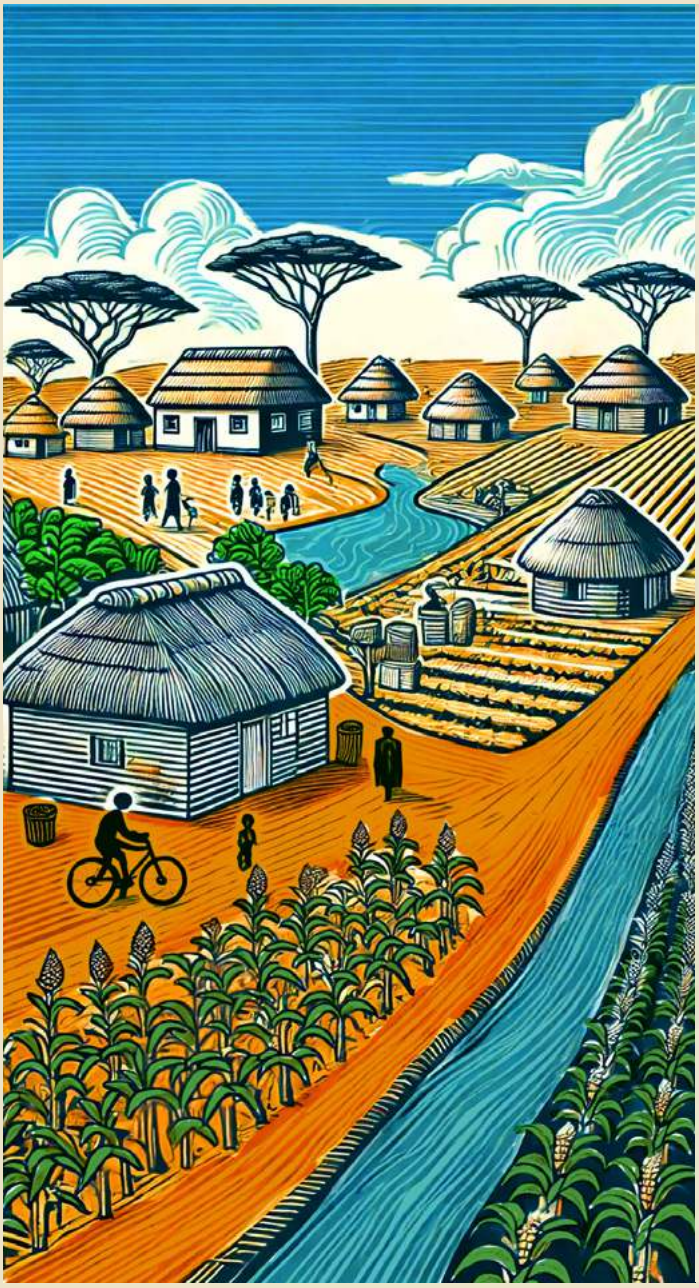

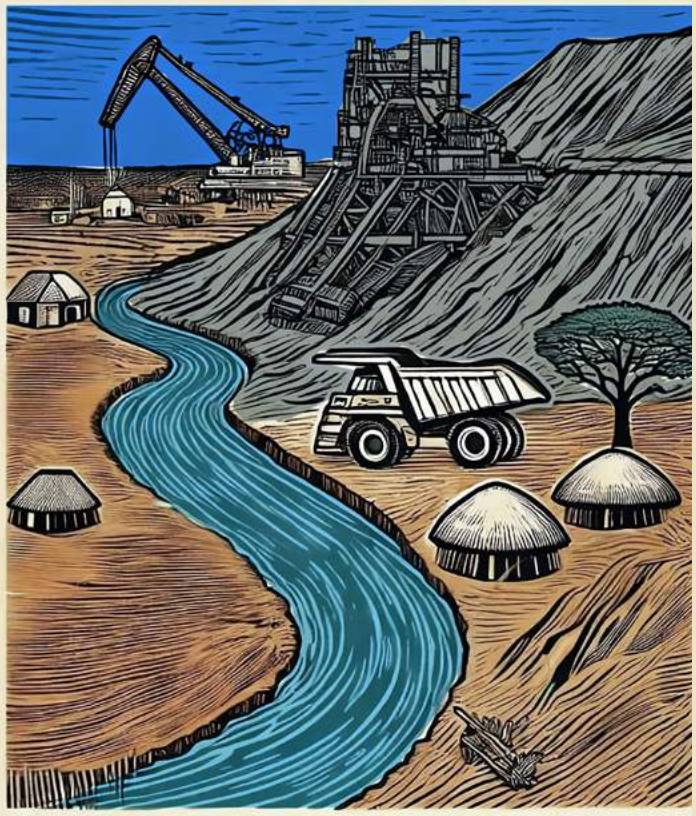

Meaningful consultations and informal land rights

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Author: Dr Godknows Mudimu

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Meaningful consultations and informal land rights

By Godknows Mudimu[1]

Abstract

The Mineral and Petroleum Resources Development Act (MPRDA) ushered a new era in the exploitation of mineral resources in South Africa and came into effect at a time when commercially viable mineral deposits were being discovered in rural parts of South Africa. Due to the legacies of colonisation, apartheid, a system of land dispossession, and patterns of distortion of customary law decision making on land matters, most of these communities find themselves in weaker negotiation positions. The precarious nature of informal rights to the land in question affects the overall outcomes that communities receive from consultation processes. This paper explores the role of meaningful, inclusive consultations that are prescribed by the MPRDA and the intersection with other rights created by the Interim Protection of Informal Land Rights Act (IPILRA). The nature and quality of such consultations depend directly on the strength of the rights of the lawful owners and occupiers of the land in question. The paper ends with a brief discussion of a case study that can be explored further to build on acceptable practices on consultations and negotiations with communities. It concludes that without a comprehensive reform to the customary land tenure system, consultations and negotiations on access and land usage will remain fundamentally skewed in favour of developers or those holding mining related rights at the expense of rural communities.

Keywords: meaningful consultation, traditional leadership, MPRDA, IPILRA, inequalities, mining affected communities, apartheid, colonisation, community development, resettlements.

1. Godknows Mudimu, I would like to thank Richard Spoor Inc Attorneys ("RSI") for providing me access to information on one of their clients where I also worked and attended various consultation meetings. As such information relates to their Client, I have omitted actual data, settlement figures etc from the Agreement in the discussion.

1. Introduction

Current debates on natural resource extraction are increasingly focusing on the equitable sharing of benefits and the allocation of risk between mining companies, mining-affected communities, the state, and other actors. In South Africa, like in other developing, mineral-rich countries, this has been exacerbated by the perceived potential of such mineral deposits to act as catalysts in reducing poverty, inequality, and high unemployment, particularly in rural areas. Part of the architecture of land dispossession in South Africa was to move black people to designated rural areas from mineral-rich, agricultural land or other commercially designated land. Most of this communal land is held by the state on behalf of these communities and administered by tribal authorities. State land also includes land acquired by or for a community – whether it is registered in their name or not.[2]

Post 1994, vast commercially viable mineral resources are being discovered in these former homelands, thereby changing these rural areas' economic status and power. Navigating the complexities of access, usage rights, compensation, rehabilitation, relocation of graves, and implementing sustainable livelihood restoration programmes linked to such land often becomes a contestation.

This paper looks at the role of meaningful consultation in producing sustainable and acceptable outcomes for communities, particularly vulnerable community members who are often disproportionately affected by land deprivation. It argues that meaningful consultation translates into meaningful outcomes for those who hold informal title to land. Secondly, it examines a case study where meaningful consultation, despite being lengthy, resulted in improved outcomes for the community involved. Lastly, it makes recommendations for similarly placed communities.

2. History of Land Dispossession

To fully appreciate current challenges regarding consultations on land matters, a brief historical account of land dispossession is critical. The history of dispossession of black South Africans stretches back to 1652 and the systematic legal framework designed to disempower black people. From the Masters and Servants Act of 1856 and the Mines and Works Act of 1911, to the ultimate Natives Land Act of 1913, all document a clear history dispossession.[3] The Natives Land Act was by far the most instrumental in land dispossession through formalised limitations on black ownership, and is regarded as a key legislation that underpinned the apartheid system.[4] Further developments, including the Bantu Authorities Act of 1951, cumulatively distorted the role of traditional leaders, who became more accountable to the apartheid system than the communities they served.[5] Khunou argues that traditional leaders and traditional authorities were key in giving effect to the traditional life of their respective communities and such governance and powers was derived from the people and were accountable to the people.[6] The institution of traditional authorities became an instrument to further the interests of the apartheid government – a position which came at the expense of the community interests.

The creation of 'homelands' was a further act of dispossession which sought to assign every black person

2. Communal Land Rights Act 11 of 2004.
3. See K Motlanthe 'Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change' 29.
4. HJ Kloppers and GJ Pienaar 'The historical context of land reform in South Africa and early policies' (2014) *PER* 20;
5. SF Khunou 'Traditional leadership and independent Bantustans of South Africa: Some milestones of transformative constitutionalism beyond apartheid' (2009) 12 *PELJ* 81.
6. Khunou (2009) *PELJ* 360.

to a designated area.[7] Between 1960 and 1964, many black South Africans were forcibly removed from their land to designated independent areas. Post 1994, the government adopted policies to undo the legacies of the past through various means, including restitution of land for those dispossessed, land re-distribution, and the reform of land tenure.[8] Land under the Bantustans was placed under the authority of tribal authorities which meant that the post-1994 legal order had to address land governance.[9] The Constitution thus recognises the role and function of traditional leadership according to customary law and subject to the Constitution.[10]

The recognition of traditional leadership and its inclusion in the Constitution was significant as the majority of South Africans still acknowledge its role and significance. Bennett argues that the role of traditional leaders in local government is the area of greatest dispute as this is one of the key areas where they exercised most of their powers.[11] Similarly, Wilcomb and Smith argue that 'under colonial rule, the foreign powers gradually realised that they could utilise customary institutions of governance to achieve the subjugation of local communities'.[12] Prior to colonisation, as argued by Khunou, there are historical accounts, documenting how chiefs were consultative and democratic.[13] To entrench this position, legislative measures and policies were passed that continued to distort customary laws for the benefit of colonial interests and post 1994, for the benefit of the government of the day.[14] This alone had a long-term impact on the manner in which communities negotiated the shared use of communal resources, as traditional authorities often by-passed established mechanisms of consultation and decision making. Some have noted that South Africans living in rural areas under the leadership of traditional authorities do not enjoy all rights as their fellow citizens in urban areas do.[15] Whatever the challenges the institution of traditional leadership currently faces, it remains a key institution to millions of South Africans, who adhere to their own traditional and cultural ways of life.[16]

3. Meaningful Consultations – The South African Framework

South Africa voted for the adoption of the United Nations Declaration on the Rights of Indigenous People ("UN Declaration") which advanced the mainstreaming of human rights, education, health, and the environment for indigenous people across the globe.[17] One critical inclusion in the declaration was the

7. See A Claassens and B Boyle 'A promise betrayed: Policies and practice renew the rural dispossession of land, rights and prospects' (2015) Policy Briefing 124, Governance of Africa's Resources Programme.
8. W Beinart, R Kingwill and G Capps (eds) *Land, law and the Chiefs in Rural South Africa* (2021) 2.
9. W Beinart, R Kingwill and G Capps (eds) (2021) 2.
10. Constitution of the Republic of South Africa, 1996 211 and 212; See also K Holzinger, FG Kern and D Kromrey 'Explaining the constitutional integration and resurgence of traditional political institutions in Sub-Saharan Africa' (2020) 64 *Political Studies* 973
11. T Bennett and C Murray 'Traditional leaders' in Constitutional law of South Africa
12. W Wilcomb and H Smith 'Customary communities as 'peoples' and their customary tenure as 'culture': What we can do with the Endorois decision' (2011) *African Human Rights Law Journal* 422, 425.
13. P Delius 'Contested terrain: land rights and chiefly power in historical perspective' *in* A Claassens and B Cousins *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (2013) UCT Press 215; Khunou (2009) *PELJ* 86.
14. A Claassens and B Cousins (eds) Land, power and custom (2008) 95; G Nkareng Klaas-Makolomakwe and T Raniga 'A critical review of the roles and functions of traditional leaders' (2021) 86 *The Thinker* 53.
15. L Ncapayi and S Ntungwa 'Land reform – A critique of Traditional Leadership' (2018) Alternative Information & Development Centre. Available at https://aidc.org.za/land-reform-a-critique-of-traditional-leadership/ (accessed 29 June 2024) see also *Premier of the Eastern Cape and Others v Ntamo and Others* 2015 4 All SA 107 (ECB) where the court confirmed a customary principle that required a headman to be elected by members of the community, in accordance with their customary law as opposed to imposition by the royal family.
16. G Nkareng Klaas-Makolomakwe and T Raniga (2021) 86 *The Thinker* 54.
17. Adopted by the United Nations General Assembly on 13 September 2007, to which South African voted for its adoption.

entrenchment of the right to redress, fair, equitable compensation for land or territories, and the right to 'free, prior and informed consent' ("FPIC") on the part of the indigenous communities. No development, resettlement, or any usage of indigenous people's land can occur without FPIC of the people involved. The principle of FPIC has also found meaning within the South African legal framework, mainly through case law.

The South African Constitution heralded a new era based on respect for fundamental rights, the rule of law, and the underlying need to undo the injustices of apartheid. The Mineral and Petroleum Resources Development Act ("MPRDA")[18] forms part of a series of legislative measures designed to undo the legacies of skewed mineral resource ownership patterns. Part of this deliberate transformative exercise was the abolishment of private ownership of minerals, transferring such under the custodianship of the state for the benefit of people of South Africa.[19]

The FPIC principle has found expression in various cases. For example, in *Salem community v Government of the Republic of South Africa and Others*, the Land Claims Court ("LCC") pointed out that 'Articles 8(2), 10 25, 26 and 27 address the protection of traditional land rights belonging to indigenous people and the right to redress as pointed above'.[20] Several South African cases have adopted and fleshed out the FPIC principle within the South African context. In *Baleni v Minister of Mineral Resources*,[21] ("*Baleni*"), the dispute was between uMgungundlovu community on the one hand and Transworld Energy and Mineral Resources ("TEM") on the other. The rural community of uMgungundlovu, consisting of about 75 households, held informal rights to their land under the Interim Protection of Informal Land Rights Act ("IPILRA") and had lived on the land since the early 1800s under Amadiba Traditional Authority.[22] The community opposed TEM's right to mine titanium and other minerals on their land, citing their right to be consulted in terms of their customary law decision making processes. TEM on the other argued that the community had no right to consent prior to the granting of the mining right and relied on the provisions of the MPRDA which, as they argued, merely requires the community to be consulted. In rejecting this interpretation, the community argued that they were vulnerable and that their way of life was strongly tied to the land and that without FPIC, they were at the risk of losing not only their land, but their way of life. Part of the dispute was therefore the need to provide a clear interpretation on the relationship between IPILRA and the MPRDA. The High Court held that full and informed consent of customary communities whose rights in land are protected under IPILRA is a requirement before a mining right is granted under the MPRDA. The court incorporated the FPIC principle as a pre-requisite before any deprivation of the informal land rights. This was because the granting of a mining right amounts to a deprivation, triggering the consent requirements under IPILRA. Without such consent, (which is obviously a product of meaningful consultation), the Minister lacks the authority to grant a mining right.

Lastly, *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*, ("*Maledu*")[23]

18. 28 of 2002.
19. MPRDA, ss 2(b), 3; see also the discussion of the MPRDA framework in *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* [2021] 4 All SA 836 (GP); 2022 (1) SA 535 (GP).
20. See also *Salem Community v Government of the Republic of South Africa and Others* 2 All SA 58 (LCC) (2 May 2014) to which the principles of 'free, prior and informed consent' were applied. See also JCN Ashukem 'Included or excluded: An analysis of the application of the free, prior and informed consent principle in land grabbing cases in Cameroon' 19 *PER / PELJ* 2016
21. 2019 (2) SA 453 (GP); see also G Barrie 'The introduction of "Free, Prior and informed Consent" to the land reform legal lexicon' (2019) 44 *Obiter* 900, 905; NH Mukwevho The evolution and development of the principle of free, prior and informed consent in South Africa (2023) 38 *South African Law Journal* 144.
22. *Baleni*, para 9.
23. 2019 (2) SA 1 (CC) paras 72, 73. Informed consent as per the court submissions are designed to ensure that local communities are not coerced or intimidated, consent is properly sought and freely given, the person whose consent is required is provided with full and reliable information relating to the scope and impact of the subject matter regarding the consultation; and they have the choice to give or withhold their consent.

confirms the interaction between the MPRDA and IPILRA, indicating that the MPRDA does not trump IPILRA, and that FPIC remains a requirement. *Maledu* demonstrates the level and impact of informality, even for those families who purchased their own properties but could not transfer title directly to their names. Prompted by the strong security of tenure attached to purchasing the farm as opposed to renting or sharecropping, in 1916 13 families purchased the farm Wilgespruit 2 JQ in the district of Rustenburg.[24] After about three years, the families paid off the farm but because they were black families, the farm could not be registered in their names. Instead, the farm was registered in the name of the Native Commissioner, who held it on behalf of the Chief of the Bakgatla-Ba-Kgafela tribe ("the Bakgatla") and not directly on behalf of the 13 families. The families lived off the land with no disturbance since 1916, until in 2008 a mining company obtained mineral rights on the farm. Because the MPRDA abolished private ownership of minerals, by the time of litigation, the mining activities on farm Wilgespruit had already commenced. The respondents instituted eviction proceedings, without any consultation with the lawful owners of the farm. Part of the questions before the court involved whether the respondents had a valid mining right and surface lease agreement which were obtained without consultation with the lawful owners of the farm. The court unanimously held that the applicants' lawful occupation was based on their informal land rights which were protected by the IPLIRA. The community thus had a right to be consulted and such rights existed notwithstanding the award of the mining right to the respondents.

The key to informed consent, as provided in *Maledu,* is to ensure that consultations are conducted without intimidation, affected and interested persons are provided with comprehensive information to make informed decisions, and individuals are given an opportunity to give or withhold consent.[25] The court held that the applicants' lawful occupation was based on their informal rights as protected under the IPLRA. FPIC, is therefore a requirement and such consent must be given voluntarily, without coercion.[26]

Regionally, the African Commission on Human and People's Rights expressed the same sentiments on the requirements for FPIC in *Centre for Minority Rights Development (Kenya) and Minority Rights Group on behalf of Endorois Welfare Council v Kenya* in which it stated that:

> '[in] 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.'[27]

While the Commission in the *Endorois* case correctly placed these obligations on the state in that matter, in South Africa, particularly in the mining context, the MPRDA places the duty to consult the interested or affected parties on the person seeking a right or permit.[28] Such a person must first give adequate notice to the landowner or the lawful occupier and then consult.[29] Secondly, as most of these community rights were made precarious and informal during colonisation and apartheid, the IPILRA also comes into play. At its core, IPILRA sets out the minimum requirements that must be met before any deprivation of informal rights to land can occur. Firstly, such deprivation cannot occur without the person's consent.[30] Secondly, in cases where the land is held on a communal basis, deprivation can only occur in accordance with the custom and usage of that community.[31] Thirdly, and most importantly,

24. *Maledu*, Heads of Argument, 3.
25. *Maledu*, para 73.
26. *Maledu*, paras 72 -73.
27. 276/2003, para 291.
28. MPRDA some of the sections imposing this duty include ss 10(1)(b), 16(4) (b); 22(4)(b); 27(5)(b) and 39.
29. MPRDA s 10(1)(b); see also the DMR 'Guideline for Consultation with Communities and Affected Parties
30. IPILRA, s 2(1).
31. IPILRA, s 2(3).

'where the deprivation of a right in land in terms of subsection (2) is caused by a disposal of the land or a right in land by the community, the community shall pay appropriate compensation to any person who is deprived of an informal right to land as a result of such disposal.'[32] Lastly, the IPILRA, like the MPRDA, does not define what constitutes appropriate compensation.[33]

The focal point of consultations on mining-related projects starts mainly with the issue of land.[34] Citing Frantz Fanon, Petse AJ opens the *Maledu* judgment as follows:

> The statement by Frantz Fanon in his book titled "The Wretched of the Earth" is, in the context of this case, apt. It neatly sums up what lies at the core of this application. He said that "[f]or a colonised people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity". Thus, strip someone of their source of livelihood, and you strip them of their dignity too.[35]

He goes further to trace the historical importance of land across the globe and South Africa in particular. Mailula, citing the submissions in the West African Land Commission of 1992, makes a compelling case for how Africans in general view land and its central importance in their way of life.[36] To Africans, land symbolises and encompasses a source of livelihoods, status, cultural and spiritual meanings, expression of communal stewardship, religious space, and a burial place for ancestors.[37] One must understand this complex relationship with land among Africans, which expresses itself through economic, social, religious, spiritual, and cultural dimensions before engaging in any meaningful consultation.[38] Notwithstanding the private ownership of land that exists within communities, such a dimension does not exclude the ownership of land through the broader 'family of which many are dead, few are living, and countless members are unborn'.[39]

Unfortunately, policy makers have not dealt with, or provided much consultation guidance on the content, level of participation, information sharing, transparency, and the acceptable standard of consultation. The DMR Guideline for Consultation with Communities and Affected Parties is a recent document that attempts to provide direction on the issue. Most of the guidance and direction on consultations have emanated from courts and academic writing as shown in the cases discussed above. Courts have unpacked the key aspects that must be covered in consultation, including accommodating various parties' interests; providing an opportunity to clear up any misunderstanding, encouraging transparency; and giving effect to the right to procedural fairness of administrative action contained in the Promotion of Administrative Justice Act.[40]

Meepo v Kotze and Others[41] was one of the first cases to deal with the rationale for consultations in a

32. IPILRA, s 2(3).
33. See MPRDA, s 54(7) where an owner or occupier of land who suffers or is likely to suffer loss or damage as a result of the reconnaissance, prospecting, or mining operations is entitled to compensation.
34. In *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 CC, para 1 provides a historical anecdote on the land dispossession and the skewed ownership patterns that resulted in land dispossession for the communities involved.
35. *Maledu*, para 1 citing F Fanon *The Wretched of the Earth* (1963) 43.
36. D Mailula 'Customary (Communal) land tenure in South Africa: Did Tongoane overlook or avoid the core issue' (2011) 4 *Constitutional Court Review* 73.
37. Mailula 'Customary (Communal) land tenure' (2011) 75; see also SJ Anaya's Indigenous peoples in international law (2004) *Oxford University Press* 141; E Dannenmaier 'Beyond indigenous property rights: Exploring the emergence of a distinctive connection doctrine' (2008) 86 *Washington University Law Review* 101.
38. Mailula (2011) 4 *Constitutional Court Review* 73.
39. Mailula, citing a Nigerian chief's submission to the west African Land Commission, 1992; WJ du Plessis 'African Indigenous land rights in a private ownership paradigm' 2011 *PER* 39.
40. 3 of 2000.
41. 2008 (1) SA 104 (NC).

mining context within the prescriptions of the MPRDA. In *Meepo,* the court held that consultation is the only prescribed method by law for assessing the impact prospecting activities may have on a landowner's land, such as farming activities.[42] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources*[43] adds further clarity on the requirements for notifying the landowners or lawful occupiers and the general purpose of consultation.

3.1. Rationale for Consultations

Understanding both the disruptive nature of mining to a community and the potential benefits it may bring, such consultation must determine 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 are concerned.[44] Consultation also equips landowners or lawful occupiers with the necessary information to make informed decisions.[45] In *Bengwenyama*, the court further highlighted that the different notice requirements and consultation indicate a severe concern for the rights and interests of those involved, as 'the granting and execution of a prospecting right represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen.'[46]

A series of recent judgments have interpreted the legal requirements to ensure that the intention of the MPRDA and IPILRA are given their true meaning. In *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*[47] ("*Sustaining the Wild Coast I*") consultation is not a mere legal compliance or a tick-box exercise. Where the requirements of the MPRDA and the Regulations are met (publication of notices as per the MPRDA and Regulations), such would still fail to satisfy or meet the requirements if the notice did not publicise the meeting or event in a manner that the community in question understands. Meaningful consultation, therefore, involves a genuine, substantive, two-way process to achieve as much consensus as possible with the landowners and lawful occupiers.[48] The Supreme Court of Appeal ("SCA") in *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast* NPC[49] ("*Sustaining the Wild Coast II*") confirmed the principles established in *Bengwenyama* and the series of previous cases. The case further confirmed another purpose of consultation – to understand the potential detrimental effects of any activities on the land of the persons involved and the effects on the communities' spiritual and cultural practices, and livelihoods.[50] This dimension ties well together with the often-uncaptured nuances on land use by Africans.

From the above discussions, meaningful consultation involves meaningful engagement with the lawful owners and occupiers of the land in question. It is meaningful if the company involved engages in earnest, transparent discussions. As held in *Sustaining the Wild Coast I*, traditional authorities do not stand on behalf of communities. Meaningful consultations also involve placing communities at an equal footing with the project developer in terms of resources. The International Finance Corporation's Performance Standards on Environmental and Social Sustainability ("IFC Standards") apply to business activities with environmental and social risks and impacts.[51] The IFC Standards aim, among other things,

42. *Meepo*, para 13.1.
43. 2011 (4) SA 113 (CC).
44. *Bengwenyama* para 65;
45. *Bengwenyama* para 66.
46. *Bengwenyama* para 63.
47. 2022 (6) SA (ECMk).
48. *Sustaining the Wild Coast I* para 95.
49. *Sustaining the Wild Coast II* (SCA) para 25.
50. *Sustaining the Wild Coast II* (SCA) para 25.
51. IFC Standards Available at https://www.ifc.org/en/insights-reports/2012/ifc-performance-standards

to assess the project's environmental and social risks, apply mitigation strategies, and address grievances from affected communities and other stakeholders.[52] They considers stakeholder engagement as an ongoing process, including stakeholder analysis and planning, disclosure and dissemination of information, consultation and participation, grievance mechanisms, and ongoing reporting to affected communities.[53]

Despite the above framework and the global best practices that appear to be moving in the right direction when dealing with meaningful consultations, certain members within the community still suffer unduly across the mining communities. This is due to various cultural practices in communities dominated by traditional authorities which often exclude women, widows, youth, and disabled community members from having a voice during such consultations.

3.2. Consultations, Cultural Practices and Informal Land Rights

Despite its transformative agenda, the MPRDA as the main piece of legislation governing mining lacks sufficient measures to ensure meaningful participation of historically disadvantaged groups, particularly women.[54] Even under the IPILRA, women in certain communities do not enjoy all rights and often allow male family relatives to make all key decisions regarding land.[55]

Gender disparities increase inequalities and access to economic resources, including security of tenure, for rural women across the globe.[56] The gendered use of and access to land resources further undermines access to key resources that most rural women need for livelihoods.[57] Bonti-Ankomah notes that land and environmental resources more generally are vital rural assets; 'they diversify rural livelihood options and provide a sense of security in contexts where formal employment opportunities are limited'.[58] Yet women who live under African customary law practices generally find themselves socially subordinated and derive less benefits from the land.[59] In a context where most rural women make their living directly off the land, any deprivation of land must directly address the gap in providing sustainable livelihoods.[60] While the character of communal land tenure has changed since the advent of democracy, women remain excluded mainly in meetings, consultations, and negotiations on land use.

Njiesassam correctly notes that common practices exclude women from obtaining rights to land in their own right.[61] A study on women, land and customary law highlighted several challenges facing women regarding the customary land tenure system.[62] These challenges include evictions after marriage breakdown or death of a spouse; struggle in accessing land, unless married; evictions from natal

52. IFC Standards.
53. IFC Standards.
54. See also D Buss, B Rutherford, C Kumah and M Spear 'Beyond the rituals of inclusion: The environment for women and resource governance in Africa's artisanal and small-scale mining sector' (2021) 116 *Environmental Science & Policy* 30 on the paradox of the feminization of mining and the increased exclusions of women in decision making
55. See Z Booi 'The Interim Protection of Informal Land Right Act: How does it protect your rights to land? 2013 *LARC* 18.
56. R Ndugwa, E Nairesiae & O Sylla Improving Access to Women's Land Rights Data for Policy Decisions: Lessons Leant and Opportunities linked to SDGs' (2018) Interactive Expert Panel – The Role of Rural Women's land rights and land tenure security in reaching the SDGs
57. U Bob 'Rural women's relations to land resources in Kwazulu-Natal: Issues of Access and control' (2008) *Alternation* 110.
58. S Bonti-Ankomah 'A Closer Look at Agrarian Reform in South Africa' *in* Land Update (2007)
59. U Bob 'Rural women's relations to land resources in Kwazulu-Natal: Issues of Access and control' (2008) *Alternation* 112.
60. G Mutangadura 'Women and land tenure rights in Southern Africa: A human rights-based approach' (2004) Presentation at Land in Africa: Market Asset or Secure Livelihood Conference, London.
61. D Philip *Women, land and Authority: Perspectives from South Africa* (1997).
62. D Budlender, S Mgweba, K Motsepe and L Williams *Women, Land and customary law* (2011) Community Agency for Social Enquiry 10.

homes by family members; exclusion from traditional institutions where key decisions around land use are made; and the perpetuation of these challenges through a denial of meaningful redress by tribal courts.[63] In a context where land rights are already precarious since they are held on behalf of communities, this exclusion and impact becomes more pronounced. Given that women use much of the land allocated for mining for subsistence farming, such decisions therefore overly affect women. In addition, the customary land tenure systems have failed to provide adequate protection to rural communities, particularly women.

3.3. African Customary Land Tenure System

The nature and the quality of consultations on land matters is intrinsically linked to the rights of those to be consulted. Colonisation and the apartheid policy stripped Africans of their title in land. Prior to the dispossession of land, land tenure among Africans was managed through customary law.[64] The character of the customary land tenure system was dual – safeguarding individual and communal rights. Cousins calls this 'a system of complementary interests held simultaneously' and different interests in the same property could vest in different holders.[65] These systems differ from community to community, but the multi-layered approach and the intersectionality of rights between various interests permeates across African communities, including South Africa. An understanding of land tenure therefore answers the '... tripartite question as to *who* holds *what* interest in *what* land'.[66]

Colonisation and the various laws that were passed had the net effect of undermining customary land tenure systems. In the *Tongoana* judgment the court summed up the weakened system as follows:

> What emerges from these regulations therefore is that (a) the tenure in land which was subject to the provisions of the Black Land Act and Development Trust and Land Act and which was held by African people was precarious and legally insecure; (b) indigenous law governed succession to land in these areas, and the application of indigenous law in relation to land in these areas subject to regulations was recognised; and (c) tribal authorities and traditional leaders played a role in the allotment of land in these areas.[67]

Tribal authorities and traditional leaders played different roles in enabling the distortion of the customary tenure system at the hands of the political actors. Notably, most pre-democratic and pre-MPRDA consultations and negotiations were dominated by traditional chiefs, acting on behalf of communities. This gave such traditional authorities power and created wealth for a few as mining companies preferred centralised consultations with authorities, excluding the lawful occupiers and owners of such land. Regrettably, the coming into effect of the MPRDA did not end this pattern, as shown by numerous court cases requiring mining companies to consult the communities directly. Such processes seldom provided meaningful outcomes for the affected owners. The solution seems to be located within a customary law tenure system that recognises women as bearers of rights who must be consulted. In creating a perma-

63. D Budlender & Others *Land and customary law* (2011) 10; P Delius 226; I Evans *Bureaucracy and race: Native Administration in South Africa* (1997) University of California Press

64. D Mailula (2011) 4 *Constitutional Court Review* 79.

65. B Cousins 'Characterising "communal" tenure: Nested systems and flexible boundaries' in Claassens & Cousins (eds) *Land, power and custom: controversies generated by South Africa's Communal Land Rights Act* (2008) 111; see also MS Freudenberger 'The future of customary tenure' (2011) *United States Agency International Development* (USAID) Issue Paper who defines customary tenure as a 'set of rules and norms that govern community allocation, use, access and transfer of land and other natural resources'; P Kameri-Mbote 'The land has its owners! Gender Issues in land tenure under customary law in Kenya' (2005) 'Land tenure refers to possession or holding of the rights associated with each parcel of land' IELRC Working Paper, Available at http://www.ielrc.org/content/w0509.pdf, 3.

66. P Kameri-Mbote 'The land has its owners! Gender Issues in land tenure under customary law in Kenya' (2005) 3.

67. *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CC), para 21.

nent solution to the issue of land tenure, it is essential that women, particularly those in rural parts, are visible within such a system. Secondly, such a system must create accessible and effective ways for the enforcement of such rights. For example, Claassens and Mnisi argue that customary law entitlements to land vesting in women are rendered 'invisible to the formal legal system'.[68] A system that acknowledges the rights of women within a traditional setting may produce meaningful benefits.

This section briefly demonstrates that despite the laudable developments in the protection of precarious rights, women living under customary law are still disadvantaged in asserting informal rights. Once land rights are weakened, other remedies flowing from such rights also tend to be compromised. For example, where compensation is payable due to deprivation of land, some cultural practices only recognise males as entitled to such compensation. This directly bypasses women- or youth-headed households. The above does not mean that all communities experience the same exclusions in terms of participation. In general, communities that have their own entrenched ways of participation that are inclusive of both men and women and that are not dominated by traditional authorities tend to obtain better outcomes in consultations and negotiations with mining companies. Strong rights in land are also important when it comes to negotiations on compensation as envisaged by the MPRDA.

4. Compensation – section 54

One of the key provisions under the MPRDA is section 54 (7) which provides that:

> 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*.

A few things are noteworthy regarding section 54. First, it was primarily drafted and designed to protect and facilitate mining activities, especially in instances where there is resistance from the landowner or lawful occupier. Thus sections 54(1) to 54(6) delineate the rights and procedures intended to assist permission holders in terms of the section to initiate mining operations. Secondly, only at the end of section 54 as shown above is the focus placed on the owner or lawful occupier in relation to a remedy. A somewhat afterthought clause at the end of the section was inserted to cover landowners and lawful occupiers in terms of the procedure and remedy. Thirdly, compensation is payable only if the owner or lawful occupier has suffered or is likely to suffer loss or damage due to prospecting or mining operations conducted on the land.

In practice, calculating compensation occasioned by prospecting or mining operations is often fraught with difficulties. This is so for several reasons. Firstly, and in communities where members are aware of their rights in this respect, the amounts demanded are often not substantiated by the actual loss or damage either suffered or likely to occur. This tends to occur when politically connected individuals dominate compensation discussions. For example, in 2022 while negotiating compensation terms on behalf of a community in Limpopo, the mandate had to be terminated due to unreasonable demands from a few members. This jeopardised a meaningful outcome for other community members. Not only was the compensation reasonable, but it was almost impossible to see the loss or damage suffered as a result of the prospecting activities.

In cases where actual loss or damage due to mining operations is readily ascertainable, the methods

68. A Claassens and S Mnisi 'Rural women redefining land rights in the context of living customary law' (2009) 25 *SAJHR* 491.

and/or formulars used to calculate payable compensation are often unclear and incapable of accounting for all the land usage by the community. Much guidance on calculating compensation related to land has come from the Land Claims Court in restitution matters. However, these methods are often unsuitable in calculating compensation occasioned by deprivation due to mining projects. The architect of the legal provisions in place (restitution vs compensation) and the forums involved tend to be unsuitable for such discussions. Compensation must therefore recompense through placing the dispossessed, insofar as money can do, in the same position as if no deprivation has occurred.[69] This also means that the specific circumstances of the dispossessed such as land usage, cultural and spiritual land usage, the concept of broader ownership (the dead, the living, and the unborn), and livelihoods affected by the mining operations must be considered in calculating compensation. The inadequacy of current methods was expressed in *Haakdoornbult Boerdery CC and Others v Mphela and Others*[70] as follows:

> Western concepts of expropriation and compensation are not always suitable when dealing with community-held tribal land. A wider range of socially relevant factors should consequently be taken into account, such as resettlement costs and, in appropriate circumstances, solace for emotional distress.

Currently, and in resettlements occasioned by mining activities, the market value of the land is used in calculating compensation, which then is subdivided per mealie-field owner. As already mentioned, such measures are often inadequate and do not always capture the nuances expressed above. Mining companies who focus purely on the value of the land or on the value of property loss or damage, while excluding other factors such as the broader land usage and the dignity of the lawful occupiers, short-change communities. As the South African Human Research Council notes 'for compensation to be meaningful, it should account for, inter alia, loss of life, loss related to communal and individually held tenure or title, as well as loss incurred for production value gained from the land, whether that production value is linked to traditional ways of life, or more commercial enterprises.'[71] For Mohlohlo (see below), the compensation negotiated attempted to speak to these underlying issues for the community. Such compensation included a direct payment to the households and an amount for the whole community. The community used part of the community settlement to purchase shares in a company – to which the trickle dividends are paid to the households monthly to date.

5. The Case of Mohlohlo[72]

It is worth noting that meaningful consultation, or the process of engaging with the landowners or lawful occupiers, is a means to an end. Like enabling rights, it empowers the affected persons to protect existing rights and to realise other rights.[73] Certain ingredients are, therefore, necessary for meaningful consultations. These include effective planning and allocation of enough time and resources; providing access to reliable, timely information regarding the proposed project;[74] potential harm or impact to the community; mechanisms to mitigate or minimise such impacts; and the benefits that such a project will bring to the

69. See *Haakdoornbult Boerdery CC and Others v Mphela and Others* para 48.
70. 2007 (5) SA 596 (SCA), para 48.
71. South African Human Rights Commission 'National hearing on the Underlying Socio-economic challenges of Mining-affected communities in South Africa' (2016) 3.
72. The spelling of Mohlohlo often differs in literature and agreements. I have used Mohlohlo and not Mothlotho.
73. On enabling rights see L Chamberlain 'Assessing enabling rights: Striking similarities in troubling implementation of the rights to protest and access to information in South Africa' (2016) 16 *African Human Rights law Journal* 365.
74. *Sustaining the Wild Coast I*, para 101, information must be in a medium and language that can be easily understood by the community members.

community, among other aspects. As demonstrated with the case study below, communities must be given independent technical and legal advisors, at the expense of the project developer or the mining company. Such technical service must be competent and capable to understand the various nuances that are often not captured in purely commercial transactions that are market dominated. This ensures that communities are placed in a better position to understand the risks, potential benefits, and their rights in terms of the proposed projects. It also provides communities with access to technical expertise on how to invest or manage any proceeds emanating from any agreement or transactions in a sustainable manner.

Resettlements for mining projects change the way of life of a community and often tear apart the community in cultural, spiritual, and economic ways. As noted above, Africans generally have a strong and different connection to land, which is often not captured or understood by foreign project developers, let alone captured or expressed when calculating compensation. Due to lack of these insights and nuances in calculating compensation, communities are often shortchanged in the process. Any resettlement or the leasing of land for a longer period requires the placement of such communities at the front and centre of such relocation and compensation that best suits their needs.

Lastly, I do not propose that the following case study is a perfect example of resettlements and compensation. I also do not propose that this case study is the only example where lessons and further developments can be advanced. I propose it as a case study of interest, in which some of the lessons can be developed further for similarly placed communities. Meaningful outcomes often require creative lawyering and consistent, inclusive consultations as key ingredients to meaningful outcomes.

5.1. Relocation Negotiations and Consultation – The case of Mohlohlo

Between 1998 and 2008, Anglo Platinum embarked on a relocation project affecting more than 1 000 families and about 10 000 people who were living in Ga-Puka and Ga-Sekhaolelo villages commonly referred to as Mohlohlo. Most of these relocations commenced in July 2007 after consultations and agreed compensation packages. However, a few families of about 100 households refused to move.[75] RSI represented these families directly and not through any traditional leadership setup. Their grievances included demands for equity ownership in the mine (as opposed to a once-off payment); increased compensation for land loss; priority employment opportunities at the mine; additional compensation for lost agricultural fields; access to sufficient water resources; and transportation provision for school children, among other concerns.[76] The extensive consultations, and their design, structure, and participation levels to address these grievances, produced better outcomes for the families.

Consultations that produce acceptable outcomes for communities require adequate time. In Mohlohlo, the initial relocation agreement for about 62 families living on farms Overysel 815 LR and Zwartfontein 818 LR was signed in 2012, followed by an addendum in 2018. Numerous delays and shifting demands required the mine and the community to spend more time engaging each other. These were consultations between the mine and the community on the one hand and the remaining families among themselves or with their legal and technical representatives on the other. These families were represented by family members, mandated by each household. Typically, at every meeting, there was a scribe who wrote down the list of attendees, a summary of discussions, and timelines for next actionable points.

75. In this part, I wish to limit the discussion only to about 62 families that were relocated to Extension 14.
76. Anglo Platinum 'Mogalakwena Mine Media Update' (2009) available at https://media.business-humanrights.org/media/documents/files/reports-and-materials/Anglo-Platinum-update-on-Mogalakwena-resettlement-Nov-2009.pdf

5.2. Inclusiveness of the Consultation and Traditional Authority

A key feature of these consultations was the absence of traditional authorities or local political leaders. As noted above, relocation agreements were traditionally negotiated under the guidance of traditional authorities, with minimal or no input from the wider community members.

Central to some of these agreements brokered for communities by traditional leaders was the general dissatisfaction by the communities of the process and the outcomes. Mohlohlo differed fundamentally from this process. From the beginning, the establishment of an equitable and democratic negotiation and consultation system, the entrenchment of the property rights vesting in individual households and their members respectively, and the efforts towards levelling of the power imbalance between the community members and their negotiating partners formed the basis of consultations. Women, youth, and elderly persons would all give input during these consultations. For example, a community meeting held in old Mohlohlo on 24 November 2014 was chaired by a young woman.[77]

5.3. Use of Soft Law and Provision of Technical Support

Consultations around resettlements and compensation requires technical and legal support to assist communities in asserting their rights. Many rural communities lack the expertise to understand the implications of resettlement or the skill to negotiate adequate or sustainable compensation. The Relocation Agreement as amended ("Agreement") incorporated the IFC Standards, thereby allowing the community to protect its rights more broadly.[78] The IFC Guidance Note 5 – Land Acquisition and Involuntary Resettlement ("IFC Guidance Note 5") corresponding to Performance Standard 5 acknowledges that project-related land acquisition and land use restrictions can adversely impact communities.[79] It addresses the negative impacts of resettlements, including landlessness, homelessness, joblessness, marginalisation, food insecurity, and loss of access to common land, among others.

The global best practices on similar projects equip the communities with adequate resources to engage in such negotiations. Such support includes legal support payable by the project developer or in the case of Mohlohlo, payable by the mine. The Agreement incorporated a provision for legal costs on behalf of the community, payable on agreed milestones. The agreement therefore differed fundamentally from similar agreements across the country. Resettlements and compensation agreements are often concluded without proper legal or any other technical support on behalf of the communities. It is a feature that further undermines the already weakened informal rights of the communities involved. Instead, community members often rely on public interest law firms or Non-Governmental Organisations ("NGOs") to provide this support. In some cases, community members are often forced to pay for legal services out of their own pockets – a position that further creates hardships and is against the best practices, including the IFC Performance Standards.

Thirdly, the Agreement considered the different needs of the community members and brought in various options to give effect to the agreement. In this regard, community members had the option to choose between an identified farm, a normal resettlement area on agreed farms, or the choice of an area within a 50-kilometre radius of their land. These options are crucial and enable a household to find a solution that meets its unique needs. Families and households within a community have different

77. Community Consultation Notes, on file with the author.
78. The IFC Performance Standards are beginning to find way in cases relating to relocations. See for example *Sishen Iron Ore Company (Pty) Ltd v Mosala and Another* (661/22) 2022 ZANCHC 33 1 June 2022
79. IFC Guidance Note 5 – Land Acquisition and Involuntary Resettlements, 2012.

needs and a one-size-fits-all approach is often inadequate. For example, in resettlement projects, some families may choose to relocate closer to their extended families or to an area that meets their economic aspirations. This is particularly true for those families with livestock or with an interest in farming activities. The Agreement therefore spoke to these key needs by the community.

5.4. Houses, Graveyards and other Structures

In many resettlements and compensation negotiations, the type of houses, size, quality of building material used, and availability of arable land in close proximity to towns or economic zones, is often a major negotiation point. In Mohlohlo, these issues had the potential to threaten the whole Agreement.

In direct response to these concerns, the Addendum to the Agreement provided that families choosing to resettle in Extension 14 were offered a selection of house designs, designed by Peter Rich Associates – a world-renowned architectural firm. This alone brought about decent houses with modern features, that maximised the available space and resources and included modern amenities, often not found in houses in rural areas.

Other facilities agreed upon by the parties and designed by Peter Rich Associates included a modern community meeting place, a creche, a clinic, a sports facility, upgrading of recreation fields for shared use with other neighbour communities, and the construction of a fence or wall around the new resettlement area, commonly known as Extension 14A.

Lastly, the Agreement also included adequate funding and the relocation of graveyards. As previously discussed, the concept of land ownership in African communities is often expressed as a tripartite relationship: ownership by the deceased (buried on the same land), the living, and future generations yet to be born. Consultations on graveyards, their exhumation, and alternative burial sites must be discussed with great sensitivity.[80] In many communities, families have a designated burial place for their loved ones and any relocation of such graves often invokes great pain and emotions for the living. Any negotiations must therefore factor in this issue and be sensitive to the cultural practices of the community in question. The Agreement therefore included a budget allocation for the relocation of identified graves and the provision of transportation services.

5.5. Alternative Land and Sustainable Projects

As demonstrated above, land plays a significant role in the lives of Africans in general. A significant part of the negotiations addressed the issue of alternative farming land. The Phomolong Communal Property Association ("PCPA") was formed as part of the Agreement to hold assets, including alternative farms, for the benefit of community members. Key to the Agreement was therefore the provision of alternative land for farming purposes. The Agreement also provided for the capitalisation of the farm and training of community members interested in taking up farming as a business. The farming projects have not picked up as the community initially opted to lease the farm while relocations were still ongoing. It is important to note that as of 2023, some families were still in the process of relocating from old Mohlohlo. Therefore, the implementation of farming projects will require considerable time.

Secondly, any resettlement agreement must consider the sustainability of any livelihood programmes.

80. Several cases have been lodged against mining companies for disrespecting graves and graveyards. See for example *Langa and Others v Ivanplats (Pty) Ltd and Others* (92090/2016) [2017] ZAGPPHC 829 (16 February 2017); see also B Saccaggi and AB Esterhuysen 'Sekuruwe grave relocation: A lesson in process and practice' (2014) *South African Archaeological Bulletin* 173.

Resettlements disrupt a community's way of life, its economic sources, water, and the 'communal' way of living that often feeds into resources shared among others. Part of the technical and legal support was to advise the community on suitable ways of investing a portion of the compensation paid to the community as part of the relocation agreement. The investment opportunity ensured that the community purchased shares in a company that was also sensitive to the needs of the community. The shareholders agreement, for example, included a trickle dividend clause – thereby allowing the community to receive some distribution throughout the year, pending the declaration and payment of ordinary dividends.[81] As opposed to once-off individual payments, agreements of this nature result in continued sustainability and alleviate hardships often caused by relocations.

Due to the perceived economic benefits of mining, a key area of contention is often the allocation of projects at the mine to community members and the employment of persons coming from the community. In Mohlohlo, a certain number of people were employed from the community. Secondly, certain projects were also ringfenced from the community, including transportation services.

Lastly, relocations also disrupt education for the community members, especially school children, by either moving the community members further from available schools or to schools that are not affordable. The Agreement therefore included provision for the payment of school fees, and the provision of learning equipment and uniforms, among others, for an agreed term. That eased the pressure on the families and created a sense of mutual respect between the mining company and the community.

6. Conclusion

The post 1994 South African government has failed to adequately address the precarious land tenure system for most historically disadvantaged persons. Enacted in 1996, IPILRA protects the rights of informal occupiers and owners of land, but it was meant to be a temporary solution to a complex land tenure problem. Weak titles in land affect the chain of land rights and disproportionately disadvantage women in rural areas. The net effect of this failure to fix the land tenure system is that it compromises and weakens the full realisation and enjoyment of rights by persons in communal land settings. This paper has argued that in South Africa, courts have taken a leading role in interpreting the rights of communities in relation to consultations, resettlements, and compensation.

Across mining communities, women, youth, and the elderly are still disproportionately affected by exclusionary practices around consultations on land matters. I argue that there is a direct correlation between meaningful consultations and the outcomes for communities involved. Using a case study, I demonstrate how soft laws and other international best practices can be used creatively to ensure sustainable, meaningful compensation outcomes for the communities. The legacies of the past, the history of land dispossession and the distortion of the role of traditional authorities has further undermined the negotiation powers of the communities.

Lastly, I demonstrate how the government has not done enough to ensure security of tenure – a position that undermines the bargaining power for communities involved. As long as the customary land tenure system remains weak and dominated by traditional authorities, women and other vulnerable members of the communities will continue to be disadvantaged in consultations and negotiations and ultimately in the outcomes of such processes.

81. This dividend was only paid to the community and was made possible by assessing the company's operational needs and projected income.

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