corruption watch

The Maledu judgment, IPILRA, and the MPRDA

The implications of court judgments for policies that elevate elite interests over the Constitution

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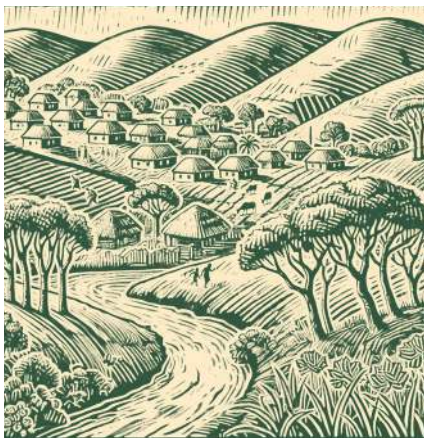

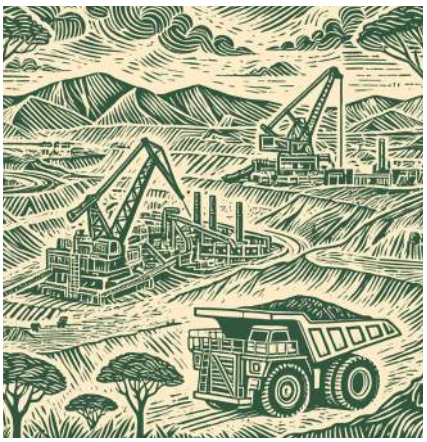

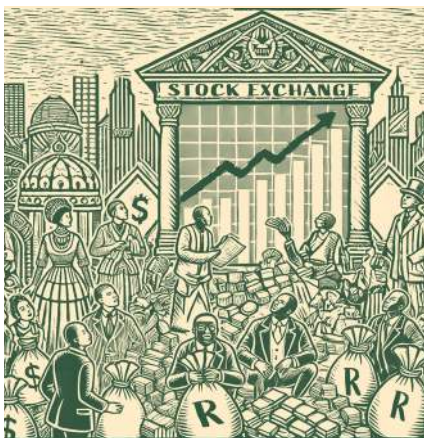

Contents

The Maledu judgment, IPILRA, and the MPRDA

The implications for policies that elevate elite interests over the Constitution

By Dr Aninka Claassens

Introduction

There have been major problems with the expansion of mining into former homeland areas during the post-apartheid era. Mining has come to be closely correlated with dispossession, evictions, and impoverishment for rural communities as described in reports by Corruption Watch, the South African Human Rights Commission, and others. It has precipitated massive human suffering and a scale of resistance and violence that has contributed to growing instability in the sector. The seriousness of the problem has been acknowledged even by the Department of Mineral Resources[1] (DMR) in the preamble to its 2020 Voluntary Guidelines.[2]

How has this level of tension, dispossession, and violence come to co-exist with South Africa's world-renowned Constitution protecting vulnerable rights? Some have sought to lay the blame at the door of the laws governing mining and tenure security, being the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) in relation to mining, and the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) in relation to tenure security.

In this paper I argue that the MPRDA and IPILRA pull in very different directions, and that IPILRA, as illustrated by pivotal court judgments in 2018 and 2021, can and has begun to play an important role in securing vulnerable tenure rights. I suggest that the MPRDA was enacted in a very different political context from IPILRA, even if only six years later, and the dispossession confronting rural communities stems

1. For the sake of consistency and clarity, this paper refers to the Department of Mineral Resources and Energy as DMR and Department of Agriculture Land Reform and Rural Development as DLA because the departments have undergone several name changes over the years. This approach aims to simplify references and avoid confusion related to the various name changes.
2. 'Issues around consultation have been problematic in that there have been no guidelines on how it should be conducted, and as a result there has been resistance on the part of many landowners and communities against mining activities in their land. This has had a negative impact on the economic growth and socio-economic development of not only the affected communities, but on the country as a whole, as it has resulted in companies being unable to proceed with their mining activities.' From the preamble to voluntary DMR consultation guidelines.

from the values and priorities embodied in the MPRDA, rather than from IPILRA. The effectiveness of IPILRA was however fundamentally undermined when government decided to stop enforcing it at the same time as the MPRDA was being developed.

This paper is divided into three sections. In the first I set out the political background to the enactment of IPILRA and the MPRDA and describe their basic features. In the second, I discuss the pivotal court judgments of 2018 and 2021 and their far-reaching implications for informal land rights in rural areas. In section 3 I discuss the way forward after the judgments – what would need to change for rural land rights to be taken seriously, and for mining to be able to co-exist with rural land rights in a stable and mutually beneficial arrangement. I discuss possible technical solutions such as the promulgation of regulations to guide the implementation of IPILRA, and a new law to provide for more comprehensive tenure reform solutions. I argue that for these to fly, the political forces and ideology that gave rise to the MPRDA would need to be confronted.

IPILRA was enacted in 1996 to give effect to the tenure security promised in section 25(6) of the Constitution. It was enacted at a time when redress for past discrimination focused on the poor and the vulnerable, who had borne the brunt of past racial dispossession and exclusion from formal rights. By the time the MPRDA was enacted in 2002 the political pendulum had swung away from focusing on the marginalised in favour of Black Economic Empowerment (BEE) – including incorporating black entrepreneurs into the ownership and profits of the mining and agricultural sectors.

Land reform policy had shifted from targeting the poor to supporting those who had most capital to contribute. It had also swung from securing the tenure rights of the most vulnerable, to supporting the claims of traditional leaders to ownership of land and power over the 18-million South Africans living in the former homelands.

A package of laws[3] to bolster the power of traditional leaders was developed simultaneously with the MPRDA. These laws cut across the citizenship rights and tenure security promised to ordinary people by the Constitution, leading to ongoing opposition and litigation about the lack of accountability measures in the new laws, which has continued into the present.

IPILRA explicitly requires the consent of rural rights holders (as opposed to traditional leaders) before they may be deprived of informal land rights. However, within four years of its enactment IPILRA came to be disregarded as a relic of a former age. The Ministry of Land Affairs, which had sponsored it initially, stopped all enforcement of its provisions. Ignored by its own Minister, it was similarly dismissed as irrelevant by the DMR and the rest of government. It did remain on the statute book, because to repeal it would breach sections 25(6) and (9) of the Constitution.

It was not until a series of court judgments in cases bought by desperate rural people in 2018 (about IPILRA and the MPRDA) and 2021 (about IPILRA and the Ingonyama Trust) that government and mining houses were forced to acknowledge the existence of IPILRA and the tenure rights it protects, and to take these seriously.

The 2018 and 2021 judgments upholding IPILRA rights have introduced a major shift in the mining terrain. People with informal land rights must now be treated as key stakeholders and their consent sought prior to any deprivation of their land rights. Expropriation of their rights is possible, but only after a court process that weighs the rights and interests of different parties. This is a sea change from the prior resort to eviction proceedings which treated rural rights holders as an inconvenience to be summarily

3. The Traditional Leadership and Governance Framework Act (TLGFA) 41 of 2003, the Communal Land Rights Act 11 of 2004 (subsequently struck down by the Constitutional Court), and the Traditional Courts Bill of 2008.

dispatched in the interests of mining expansion.

Problems remain, however, in that IPILRA was designed to be an interim holding measure and the permanent law it envisaged was never enacted. Nor were regulations to augment IPILRA ever introduced. There is lack of clarity in respect of who holds IPILRA rights and how their consent must be obtained. Similarly, there are not clear standards to guide and adjudicate the fairness of the process of obtaining consent. This is compounded by ignorance of customary law and its requirements,

In this paper I propose that technical solutions to these gaps are possible. These are constrained by whether there is sufficient political will within government to promulgate regulations or introduce comprehensive new legislation to guarantee security of tenure. A key issue is that government appears committed to outsourcing control over land and people in the former homelands to traditional leaders, without checks and balances to protect basic rights. Section 3 discusses the interests and constraints affecting different players in this arena, including the ministries of Land and Mining, mining companies, traditional leaders, and rural land rights holders.

1. IPILRA, THE MPRDA, AND TRADITIONAL LEADERSHIP LAWS

1.1. Background concerning IPILRA and the MPRDA

IPILRA and the MPRDA are both post-apartheid pieces of legislation. IPILRA seeks to secure vulnerable land rights, the MPRDA seeks to support and regulate the expansion of mining for the public good. Some of their stated purposes seem to align with one another, and yet until the Constitutional Court's *Maledu* judgment[4] of October 2018, the MPRDA was routinely used to expand mining in a manner that disregarded and trumped the informal land rights protected by IPILRA, especially in former homeland areas where many valuable minerals are concentrated.

IPILRA was designed to address the legacy of past discriminatory laws by protecting the *de facto* tenure security people managed to create despite, or outside, the remit of discriminatory laws. It defines informal land rights as rights based on established *de facto* or customary occupation of land and provides that the holders of informal land rights may not be deprived of their land without their consent, except by expropriation. As its title states it was designed to be an interim measure pending the introduction of more comprehensive tenure legislation, the draft Land Rights Bill, in 1999. As such it is essentially a protective measure to ensure that informal land rights cannot simply be denied or ignored in the interim.

The MPRDA transfers ownership of underlying mineral rights from the previous (overwhelmingly white) holders of mineral rights to the state and regulates the granting of prospecting and mining rights to mining companies who seek to mine the land.

While the MPRDA has been justified as reforming the pre-existing reality of mineral rights vesting overwhelmingly in white owners, this does not hold for the former homelands where the land and minerals were generally nationalised to the homeland governments. Black people were denied ownership rights in the former homelands, just as they were in 'white' South Africa. This legacy is ignored and compound-

4. Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another (CCT265/17) [2018] ZACC 41; 2019 (1) BCLR 53 (CC); 2019 (2) SA 1 (CC).

ed by the justification that the MPRDA's transfer of mineral rights to the state addresses entrenched racial inequality.

A key feature of the MPRDA is that it requires applicants for mining rights to include BEE partners. This requirement is vaunted as 'transforming' the mining industry through the inclusion of black individuals as partners in mining companies. The MPRDA also requires mining companies to develop and submit 'social and labour plans' as part of their application for mining rights. These are meant to detail how they plan to support development in mining-affected communities and improve conditions for their workers.[5] While the composition of mining companies has changed due to the BEE requirements, little has changed for those on whose land mining takes place – in fact, in many areas poverty and exclusion has deepened.

Two crucial court judgments in October and November 2018 upset the prevailing status quo by finding that the MPRDA must be read concurrently with IPILRA. In other words, the MPRDA cannot be read to trump IPILRA rights. The first of these two, the Maledu judgment, finds that the consent of informal land rights holders must be obtained before they can be deprived of their land rights.

The second judgment, the Baleni judgment,[6] goes further in finding that the state may not grant mining licenses before the consent of informal land rights holders has been obtained. It also finds that the holders of informal land rights are not in a position to provide their free and informed consent if they are denied access to the information contained in mining rights applications, as had been the norm. It guarantees them access to all such documents, including social and labour plans, provided that sensitive financial information may be redacted.

1.2. Background history in relation to the enactment of IPILRA

IPILRA was enacted in 1996 to give effect to sections 25(6) and 25(9) of the Constitution, which state:

> 25(6). 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.
>
> 25(9). Parliament must enact the legislation referred to in subsection(6).

Section 25 was included in the Constitution in the context of debates about the property clause during the Constitutional Assembly process. Rural activists who had been involved in struggles against forced removals and farm evictions, and for secure tenure rights in both urban and rural areas, opposed the inclusion of a property clause that would entrench the outcome of past dispossession and systematic exclusion as a fundamental right. A compromise was reached, in terms of which certain sections provided positive land reform rights to balance the protection of property rights. These were section 25(5) which asserted the right of equitable access to land for land redistribution purposes, section 25(6) which protected tenure security, and section 25 (7) which provided for restitution of land rights for forced removals after 1913. The Constitution was adopted in 1996, the same year that IPILRA was introduced by the Department of Land Affairs (DLA) and enacted by Parliament.

Many of the senior civil servants in the post-1994 DLA were drawn from anti-apartheid land-support or-

5. They were routinely withheld from affected rural people living around the mines both by mining companies and the state, forcing those affected to hire lawyers to submit PAIA applications.
6. Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP).

ganisations and identified strongly with the land rights contained in section 25 of the Constitution. A key document extrapolating the vision for land tenure reform was the 1997 White Paper on Land Reform.[7] It states:

> *New tenure systems and laws should be brought in line with reality as it exists on the ground and in practice … The recognition of de facto systems of vested rights in land as a starting point for solutions is fundamental to tenure reform. … The most basic form of vested rights in land is established occupation. This must not be jeopardised unless viable and acceptable alternatives are available. Another important form of established vested rights is long term historical ownership of the land which exists in practice, but which is not recognised in law.*[8]

To give effect to this vision, a drafting team composed of lawyers and former land rights activists was constituted in the Ministry of Land Affairs to draft a Land Rights bill that would provide legal recognition to *de facto* underlying land rights that had been denied or ignored by apartheid laws. This was a complex task fraught with difficulties. Upgrading all rights indiscriminately could entrench the status quo of women's exclusion and consolidate, rather than unpack, the outcome of waves of forced resettlement onto land where other black people had prior, historical rights. Accordingly, the tenure reform core group in the DLA undertook several pilot projects to engage with and attempt to find solutions to these difficulties. This experience fed into the drafting of the Land Rights Bill, which took longer than anticipated, but by 1999 was virtually complete.

The research engagement associated with the pilot projects indicated the urgent need for an interim measure to protect vulnerable land rights holders while the draft Land Rights Bill was being finalised and during its passage through Parliament. Pre-emptive evictions were, and are, an ever-present danger in the context of land reform laws. It is for this reason that IPILRA was designed to be an interim holding measure that provided only for base-line protection[9] for existing informal land rights until the Land Rights Bill was enacted.

IPILRA, which is short at only two pages, provides for regulations to add meat to its bones. These would help to clarify from whom, and how, consent should be obtained. Accordingly, the tenure reform core group developed and tested draft procedures for obtaining and witnessing consent. These procedures were officially adopted by the DLA's policy committee in 1998 and subsequently incorporated into forms to be filled out by officials to certify that consent was properly obtained in instances where development entailed changes in land rights or deprivation of rights. Experience with the procedures was to be fed into draft IPILRA regulations and the Land Rights Bill drafting process. When then President Thabo Mbeki appointed a new Minister of Land Affairs in 1999 she changed the policy, and the procedures fell into disuse.

1.3. Context in which IPILRA was sidelined and the MPRDA enacted

In 1999 the term of first post-apartheid president Nelson Mandela ended and he was replaced by Mbeki. Mbeki appointed a new Minister of Land Affairs who instituted a moratorium on the rapidly expanding redistribution programme, and halted work on the draft Land Rights Bill. In its place a new team of drafters got to work on the Communal Land Rights bill that provided for the transfer of title of 'communal land' from the state to traditional institutions and leaders. This dramatic change of direction was in line

7. Still the only official White Paper issued by the DLA.
8. White Paper on Land Reform Policy 1997 page 85.
9. The Land Rights Bill envisaged a continuum of rights from basic protection to higher content registrable land rights depending on the input of the land rights holders.

with draft legislation about the powers of traditional leaders that was being simultaneously developed within the Department of Constitutional Development.[10] These developments took place at the same time as the MPRDA was being developed by the Department of Mineral Affairs.

At the national levels there had already been a shift from the earlier Reconstruction and Development Policy to the new Growth, Employment and Redistribution policy. It is beyond the scope of this paper to discuss this shift which is well documented in the literature. Suffice to say that there was a clear shift away from the focus on redistribution to a focus on BEE particularly targeted at the ownership and management of major industries. A key driver of BEE policy was the mining industry which sought to stabilise the sector by ensuring that influential black politicians and entrepreneurs also had stakes in maintaining the status quo. The MPRDA was enacted in 2002 with the Black Economic Empowerment Act 53 of 2003 following closely behind. This opening up of mining to black partners happened at the same time as the platinum mining boom was taking off in the former Bophuthatswana and Lebowa homelands, helping to consolidate links with influential figures who had connections with the former homelands, such as Patrice Motsepe[11], Kgosi Nyalala Pilane,[12] and Seth Nthai[13].

The Department of Mineral Affairs came to play a key role in identifying 'acceptable' black economic empowerment partners for those applying for mining rights. It also told the holders of mining rights to negotiate land access with traditional leaders as opposed to the rural residents directly affected by mining, despite the lack of legislation empowering traditional leaders to transact land rights. Its power to grant or withhold mining rights lent weight to its advice.

1.4. Traditional leadership laws

The Traditional Leadership and Governance Framework Act of 2003 (TLGFA) resurrected the boundaries of the discredited Bantu Authorities Act 68 of 1951 that had served as the local government level of homeland administration. The Act sought to revive the powers with which traditional leaders had been vested during apartheid. The traditional leader lobby was not satisfied with the Act, however because they wanted explicit ownership and control over land, which had been denied them during apartheid. The TLGFA could not provide them with ownership or power over land, as land is a national competence and only the Ministry of Land has the power to introduce land legislation. The Communal Land Reform Bill, which already existed in draft form, was amended at the 11th hour to provide that 'traditional councils' (the new name for Bantu or tribal authorities) would have the power of land administration throughout the former homelands.

The MPRDA was enacted in 2002. The TLGFA was enacted in 2003, and the Communal Land Rights Act (CLRA) followed hard on its heels in early 2004. People living within the resurrected Bantustan boundaries found themselves once again subjects of apartheid-era tribal units, now renamed traditional communities, regardless of their views. The CLRA provided that ultimately ownership of land in the former homelands would be transferred from the state to such traditional communities headed by traditional leaders. All three pieces of legislation cut across and contradicted IPILRA's focus on decision-making authority as a key component of informal land rights vesting in individuals and user groups.

The CLRA was challenged by rural communities on the basis that it undermined their tenure security. In 2006 the North Gauteng High Court found that sections of the CLRA undermined tenure security

10. This was the TLGFA. The Department of Justice's Traditional Courts Bill was later added to the package.
11. Through his father ABC Motsepe.
12. Of the Bakgatla ba Kgafela and the respondent in much litigation including two Constitutional Court judgments.
13. Who was struck off the roll of advocates.

and thereby flouted section 25(6) of the Constitution. That decision was appealed to the Constitutional Court, which in 2010 struck down the CLRA in its entirety on procedural grounds. Fourteen years later there is still no law to replace it, despite the requirement in section 25(9) of the Constitution that legislation must be enacted to secure tenure rights.

Notwithstanding that the CLRA was struck down before it was brought into operation, the DMR continues to advise mining houses to consult traditional leaders about the expansion of mining, rather than the people whose informal land rights stand to be directly affected. The colonial and apartheid mechanism of 'tribal resolutions' has been resurrected to replace the requirement of consent by affected rights holders. It appears that there is little if any government supervision of the adequacy of such consent. Often consent documents take the form of a handful of signatures 'on behalf of the tribe', as emerged in the Maledu litigation.

1.5. IPILRA - down and out, but still alive

IPILRA has remained on the statute books despite the dramatic policy swing away from rural land rights vesting in families and individuals. In fact, it has been renewed[14] every year under pressure from civil society. The DLA is aware that to repeal it, or to refuse to renew it, would precipitate a constitutional challenge.

The repeal of the CLRA, and with it the vesting of land administration power in traditional leaders, has left a seeming legal vacuum in relation to who has the power to sign off on mining deals in the former homelands. The MPRDA and its regulations have come to fill that vacuum. These provisions and regulations ignore IPILRA, treating rights holders at best as 'interested and affected parties' insofar as the environmental impact of mining is concerned.

1.6. Tenure security – the divergence between the MPRDA and IPILRA

The key difference between the MPRDA and IPILRA in relation to tenure security is that the MPRDA provides only for consultation, whereas IPILRA requires the consent of IPILRA rights holders prior to developments that would deprive them of their informal land rights.

The MPRDA

The MPRDA provides that once the Regional Manager accepts a mining right application, he or she must notify the mining right applicant in writing, to:

> *"(a) submit the relevant environmental reports, as required in terms of Chapter 5 of the National Environmental Management Act, 1998, within 180 days from the date of the notice; and*
>
> *(b) to consult in the prescribed manner with the landowner, lawful occupier[15] and any interested and affected party and include the result of the consultation in the relevant environmental reports."*

On accepting a mining right application, the Regional Manager must also (in terms of section 10(1) of

14. Section 5(2) of IPILRA provides that the Act will lapse on 31 December 1997 but that the Minister may, by notice in the government gazette, extend the application of the Act for periods not exceeding 12 months.
15. A common misperception among mining companies and their lawyers is that anyone without title deeds or a rental or employment contract is not a lawful occupier. It is precisely this misperception and its consequences that IPILRA was enacted to redress.

the MPRDA) put up a notice ("Mining Right Acceptance Notice") and call upon interested and affected parties to submit their comments regarding the application within 30 days. Despite these consultation requirements in the Act, the process of consultation is generally subsumed within the environmental approvals process which is governed by environmental regulations aimed at establishing the views of 'interested and affected parties' in relation to the impact of mining on the environment.

Amended MPRDA regulations mentioned IPILRA for the first time in 2020, by inserting IPILRA rights holders in the list of 'interested and affected parties' to be included in the consultation process. But the consultation process remained governed by environmental regulations that, by their nature, were not designed to elevate the interests of those whose homes and livelihoods are directly at stake over other 'interested and affected parties' with environmental concerns. Nor did the amended regulations mention that the MPRDA must be read concurrently with IPILRA, and the IPILRA consent requirements complied with, despite the amended regulations being introduced after the Maledu judgment had clarified the law in this regard.

As the facts of the Maledu case (discussed below) indicate, companies with mining rights have resorted to eviction proceedings to 'get rid' of such occupiers after the most cursory of 'consultation' processes. In many instances this consultation has not even been with the people directly affected – those living within the path of the proposed mining – but with traditional leaders or 'tribes' who claim blanket jurisdiction over people and land.

IPILRA

IPILRA by contrast, explicitly requires the prior consent of those whose land rights stand to be affected before deprivation of rights. It defines informal land rights as the 'use of, occupation of, or access to land' in terms of customary law, indigenous law, usage, and administrative practice in particular areas. These areas cover mainly[16] the former homelands and SADT areas to which black people were relegated[17] during apartheid.

Section 2(1) provides that 'no person may be deprived of an informal right to land without his or her consent'. 'Person' is defined to include community or part thereof.

Section 2(4) clarifies that where land is held on a communal basis there must be proper notice of, representation of, and participation in meetings of directly affected rights holders. It refers to decisions –

> *'taken by a majority of the holders of such rights present or represented at a meeting convened for the purposes of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.' (my underlining)*

These sections make it clear that it is those threatened with deprivation whose consent is required, not other people whose land rights are not directly at issue.

The size of the group of decision-makers will therefore expand or contract depending on who is impacted by the scope of the proposed mining. Some impacts will be direct and clear, for example where

16. There is a fourth category of rights, beneficial occupation which applied throughout South Africa. This was intended to cover all urban and rural areas where people had managed to establish beneficial rights despite apartheid legal prohibitions. However, the Act limited the period of beneficial ownership to five years of continuous occupation prior to 1997 (Section 1(iii)(c)). This cut-off date has never been amended despite the act being renewed every year so the number of people who are able to prove five years of beneficial occupation prior to 1997 is now much smaller.
17. This relegation was effected through restrictions on ownership and tenancy by the 1913 Land Act, by forced removals from 'black spots' in 'white' South Africa between 1960 and 1987, and by the endorsement of black people out of 'white areas' in terms of the infamous pass or influx control laws.

houses and fields belonging to specific families or individuals are targeted for relocation. Others will affect people who share access to resources such as grazing land in particular areas.

IPILRA defines 'community' as 'any group or portion of a group of persons whose rights are derived from shared rules determining access to land held in common by such group' (1(ii)). In providing for 'portion of a group' the definition acknowledges that sub-groups of those directly affected may have different interests from those of wider encompassing communities.

It is important that in neither IPILRA nor the MPRDA does the definition of community assume communities to be 'tribes' or traditional communities. It was only with the enactment of the TLGFA in 2003 that communities came to be equated with tribes.

The MPRDA[18] defines community as:

> *'a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law'. Provided that, when 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 affected by mining on land occupied by such members or part of the community. (section 1)*

This too makes it clear that those directly affected by mining are the key stakeholders, as opposed to larger encompassing tribes. A crucial problem is that the default to colonial- and apartheid-era tribal resolutions in place of IPILRA consent means that the overarching 'tribe', sometimes consisting of hundreds of thousands of people, replaces the particular people or village whose land rights stand to be affected or destroyed by mining.

Those directly affected became structural minorities within large superimposed tribal units. There is, moreover, no legal basis on which traditional leaders are authorised to sign off on 'tribal' land rights or on rural people's land rights since the CLRA was repealed in 2010. While the TLGFA resurrected controversial apartheid-era boundaries it could not provide traditional leaders with power over land. Despite this the DMR advises applicants for mining rights to consult with chiefs rather than those directly affected, and to include them either as BEE partners or if not, then in some other way.

2. JUDGMENTS ON THE MPRDA, IPILRA, AND THE INGONYAMA TRUST

In this section I discuss judgments dealing with flaws in processes of consultation and consent with rural rights holders in customary areas. The first judgment, Bengwenyama[19], deals with the inadequate tick-box approach to consultation that has characterised mining, and finds that it falls short of the requirements of the MPRDA. The next two, Maledu and Baleni, deal with the interface between IPILRA and the MPRDA in relation to the requirement of consent. The third, the CASAC Ingonyama[20] leases case, deals with leases that holders of IPILRA and customary rights were forced to enter into in KwaZulu-Natal. While Maledu and Baleni confine themselves to the context of 'community' rights, the Ingonyama judgment drills deeper and deals with family- and individually-held IPILRA and customary law rights within

18. The MPRDA was enacted in 2002 before the 2003 TLGFA resuscitated 'tribes' and renamed them 'traditional communities.'
19. Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC).
20. Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others (12745/2018P) [2021] ZAKZPHC 42; 2021 (8) BCLR 866 (KZP); [2021] 3 All SA 437 (KZP); 2022 (1) SA 251 (KZP) (11 June 2021)

communities. This has important implications in relation to consent, and from whom and how it must be obtained in respect of the three categories of IPILRA rights, being occupation, use, and access. These implications are further discussed in section 3.

It is significant that both the Bengwenyama and Maledu judgments are appeal judgements by the Constitutional Court which override earlier judgments by the High Courts and Supreme Court of Appeal (SCA) that had validated and reinforced practices that undermine the rights of the holders of informal land rights in customary areas. Lower courts routinely grant interdicts to traditional leaders to stop meetings attempting to assert accountability[21] and accept 'tribal resolutions' as sufficient proof of consultation and consent.

2.1. The 2010 Bengwenyama judgment

This is a Constitutional Court appeal judgment after the SCA and the lower courts had rejected prior appeals by the applicants. The applicants are a rural community who had applied for a prospecting right on their own land, only to discover that the DMR had granted the prospecting right to an external company which had failed to consult them.

A central feature of the judgment is that context matters, and that legal provisions must be interpreted to take into account factors such as the impact of past racial discrimination on ownership of land, access to mineral wealth, and the distribution of power and wealth in society (para 1). The judgment finds that 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 (para 63). It re-examines the requirements of the MPRDA by reference to the objects of the Act and finds that the different notice and consultation provisions in the Act are indicative of a serious concern for the rights and interests of landowners and lawful occupiers (para 63).

The judgment finds that consultation should result in an accommodation between the applicant for the license and the land rights holder with respect to compensation for the inevitable losses suffered by the land rights holder (paras 38 and 65).

> *Another more general purpose of the consultation is to provide landowners and lawful occupiers with the necessary information on all that is to be done so that they can make an informed decision (para 66).*

Despite Bengwenyama's finding in 2010 that the applicant for a prospecting (or mining) right must keep the landowner or lawful occupier informed about the application, provide sufficient detail about the likely impact of the mining right, and consult with a view to reaching agreement about how to accommodate that impact on the owners' or occupiers' enjoyment of their land rights (para 68), little changed in relation to how applications for mining rights were assessed and processed by the DMR. This is borne out by the facts set out in the subsequent Maledu and Baleni judgments.

2.2. The Maledu judgment of October 2018

The Maledu judgment was a(nother) unanimous appeal judgment of the Constitutional Court, in this instance against an eviction that had been ordered by the North West (NW) High Court and upheld by

21. This practice is described in the Constitutional Court's 2010 Pilane v Pilane judgment which criticises Kgosi Nyalala Pilane for routinely resorting to such interdicts and overturns previous judgments granting and upholding such interdicts. Despite the Pilane v Pilane precedent such interdict applications are still often granted to traditional leaders in lower courts in rural areas.

the SCA. The facts concern the Lesethleng community whose forebears had bought a farm in the vicinity of Rustenburg in 1919. At the time that the villagers bought the land, the 1913 Land Act prohibited black people from owning land in their own names. The original group who had clubbed together to raise the purchase price of the farm were thus forced to register it as held in trust in the name of the overarching Bakgatla baKgafela tribe, which they were part of. It was a common practice in the northern provinces for land buyers to club together to buy land, and to be required to register it in the name of a tribe or the Minister of Native Affairs, rather than in their own names.[22] It is also common practice for the descendants of the original buyers to maintain exclusive use and occupation of the purchased land, to the exclusion of the rest of the tribe, as was, and is the case in this instance.

When mining was about to expand onto the purchased farm the mining company, headed by the traditional leader of the Bakgatla baKgafela 'tribe,' failed to consult the descendants of the original buyers even though they were the exclusive users of the farm. Instead, he relied on a 'tribal resolution' signed by a handful of people, none of whom were from Lesethleng. The resolution purported to represent the views of the much larger[23] encompassing 'tribe', within which the Lesethleng community were a minority.

The DMR granted the mining right despite the lack of evidence of effective consultation (whether with the tribe or with those directly affected), and the outraged Lesethleng villagers then physically barred the mining company from starting operations. They insisted they were the rightful owners of the land, and that mining could not commence without their agreement. The mining company applied for an eviction order against them, which was granted by the NW High Court and upheld on appeal by the SCA. They were obviously unable to provide a title deed as proof of their land ownership, which was therefore disregarded by both courts.

The Constitutional Court overturned the eviction order and made several far-reaching findings about the correct interpretation of the MPRDA, and of IPILRA. The Lesethleng villagers had argued that they were landowners, but the amicus in the Constitutional Court raised the issue of IPILRA rights. While the applicants did not have proof of their landownership status, they fell squarely within the definition of IPILRA in that they had (and have) exclusive use of the land despite their lack of formal title, which had been denied them by past discriminatory laws and practices. The Court found that the granting of a mining right does not extinguish pre-existing land rights as was argued by counsel for the mining company. It found further that the MPRDA cannot override or exclude the protections for the holders of informal land rights enshrined in IPILRA and the Constitution. It found that the two laws must be read concurrently. This means that consent must be obtained from the holders of informal land rights (being those whose rights are directly affected) before mining can override or undermine their land rights.

The judgment also found that mining companies cannot resort to eviction proceedings before, or without complying with the dispute resolution provisions in section 54[24] of the MPRDA. It found moreover

22. 'No chief ever bought a piece of land!' Struggles over property, community and mining in the Bakgatla-ba-Kgafela Traditional Authority Area, North West Province. S Mnwana, G Capps – Society Work and Development Institute. Report 3. Wits University 2015.
23. There are at least 32 villages within the Bagatla ba Kgafela 'tribe', each of which is composed of separate clans with unique histories of land acquisition and occupation.
24. Section 54(3) stipulates that "[i]f the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage." Furthermore, in terms of section 54(4) "if the parties fail to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965), or by a competent court".

that section 54 disputes must be resolved before mining commences (Greyling 2022).[25] This requires that compensation for deprivation must be agreed *prior* to the commencement of mining, significantly changing the balance of power between powerful mining companies and vulnerable villagers asking for compensation once their surface rights to land have already been rendered valueless by mining.

2.3. The Baleni judgment of November 2018

This is a judgment of the North Gauteng High Court concerning the Xolobeni community on the Wild Coast of the Eastern Cape. It has never been appealed despite numerous statements by the Minister of Mineral Resources, Gwede Mantashe, of his intention to lodge an appeal, and therefore stands as an undisputed judgment.

Unlike the Maledu judgment which concerned a dispute between mining-affected villagers and a mining company headed by their traditional leader, the Baleni case was against the state. It took the form of a declarator application seeking to clarify the law. Essentially, the Xolobeni community argued that the state could not issue a mining right over their land before IPILRA had been complied with – in other words until IPILRA rights holders had consented to mining on their land. They argued further that the process and terms of consent must comply with their living customary law. As discussed below, their customary identity and way of life is of particular significance to them.

The judgment finds in their favour. It finds that the state may not grant mining rights without the prior consent of those whose IPILRA and customary land rights would be affected by mining. It finds furthermore that the process of granting and obtaining consent must be done in accordance with the customary law of those whose land rights are affected. Such consent must be 'free, prior and informed'.

The background to the case is instructive as the Xolobeni community have retained particularly intact and highly valued forms of customary law and authority over generations. They have lived on the pristine Wild Coast in the Eastern Cape for centuries and have a proud history of repulsing both colonial and apartheid forms of oppression, including conquest and the infamous Bantu Authorities Act of 1951. They have a history of continuous use of land and sea resources governed by customary law. The terms and strategies used to oppose and defy conquest and the imposition of Bantu Authorities were informed by the strong assertion of their customary identity as the rightful owners and users of land along the Pondoland coast. Historically they would have been classified as 'red'[26] as opposed to 'school' people, meaning that they valued their indigenous identity and culture over the expansion of mission education, religion, and cultural norms.

Their land is rich in titanium and other valuable minerals, and an Australian company, Transworld Energy and Mineral Resources, had long sought to mine it. There has been concerted resistance to the expansion of mining into their villages and to other 'development projects' such as the expansion of the N2 toll road that would disturb their customary way of life and the pristine environment for eco-tourism which is their preferred form of development.

They vociferously support the inclusive nature of customary decision-making processes and forms of authority (for example they support the local headwoman and the late Mpondo king Mpondombini Sigcau and his widow), but they have fallen out with traditional leaders who support mining. They accuse

25. https://www.polity.org.za/article/is-section-54-of-the-mprda-a-practical-mechanism-to-resolve-issues-between-right-holders-in-terms-of-the-mprda-and-owners-or-lawful-occupiers-2022-10-06 By Nina Greyling, Polity website, 2 October 2022.

26. The equation of the term 'red' with a strong indigenous Xhosa identity was noted by historians and anthropologists and has been reinforced in popular culture by Zakes Mda's book The Heart of Redness. It derives from the use of red ochre.

specific leaders of being bought by the mining companies and betraying the customary values of consultation and inclusive decision-making. This came to a head after the mining company appointed their local inkosi, Lunga Baleni, as a shareholder in their company. Prior to that he had opposed the mining.

A key flash point of tension was that the mining company had failed to identify exactly which land would be mined and who would be directly affected. Instead, the mining company and government representatives have chosen to consult with senior traditional leaders from broad swathes of nearby villagers. This ignores the very real differences of interest between those who stand to be directly deprived of their land rights, and others in the broader area whose land rights will not be directly affected, but who hope to profit from promises of employment and preferential contracts with the mine. Minister Gwede Mantashe has long called for agreement by traditional leaders, or a polling of the wider area, rather than the identification of those directly affected and direct engagement with them.

The Baleni judgment elicited a furious response from Minister Mantashe. In his view it usurped the state's prerogative to issue mining licenses in the public interest and instead bestowed that authority on self-interested rural communities. He warned that this would lead to 'corruption', a risible proposition in light of the DMR's own abject failings and its insistence that mining companies accept the BEE partners it favours. Despite many threats to do so, he has failed to appeal it, no doubt because of legal advice that the unanimous Maledu judgment had put it beyond doubt that IPILRA and the MPRDA must be read concurrently, and that the constitutionally guaranteed right to tenure security must be upheld.

2.4. CASAC Ingonyama leases judgment of 2021 – rights of individuals and families within customary law.

The three judgments discussed above deal with the rights of 'customary communities' rather than the rights of families and individuals living within customary tenure systems. We now go on to briefly discuss the Ingonyama lease case (CASAC Ingonyama judgment) even though it does not deal with mining specifically.

The Ingonyama Trust, which is an organisation *sui generis* to the province of KwaZulu-Natal, began to issue the holders of IPILRA and customary land rights with leases in about 2007. These leases required the lessees to pay escalating amounts of rent for land they already occupied and used (often for decades, sometimes for generations), and provided that failure to pay would result in eviction.

The practice of forcing people to take out such leases was challenged in the Kwazulu-Natal High Court on the basis that it undermined IPILRA rights, customary law ownership rights, and the constitutional right to tenure security. The CASAC Ingonyama judgment found that the leases programme undermined IPILRA, customary law, and the constitutional right to tenure security, and declared it to be unlawful. The court ordered that no further leases be issued, that existing leases be cancelled, and the rent paid thus far be refunded.

As in the case of the Baleni judgment there were threats of appeals, not by the Minister[27] in this case, who agreed to abide the judgment after initially opposing the application, but by the Ingonyama Trust Board. An appeal was lodged but later withdrawn and the High Court judgment thus stands.

The judgment provides at para 96 that:

> *Under customary law, each family head has the right to be allotted a family home site, arable*

27. In this instance the relevant Minister is the Minister of Land Affairs.

> *land and a right to graze his livestock on pasture lands. The land is allotted to an individual without requiring anything in return in the nature of a purchase price or rental. The individual's holding of a portion of the land allotted to him or her is sacrosanct in that it is inviolable and passes from generation to generation (inheritable). It becomes the property of the individual's family. Nothing can be done with it without the involvement and consent of such individual or his or her family members. The owner of residential or arable land acquires an exclusive right to its use.*

It goes further to state at para 101 that;

> *The rights of persons to occupy or use Trust-held land are acquired through Zulu customary law, customs and usages, and such rights entitle the owner to occupy and use the land, to dispose of such land to another person, to erect a building or let it, and transfer it to another person, including bequeathing it to his or her children.*

It is important to note the apparent tension between the CASAC Ingonyama judgment's focus on rights vesting in individuals and families, and the focus of the Maledu and Baleni judgments on right vesting in communities. This seeming difference reflects the different nature of the matters bought to court by the applicants. In the Maledu and Baleni matters, groups of people were asking for redress for their communities, whereas in the CASAC Ingonyama case, individuals and families had been targeted to pay rent for land they already owned and the redress they sought was for themselves as families and individuals. We will return to discuss the interface between community and individual forms of ownership in section 3 as it has important implications in relation to consent, and who may grant it.

The judgments discussed in this section, and the facts discussed in the judgments have highlighted what has gone wrong with mining and development in former homeland areas, and how the laws should be interpreted in future. They cannot, however, solve the problem of the gaps and uncertainties left by government's failure to introduce a comprehensive law to protect vulnerable rights in customary areas as required by section 25(9) of the Constitution. Or, failing the introduction of a comprehensive law, government's failure to at least introduce regulations for IPILRA that provide clear directions and procedures to operationalise this minimalist interim law. In the next section I argue that both a comprehensive law and IPILRA regulations are required by sections 25(6) and 25(9) of the Constitution, but that given current constraints, in particular government's commitment to transfer title of land in the former homelands, to traditional leaders, IPILRA regulations may be more achievable and would go a long way towards addressing the tenure security crisis in rural areas.

3. WAY FORWARD – CONSTRAINTS AND OPPORTUNTIES IN RELATION TO ADDRESSING THE LACUNA CREATED BY GOVERNMENT

The judgments make it clear what not to do, but the steps required for rural communities and mining companies to enforce and comply with IPILRA remain unclear. Yes, there must be meaningful consultation with those whose informal rights are affected. Yes, their consent must be obtained, and in a way that is consistent with local customary law. Yes, compensation is required if people consent to give up their land rights to outsiders. But as long as there are no guidelines, standards, and review mechanisms this remains a hit and miss affair.

Answers to the following questions are often not easily apparent, whether to mining companies or to rural rights holders:

- Who has IPILRA rights, and who does not?
- What is the footprint and potential impact of the proposed mining?
- Who would be affected and how would they be affected? Whose consent would be required? (This depends on who has what decision-making authority in relation to different land uses)
  - » Would homestead plots and houses be affected? If so, who has what rights and decision-making authority within the homestead?
  - » Would fields be affected? Who are the primary users and decision-makers in relation to the fields? Who has secondary rights, or rights of access (for example, grazing rights after the harvest)?
  - » Are more 'communal' areas such as grazing and forest land potentially affected? Which groups of people share primary access to, and decision-making authority over these areas of land? Are there other groups with secondary access (perhaps traverse rights, or rights to use certain resources with permission)?
- What process must be followed when obtaining consent from those with strong use and occupation rights?
- What process must be followed when obtaining consent from those with shared access to communal rights?
- How does customary law come into all of this? Which issues can be decided by the rights holders directly affected? Which issues must go to the larger user group or neighbourhood? And when does the local headman or customary authority structure for the larger area need to be involved?
- What about secondary rights, for example people with traverse rights (who may not immediately be directly affected, but may be affected in the future)? To what extent must secondary rights holders be consulted and by what process? Do they stand to be compensated and if so, in what measure? What do local precedents tell us?
- How will the adequacy of consultation and consent negotiations be adjudicated as sufficiently fair and inclusive? Who will sign off on such negotiations? What records will be available to courts asked to review disputed outcomes?

3.1. The role of the old Interim Procedures and need for new IPILRA regulations

After IPILRA was enacted in 1996 it was widely advertised on radio in different languages and Interim Procedures were developed and approved[28] to enable the Minister to assess whether IPILRA had been properly enforced before signing off on development deals in her capacity as nominal owner of most land in the former homelands. The procedures required officials of the Department to monitor the process of providing information about the pending development to those affected, to monitor the advertisement of meetings, and to attend and report on the inclusiveness of the meetings and the views expressed at such meetings.

These Interim Procedures, while rudimentary, included a set of questions and forms that officials had to complete in respect of all development on state-owned customary land. The forms directed officials to interrogate issues like the differing interests of affected rights holders, the interests of women, and to record dissenting views expressed in community meetings. They provided structure and basic oversight which ensured that rural rights holders had to be treated as stakeholders and that developers had to

28. By the DLA policy committee and the Minister in 1998

propose serious alternatives where land rights were at issue. Only after the forms had been submitted to show that consent had been obtained from rights holders could the Minister authorise development in her role as nominal owner.

The promulgation of IPILRA regulations could address many of the most immediate threats to tenure security that were created by the sidelining of the Interim Procedures and would provide much-needed clarity to vulnerable rural rights holders, mining houses, government, and the courts in assessing whether IPILRA and customary law have been properly complied with. Such regulations would however need to be closely based on IPILRA itself. In sections 3.1 to 3.3 below I elaborate on key features of IPILRA that the regulations would have to build on, or risk cutting across the bottom line protections and customary law provisions it contains.

3.2. IPILRA already provides clear bottom line protections to guide regulations

IPILRA clarifies at least three bottom lines in relation to basic protections, but it was never designed to do more than this. For example, **it clarifies that the people who must consent are those who stand to be deprived of their land rights**, not overarching tribes or neighbouring communities.[29] It provides for **compensation**, and it requires that informal land rights be protected according to **customary law.**

As already discussed, Section 2(4) clarifies that it is the 'holders of such rights' whose consent must be obtained.

The definition of community also makes it clear that consent from smaller units within overarching tribes or tribal structures is envisaged. Specific user groups who share access to particular portions of grazing land targeted by mining would qualify, to the exclusion of people from neighbouring villages who do not share access to this grazing land. This is consistent with the well-documented layered and nested nature of systems of rights and authority within customary systems of land rights.

Just as strong systems of family ownership of fields and homesteads co-exist with shared access areas within customary systems, so too do localised systems of access and control to specific resources at village or clan level. Overarching tribal identities are built up on these more localised and nested systems of rights and authority and do not contradict or trump them.[30]

In addition to focusing the consent requirement on those **directly affected**, whether at the family level or at the level of user groups with shared rules governing access to specific land, IPILRA also importantly provides for **compensation** and for the **recognition of customary law**.

Section 2(3) states that where the deprivation of rights derives from a group's decision to dispose of land, 'the community shall pay appropriate **compensation** to any person deprived of an informal land right as a result of such disposal'. This differentiates situations of internal regulation of rights (which do not necessarily require compensation), from those of disposal of customary land rights to third parties, in which circumstance compensation is necessary.

Customary law governs IPILRA rights because the 'use, occupation and access' rights that IPILRA protects are held 'in terms of any tribal, customary or indigenous law or practice' (section 1(iii)(a)(i)), or 'the custom, usage or administrative practice in a particular area'. This adds customary law requirements and protections to the base-line consent provision in IPILRA.

29. The provisions that make this explicit are discussed in section 1.6 above.
30. HWO Okoth Ogendo 'The nature of land rights under indigenous law and culture in Africa' in Land Power and Custom, UCT Press, Juta, 2008. And Isaac Schapera 'The handbook of Tswana Law and Custom'. 1938, republished by Routledge in 2020.

3.3. The difference between 'communal' *access* rights on the one hand, and *use* and *occupation* rights on the other

Use and occupation rights to homesteads and fields generally vest in specific families and are not 'communal' in the same sense as access rights to shared areas such as grazing land and forests. Homesteads and fields more closely resemble 'individual ownership'[31], with family members being the primary decision-makers, and those to whom compensation would be due. The strength of these customary ownership rights to fields and homesteads is well recognised in customary law, as illustrated by the Ingonyama judgment.

At the same time, these strong ownership rights differ from the stereotype[32] of absolute and exclusive ownership, in that group rules exist to regulate access to homesteads and fields, and generally the group as a whole may make decisions governing the disposal of such rights in the interests of the wider group.

In section 1 of IPILRA, 'informal right to land' is defined to mean 'the use of, occupation of, or access to land' within four categories of land, three of which comprehensively cover the land-holding arrangements in the former homelands.

In this discussion we focus only on land in the former homelands and on the words 'use, occupation, and access'. Those familiar with the 'bundle of rights' legal metaphor will know that use and occupation rights are particularly strong and often regarded as akin to ownership, in that the holders of such rights may generally bequeath them, may often transfer them to others (generally under specific circumstances and with group oversight), and have the right to vindicate them against others who try to usurp or interfere with them. Access rights are materially different in that they deal with rights of access to shared 'communal' resources, such as forests, grazing land, and wetlands.

The different nature of use and occupation rights on the one hand, and access rights on the other is implicit in IPILRA. Section 2 of the Act deals with deprivation. Section 2(1) provides that no-one may be deprived of their use, occupation, or access rights without their consent. Section 2(2) introduces a caveat, which is that 'where land is held on a communal basis' then people may be deprived of their right if this is done in accordance with customary law. Section 2(3) provides a further caveat, which is that if the group disposes of land to an outside party, they must pay compensation to those who lose land rights.

It is clear that 2(2) differentiates 'communal' land from land that is not communal, being land that is occupied and used rather than subject to shared access rights. This interpretation is bolstered by the definition of 'community' which refers only to 'access' rights and does not include use and occupation rights. Section 1(iii)(d) by contrast, in referring to rights that are upgradable to ownership in terms of the Upgrading of Land Tenure Rights Act, refers only to use and occupation rights (not access rights).

The word 'communal' should not imply that access rights are free for all. On the contrary, only specific families or individuals will be allowed to share in resources in particular areas, although others may be allowed to under specific circumstances, and with the express permission of the first group.

While IPILRA prescribes explicit procedures to govern the deprivation of 'access' rights by the majority of such rights holders in section 2(4), it is does not provide specific procedures in relation to the deprivation of use and occupation rights. In my view this is because the strength of use and occupation rights and their equivalence with ownership is implicit. Pre-1994 laws such as the Upgrading of Land Tenure

31. Kerr, AJ: The Customary Law of Immovable Property and Succession (Rhodes University, 1990, Schapera (see footnote above)
32. I argue below that this is an inaccurate stereotype and that even western forms of ownership are not absolute in that they are routinely regulated in the public interest.

Rights Act had already recognised use and occupation rights as deserving the status of ownership, which implies consent and compensation before deprivation, and failing that, expropriation.

The difference between use, occupation, and access rights has important implications for how, and from whom, consent must be obtained. In general terms the deprivation of access rights may be agreed by the majority of the holders of such rights after a properly constituted meeting which meets the standards set out in 2(4), whereas use and occupation rights, which are not 'communal', require the explicit consent of the holders of such rights.

The implication is that those with use and occupation rights must be consulted at family level about their houses and fields, and that compensation for homes and fields should be paid to rights holders directly. Deprivation of shared access rights to communal areas is different, in that the majority of rights holders must agree in properly constituted meetings, and rights holders may agree to different forms of jointly held compensation.

In highlighting the distinction between use and occupation rights on the one hand and access rights on the other, I run the risk of reinforcing the pernicious divide between 'individual western ownership' and 'communal tribal ownership' that pervades government stereotypes about the difference between the former homelands and the rest of South Africa. Title deeds, while available only to a minority,[a] are much sought after by black and white South Africans as the strongest form of ownership. It is revealing that the traditional leader lobby too, is demanding title to land in the former homelands as opposed to the recognition of underlying forms of customary ownership.

The dichotomy between the ideal of absolute forms of western ownership on the one hand, and unknowable and imprecise forms of communal ownership on the other is, in my view, more ideological than real, but does enormous damage. As I have argued above customary ownership systems are not 'communal'. They include very strong family and individual ownership within them, just as title deeds do not confer absolute ownership on their holders, but are subject to a host of planning, environmental, and zoning restrictions.

Another reason not to equate use and occupation rights too closely with western constructs of exclusive ownership is that this can lead to mining companies negotiating separate deals for homestead and ploughing land with individual families, that provide the mining companies with more powers over the land than the families had according to customary law. Dealing separately with different families without regard to customary oversight mechanisms applying to fields and homestead land is divisive and threatens the social fabric that is a fundamental component of customary land rights.

3.4. Taking account of relative rights and customary law

As the Constitutional Court has stressed, customary land rights need to be examined on their own terms, not through the prism of western legal constructs. In customary systems, strongly protected use and occupation rights often co-exist with clear limits on their disposal. In many situations owners are allowed to sell them, but subject to the agreement of family members and their neighbours, witnessed by the local headman or traditional authority structure. Potential buyers may be vetoed by neighbours because of the risk that they prove to be a disruptive presence in the local community. Land acquisition and acquiring membership of the community are inter-related and the risk of admitting anti-social people to the community must be carefully managed.

Thus, while it will be necessary to obtain the consent of those who occupy houses or use fields, it is unlikely to be sufficient to do so, depending on the content of the local customary law which, in many

instances, imposes limits on their disposal and the purposes for which residential and arable land may be used. This is not dissimilar from more formal state law – paying compensation for the deprivation of use and occupation rights would not imply that the mine had acquired full ownership of the residential or arable land. Such payment would not automatically entitle the mining company to start mining on residential or arable land. Zoning and planning priorities continue to regulate the land in both systems.

Customary law needs to be recognised as a nuanced system of law on its own terms, neither as a monolithic form of 'communal tenure', nor as a proxy for inaccurate understanding of exclusive individual ownership vesting in traditional leaders or 'household heads'. Customary systems regulate the rights of individuals against the entitlements of the group. In situations of land shortage, it is not unusual[33] for groups to agree to give up access to parts of the shared grazing land in order to demarcate additional homesteads for grown children of the community. This would not ordinarily attract compensation, because while it deprives members of part of their access rights, it is necessary to fulfil the strong birthright of adult children to qualify for homestead land once they have established families of their own.

3.5. The need for legal innovation to make customary law rights legible to the dominant legal culture

Given the pervasive lack of training in customary law, and the common default to the false dichotomy between individual and communal ownership, it is crucial that the content of customary law be made legible within the dominant legal culture. Lawyers trained to believe that ownership depends on a clearly delineated owner owning a clearly delineated piece of land to the exclusion of all others need to be able to perceive that overlapping relative rights can co-exist within flexible boundaries of land.

After all, mechanisms to accommodate such overlapping rights and different land uses have been developed to accommodate developments within 'western' systems of law. For example, share-block ownership allows different people to own not only specific units of land within shared outer boundaries, but also for them to own different units of time. Sectional title law allows owners to share common spaces and also own certain areas 'exclusively', subject to strong group rule and restrictions.

Eminent legal academics such as the late Prof Andre van der Walt[34] have shown that historically and internationally, ownership of land has never had the exclusive and absolute nature that is often ideologically attributed to it. There have always been relative rights co-existing within ownership systems, whether of tenants, *bywoners*, family members, or those with rights of way. Rent control, zoning, and environmental and planning laws have always limited ownership rights.

In raising this issue, I am not proposing that customary ownership be straight-jacketed into legal schemes developed for other contexts such as sectional title or share-block. Instead, I am suggesting that ideological stereotypes have blinded many legal practitioners from being able to see not only the nuanced and flexible nature of customary ownership, but of ownership in general.

The World Bank and other international institutions used to propose land 'titling' as the solution to insecure tenure in Africa, but land titling schemes had massive unintended consequences. They created 'winner-takes-all' stakes that changed the relationship between the title deed holder and other family members, particularly women. They ignored the 'secondary' rights and reciprocal relationships that characterise and support customary livelihoods and systems of tenure. Land titling schemes were also

33. Sindiso Mnisi and Aninka Claassens 'Tensions between vernacular values that prioritise basic needs and state versions of customary law that contradict them' in Stellenbosch Law Review, Vol 22, No 3, 2011.
34. https://blogs.sun.ac.za/law/aj-andre-van-der-walt-1956-2016/ (accessed 20 August 2024)

resource-intensive and expensive, yet many such schemes reverted to more inclusive customary tenure arrangements within a generation.

The World Bank and UN Habitat dropped their land titling approach in favour of advocating for and supporting local processes of recording customary rules and arrangements against a spectrum of rights. These recordal processes allow for overlapping rights in land that relate to the different purposes for which land is used. The priority is to make such rights legible so that they can be protected from third parties, while not changing the internal dynamics that balance and enrich local livelihoods and social cohesion.

3.6. Customary law is not unknowable

In South Africa the courts have recognised customary law to be the 'living law' practiced by communities, rather than the ossified version created and imposed by colonial and apartheid laws and text books. This directs us to an empirical examination of current practice in the local area, as the courts have also stressed that customary law will vary from place to place. Customary law is therefore not something mysterious or unknowable. It can be ascertained by finding out what values and practices currently govern access to land and regulate its use and disposal.

3.7. Vested interests and government's failure of imagination

Implicit in state support for development is its duty to simultaneously protect vulnerable rights and to regulate development for the welfare of society at large. The post-apartheid government has instead reinforced a mode of primitive accumulation that is predicated on once-off profits derived from stripping rural people of their property and citizenship rights.

The state has mobilised laws such as the Traditional Leadership and Governance Act of 2003, the Communal Land Rights Act of 2004, and the Traditional Courts Act of 9 of 2022 to reiterate the colonial and apartheid myths that:

- Rural Africans have no property rights within 'communal areas'.
- Rural Africans are tribal subjects, rather than rights-bearing citizens.
- Traditional leaders have sole authority over land and people within the former homelands, which were resurrected as jurisdictional zones of chiefly authority in 2003.

This has, inevitably, led to destabilising levels of poverty, resistance, and violence in mining-affected areas, and has been condemned by the Constitutional Court as abrogating the basic citizenship and property rights contained in the Constitution.

Mining does not require this level of dispossession in order to be viable. Experience from other countries shows that properly regulated mining can contribute to local stability and development. The South African state has, however, shown no inclination to regulate mining so that the constitutionally protected right to tenure security is upheld.

In the next section I interrogate the role players in the sector to assess the potential for turning this situation around. These include the Ministry of Mineral Resources, the Ministry of Land, traditional leaders, mining companies, and the rural people directly affected by mining in former homeland areas.

3.8. Different role players

The **Minister of Mineral Resources**, Gwede Mantashe, appears the most wedded to the status quo and to the allies he has chosen to prioritise, being the BEE component of mining companies and traditional leaders. He has regularly made derogatory comments about rural people who attempt to assert their rights, and repeatedly chosen to meet with mining companies and traditional leaders rather than the rural people directly affected by mining. The mining cadastre has fallen into chaos and there are massive backlogs in processing and granting mining licenses. Various regional offices have had to be closed because of evidence of corruption. But he remains seemingly impervious to criticism about the impact on the mining industry, or on rural rights holders. The Department's response to the Maledu and Baleni judgments has been minor amendments to MPDRA regulations in 2020 and non-binding consultation guidelines, neither of which refers to compliance with IPILRA or its consent requirement. There appears to be no prospect of change as long as Mantashe remains the Minister.

The Ministry of Land bears responsibility for protecting land rights and for enforcing IPILRA. There is a new **Minister of Land Reform** from the Pan Africanist Congress, Mzwanele Nyhontso. He is the first minister since 1994 who is not from the ANC, and may be less wedded to the ANC's political alliance with the traditional leader lobby. He is the Minister who would have to initiate amendments and/or regulations to IPILRA. In addition, the Minister has an additional set of duties as the nominal owner or trustee of much of the land in the former homelands. In that capacity he has fiduciary duties to beneficiaries when signing off on development deals affecting land in the former homelands. It was to guide such fiduciary responsibilities that the 1994 Minister of Land Affairs relied on the Interim Procedures to ensure that IPILRA consent requirements had been complied with.

Prior to the formation of the Government of National Unity (GNU), the Department of Land Affairs appeared to show signs of movement on IPILRA. In February 2023 it invited a number of experts to address it about tenure policy, myself included. At that meeting, attended virtually by the then Minister, and in person by the director-general (DG), Deputy DGs, and senior management team, an undertaking was made on behalf of the DG that the Department would move fast to introduce IPILRA regulations to address the problems highlighted by recent court judgments. He and others of the senior management team said they were committed to consulting with reputable customary law experts to ensure that such regulations built on the potential inherent in customary law.

Eighteen months later, however, even draft regulations have yet to see the light of day. My assumption is that this is because the ANC remains wedded to its alliance with the traditional leader lobby which continues to agitate for transfer of title of land in the former homelands to themselves. Yet the senior management is well aware[35] that any such transfer would be challenged and struck down, given prior Constitutional Court judgments and the more recent Ingonyama judgment, which show that 'communal' land is not in the gift of the Ministry to 'bestow' on traditional leaders. The Ministry would first have to expropriate or obtain consent from the holders of informal and customary land rights.

When and if the DLA introduces its long promised Communal Land Tenure bill consolidating the power of traditional leaders over 'communal land', this will exacerbate the already unstable status quo and become a flashpoint that will further destabilise rural communities and mining in the former homelands. It would be unfortunate if precious human resilience and scarce legal resources have to be spent attacking yet another disaster-prone law, rather than on pro-actively challenging government to introduce constitutionally required law and regulations to enhance tenure security. The DLA appears to be frozen in limbo,

35. It has fought and lost an ignominious string of judgments concerning land rights, and been excoriated for its attitude to rural people's rights by the Constitutional Court in many of these judgments.

not wishing to disappoint the traditional leader lobby, yet unable to comply with its demand for freehold title. In the meantime, it remains in flagrant contempt of sections 25(6) and 25(9) of the Constitution which requires Parliament to enact law to secure vulnerable tenure rights. Twenty-eight years after the adoption of the Constitution in 1996, there is still no comprehensive tenure law securing land rights in the former homelands, apart from the two-page Interim Protection of Informal Land Rights Act.

The **traditional leader lobby** has been vociferous in demanding laws that provide themselves with far-reaching unilateral powers that in some instances (such as land) surpass the powers they had during apartheid. They have made no attempt to justify these powers as derived from, or reflecting living customary law. Their focus on title deeds for themselves exemplifies this lack of concern for underlying customary values and practices. They ignore the strength of customary ownership rights vesting in families and individuals, just as the Ingonyama Trust did in attempting to extract rent for itself from customary land owners. The laws they have lobbied government to enact centralise power at the level of senior traditional leader and upwards, ignoring the pivotal role of headmen in maintaining the layered system of rights and authority that underpins the stability of neighbourhoods and provides a critical safety net for the poor.

On the ground, systems of customary land rights vesting in families, individuals, and user-groups continue to exist, and to be held dear and defended by litigants fighting and winning court cases. Time and again the jurisprudence of 'living customary law' is used to strike down the distorted and autocratic version of chiefly power claimed by the traditional leader lobby. The fact that living law continues to reflect strongly guarded land rights and participatory decision-making processes indicates that a high proportion of traditional leaders (including headmen) still abide by and uphold these values, rather than the demands for unilateral power expressed by the senior traditional leader lobby.

The excesses of the proponents of that lobby have been blatant and extreme, whether the Ingonyama's Trust's rent seeking in respect of family-owned land, Buyelekhaya Dalindyebo's ordered killings of 'disobedient subjects', or Nyalala Pilane's interdicting the 'royal family' from meeting to try to demand accountability in respect of over a billion rand in mining revenue.

Unfortunately most traditional leaders have failed to distance themselves from either the laws or the excesses, even while continuing to uphold participatory and inclusive versions of land rights and customary law at the local level. In recent years, however, some traditional leaders or proponents of customary law have begun to speak out in demanding accountability for such excesses.[36]

Including traditional leaders in forums to interrogate and debate the nature of customary law land rights and accountability may be a possible avenue to widen the debate about the recognition and protection of customary land rights beyond the traditional leader lobby. This could provide an important antidote to the autocratic version of custom espoused by the traditional leader lobby and a rich source of evidence about the nature of customary land right. Such forums would, however, have to be sensitively formulated and convened by respected and respectful leaders.

The **mining industry** is not necessarily a cohesive grouping of companies. That said, there are indications that some large companies have realised that paying dues to unaccountable traditional leaders, rather than to the people directly affected, has serious implications for local stability and sustainability. The 'winner-takes-all' stakes created by the traditional leadership law's attempt to centralise power and control in the person of a senior traditional leader has led to endemic succession and leadership disputes that have destabilised communities over months and years, with serious consequences for mining operations in some areas. The levels of violence arising from such disputes, and from furious IPILRA rights holders

36. Inkosi Mandla Mandela in respect of the Ingonyama Trust in Parliament, and Judge Isaac Madondo on the bench.

demanding accountability, have led to mines having to close down operations, in some instances for significant amounts of time.

When Kgalema Motlanthe's 2017 High Level Panel on Poverty and Inequality asked the Chamber of Mines why its members signed deals with traditional leaders who had no legal authority in respect of the land, the Chamber replied as follows:

> *The Chamber has no role in this regard. The transactions are concluded by the companies themselves. However, our understanding is that companies are required, or at least face strong recommendations, by the DMR to do their community BEE transactions with the traditional authorities where they exist. We are conscious that the legitimacy of traditional leaders is disputed by some community members in some jurisdictions, and that this can be the source of negative relationships between mines and adjacent communities. There have also been cases where the proceeds of these transactions have been mismanaged. None of this is satisfactory for the mines and the companies that own them.*

In relation to a specific question about the legal standing of traditional leaders to contract, the Chamber replied:

> *We are aware that some cases have been brought by certain parties challenging the legality of some of these transactions. However, we are unaware of any adverse finding as yet. In our view these challenges, in any event, are as much questions of social legitimacy as legal ones.*[37]

Since then the Maledu and Baleni judgments have made it clear that mining companies have a choice between complying with the Constitution and following government's lead.

A major mining company has commissioned an expert report on how to ensure that it complies with IPILRA in future. There are indications that the Minerals Council is being lobbied to consider, or is considering guidelines or regulations that would guide the industry as a whole, so that all mining companies comply with the same standards and procedures. While it is heartening that parts of the mining sector are seeking pragmatic ways in which to comply with the Constitution and with IPILRA, it is ironic that it is they, as opposed to government, who are seeking ways to regulate their own conduct in order to comply with the law.

The situation in many **rural communities** has gone from bad to worse as mining expands, and people watch the impact of mining in neighbouring areas as it comes closer to them. Violence and assassination of rural activists has increased, with no perpetrator ever brought to book. In some areas young people have lost all confidence in their elders whom they accuse of 'selling out' in the early negotiations. Others have lost confidence in the rule of law and resort to burning community resources in protests that seek to draw attention to their bleak futures.

There are serious divisions in many areas between those who believe in the jobs promised by the mining companies, or have such jobs, and others whose homes and fields are in the direct path of the mining. People in these different positions are played off against one another, whether by traditional leaders, government, or mining companies, leading to violence and life-long family and community rifts.

Despite this, there are iconic groups who have stood together to use the law in legal struggles to assert their land rights, and challenge laws that undermine them**.** Most of these struggles have been defensive and taken years to yield results; against evictions, against the CLRA, against specific traditional leadership laws, against interdicts by traditional leaders to stop meetings, against the imposition of leases by the

37. Accessed on 1 August 2024 at https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Roundtable-Land_reform/CoM_Response_to_the_HLP-28_July_2017_FINAL.pdf

Ingonyama Trust, to name a few. Many other rural groupings seek to follow their lead and do the same, but there is a dire shortage of lawyers with the necessary skills and ability to do this work for free or at reduced rates.

These time-consuming case-by-case defensive legal strategies have laid a solid factual basis for a more offensive approach that seeks to enforce sections 25(6) and (9) of the Constitution by a mandamus application that Parliament must enact measures to protect vulnerable tenure rights in former homeland areas. It is now 28 years since Parliament was required to do so, and yet even regulations to enable compliance with IPILRA have not been gazetted.

Section 25(9) refers to **Parliament** enacting law to secure tenure rights, as opposed to the Ministry of Land Affairs. While the Ministry of Land Affairs would remain a key respondent, the joinder of Parliament and a focus on it having been in breach of the Constitution for 28 years may provide additional traction, given the composition and dynamics of the new GNU Parliament.

3.9. Tipping point?

This paper suggests that a tipping point has been reached which calls for an offensive legal strategy to enforce section 25(9) of the Constitution through a mandamus application that requires Parliament to enact measures to secure vulnerable tenure rights in the former homelands. In my view the appropriate remedy at this stage is that IPILRA be amended to make it permanent, and regulations be promulgated to support compliance whenever the deprivation of informal land rights is at issue.

Who should bring such an application to court? Obviously the main applicants must be the rural people whose land rights are directly at issue, but it would strengthen the application were it to be joined by traditional leaders who have a stake in customary systems of land rights and their protection. Is there a role for mining companies in such an application? Probably not, given the past antagonistic relationships between mining companies and rural rights holders. Yet mining companies have their own imperatives for needing binding regulations that provide certainty across the sector and enable them to comply with the Constitution.

An obvious question here is why the remedy in such a mandamus application should be limited to minor amendments to IPILRA and regulations as opposed to a comprehensive new law dealing with tenure security in former homeland areas such as the draft Land Rights Bill of 1999. My reading of current political dynamics is that there is neither the political will, nor the capacity in government to draft and shepherd such a law through Parliament. I suspect that the Courts may also be more comfortable ordering minimalist corrective interventions rather than large-scale law reform. Others may not share this reading, and a more comprehensive law could be put forward as an additional remedy in such a mandamus application.

In this section I have argued that a minimal amendment to IPILRA to remove the renewal date[38], and the introduction of Regulations to guide the process of obtaining consent from IPILRA rights holders, would avert many of the worst abuses taking place. It would provide clarity and certainty to IPILRA rights holders and to mining companies as to how to go about what may currently seem a daunting process of finding mutual accommodation.

38. The key issue here is simply to repeal section 5.2 of IPILRA which provides for the Act to expire in 1997 and provides for its annual renewal. This small amendment is hardly controversial. Even the unconstitutional Communal Land Rights Act repealed section 5.2 of IPILRA, thereby making the Act permanent.

4. Conclusion

This paper has argued that IPILRA regulations are urgently required to ensure that all parties understand how to comply with the basic protections in IPILRA. These regulations must also set out the criteria against which to measure the process of compliance. I have argued that this is not a complex task; that IPILRA contains within it the basics of compliance, being the consent requirement by those directly affected (as opposed to traditional leaders), adherence to customary law (which can be empirically ascertained), and compensation for deprivation to outsiders (as opposed to for the internal regulation of group rights). These can most easily and elegantly be set out in regulations to IPILRA, or (at a stretch), in compulsory guidelines to the MPRDA.

While such regulations would go a long way in averting the scale of dispossession, conflict, and violence described in sections 1 and 2, they would remain, like IPILRA itself, essentially minimalist and defensive, a bulwark against rights abrogation in a legal system that continues to valorise title deeds and mining, perplexed by and dismissive of customary law.

In order for tenure reform and customary law to be taken seriously in South Africa we need a more far-sighted approach. Hard-won concessions backed by court judgments are an important starting point, but are not sufficient to realise the potential for fair and stable outcomes that customary balancing mechanisms within systems of relative rights provide. We remain stuck in the 'winner-takes-all' scenario of one party having exclusive rights (whether title deeds or mining rights) while the other remains a supplicant, despite decades or generations of vested rights in the land. At stake is not only the prospect of peaceful and respectful co-existence of mines and rural communities, but also the long-term legitimacy of law in South Africa. Laws that fail to resonate with the values and life experience of the majority of the population, inevitably lose their traction in the lives of ordinary people, contributing to violence and lawlessness.

In section 3 I suggest that there are well established precedents for Parliament to follow, both locally and internationally, in incorporating the proactive recognition of customary systems of land rights in our legal system and making them legible. More than that, customary mechanisms for balancing and adjudicating inclusive systems of relative rights provide a locally legitimate template for the inclusion and balancing of social and economic rights as envisaged by the Constitution.

Ultimately section 25(9) provides that Parliament must introduce a law to enforce tenure security. That law is long overdue and desperately needed. I suggest that the time is ripe for a mandamus application to require Parliament to amend IPILRA to make it permanent, and to introduce regulations to enable and support compliance.

For mining and rural communities to co-exist peacefully and to their mutual benefit, acceptable alternatives such as land, housing, and other forms of compensation are necessary where IPILRA rights stand to be impinged. Where mining companies cannot, or will not provide acceptable alternatives, rural communities have the right to say no to mining on their land. The state can pursue expropriation in such cases, but the courts would have to balance the relative rights of the mining companies against those of the land rights holders. This would provide far greater protection than the current status quo.