par 6.13
[101] The Lesetlheng community was part of these processes. It is common cause that a

relocate farmers from Wilgespruit commenced.[102]

14.11 The Court *a quo* correctly found on the facts of the case that the Community's residual informal rights were accordingly deprived in accordance with the customs and usage of the Bakgatla Community, of which the Appellants form part, as contemplated in section 2(2) of ("IPILRA").

14.12 It is also important to note that the Appellants' case *a quo* was not that they are not part of the Bakgatla-ba-Kgafela Community and/or that the Bakgatla-ba-Kgafela Traditional Council had no authority over them as a distinct community[103] to whom the land exclusively belongs, thereby rendering the Bakgatla-ba-Kgafela Community decision ineffective.

14.13 Having been represented, the Appellants' informal land rights were deprived in terms of section 2(2) of IPILRA and the Court *a quo* made the correct finding in this respect.

14.14 In any event, it is unnecessary in law to enter into a lease agreement in respect of the surface of the land on which mining operations are to be conducted. A surface lease serves the good order and also serves to compensate the lessor for the use of the land by the lessee for mining purposes, but it is not a pre-requisite to mine lawfully. As set out more fully above, the holder of a mining right already enjoys such rights to the surface

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meeting was held with representatives of the Lesetlheng community on 23 June 2010. FA, vol 1, p 53, par 6.19; Affidavit of Kgosi Pilane, vol 5, p 482, par 3.28; Vol 10, pp 909-911; FA26(a) and FA26(b), vol 3, pp 206-214; AA, vol 7, p 636, par 7.30.

[102] FA, vol 1, pp 57 – 72, par 7.1-7.7; FA32, vol 3, pp 281-293.

[103] AA, vol 6, p 585, par 2.1

as are necessary effectively to mine the mineral concerned, by virtue of section 5(3) of the MPRDA.[104] It follows that:

14.14.1 it is unnecessary for the holder of a mining right to obtain the landowner's or lawful occupier's consent to obtain or exercise a mining right; and

14.14.2 the invalidity of the lease agreement (which is not admitted) would have no legal effect on the Mining Respondents' entitlement to mine on Wilgespruit.

THE ARGUMENT THAT THE MINING RESPONDENTS ARE NOT ENTITLED TO MINE EVEN IF THEY HAVE A VALID MINING RIGHT AND LEASE

15. **Section 5(4)(c)**

15.1 Section 5(4)(c) originally provided that "*no person may … mine … without … (c) notifying and consulting with the land owner or lawful occupier of the land in question*". It was interpreted in *Meepo*[105] to be a distinct requirement, and to require notification and consultation after the grant of the mining right, prior to commencement of mining, with a view to reaching agreement about the practical consequences of mining.

15.2 Section 5(4) was repealed by Act 49 of 2008 with effect from 7 June 2013 and replaced with section 5A which in subsection (c) only requires 21 days written notice to the landowner or lawful occupier prior to commencement of mining.

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[104] A mining right holder is, of course, free to enter into a surface lease agreement to regulate matters relating to the exercise of the mining right on the land and for the sake of good order (as IBMR did in the present case). See FA, vol 1, p 48, par 6.1-6.2.

[105] 2008 (1) SA 104 NC.

15.3 As stated above, this case pertains to the remainder of the farm Wilgespruit.

15.4 The mining right was granted to IBMR on 19 May 2008.[106] As stated above, on 28 June 2008, the Bakgatla Traditional Community resolved at a *Kgotha Kgothe* that the Bakgatla would conclude a surface lease agreement and concluded the notarial lease agreement with IBMR in 2012 on the terms and conditions as per the draft copy annexed to the minutes.[107]

15.5 Extensive further consultations were conducted with the farmers and occupiers of Wilgespruit (who were willing to consult with the applicants) regarding the implementation of the mining right and the lease, as well as the relocation as agreed in the lease.[108]

15.6 The Mining Respondents commenced with the consensual relocation process in 2013 to relocate the approximately 50 households on Wilgespruit which had grown in number from about 9 households in 2007. Approximately 26 huts with associated kraals were relocated to the neighbouring farms by agreement.[109] The Appellants, however, refused to relocate.

15.7 Open cast mining was scheduled to commence on this part of the farm in about July 2014. Preparatory work was halted after a spoliation application was brought by the Appellants, which was settled on the basis set out in the

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[106] FA, vol 1, p 42, paras 5.2.1-5.2.2; p 50, par 6.9; FA11, pp 114-125.

[107] FA, vol 1, p 51, par 6.12 p 51; FA24, vol 2, p 179-201 (the community resolution); FA29, vol 3, p 220 (ratification of the resolution by the DG); Annexure FA30, vol 3, pp 221-241 (the Registered Notarial Lease).

[108] FA, vol 1, p 53, par 6.19; FA26(a) and FA26(b), vol 3, pp 206-214; FA, vol 1, pp 57-77, par 7 and esp. paras 7.8, pp 73-77; FA32, vol 3, pp 281-293 (summary of extensive further consultations); FA, vol 1, p 91, par 8.10.2; FA59, vol 5, pp 460-461 (written notice).

[109] FA, vol 1, pp 57-72, paras 7.5.1-7.7.

court order annexed to the Appellants' answering affidavit[110] on 3 September 2015. Mining on this part of the farm could thus not commence as planned. In June 2013, section 5(4)(c) was repealed.

15.8 To the extent that section 5(4)(c) still applied when this process commenced, there were numerous notifications, consultations and agreements reached with the object of dealing with the practical consequences of mining as set out in the founding affidavit.[111]

15.9 There is accordingly no merit in the section 5(4)(c) argument.

16. **Alleged need to exhaust section 54**

16.1 It is respectfully submitted that, once it is accepted, as it must, that in law a mining right supersedes ownership or informal land rights and the entitlements that flow therefrom, it is the end of this argument. This is because it follows from this proposition that the mining right holder can exercise such rights in respect of the surface as are necessary in order to mine the minerals effectively and that, inasmuch as the owner's or informal land right holder's rights are irreconcilable therewith, the latter's rights must give way. The reason for this proposition, which has long been accepted by the courts as set out above, is that the holder of the mining right already, by virtue of the grant of the mining right, holds all such rights to the surface as are reasonably

[110] See Annexure JDM10, vol 9, pp 830 – 831.

[111] The process which was conducted in consultation with the Bakgatla authorities and affected people are set out in detail in the founding affidavit: FA, vol 1, pp 57-72, paras 7.5.1-7.7. There is nothing but a bald denial of these facts in the answering affidavit. The respondents, without giving any particulars, merely allege (in AA, vol 7, p 621, par 5.7) that "such consultation process as there has been, has been misdirected and conducted on the wrong basis and often with the wrong people". This bald denial is insufficient to create a dispute of this fact on the papers.

necessary effectively to mine the minerals concerned. This in turn demonstrates that the surface owner's or occupier's contrary surface rights are already expropriated at the stage when the mining right is granted which mining right, as stated, already carries with it the ancillary rights to the surface.

16.2 The Mining Respondents do not contend that the granting of a mining right extinguishes all other surface rights on the land in question. The submission is that there vests in the holder of the mining right a *limited real right* upon the grant of the mining right which means that the owner of the land remains owner of the surface but burdened with the (expropriated) limited real right. The same pertains to the informal land right. The position can be likened to the granting of a servitude over the land and over the informal land right.

16.3 The manner in which the MPRDA deals with this matter is by way of the process envisaged in section 54 (which may culminate in expropriation of the ownership of the land as such) and which also gives the owner or occupier a claim for loss or damage caused by the lawful mining operations. The process can be initiated by the holder of the right (in terms of section 54(1)) or by the owner or lawful occupier (in terms of section 54(7) of the MPRDA).

16.4 The Appellants are with respect mistaken when they contend[112] that section 54 must first be exhausted before mining can commence:

16.4.1 In the first instance, as stated, the rights to the surface reasonably

[112] See for eg AA, vol 7, p 645, par 9.1 where the respondents state: "It is furthermore denied that surface rights must automatically give way to mining rights or that the Applicants could bring this application before they have complied with the process described in section 54 of the Mineral and Petroleum Resources Development Act."

required effectively to mine the minerals (i.e. rights in land) were already granted to IBMR (and thus expropriated from the owner /occupier of the land) as part and parcel of the mining right when it was granted.[113]

16.4.2 Secondly, it follows that the process in section 54 need not be exhausted before the Mining Respondents can lawfully exercise the mining right. As held by Mlambo JA in this regard in *Joubert and Others v Maranda Mining Co (Pty) Ltd* 2010 (1) SA 198 (SCA) par 16:

> "[16] However, counsel for the appellants also submitted in the alternative that the impasse created by the appellants' blanket refusal to allow the respondent access to the land meant that the regional manager had to initiate the process aimed at the expropriation of the land as envisaged in s 54(5). The implication of this submission is that the jurisdiction of the High Court and this court to resolve that impasse is not countenanced by the Act. That there is no merit to this submission is borne out by the fact that it was made without much conviction, and rightly so. No provision in the Act could be pointed out in support of this line of reasoning. Furthermore, it would be absurd for the Act to permit an unreasonable refusal for access based on a clear objective to frustrate the legitimate endeavours of a permit holder."

16.5 The Appellants contend[114] that the *Maranda* case on which the court *a quo* relied is distinguishable but their arguments in this regard do not bear scrutiny. The further argument that, if not distinguishable, the case has been wrongly decided because the right to commence mining is suspended pending the completion of the ‘first stage’ of the section 54 process, also has no basis in the wording of the MPRDA or in any case law. We refer in this regard to what has been set out above regarding the nature and content of a

[113] For the legal nature of the grant, see Dale et al *South African Mineral and Petroleum Law* p MPRDA-140-142, par 96.4.

[114] Heads of argument in CC: paras 97-103.

mining right that has been granted.

16.6 The Appellants' argument implies that a court may not issue an interdict or order whereby the holder of the right is entitled to mine until the compensation to be paid in terms of section 54 has been agreed. The Appellants failed to support this contention. Their interpretation of section 54 as being a tool to be used in negotiations in order to "exact" compensation and to pressure the mining right holder is, with respect, clearly incorrect.

16.7 It is submitted that the learned judge *a quo* correctly rejected the Appellants' argument[115] that the decision is distinguishable and correctly applied the *Maranda* decision.[116] To exhaust a process of compensation, as suggested by the Appellants, before mining activity can commence will have no more the desired effect of compensating for damages or losses than what it would have if mining commences before conclusion of such a process. The Supreme Court of Appeal in *Maranda* described the "exhaustion" argument contended for by the Appellants, as "absurd".[117]

THE APPELLANTS' ARGUMENTS BASED ON THE LAND USE SCHEME

17. The Appellants argue that the Mining Respondents are not entitled to exercise the mining right because it is not permitted by the Moses Kotane Town-Planning Scheme, 2005 (which took effect on 22 December 2006) ("the Scheme") and that the court *a quo* erred in holding that -

17.1 the prospecting conducted prior to commencement of the Scheme was

[115] Judgment *a quo*, vol A, pp A22-A24.
[116] Judgment *a quo*, vol A, pp A24-A25.
[117] At 204C.

lawful, within the meaning of clause 4(7) of the Scheme read with section 43 of the Ordinance; and

17.2 prospecting prior to the commencement of the Scheme qualified as mining.

18. In respect of the first point, the Appellants state in par 117 of their heads that, prior to commencement of the current Scheme, Wilgespruit's land use was regulated by the Rustenburg District Council Town Planning Scheme, 2000, and that the use of the land for prospecting was unlawful in terms of that scheme. The Rustenburg Scheme never formed part of the papers.

18.1 It is trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence.[118] It is also trite that the defence of an illegality or a prohibition is in the nature of a special defence which must be alleged and proved and which the Mining Respondents would be entitled to rebut.[119]

18.2 Inasmuch as the Appellants wished to rely on any prohibition applicable to the Mining Respondents to prospect on the farm one month prior to commencement of the Moses Kotane Scheme, such prohibition thus had to be pleaded in the Appellants' affidavits and proved.

18.3 The Appellants, however, failed to plead any such prohibition in any of its affidavits. There is no allegation in the papers of unlawfulness, except for the allegation of a contravention of the Moses Kotane Scheme.

18.4 It is further submitted that, inasmuch as the Appellants wished to rely on any

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[118] *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 SCA 200D-E.

[119] *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G-H; *Courtney-Clarke v Bassingthwaighte* 1991 (1) SA 684 (Nm) at 690A; *R v L. & M. Joseph* 1912 TPD 729.

other town-planning scheme, they also had the duty to prove such scheme by, at least, attaching a copy thereof to their answering affidavit.[120] There never was an application *a quo* to introduce further evidence in this regard by way of a further affidavit or otherwise. The Appellants know that full well but persisted with an allegation that they did apply to introduce further evidence. The Court is respectfully referred to the opposing affidavit of the Mining Respondents in the application for leave to appeal in this Court[121] annexing an extract from the record of proceedings[122]. The Court is also referred to the judgement *a quo* on leave to appeal[123].

18.5 It is accordingly not open to the Appellants to raise this point on appeal, and by way of statements in their heads of argument.[124] Trial by ambush cannot be permitted.[125] If the matter had been properly raised in an affidavit, the Mining Respondents would have disputed the applicability of the Rustenburg Scheme.

19. As stated, the second argument is that the court *a quo* erred in holding that the respondents' current mining operation is a continuation of the prior, lawful prospecting. It is submitted that this argument is based upon the erroneous application of the concepts of *prospecting* and *mining* as defined in the MPRDA, to the Scheme, as if those words bear the same, defined meaning in the Scheme. The Scheme should be interpreted as a distinct instrument, within

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[120] *Magalies-Bronberg Property Owners Association (MBPA) and Others v City of Tshwane Municipality and Others* NGHC 86552/2016 (12 Oct 2015; 9 March 2016) (per Mali AJ).

[121] Vol 15, pp 1469-1474, paras 44-56.

[122] See Annexure DB2 at pp 1497 – 1499.

[123] Vol 15, 1435 at 1441, par [18] [19].

[124] The background to the matter is set out in the Mining Respondents' response to the application for leave to appeal, at vol 15, pp 1466-1473, paras 29-52.

[125] *Molusi and Others v Voges No and Others* 2016 (3) SA 370 (CC).

its own context as set out below.

19.1 The relevant provisions of the Moses Kotane Town-planning Scheme are as follows:

19.1.1 The Moses Kotane Town-Planning Scheme was prepared and promulgated in terms of the Town-Planning and Townships Ordinance 15 of 1986 (NW)[126] and that Ordinance is applicable to its enforcement. It took effect on 22 December 2006.

19.1.2 Its purpose[127] corresponds with the general purpose of town-planning schemes set out in section 19 of the Ordinance. It is *inter alia* to coordinate harmonious development of the Districts of Mankwe and Madikwe in such a way as will most effectively tend to promote *inter alia* the efficiency and economy of the development thereof.

19.1.3 A town-planning scheme is a document which regulates the land uses of properties in the area. *"Property"* is defined[128] as *"any piece of land indicated on a diagram or general plan approved by the Surveyor-General intended for registration as a separate unit in terms of the Deeds Registries Act …"*. It therefore deals with the whole of the Farm Wilgespruit as a registered unit of land (cadastral unit).[129]

19.1.4 Clause 2[130] sets out the regulating function of the Town-planning scheme:

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[126] Chapter II: s 18 and further.
[127] Vol 10, p 960.
[128] Vol 10, p 967.
[129] Deed of Transfer No 1230/1919, FA8, vol 2, pp 104-110.
[130] Vol 10, p 970.

> "The use of all land included in the area of jurisdiction of the Council shall be controlled by this Scheme. No land or building may be used for any purpose other than that permitted in this Scheme."

19.1.5 The Farm Wilgespruit is controlled in the Scheme although it is not specifically mentioned in the Zoning Register.[131] The introduction to this Zoning Register states that any property not listed to the annexed list shall be regarded as having an *"Agricultural"* zoning in the case of farm land. Wilgespruit is not mentioned in the list, but falls within the area to which the Scheme applies and it is common cause that it is thus zoned *"agricultural"*.[132]

19.1.6 Schedule I Table B sets out the use zones.[133] Use Zone 9 is agricultural. Table A sets out the uses which are permitted in respect of the various use zones. Permitted Use 17 is that of *"mining industry"* and is a use which will be permitted only with the special consent of the Council in Use Zone 9 agricultural.

19.2 The Town-planning scheme differentiates between surface mining and underground mining.

19.3 *"Mining industry"* deals with surface mining:

> "The mining of minerals from the ground[134] including gravel, sand and stone and it includes buildings connected with such operations and a crusher

[131] See Moses Kotane Townplanning Scheme, Schedule 2, Vol 10, p 987.
[132] See definition of *"agricultural"* at Vol 10, p 961, which includes pastures, meadows, arable land, plantations, fisheries, orchards.
[133] Vol 10, p 986.
[134] i.e. the surface.

plant."[135]

19.4 Clause 5 exempts underground mining from any prohibition or restriction contained in the Town-planning scheme and refers to –

> "(1) the exploitation of minerals by underground working as regards any land not included in an established township."

19.5 The concept of *"mining"* is thus a broad one which includes a host of activities in essence the exploitation of minerals and all activities designed to extract minerals from the earth for that purpose. The activity of prospecting falls within the set meaning of *"exploitation"* of minerals and is by its very nature an activity designed to make use of and turn minerals to account.[136]

19.6 If *"mining"* were interpreted so as to exclude prospecting it would mean that although mining in the strict sense is allowed with special consent, prospecting which by its very nature is an activity designed to enable economic extraction of minerals is absolutely prohibited by virtue of clause 2 of the Town-planning scheme:[137]

> "No land or building may be used for any purpose other than that permitted in the Scheme."

19.7 The purpose of the town-planning scheme is to co-ordinate harmonious development in such a way as will most effectively tend to promote the efficiency and economy of development.

19.8 Such an interpretation is absurd and would exclude the development of new

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[135] See definition, vol 10, p 964.

[136] *Coal of Africa & Another v Akkerland Boerdery*, unreported judgment by Kgomo J in the North Gauteng High Court, Pretoria under case number 38528/2012 dated February 2014, at par 105.

[137] Vol 10, p 970.

mines in an area which is rich in platinum group metals. A large part of prospecting activities is invasive of the surface of the land as is explained in the applicants' supplementary replying affidavit.[138] It is submitted that the background facts with respect to the nature of prospecting and mining operations, as set out in the supplementary replying affidavit, form part of a matrix of facts which on principles of interpretation must be taken into account in interpreting the town-planning scheme.[139]

19.8.1 The object of a town-planning scheme is to regulate the surface use and it would be an anomaly if on the very same land the town-planning scheme regulates mining but not prospecting which continues even after mining has started.

19.8.2 The mining of a resource is an integrated process which consists also of prospecting which continues even after physical mining has started. Prospecting and mining is really one integrated process where one includes the other.[140] From the above it is thus clear that the use of the phrase *"mining industry"* is intended to include the integrated process of prospecting and mining on the surface and that if a special consent for *"mining industry"* is obtained in respect of Wilgespruit, both prospecting and mining operations may be conducted in terms thereof.

19.9 In the circumstances of this case, however, the Appellants cannot rely on the prohibition in clause 2(1) which prohibits the conduct of mining industry

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[138] See the concept of prospecting and mining operations as explained in par C.27-38.10, vol 11, pp 1012-1017.

[139] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[140] See definition of *"mine"* used as a noun, which includes any excavation made for the purpose of searching a mineral - section 1 of the MPRDA.

activities by the Mining Respondents on the Farm Wilgespruit because the Town-Planning Scheme and the Ordinance both provide that a non-conforming use, i.e. one which is not in conformity with the scheme, may be continued for a period of 15 years from the date of commencement of the Scheme.

19.10 Clause 4(7)[141] provides that such a use may be continued for a period of 15 years from the date of commencement of the Scheme, subject to the provisions of section 43 of the Ordinance.

19.11 Section 43 of the Ordinance in turn provides that if, on the date of the coming into operation of an approved scheme, the land is being used or, within one month immediately prior to that date, was used for a purpose which is not a purpose for which the land concerned has been reserved or zoned in terms of the provisions of the Scheme, but which is otherwise lawful and not subject to any prohibition in terms of the Ordinance, that use may be continued[142] for a period of 15 years from the date of coming into operation of the Scheme.[143] If the right is not exercised for a continuous period of 15 months, it shall thereafter lapse.[144] The 15 year period may on application be extended for a maximum of 15 years.[145] These provisions relieves the Municipality from the duty of paying compensation where the Scheme prohibits an otherwise lawful use.[146]

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[141] Vol 10, p 971.
[142] Section 43(1).
[143] Section 43(2)(b).
[144] Section 43(2)(a).
[145] Section 43(5).
[146] Section 44 read with 43(2) of the Ordinance.

19.12 On 22 December 2006, the Mining Respondents were conducting activities on Wilgespruit which, after that date would be prohibited by clause 2(1) of the Town-planning scheme in the absence of a special consent of the Municipality. These activities were lawfully conducted in terms of a prospecting right granted to the first respondent.[147] Mining was later continued in terms of a mining right granted to IBMR on 19 May 2008.[148] A mining right was granted to PPM and extended to include the western portion of the Farm Wilgespruit.[149]

19.13 The mining industry activities which were taking place already one month before 22 December 2006 on Wilgespruit, were thus lawful and were continued in a lawful manner until the present.

19.14 Clause 4(7) of the Town-planning scheme[150] and section 43 of the Ordinance, were therefore of direct application and the mining industry activities thus conducted, could be continued for at least 15 years.

19.15 The mining industry activities on the Farm Wilgespruit were continued after 22 December 2006 until the present without any interruption of a continuous period of 15 months or at all. These activities are more fully described in paragraph D of the supplementary replying affidavit of the Mining Respondents.[151] The Appellants did not take issue with these facts in any rejoining affidavit. It is clear from these facts that the Mining Respondents have engaged fully in “mining industry” activities on the properties

[147] FA, vol 1, p 41, par 5.1.2; p 49, par 6.6; SR3, vol 11, pp 1044-1045.
[148] FA, vol 1, p 42, par 5.2.1; FA11, vol 2, pp 114-125.
[149] FA, vol 1, pp 44-45, par 5.4.
[150] Vol 10, p 971.
[151] Vol 11, pp 1017-1033.

throughout the relevant period from 22 November 2006 up to the present. There is thus, with respect, no doubt that the prohibition in clause 2(1) of the Moses Kotane Town-Planning Scheme is not applicable to the applicants' prospecting and mining activities on the Farm Wilgespruit.

19.16 It is furthermore clear that the Moses Kotane Local Municipality is also of the opinion and acts on the basis that the activities of the respondents on Wilgespruit are lawful. In a letter dated 19 November 2012 the municipal manager commented on a scoping report and environmental assessment for the proposed mining-related projects of the respondents on Wilgespruit by extending certain infrastructure. In this letter it was stated that the municipality had no objection regarding the proposed development despite the fact that it was noted that the development would have negative impacts on land use.[152] If the municipality was of the view that the land use of the respondents for mining industry was unlawful and that a special consent had to be obtained from the municipality, it would most certainly have been stated in this letter.

19.17 The Appellants' argument based on the Scheme thus have no merit and is based on an incorrect interpretation of the Moses Kotane Town-Planning Scheme and section 43 of the Town-Planning and Townships Ordinance 22 of 1936.

COSTS

20. It is submitted that the learned judge *a quo* correctly analysed and applied the

[152] SR2, vol 11, pp 1042-1043.

Biowatch principles to the present case. She correctly described the present matter (even though involving a constitutional issue) as a private dispute between private companies and individual land occupiers (paragraphs 82 – 85 of the judgment[153]) and correctly found that no exceptional circumstances had been presented to warrant a departure from the general principle in private litigation that costs should follow the result.

21. The Court *a quo* dealt with the arguments of the Appellants in this regard in the judgment in the application for leave to appeal: see paragraphs 20 to 21.[154]

22. The Court *a quo* exercised its discretion in respect of costs judicially and no interference with that costs order is warranted.

CONCLUSION

23. The Respondents therefore pray that the application for leave to appeal be dismissed with costs, such costs to include the costs of three counsel.

24. If the application for leave to appeal is granted, the Respondents pray that the costs of that application be costs in the cause, and that the appeal be dismissed with costs, such costs to include the costs of three counsel.

DATED AT PRETORIA ON THIS 3RD OF MAY 2018.

GL GROBLER SC
JL GILDENHUYS
I OSCHMAN

[153] Vol A, pp A44-A45.
[154] Vol 15, pp 1441-1442.

Parc Nouveau Chambers, Pretoria

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 265/17

In the application for admission as *amicus curiae* of:

MDUMISENI DLAMINI Applicant

In the matter between:

GRACE MASELE (MPANE) MALEDU
& 36 OTHERS 1st to 37th Applicants

LESETLHENG VILLAGE COMMUNITY 38th Applicant

and

ITERELENG BAKGATLA MINERAL
RESOURCES (PTY) LTD 1st Respondent

PILANESBERG PLATINUM MINES (PTY) LTD 2nd Respondent

BALENI APPLICANTS' HEADS OF ARGUMENT

Table of Contents

I INTRODUCTION 1

II THE ADMISSION OF THE BALENI APPLICANTS AS AN *AMICUS CURIAE* 3

COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF RULE 10 3
INTEREST IN THESE PROCEEDINGS 4
THE SUBMISSIONS ARE USEFUL, DIFFERENT TO THE SUBMISSIONS OF OTHER PARTIES AND RELEVANT 8

III IPILRA AND THE MPRDA 11

IPILRA 11
HISTORY AND PURPOSE 12
OPERATION 14
DEPRIVATION 15
THE MPRDA 18
HISTORY AND PURPOSE 18
OPERATION 19
HARMONIOUS READING OF IPILRA AND THE MPRDA 24
THE TEXT OF IPILRA AND THE MPRDA 24
PURPOSE AND CONTEXT OF IPILRA AND THE MPRDA 31

IV INTERNATIONAL LAW 32

MEANING OF FREE, PRIOR AND INFORMED CONSENT 33
BINDING TREATIES 34

THE ADMISSION OF DR ANINKA CLAASSENS' EVIDENCE 40

THE TEST FOR THE ADMISSION OF EVIDENCE IN THIS COURT 40
THE NATURE OF DR CLAASSENS' EVIDENCE 42
DR CLAASSENS' EVIDENCE IS RELEVANT 43
INCONTROVERTIBLE AND/OR OF AN OFFICIAL, SCIENTIFIC, TECHNICAL OR STATISTICAL NATURE CAPABLE OF EASY VERIFICATION 45

VI APPLICATION TO THE FACTS 47

VII CONCLUSION 48

I INTRODUCTION

1 The Interim Protection of Informal Rights to Land Act 31 of 1996 (**IPILRA**) was enacted to recognise customary land rights that had been historically disregarded and undermined. Consistently with the Constitution's recognition of the status of customary law, IPILRA requires communities living on customary land to democratically consent to any deprivation of their rights on land.

2 The Mineral and Petroleum Resources Development Act 28 of 2002 (**MPRDA**) does not alter the impact of IPILRA. The two statutes – IPILRA and the MPRDA – must be read harmoniously, and consistently with constitutional rights and international law. The only way to do that is that IPILRA consent is required prior to the grant of a mining right under the MPRDA.

3 That consent cannot be obtained merely by through the signature of a traditional leader. It must be obtained in a manner consistent with both living customary law, and government policy about the proper implementation of IPILRA.

4 In this case, IPILRA consent was required before a mining right could be granted over Wilgespruit. It was not obtained. The consent purportedly obtained does not qualify as IPILRA consent. Accordingly, the award of the mining right was invalid.

5 Mr Dlamini represents a group of people who are involved in a similar struggle for the right to free, prior and informed consent. He is a member of the Umgungundlovu

Community which has brought litigation in the High Court to insist that their consent in terms of IPILRA is required before a mining right can be granted over their land (**the Baleni Applicants**). They seek admission as an *amicus curiae* in this matter to advance the same legal submissions they have advanced before the High Court.

6 In doing so, they seek to provide this Court with vital historical and policy information that provides the necessary context to interpret IPILRA and the MPRDA. The affidavit of Dr Aninka Claassens provides material and weighty evidence that is either official or incontrovertible.

7 These heads of argument are set out as follows:

7.1 **Part II** deals with the admission of Mr Dlamini – as the representative of the Umgungundlovu Community and the Baleni Applicants – as an *amicus curiae*.

7.2 **Part III** addresses the interaction between IPILRA and the MPRDA;

7.3 **Part IV** covers the relevant international law;

7.4 **Part V** deals with the admission of Dr Claassens' affidavit; and

7.5 **Part VI** explains why it appears that IPILRA was not complied with in this case.

8 These heads of argument should be read together with the heads of argument filed by the Land Access Movement of South Africa. Those submissions – which address the status and content of customary law – supplement and support the Baleni Applicants' submissions.

II THE ADMISSION OF THE BALENI APPLICANTS AS AN *AMICUS CURIAE*

9 Mr Dlamini, acting in his own interest, on behalf of the Baleni applicants and Umgungundlovu Community, and in the public interest, meets the requirements for admission as an *amicus curiae* set out in Rule 10, in that:

9.1 he has sought the consent of the parties and complied with the procedural requirements of Rule 10;

9.2 he has a demonstrable interest in these proceedings; and

9.3 the submissions he advances will be useful to the Court, are different from those of the other parties, and are plainly relevant.

Compliance with the procedural requirements of Rule 10

10 Rule 10(1) requires an interested party to seek the written consent of all parties to be admitted as an *amicus curiae*.

11 On 23 March 2018, the Baleni applicants' attorneys wrote to the parties to seek consent for their involvement in the matter as an *amicus curiae*.[1]

11.1 On 4 April 2018, the applicants indicated that they had no objection to the Baleni applicants' admission as an *amicus curiae*.[2]

11.2 Also on 4 April, the respondents explained that they would not consent to the Baleni applicants' admission. In a terse response, they claimed that "*after careful*

[1] Annexure MD2, p 37.

[2] Annexure MD3, p 39.

consideration", they had concluded that the submissions in relation to "*the pending Baleni declarator have no bearing in the above matter"*.[3] They did not claim that the Baleni applicants had an insufficient interest in the matter. Nor did they allege that the Baleni applicants' submissions would be no different to those of the parties before the Court. They refused consent only on the basis of the apparent irrelevance of the submissions.

12 Rule 10(4), read with Rule 10(5), require that where consent is not granted, a party must apply to the Court for admission as an *amicus curiae* within 5 days after the filing of the respondents' written submissions. The respondents filed their written submissions on 4 May 2018.

13 The Baleni applicants accordingly brought an application on 11 May 2018 – that is, within the five-day period stipulated in Rule 10(5) – for leave to be admitted as an *amicus curiae*.

Interest in these proceedings

14 Mr Dlamini clearly has the requisite interest in this matter. As explained in his affidavit seeking admission as an *amicus curiae*, Mr Baleni brings this application:

14.1 in his personal capacity;

14.2 on behalf of the applicants in the Baleni matter;

14.3 on behalf of the Umgungundlovu Community; and

[3] MD4, p 40

14.4 in the public interest.

15 A brief comparison of some of the issues arising in the Baleni matter and in this matter make plain the interest which Mr Dlamini, the Baleni applicants and the Umgungundlovu Community have.

16 In respect of the Baleni matter:

16.1 The Umgungundlovu community have for generations owned and occupied land along the Wild Coast between Port Edward, KwaZulu Natal, and the Mkhambathi Nature Reserve in the Eastern Cape. It is utilised for residences, grazing of livestock, the cultivation of crops, and for natural resources.[4]

16.2 In a project known as the Xolobeni Mineral Sands Project, Transworld Energy and Mineral Resources (SA) Pty Ltd (**TEM**) has applied to conduct open-cast sand mining for titanium on 2 859 hectares of this land.[5]

16.3 The Baleni applicants have argued that no mining right may be granted over their land without their consent. They seek a declaratory order from the High Court that:

16.3.1 No mining right may be granted over their land unless and until the provisions of in terms of their customary law and the IPILRA are complied with, or the Minister of Mineral Resources has expropriated the land; and

16.3.2 IPILRA requires compliance with the specific provisions of the Baleni

[4] Founding affidavit, para 8.

[5] Para 9.

applicants' customary law.[6]

16.3.3 TEM and the Department of Mineral Resources argue that customary communities have no right to consent prior to mining, and that the relevant authority to be consulted regarding the mining right application is iNkosi Lunga Baleni of the Amadiba Traditional Council.[7]

17 The present matter, in which an eviction order was granted by the High Court, is strikingly similar, and turns on overlapping questions:

17.1 It concerns an application to evict certain Lesetlheng residents from their ancestral land, in order to enable the respondent mining companies to conduct platinum mining.

17.2 The Lesethleng residents allege that they are the true owners of the land, alternatively that they have informal land rights under IPILRA, and that the mining right and lease agreement granted in the respondents' favour are accordingly invalid.

17.3 In the High Court, the Respondents obtained the eviction order on the basis that a mining right supersedes an owner's or occupier's right, and that, in any event, a surface lease had been granted in the respondents' favour pursuant to a resolution by the Bakgatla community at a *Kgotha Kgothe*, which the Court found constitutes sufficient consent for purposes of IPILRA.

[6] Paras 10 and 12.

[7] Para 11.

18 Both cases thus pertinently raise the issue of the proper interpretation of IPILRA, the extent to which it requires free, prior and informed consent, and its interaction with the provisions of the MPRDA.

19 Above all, the Baleni applicants are concerned that the Itereleng matter may set a precedent that will preclude the relief they seek in the Baleni matter, and may affect their rights and the rights of other communities.

20 In this sense, the Baleni applicants' interest in this matter is no different to that of the Eastern Cape and Western Cape MECs for Health in *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ*.[8]

20.1 In that case, the Court was required to consider the application and possible development of the common law "*once-and-for-all*" rule in the context of delictual damages.

20.2 The Eastern Cape MEC sought admission as an *amicus curiae*, because she was involved in trials raising similar issues in the Mthatha High Court, and "*sought to ensure that the decision in this matter does not prevent her from raising two defences in pending trials*".[9]

20.3 The Western Cape MEC sought admission to ensure that the decision did not pre-empt "*certain mechanisms that she is devising*" to deal with such claims, and that the Western Cape High Court had already sanctioned.[10]

[8] 2018 (1) SA 335 (CC).

[9] Para 6.

[10] Para 7.

20.4 The parties, quite properly, did not object to the admission of the MECs, and they were admitted in advance of the hearing. Their admission was pivotal: the Court carefully circumscribed its judgment to allow for the possibility of future development of the law.[11]

The submissions are useful, different to the submissions of other parties and relevant

21 The Baleni applicants' experience and arguments will be of considerable assistance to this Court in considering this matter. In short, the submissions address matters that bear directly on the proper determination of this matter:

21.1 First, and in the most general terms, the provisions of IPILRA must be complied with prior to the award of a mining right;

21.2 Second, and more specifically, compliance with the provisions of IPILRA, and the policies and procedures issued under it, requires that, except where land is expropriated, any deprivation of rights requires the consent of all affected rights holders in terms of their customary law; and

21.3 Third, these contentions are supported by regional law, international law, and foreign law.

22 To the extent that the Court accepts the above submissions as valid, we submit that it follows that the High Court decision should be overturned. At minimum, it would render erroneous the High Court's reasoning as regards the interpretation and application of IPILRA. It simply cannot be contended that they are irrelevant.

[11] Para 58.

23 The Baleni applicants' submissions are also novel and, we submit, will be of substantial benefit to the Court.

23.1 The issue of informal land rights under IPILRA received minimal attention in the High Court. The Court simply concluded that, because a resolution had been passed by the broader Bakgatla community ratifying, confirming and approving the surface lease agreement, any "*residual informal rights held by the respondents were terminated in accordance with the customs or usage of the Bakgatla community*".[12]

23.2 In both the High Court and this Court, the applicants' submissions have focused primarily on their ownership of the land. While they raise their informal rights under IPILRA in the alternative, the Baleni applicants' submissions expand upon, and differ from those in significant respects.

23.3 As set out more fully below, the Baleni applicants provide a detailed purposive and contextual interpretation of both IPILRA and the MPRDA and demonstrate that they can be interpreted harmoniously. They also submit, unlike the applicants in this matter, that:

23.3.1 the consent requirements of IPILRA must be complied with *prior* to the award of a mining right;

23.3.2 the mere award of a mining right does not amount to an expropriation; and

23.3.3 because customary law is subject only to statutes that expressly regulate it, the MPRDA does not limit the customary law rights that IPILRA protects.

[12] High Court judgment, para 43.

23.4 In addition, the Baleni applicants raise issues of comparative, regional and international law, which have not been addressed by any of the parties in determining the proper interpretation of IPILRA. These are plainly relevant, particularly given the considerable consensus across international instruments that indigenous communities have a right to grant or refuse their free, prior and informed consent to any development that will significantly affect them.

23.4.1 International law has rightly been described as having "*a special place in our law which is carefully defined by the Constitution*."[13]

23.4.2 In terms of section 233 of the Constitution, courts must prefer any reasonable interpretation of legislation that is consistent with international law over an alternative interpretation that is inconsistent with international law.

23.4.3 Section 39(1) provides that, when interpreting the Bill of Rights, courts must consider international law and may consider foreign law.

23.4.4 The application of comparative and international law to this matter is accordingly useful, novel, and undeniably relevant.

23.5 Moreover, two further issues, which are raised only by the Baleni applicants, arise from the affidavit of Dr Claassens:

23.5.1 first, that the approach of the High Court, in which a resolution taken by a "traditional community" is regarded as the hallmark of proper consultation,

[13] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 97.

and as presumptive proof of consent by all sub-groups within such a community, is reminiscent of a period premised on the exclusion of African people from decisions affecting their land rights; and

23.5.2 second, that precisely in order to break with that past, government has issued policies and procedures which require the consultation and consent of the holders of informal land rights who are *actually affected* by decisions, as opposed to colonially defined "tribes" or "traditional communities".

24 For these reasons, we submit that the application for leave to be admitted as an *amicus curiae* should succeed.

III IPILRA AND THE MPRDA

25 This Part describes the relevant provisions of the two statutes at the centre of this application: IPILRA and the MPRDA. We summarise the context in which they were each enacted, their objects and purpose, as well as the relevant provisions. We then explain how and why they must be interpreted in harmony.

26 In summary, where customary rights are involved IPILRA and the MPRDA work in conjunction with each other. Consent under IPILRA is required for the grant of a mining right under the MPRDA.

IPILRA

27 In describing IPILRA, we first consider its history and purpose. We then lay out its basic

operational provisions. Lastly, we explain why the grant of a mining right, and the imposition of a lease, constitute a deprivation triggering IPILRA.

History and purpose

28 IPILRA is deeply rooted in South Africa's history and its transformative vision. This Court has summarised our history in these terms:

> *"Our history is well known. It is one of colonialization, apartheid, economic exploitation, migrant labour, oppression and balkanization. Gross inequalities were deliberately and legally imposed as far as race and also geographical areas are concerned. Not only were there richer and poorer provinces, but there were "homelands", which by no stretch of the imagination could be seen to have been treated on the same footing as "white" South Africa, as far as resources are concerned."*[14]

29 Section 25(6) of the Constitution is one of the key mechanisms to redress that shameful history, and particularly the unequal access to land and security of tenure. It reads:

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

30 This Court has repeatedly recognised that secure access to land is deeply linked to the dignity of African people and communities. In the recent matter of *Daniels v Scribante*, Madlanga J begins his judgment with the following quote:

> *"The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it. When the whites took our land away from us, we lost the dignity of our lives: we could no longer feed our children; we were forced to become servants; we were treated like animals. ... [I]n everything we do, we must remember that there is only one aim and one solution and that is the land, the soil, our world."*[15]

[14] *Mashavha v President of the Republic of South Africa and Others* [2004] ZACC 6; 2005 (2) SA 476 (CC) at para 51.

[15] *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC) at para 1. The original footnote reads: "These words are

31 For customary communities, it is no exaggeration to say that "*the land is [their] whole lives*". That is true of all customary communities. That intimate connection, together with the history of discrimination, are why IPILRA protects those communities' right to decide what happens to their land.

32 While *Daniels* was particularly concerned with the plight of farm dwellers, the same concern applies to communities like the Applicants whose tenure was made insecure by Apartheid's racist treatment of traditional customary land rights and, the laws of the authoritarian "homeland" governments. The apartheid government introduced increasingly draconian laws stripping customary rights and allowing the state to evict people at will.

33 IPILRA was adopted to protect those who held insecure tenure because of the failure to recognise customary title. Its purpose, according to the short tile, is "*[t]o provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law*". That the statute was initially intended to be temporary appears from s 5(2) which states that the Act will lapse on 31 December 1997, unless the Minister extends its operation.[16] In fact, the operation of IPILRA has been repeatedly extended in terms of s 5(2), most recently until 31 December 2018.[17] Notwithstanding the fact that it was meant to provide interim protection, IPILRA has effectively become

reported to have been uttered by an old man, Mr Petros Nkosi, at a community meeting in the then Eastern Transvaal. I found them in Rugege "Land Reform in South Africa: An Overview" (2004) 32 *International Journal Legal Information* 283 at 286."

[16] IPILRA s 5(2) reads: "*The provisions of this Act shall lapse on 31 December 1997: Provided that the Minister may from time to time by notice in the Gazette extend the application of such provisions for a period of not more than 12 months at a time: Provided further that any such notice shall be laid upon the Table of Parliament, and if Parliament by resolution disapproves of such notice, such notice shall cease to be of force and effect, but without prejudice to the validity of anything done in terms of such notice before it so ceased to be of force and effect.*"

[17] GN 1303 in *GG* 41270 of 24 November 2017.

permanent and offers the primary legal protection for traditional communities to control their own land according to customary law.

Operation

34 IPILRA specifically seeks to protect "*informal rights in land*". It includes a detailed definition of the term.[18] It is common cause that the Applicants hold informal rights in the subject land as defined in IPILRA.

35 The core provision of IPILRA is s 2(1) which requires the consent of the holder of an informal right before he or she may be deprived of property. It reads:

> *"Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1875 (Act 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent."*

[18] IPILRA s 1 defines "informal right in land" as follows:

"*(a) the use of, occupation of, or access to land in terms of-*

(i) any tribal, customary or indigenous law or practice of a tribe;

(ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in-

(aa) the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act 18 of 1936);

(bb) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act 21 of 1971); or

(cc) the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei;

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

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

(d) the use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991 (Act 112 of 1991), although he or she is not formally recorded in a register of land rights as the holder of the right in question,

but does not include-

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

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

36 Many informal rights, including the Applicants', are not held individually but communally. IPILRA therefore defines "*person*" to include a community.

37 Section 2(2) ties the requirement of consent to the traditions of the community as a whole: "Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community." Subsection 2(4) stresses that the "custom and usage of the community" must at least require the support of the majority of affected rights holders.[19]

38 Before we turn to the MPRDA, we explain why the grant of a mining right, and the conclusion of a lease, constitutes a deprivation in terms of s 2(1).

Deprivation

39 Does the grant of a statutory mining right constitute a deprivation as contemplated in s 2(1)? IPILRA does not define deprivation. In the context of the grant of a mining right, it seems that there are two possible interpretations.

40 The first possibility is the test for deprivation of property in terms of s 25(1) of the Constitution. A wide meaning has been given to the term in that context. The Constitutional Court held in *FNB* that, "*[i]n a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned.*"[20] All that is required is

[19] IPILRA s 2(4) reads: "For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate."

[20] *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 57.

interference that has a "*legally relevant impact on the rights of the affected party*".[21] Legal relevance is a matter of degree:

> *"Whether there has been a deprivation depends on the extent of the interference with or limitation or use, enjoyment or exploitation…at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."*[22]

41 Granting a statutory mining right satisfies that test. It is a limited real right, meaning that it subtracts from a landowner's *dominium* (as discussed below). It also empowers its holder to engage in invasive activities on the land.[23] These activities cause deterioration of land, and often lead to its desertion. Statutory mining rights go beyond the "*normal restrictions on property use or enjoyment found in an open and democratic society*". Their grant would constitute a deprivation for the purposes of s 25 of the Constitution.

42 This holds even when taking into account that the community does not own the resources which, in terms of the MPRDA, belong to all South Africans. By granting a mining right to somebody else, the Minister destroys that right which attaches to the land. It must follow that their grant also constitutes a deprivation for the purposes of s 2 of IPILRA.

43 The second possibility is to interpret s 2 of IPILRA as requiring a subtraction from a landowner's dominium. This is the test that is applied when determining whether a right is a real right. One compares the right in question (in this case, a statutory mining right) and its correlative obligation to determine whether the obligation is a burden upon the land

[21] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism: Eastern Cape* [2015] ZACC 23 at para 73.

[22] *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) at para 32.

[23] Section 5 of IPILRA.

itself, or whether it is something that is to be performed by the landowner personally. In order to burden the land and not the landowner (and therefore constitute a real, not personal, right) the right should curtail the landowner's rights in relation to their physical enjoyment of the land.

44 Granting a statutory mining right also satisfies that test. The MPRDA itself characterises statutory mining rights as limited real rights.[24] And limited real rights necessarily subtract from a landowner's *dominium*.[25] Even without that statutory shortcut, the correlative obligations of a statutory mining right burden the land itself. They are not personal obligations, but are fixed to the land. They entitle the holder not only to remove the resources (which the community does not own), but to access and alter the land (which the community does own) in order to extract those minerals. It is the process of extraction, not the loss of the minerals, that constitutes a deprivation of the community's property.

45 Accordingly, however the word "*deprive*" in s 2(1) is interpreted, it is clear that the grant of a mining right in terms under the MPRDA would amount to a deprivation.

46 The conclusion of a lease over the land plainly constitutes a deprivation. It is not related to the minerals, but directly to use of and access to the land. On any interpretation, a lease constitutes a deprivation.

47 Accordingly, both the grant of the right, and the conclusion of the lease, triggered the consent requirement in IPILRA.

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[24] MPRDA s 5(1).

[25] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 at 281.

The MPRDA

History and Purpose

48 Prior to the commencement of the MPRDA, a landowner held rights over minerals beneath their land unless and until those rights were ceded to another party. While ceding the rights to minerals would also cede the right to access the owner's land for the purposes of mining, if the mineral had not been ceded the owner could sterilise both the mineral and the land above the mineral.

49 In part to address the inequitable access to mineral wealth that inevitably flowed from South Africa's racial gap around land ownership, the MPRDA established that "*mineral … 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.*"[26] Mogoeng CJ explained the underlying rationale for the MPRDA in these terms:

> "*South Africa is not only a beauty to behold but also a geographically sizeable country and very rich in minerals. Regrettably, the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry. That legislative intervention was in the form of the MPRDA.*"[27]

50 That equalising purpose is recognised throughout the MPRDA:

[26] MPRDA s 3(1).

[27] *Agri SA CC* at para 1.

50.1 The preamble recognises "the need to promote local and rural development and the social upliftment of communities affected by mining" and "the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination."

50.2 The objects of the Act, set out in s 2, include:

> "*(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;*
>
> *(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, ... to benefit from the exploitation of the nation's mineral and petroleum resources; ...*
>
> *(h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.*"

51 That is the backdrop against which the operative provisions of the MPRDA must be interpreted. In particular, that is the backdrop for determining whether communities who were the victims of past discrimination, and who have deep cultural and religious connections to their land, should be required to consent to the grant of a mining right.

Operation

52 As part of its custodial role, the State is tasked with granting mining rights to applicants. In awarding these rights, the State awards limited real rights in respect of the land to which such mining rights relate.[28]

53 Section 4(2) of the MPRDA explicitly states: "*In so far as the common law is inconsistent with this Act, this Act prevails.*" The MPRDA contains no similar provision with regard

[28] MPRDA section 5(1).

to customary law, which is a source of law with equal constitutional status to common law. Nor does the MPRDA, unlike other legislation, state that it prevails over other legislation in the event of a conflict. Indeed, it specifically provides that mining rights, once granted, do not prevail over other law.[29]

54 Section 22 of the MPRDA sets out the procedure to be followed in the application for mining rights.[30] The application is made to the Regional Manager. If the application meets certain minimum criteria, she must accept it. She must then notify the applicant in writing to: (a) conduct an environmental assessment, and (b) "*to notify and consult with interested and affected parties within 180 days from the date of the notice*".[31] The Regional Manager must then forward the results of the consultation and the environmental report to the Minister.[32]

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[29] MPRDA s 25(2)(d).

[30] Section 22 reads in full:

> *"(1) Any person who wishes to apply to the Minister for a mining right must lodge the application*
>
> *(a) at the office of the Regional Manager in whose region the land is situated;*
>
> *(b) in the prescribed manner; and*
>
> *(c) together with the prescribed non-refundable application fee.*
>
> *(2) The Regional Manager must, within 14 days of receipt of the application, accept an application for a mining right if—*
>
> *(a) the requirements contemplated in subsection (1) are met;*
>
> *(b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land; and*
>
> *(c) no prior application for a prospecting right, mining right or mining permit or retention permit, has been accepted for the same mineral and land and which remains to be granted or refused.*
>
> *(3) If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing within 14 days of the receipt of the application.*
>
> *(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing*
>
> *(a) to conduct an environmental impact assessment and submit an environmental management programme for approval in terms of section 39, and*
>
> *(b) to notify and consult with interested and affected parties within 180 days from the date of the notice.*
>
> *(5) The Minister may by notice in the Gazette invite applications for mining rights in respect of any land, and may specify in such notice the period within which any application may be lodged and the terms and conditions subject to which such rights may be granted."*

[31] MPRDA s 22(4).

[32] MPRDA s 22(5).

55 In addition to the consultation that must be conducted by the applicant, s 10 of the MPRDA requires the Regional Manager to publicise that the application has been lodged, and to "*call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice.*" If a person objects to the grant of the mining right, "*the Regional Manager must refer the objection to the Regional Mining Development and Environmental Committee to consider the objections and to advise the Minister thereon.*"[33] The MPRDA does not separately require consultation with owners, other than in their capacity as interested and affected persons.

56 In *Bengwenyama Minerals*,[34] the Constitutional Court considered a review by a community that had not been consulted as required by the MPRDA prior to the grant of a prospecting right on their land. Justice Froneman made it clear that consultation is not a formal exercise. He held that merely informing the community of the application and ascertaining whether or not it objected did not comply with the Act's requirement for consultation. He described the nature and purpose of consultation in these terms:

> "*One of the purposes of consultation with the landowner must surely be to see whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's rights to use the property is concerned. Under the common law a prospecting right could only be acquired by concluding a prospecting contract with the landowner, something which presupposed negotiation and reaching agreement on the terms of the prospecting contract. The Act's equivalent is consultation, the purpose of which should be to ascertain whether an accommodation of sorts can be reached in respect of the impact on the landowner's right to use his land. Of course the Act does not impose agreement on these issues as a requirement for granting the prospecting right, but that does not mean that consultation under the Act's provisions does not require engaging in good faith to attempt to reach accommodation in that regard.*"[35]

[33] MPRDA s 10(2).

[34] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC).

[35] Ibid at para 65.

57 Clearly, consultation is not the consent required under IPILRA.

58 Section 23 provides for the granting and duration of mining rights.[36] It obliges the Minister to grant the right if certain conditions are met. Those include that "*the mineral can be mined optimally*", that the mine can be properly financed, that "*mining will not result in unacceptable pollution, ecological degradation or damage to the environment*", the Applicant has and will comply with the Act, and whether it will advance access to the industry for historically disadvantaged persons, and promote the social and economic welfare of all South Africans. Section 23 does not require the support, let alone consent, of the affected community.

59 It is clear that, with regard to a common-law owner, the Minister may grant the right against the will of the landowner. In addition, the holder of a mining right is given wide-ranging rights to access the land, against the will of the landowner if necessary.[37] The landowner's protection is limited to receiving 21 days' notice of any operations.[38]

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[36] MPRDA s 23(1) reads:

> "*(1) Subject to subsection (4), the Minister must grant a mining right if*
>
> *(a) the mineral can be mined optimally in accordance with the mining work programme;*
>
> *(b) the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;*
>
> *(c) the financing plan is compatible with the intended mining operation and the duration thereof;*
>
> *(d) the mining will not result in unacceptable pollution, ecological degradation or damage to the environment;*
>
> *(e) the applicant has provided for the prescribed social and labour plan;*
>
> *(f) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996);*
>
> *(g) the applicant is not in contravention of any provision of this Act; and*
>
> *(h) the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan.*"

[37] MPRDA s 5(3).

[38] MPRDA s 5A(c).

60 The MPRDA does partially address the rights of communities. The Act defines "*community*" as:

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

61 This definition includes communities like the Applicants who own their land, but also applies to a far wider group who only have a lesser right or interest in the land. These communities must be consulted as "*interested and affected persons*" in terms of s 10 and s 22.

62 In addition, s 23(2A) confers on the Minister the following power when granting a mining right:

> *"If the application relates to the land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community."*

63 This provision recognises that the surface use of customary land is different because land is intrinsic to the identity and the way of life of the people. This section was clearly put in place to ensure the full protection of the rights of indigenous communities which have long been trampled by the legacy of apartheid and segregation. It also allows the Minister to require that economic benefits flow to the community. As we explain below, s 23(2A) grants a power to the Minister, coupled with a duty to exercise it in appropriate circumstances.

Harmonious reading of IPILRA and the MPRDA

64 The Baleni applicants submit that IPILRA applies notwithstanding the provisions of the MPRDA. IPILRA requires consent before a mining right can be granted. The MPRDA does not repeal IPILRA and can be read together with IPILRA. That interpretation is consistent with international law, and best promotes constitutional rights. Therefore, it must be adopted.

65 We structure the argument as follows:

65.1 The **text** of the two statutes favours our interpretation;

65.2 The **purpose and context** of both statutes weigh in favour of consent; and

The text of IPILRA and the MPRDA

66 There are multiple pointers in the text of the two statutes, and the ordinary canons of statutory interpretation, that point to the fact that IPILRA must apply. In this regard we highlight the following issues:

66.1 The presumption against implicit repeal;

66.2 The flawed argument that the MPRDA "*covers the field*"; and

66.3 The textual provisions of the MPRDA that support the application of IPILRA.

The presumption against repeal

67 There is a strong statutory presumption that laws must be read together unless there is a clear conflict. This has been fully endorsed by this Court as follows:

> *"The common-law rule of implied revocation provides that where there is an irreconcilable conflict between two enactments, the later enactment will take precedence over the earlier one. However, this rule is applied with circumspection in the light of the presumption that the legislature does not intend to alter the existing law more than is necessary. It should thus not readily be inferred that a law has been impliedly repealed. This is important for certainty in our law."*[39]

68 The Court went on to hold that a court should only conclude that a law has been impliedly repealed where there is "*a clear and unequivocal legislative intention to repeal*".[40]

69 The same point was recently made by Ponnan JA:

> *"[R]epeal by implication is not favoured. An interpretation of apparently conflicting statutory provisions which involve the implied repeal of the earlier by the later ought not to be adopted unless it is inevitable. Any reasonable construction which offers an escape from that is more likely to be in consonance with the real intention of the Legislature."*[41]

70 The key requirement is that the two laws must be irreconcilable.

71 IPILRA and the MPRDA are not irreconcilable. It is a simple matter to read them together: While consent is not required of common law owners, it is required of IPILRA rights holders. There is further nothing in the MPRDA that is inconsistent with this interpretation. Indeed, several provisions support it.

72 Read together one is clear that there must be consultation as required in terms of ss 10 and 22 of the MPRDA and consent as required by s 2(1) of IPILRA. The processes may overlap, but both must be complied with before the Minister is entitled to issue a mining

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[39] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC) ; 2010 (4) SA 55 (CC) at para 67, applied and approved in *Laubscher N.O. v Duplan and Another* [2016] ZACC 44; 2017 (2) SA 264 (CC); 2017 (4) BCLR 415 (CC) at para 39.

[40] Ibid.

[41] *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA) at para 118, emphasis added, citations omitted (concurring judgment, supported by Lewis JA).

right in regard to customary land.

73 The presumption is supported by the history of regular extension of the IPILRA deadline. It is common cause that IPILRA is not a statute that was enacted and forgotten. It is extended every year by the Minister of Land Reform, with the knowledge of Parliament. If there was any concern that it was overbroad, outlived its purpose, or conflicted with other statutes, the Minister of Land Reform and Parliament would have acted to repeal or amend it. They have done the opposite. That means that IPILRA is as important now as it was when it was enacted in 1996.

The MPRDA does not Cover the Field

74 There further seems to be an incorrect interpretation of the presumption linked to one of our canons of interpretation by the respondents – *generalia specialibus non derogant* (general words and rules do not derogate from special ones). The effect of this maxim was recently explained as follows:

> *"Where there is legislation dealing generally with a topic and, either before or after the enactment of that legislation, the legislature enacts other legislation dealing with a specific area otherwise covered by the general legislation, the two statutes co-exist alongside one another, each dealing with its own subject matter and without conflict. In both instances the general statute's reach is limited by the existence of the specific legislation."*[42]

75 The argument seems to be that as the MPRDA seeks to cover the field of mining, it repeals all former acts. Or, it would be that the MPRDA is the specific statute and therefore prevails over IPILRA, which is the general statute. The argument has no merit.

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[42] *Southern African Litigation Centre* at para 102. See also *Sasol Synthetic Fuels (Pty) Ltd v Lambert* 2002 (2) SA 21 (SCA) at para 17 ("*When the Legislature has given attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly.*")

76 IPILRA and the MPRDA cover different issues. The MPRDA may seek to cover the field of mining, but it does not purport to cover the field of ensuring equitable access to land and tenure protection in terms of ss 25(5) and (6) of the Constitution. That issue is dealt with by, amongst other statutes, IPILRA. The two statutes cover different issues, and neither can be read to be more "specific" than the other.

77 This distinction was expressly recognized by the Supreme Court of Appeal[43] and the Constitutional Court[44] in the *Maccsand* judgments. Both courts concluded that a successful applicant for a mining right under the MPRDA must still obtain the necessary planning approval to establish a mine from the relevant municipality. While the judgments turned in part on the respective competences of the national and local spheres of government, the courts also recognized the possibility of overlapping statutes that both impact on mining:

> *"If it is accepted, as it should be, that LUPO regulates municipal land planning and that, as a matter of fact, it applies to the land which is the subject matter of these proceedings, then it cannot be assumed that the mere granting of a mining right cancels out LUPO's application. There is nothing in the MPRDA suggesting that LUPO will cease to apply to land upon the granting of a mining right or permit. By contrast section 23(6) of the MPRDA proclaims that a mining right granted in terms of that Act is subject to it and other relevant laws."*[45]

78 Or, as Plasket AJA put it in the SCA:

> *"[I]t cannot be said that the MPRDA provides a surrogate municipal planning function that displaces LUPO and it does not purport to do so. Its concern is mining, not municipal planning. That being so, LUPO continues to operate alongside the MPRDA. Once a mining right or mining permit has been issued, the successful applicant will not be able to mine unless LUPO allows for that*

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[43] *Maccsand (Pty) Ltd v City of Cape Town and Others (SCA)* [2011] ZASCA 141; 2011 (6) SA 633 (SCA)

[44] *Maccsand (Pty) Ltd v City of Cape Town and Others (CC)* [2012] ZACC 7; 2012 (4) SA 181 (CC).

[45] *Maccsand (CC)* at para 44.

use of the land in question."[46]

79 Therefore, a comparable analysis applies to the relationship between IPILRA and the MPRDA. The MPRDA does not provide a substitute for IPILRA because it is not intended to perform the same function. The MPRDA is intended to regulate mining; IPILRA is intended to ensure secure tenure and equitable access to land. They "*operate alongside*" one another. That is why IPILRA is applicable when the grant of mining rights is on customary communal land.

80 The intersecting nature of the MPRDA is not limited to planning laws. Section 23(6) of the MRPDA provides that a mining right is subject to <u>any</u> relevant law. That includes, for example, the provisions of NEMA,[47] the National Water Act[48] or the National Heritage Resources Act.[49] The same would be true of other security of tenure laws like ESTA, PIE and the Labour Tenants Act. They must still comply with those laws that exist to give effect to s 25(6) of the Constitution. This must also be true of IPILRA.

81 To put it simply: The MPRDA applies generally to mining and mining rights and clearly requires consultation with landowners. But it imposes that requirement as a minimum, not a maximum. The MPRDA is a base and not a ceiling. The MPRDA applies, but so does IPILRA when dealing with customary law. Both statutes must be complied with: there must be consultation (in terms of the MPRDA) and consent (in terms of IPILRA).

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[46] *Maccsand (SCA)* at para 33.

[47] National Environmental Management Act 107 of 1998.

[48] Act 36 of 1998.

[49] Act 25 of 1999.

The text of the MPRDA

82 Nothing in the text of the MPRDA makes the interpretation advanced implausible or unreasonable. To the contrary, the text supports the usual position that the MPRDA and IPILRA must be read together.

83 First, s 5 of the MPRDA expressly supersedes common law, but does not claim to supersede customary law and nothing in its reading would suggest this as well. Customary law is an independent source of law with the same status as common law.[50] The singling out of common law in s 4(2) of the MPRDA can only be interpreted to mean that the MPRDA was not meant to trump customary law rights. Until the Legislature expressly states this, there can be no presumption for the taking away of existing rights.

84 Moreover, as pointed out earlier, there is an enhanced need to specify when a statute intends to limit customary rights. Where one statute (IPILRA) expressly protects those rights, and another statute (the MPRDA) does not expressly reduce that protection, s 211(3) mandates that the customary rights protected by the first remain in place.

85 Second, the definition of community makes it clear that the applicant and the Regional Manager must consult with the community in their capacity as "*interested persons*". And, as this Court held in *Bengwenyama*,[51] consultation is not agreement. That supports the Applicants' position. There must be both consultation in terms of the MPRDA with the community as interested persons, **and** community consent in terms of IPILRA in their

[50] This is dealt with in the heads of argument on behalf of LAMOSA.

[51] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC)

capacity as owners.

86 Third, the Minister's power under s 23(2A) is not a substitute to consent, but a complement to consent. The provision obliges the Minister to impose conditions to protect the rights and interests of the community, including requiring their participation. The same power does not exist with regard to land not occupied by the community. Several points are important:

86.1 The provision applies to all land that is occupied by communities. Many of those communities will not qualify for the protection of IPILRA. Section 23(2A) nonetheless recognizes that the Constitution requires special concern and respect for community land. That buttresses the need to read the MPRDA with IPILRA when the latter act applies.

86.2 Where the community is governed by IPILRA, s 23(2A) still serves a vital purpose: It requires the Minister to give legal effect to negotiations between the community owner and the applicant, to the extent those are necessary to protect the community's rights and interests. Without s 23(2A), the mining right could not incorporate any conditions that might be negotiated between the parties. Without that protection, the negotiation could only be concluded as an ordinary contract. The right holder would be able to exercise all the rights under the MPRDA, and the community would only be able to enforce contractual remedies. Section 23(2A) ensures that the Minister will introduce the necessary conditions into the right itself. That provides communities that – exercising their right under IPILRA – elect to allow mining can still be properly protected.

87 In short, s 23(2A) serves a very different purpose to IPILRA. IPILRA is about allowing the community to decide whether mining can occur, and if so how. Section 23(2A) is intended to both protect communities who fall outside IPILRA, and to formalize the protection of those communities covered by IPILRA.

88 Lastly, it is important to stress that *Bengwenyama* did not decide whether IPILRA applies or not. Indeed, in several ways *Bengwenyama* supports the Applicants' contention:

88.1 IPILRA was never raised in *Bengwenyama*.

88.2 The case was concerned with a community that did want its land to be mined. The dispute was whether they should be allowed to mine their own land, or whether an outside company could be permitted to mine it. That is a very different situation from the present where the community may object to anybody mining on its land, even the community itself.

88.3 *Bengwenyama* supports the underlying substantive premise of the Applicants' case that communities must be intimately involved in decisions about their land. While the MPRDA does not require agreement, IPILRA does.

Purpose and Context of IPILRA and the MPRDA

89 Purpose and context are vital to determining the proper meaning of IPILRA and the MPRDA. IPILRA was enacted to secure the tenure of those living on community land. It was intended to prevent the state and private parties from undermining those rights. There is no basis to read IPILRA restrictively to undermine its core purpose.

90 The same is true of the MPRDA. It was enacted to make the state the custodian of the country's mineral wealth, so that it can ensure that minerals are exploited in a manner that redresses existing inequalities. The purpose of the MPRDA is advanced, not inhibited, by reading it together with IPILRA. IPILRA merely affords a group of particularly vulnerable owners, who have a particularly close cultural connection to their land, special protection. Section 23(2A) makes it clear that protecting community rights to land is part of the purpose of the MPRDA.

91 Moreover, requiring consent in terms of IPILRA does not frustrate the other goals of the MPRDA to ensure that minerals are beneficially exploited. If a community refuses to consent in a manner that inhibits the achievements of those goals, the Minister is fully entitled to expropriate their land under s 55. IPILRA does not remove that right.

92 In short, the MPRDA and IPILRA are not in tension. They are both transformative pieces of legislation that are meant to redress past injustices. They best achieve that shared purpose by being read in harmony. That interpretation is also the only one that is consistent with international law.

IV INTERNATIONAL LAW

93 International law is directly relevant to whether IPILRA applies. There is a strong consensus across multiple international instruments that indigenous communities like the Applicants and the Amicus have a right to grant or refuse their **free, prior and informed consent** to any development that will significantly affect them.

94 Free, prior and informed consent (**FPIC**) is mandated both by treaties South Africa has

ratified, and by "soft law" that, while not directly binding, supports and informs South Africa's direct international law obligations. We address the binding law in these heads. But first we deal with two general issues: the meaning of free, prior and informed consent, and the meaning of "*indigenous people*" and "*people*".

Meaning of free, prior and informed consent

95 Free, prior, informed consent refers both to a substantive **right** under international law as well as a **process** designed to ensure satisfactory development outcomes. The principle places the development decision in the hands of the community.

96 To realise this principle, the community's decision should, first, be made **free** from any obligation, duty, force or coercion. This means that alternative development options should also be available to the community to ensure that the decision is based on real choice.

97 Secondly, the community is entitled to make the development choice **prior** to any similar decisions made by government, finance institutions or investors.

98 Thirdly, the community must be able to make an **informed** decision. That means that they should be provided sufficient information to understand the nature and scope of the project, including its projected environmental, social, cultural and economic impacts. Such information should be objective and based on a principle of full disclosure. The community should be afforded enough time to digest and debate the information.

99 Finally, consent means that the community's decision may be to reject the proposed

development. They can say no. In terms of international law, FPIC must be obtained in a manner that is in accordance with the indigenous peoples' customary laws and practices of decision-making. FPIC is also described as a process precisely because the right to say no places the community in a position to negotiate. In other words, FPIC is not designed only to stop undesirable projects, but also to provide communities with, and recognise their legal right to, better bargaining positions when they do consider allowing proposed developments on their land or resources.

100 It should thus be accepted at this point without further explanation that the Applicants fall squarely into the definition of indigenous people protected in terms of these international treaties.

101 The right to free, prior and informed consent generally attaches to "*indigenous people*" or "indigenous communities".[52] That term plainly covers the Baleni applicants.[53]

Binding Treaties

102 There are four sources that directly bind South Africa to ensure that it provides FPIC to people like the Applicants whose culture, land and livelihoods are threatened by development:

[52] Most recent international law developments have clarified that the right can also attach to local communities with customary ownership and rights to land (ACHPR/Res.224 (LI) 2012: Resolution on a Human Rights-Based Approach to Natural Resources Governance) and "sub-Saharan African Historically Underserved Traditional Local Communities" (World Bank Environmental and Social Framework (2017).

[53] The African Commission on Human and Peoples' Rights have, like its international counterparts, avoid providing an exhaustive definition of 'indigenous peoples/communities', but identified the following key characteristics of such groups: "*a) Self-identification; b) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; c) A state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model;. Moreover, in Africa, the term indigenous populations does not mean "first inhabitants" in reference to aboriginality as opposed to non-African communities or those having come from elsewhere.*" ACHPR Advisory Opinion of the African Commission on Human and Peoples' Rights on the UNDRIP adopted May 2007.

102.1 The Convention on the Elimination of All Forms of Racial Discrimination (**CERD**);

102.2 International Covenant on Economic Social and Cultural Rights (**ICESCR**);

102.3 The International Covenant on Civil and Political Rights (**ICCPR**); and

102.4 The African Charter on Human and People's Rights (**African Charter**).

103 First, the Committee tasked with interpreting states parties' obligations under CERD has expressly held that states must obtain the informed consent of indigenous peoples. In its 23rd General Recommendation, the CERD Committee noted that "*in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises.*"[54]

104 It therefore called on states 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*".[55] The Committee made a special call for states to "*recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources*".[56] If indigenous people had already "*been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent*",[57] the Committee called on states to compensate them for their loss.

[54] *General Recommendation XXIII on the Rights of Indigenous Peoples* (1997) at para 3.

[55] Ibid at para 4(d).

[56] Ibid at para 5.

[57] Ibid.

105 The CERD Committee expressly held that the requirement of free, prior and informed consent applies "*to the exploitation of the subsoil resources of the traditional lands of indigenous communities*". It held that "*merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples.*"[58]

106 Second, South Africa has also ratified the ICESCR. In its 2009 General Comment on the right to take part in cultural life, the CESCR Committee held as follows:

> *"States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories."*[59]

107 The Committee recognised that indigenous people have "t*he right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions*". To give effect to that right, "*States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights.*"[60] Lastly, the General Comment holds that states parties "*should obtain [communities'] free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.*"[61]

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[58] *UNCERD, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador* (Sixty Second Session, 2003), U.N. Doc. CERD/C/62/CO/2, 2nd June 2003, para 16. This finding was cited by the African Commission in the *Endorois* matter discussed below at fn 128.

[59] CESCR, General Comment No 21 E/C.12/GC/21 (21 December 2009). at para 36.

[60] Ibid at para 37, citing both ILO Convention 169, and UNDRIP, which are discussed below.

[61] Ibid at para 55(e).

108 Third, the Human Rights Committee – which is tasked to interpret the ICCPR – has held that the collective right of minorities to enjoy their culture includes the right to free, prior and informed consent. In *Angela Poma Poma v Peru*,[62] the complaint concerned the diversion of water from underground springs depriving the indigenous Aymara people of access to the water. Water was essential for their traditional activity of grazing and raising Ilamas, on which their livelihoods depended. The Committee held that this violated the right to culture and religion in art 27 of the ICCPR[63] (the equivalent of ss 30 and 31 of our Constitution) because the state had not obtained the complainant's free, prior and informed consent:

> "*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."*[64]

109 Fourth, the bodies responsible for interpreting the African Charter – the African Commission on Human and People's Rights (**African Commission**), and the African Court on Human and People's Rights (**African Court**) – have found that multiple rights in the Charter demand that no decisions may be made about peoples' land without their free, prior and informed consent.

110 The relevant decision of the African Commission is *Centre for Minority Rights Development v Kenya* (***Endorois***).[65] The Endorois are a community of approximately 60

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[62] Communication No 1457/2006, Doc CCPR/C/95/D/1457/2006 (27 March 2009), available at http://www.worldcourts.com/hrc/eng/decisions/2009.03.27_Poma_Poma_v_Peru.htm.

[63] ICCPR art 27 reads: "*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*"

[64] Ibid at para 7.6.

[65] *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* ACHPR

000 people who have for centuries lived in the area around Lake Bogoria in Kenya. They were dispossessed of their ancestral land through the creation of the Lake Hannington Game Reserve in 1973. Prior to this, the Endorois had for generations practised a sustainable way of life which was inextricably linked to their land. In 1997 members of the Endorois community lodged a claim in the Kenyan High Court for relief which included an order declaring that the land surrounding Lake Bogoria was the property of the Endorois community and should be held in trust on their behalf. The claim was dismissed. The Community then approached the African Commission.

111 The Commission found that Kenya had violated multiple rights of the complainants, including the right to property, the right to natural resources, and the right to development. The violation of the right to development focused on the absence of consent. The Commission held that the right to development is both constitutive and instrumental and a violation of either the procedural or substantive elements constitutes an infringement of the right. To comply with the right, development must be: (i) equitable; (ii) non-discriminatory; (iii) participatory; (iv) accountable; and (v) transparent.

112 The Commission also concluded that the right to natural resources[66] of the members of the

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Communication 276/2003, available at http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf.

[66] Art 21 of the Charter reads:

(1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it

(2) In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

(3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

(4) State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity.

(5) State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by

Endorois community had been infringed as

> *"the State has a duty to consult with them, in conformity with their traditions and customs, regarding any proposed mining concession within Saramaka territory, as well as allow the members of the community to reasonably participate in the benefits derived from any such possible concession, and perform or supervise an assessment on the environmental and social impact prior to the commencement of the project."*[67]

113 The African Court reached a similar conclusion in the *Ogiek* matter,[68] which was decided in 2017. Importantly, with regard to the right to development, the Court cited article 22 of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), which reads:

> *"Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions."*

114 At the time the interim Constitution was adopted, many people had insecure access to land. These included farm dwellers, labour tenants, urban occupiers and those living on community land. In its first few years, the original democratic parliament adopted a suite of legislation to protect these vulnerable people. The Extension of Security of Tenure Act[69] was enacted to protect farm dwellers. The Land Reform (Labour Tenants) Act[70] was promulgated to protect labour tenants. The Prevention of Illegal Eviction and Unlawful Occupation of Land Act[71] was adopted to protect urban occupiers. The Restitution of Land

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international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources..

[67] *Endorois* at para 266.

[68] *African Commission on Human and People's Rights v Republic of Kenya* Application No. 006/2012 (Ogiek).

[69] Act 63 of 1997.

[70] Act 3 of 1996.

[71] Act 19 of 1998.

Rights Act was enacted for those who were dispossessed by racist laws.[72]

115 And IPILRA was adopted to protect those who held insecure tenure because of the failure to recognise customary title. Its purpose, according to the short title, is "*[t]o provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law*". That the statute was initially intended to be temporary appears from s 5(2) which states that the Act will lapse on 31 December 1997, unless the Minister extends its operation.[73] In fact, the operation of IPILRA has been repeatedly extended in terms of s 5(2), most recently until 31 December 2018.[74] Notwithstanding the fact that it was meant to provide interim protection, IPILRA has effectively become permanent and offers the primary legal protection for traditional communities to control their own land according to customary law.

THE ADMISSION OF DR ANINKA CLAASSENS' EVIDENCE

The test for the admission of evidence in this Court

116 As noted above, the Baleni applicants have also applied to admit an expert affidavit by Dr Aninka Claassens.

117 The test for the admission of evidence under Rule 31(1) is as follows:

117.1 the factual material must be relevant to the determination of the issues before the

[72] Act 22 of 1994.

[73] IPILRA s 5(2) reads: "*The provisions of this Act shall lapse on 31 December 1997: Provided that the Minister may from time to time by notice in the Gazette extend the application of such provisions for a period of not more than 12 months at a time: Provided further that any such notice shall be laid upon the Table of Parliament, and if Parliament by resolution disapproves of such notice, such notice shall cease to be of force and effect, but without prejudice to the validity of anything done in terms of such notice before it so ceased to be of force and effect.*"

[74] GN 1303 in *GG* 41270 of 24 November 2017.

Court and must not specifically appear on record; and

117.2 the factual material must be:

117.2.1 common cause or otherwise incontrovertible; or

117.2.2 of an official, scientific, technical or statistical nature capable of easy verification.

118 As we explain below, the factual material in Dr Claassens' affidavit is self-evidently relevant, does not appear from the record, and is either incontrovertible, or of an official, scientific, technical or statistical nature capable of easy verification.

119 In addition to Rule 31, Rule 30 incorporates various provisions of the old Supreme Court Act 59 of 1959, including section 22, which applied to the power of courts on appeals. In its present form, that provision is contained in section 19 of the Superior Courts Act 10 of 2013 (which repealed the Supreme Court Act).

119.1 Section 19, like section 22 before it, permits a court on appeal, where it is in the interests of justice to do so, to "*receive further evidence*". This Court has held that it will do so where such evidence is weighty, material and to be believed.[75]

119.2 In addition, in determining whether to grant the application to admit the evidence, an appeal court will consider the reasonableness of the explanation for its late filing.[76]

[75] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 para 41.

[76] *Id.*

The nature of Dr Claassens' evidence

120 Dr Claassens' affidavit is in two parts.

120.1 In the first part, she explains:

120.1.1 the centrality of autocratic chiefly rule under colonialism and apartheid, in which all rural black South Africans were subsumed within tribal boundaries, and control over land was vested in traditional leaders, rather than in the people who occupied and used the land;[77]

120.1.2 in this context, the use of "tribal resolutions" to support the colonial and apartheid distortion of layered and accountable decision-making processes, and to favour the Native Commissioner's version over an examination of whether proper consultation had occurred and consent had been obtained;[78] and

120.1.3 using historical judgments as an illustrative tool, the particularly stark effect that this policy had on African land-buying syndicates, who were forced to affiliate with 'tribes' in order to obtain exemptions from the 1913 Land Act.[79]

120.2 In the second part, she sets out three government policies, namely:

120.2.1 The "*Interim Procedures Governing Land Development Decisions Which Require the Consent of the Minister of Land Affairs as Nominal Owner of*

[77] Dr Claassens' affidavit, paras 19-45.

[78] Id paras 46-53.

[79] Id paras 54-65.

the Land", which prescribe detailed procedures aimed at ensuring genuine participation, consultation and consent by those actually affected by land development decisions.[80]

120.2.2 The "*Entitlement of ESTA and IPILRA Rights Holders in Respect of State Land Disposal Projects*", which provides that that occupants of state land who qualify as rights holders in terms of IPILRA have property rights to the land, of which they cannot be deprived "*unless they consent, or the rights are expropriated*", and are to be treated as if they are owners of the land.[81]

120.2.3 The "*State Land Lease and Disposal Policy*", which continues to recognise the existence of subgroups, as distinct from traditional communities, as the potential holders of informal land rights, and requires compliance with IPILRA and the procedures issued in terms of it whenever a development threatens to affect the rights of such a subgroup.[82]

Dr Claassens' evidence is relevant

121 Whether the admission of Dr Claassens' affidavit is considered under Rule 31 or section 19, the first inquiry is whether it is relevant.[83] Both parts of Dr Claassens' evidence are relevant to this matter. Quite clearly, neither presently appears from the record.

[80] Id paras 73-90.

[81] Id paras 91-97.

[82] Id paras 98-106.

[83] *Mail and Guardian Ltd v Chipu* 2013 (6) SA 367 (CC) para 11.

122 The evidence of Dr Claassens will assist the Court in properly interpreting section 25(6) of the Constitution and IPILRA. Dr Claassens has, quite properly, not offered such an interpretation herself.[84] However, we submit that:

122.1 A proper interpretation requires an understanding of the historical context she provides.

122.1.1 Historical context is directly relevant to the task of statutory and constitutional interpretation. As the majority held recently in *Daniels v Scribante,*[85] in interpreting the consent requirement under ESTA, a detailed historical perspective of land dispossession and labour tenants was "*necessary to understand ESTA's context*".[86]

122.1.2 Historical context takes on special significance in cases involving customary law and land rights. Not only must the content of customary law and of land rights "*be determined by reference to the history and usages of the community*",[87] but it must also always be kept in mind that our colonial and apartheid past has had a distorting effect on customary law, in a way that "*emphasises its patriarchal features and minimises its communitarian ones*".[88]

122.1.3 Dr Claassens' evidence demonstrates quite clearly that the approach adopted in the High Court, which treats tribal resolutions as the hallmark

[84] Dr Claassens' affidavit, para 68.

[85] 2017 (4) SA 341 (CC).

[86] Para 13.

[87] *Alexcor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 60.

[88] *Shibi v Sithole* 2005 (1) SA 580 (CC) para 89.

of consultation and consent, harks back to the autocratic forms of "consultation" that existed under colonialism and apartheid.

122.2 A consideration of current government policy is similarly relevant to a determination of Government's compliance with IPILRA.

122.2.1 The procedures set out in and attached to Dr Claassens' affidavit[89] require extensive consultation with those whose rights are actually affected by a deprivation. The most recent policy expressly recognises that those procedures are still in force.

122.2.2 As this Court recently held, "*National policy is not inconsequential.*"[90] Government is not entitled simply to ignore it. While it may deviate from policy, and indeed must not consider itself inflexibly and rigidly bound, "*its officials are not entitled simply to ignore it. They must generally act in accordance with it, unless there is a reasonable basis for deviating from it*".[91]

Incontrovertible and/or of an official, scientific, technical or statistical nature capable of easy verification

123 The second part of Dr Claassens' affidavit simply sets out the official policies of the Department of Land Affairs, some of which she was involved in drafting, and which

[89] Dr Claassens' affidavit, paras 73-90.

[90] *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) para 30.

[91] *CTP Limited and Others v Director-General, Department of Basic Education and Others*, unreported, Case No: 38562/2017 (28 February 2018) (GP) para 72. See also *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC), paras 99, 127, and 210; *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) para 19.

remain in force today.

124 It is, with respect, difficult to conceive of evidence of a more "*official*" nature than government policies. They are also entirely incontrovertible; while the respondents may debate their implication, and their application to the facts, they cannot plausibly dispute their contents. At very minimum, therefore, the second part of Dr Claassens' affidavit straightforwardly meets the Court's test for admissibility.

125 In addition, we submit, the historical material in the first part of Dr Claassens' affidavit likewise satisfies this test.

126 In dealing with the historical context, which is extensively referenced in her affidavit to authoritative sources, Dr Claassens limits herself to an historical account that is confirmed in numerous cases and published works. In large part, she simply records basic historical premises. As she explains, these premises are not seriously disputed by scholars.[92]

127 Accordingly, the first part of Dr Claassens' affidavit meets the Court's test for admissibility in that it is largely of an official nature, is capable of easy verification, and is, in any event, otherwise incontrovertible.

128 In the alternative, and while we persist in contending that her evidence is incontrovertible, we submit that for the same reasons it is, at minimum, weighty and to be believed, and therefore admissible under rule 30, read with s 19 of the Superior Courts Act.

[92] Dr Claassens' affidavit, para 5.

129 Her expert evidence on the historical context necessary and relevant for a proper understanding and interpretation of the Constitution and IPILRA can only assist the Court in fulfilling its constitutional duties. We submit that no prejudice will be caused to the parties, who have an opportunity, if they wish, to seek leave to file their own expert affidavit, and will be entitled to respond to Dr Claassens' contentions by way of written submissions.

130 Lastly, the explanation provided for Dr Claasens' evidence only being filed on appeal, and not at an earlier stage of proceedings, is simple and compelling: she only became aware of this case when it was pending before this Court.[93] She simply could not have adduced it earlier.

VI APPLICATION TO THE FACTS

131 As LAMOSA demonstrates in its heads of argument, customary law – and therefore IPILRA – was not, in fact, complied with when the mining right was awarded.

132 In addition, when it came the lease for mining, no attempt to comply with the interim procedures was made.[94] The only record regarding IPILRA compliance was a resolution with one signatory: Kgosi Pilane. This is precisely the approach that IPILRA and the IPILRA procedures reject. Where a policy is in place, state officials cannot merely ignore it. They must either act in accordance with the policy or have a reasonable, clearly articulated basis for deviating from it.[95]

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[93] Founding affidavit, para 59.

[94] FA24, Record vol 2 p 179.

[95] *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC), paras 99, 127, and 210; *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) para 19.

133 It is evident that the Minister merely ignored the IPILRA procedures in signing the lease over Wilgespruit 2 JQ. There is no effort to establish why this was reasonable. This is particularly troubling given the historical injustice that IPILRA, and the procedures developed to give effect to it, sought to address.

VII CONCLUSION

134 In the circumstances, the Baleni applicants pray for admission as *amicus curiae* and for the admission of the affidavit of Dr Aninka Claassens.

TEMBEKA NGCUKAITOBI

MICHAEL BISHOP

YANELA NTLOKO

MICHAEL MBIKIWA

Counsel for the Applicants for admission as amici curiae

Chambers Sandton and Cape Town

18 May 2018

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 265/17

In the application for admission as *amicus curiae* of:

MDUMISENI DLAMINI Applicant

In the matter between:

GRACE MASELE (MPANE) MALEDU
& 36 OTHERS 1st to 37th Applicants

LESETLHENG VILLAGE COMMUNITY 38th Applicant

and

ITERELENG BAKGATLA MINERAL
RESOURCES (PTY) LTD 1st Respondent

PILANESBERG PLATINUM MINES (PTY) LTD 2nd Respondent

BALENI APPLICANTS' TABLE OF AUTHORITIES

I LEGISLATION

1. Expropriation Act 63 of 1975.
2. Extension of Security of Tenure Act 63 of 1997.
3. Interim Protection of Informal Rights to Land Act 31 of 1996.
4. Land Reform (Labour Tenants) Act 3 of 1996.
5. Mineral and Petroleum Resources Development Act 28 of 2002.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT: 265/17

In the application for admission as *amicus curiae* of:

LAND ACCESS MOVEMENT OF SOUTH AFRICA Applicant

In re the matter between:

GRACE MASELE (MPANE) MALEDU & OTHERS First Applicant

and

ITERELENG BAKGATLA MINERAL RESOURCES (PTY) LTD First Respondent

PILANESBERG PLATINUM MINES (PTY) LTD Second Respondent

LAMOSA'S HEADS OF ARGUMENTS

I INTRODUCTION

1. The Land Access Movement of South Africa (**LAMOSA**) seeks to submit, affidavits and extracts from testimony under oath from senior members of the Bakgatla ba Kgafela Royal Family and traditional structure pertaining to the community's customary law of decision-making in relation to land.

2. This evidence is relevant to the determination of this matter before the Court:

   2.1. The Applicants submit that, if the Court does not recognise their ownership to the farm Wilgespruit, then they are customary rights holders for the purposes of the Interim Protection of Informal Land Rights Act 31 of 1996 (**IPILRA**).[1] In terms of that Act, persons, such as the Applicants, could only have been deprived of their land rights through their consent[2] or through a decision taken "*in accordance with the custom and usage of that community*".[3]

   2.2. The Respondents have accepted that the Appellants are holders of informal rights to the land in question in terms of IPILRA.[4] They say those rights were deprived either by operation of law when the mining right was awarded,[5] or *in terms of customary law* as contemplated in IPILRA when a *Kgotha Kgothe* of the Bakgatla ba Kgafela resolved on

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[1] Applicants' Heads of Argument at para 40.
[2] IPILRA s 2(1).
[3] IPILRA s 2(2) ("*Such custom and usage is deemed to at a minimum include the majority agreement of the holders of the land rights given at a meeting convened for those purposes*").
[4] Respondents' Heads of Argument at para 8.5.
[5] Respondents' Heads of Argument at para 10.4

28 June 2008 to conclude a surface lease agreement over the farm Wilgespruit.[6]

2.3. LAMOSA aligns itself with the argument raised by the Baleni Applicants' in the Founding Affidavit to their application to be admitted as amicus curiae to these proceedings, namely that IPILRA must be complied with prior to the awarding of a mining right.[7] Any deprivation of informal land rights, it is submitted, must comply with IPILRA.

2.4. Where compliance with IPILRA is required, and the land rights holders do not consent to such deprivation,[8] compliance with the applicable customary law of the community concerned is required. It is thus not possible for the Court to determine whether the land rights of the Appellants were lawfully deprived without knowledge of the content of the applicable customary law and whether any relevant decisions were taken in line with such customary law.

3. The Court cannot make a determination on these questions without understanding the contents of the applicable customary law. Indeed, this Court has found that it "*is obliged to satisfy itself, as a matter of law, on the content of customary law*".[9]

4. Despite the central role that customary law plays in the dispute before this Court, neither of the parties to these proceedings has provided evidence of the applicable customary law of the Bakgatla ba Kgafela. At best, the Respondents

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[6] Respondents' Heads of Argument at para 14.4.
[7] FA of Mdumiseni Dlamini at para 22.1.
[8] It is common cause that the Appellants never consented to the deprivation of their land rights.
[9] *Mayelane v Ngwenyama and Another* [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) at para 48.

assert that the land rights of the Appellants were extinguished at a *kgotha kgothe*, "*a community meeting for attendance by all adult members of the Bakgatla-ba-Kgafela Traditional Community where important community decision are taken*".[10] As we show below, that is plainly inadequate.

5. These heads of argument are structured as follows:

5.1. **Part II** addresses the nature and status of customary law, and particularly the impact of s 211(3) of the Constitution;

5.2. **Part III** concerns the manner of determining customary law, and particularly the need for evidence;

5.3. **Part IV** summarises the evidence that LAMOSA seeks to submit on the content of Bakgatla ba Kgafela;

5.4. **Part V** applies that customary law to the facts of this case; and

5.5. **Part VI** deals with the application for admission of evidence and as an amicus curiae.

II THE NATURE AND STATUS OF CUSTOMARY LAW

6. Section 211(3) of the Constitutions states that "*courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law*". Where appropriate, section 39(2)

[10] HC Judgment at para 7.4; Record Vol 1, pp A005-A006.

entitles a court to develop the customary law to "*promote the spirit, purport and objects of the Bill of Rights*".

7. In the pre-constitutional era, and in particular the oft-cited *Van Breda v Jacobs*,[11] custom was seen as "*a useful accessory…filling in normative gaps in the common law*".[12] That has changed.

8. In terms of the Constitution, customary law is now recognised as an independent and original source of law. As this Court explained in *Alexkor*:

> "*Like all law [customary law] depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. … It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system.*"[13]

9. In *Bhe*, Langa DCJ elaborated on the implication of this finding. Langa DCJ held:

> "*Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.*"[14]

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[11] 1921 AD 330.
[12] *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 54.
[13] *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at para 51. See also *Bhe and Others v Khayelitsha Magistrate and Others* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 41 ("*customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.*")
[14] *Bhe* at para 41.

10. This Court has emphasised that customary law is a living system of flexible and changing law.[15] In *Mayelane*, this Court held that:

> "*This Court has accepted that the Constitution's recognition of customary law as a legal system that lives side-by-side with the common law and legislation requires innovation in determining its 'living' content, as opposed to the potentially stultified version contained in past legislation and court precedent.*"[16]

11. Given the flexible nature of customary law, its content is not "*easily ascertainable*".[17] It can also not be established with simple reference to the common law.[18] Finally, the Court has acknowledged the history of distortions of customary law through official, colonial and apartheid codifications.[19] Langa DCJ stated, in *Bhe*, "*[t]he difficulty lies not so much in the acceptance of the notion of 'living' customary law. . . but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights*."[20]

12. Section 211(3) of the Constitution bears repeating: "*courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law*". The language is clear – only a statute that expressly deals with customary law can alter customary law.

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[15] See *Shilubana* at para 54.1 (this Court held that "*like the common law, [customary law] is adaptive by its very nature*".)
[16] *Mayelane* at para 43.
[17] *Bhe* at para 81.
[18] See *Alexkor* at para 53-54 ("*In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. . . . Without attempting to be exhaustive, we would add that indigenous law may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. However, caution must be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it.*")
[19] *Bhe* at paras 62, 72 and 86.
[20] Ibid at para 109.

Customary law rights and rules cannot be altered implicitly. If the legislature wishes to alter customary law, it may, but only if it addresses the issue directly.

13. There are two reasons why s 211(3) operates in this manner:

13.1. It is a recognition of the historical degradation of customary law. In the words of Mokgoro J, "*[c]ustomary law was lamentably marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community*".[21] Section 211(3) seeks to redress that historical position by insisting that customary law will remain in place unless "*specifically*" altered.

13.2. This is vital to ensure certainty about the existence of existing rights. The status of customary law rights will be precarious if it can be amended by mere implication. This is also vital to ensure that people are aware of the proposed change to customary law and are able to participate in considering that change. As this Court held in *Doctors for Life*:

> "*The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective*

[21] *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 172, quoted with approval in *Bhe* at para 43.

in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist."[22]

III DETERMINING THE CONTENTS OF CUSTOMARY LAW

14. When this Court was first asked, in *Shilubana*, to rule on the application of a customary rule, it laid down principles as to how a Court should go about ascertaining the content of the customary law. The Court set out four factors to be considered:

14.1. The past practice and tradition of the community.[23] This entails a historical enquiry.

14.2. The contemporary practice of a particular community;[24]

14.3. The impact of the development of the customary law on the people who live it. This entails a balancing of the facilitation of the development of customary law with the value of legal certainty and respect for vested rights.[25]

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[22] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) at para 115.
[23] *Shilubana* at para 44.
[24] Ibid at para 46.
[25] Ibid at para 47.

14.4. Finally, in finding the content of customary law, the Court is obliged to promote the spirit, purport and objects of the Bill of Rights.[26]

15. These principles were applied in comparable circumstances in *Mayelane v Ngwenyama*. The case concerned whether XiTsonga customary law required the first wife to give her consent in order for a husband to take a subsequent wife. In that case, like in the present one, the Court had to determine the content of customary law without adequate evidence or submissions before it as to the contents of the applicable customary law.

16. It rejected the notion that the content of customary law is a question of fact. It held, unambiguously, that: "*Determination of customary law is a question of law*", just like the determination of the common law.[27]

17. As is the case here, there were only bald allegations about the content of Xitsonga customary law in the record.[28] After the hearing, the Court asked the parties, and the amici curiae, to provide submissions, based on factual evidence, on the content and nature of Xitsonga customary law.

18. The Court found that the mere statement on affidavit of the content of customary law was not enough. Froneman, Khampepe and Skweyiya JJ, writing for the majority, held that further evidence was vital. Customary law must be treated "*with the deference and dignity it deserves as one of the constitutionally-recognised sources of our law*."[29]

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[26] Ibid at para 48.
[27] *Mayelane* at para 47.
[28] Ibid at para 47.
[29] Ibid at para 48.

19. That constitutional status means that "*a court is obliged to satisfy itself, as a matter of law, on the content of customary law, and its task in this regard may be more onerous where the customary-law rule at stake is a matter of controversy.*"[30] This may impose a proactive step on courts "*to take steps to satisfy themselves as to the content of customary law and, where necessary, to evaluate local custom in order to ascertain the content of the relevant legal rule*".[31]

20. In *Mayelane*, this Court specifically acknowledged the contribution of the amici in that case in making submissions as to the contents of the applicable customary law.[32] While LAMOSA has provided the submissions without a prior request from the Court, that is because it has particular access to evidence on the content of the relevant customary law.

21. In the next Part, we explain why customary law is relevant to the present matter.

IV THE RELEVANCE OF CUSTOMARY LAW

22. Customary law is relevant for the simple reason advanced in detail by the Baleni Applicants. IPILRA prohibits a deprivation unless consent is granted in terms of customary law. The grant of a mining right constitutes a deprivation of existing customary land rights. Accordingly, the mining right could only be lawfully granted if consent was granted in term of customary law prior to the

[30] Ibid at para 48.
[31] Ibid.
[32] Ibid at para 18.

grant of the mining right. The same applies to the conclusion of the lease, which also amount to a deprivation.

23. And IPILRA makes it clear that consent must be granted in a manner consistent with customary law. 55. Section 2(2) ties the requirement of consent to the traditions of the community as a whole: "*Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community.*" Accordingly, under IPILRA, customary law for decisions about land must be complied with.

24. In addition to the reasons advanced by the Baleni applicants, we mention two further reasons why IPILRA can and must be read together.

25. First, as alluded to earlier, s 211(3) requires that legislation which alters customary law must "*specifically deal*" with customary law. IPILRA is clearly such a law. The Mineral and Petroleum Resources Development Act 28 of 2002 (**MPRDA**) is not. It does not purport to deal with customary law at all. It deals with mining. Indeed, s 4(2) "*specifically deals*" with common law. But the Act remains silent on customary law.

26. Second, under s 39(2), both acts must be interpreted to promote the spirit, purport and objects of the Bill of Rights. Two constitutional rights are relevant:

    26.1. The most obvious right at stake is the right to security of tenure in s 25(6). Section 25(6) applies to a "*person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws*

or practices". The Applicants fall in that category. They are entitled to "*tenure which is secure*", but only "*to the extent provided by an Act of Parliament*". The relevant act that provides secure tenure is IPILRA. The Applicants therefore have a constitutional right to the security provided by IPILRA. Any limitation of that statutory right is a limitation of s 25(6).[33]

26.2. The Constitution protects the right of everyone to "*participate in the cultural life of their choice*".[34] Section 31 also protects the collective right of "*[p]ersons belonging to a cultural … community*" to "*enjoy their culture*" collectively "*with other members of that community.*"[35] Interpreting the MPRDA to trump IPILRA would violate these rights in two ways:

26.2.1. It would undermine the right of customary communities to adhere to their customary law concerning the use of their land. This distinguishes the grant of mining rights over customary land from land held under common-law. Common-law owners have no cultural right to respect for their attachment to the land. Customary-law owners do.

26.2.2. Mining itself will seriously disrupt the existing customary practices and systems of traditional governance within communities.

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[33] See *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC)at para 38 ("*Although the right we are concerned with here is expanded on in ESTA, its true source is section 25(6) of the Constitution, which is located in the Bill of Rights.*")

[34] Constitution s 30.

[35] Constitution s 31.

27. Finally, LAMOSA submits that the grant of a mining right does not constitute an expropriation. As this Court made clear in *Agri SA*: "*There can be no expropriation in circumstances where deprivation does not result in property being acquired by the state.*"[36] The grant of a mining right does not result in the state acquiring property. Therefore, it is not an expropriation.

28. If LAMOSA and the Baleni applicants are correct that the MPRDA does not extinguish the exercise of customary rights to land, then any deprivation will have to follow IPILRA and the applicable customary law. The question then is what is the content of customary law?

IV THE CONTENT OF CUSTOMARY LAW

29. Ms Tjale, on behalf of LAMOSA, set out the factual material pertaining to the applicable customary law of the Bakgatla-ba-Kgafela as it was presented to the North West Commission into Affairs of the Bakgatla-ba-Kgafela. The benefit of the material is that it was contained both in affidavits and oral evidence, subjected to cross-examination, under oath. Furthermore, the line of questioning before the Commission dealt specifically with the question as to how decisions in the Bakgatla should be made in terms of customary law.

30. In summary, the evidence put forward by Kgosi Pilane and other senior members of the Royal Family, was that:

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[36] *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 59.

30.1. At local, ward or village level, communities have considerable autonomy in decision-making;

30.2. Tswana and Bakgatla customary law has at its core a "*commitment to rule by consultation and consent*";[37]

30.3. A decision pertaining to the deprivation of rights in land would start with the village that is likely to be most directly affected. The village's "*consent or consensus*" is sought.

30.4. After their consent was received, other villages that will not be directly affected will be consulted.

30.5. From there, the decision will go to the dikgosana, the heads of clans and finally to the traditional council.

30.6. Only after all these structures have approved of the decision, can it finally proceed to a *kgotha kgothe* were the entire community must take a resolution in favour of the decision.

31. The important point is that a *kgotha kgothe* comes at the end of a long consultation process that starts with the all-important consent of those most directly affected. As Kgosi Pilane himself described it (emphasis added):

> "*the resolution of the tribe mostly happens when there is an issue relating to land or major development which have [sic] to effect the usage of land in any part of the community. Then what normally happens before that resolution is taken, we would go to the villages that are directly going to be effected [sic] and get their consent or debate until we get their consensus and we would then take it to other far*

[37] Tjale FA at paras 33-4.

distance villages to inform that there is going to be this kind of major development which is going to affect these people in the area."[38]

32. The power of a *kgotha kgothe* to take important decisions relating to land in terms of Tswana customary law generally and the customary law of a particular community specifically, was the subject of recent trial proceedings and an eventual judgment of the full bench of the North West High Court.[39] The Royal Bafokeng Nation argued that their structure referred to as the Supreme Council had the power under customary law to take a decision to institute litigation pertaining to the community's land because it has, as a matter of fact, done so in the past. In rejecting this argument, Gutta J, writing for the full bench, wrote:

> "*Although past and existing practices are relevant in determining customary law, the customary law must reflect the rights and values of the Constitution, hence it is subject to the Constitution. The present litigation concerns a matter of great public importance, namely the basis upon which substantial tracts of Bafokeng land should be held. The dispute in this regard was well known, and has a strong capacity to divide the nation. It concerns the ownership of specific land, with the result that those who have competing ownership claims, and also those who have customary land rights in respect of that land, are directly affected by the decision.*

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[38] Tjale FA at para 39 and Annexure ET18.

[39] *Bafokeng Land Buyers Association and Others v Royal Bafokeng Nation and Others* [2018] ZANWHC 5. The matter arose when certain members of the Royal Bafokeng Nation brought a challenge in terms of Rule 7 to the authority of the Chief to have brought an application on behalf of the community for the transfer of 61 farms currently being held in trust by the Minister into the name of the Bafokeng. The community members said that the Bafokeng Supreme Council did not have the authority in terms of customary law to take a decision to bring the ligitation, in particular without broad consultation beforehand as required by customary law. Furthermore, they said that a subsequent *kgotha kgothe* meeting overturned any decision to bring the litigation. During the trial proceedings, detailed evidence as to the nature and power of the *kgotha kgothe* and other decision making structures were led.

I agree with the appellant's submission that when core procedural and governance values of the Constitution are at stake, such as participation, consensus-seeking and consultation, these cannot be excluded from the customary law in the name of practice, conduct or expedience. Similarly, power does not reside with a body simply because that body asserts it. To determine customary law in this way would defeat constitutional rights, undermine the rule of law, and corrode the integrity of the system of traditional governance and its core values."[40]

33. This dictum reinforces the evidence led at the Commission.

V CUSTOMARY LAW WAS NOT COMPLIED WITH

34. The facts of this matter clearly demonstrate that the customary law of the community was not complied with.

The Facts

35. This matter concerns an application to evict the Applicants from their ancestral land to enable the Respondents to conduct platinum mining on the farm called Wilgespruit.

36. In 2004, IBMR obtained a prospecting right over Wilgespruit.[41] At the time IBMR was 100% owned by the Bakgatla Community. For the purposes of prospecting, the community transferred 15% of its shares in IBMR to a company called Barrick (who later withdrew again).

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[40] Ibid at para 28-29. The Respondents in that matter have petitioned the SCA for leave to appeal.

[41] Record p 49 at para 6.6. On 12 April 2003, a land rights holders' resolution was purported to have been taken by the Bakgatla ba Kgafela community in terms of IPILRA. The resolution dealt with the creation of IBMR and applying for prospecting rights over Wilgespruit and five other farms. FA at para 6.4: Record Vol 1, p 49; Annexure FA20, Record p 165; AA at para 7.17, Record p 632; Record p 1410.

37. It is worth noting that, even the decision to register a company, namely IBMR, for the purposes of applying for a *prospecting* right, was preceded by an IPILRA decision signed by Kgosi Pilane on 12 April 2003. IBMR was well aware that it was required to comply with IPILRA. Yet, when it came to obtaining the mining right, it did not do so.

38. On 21 April 2007 and at Lesethleng village Barrick held a meeting where the Traditional Council chair, Mr Kobedi Pilane was present. The Respondents allege that the purpose of the meeting was to consult "*with the members of the community to explain the process and progress of the mining activities subsequent to the completion of the prospecting*".[42] The High Court accepted that this was not a meeting for the purposes of s 22(4)(b) of the MPRDA.

39. Whatever its status under the MRPDA, it is evidently apparent that it was not a meeting for the purposes of IPILRA. There was certainly no attempt to seek the consent of the affected rights holders for the mining right to be awarded.

40. The mining right was granted to IBMR on 19 May 2008, and was notarially executed and took effect on 20 June 2008. The right required IBMR to commence mining within a year of the effective date. It allowed IBMR to commence mining operations subject to s 5 of the MPRDA immediately on or after the effective date.

41. On 28 June 2008, a "*tribal resolution*" was signed by Kgosi Pilane at a meeting described as a *kgotha kgothe*. The resolution ratified previous agreements signed by Kgosi Pilane relevant to the exercise of the mining right. In terms of

[42] FA at para 6.7: Record Vol 1, pp 49-50.

the resolution the Bakgatla ba Kgafela community allegedly agreed to enter into a lease over Wilgespruit. A representative of Barrick and a director at IBMR signed as witnesses.

42. At the time of signing the 'tribal resolution', Kgosi Pilane was a director of IBMR.[43]

43. The resolution was only ratified by the Minister of Rural Development in December 2011, and the notarial lease executed in April 2012 and registered in the Deeds Office on 3 October 2012.[44]

Non-compliance

44. The above facts are clearly not compliant with customary law:

44.1. There was no compliance with the core "*commitment to rule by consultation and consent*";

44.2. The decision did not start with the village that is likely to be most directly affected. The village's "*consent or consensus*" was not sought.

44.3. The view of other villages was not obtained.

44.4. The decision did not go to the dikgosana, or the heads of clans.

45. Clearly, neither the grant of the right, nor the conclusion of the lease complied with customary law.

46. As a result, both decisions failed to comply with IPILRA, and are therefore unlawful.

[43] Annexure FA11 at p 117 of the Record.
[44] FA at para 6.22; Record p 55.

VI ADMISSION OF EVIDENCE AND AS AMICUS CURIAE

47. In light of the above submissions, it is possible to address the two applications before this Court:

47.1. The application for admission as an *amicus curiae*; and

47.2. The application for admission of the evidence concerning the content of customary law.

Admission as Amicus Curiae

48. The requirements for admission in terms of Rule 10 are that the applicant:

48.1. Has sought the consent of the parties and complied with the procedural requirements of Rule 10;

48.2. Has demonstrable interest in these proceedings; and

48.3. The submissions will be useful to the Court, and are different from those of the other parties.

49. LAMOSA has complied with these requirements.

50. First, it wrote to all the parties seeking consent, and brought the application for admission within the time period specified in Rule 10. The Applicants consented to LAMOSA's admission and the Respondents have not opposed it.

51. Second, as an NGO working in the area of customary law and land, and particularly given its participation int eh North West Commission, it has an interest in these proceedings.

52. Third, the submissions are plainly different from the parties, none of whom have addressed the status or content of customary law.

Admission of Evidence

53. The test for the admission of evidence under Rule 31(1) is as follows:

53.1. the factual material must be relevant to the determination of the issues before the Court and must not specifically appear on record; and

53.2. the factual material must be:

53.2.1. common cause or otherwise incontrovertible; or

53.2.2. of an official, scientific, technical or statistical nature capable of easy verification.

54. In addition to Rule 31, Rule 30 incorporates various provisions of the old Supreme Court Act 59 of 1959, including section 22, which applied to the power of courts on appeals. In its present form, that provision is contained in section 19 of the Superior Courts Act 10 of 2013 (which repealed the Supreme Court Act).

55. Section 19, like section 22 before it, permits a court on appeal, where it is in the interests of justice to do so, to "*receive further evidence*". This Court has held that it will do so where such evidence is weighty, material and to be believed.[45]

56. On the strength of this Court's approach in *Mayelane*, the evidence must be admitted. Compliance with customary law is directly relevant to the resolution of this case. The Court therefore has an obligation to determine the content of customary law. The evidence that LAMOSA seeks leave to introduce is directly relevant to that question.

57. The other parties should be afforded an opportunity to file further evidence responding to LAMOSA's evidence on the content of the customary law. However, given the nature and source of that evidence, it is difficult to think of a basis on which it could be materially disputed.

58. Accordingly, whether under rule 30 or rule 31, the evidence should be admitted.

TEMBEKA NGCUKAITOBI

MICHAEL BISHOP

YANELA NTLOKO

MICHAEL MBIKIWA

Counsel for the Applicants for admission as amici curiae

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[45] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at para 41.

Chambers Sandton and Cape Town

18 May 2018