



Research Article

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The Right of Access to Land VIS-À-VIS the Right to Mine: The Discussion on the Lessons Drawn from the Case of Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another 2019 (1) BCLR 53 (CC)

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Abstract

Land remains a contentious issue in South African history to date. It provides people with hope and various opportunities. This paper discusses the right of access to land and the right to mine. The paper discusses at length the requirements set at law and considered significant for compliance to attain these rights. Four dominant issues emerge from the discussion namely land, mining rights, consultation and consent as well as deprivation as pillars adjoined to critique the fundamental legal requirements needed to access land and to mine it. Mining companies compete for access to the country's mineral lands and petroleum resources to exploit them relentlessly. Whilst South Africa has been installed as the conduit of the nation's mineral and petroleum resources, the need to enforce compliance with the requirements set a national law is critical to avoid illegal mining and unlawful deprivation of land for mining purposes. This is because most of the land in South Africa is communal or belong to private owners, concentrated with the mineral wealth. Legislation such as the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) and the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA), as amended, are triggered for this discussion.

Keywords: Land, mining right, protection, consultation, consent

1. Introduction

The right of access to land provided for and protected by (the Constitution of South Africa, 1996:25) has some major embodiment on the right to mine provided by (the MPRDA, 2002:23). The MPRDA, 2002 was formally installed as the nation's mineral and petroleum resources conduit for the benefit of the all the people including the previously disadvantaged people who could not access the mining sector due to racial and discriminatory laws to now do so. We may however have learnt at some point in our journey of reading that common law was previously dominant in terms of the regulation of minerals and how mining minerals and related resources got shaped. Common law was clear that a private land owner also had rights over the minerals on the surface and depth of that particular land (through the *Cuius est solum, eius est usque ad coelum et ad inferos*). This was a popular principle at common law, however its notion was later neutralised and separated by the introduction of the new law (MPRDA, 2002). Basically this principle meant that for as long as the land contained minerals, the owner of that land will one way or another be affected by future and planned mining activities. The promulgation of this new mining law, the MPRDA, 2002 painted a new picture in terms of how the neutralisation of the common law principles in relation to mining regulation ought to be treated henceforth. This painted picture was such that since the separation of the land owner from the co-ownership of minerals within that land, obtaining informed consent from that land owner was necessary in cases of any imminent mining activities over such specific land (MPRDA, 2002:10). We however are very much aware that most of the lands are under the control of Tribal Authorities held in communal trusts. This therefore required that proper consultations be initiated in order to obtain such informed consent. So, for the purpose of the consultations, an interim law in South Africa was introduced to assist in ensuring that such is done within the ambits of the law, more specifically to assist with matters affecting the private or communal lands (IPILRA 1996). Most of these communal lands which are often under control of Tribal Authorities do not get released freely without proper and regular engagements. In order to gain access to these lands for mining purposes, the state must take cognisance of the already existing right of occupation of such property by the communal owners or lawful occupiers. Not everyone is capable of mining but for those who can, the prescriptions carried at law ought to be heeded. A common law principle which considered the land owner the owner of minerals in his or her land created a complex but disputable situation in that it has now become prevalent that right of access to land and right to mine are contentious. In order for one to gain access to the mineral lands for mining purposes, owners or lawful occupiers must be consulted first unless there are consented expropriation measures at the forefront which may either be followed through compensation processes or through state's development of its own laws in the public interests for radical economic transformation. However, what is to follow is the crux of what needed to be done when MPRDA, 2002 and the IPILRA, 1996 are triggered by our

courts for the adjudication of disputes in respect of right of access to land and right to mine.

2. Conceptual Interpretation

2.1 Land

Some see land as a commodity that carries a moral claim like an asset or as a source of income for property owners (Vorster N, 2019)). In terms of s 25 of the Constitution, land right is enshrined and protected as property belonging to the owner or lawful occupier. Section 1 of the MPRDA, 2002 defines land as that which includes the surface of the land the sea, where appropriate.

2.2 Mining right

Section 1 of the MPRDA, 2002 defines the mining right as the right to mine granted in terms of section 23(1).

2.3 Protection

Protection means the protection of informal land rights of the communal land owners in terms of IPILRA, 1996.

2.4 Consultation

Consultation spoken about here is one in terms of s 2 of the Interim Protection of Informal Land Right Act, 1996. However, the court expressed that one of the purpose of consultation must be surely to establish whether some sort of accommodation can exist between the applicant of a mining right and a lawful occupier of land insofar as the interference with the lawful occupier to use and enjoy the property is concerned (Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another 2019:79)

2.5 Consent

Consent spoken about here is one provided for in terms s 10 of the Interim Protection of the Informal Land Rights Act, 1996. Some authors opined this aspect to refer to informed consent given freely and prior any activity could be taken (Nyaradzo Precious Chagwinya), 2018).

3. Research Problem Background

It has become conventional that lack of consultation and informed consent in South Africa threatens the ability of communal land owners or occupiers to survive and to maintain their level of peace and enjoyment of their properties on which minerals are prevalent. Incoherent and non-compliant practices bear the adverse impacts on their socio-economic and sustainable developments of these people. Mostly, their lands which as their property gets expropriated without compensation by the state for mining purposes. Lack of compliance with the MPRDA, 2002 and the IPILRA, 1996 has led to these problems where communities lose their indigenous or communal rights and livelihoods because of greed or hurried mining activities. Mining companies that reach a stage of informed consent often fantasizes that mining is feasible (Martha Macintyre, 2007:12). There are also social risks associated with mining that are posed to the people and their lands. The other problems linked to the issue of consultation and consent is the representation aspect. It has become problematic as to who actually is supposed to be consulted to obtain the informed consent. There have been problems as well with regard to how and when will consultation and consent regarded to have been done and obtained. The right of access to land and right to mine that land have played critical roles together with the required aspect of consultation and informed consent. This is expanded more in the literature review of this paper.

4. Research Question

The paper looks at how enforcement and compliance with the MPRDA, 2002 and IPILRA, 1996 is critical to protect the rights of indigenous and previously disadvantaged people when mining rights are sought. It questions the aspect of consultation and consent and its extent towards accommodating these people. The paper also questions the measures taken by the Minerals and Energy Department to spare the rights of the people when mining companies want to access their lands for mining purposes. The paper also looks at the measures that could be taken to avoid adverse impact of deprivation of property of these people when mining rights are sought and to what extent compensation is significant to restore the dignity of the people deprived of their lands.

5. Research Methodology

The research methodology to be canvassed in this paper is qualitative. It will be based on an extensive literature study on the subject of the right of access to land and right to mine using library materials which include but are not limited to legislation, academic journals, case law, legal reports and documents.

6. Purpose of the Study

The paper aims to analyse how the notion of the right of access to land and right to mine may be employed as contemporary measures in accordance with how effectively issues of consultation and an informed consent in South Africa ought to be addressed.

7. Importance of the Study in this Paper

This paper will illuminate how access to land and right to mine can intensively be harnessed in an academic contribution to radically realize the protection of the indigenous people rights when mining rights are sought. Additionally, demonstrate measures that may be deployed to advance the protection of the vulnerable indigenous people and their lands, whilst devising mechanisms on how compliance is enforced. Furthermore, the paper will indicate how case law has played a significant role in an attempt to straighten the aspects of compliance associated with the right of access to land and right to mine which are discussed and interpreted here as distinctive elements.

8. Literature Review

At common law, the practice was that the minerals attached to the land became the property of the landowner and could only become property of the third party if extracted and detached from that land. This was when the notion of separation of the two concepts took shape under the MPRDA of 2002. The owner still had real rights to mineral lands only to the extent that the state exercised exclusive control as the custodian of minerals and petroleum resources espoused in s 3(1) of the MPRDA of 2002. However, Johan D Van der Vyver had some important points to share. He mentioned that once minerals were extracted from the land they became distinct legal objects separated from the land and could become the property of that person other than the landowner (Johan, 2012). This meant that the state as the current custodian of the minerals and petroleum resources could at some point when granting mineral rights or permits, indirectly grant right of access to land to third parties for the purpose of mining minerals. It is from this point that the discussion has taken more shape. The state ought to ensure that third parties comply with the applicable law of consultation and informed consent when rights are sought. Most importantly, the state must opt not to separate the two, but pave way for expropriate were justifiable. In such instances, the law of expropriation is South Africa set requirements that must be complied with (Constitution, 1996:25). Johan continued to allude that separation of the landowner from his or her common law right of mineral and petroleum resources sometimes intended to serve public purpose and interests when the law allowed, for instance in the constitutional meaning of expropriation (Johan, 2012).

Janin Ubink and Joanna Pickering cooperatively come up with an interesting

analysis on the protection of the rights of the property owners especially in the traditionally governed areas. The writers touched on the significance of the IPILRA of 1996 by mentioning situations under which informal land rights holders may be deprived their land rights. Informal land rights holders may be deprived of their land rights only in accordance with the custom and practices of that particular community. This further suggested that communal land can be deprived for activities such as those of mining only in terms of the law of general application and for as long as it fulfilled the spirit, purport and objects of the constitution of 1996. Furthermore it meant that majority of the community members must be present or be represented at an arranged meeting in order to grant the retired informed consent for the disposition of such right (Janin Ubink and Joanna Pickering, 2020).

Tracy-Lynn Field also had something to share aligned to the above discussion. Accordingly, Tracy said that the MPRDA of 2002 has no means to protect communities whose lands, livelihoods and culture are directly affected, and possibly destroyed, by mining(Tracy-Lynn Field, 2020). One may ask as to why the protection clauses are excluded from the MPRDA which was brought up with an intention to redress the ills of the past. It should have been better if the protection clauses were included. At the least, because of the consent enshrined in the MPRDA of 2002 and the consultation requirements raised in the IPILRA of 1996, there is a causal link created. It has become apparent that one can be strongly inclined to grant informed consent to mine in relation to specific land if the requirements for access to such land have been met or complied with. The provisions in MPRDA and IPILRA will undoubtedly be required to be realigned, collective reliable and applied. Elmarie Van Der Schyff also touched on the silence of the MPRDA of 2002 when it comes to the collective inclusion of the two requirements(of consultation and informed consent) she said that MPRDA is mute on the issue of access and does not expressly provide for compulsory compensation of a landowner for the surface of its property (Elmarie, 2019). It is of no significance value for one to gain access into the property of the landowner for mining purposes if the required consent is lacking. Lack of proper engagements with the parties affected or concerned build up to contentious concerns.

Tabitha Muthoni Mugo constructively shared that the concerns associated with the mining activities in South Africa associated with the extraction of minerals and petroleum resources on the lands of most of the mining communities inhabit, saying without the communities' consent or any benefit accruing to them it is unlikely that communities can agree (Mnwana, 2015). Tabitha further opined that mining companies must actually consider ways to mitigate the grievances arising from the hosting mine communities by using consultative platforms, further saying that one of the mitigation factors would be seeking Free and Prior Informed consent (Tabitha, 2021).

The Property Rights From Above and Below: Mining and Distributive Struggles in South Africa Report (PRAB: MDSSA) collated the South African historical development agenda on equality, constitutionalism, international and investment approaches. It

focused on the tensions between rights of property and the imperatives of transformation in South Africa's mining sector. It further suggested that these factors needed critical political debates than adjudication (as referred to in PRAB: MDSSA, 2019).

Finally, the concern that I have with MPRDA of 2002 and the IPILRA of 1996 is that there is somehow an encouragement of dispossession. For instance if the community can give informed consent after being consulted and there are no means at which the community can resist except for the promises of benefits which never ever accrue to them, dispossession is possible. Phillian Zamchiya opined that mining companies can sometimes disregard one of the two laws above for easy dispossession of local farmers. He mentioned that at face value it was not convincing why the IPILRA of 1996 could be disregarded because of one's quest to mine the communal lands (Phillian Zamchiya, 2019).

9. Legislative and Judicial Interpretations

The IPILRA contained direction with regard to the issues relating to access to land. There were unresolved issues that its amendment, Rural Development and Land Reform General Amendment Act 4 of 2011 could not cure which IPILRA of 1996 could cure itself. The amendment, despite its efforts to fill in the gap to avoid future legal disputes, lacked solution to remedy the current problems associated with required consultations. However, the amendment did provide for reforms in line with the constitutional requirements (The Constitution, 1996:25). Therefore for this work, the amendment will not be engaged in driving the relevant points. Notwithstanding the intention brought about the amendment, there are myriad court decisions below attempting to resolve the impasse of disputes relating to right of access to land and mining rights. The decision of the Constitutional Court (in Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another 2019:53) aids a new approach to the amended provisions of section 2 of the IPILRA of 1996 in that it shed more light in terms of what must be procedurally followed to gain access to land. The decision ignited the provisions in that it sought to balance the between the right of access to land and to mine, as well as the right to land and the arbitrary deprivation of that right. This employed the Constitutional Court to separately invoke the provisions in section 54 of the Minerals Petroleum Resources Development Act of 2002 which profusely engaged the interests of the community and those of persons pursuing mining rights. Section 54 of the MPRDA of 2002 provided for instances when a mining company was refused access to the land with intentions to mine. Secondly where the landowner or lawful occupier has suffered or is likely to suffer loss or damage as a result of continuing mining operations. This suggested that compensation be payable under certain circumstances where damage occurs whilst using the right (Vorster, 2019). To connect this inquiry to consultation requirement in terms of section 2 of the IPILRA of 1996 and then the

requirements in section 54 of the MPRDA of 2002 it was imperative to point to the impact these had at the constitutional interests of the interested and affected parties in terms of s 10 of the MPRDA of 2002. It was prudent to state that the court in the case (of Baleni and Others v Minister of Mineral Resources and Others 2019: 453) produced a significant adoption of the approach adopted in the Maledu case. This case seemed to provide an igniting picture that enjoins the right of access to land and right to mine which are campaigned in this work. Constitutionally land is often postulated as a commodity of the South African communities (Vorster, 2019). Section 2 of the IPLRA of 1996 provided that proper representation be manufacture for the required informed consent to be granted. The mere fact that a valid right to mine existed does not necessarily mean that people should lose their immediate rights, especially rights attached to land. These rights are constitutionally protected rights (The Constitution of 1996:25) and are also socio economic rights promoted through the Constitution of 1996. Therefore this work further demonstrates the gap that exist between the law and the interests of the people. Meyer provided a very good point in view and analysis of the court decision in that a (final legislation should be enacted to provide protection for people who hold informal land rights, and consequently to formalise indigenous communities' land rights to ensure that these judgments act as the precursor for fundamental change in the current debate regarding informal land rights, Meyer 2020)

This work illustrated the incorrect approaches adopted in High Court in Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another 2019, and it was rather a direct indictment to remedy such approaches clarities improvised by the Constitutional court. The decisions in those courts ignored various points of law, the court (in *Finbro Furnishing (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985:415) stated that the tendency of our law was of a reconciliation character aimed at solving instances where the rights were competing. Although our law may try to solve the situation, there may be instances where it is inscrutable.

In view of this discussion, certain legislative meanings were interpreted wrongly away from what our law intended and thus necessitating other courts such as the constitutional court to employ correct interpretations in an attempt to eliminate gaps that may be infused as a result of wrongly arriving at some decisions which may impact on peoples' rights. It was imperative to employ other laws when required however, for instances sections 25, 39 and 211 of the Constitution of 1996, to bring meaning to the intended purpose of the legislature. Hence this work highlighted the salient issues considered connected with how the law should be interpreted in line with the demands of the correct law such as clarifying the connotations of the principles of consultation and informed consent required in the discussion.

9.1 *The Factual analysis of the courts proceedings*

The applicants initiated appeal proceedings against the orders of the High Court of

South Africa in North West to the Constitutional Court which upheld the appeal, following court *a quo* orders granted in favour of the respondents (Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another 2019 :3)

Applicants raised arguments about being the rightful owners of a particular farm, and also that it was their fore parents who bought the land back in early 19th century after a decision had been taken by the community in 1916. The applicants were not residents on the farm but some of the workers were. The farm was as a result of the past laws transferred to the Minister who still holds it by title in a trust on behalf of the community. Applicants contended that only those (Lesetlheng Community) who had contributed to the purchase of the land have legal interest than those (Bakgatla-Ba-Kgafela) who did not ((Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another 2019:12). The farm was divided into thirteen (13) plots which were allocated to thirteen families (Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another 2019:13). These people conducted agricultural activities on this farm one which they also had exclusive control of. The families, over time constructed structures for their workers and livestock. In 2004, the state granted a prospecting right over the same farm to the respondents. In May 2008 an environmental management programme (EMP) was approved. In June 2008, after the approval of an EMP, a surface lease agreement was entered into by the Bakgatla Tribal Authority and the State in respect of the farm (Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another 2019:14).

In 2015, the applicants instituted urgent proceedings for a spoliation order that was a result of the respondents mining operations. The respondents then sought an interdict in the orders above against the applicants. The respondents, in their application, argued they has properly consulted as required by law when applying for both rights (Maledu and others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another 2019:15).

Applicants argued on several bases, during their opposition to the application by the respondents that they were the real owners of the land and they and raised the concern that they have never been consulted as required by s 2 of the IPILRA of 1996 (Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another 2019:16). The court *a quo* said that the surface lease was not a pre-requisite prior to the respondent exercising their mining right because s 5 of the MPRDA of 2002 granted a mining right holder access to land and to which the mining right relates(par 18). Further, the court *a quo* concluded that the members of the household on the farm were properly informed and therefore consultation was done as a result. Lastly, the court *a quo* accepted that s 54 of the MPRDA did not preclude the respondents from commencing with their mining operations. in this matter, the respondents also saw it fit in to commence with mining activities notwithstanding the fact that the process envisaged in s 54 had not been concluded (Joubert v Maranda Mining Company (Pty) Ltd 2009:40).

9.2 *The law applied in the case*

According to the CC's Petse AJ, there interests of justice dictated that leave ought to be granted (S v Boesak 2001:11-2). The applicants sought to vindicate their land tenure rights. The Constitutional Court was seen as a correct platform by the parties to resolve the feuds and to provide clarity with regards to the perceptions of the law (Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another 2019: 32). The court's approach showed that its judgment was necessary to shed light on what the legislature's intentions were regarding some of the statutory provisions and the law and its recourse provided more light to the aggrieved parties which is the similar case in other court decisions. This designated that the Constitutional Court clarified the decision of the former court which in my opinion stalled to interpret and to provide clear path of what the legislature intended by interpretation. It is therefore legally practicable that the Constitutional Court had to put clear its final position by providing a recourse in the spirit of constitutional parameters.

Firstly, the Constitutional Court was inundated in providing clarities regarding the intentions of the IPILRA, MPRDA and the Constitution of 1996. It was construed, as the interpretation of the court suggested, that the previous court paid lip service in providing the litigants with the clear path of what actually the correct position in law should be, hence the upholding of the appeal. The Constitutional Court had to evaluate the meaning of the provisions of the legislation to provide declarations that could assist parties to find commonality. Further the Constitutional Court position was to clarify the position of the rights in dispute to harmonise the situation relating to access to land and right to mine where plausible. Secondly, the Constitutional Court had to measure the meaning of the provisions parallel to try and make conclusions in line with parties' relations in terms of the rights in question. Thirdly, the Constitutional Court had to make determinations as to whether it is necessary to admit additional evidence by admitting an amici as another angle of having to hear advance evidence besides that of the litigants. Finally, the Constitutional Court, sitting as appeal court, sought to clarify the high court orders (Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another 2019:39). On the constitutional and statutory framework explained in here, the Court had to employ and provide convenient references which are relevant for the determination of the case (Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another 2019:43). The Court considered that statutory provisions must be interpreted in accordance with the Bill of Rights. The connotation here was dealt with later in the constitutional law discussion in (Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd Limited v Smit N.O 2000:21 where the court held that "the meaning of the provisions in an Act must be ascertained having regard to the scheme of the Act as a whole, and to the object and purpose of the legislation underpinning the provisions being interpreted) (Mistry v Interim National Medical and Dental Council 1998: 17-18)].

The Constitutional Court therefore postulated to the law in this way: that the provisions in the MPRDA of 2002 that permitted the respondents to evict the land owner when he or she refused access to land; the respondents rights are derived from the MPRDA of 2002 which contained measures for resolving disputes such as this; the respondents undermined the supervisory role of the Regional Manager who administers and implements the MPRDA of 2002 and; that there is no remedy available at common law that is invoked by the MPRDA of 2002. The analysis to follow is based on the above findings.

9.3 An Analysis

The Constitutional Court was satisfied that the matter be resolved on the premise of s 54 of the MPRDA of 2002 and s 2 of the IPILRA of 1996. Thus the Constitutional Court by drawing inferences from various case law, considered salient critical issues central to the decision the Constitutional Court took. The Constitutional Court inquired on the respondents' position with regard to its reliance to section 54 of the MPRDA. This was done to glimpse on whether there were obligations created before respondents could apply for eviction against the applicants. The Constitutional Court had to test whether there was a common law remedy which existed under section 54. The Constitutional Court's view on the respondents' reliance on section 54 and (*Joubert v Maranda Mining Company (Pty) Ltd* 2009:40) was considered unsupported and baseless as reference to the *Maranda* case bore different facts to the matter in question. Further that at the time of the judgment the repealed section 5(4)(c) of the Minerals Act 50 of 1991 was still in force, therefore making it necessary for the Constitutional Court to consider if it was necessary employ it in its judgment. The Constitutional Court extended its view on the issues attached to the notification and consultation processes. Adjoining these, s 10 of the MPRDA of 2002 required the State to within 14 days in a determined manner make notice that an application for a mining right was accepted. This is relevant for the interested and affected parties to be able to submit their objections to the acceptance. This process is relevant because it required the respondents to consult with the applicants and to include the result of such consultations in the environmental report required by the Regional Manager office in terms of section 16(4)(b) and regulation 39 of the MPRDA of 2002. This the Constitutional Court considered customarily as matters imposed for the application of a mining right upon which the landowner's or lawful occupier's rights are affected and remarked using the approach in (*Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Lt*, 2010:78).

In the Constitutional Court's consideration of s 54 of the MPRDA of 2002 was premised on the impression of perfect balance between the mining right and the surface right holders. In the Constitutional Court's view, s 54 of the MPRDA of 2002 required the disputing parties to solicit common ground. Thus this s required parties to enter into harmonious deliberations and negotiations in resolving their disputes. Further, that if

the parties were unable to arrive at any reasonable resolution, the state could have, in terms of s 55, recommended that the right in the land be expropriated. In other words, s 54 was not properly contested by the respondents in the matter. The decision was premised around whether s 54 can be exhausted before an eviction or interdict is sought, for which the Constitutional Court found was not provided for. Consequently the Court had to set orders of the court *a quo* aside and dismiss the eviction order and interdict granted against the applicants.

Section 2 of the IPILRA of 1996 was in essence an injunction to s 54 of the MPRDA of 2002. In the constitutional court's view, the selected provisions of the MPRDA of 2002 required to be read in such way to find ground with other legislation, in this case the IPILRA of 1996 as well as the Constitution of 1996 as a state legal instrument. As already noted *supra*, a mining right holder and a landowner or lawful occupier can co-exist harmoniously, as was the intention of the Constitutional Court to reconcile s 2 of the IPILRA of 1996 and s 54 of the MPRDA of 2002. The Constitutional Court, to my view, devised a resolution for the disputes by avoiding the impression as if s 54 existed in isolation. The court has done this to avoid delinking the purpose in both sections. Thus for those disadvantaged by the previous discriminatory laws' impact on their security of tenure, must have been legally protected. This therefore, in the Constitutional Court view, demonstrated that any subsequent agreement, such as the surface land agreement entered into between the Tribal Authority and the miners, was capricious.

As a result of this analysis and the immediate emergence in the appeal, mining right holders must fulfil the purpose enshrined in s 2 of the IPILRA of 1996 and s 54 of the MPRDA of 2002 respectively. This required compliance with the standards set at common law and at statutory levels. This helped parties, as the Constitutional Court highlighted (in *Meepo v Kotze* 2008: 13.1& 90 that the MPRDA of 2002 provided for due consultations between a landowner and the holder of or applicant for a permit to alleviate possible serious inroads being made on the property right of the landowner). In other words, consultative arrangements must be intrigued as measures of peaceful mining process. This talks to the land in the care or lawful occupation by individuals or a community. It is clear that the exercising of a mining rights could also have direct impact on the right of property of the land owner. The correct stance that must be taken is to protect the traditional communities by ensuring that such communities' right to decide and their interests or exclusive heritage are not compromised. The communities must afforded legal protection which would ensure that they assumed control over and to deal with their lands in accordance with their customary practises and usages as supported by the Constitution. Finally, the IPILRA of 1996, though amended, provided informal rights to land and for such land to be deprived, but not without consent. The exercise of a mining right has always subject to any other laws having a bearing on such rights such as the IPILRA of 1996 and other related laws (*Maccsand (Pty) Ltd v City of Cape Town* 2012:92). Accordingly, all potential disputes regarding access to land or

compensation needed to be dealt with before commencement of mining operations unless the affected parties were at some point committed in bad faith to the negotiations (*Joubert v Maranda Mining Company (Pty) Ltd* 2009: 40.3). Ideally, it is important to then evaluate why the Constitutional Court was adamant that legitimate solutions to the disputes could be provided through interpretations in conformity to constitutional law.

9.4 Constitutional law Application

The Constitutional Court usually decide matters of constitutionality or any other matters if the court deems it necessary for them to be adjudicated on that level (*Paulsen v Slip Knot Investments 777 (Pty) Limited* 2015: 21). This notion was also endorsed further in other court case (in *DE v RH* 2015: 8-10 where the jurisdiction of the Constitutional Court was drawn in that it was of the view that the notion that a point of law is arguable entails some degree of merit in the argument. Although the argument need not, of necessity, be convincing at this stage, it must have a measure of plausibility).

In providing the directive, the Constitutional Court recognised the general obligation imposed in s 39 of the Constitution which merely required of the court to interpret legislation and develop both the common law and customary law in line with the Constitution (*Affordable Medicines Trust v Minister of Health* 2006:44). In this case note, the interpretation was required for the applied provisions of the MPRDA of 2002 and IPILRA of 1996. Having a bearing on this provision, the Constitutional Court considered necessary to proceed with statutory framework interpretations. The central idea to employ section 39(2) was in essence critical to promote the spirit, purport and object of the Bill of Rights. Allied with this principle, is the fathom that this principle be construed in line with the Constitution. Accordingly Moseneke DCJ emphasised (in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007:1027 that in searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to social and historical background of the legislation). In the interpretation practice, the historical context of South Africa envisioned by the Constitution and the interpretative canons must provide clear guidelines (Bapela and Monyamane 2021). Legislation must be interpreted to provide meaning to words contained therein. This the Constitutional Court must to ensure conformity with the purpose espoused in s 39. Primarily, it was based on this aspects that the Constitutional Court adopted a cautious approach when considering the necessity of community's consent and consultation for a mining right. In essence, consent must be given free, voluntarily and must not be coerced (*Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019:72). This therefore meant that not only the community consent to right of access to land is required, but also that the community must be sufficiently informed about such right. The Constitutional Court implicated both Ss 25 and 211 of the constitution. Ideally, the

interpretation in relation to s 211 of the Constitution enjoins to entrench the autocratic powers of traditional leaders under the system of colonialism and apartheid (*Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019:35). Thus it is implanted within the IPILRA of 1996 to provide communities or communal land owners with legal protection to assume control over and deal with their land according to their customary law practices and usages. Consensually, combatting any interference with the use, enjoyment or exploitation of private property which involves some deprivation in respect of a person having title or right to or the property concerned is worrying (*First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services*; *First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002: 57). The Court has thoroughly interpreted the legislation with conformity to the constitution in providing more vivid picture of the intentions in section 2 of the IPILRA and the provisions in the (MPRDA 2002: 54).

10. Conclusions

The straight-out explanations of the Constitutional Court enhanced assurance and consistency into the years to follow in that litigating parties should be obligated to ensure that their rights are tested rigorously linking up to correct statutory interpretations(Botha, 2011). There are clearly additional obligations despite those imposed in section 39(2) of the constitution created by IPILRA to obtain the community's consent prior to grating a mining right. The IPILRA sought to protect traditional communities by ensuring that their right to land over which they have interests, is exclusively controlled. Further, on the salient autonomy of the legislation, the communities' legal protection must burgeon their land right in line with the customary law and the usages practised by them. In other words, the IPILRA's intention was to protect rather than to deprive. Thus it was the intention of the Constitutional Court to interpret the IPILRA in harmony with the goals intended in the MPRDA and the Constitution (Tlale, 2020). For instance, on issues of consultation and consent, it was the Constitutional Court view on the resolution adopted by the community that the respondents' postulated stance that the applicants had actually consented in terms of section 2(4) of the IPILRA was abrupt. This was so because the purpose in this section was not interpreted nor explained properly by the respondents. This therefore necessitated the applicants' legal protection to their land right strengthened and found to be lawful (*Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019:113). The Constitutional Court has affirmed futuristically that persons intending to be granted a mining right must ensure that consultative requirements prescribed by MPRDA are fully adhered to (*Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019:78). Further, it mandated that section 54 of the by MPRDA be complied with before relief of any nature is sought (*Maledu and Others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019:86, 87). This

touched on the processes outlined under section 54 of the MPRDA necessary for mining right holders to finalise before commencing with mining operations.

Finally, the Constitutional Court adequately provided the interpretative nature of the legislature by opening a space for our courts to have an opportunity to test the meaning of legislation in some of their cases, which was to create space for possible arbitration of disputes outside courts (MPRDA, 2002: 54). Though most of courts' interpretation conform to the constitution, the judgement opened and made blunt the concomitant obligations inundated to our courts in following through interpretative legal processes when passing judgements emanating from complex court cases such as this (Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd, 2007: 53). Also that certain rights cannot exist without diverting towards the rules of interpretation and therefore employing principles necessary to put clear the meanings for pure understanding and consumptions during legal discourse (Maunatlala & Maimela, 2020). Nonetheless, the writer's narrative to here is that the court in this work was of the view that legal principles applied and used to forge interpretations are also for realising the kind of relief to be passed and that which may have the potential of settling disputes. Thus, in the Maledu's case, understanding the rules of interpretation in elevating disputes was very critical.

To sum up the issues of access to land and the right to mine, the clear approach is that the Minister must make possible channels under which interested and affected parties are consulted and an informed consent is sought first, more especially if such people's rights are affected by this intended mining activity (MPRDA, 2002:10). This has come as a relief to the communities whose lands have been affected in line with the same practise of wanting to mine experienced in this case. Thus for future, the communal land rights, which may encompass various things, ought to be respected and promoted before any other right is granted in order not to disturb their peace and enjoyment of their property one which the Constitution of 1996 and property law protects. The right of access to land and the right to mine can co-exist but only when the rights in the main are not affected. Proper administrative law principles and other related aspects of constitutional significance to the violation of rights must then be invoked in such cases if it is found that there procedure for acquiring mining rights was flouted (Promotion of Administrative Justice Act, 2000: 3;4 & 6).

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