IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG PROVINCIAL DIVISION, PRETORIA)

CASE NO: 73768/2016

In the matter between:

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

and

MINISTER OF MINERAL RESOURCES	First Respondent
DIRECTOR-GENERAL-DEPARTMENT OF MINERAL RESOURCES	Second Respondent
DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION DEPARTMENT OF MINERAL RESOURCES	Third Respondent
REGIONAL MANAGER: EASTERN CAPE-DEPARTMENT OF MINERAL RESOURCES	Fourth Respondent
TRANSWORLD ENERGY AND MINERAL RESOURCES (SA) PTY LTD	Fifth Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Sixth Respondent
DIRECTOR-GENERAL – DIRECTOR OF RURAL DEVELOPMENT AND LAND REFORM	Seventh Respondent

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I INTRODUCTION

1. On the Wild Coast there is an area called Umgungundlovu. It is an area of immense natural beauty where several hundred people – the Applicants – and their ancestors have lived according to their customs and traditions for centuries. This case arises because the sands of Umgungundlovu are rich in titanium.

2. An Australian Mining Company – the Fifth Respondent (**TEM**) – wants to mine those titanium-rich sands under the Xolobeni Mineral Sands Project. The community of Umgungundlovu does not want TEM to mine. They fear the disastrous social, economic, and ecological consequences of mining.

3. At its most fundamental, this case is about who gets to decide if TEM will be able to mine. Is it the community, which has lived there for centuries? Or is it a foreign mining company, by submitting a compliant application to the First Respondent (**the Minister**)?

4. At a technical level, the case is about the interaction of two statutes: the Interim Protection of Informal Land Rights Act (**IPILRA**)[1] and the Mineral and Petroleum Resources Development Act (**MPRDA**).[2] Both were enacted to redress our history of economic and territorial dispossession and

[1] Act 31 of 1996.

[2] Act 28 of 2002.

marginalisation. Together they seek to restore land and resources to Black people who were the victims of historical discrimination.

5. IPILRA makes it clear that customary communities like the Applicants have a right to decide whether or not development occurs on their land. The MPRDA requires that the community is consulted before the Minister awards a mining right. But it does not expressly require that they consent.

6. The Applicants submit that the two statutes must be read to work together, not to conflict. The only way to do that is to hold that both IPILRA and the MPRDA apply. The community must be consulted under the MPRDA, and must consent in terms of IPILRA. This is not only the best way to interpret the statutes in light of their purpose, it is the only interpretation that is consistent with international law and that promotes constitutional rights.

7. The Respondents argue that the MPRDA trumps IPILRA. In their view, communities like the Applicants that have an intimate cultural connection to the land, and depend on it for their economic, physical and spiritual survival, should have no more rights than any other owner. No owner can have a right to refuse consent to mining.

8. This interpretation fails to appreciate the differences between customary communities like the Applicants, and ordinary common-law owners. It must be rejected.

9. The Applicants have brought this application to ensure that their consent is required before a mining right is granted on their land. They seek a variety of declaratory orders:

   9.1. First, they seek orders that their consent is required in terms of IPILRA.

   9.2. Second, they seek declarations that their customary law requires decisions to be taken by consensus.

   9.3. Third, in the alternative, they seek an order that compensation must be determined and paid before a mining right can be exercised.

   9.4. Fourth, in the further alternative, if the MPRDA cannot be interpreted to require either IPILRA consent, or prior compensation, it is unconstitutional.

10. The fundamental fact that underlies this case relates to the vulnerability of communities like the Applicants. Their way of life is intrinsically linked to the land. Customary communities tend to suffer disproportionately from the impacts of mining as they are directly affected by the environmental pollution, air borne diseases, loss of their farm land and grazing land, forced displacement and the loss of community amongst other things. Without free, prior and informed consent, they are at real risk of losing not only rights in their land, but their very way of being. That is why international law obliges South Africa to grant mining rights only if the Applicants grant their consent.

11. These heads of argument are structured as follows:

   11.1. **Part II** provides a brief factual background;

11.2. **Part III** deals with whether this is an appropriate case for declaratory relief;

11.3. **Part IV** sets out the basic principles of statutory interpretation;

11.4. **Part V** summarises the relevant legal framework

11.5. **Part VI** addresses the heart of the matter: why IPILRA applies to mining rights;

11.6. **Part VII** deals with the alternative argument that the MPRDA requires prior determination and payment of compensation;

11.7. **Part VIII** addresses the further alternative argument that the MPRDA is unconstitutional;

11.8. **Part IX** covers the declarations concerning the content of the Umgungundlovu Community's customary law; and

11.9. **Part X** concludes.

II FACTUAL BACKGROUND

12. This case is primarily a dispute about legislative interpretation. However, the facts are important to resolving some of the declaratory relief the Applicants seek. We therefore briefly summarise the core facts.

13. On 3 March 2015, TEM applied for a right to conduct open cast mining activities over a coastal stretch of land some 22 kilometres long and 1,5 kilometres wide.[3]

[3] FA at para 27: Record Vol 1, p 18.

14. The land is owned collectively and individually by members of the Umgungundlovu community, and some 70 to 75 households, known in isiMpondo as imizi (singular: umzi), comprising more than 600 individuals, who live within 1.5 kilometres of the coast in Umgungundlovu. The vast majority of these imizi are in the proposed mining area. The land has been used and occupied by the Applicants and their families for generations.[4]

15. The Umgungundlovu community is a community in terms of customary law based on its shared customary law system of governance and access to the land and the resources, as well as a community as defined by both IPILRA[5] and the MPRDA.[6]

16. The land is an important resource and is central to the Applicants' livelihoods and subsistence. They use it for grazing, for cultivating their crops, depend on it for water, and for building materials, firewood, edible and medicinal fruits and plants, fish and shellfish.[7] Members of the community also rely on tourism that occurs within the area.[8]

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[4] FA at para 51: Record Vol 1, p 24.

[5] Section 1 of IPILRA defines "community" as "any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group".

[6] Section 1 of the MPRDA 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".

[7] FA at para 30: Record Vol 1, p 19.

[8] FA at para 31: Record Vol 1, p 19.

17. The land also has deep spiritual and religious connections. For the Applicants, an umzi is far more than a place of living – it is a symbol of social maturity and social dignity. Through the Applicants' routine ritual, it serves as a conduit for the perpetuation of relations of inter-linkage and mutual dependence between the living and the dead.[9]

18. Throughout the mining right application process the community have essentially featured as an afterthought – they have only been consulted regarding the environmental authorisation and there has been no indication from TEM or the DMR that the Community's repeated declarations that mining cannot occur on their land have been considered, much less heeded.

19. There have been various mining applications, including the award of a mining right in 2008 that was set aside in 2011. Even in setting aside this mining right, the Minister of Mineral Resources found that the Community had been adequately consulted.[10]

20. The prospect of mining on the land has sterilised all alternative development and investment in the community since the mid-2000s.

[9] FA at para 121: Record Vol 121, p 40.

[10] FA annexure DB8 at para 2: Record Vol 1, pp 272.

21. The Applicants reasonably fear that the mining right will have a severe negative effect on their land and community. Amongst other concerns, the Applicants have reasonable concerns about the impact of mining on water.[11] They reasonably fear that mining will result in the "*physical displacement of community members form their land or from their homes*" which will lead to "*economic displacement associated with the loss of assets or access to assets and resources*".[12] Community members will also lose access to communal resources that they rely on to survive.[13] It will destroy the local tourism industry which "*is predicated on the area's natural beauty*".[14]

22. Mining will also disrupt existing "*social and economic linkages that bind the community together*".[15] Industrialisation will lead to an increase in outsiders, placing increased pressure on social services, squatting, crime, alcohol abuse and other social evils. It is likely to lead to "*the further destruction of traditional authority structures and traditional norms and culture*".[16] It will lead, ultimately, to "*the loss of the community's cultural identity and … way of life*".[17]

23. These impacts are not imaginary or hypothetical. They are well documented in South Africa and internationally.[18]

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[11] FA at paras 147-9: Record Vol 1, pp 47-8.

[12] FA at para 152: Record Vol 1, p 48.

[13] FA at para 154.2: Record Vol 1, p 149.

[14] FA at para 154.3: record Vol 1, p 149.

[15] FA at para 154.5: Record Vol 1, p 50.

[16] FA at para 154.6.4: Record Vol 1, p 50.

[17] FA at para 154.7: Record Vol 1, p 50.

[18] FA at paras 155-6: Record Vol 1, pp 50-1. See also Capel Affidavit: Record Vol 6, p 511.

24. The applications have caused intense conflict and division in the community that has resulted in violence within and between families. In the First Applicant's words: "*The proposed mining activities of TEM threaten to tear our community apart and to leave us divided, insecure and vulnerable.*"[19] These conflicts have been triggered and exacerbated by the fact that certain community members, including former mining opponent iNkosi (Chief) Baleni, have become directors in subsidiary companies and various other activities.[20]

25. The Applicants have not and will not consent to mining on their land. The mining rights application, however, is proceeding on the basis that the Applicants' consent is not needed.

26. Both TEM and DMR have made it clear that they do not believe that the Applicants' consent is not required in order to award the mining right.

27. There is presently a moratorium on the award of mining rights for 18 months or until the Minister is satisfied that the ongoing conflict is resolved.[21]

[19] FA at para 126: Record Vol 1, p 41.

[20] FA at para 128: Record Vol 1, p 42.

[21] TEM's AA at para 8: Record Vol 15, p 1352.

III APPROPRIATE TO GRANT DECLARATORY RELIEF

28. This is an application for several forms of declaratory relief. The Applicants submit this is an appropriate case for the court to grant declaratory relief.

29. TEM agrees. While it argues the issue is "*academic*", it agrees that it is "*desirable to achieve certainty on the legal issue raised by the applicants*".[22] As TEM rightly points out, the issue will be raised in a subsequent review if it is not resolved now.

30. DMR, however, argues that the application is premature because it has been brought before internal remedies have been exhausted.[23] This position is mistaken. The Applicants do not seek to review any decision and therefore are not required to exhaust internal remedies. They seek declaratory relief, to which different principles apply.

31. This Court has a discretion whether to grant declaratory relief or not. That discretion exists both in terms of s 21(1)(c) of the Superior Courts Act,[24] and s 38 and 172(1) of the Constitution. Under the Superior Courts Act, "*there is a two-stage substantive enquiry leading to the decision whether or not to grant a*

[22] TEM AA at para 12: Record Vol 15, p 1353.

[23] DMR AA at para 13: Record Vol 16, p 1413.

[24] Act 10 of 2013. Section 21(1)(c) reads: "*A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power- … (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.*"

declaratory order: not only must the court be satisfied that the applicant has the necessary interest but also that the case is a proper one for the exercise of the discretion given to the court."[25] There is no debate that the Applicants have the necessary interest. The only question is whether this is an appropriate case.

32. The question under the Constitution is whether it is "*appropriate*" or "*in the interests of justice*" to grant declaratory relief in the circumstances. As the Constitutional Court has held, declaratory orders are "*a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values.*"[26]

33. There are several reasons why, in this matter, declaratory relief is appropriate:

33.1. The two parties directly affected – TEM and the Applicants – <u>want</u> this Court to exercise its power to grant declaratory relief. DMR's objection is half-hearted and misplaced. It can have little interest in denying the affected parties clarity on an issue that is important to them.

33.2. The particular history around contestation of this mining right, which has been pending for over a decade, requires clarity. People's lives are at risk. The declaratory relief sought will, one way or another, reduce tension in the area.[27]

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[25] *Muldersdrift Sustainable Development Forum v Council of Mogale City* [2015] ZASCA 118 at para 17.

[26] Rail Commuters Action Group v Transnet Ltd t/a Metrorail (CCT 56/03) [2004] ZACC 20; 2005 (2) SA 359 (CC) at para 107.

[27] FA at para 163: Record Vol 1, p 53.

33.3. While it may be possible for the Applicants to review an eventual decision to grant the mining right on the basis that they did not consent in terms of IPILRA, that may be too late. It is possible that mining will commence while the internal appeal[28] and the judicial review are pending. Requiring the Applicants to wait until then may mean that their consent becomes meaningless. Even if successful, they will have a right to consent after mining has already destroyed their land and their culture.

33.4. The declaration will not pre-empt the Minister from exercising his powers under the MPRDA.

34. For all these reasons, this is an appropriate case to grant declaratory relief.

IV PRINCIPLES OF INTERPRETATION

35. The primary issue in this case is how to interpret IPILRA and the MPRDA. It is therefore necessary to set out three key principles of statutory interpretation:

35.1. The role of s 39(2) of the Constitution;

35.2. The importance of purpose and context; and

35.3. The role of international law.

[28] MPRDA s 96(2)(a). See also Capel Affidavit at para 74: Record Vol 6, p 538.

Section 39(2)

36. The guiding light for interpreting statutes is s 39(2) of the Constitution, which requires that courts interpreting "*any legislation … must promote the spirit, purport and objects of the Bill of Rights.*" As the Constitutional Court put it in *Makate v Vodacom*, s 39(2) means that courts are "*bound to read a legislative provision through the prism of the Constitution.*"[29] This obligation is "*activated*" whenever "*the provision under construction implicates or affects rights in the Bill of Rights*".[30] There are three further elements of s 39(2) that bear mention.

37. First, where a provision is capable of more than one meaning, s 39(2) creates two obligations:

    37.1. The first obligation might conveniently be referred to as the "Hyundai obligation". If a provision is reasonably capable of two interpretations and one interpretation would render it unconstitutional and the other not, the courts are required to adopt the interpretation that would render the provision compatible with the Constitution. Thus, in *Hyundai* the Constitutional Court held that "*judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.*"[31]

[29] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) at para 87.
[30] Ibid at para 88.
[31] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at paras 22--23.

37.2. The second obligation might conveniently be referred to as the "*Wary obligation*". If a provision is reasonably capable of two interpretations, section 39(2) requires the adoption of the interpretation that "*better*" promotes the spirit, purport and objects of the Bill of Rights. This is so even if neither interpretation would render the provision unconstitutional.[32]

38. Second, s 39(2) is not a licence to ignore the text of legislation. The legislation must be "*reasonably capable*" of bearing the assigned interpretation.[33] Or, as Sachs J put it in *SAPS v PSA*, s 39(2) "*require[s] that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution.*"[34] It is not any textual tension that must be avoided, but only "*undue*" strain.

39. Third, at the same time s 39(2) specifically, and the Constitution as a whole, embraces a new approach to interpretation. It requires courts to "*prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees*".[35]

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[32] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107.

[33] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (10) BCLR 1079(CC); 2001 (1) SA 545 (CC) at para 24.

[34] *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC) at para 20 (my emphasis). The term "*unduly strained*" is drawn from *Hyundai* (n 32) at para 24.

[35] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) at para 53 (our emphasis).

Purpose and Context

40. Whether or not the legislation implicates constitutional rights, our courts have eschewed the approach of "*blinkered peering at an isolated provision in a statute*" to determine its meaning. As Ngcobo J (as he then was) explained in *Bato Star*: "*The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous.*"[36] The exercise of interpretation must instead focus on the purpose of the provision and the context in which it appears.

41. Purpose: In *Daniels v Scribante*, the Constitutional Court emphasised that courts must adopt "*a purposive interpretation that is compatible with the mischief being addressed by the statute concerned.*"[37] That means that a court must determine the goal of a statute as a whole, and of a particular provision and seek, as far as possible, to interpret the legislation to further that goal. In the specific context of s 25(6), the Court held:

> "*With all this background in mind, the mischief that section 25(6) of the Constitution and ESTA are seeking to address is not far to seek. Addressing that mischief is not only about securing the tenure of ESTA occupiers. It is also about affording occupiers the dignity that eluded most of them throughout the colonial and apartheid regimes. We must adopt an interpretation that best advances this noble purpose of section 25(6) and ESTA.*"[38]

[36] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 90 (my emphasis). Endorsed in *Goedgelegen* (n 36) at para 53.
[37] *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 24.
[38] *Daniels* (n38) at para 23.

42. As we explain below, s 25(6) is equally central to the proper interpretation of IPILRA which was enacted to fulfil the right to security of tenure.

43. Context: As Wallis JA has explained: "*Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise.*"[39] Or, as Lewis JA pithily put it: "*Words without context mean nothing.*"[40] The obligation to consider context is required by the Constitution.[41] Context, as Moseneke DCJ explained, includes two elements: "*the social and historical background of the legislation*" and "*the grid … of related provisions and of the statute as a whole including its underlying values.*"[42] IPILRA and the MPRDA must be interpreted against the historical background of devaluing customary rights in land, and ensuring that only white people benefited from South Africa's resources.

International and Comparative Law

44. International law plays a vital role in interpreting statutes for two reasons.

    44.1. Section 233 of the Constitution provides: "*When interpreting any legislation, every court **must** prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative*

[39] Ibid at para 25.
[40] *Novartis v Maphil* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) at para 28. See also *Goedgelegen* (n 36) at para 53 ("*Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.*")
[41] *Bato Star* (n 37) at para 91 ("*The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, section 39(2).*")
[42] *Goedgelegen* (n 36) at para 53.

interpretation that is inconsistent with international law". As we show below, international law binding on South Africa requires that the Applicants provide free, prior, informed consent before mining occurs on their land. The only interpretation consistent with that international law is that IPILRA applies.

44.2. In terms of s 39(1)(b) of the Constitution, this Court "*must*" consider international law when interpreting the Bill of Rights. As the Court must also interpret IPILRA and the MPRDA in line with the Bill of Rights, international law is relevant to determining what those rights – including the rights to security of tenure, property, culture and a healthy environment – demand.

45. Comparative law also plays an important role. Section 39(1)(c) of the Constitution allows courts to consider foreign law when interpreting the Bill of Rights. Like the relevant international law, foreign law supports the need to obtain the Applicants' consent before permitting mining on their land.

V THE LEGAL FRAMEWORK

46. In this Part we describe 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 enacted, their objects and purpose, as well as the relevant provisions. As the rights at issue in this case are customary rights, we then describe the proper constitutional status of customary law.

IPILRA

47. In describing IPILRA, we first consider its context and purpose. We then lay out its basic operational provisions. Lastly, we deal with two issues concerning its application to the present situation.

History and Purpose

48. IPILRA is deeply rooted in South Africa's history and its transformative vision. The Constitutional 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.*"[43]

49. 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."*

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

50. As the Constitutional Court has repeatedly recognised, 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.*"[44]

51. There is no debate that the Applicants have a deep, historical, cultural, spiritual and economic connection to their land. 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.

52. 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, in the case of the Transkei, the laws of the authoritarian "homeland" government. As Prof Beinart points out, many communities were forced to

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

adopt "betterment" schemes that fundamentally altered customary land rights and ways of life.[45] The Transkeian government introduced increasingly draconian laws stripping customary rights and allowing the state to evict people at will.[46] While the Applicants' ancestors escaped the application of betterment through fierce resistance,[47] it is clear that their lack of concrete tenure security arises directly from past racially discriminatory laws and policies.

53. 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[48] was enacted to protect farm dwellers. The Land Reform (Labour Tenants) Act[49] was promulgated to protect labour tenants. The Prevention of Illegal Eviction and Unlawful Occupation of Land Act[50] was adopted to protect urban occupiers. The Restitution of Land Rights Act was enacted for those who were dispossessed by racist laws.[51]

54. 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,

[45] Beinart FA at para 44, Record Vol 12, p 1055.

[46] Beinart FA at para 46: Record Vol 12, pp 1055-6.

[47] FA at para 118-119. Record Vol 1 p 39-40.

[48] Act 63 of 1997.

[49] Act 3 of 1996.

[50] Act 19 of 1998.

[51] Act 22 of 1994.

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.[52] In fact, the operation of IPILRA has been repeatedly extended in terms of s 5(2), most recently until 31 December 2018.[53] 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.

Operation

55. IPILRA specifically seeks to protect "*informal rights in land*". It includes a detailed definition of the term.[54] It is common cause that the Applicants hold informal rights in the subject land as defined in IPILRA.

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[52] 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.*"

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

[54] 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);

56. 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."*

57. Many informal rights, including the Applicants', are held both individually and communally. IPILRA therefore defines "*person*" to include a community or part thereof.

> *(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*".

58. 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 the members of that community.[55]

59. Before we turn to the MPRDA, there are two preliminary issues regarding the proper interpretation of IPILRA that are disputed by the Respondents:

59.1. Whether the grant of a mining right constitutes a deprivation in terms of s 2(1); and

59.2. Whether the MPRDA is a law envisaged in s 2(1) that would exclude the requirement of consent.

The Grant of a Mining Right is a Deprivation

60. 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.

[55] 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."

61. 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.*"[56] All that is required is interference that has a "*legally relevant impact on the rights of the affected party*".[57] 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.*"[58]

62. 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.[59] 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.

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

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

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

[59] Section 5 of IPILRA.

63. 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. As we expand on below, the community still has a preferent right to those minerals in terms of s 104 of the MPRDA. 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.

64. 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 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 his or her physical enjoyment of the land.

65. Granting a statutory mining right also satisfies that test. The MPRDA itself characterises statutory mining rights as limited real rights.[60] And limited real rights necessarily subtract from a landowner's *dominium*.[61] Even without that statutory shortcut, the correlative obligations of a statutory mining right burden the land itself. They are not personal obligations, but fixed to the land. They

[60] MPRDA s 5(1).

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

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.

66. 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.

Section 2(1) excludes the MPRDA

67. The requirement for consent in s 2(1) of IPILRA is made subject to "*the provisions of the Expropriation Act, 1975 (Act 63 of 1975), any other law which provides for the expropriation of land or rights in land*". The question is whether the MPRDA is such a law. The Respondents argue that the phrase is ambiguous. It either means that:

67.1. IPILRA is subject to (a) any other law that provides for the expropriation of land and (b) any other law that provides for rights in land; or

67.2. IPILRA is subject to any other law that provides for the expropriation of (a) land and (b) rights in land.

68. If the former, then the MPRDA applies to the exclusion of IPILRA because the MPRDA provides for the grant of mining rights which are rights in land. If the latter, then s 2(1) IPILRA is not subject to the MPRDA since the Constitutional

Court has made it clear that the granting of a statutory mineral right under the MPRDA does not constitute expropriation.[62]

69. Properly interpreted, the phrase "rights in land" attaches to "expropriation", and IPILRA is not subject to the MPRDA:

69.1. Grammatically, the words can only mean a law that provides for the expropriation of land or the expropriation of rights in land. If the sentence intended to include "a law which provides for rights in land", there would have been a comma between the words "land" and "or". It would have read: "*or any other law which provides for the expropriation of land, or rights in land*". Without the comma, the sentence can have only one grammatical meaning.

69.2. The entire phrase "*or any other law which provides for the expropriation of land or rights in land*", is preceded by "*the provisions of the Expropriation Act, 1975 (Act 63 of 1975)*". That demonstrates that "*or any other law*" is a reference to any other law dealing with expropriation, whether it be the expropriation of land or the expropriation of rights in land.

69.3. The purpose of s 2(1) would be entirely defeated if the consent requirement was subjected to "any law which provides for rights in land". That would include the common law and all statutes that recognize, grant, or allow deprivations of rights in land. Consent would be

[62] *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at paras 67-71. It may be that IPILRA is subject to those provisions in the MPRDA that do relate to expropriation. However, that issue does not arise here.

meaningless as it would not be required where any other law granted another person any right to the land. It would only apply where no other law addressed the right in the land at all, in which case the right to refuse consent would serve no purpose.

70. Accordingly, s 2(1) is not subject to the MPRDA. Read on its own, IPILRA would plainly require the consent of the Umgungundlovu people before a mining right could be awarded. The more difficult question is whether that requirement is altered by the MPRDA. We consider that Act next, and then turn to how the two statutes must be interpreted together.

The MPRDA

History and Purpose

71. 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.

72. 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."[63] 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.*"[64]

73. That equalising purpose is recognised throughout the MPRDA:

73.1. 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*".

73.2. 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*

[63] MPRDA s 3(1).

[64] *Agri SA CC* (n 62) at para 1.

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."

74. 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, religious and economic connections to their land, should be given more protection than ordinary common-law owners.

Operation

75. 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.[65]

76. 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 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.

[65] MPRDA section 5(1).

Indeed, it specifically provides that mining rights, once granted, do not prevail over other law.[66] As we detail below, the ordinary rules of interpretation must be employed to read IPILRA and the MPRDA together.

77. Section 22 of the MPRDA sets out the procedure to be followed in the application for mining rights.[67] The application is made to the Regional Manager. If the application meets certain minimum criteria, she must accept it.

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

[67] 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."*

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*".[68] The Regional Manager must then forward the results of the consultation and the environmental report to the Minister.[69]

78. The environmental authorisation applications are not governed by the MPRDA, but by the National Environmental Management Act (**NEMA**).[70] However, the Minister of Mineral Resources is the responsible authority for considering such applications.[71] To receive an environmental authorisation, a mining right applicant must first complete a scoping report. Once this is accepted, an environmental impact assessment must be completed. An environmental authorisation is granted or refused based on the contents of this EIA.

79. 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*

[68] MPRDA s 22(4).

[69] MPRDA s 22(5).

[70] Act 107 of 1998. The definition of "*environmental authorisation"* is "*the meaning assigned to it in section 1 of the National Environmental Management Act, 1998 (Act 107 of 1998)*".

[71] MPRDA s 38A.

refer the objection to the Regional Mining Development and Environmental Committee to consider the objections and to advise the Minister thereon."[72]

80. The MPRDA does not separately require consultation with owners, other than in their capacity as interested and affected persons.

81. In *Bengwenyama Minerals*,[73] 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*

[72] MPRDA s 10(2).

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

that consultation under the Act's provisions does not require engaging in good faith to attempt to reach accommodation in that regard."[74]

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

83. Section 23 provides for the granting and duration of mining rights.[75] 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.

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[74] Ibid at para 65.

[75] 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."

Section 23 does not require the support, let alone consent, of the affected community.

84. 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.[76] The landowner's protection is limited to receiving 21 days' notice of any operations.[77]

85. 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".*

86. 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.

[76] MPRDA s 5(3).

[77] MPRDA s 5A(c).

87. 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."*

88. 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. Section 23(2A) speaks to the greater interests of the community and the relationships linked to the land and the need to ensure that they are fully protected. As we explain below, s 23(2A) grants a power to the Minister, coupled with a duty to exercise it in appropriate circumstances.

89. Lastly, the MPRDA also provides a preferential right for communities to apply for prospecting or mining rights.[78]

90. The two remaining operational issues are linked: compensation and expropriation. Section 54 of the MPRDA provides for compensation for loss or damage suffered as a result of the mining. Compensation can be paid in two circumstances:

[78] MPRDA s 104. The Constitutional Court has described this as "a special category of right for these communities". *Bengwenyama* (n 73) at para 73.

90.1. If the owner refuses access to the right holder, the right holder is obliged to notify the Regional Manager;[79] or

90.2. If the owner has suffered or is likely to suffer loss or damage, she must notify the Regional Manager.[80]

91. In either instance, the process to resolve the dispute is as follows:

91.1. If the Regional Manager agrees that damages have occurred or are likely to occur, she must "*request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage.*"[81]

91.2. If that fails, the compensation must be determined by arbitration or litigation.[82]

91.3. If the Regional Manager believes the failure to reach an agreement is the fault of the right holder, she may "*prohibit such holder from commencing or continuing with mining operations on the land in question*

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[79] MPRDA s 54(1), which reads:

"*(1) The holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because the owner or the lawful occupier of the land in question-*

(a) refuses to allow such holder to enter the land;

(b) places unreasonable demands in return for access to the land; or

(c) cannot be found in order to apply for access."

[80] MPRDA s 54(7), which reads: "*The owner or lawful occupier of land on which reconnaissance, prospecting or mining operations will be conducted must notify the relevant Regional Manager if that owner or occupier has suffered or is likely to suffer any loss or damage as a result of the prospecting or mining operation, in which case this section applies with the changes required by the context.*"

[81] MPRDA s 54(3).

[82] MPRDA s 54(4).

until such time as the dispute has been resolved by arbitration or by a competent court."[83]

91.4. If the Regional Manager believes that further negotiations could harm the objects of the Act, she can recommend that the Minister expropriate the land in question in terms of s 55.[84]

92. That leads to s 55 which affords the Minister a broad power to expropriate land "*[i]f it is necessary for the achievement of the objects referred to in section 2(d), (e), (f), (g) and (h)*".[85] That expropriation occurs in terms of the Expropriation Act,[86] and the Minister must compensate the landowner for her loss.[87] Where an IPILRA community refuses consent, but the Minister believes mining is necessary to achieve the purpose of the MPRDA, he can always exercise the power to expropriate.

93. As the Constitutional Court noted in *Bengwenyama*, the right to compensation is necessary precisely because the MPRDA permits rights to be granted without the owner's consent. In emphasising the importance of seeking to reach agreement at the consultation stage, Froneman J held:

> *"Failure to reach agreement at this early consultation stage might result in the holder of the prospecting right having to pay compensation to the landowner at a later stage. The common law did not provide for this kind*

[83] MPRDA s 54(6).

[84] MPRDA s 54(5).

[85] MPRDA s 55(1).

[86] Act 63 of 1975.

[87] MPRDA s 55(2).

> *of compensation, presumably because the opportunity to provide recompense for use impairment of the land existed in negotiation of the terms of the prospecting contract.*"[88]

94. As we explain below, if communities' land can be mined without their consent, then it is vital that compensation is determined before a mining right is granted. That is why s 23(2A) imposes the duty on the Minister to impose the necessary conditions to protect communities, including a condition that compensation is determined and paid before the right is exercised.

Customary Law

The status of customary law

95. In the pre-constitutional era, and in particular in the oft-cited case of *Van Breda v Jacobs*,[89] custom was seen as "*a useful accessory … filling in normative gaps in the common law*".[90] That is no longer the case.

96. In terms of the Constitution, customary law is an independent and original source of law. As the Constitutional 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*

[88] *Bengwenyama* (n 73) at para 65.

[89] 1921 AD 330.

[90] *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 54.

indigenous law as an independent source of norms within the legal system."[91]

97. This arises from several interlocking provisions of the Constitution:

97.1. Section 39(3) provides that the Bill of Rights "*does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.*"

97.2. Section 211(3) reads: "*The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.*" We return to the precise meaning of this provision below.

97.3. Sections 30 and 31 of the Constitution protect the rights of all people, jointly and individually, to participate in the cultural life of their community.[92]

98. As an independent source of law, the customary system may give rise to rights, such as access and use rights to resources, including land and minerals. As the SCA held with regard to the land rights of the Richtersveld Community: "*The right was rooted in the traditional laws and custom of the Richtersveld people. The right inhered in the people inhabiting the Richtersveld as their common*

[91] *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.*")

[92] We quote these provisions in full in the next section.

property, passing from generation to generation."[93] The existence and validity of customary law, therefore, is determined with reference to the Constitution and not to common law or statutory law.

Legislation that specifically deals with customary law

99. Statutes may amend customary law, but only if it "*specifically deals*" with customary law as required by s 211(3). The Supreme Court of Appeal recently restated the general rule about statutes that appear to alter the common law:

> "*It is a well-known canon of construction that we cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention of the legislature to alter the common law, or the inference … must be such that we can come to no other conclusion than that the legislature did have such an intention.*"[94]

100. The general presumption that legislation does not alter customary law is even stronger because of the clear wording of s 211(3) of the Constitution. Under s 211(3), customary rights continue to exist subject only to the Constitution and "*legislation that specifically deals with customary law*".

101. IPILRA is plainly legislation envisaged in s 211(3) of the Constitution. Its primary purpose is to identify and protect 'informal' rights to land, including

[93] *Richtersveld Community and Others v Alexkor Ltd and Another* [2003] 2 All SA 27 (SCA) at para 28.
[94] *Litako and Others v S* (584/2013) [2014] ZASCA 54; [2014] 3 All SA 138 (SCA); 2014 (2) SACR 431 (SCA); 2015 (3) SA 287 (SCA) at para 52, quoting with approval from *Casserley v Stubbs* 1916 TPD 310 at 312. *Litako* was recently cited with approval in *Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC) at para 153 fn 130.

customary rights:

101.1. The definition of an "*informal right to land"* includes "*the use of, occupation of, or access to land in terms of any tribal, customary or indigenous law or practice of a tribe*",[95] including categories of land held in terms of customary law that falls under historical statutory and trust arrangements.[96]

101.2. Individual decisions may be overridden by a decision of the community "*in accordance with the custom and usage of that community*" if the land is held on a communal basis.[97]

101.3. Section 2(4) specifically regulates a minimum democratic requirement for communal decision making.

102. By contrast, the MPRDA does not purport to regulate customary law at all. The MPRDA only meets the standard to alter the common law; s 4(2) makes it plain that the Act prevails over common law. IPILRA, by contrast, does regulate customary law.

103. The only conclusion is that the legislator intended to treat the two sources of law differently. The holders of common-law rights (largely individual white landowners) need not consent to the granting of a mining right; the holders of customary law rights (mostly black communities) must consent. As we explain below, that means it must prevail in the sphere of customary rights.

[95] IPILRA s 1(1)(a)(i).

[96] IPILRA ss 1(1)(a)(ii) and 1(1)(b).

[97] IPILRA s 2(2).

VI IPILRA APPLIES

104. This Part addresses the core issue: why the requirement for consent in IPILRA applies to applications for mining rights under the MPRDA.

105. The basic proposition is simple. 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.

106. The argument is structured as follows:

106.1. The **text** of the two statutes favours our interpretation;

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

106.3. **International law** necessitates consent;

106.4. The **constitutional rights** at stake require consent; and

106.5. **Comparative law** supports the need for consent.

Text

107. 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. We address the following issues:

107.1. The presumption against implicit repeal;

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

107.3. Some specific textual provisions of the MPRDA that support the application of IPILRA.

Presumption against Repeal

108. There is a strong statutory presumption that laws must be read together, unless there is a clear conflict. The Constitutional Court has described the presumption 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.*"[98]

109. 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*".[99]

110. 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*

[98] *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.

[99] Ibid.

> *reasonable construction which offers an escape from that is more likely to be in consonance with the real intention of the Legislature."*[100]

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

112. 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. As we set out in more detail below, there is nothing in the MPRDA that is inconsistent with that interpretation. Indeed, several provisions support it.

113. To be clear, 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 right.

114. The presumption is supported by the history of regular extension of the IPILRA deadline. 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

[100] *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).

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.

Covering the Field

115. There is another statutory presumption that the Respondents may contend counts in favour of a conclusion that the MPRDA trumps IPILRA. It is classically stated as follows: "*if this last Act professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former Acts, so far as it differs from them in its prescriptions.*"[101]

116. This presumption is linked to another canon of interpretation – *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.*"[102]

[101] *Gorham v Luckett* 6 B Monroe (Ky) 146 (1845), recently cited with approval in *Southern African Litigation Centre* (n 102) at para 102 (Wallis JA).

[102] *Southern African Litigation Centre* (n 102) 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.*")

117. The argument would 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. Neither way of framing the argument has merit.

118. The reason is simple: 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.

119. This reality was expressly recognized by the Supreme Court of Appeal[103] and the Constitutional Court[104] 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*

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

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

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."[105]

120. 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 use of the land in question.*"[106]

121. 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.

122. 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.

[105] *Maccsand (CC n 106)* at para 44.

[106] *Maccsand (SCA n 105)* at para 33.

That includes, for example, the provisions of NEMA,[107] the National Water Act[108] or the National Heritage Resources Act.[109]

123. The same would be true of other security of tenure laws like ESTA, PIE and the Labour Tenants Act. The fact that a company has been granted a mining right does not exempt them from complying with those laws if they wish to evict occupiers in order to exercise their mining right. They must still comply with those laws that exist to give effect to s 25(6) of the Constitution. Exactly the same is true of IPILRA.

124. To put it simply: The MPRDA applies generally to mining and mining rights, and requires consultation with landowners. But it imposes that requirement as a minimum, not a maximum. Within the circle drawn by the MPRDA is a smaller, more defined circle dealing with land owned by traditional communities. More is required when a statutory mining right is sought in respect of land falling within that smaller circle. The MPRDA applies, but so does IPILRA. Both statutes must be complied with: there must be consultation (in terms of the MPRDA) and consent (in terms of IPILRA).

125. The primacy afforded to community consent by IPILRA is not affected by the fact that the MPRDA came into force after IPILRA. IPILRA deals with a particular focus area: land owned by communities in terms of customary law.

[107] National Environmental Management Act 107 of 1998.

[108] Act 36 of 1998.

[109] Act 25 of 1999.

The MPRDA provides an overarching statutory framework for mining and mining rights. One of the minimum requirements that it prescribes is consultation with interested persons. But that is a statutory floor, not a ceiling.

126. Just as there may be additional requirements for protecting the environment in terms of NEMA, there may be additional requirements for protecting particular types of land, and landowners with particularly intense interest in the land, like customary communities. Given IPILRA's specificity, it ought to be presumed that the legislature did not intend for the MPRDA to dilute its particular focus.

The text of the MPRDA

127. Is there anything in the text of the MPRDA that makes this interpretation implausible or unreasonable? No. To the contrary, the text supports the usual position that the MPRDA and IPILRA must be read together.

128. First, the MPRDA expressly supersedes common law, but does not claim to supersede customary law. As we have already explained, customary law is an independent source of law with the same status as common law. 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.

129. 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.

130. Second, the definition of "*owner*" in the MPRDA does not cover customary owners like the Applicants. While they are covered in the definition of community, no provision is made for them to be treated as owners. The definition refers to, on the one hand, people in whose name the land is registered (common law owners) and on the other, occupants of State land. While customary-law owners would qualify under that definition, they are not treated as owners by the Act, but identically to communities who have only a non-ownership interest in the land. But the Applicants are owners under customary law. The only way to make sense of that exclusion is that, in their capacity as owners, the Applicants have the rights under IPILRA.

131. Third, 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 the Constitutional Court held in *Bengwenyama*, 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 capacity as owners.

132. Fourth, 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:

132.1. 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.

132.2. 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.

133. 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 protect communities who are not protected by IPILRA, and to formalize those communities that are protected by IPILRA.

134. 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:

134.1. IPILRA was never raised in *Bengwenyama*.

134.2. 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.

134.3. The community was treated as the owner for purposes of IPILRA. It is not clear on what basis that conclusion was reached, but it is plain that the Applicants in this matter do not meet the definition of owner.

134.4. *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.

135. There are only two cases we are aware of that deal with IPILRA in the context. Both implicitly support the Applicants' interpretation. In *Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another v Maledu and Others*[110] a community objected to mining on the basis that it had not consented in terms of s 2(2) of IPILRA. The Court held that, in fact, the community had consented as a

[110] Unreported Judgment of the North West High Court, Case No. 495/2015 (16 February 2017).

compliant meeting had been called where a decision was made to support the mining.

136. But there was never any suggestion that IPILRA had no application. The question the Court answered was whether consent had been granted or not. Like *Bengwenyama*, the issue was not directly decided. But the Court's assumption that IPILRA must be complied with demonstrates, at the very least, that the MPRDA is capable of being read together with IPILRA.

137. Therefore, at worst for the Applicants, the text is ambiguous. That ambiguity would then be resolved by considering the substantive aids to interpretation – purpose and context, international law and the Constitution. The following sections demonstrate that all those substantive aids require that IPILRA must apply.

138. In the matter of *Blackhill Engineering & Construction CC v Barolong Boora Tshidi Tribal Authority and Others,*[111] it was common cause that IPILRA had to be complied with prior to community representatives signing a shareholders' agreement that the DMR had made a prerequisite for the grant of a mining right. The Court agreed that IPILRA applied, and found that it had not been complied with.

[111] Unreported Judgment of the North West High Court, Case No. 385/2009 (31 May 2012).

Purpose and Context

139. Purpose and context are vital to determining the proper meaning of IPILRA and the MPRDA. We have already set out the history and context within which the two statutes were adopted. Both support the meaning advanced.

140. 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. Yet on the Respondents' strained interpretation, that is exactly what the MPRDA would permit. There is no basis to read IPILRA restrictively to undermine its core purpose.

141. 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 animating concern was not to allow foreign companies untrammeled access to community land, but to ensure that access to minerals was fair and consistent with constitutional rights.

142. 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.

143. 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.

144. 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.

International Law

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

146. 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 each in turn. 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.

147. The international law discussed below establishes certain key principles that define the nature of and content of the principle of free, prior and informed consent.

148. 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.

149. 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.

150. Secondly, the community is entitled to make the development choice **prior** to any similar decisions made by government, finance institutions or investors. In other words, FPIC is not realised if the community is presented with a project as a fait accompli.

151. 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.

152. 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.

153. 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.

Indigenous people

154. The right to free, prior and informed consent generally attaches to "*indigenous people*" or "indigenous communities".[112] That term plainly covers the Umgungundlovu community.[113]

[112] 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).

[113] 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*

155. The African Court confirmed that the term "people" in the African Charter does not only apply to all the people of a state, but "*includes sub-state ethnic groups and communities that are part of that population.*"[114] The Umgungundlovu Community identifies as a distinct community for purposes of their customary governance and land holding system, which has a distinct cultural identity, and a long history of occupying their land, qualifies as an indigenous people or a "people" that is entitled to give or withhold their free, prior and informed consent.

Binding Treaties

156. 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:

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

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

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

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

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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.

[114] Ibid at paras 198-9.

157. 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.*"[115]

158. 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*".[116] 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*".[117] 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*",[118] the Committee called on states to compensate them for their loss.

159. In dealing with a complaint regarding the conduct of Ecuador, the CERD Committee expressly held that the requirement of free, prior and informed

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

[116] Ibid at para 4(d).

[117] Ibid at para 5.

[118] Ibid.

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.*"[119]

160. 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.*"[120]

161. The Committee recognised that indigenous people have "*the 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*

[119] *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.

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

covered by their specific rights."[121] 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.*"[122]

162. 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*,[123] 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 llamas, on which their livelihoods depended. The Committee held that this violated the right to culture and religion in art 27 of the ICCPR[124] (the equivalent of ss 30 and 31 of our Constitution) because the state had not obtained the complainant's free, prior and informed consent:

> "*In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the*

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

[122] Ibid at para 55(e).

[123] 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.

[124] 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.*"

opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members."[125]

163. 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.

164. The African Commission's decision in the matter of *Centre for Minority Rights Development v Kenya* (***Endorois***)[126] is worth considering in more detail. The Endorois are a community of approximately 60 000 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

[125] Ibid at para 7.6.

[126] *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* ACHPR Communication 276/2003, available at http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf.

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.

165. 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.

166. Drawing on comparative and soft law that we discuss below, the African Commission held that the procedural element of the right to development had been violated:

> "*the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.*"[127]

[127] *Endorois* (n 128) at para 291.

167. The Commission also concluded that the right to natural resources[128] of the members of the 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.*"[129]

168. The African Court reached a similar conclusion in the *Ogiek* matter,[130] which was decided in 2017. The case – which was brought to the Court by the African Commission – concerned the eviction of the Ogiek people from the Mau Forest in Kenya. As in *Endorois*, the Court held that Kenya's conduct violated the

[128] 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 international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources..

[129] *Endorois* (n 129) at para 266.

[130] *African Commission on Human and People's Rights v Republic of Kenya* Application No. 006/2012 (Ogiek).

rights to property, control of natural resources, and development. 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.*"

169. In light of UNDRIP, the Court held that the right to development had been violated because the "*Ogieks have been continuously evicted from the Mau Forest … without being effectively consulted.*"[131] Although the African Court did not use the language of free, prior and informed consent, its findings are consistent with that standard.

Persuasive Authorities

170. The four treaties outlined above bind South Africa to obtain the free, prior and informed consent of the Applicants before issuing a mining right. But there are also multiple sources of soft law that support the obligation to obtain that consent:

170.1. The UNDRIP;

170.2. The findings of the Special Rapporteur; and

[131] *Ogiek (*n132) at para 210.

170.3. The International Labour Organisation Indigenous and Tribal Peoples Convention (**ILO Convention**).[132]

171. First, in 2007, the UNDRIP consolidated developments concerning indigenous people, and affirmed the right of FPIC for indigenous peoples prior to the implementation of any project affecting their lives. UNDRIP was adopted by the United Nations General Assembly with 144 votes, *including South Africa's*. While the UNDRIP is not a binding treaty, it is widely used to interpret state's treaty obligations. The African Court on Human and People's Rights referred to it repeatedly in the *Ogiek* Judgment,[133] as did the African Commission in *Endorois*.[134] Indeed, the Court went so far as to hold that Kenya had violated Ogieks' "*rights to land as defined above and as guaranteed by Article 14 of the Charter read in light of the United Nations Declaration on the Rights of Indigenous Peoples of 2007.*"[135] UNDRIP is plainly a highly persuasive source of international law.

172. And UNDRIP repeatedly and expressly requires free, prior and informed consent[136] in exactly situations like the present.

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[132] ILO Convention 169 (1989).

[133] *Ogiek* (n 132*)* at paras 126, 127, 128, 129 181 and 209.

[134] *Endorois* (n 129) at nn 10, 15, 108 and 127. New Zealand Supreme Court relied on UNDRIP when assessing standing to enforce Maori land rights. *Proprietors of Wakatu and Others v Attorney-General* [2017] NZSC 17 at para 491.

[135] *Ogiek* (n 132) at para 131.

[136] In addition to arts 19 and 32 quoted in the text, UNDRIP requires free, prior and informed consent for the removal or people from their land (arts 10 and 28), cultural, religious, intellectual and spiritual property (art 11(2)), and the storage of hazardous materials (art 29).

172.1. Article 19 of the UNDRIP provides:

> "*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*"

This applies directly to the Minister's administrative decision to grant a mining right.

172.2. Article 32(2) is even more explicit:

> "*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*"

173. An interpretation that the requirement for consent in IPILRA does not apply would directly contradict these provisions of UNDRIP.

174. Second, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People submitted a report to the ESCR Committee in 2003.[137] The Special Rapporteur had noted that when large scale

[137] *Report of the Special Rapporteur on the situation of human rights and Fundamental Freedoms of Indigenous People* E/CN.4/2003/90 (21 January 2003).

development projects "*occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them.*" These changes include the

> *"loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence."*[138]

175. All of these negative consequences have already materialised in the Applicants' land, or are reasonably feared by the Applicants. For these reasons, the Special Rapporteur concluded his report as follows:

> "*The issue of extractive resource development and human rights involves a relationship between indigenous peoples, Governments and the private sector which must be based on the full recognition of indigenous peoples' rights to their lands, territories and natural resources, which in turn implies the exercise of their right to self-determination. Sustainable development is essential for the survival and future of indigenous peoples, whose right to development means the right to determine their own pace of change, consistent with their own vision of development, including their right to say no.* ***Free, prior, informed consent is essential for the human rights of indigenous peoples in relation to major development projects,*** *and this should involve ensuring mutually acceptable benefit sharing, and mutually*

[138] Ibid at page 2.

acceptable independent mechanisms for resolving disputes between the parties involved, including the private sector."[139]

176. In 2009, the new Special Rapporteur, Dr James Anaya, issued a report dealing specifically with the issue of FPIC.[140] He stressed that they duty applies "*whenever a State decision may affect indigenous peoples in ways not felt by others in society. Such a differentiated effect occurs when the interests or conditions of indigenous peoples that are particular to them are implicated in the decision*".[141]

177. The Special Rapporteur also emphasised that FPIC is not meant to be understood as "*a veto power that [indigenous peoples] could wield to halt development projects.*"[142] Rather, FPIC is "*designed to build dialogue in which both States and indigenous peoples are to work in good faith towards consensus and try in earnest to arrive at a mutually satisfactory agreement.*"[143] The goal is "*avoiding the imposition of the will of one party over the other, and at instead striving for mutual understanding and consensual decision-making.*"[144]

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[139] Ibid at para 66.

[140] *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the Situation Of Human Rights and Fundamental Freedoms of Indigenous People* A/HRC/12/34 (15 July 2009).

[141] Ibid at para 43.

[142] Ibid at para 48.

[143] Ibid at para 49.

[144] Ibid.

178. As we pointed out above (and expand on below), that is exactly what s 23(2A) of the MPRDA is meant to encourage. By requiring the Minister to set conditions to protect communities on customary land, it encourages the parties to seek consensus. Of course, that consensus can only be meaningful if it involves the prior payment of compensation.

179. Third, the ILO Convention repeatedly makes it clear that informed consent is required in matters that affect indigenous people:

179.1. Article 6(1) requires that governments "*consult the peoples concerned … whenever consideration is being given to legislative or administrative measures which may affect them directly*".

179.2. Article 6(2) makes it clear that those consultations must "*be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures*".

179.3. Article 15 deals with the right to resources. It reads:

"*1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.*

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair

compensation for any damages which they may sustain as a result of such activities."

As noted earlier, the consultation requirement in fact requires an attempt to obtain consent.

180. Fourth, the Inter-American Commission and the Inter-American Court have repeatedly found that free, prior and informed consent is required for projects that affect the land or resources of indigenous people.[145] In the *Saramaka* case, the Court held:

> "*[R]egarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions.*"[146]

181. These decisions informed both the African Commission in *Endorois*, and the African Court in *Ogiek*.

[145] *Community of Awas Tingni v the Republic of Nicaragua* Inter-American CHR Series C, no 79 (31 August 2001); Case 11.140,Inter –Am Report No 75/02 (27 December 2002); Case 12.053, Inter-Am CHR Preliminary Report No 96/03 (24 October 2003); *Mary and Carrie Dann v United States* Case 11.140, Inter-Am CHR, Report No 75/02, OEA/Ser.L/V/1L 117, doc.1.rev.1(2003); *Maya Indigenous Communities of Toledo District v Belize Case* 12.053, Inter-Am CHR, Report No 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004); *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, and Cost, Inter-Am Ct HR (ser. C) No 174, 63 (Nov 28, 2007); *Kichwa Indigenous People of Saryaku v Ecuador*, Merits and Reparations, Judgment, Inter-Am Ct HR (ser. C) No 245 (June 27, 2002).

[146] *Saramaka* (n 147) at pars 134 and 137.

182. Fifth, even the World Bank requires free, prior and informed consent for major development projects.[147] Like the Special Rapporteur, the Bank "r*ecognizes that Indigenous Peoples (or as they may be referred to in the national context) may be particularly vulnerable to the loss of, alienation from or exploitation of their land and access to natural and cultural resources.*"[148] In its 2017 *Environmental and Social Framework*, it requires any borrower seeking World Bank funds to obtain the free, prior and informed consent of the relevant people if the project will:

> "*(a) have adverse impacts on land and natural resources subject to traditional ownership or under customary use or occupation;*
> *(b) cause relocation of Indigenous Peoples/ Sub-Saharan African Historically Underserved Traditional Local Communities from land and natural resources subject to traditional ownership or under customary use or occupation; or*
> *(c) have significant impacts on Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities' cultural heritage that is material to the identity and/or cultural, ceremonial, or spiritual aspects of the affected Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities' lives.*"[149]

183. Again, this is the standard required by international law, and by IPILRA.

[147] World Bank *Environmental and Social Framework* (2017).

[148] Ibid at page 10, para 55.

[149] Ibid at pages 79-80, para 24.

Conclusion on international law

184. The international law is unambiguous: South Africa may only lawfully grant a mining right over the Applicants' land if they have given their free, prior and informed consent. Granting the right without that consent would violate South Africa's international obligations. In terms of s 233, this Court must adopt the Applicants' interpretation of IPILRA and the MPRDA that is consistent with international law.

185. The international law is also relevant because it informs the interpretation of the constitutional rights at stake.

Constitutional Rights

186. There are three constitutional rights that will be limited if the MPRDA is interpreted to permit a mining right to be granted without consent:

186.1. The right to security of tenure;

186.2. The right to culture; and

186.3. The right to a healthy environment.

Security of Tenure

187. 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).[150]

188. The Respondents' interpretation of the MPRDA limits the right because it makes requirement of consent inapplicable to the grant of a mining right.

Culture

189. The Constitution protects the right of everyone to "*participate in the cultural life of their choice*".[151] 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.*"[152] The Respondents' interpretation would violate those rights in two ways:

189.1. It would undermine the right of the Applicants 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.

189.2. Mining itself will "*certainly destroy … the rich and fairly unique culture and traditions of the local people*".[153] Or as it is put elsewhere, mining

[150] See *Daniels* 38 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.*")

[151] Constitution s 30.

[152] Constitution s 31.

[153] FA at para 154.3: Record Vol 1, p 49. This averment is not meaningfully denied. See Government AA at para 61: Record p 1432.

may cause "*the further destruction of traditional authority structures and traditional norms and culture*".[154]

190. The international law considered above – and the comparative law set out below – makes it clear that consent is a requirement for the protection of cultural rights. Permitting mining without consent violates the right to culture of communities like the Applicants.

Environment

191. Section 24 protects the right to a healthy environment in the following terms

> *"Everyone has the right -*
> *(a) to an environment that is not harmful to their health or well-being; and*
> *(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -*
> *(i) prevent pollution and ecological degradation;*
> *(ii) promote conservation; and*
> *(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."*

192. The MPRDA protects this right by requiring environmental authorisations. But there is more to s 24 than merely protecting the environment.

[154] FA at para 154.6.4: Record Vol 1, p 50.

193. Section 24 also endorses the need for *sustainable development* and *environmental justice*. Both of those concepts – which are clearly defined in law – support the Appellants' customary right to control their land.

194. *Sustainable development* in terms of the Constitution demands reasonable legislative measures aimed at "*ecologically sustainable development whilst promoting justifiable social and economic development*". The Constitutional Court explained the meaning of the term in *Fuel Retailers*:

> *"The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. … Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.*"[155]

195. Section 24 also requires *environmental justice* that balances conservation against legitimate human use of environmental resources. Murcott argues compellingly for the central role of environmental justice in s 24.[156] She defines environmental justice as requiring

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[155] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* [2007] ZACC 13; 2007 (6) SA 4 (CC) at para 45

[156] M Murcott 'The Role of Environmental Justice in Socio-economic Rights Litigation' (2015) *SALJ* 875.

> "*the just distribution of environmental benefits and burdens, taking into account past systemic race and class discrimination. Accordingly, environmental justice seeks to respond to unjust living conditions and the unjust distribution of environmental benefits and burdens in society, as 'an all-encompassing notion that affirms the use value of life, all forms of life, against the interests of wealth, power and technology'.*[157] *It is therefore an inherently transformative and redistributive concept.*"[158]

196. Environmental justice is not only part of s 24, it is expressly recognised in the principles of National Environmental Management Act (**NEMA**) which include the following:

> "*Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.*
> *Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.*"[159]

197. Accordingly, s 24 not only protects natural resources, it protects the interests of those people who rely on the resources. In particular, it requires redress for past discrimination, and recognition of ongoing deprivations in the distribution

[157] Manuel Castells *The Power of Identity: The Information Age Economy, Society and Culture* (1997) 132 quoted in Jackie Dugard & Anna Alcaro 'Let's work together: Environmental and socio-economic rights in the courts' (2013) 29 *SAJHR* 14 at 18. (Original footnote)

[158] Murcott (n 77) at 876.

[159] NEMA s 2(4)(c) and (d) (our emphasis).

of resources.

198. Sustainable development and environmental justice support the notion that communities that are deeply tied to their land should be required to consent to any mining that will occur on the land.

Conclusion on constitutional rights

199. Some of these rights may also be partially relevant to rights granted over land owned under common law. But there are two important differences:

199.1. The particular combination of constitutional rights uniquely affects communities like the Applicants. They are the type of owners that risk the loss of tenure, the loss of culture, and the violation of environmental justice.

199.2. The MPRDA cannot be interpreted to require consent in those instances. It can be interpreted to require consent for customary land.

200. Following s 39(2), the Applicants' interpretation must be adopted.

Comparative practice

201. Comparative experience is important because – together with the international law – it informs the proper interpretation of the Constitution.

202. A number of domestic courts have concluded that their constitutions, read in light of international law, require free, prior and informed consent. We consider three such examples:

202.1. The Colombia Constitutional Court

202.2. The Belize Supreme Court; and

202.3. The Supreme Court of Canada.

Colombia

203. The Constitutional Court of Colombia leads the way in giving definition to the right to consent to communities. It gives direction on the following: affected communities including most affected "non aboriginal" communities, relevant land and territories, and the content of the right itself.

204. Based on the principle of equality the provisions of the Colombian Constitution are interpreted to provide that the Afro-Colombian, indigenous and black communities are holders of fundamental rights and subject to special constitutional protection. The principle of equality of cultures[160] prohibits imposing forms of mainstream life as the only valid or prevalent options on the worldview of indigenous peoples. Article 40 of the Constitution establishes the right of participation of all citizens in matters that affect them.

[160] Colombian Constitution art 70.

205. A number of judgments[161] consider the application of free, prior and informed consent. The *Atrato* case[162] provides useful guidelines related to the tests of proportionality and reasonableness:

> "*[T]he participation of indigenous peoples and communities of African descent … can be summarized as follows:*
>
> *(i) the mere participation, associated with the involvement of communities in decision - making bodies at the national level as well as the impact through their organizations they can exercise in all scenarios that interest them for any reason;*
>
> *(ii) the prior consultation against any measure that directly affects them; and*
>
> *(iii) the free, prior and informed consent when that measure (standard, program, project, plan or policy) produces an intense involvement of [or significant impact on] their rights, especially those of a territorial nature.*"
>
> *in the event that the rule of consent applies, … any of the measures that the jurisprudence of the Constitutional Court and international human rights law have identified as potential causes of too intense involvement of the rights of indigenous peoples, are only reasonable and, therefore constitutionally valid, if it has the prior, free and informed consent of the people concerned.*"

[161] Judgment T-129 of 2011; SU-383 2003.

[162] Greater Community Council of the Popular Peasant Organization of the Alto Atrato; Judgment T-766/15 RIGHT TO THE PRIOR CONSULTATION OF AFRO-DESCENDANT COMMUNITIES Fourth Chamber of Review of the Constitutional Court. See also Endorois (n 128) at para 291:

> "*Additionally, the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions*."

206. The Colombian Court has expanded in detail on precisely what informed consent requires. It has stressed that "*any process must be judged in accordance with the distinctive characteristics of each concrete case*".[163] However, there are times when a community will have a veto right:

> "*[A]n ethnic community cannot be forced to renounce its way of life and its culture for the mere arrival of an infrastructure project or an exploitation project, and vice versa. Because of this, in exceptional or limiting cases, the organisms of the state and in a residual form the constitutional judge, if the evidence indicates the necessity of consent of the communities in order to determine the least harmful option, may order that course of action."*[164]

Belize

207. In Belize, the Supreme Court has recognized UNDRIP as binding in requiring informed consent from indigenous peoples for any acts that might affect the indigenous peoples' enjoyment of their land.[165] The SC found that the lower courts have recognized that the Maya have rights to lands in Southern Belize based on the Maya People's traditional use and occupation of those lands. It was taken into account that the nature of title of Maya historical lands cannot

[163] Decision T-129 of 2011, as translated in Espinosa & Landau *Colombian Constitutional Law: Leading Cases* (2017) at 269. As Espinosa and Landau note, the Mexican Supreme Court reached a similar outcome in 2015. Ibid at 270.

[164] Ibid.

[165] IN THE SUPREME COURT OF BELIZE, A. D. 2014 CLAIM NO. 394 OF 2013 SARSTOON TEMASH INSTITUTE FOR INDIGENOUS MANAGEMENT http://www.belizejudiciary.org/web/wp-content/uploads/2014/01/Supreme-Court-Claim-No-394-of-2013-Sarstoon-Temash-Institute-for-Indigenous-Management-et-al-v-The-Attorney-General-of-Belize-et-al-.pdf

be delineated by meets and bounds, as they are an agrarian nomadic people and the nature of their title is anecdotal, rooted in stories of their traditional use of the land for farming, hunting, fishing, etc.

208. Accordingly, the onus of demarcating property belonging to the Maya rests on the Government of Belize in consultation with the Mayas. "*It is not for the Mayas to come and prove that their land lies within the park. It is for the Government of Belize to meet with the Mayas and make good faith attempts to arrive at a mutual understanding and agreement as to what areas of land will be demarcated as Maya Lands*".

209. Importantly, the Supreme Court held that Belize was bound by the UNDRIP: "*Belize, as a member state of the United Nations which voted in favor of [UNDRIP] on 13th September, 2007 is clearly bound to uphold the general principles of international law contained therein.*"[166] It was also bound by the earlier holdings of the Inter-American Court of Human Rights[167] which had held that Belize could not demarcate the land *except with fully informed consent, under conditions."*

[166] Ibid at 33.

[167] Maya Indigenous Community of The Toledo District v. Belize Case 12.053, Report No. 40/04, Inter-Am. C. H. R, OEA/SER.L/V/II.122 Doc.5 rev.1 at 727 (2004)

Canada

210. In 1997, the Supreme Court of Canada held in *Delgamuukw v British Columbia*[168] that aboriginal people are always entitled to be consulted about decisions taken over their land. But in certain circumstances, depending on the nature of the proposed government action, they may also have a right of consent. As Lamer CJ explained:

> "*There is always a duty of consultation. … The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.*"[169]

Conclusion on Interpretation

211. The MPRDA and IPILRA must be read together, unless that is impossible. But it is possible. Indeed, the only reading that is consistent with the text and purpose of both statutes is that consent is required before a mining right may be granted on community land.

[168] *Delgamuukw v British Columbia* (1997) 3 SCR 1010 at para 186.

[169] Ibid at para 168.

212. That is not only the interpretation required by the statutes, it is mandated by ss 39(2) and 233 of the Constitution. It is the only interpretation consistent with international law, and it is the interpretation that better promotes constitutional rights.

VI COMPENSATION

213. In the alternative to the argument that consent under IPILRA is required, the Applicants seek a declaration that the amount of compensation to which owners are entitled must be determined **before** the mining right is awarded.[170]

214. The need for this approach to protect the Applicants' customary and constitutional rights is clear. The ability to resist the commencement of mining operations is vital to ensure that the negotiation for compensation happens on an equal playing field. As the First Applicant explains:

> "*Once mining begins, the negative impact on our quality of life and on our livelihoods will be such that we will effectively be placed under duress to accept whatever compensation is on offer before our lives become completely intolerable and we are obliged to move out of necessity.*
> *The pressure on the community to accept any proposals from TEM will increase as the mining encroaches further and further into our land and*

[170] NOM at para 9: Record Vol 1, p 4.

environment and the social economic and environmental impacts intensify."[171]

215. Moreover:

215.1. International law also requires decisions about compensation to be taken prior to any deprivation;

215.2. The deprivation of the community's land occurs at the time the right is granted, not only when it is exercised;

215.3. An interpretation that permitted the right to be awarded without compensation would be contrary to existing customary rights that have not been expressly repealed or amended;

215.4. It would also limit the rights to culture, secure tenure and a healthy environment for the reasons set out earlier;

215.5. In addition, it would violate the right not to be arbitrarily deprived of property. We set out the argument on the right to property when we address the constitutional challenge to the MPRDA below. In short, a key determination of whether a deprivation is arbitrary is whether there is compensation. If no compensation is paid, then the deprivation is almost certainly arbitrary. That much is recognised by s 54 of the MPRDA which requires compensation even for ordinary common-law landowners who suffer loss or damage.

[171] FA at paras 268-9: Record Vol 1, p 82.

216. In the case of communities with customary ownership over their land, the MPRDA must be interpreted to require a determination of compensation prior to the award of the right. This is possible because, properly interpreted, s 23(2A) obliges the Minister to impose conditions on the award of the right when it is necessary to protect the community's interests. In order to protect those interests, it will always be necessary to ensure that compensation is determined and paid before the right becomes effective.

217. The interpretive route to find that s 23(2A) imposes this obligation follows well-trodden ground. To recall, the section reads: "*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.*"

218. The word "*may*" can be interpreted to confer a discretion. But it can also be interpreted as "*an authorisation to exercise a power coupled with a duty to use it if the requisite circumstances were present*".[172] The Constitutional Court has adopted precisely that approach in *Van Rooyen*[173] and *Joseph*[174] in order to read statutory provisions within constitutional bounds. There is no textual difficulty in reading s 23(2A) to mean that the Minister has the power to impose

[172] *SAPS v PSA* (n 42) at para 15. For the long history of this approach see, for example, *South African Railways and Harbours v New Silverton Estate, Ltd* 1946 AD 830 at 842; *Commissioner for Inland Revenue v I H B King; Commissioner for Inland Revenue v A H King* 1947 (2) SA 196 (A) at 209-210; *Weissglass NO v Savonnerie Establishment* [1992] ZASCA 95; 1992 (3) SA 928 (A) at 937.
[173] *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at paras 181-182.
[174] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) at para 73.

conditions and is obliged to do so when it is "*necessary to promote the rights and interests of the community*". It could hardly be argued that the Minister is entitled not to impose conditions when he accepts that it is necessary to protect the community's rights.

219. But the Applicants' case goes further. They submit that, not only does the Minister have a general obligation to act when it is necessary; he has a specific obligation to act to ensure compensation is determined and paid.

220. The textual plausibility of this approach flows from *South African Police Service v Public Servants Association*.[175] In that matter, the Constitutional Court had to interpret regulation 24(6) of the regulations for the South African Police Service (**SAPS**), which read:

> "*(6) If the National Commissioner raises the salary of a post as provided under subregulation (5), she or he **may** continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent-*
> *(a) already performs the duties of the post;*
> *(b) has received a satisfactory rating in her or his most recent performance assessment; and*
> *(c) starts employment at the minimum notch of the higher salary range.*"

221. In the Supreme Court of Appeal, the judges had split between interpretations that reg 24(6) granted the National Commissioner a discretion to continue to employ the incumbent, and an interpretation that it obliged the Commissioner

[175] [2006] ZACC 18; 2007 (3) SA 521 (CC).

to do so.[176]

222. The Constitutional Court took a middle path. Sachs J explained that there were competing constitutional concerns – the need to respect the decisional powers of the Commissioner, and the labour rights of incumbent employees. In the central passage, he held as follows:

> "*In my view, then, the regulations can and should be read in a way that neither produces the rigidity of outcome that would flow from the view of the majority in the Supreme Court of Appeal, nor carries the risk of consequent redundancy, implicit in the minority approach. It is indeed possible to harmonise flexibility of application with respect for appropriate job security. This can be achieved by acknowledging that the Commissioner does have a discretion whether to advertise or not, but that the discretion must in each case be exercised in such a way as to not lead to the loss of employment by a satisfactory incumbent as a consequence of the upgrading of his or her post. Nor should incumbents who are threatened with retrenchment because their posts have been upgraded, be obliged on a case by case basis to invoke administrative or labour law mechanisms to secure their positions in the service. Since retrenchment utilising the provisions of regulation 24(6) would be manifestly unfair, the regulation should be interpreted as a matter of law as requiring the Commissioner to exercise his discretion in a manner which does not lead to job loss.*"[177]

223. Accordingly, the Court granted a detailed order setting out how the Commissioner's power had to be exercised in order to comply with the constitutional concerns at stake. It read:

> "*(1) It is declared that:*
> *(a) The applicant is vested with a discretion in terms of regulation 24(6) of Regulation 389, the Regulations for*

[176] *Public Servants Association v National Commissioner of the South African Police Service* [2005] ZASCA 108; [2007] 1 All SA 363 (SCA); 2007 (2) SA 71 (SCA).
[177] *SAPS v PSA* (n 42) at para 34 (my emphasis).

South African Police Service, published in the Government Gazette No 21088 on 14 April 2000, either:-

(i) to advertise the post which he or she has decided to regrade to a higher grade, or;

(ii) to continue to employ the incumbent employee in the newly higher graded post without advertising the post, provided that the requirements of regulation 24(6)(a), (b) and (c) are satisfied.

(b) The incumbent of a post is not entitled to an automatic promotion to a post upgraded by the applicant in terms of regulation 24(6).

(c) The Commissioner's discretion with regard to upgrading of posts in terms of regulation 24(6) must be exercised in a manner which does not result in retrenchment of an incumbent employee who is not promoted to the upgraded post."

224. This is a variation of the ordinary interpretation of may to impose a power coupled with a duty. It also lays out when that duty will exist, and when it will not. The Court limited the reach of the discretion <u>at its source</u>.

225. The same applies here. Section 23(2A) provides a power and a duty to act when necessary to protect the rights and interests of the community. It will always be necessary to achieve that end to ensure that compensation is determined and paid prior to the exercise of the right. The Applicants are entitled to a declaratory order to that effect, as was granted in *SAPS v PSA*.

VIII CONSTITUTIONAL CHALLENGE

226. Legislation must always be interpreted to avoid a finding of invalidity. If despite, the argument advanced above, this Court concludes that the MPRDA and IPILRA cannot be interpreted to either:

226.1. Require consent in terms of IPILRA; or

226.2. Mandate that the Minister must act under s 23(2A) to impose the condition that compensation is determined and paid prior to the exercise of the right,

then the MPRDA is unconstitutional.

227. This challenge is clearly pleaded in the Founding Affidavit,[178] and is not meaningfully answered by the Respondents.

228. We have already set out in **Part VI** why excluding consent under IPILRA would violate the rights to culture, secure tenure, and a healthy environment. A further failure to require pre-award compensation would only enhance that unconstitutionality. The only additional right to be considered is the right not to be arbitrarily deprived of property.

Property

229. Section 25(1) of the Constitution protects the right not to be arbitrarily deprived of property.[179] We have already explained why the grant of a mining right

[178] FA at paras 275-6; Record Vol 1, p 85.

[179] It reads: "*No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*"

constitutes a deprivation of customary law property rights. The question is whether, on the Respondent's approach, the deprivation would be arbitrary.

230. The Constitutional Court dealt with the meaning of "*arbitrary*" in *FNB*.[180] It held that the term is flexible and depends on the particular context. It can require anything from narrow rationality, to full proportionality. Moreover, it has both a procedural and a substantive dimension. The basic requirement is there must be "*sufficient reason for the particular deprivation*".[181]

231. The deprivation would be arbitrary if it does not require prior determination of compensation. Section 54 makes it clear that the community would be entitled to compensation at some stage. But there is no sufficient reason why it should not be paid <u>before</u> mining occurs. That is arbitrary on the ordinary meaning of the word.

232. The violation is exacerbated by the serious consequences of delaying compensation that we have outlined above.

233. Accordingly, if the MPRDA cannot be interpreted in line with constitutional demands, it must be declared unconstitutional and invalid.[182]

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[180] *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another* [2002] ZACC 5; 2002 (4) SA 768 (CC).

[181] Ibid at para 100.

[182] Constitution s 172(1).

IX CUSTOMARY LAW

234. Part of the relief the Applicants seek in prayers 7 and 8 relate to the content of customary law of the Umgungundlovu Community. To assess those prayers, it is necessary to:

234.1. Set out how the content of customary law is determined; and

234.2. Assess the evidence before this Court on the content of customary law.

Determining the content of Customary Law

235. The Constitutional Court has laid down the following general principles for the determination of customary law:

235.1. Customary law is "*a system of law that […] has its own values and norms";*[183]

235.2. Therefore, the validity of customary law must be determined with reference to the Constitution (rather than the common law or statute law);[184]

235.3. Customary law is the law as practiced by the community;[185] and

235.4. It *"develops* [through practice] *to meet the changing needs of the community*".[186]

[183] *Mayelane v Ngwenyama & Another* [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLE 918(CC) at para 24.

[184] *Alexkor* (note 93 above) at para 51 and *Bhe* (note 93 above) at para 42.

[185] *Mayelane* (n 187 above) at para 24.

[186] Ibid.

236. To determine the content of "*living customary law*", Van der Westhuizen J, in *Shilubana*,[187] sets out four factors to be considered:

236.1. The past practice and tradition of the community.[188] This entails a historical enquiry.

236.2. The contemporary practice of a particular community;[189]

236.3. 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.[190]

236.4. Finally, in finding the content of customary law, the Court is obliged to promote the spirit, purport and objects of the Bill of Rights.[191]

237. These principles were recently applied by the Full Bench of the Bhisho High Court in *Premier of the Eastern Cape and Others v Ntamo and Others*.[192] The Court had to interpret s 18 of the Eastern Cape Traditional Leadership and Governance Act which required that a headman had to "qualify in terms of customary law". The Court held that customary law had to be determined for the specific community at issue. It held that the customary law of Xhalanga and even of the village of Cala Reserve could differ from the customary law of neighbouring areas.

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[187] N 92 above.

[188] At para 44.

[189] At para 46.

[190] At para 47.

[191] At para 48.

[192] [2015] ZAECBHC 14; 2015 (6) SA 400 (ECB); [2015] 4 All SA 107 (ECB).

> *"The practical implementation of s 18 may differ across the province, from place to place, according to the customary law that is applicable in each. That may mean that in identifying candidates for headmanship, royal families may enjoy varying degrees of discretion: how much discretion a royal family will have to identify candidates will depend on the applicable customary law and the customary law requirements for qualification as a headman in each case."*[193]

238. It stressed that this interpretation was consistent with the statute, and the Constitution. Moreover, it "*advances, rather than retards, the promotion of democratic governance and the values of an open and democratic society by recognising the customary law of local communities in the identification of those who will govern them on the local, and most intimate, level.*"[194]

239. Relying on expert evidence presented by the Applicants, which was undisputed by the respondents, it held that in Xhalanga a headman only qualified if he had been elected by the community.

240. As we show below, a similar analysis applies in this case.

The Evidence in this Case

241. Like the applicants in *Ntamo*, the applicants in this case have put up both the evidence of experts – Prof Beinart and Chenai Murata – as well as the evidence of the First Applicant as the iNkosana of Umgungundlovu, and Mashona Wetu,

[193] Ibid at para 69.

[194] Ibid at para 70.

and elder of the community. In substance, that evidence remains undisputed. It establishes the following:

241.1. The powers to allocate and administer land are not vested in one individual or one structure of leadership; it is instead a shared responsibility that flows from the bottom upwards;[195]

241.2. Decision-making is not majoritarian but consensus-driven.[196]

241.3. When assessing the application to land of an outsider, even broader and more inclusive participation is required;[197] and

241.4. Applications to land are typically declined if it is likely to cause conflict between community members of division. The higher the potential of conflict, the higher the degree of consensus required.[198]

242. This evidence has not been denied. The Full Court dealt with a similar situation in *Ntamo*. Plasket J explained the position as follows:

> *"The only evidence as to the customary law in the Cala Reserve concerning the identification of headmen is that tendered on behalf of the respondents by Professor Ntsebeza. His evidence stands unchallenged. It is the only admissible evidence on the issue. No reason was advanced as to why it ought not to be accepted.*
>
> *[70] If the appellants contended that the customary law was something other than that stated by Professor Ntsebeza, they should have adduced evidence to that effect. They did not. They are in the same position as any other litigant who does not challenge evidence properly adduced by an opposing party. They are not able to rebut it and are bound by it if it*

[195] FA at para 79.

[196] FA at para 85.

[197] FA at para 83.

[198] FA at para 84.

is properly accepted by the court. They chose not to adduce this evidence at their peril."[199]

243. The same is true here. The Respondents elected not to advance expert evidence about the history or current practice of the Umgungundlovu Community. They did so at their peril.

244. The only attempt made by any of the Respondents to dispute this version of customary law is the report prepared by Prof Mqeke, and filed on behalf of the State Respondents. But the Mqeke Report simply does not address the **evidence** that is relevant to establishing the content of customary law. The report is almost entirely legal opinion about the relative legal status of customary law and the TLGFA. Indeed, Prof Mqeke qualifies himself entirely as a legal expert,[200] not as a person with expertise about the history or practice of the Umgungundlovu community.

245. As a result, his opinion is entirely irrelevant to determining the content of customary law. It is also inadmissible. Shwikkard and Van der Merwe state the rule regarding expert evidence as follows: "*Any opinion, whether expert or non-expert, which is expressed on an issue which the court can decide without receiving such opinion is in principle inadmissible because of its irrelevance.*"[201]

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[199] Ntamo (n 194) at 69.

[200] Mqeke Affidavit at para 1, Record Vol 16, pp 1452-3.

[201] PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (3 ed, 2009) at 87, citing *S v H* 1981 (2) SA 586 (SWA).

The proper status of customary law relative to statutes is legal question which this court can and must decide without receiving expert opinion.

246. In as far as Prof Mqeke attempts to deny Ms Baleni's version of the customary law of her community, he argues that some of what she says is similar to old Transkei land legislation and that some of it is similar to the customary law of all Nguni people. That may be true, but it is irrelevant.

247. Prof Mqeke appears to suggest that the customary law of a particular community can only be accepted if it is in no way similar to other forms of law, whether statutory or customary. That is obviously incorrect. The reason Ms Baleni describes the customary law of her community is because any inquiry into the customary law to be applied (which is a factual enquiry into the content of the law) must be into the customary law *of the community concerned*, ie, Ms Baleni's community. She does not pretend that the customary law of her community is unique. She simply asserts what it is at present. The customary law, as is and developed by this community, must be followed. That is precisely the approach taken by the Constitutional Court in *Shilubana* and *Mayelane*, and by the Full Bench in *Ntamo*.

248. Insofar as the Respondents intend to endorse the legal arguments made by Prof Mqeke, they are incorrect. Prof Mqeke's argument is entirely based on a flawed interpretation of the TLGFA that assumes that the TLGFA *extinguished* customary law. That is not the case.

249. The essence of Prof Mqeke's argument is that the TLGFA covers the field when it comes to traditional leadership and the administration of communal land.

250. Prof Mqeke interprets section 20 of the TLGFA to provide traditional councils with powers over land administration. In fact, section 20 merely provides guidelines for roles that may be allocated to traditional councils through legislative and other measures. The legislature attempted to allocate the role of land administration to traditional councils through the Communal Land Rights Act of 2004, but the Act was never implemented before it was declared unconstitutional in 2010.[202] Thus, and as the Constitutional Court pertinently pointed out in striking down the Act, customary law continues to regulate that governance of land:[203]

But, the field that CLARA now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land. This system also regulates the powers and functions of traditional leaders in relation to communal land. It is this system which CLARA will repeal, replace or amend. […] Indeed all the parties approached the matter on the footing that the land which the four applicant communities occupy is regulated by indigenous law.

251. On Prof Mqeke's approach, institutions that are not recognized by the TLGFA also do not, in law, exist.

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[202] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC) ; 2010 (8) BCLR 741 (CC) (11 May 2010).

[203] Ibid at para 79.

252. This approach cannot be sustained. As we stressed above, customary law is an independent source of law recognised by the Constitution. It is not defined by statute, nor does it gain its authority from statute. If legislation recognizes and regulates certain customary structures, it does not thereby eliminate all the other customary structures. Those structures continue to exist and operate in terms of customary law.

253. The Constitutional Court made this plain in *Pilane v Pilane*.[204] The case concerned an attempt by the officially recognized traditional leadership to prevent meetings from being held by a dissident faction of the community that was contemplating secession. Skweyiya J held that the applicants had made no case for preventing the meetings from occurring. More importantly, he held:

> "*The [applicants] have officially been recognised as the traditional leadership of the Traditional Community by statute to perform certain public functions, in accordance with the Constitution. Accordingly, they are organs of state. Their authority and power are devolved upon them as organs of state from the Constitution itself. However, given that statutory authority accorded to traditional leadership does not necessarily preclude or restrict the operation of customary leadership that has not been recognised by legislation, the position as it stands is far from clear.*"[205]

254. There are, therefore, two forms of traditional leadership: statutory and non-statutory. These are not in conflict, but in harmony. The one is recognised by the TLGFA – which in any event requires adherence to customary law – and

[204] *Pilane v Pilane* [2013] ZACC 3; 2013 (4) BCLR 431 (CC).

[205] Ibid at para 44.

has powers and obligations both under customary law and under the statute. The second is recognized by customary law and has the powers and obligations afforded it under customary law.

255. The TLGFA itself recognizes this duality; indeed its entire structure rests on the continued existence of a parallel system of traditional governance under customary law:

255.1. The preamble to the TLGFA states that its aim is "*to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices".* That can only happen if those customary laws and practices exist independent of the Act.

255.2. Section 1 defines the various types of traditional leaders – kings and queens, principal traditional leaders and so on. Each definition requires that the person "exercise authority in accordance with customary law". Again, the Act requires an independent customary law of governance.

255.3. In recognising traditional leaders, the TLGFA makes clear that the person recognized must "*qualif[y] in terms of customary law*".[206] The continued existence of customary law is a requisite source of power for traditional leaders.

255.4. The functions of a traditional leader are, first, those "*provided for in terms of customary law and customs of the traditional community concerned*".[207] In addition, recognized traditional leaders have functions

[206] See TLGFA ss 9(1)(a)(i), 10A(1)(a)(i) and 11(1)(a)(i).

[207] TLGFA s 19(1).

in terms of legislation. But far from replacing or subordinating customary law, the TLGFA relies on it to define the roles of traditional leaders.

256. Again, this reality was expressly recognised by the Full Court in *Ntamo* which considered the factors identified in *Shilubana* to determine the customary law of the specific community before it.

257. Finally, Prof Mqeke argues that Beinart's evidence cannot be used because he does not interrogate all the statutes. But this fundamentally misunderstands the import of Prof Beinart's evidence. He is not seeking to provide impermissible expert legal opinion. He is providing the expert historical opinion that the Constitutional Court has held is necessary to determine the content of customary law.

258. Accordingly, there is no reason not to grant the declarator the Applicants have sought. As the Full Bench held in *Ntamo*, a declarator about the content of customary law is appropriate in these circumstances.[208]

X CONCLUSION AND COSTS

259. The Applicants do not seek much. They seek only that their right in IPILRA and in international law is respected by the Respondents. They seek only the recognition of their right to decide whether or not their ancestral land will be

[208] *Ntamo* (n 194) at para 57.

fundamentally altered by mining,[209] and if so how they will be compensated. The Constitution requires nothing less.

260. The Applicants are entitled to the relief sought in the notice of motion, including the costs of two counsel.

TEMBEKA NGCUKAITOBI

MICHAEL BISHOP

YANELA S NTLOKO

Counsel for the Applicants

Chambers, Sandton and Cape Town

12 February 2018

[209] Subject to the Minister's power to expropriate in terms of section 55 of the MPRDA.