



# Baleni v Minister of Mineral Resources: A fait accompli

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## Synopsis

The court in *Baleni v Minister of Mineral Resources* [2019] 2 SA 453 GP and [2020] 4 All SA 374 (GP), deliberated on the protection of rights of a community holding informal land tenure under Customary Law. The contention related to the necessary level of consent needed to acquire a mining right over such land. Moreover, whether consultations with such communities (Section 23, *Mineral and Petroleum Resources Development Act* 28 of 2002 (MPRDA) or consent (Section 2, *Interim Protection of Informal Land Rights Act*, No. 31 of 1996 (IPIIRA)) was required to acquire such right. The case has a significant bearing on the granting of mining rights in South Africa, and the discretion of the Minister of Mineral Resources (the Minister) in this regard. However, the objectives of the MPRDA and IPIIRA do not dovetail, therefore consultation and consent are not mutually exclusive (Tlale, 2020). This note argues that, despite the resounding victory of this case, the peripheral basis surrounding the decision and the various levels of engagement require serious deliberation. Equally, the degree of reliance on the IPIIRA requires clarity to avoid aborting the fundamental objectives of the MPRDA. This paper provides considerations and recommendations that may reduce or eliminate the tensions between the statutory and socio-economic rights in the application of the two statutes.

## Keywords

Baleni, informal land rights, mining communities, SLPs, MPRDA, PILRA.

## Introduction

A substrate of the South African economy is mining, an industry plagued by pressures associated with the extent of its failure to consider the environments and communities it engages (Malesa and Morolong, 2021). The historical tension between mining companies and the communities in which they operate stems from the inequities of the apartheid and migrant labour systems (Hamann, 2003). As such, the legacy of this industry is fraught with controversy and imbalances between mineworkers, communities, and mining companies (Thambi, 2019).

In terms of the Mineral and Petroleum Resources Development Act (MPRDA), mineral and petroleum resources are the heritage of the people and as custodian, the State is empowered to grant new order rights (MPRDA). These new order rights relate to prospecting and mining rights under the MPRDA, which are limited real rights in respect of the minerals and land. As such these rights require registration in order to provide security of tenure (Thomas, 2018). However, these rights are often awarded in respect of land owned by informal communities, where the entitlements to these rights inadvertently impinge on and encumber the landowner's 'ownership' prerogatives (van der Schyff, 2019). Furthermore, once granted, these rights provide the holder with a statutory right to enter the said land. This right to enter the land entitles the holder to interdict the landowner or occupier against any unlawful denial of access (Thomas, 2018). It is, therefore, obvious how prospecting or mining rights are perceived as the deprivation of a property right; and the continued imperative to maintain balance between the statutory right and the socio-economic protection (van der Schyff, 2019).

A good relationship between a mining company and a community is essential for the development of mining operations, which rely on the level of acceptance by a community toward the company (Nieto and Medina, 2020). It is therefore incumbent on mining companies to provide legitimacy, transparency, and trust through assurance, informed communication, and community participation (Nieto and Medina, 2020). *The Broad-Based Socio-Economic Empowerment for Mining and Minerals Industry* 2018 (the Charter) outlines transformation objectives and engages with social and labour plans that companies are required to have by law. However, it is argued that some of the Charter improvements could be implemented in

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a system that has failed to hold companies accountable to their commitments (Nicolson, 2018).

Landowners and/ or communities surrounding South African mines are often entangled with social issues relating to poverty, unemployment, and poor housing (Chenga, Cronje, and Theron *et al.*, 2005). They are often at a disadvantage in engaging large mining companies, with challenges ranging from issues of land tenure, ownership, buy-ins, and partnership (Chenga, Cronje, and Theron, 2005). Furthermore, they are rarely homogeneous in terms of political or cultural structure, which exacerbates the challenges. This is evidenced when local economic development commitments of mining right holders are appropriated by communities with contradictory expectations (Marikana Commission of Enquiry, 2014). The rippling effects result in (but are not limited to) significant delays for right holders and potential prohibitions imposed by the Regional Manager in the enforcement of these mining rights (Stevens and Louw, 2018).

Despite these challenges, the Department of Minerals Resources and Energy (DMRE) is committed to provide protection and benefits to communities in mining areas (Chenga, Cronje, and Theron, 2005). In particular, the MPRDA requires consultation with 'interested and affected parties', landowners, or lawful occupiers before a mining or prospecting right is granted. An applicant for a mining right (or prospecting right) who is not the landowner will need to consult with the 'landowner'. The landowner could be a community and/or 'splinter' groups within such communities claiming to be legitimate owners of the land (Mnguni and Sibiso, 2012). Note that *'interested and affected parties' has been defined in the MPRDA Regulations as 'natural or juristic person with a direct interest in the proposed or existing operation or who may be affected by the proposed or existing operation'* (MPRDA). While the MPRDA attempts to rectify past imbalances endured by communities in South Africa, its provisions have not always been successful in this regard (Mitchell *et al.*, 2012). In fact, the procedural aspects of the MPRDA remain challenged, with anomalies in the mineral rights application system (Tlale, 2020). The MPRDA only provides for consultation, and not prior consent to the granting of a mining right (Maolusi, 2019).

In terms of Section 10(1) of the MPRDA, on acceptance of an application for a mining right (or prospecting right), the Regional Manager is required to notify interested and affected parties of the application and, at the same time, request their submission of comments (Section 22 of MPRDA). Section 10 is therefore the "first round of consultation" (Thomas, 2018), where the applicant is required to inform the landowner or occupier of the mining activities related to the mining right. This enables the landowner or occupier to determine the impact of such mining activities on their land (Tlale, 2020).

More specifically, in terms Section 16 (application for prospecting rights) and Section 22 (application for mining rights) of the MPRDA; the 'applicant' notifies and consults the landowner or lawful occupier and any other affected parties (*i.e.* the surface rights owner) (Thomas, 2018). Thus, Section 16(4) and 22(4) consultations are the 'second round of consultation' (Thomas, 2018). This details the successful applicants' access to the land and associated compensation for the land occupiers (Tlale, 2020).

Section 22 of the MPRDA, however, goes further and prescribes the procedure for application for a mining right (Baleni, 2020). Section 23 of the MPRDA obliges the Minister to grant a mining right application if the listed requirements of the MPRDA are satisfied (Baleni, 2020) while Regulation 10 of the

MPRDA prescribes the information contained in a mining right application, including a social and labour plan per Regulation 46 (Baleni 2020). Lastly, Regulation 50 (f) of the MPRDA details the engagement process of interested and affected parties in the context of an environmental impact assessment report (Baleni, 2020). The aforementioned sections demonstrate the tenets of the MPRDA, namely, that a mining right application needs to ensure sustainable development and participation based on adequate and meaningful consultation (Baleni, 2020).

The Intern Protection of Informal Land Rights Act (IPILRA) on the other hand, which was a temporary measure, ensures the protection of compromised communities' informal land rights and their participation in respect to any tenure or development on their land (Communal Land Tenure Policy and IPILRA, 2012). In particular, Section 2(1) of IPILRA recognizes that unless communities consent, they cannot be deprived of their 'informal rights' to their land (Communal Land Tenure Policy and IPILRA, 2012). In spite of its 'temporary' nature, scholars argue that the IPILRA has a permanency equal to that of any other Act of Parliament.

The Baleni decision confirms the need for companies to seriously consider the rights of communities or risk possible loss. Therefore, part of the license application process requires companies to engage with communities. This informs communities about the nature and extent of proposed mining activities. However, in the Baleni case the DMRE failed to act as the custodian of mineral rights by negligently awarding mining rights without verification of proper consultation as per the MPRDA (Tlale, 2020). Although Transworld Energy and Mineral Resources (TEM) alleged that it had consulted the community in terms of Section 22(4) of the MPRDA, it failed to substantiate (Tlale, 2020) whether proper consultation had in fact occurred. In addition, the DMRE accepted an unsubstantiated draft social and labour plan from TEM (Baleni, 2020). Based on the facts, the court ordered that the Minister obtain full and informed consent of communities before granting any mining rights (Maolusi, 2019). Furthermore, that on request, interested and affected parties are entitled to copies of mining right applications (Baleni, 2020).

This case has aroused much controversy, particularly when Basson J emphasized that the Minister lacked authority to grant mineral rights unless the relevant provisions of the IPLIRA had been complied with (Baleni, 2019). Civil society groups argued that the lack of meaningful consultation with communities was prevalent throughout the Mining Charter drafting process, despite the DMR being ordered to engage and address communities (Nicolson, 2018). Those representing communities argued that communities should be required to give consent, rather than just be consulted before a mining license is issued (Nicolson, 2018). The court failed to address how to reconcile the different levels of engagement under the MPRDA (statutory right) and IPLIRA (socio-economic protection), *i.e.* to address the question of consultation *versus* consent (Tlale, 2020). Nor did the court explain the consequences of the right to refuse consent to mine in areas where government currently own the mineral resources under the ground (Nicolson, 2018).

### The problem

At ground level, there appears to be a misalignment of the basic foundations of the rights and associated ancillary rights in relation to consultation processes (van der Schyff, 2019). This misalignment is attributable to the differing objectives of the

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MPRDA and IPLIRA which is apparent in (i) the entitlements of holders of prospecting or mining rights, (ii) the burden on landowners, and (iii) the indistinct consultative processes. The MPRDA only provides for consultation and not prior consent to the granting of a mining right (Maolusi, 2019) while the IPLIRA requires consent from the land occupiers before mineral rights are granted. In light of the Baleni judgement, consent of land occupiers would be a prerequisite in all mineral right applications. This would render communities selective as regards the activities allowed on their land (Tlale, 2020). The question therefore, is whether this was the real intention behind the Baleni judgement.

## Aim

This paper reviews some of the disparities that seem to lend weight to the above problem. For example, the levels of engagement under IPLIRA and the MPRDA are not mutually exclusive, nor are the respective rights of the different parties reconcilable (Baleni, 2019). Instead, it has been accepted that the two statutes must be read together (Baleni, 2019). This paper aims to provide considerations and recommendations which could notably contribute to easing the problem, while preserving the tenets of the MPRDA and IPLIRA.

## Background to the Baleni case

### Facts

The Baleni case relates to a dispute in the High Court between the rural community of Umgungundlovu or the Applicant. The community represents a group of villagers under the Amadiba traditional authority in Xolobeni in the Eastern Cape. An Australian mining company, Transworld Energy and Mineral Resources (TEM) was the Respondent (Meyer, 2020). At the head of the Umgungundlovu community and the Umgungundlovu iNkosana Council (a body established under customary law) was Duduzile Baleni (Meyer, 2020). The community's forbears have resided in the area of Umgungundlovu since the 1800s and, as such, they have held informal rights to the land under IPLIRA and customary law (Baleni, 2019). The initial primary issue was whether interested and affected parties in an application for a mining right are entitled to a copy of the mining right application in terms of Sections 10 and 22(4) of the MPRDA (Malesa and Morolong, 2020).

In 2008 the government, with the backing of the local chief representing these villagers, had granted a mining right to TEM's holding company, *Mineral Resources Commodities* (Meyer, 2020). Conflict ensued amongst factions within the community as to whether a mining right over the land should have been granted or not (Meyer, 2020). In response to the conflict, the Minister of Mineral Resources imposed a moratorium of 18 months on mining in the Xolobeni area (effective till 9 June 2017) (Section 49 (1) of the MPRDA).

Following this, on 3 March 2015, TEM applied for a mining right over land on which the community lived and farmed (Malesa and Morolong, 2020). Given the history of their dependency on the land, the community were concerned about the 'disastrous social, economic and ecological consequences of mining' (Baleni, 2019). They argued that given their 'reach' of the land, they should have been consulted and provided with the requisite authority to consent to mining operations in the area (Baleni, 2019). They acknowledged the customs and complex decision-making processes within their community, e.g. majority approval by

community members of such mining operations was not always considered tantamount to consent (Baleni, 2019). However, the failure of TEM to engage and consult with the community on the proposed mining operations and their failure to provide detailed information did not equip the community to consent to TEM's operations (Baleni, 2019).

Given that such mining operations might result in their physical displacement and economic disruption (Maolusi, 2019), the community wrote to the DMRE, and more specifically the Regional Manager, to ascertain the status of TEM's mining right application; and to request a copy of the application. (Baleni, 2020). The Regional Manager advised them to direct their request to TEM, or to the DMRE in terms of the Promotion of Access to Information Act, 2 of 2000 ('PAIA'). Despite these efforts by the community to request a copy of the application, TEM refused to comply. The community then resorted to instituting an application compelling TEM to disclose the application documents. TEM subsequently supplied a copy thereof, but argued that the community were not entitled to it in terms of the MPRDA (Veeran and Bishunath, 2020). Instead, TEM stated that access to the application documents could be gained through the PAIA (Baleni, 2020).

It was the contention of the community that, based on Sections 10 and 22(4) of the MPRDA, interested and affected parties would automatically upon request obtain a copy of a mining right application to supplement consultations between the parties (Baleni, 2020). They believed that their successful participation with TEM was subject to adequate and meaningful consultation and that only with such consultation would TEM obtain the mining right, and the community the right to sustainable development (Baleni, 2020).

TEM and the Minister opposed the requirement to obtain consent on the basis that the MPRDA provides only for consultation, and not prior consent, before the granting of a mining right (Maolusi, 2019).

### Judgement

The judgement embarked on the interpretation and application of the provisions of the MPRDA and the IPLIRA. This was crucial to determine the necessary level of engagement before granting a mining right. Furthermore, it was necessary to establish whether consultation as required per the MPRDA applies to the exclusion of consent as required per the IPLIRA (Baleni, 2020).

The central issue before the court was whether *consultation* with members of communities holding rights to land under Customary Law was a prerequisite before granting a mining right (Section 23 of the MPRDA), or whether *consent* (Section 2 of the IPLIRA) was required (Baleni, 2019/2020). The court referred to Section 23(2A) of the MPRDA in order to bolster its stance on the issue of 'consent'. However, Section 23A empowers the Minister to introduce conditions into mining rights that have been granted. Therefore, this section has no relevance to a community's right to refuse the granting of a mining right under the IPLIRA.

According to the community, Section 2(1) of the IPLIRA required the consent of the holder of an informal land-based right before such person/community is divested of property, i.e. before a mining right is granted. However, TEM argued that all that was required before the granting of a mining right was 'consultation' and not consent as per the IPLIRA. Thus, they contended that in accordance with the MPRDA, the community had no right to consent to the mining right (Baleni, 2020).



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In a parallel case, namely, *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and other* 2011 (3) BCLR 229 (CC)), the Constitutional Court had to decide on the issue of consultation in circumstances where the landowner was a traditional community and where there had been no proper consultation by the holder of the prospecting right. It was stated that: *'It appears that, apart from the mechanisms provided for in Sections 10(2) and 54 of the MPRDA, which mechanisms are designed to resolve objections or disputes between an applicant for or a holder of a prospecting right and a landowner, consultation is the only prescribed means whereby a landowner is to be appraised of the impact prospecting activities may have on his land and, for instance, his farming activities'* (Sechaba v Kotze and Others (2007)).

However, the Baleni judgement relied extensively on *Maledu v Itireleng Bakgatla Mineral Resources (Pty) Ltd* 2018 ZACC 41, where a mining right had already been granted. In the Maledu case, the court held that Common Law requires the landowner and the mining right holder to exercise their rights alongside each other as far as reasonably possible. It was held that the purpose of IPLIRA is to provide temporary protection of certain rights to an interest in land (Maledu, 2018). The court added that the award of the mining right constituted a deprivation of informal rights to land, since the rights granted to the mining right holder are extensive, and would deprive the community of their rights to their land (Maledu, 2018). As such, the mining company in Maledu was obliged to comply with Section 2 of the IPLIRA. In this case, the court re-established the importance of Section 2 of IPLIRA and the requirement of consent from community members/ the community in accordance with that particular community's customs and traditions (Maledu, 2018).

It is worth noting that, prior to the Baleni decision, interested and affected parties were restricted to the use of the weighty mechanisms of PAIA to gain access to information. This provided for limited access to copies of mining right applications, which in some instances were provided only after the consultation process (Peter Leon, 2021).

It was held in Baleni, that *'interested and affected parties'* in terms of MPRDA should be consulted, and that an application for mining-rights-related land rights would require community consent (Malesa and Morolong, 2020). It was further held that meaningful consultation per the MPRDA involved discussion in calm equanimity, with each mining operation making allowances especially for the land 'owner' or occupier (Baleni, 2020). Effectively, the landowner's/occupier's input to the mining application was to acquaint the Minister of compliance to the prescribed requirements MPRDA objectives and consultation processes (Malesa and Morolong, 2020).

In final judgement in the Baleni case, the High Court ordered that interested and affected parties are to be furnished with a copy of an application for a mining right (Malesa and Morolong, 2020). This right was based on the requirements imposed under Sections 10(1) and 22(4) of the MPRDA, which include a duty to meaningfully consult with interested and affected parties during the application process.

### Considerations and recommendations

There is no doubt that the Baleni judgement is a resounding one, and a step in the right direction. However, the author does not agree with the reasoning of the judgement, because fundamentally it has always been intended for the landowner/occupier and the mining right holder to exercise their rights alongside each other

(Maledu case). However, engaging in 'meaningful consultation' during application for a mining right (MPRDA) is the only prescribed means for the informal right-holder to be informed of the extent of the mining activities on their property. The purpose of IPLIRA, on the other hand, is to provide temporary protection of certain rights for those occupying the land (Maledu, 2018). In this regard, 'consent' of the holder of an informal right was premised on the view that granting of a mining right is seen as divestment of the informal right-holder of their property. It is, therefore, necessary to appreciate that prospecting or mining rights are often perceived as the deprivation of a property right; hence the continued imperative to maintain the balance between the statutory right and the socio-economic protection (van der Schyff, 2019). The challenge is to find the balance between statutory rights and the socio-economic protection measures. The court failed to divulge how to reconcile the disparity between the primary objectives of the MPRDA and IPLIRA, namely, 'consultation' and 'consent' respectively (Tlale, 2020). In terms of these statutes, landowner/occupier and miner rights will always be juxtaposed. However, it has been accepted that the two statutes must be read together (Baleni, 2019).

The court did not consider a further point, namely the power yielded by the right to unreasonably withhold or refuse consent to mining in areas where government (which holds the same position as the owner) currently owns the mineral resources under the ground (Nicolson, 2018). Nor did the court consider how certain factors could defeat the MPRDA's goal of ensuring equitable access to mineral and petroleum resources in South Africa (Reid, *et al.*, 2021). Despite this, the Baleni ruling fundamentally alters the authority of the Minister of DMRE to grant a mining right in South Africa. With this development, the Minister appears to have limited or no lawful authority to grant mining rights in terms of Section 23 of the MPRDA, and in particular, in respect of land occupied under a right to land in terms of tribal, customary, or indigenous law, or practice of a tribe per the IPLIRA (Maolusi, 2019). The DMRE is of the view that the ruling will strengthen and extend the scope and application of the MPRDA, facilitating streamlined consultation processes (Veeran and Bishunath, 2020). However; the following aspects (or at least some of which) informed the judgment and thus require further deliberation and/ consideration with the respective recommendations:

### Clarification re the temporary nature the IPLIRA

Central to the Baleni decision is the IPLIRA. In spite of its temporary nature, the IPLIRA is an Act of Parliament. Hence, where decisions such as the Baleni case rely thereon, the veracity and longevity of the IPLIRA has to be tested. To this end, the IPLIRA states that the Minister of Rural Development and Land Reform can make regulations (Communal Land Tenure Policy and IPLIRA, 2012). Bearing this in mind, it is hereby recommended that legally binding regulations be introduced into the IPLIRA. Such regulations should detail processes and procedures for consultation and/or compensation relating to informal land rights (Communal Land Tenure Policy and IPLIRA, 2012). Furthermore, these regulatory provisions should be aligned (where necessary) to similar provisions contained in the MPRDA.

### Amendments to the MPRDA Regulations published for implementation

Selected Mineral and Petroleum Resources Regulations (Amended Regulations) published in 2020 by the Minister for the DMRE

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(Masina and Bromham, 2020) inform the judgement. Such amended regulations widen the requirements of 'meaningful consultation' and the obligation on the mining right holders to consult with members of a community (Veeran and Bishunath, 2020). Therefore, the Amended Regulations require clarity with respect to the following:

- ▶ Reliance on the MPRD Regulations 2019 ('Draft Amendments') remains questionable, particularly since it extends the definition of 'Interested and affected person', to include 'any other person (including on adjacent and non-adjacent properties) whose socio-economic conditions may be directly affected by the proposed prospecting or mining operation'. This definition is far too expansive to withstand the rigor of judicial scrutiny (Christie and Berman, 2020).
- ▶ Furthermore, the definition of 'Mine Community' in the Amended Regulations is misaligned with the definition of 'community' in the MPRDA and the definition of 'host community' in the Mining Charter (Masina and Bromham 2020). This is a recipe for disaster.
- ▶ Lastly, though undefined in the MPRDA or its Regulations, 'meaningful consultation' has supplanted the concept of 'engagement' in the Draft Amendments and this requires an applicant to have 'facilitated' the 'participation' of the landowner, lawful occupier or interested and affected party. However, the Amended Regulations link the concept of 'meaningful consultation' to the public participation processes (Regulation 3A of the Environmental Impact Assessment), whilst the Draft Amendments refer to 'consultation' and not 'meaningful consultation' (Christie and Berman, 2020).

It is recommended that the above anomalies surrounding the aforementioned references in the MPRDA (between the community/holder, consultation/meaningful consultation) be clarified if they are to be relied upon.

### Consultation and Section 54

The MPRDA provides only for consultation, and not prior consent to the granting of a mining right (Maolusi, 2019). Whilst the MPRDA does not purport to regulate Customary Law, communities with rights in land are given inordinate protection in terms of IPILRA. Yet, regardless of the aforementioned discrepancy, the MPRDA continues to apply, as does the IPILRA.

'Consultation' in the context of mining is a very animate and ongoing process, involving a plethora of stakeholders; and it commences from the conception to 'mine'. In terms of the MPRDA Section 5(4) (c) (now repealed), consultation with the surface rights landowner or lawful occupiers of land was required before mining began. This consultation reduced the interference with the landowner or occupier's rights (Majoni, 2013). It also protected the surface rights landowner's rights, and inferred that agreement regarding compensation could be achieved before access to the land was granted to the mining right holder (Thomas, 2018).

Section 54 of the MPRDA makes provision for the deployment of dispute resolution, but only between mining right holders and the landowner or lawful occupiers (Veeran and Bishunath 2020). It comes into play (i) where a mining company is denied access to land which it intends to mine by the landowner or lawful occupier; or (ii) where the landowner or lawful occupier has suffered, or is likely to suffer, loss or damage because of mining operations (Schoeman, 2019). The Constitutional Court in Maledu and

Others (Maledu, 2019) held that, with the repeal of Section 5(4) (c); Section 54 is invoked by disputes of compensation. Although Section 54 allows for further consultation and negotiations, it has to be exhausted in order to guarantee balancing the rights of the mining right holder and the surface rights of the landowner (Thomas, 2018). However, the challenge with consultation under Section 54 and Section 5(4) (c) (now repealed) is that at that stage, the mining right has already been granted (Thomas, 2018).

A further anomaly relates to the responsibility to notify the Regional Manager of consultations with the landowner, lawful occupier, and any 'interested and affected party'. In this regard, Section 54(1)(c) of the MPRDA refers to a 'holder' of prospecting and mining rights, whereas Sections 16 and 22 of the MPRDA respectively refer to 'applicants' of prospecting and mining rights. Yet, Section 54 comes into effect only when a prospecting or mining right has already been granted and the consultation process has been completed. Furthermore, the concepts of 'access' and 'entry' are regarded by the legislature as two distinct notions, even though securing 'access' to the prospecting or mining area should form part of the consultation process, (van der Schyff, 2019).

Since Section 54 deals with compensation, consultation, and negotiation, it is recommended that it be amended to include 'applicants'. Furthermore, such amendment could be aligned with the consultative process of Social and Labour Plans (SLPs), which could eliminate the requirement that mining companies exhaust Section 54 processes before approaching the courts. To bolster this recommendation, a suspensive clause could be added to Section 54, *i.e.* 'if meaningful consultation has not been engaged and documented in an SLP, then Section 54 processes can be dispensed with in order to approach a court'. This could effectively prevent the tenets of MPRDA from being hampered by delays requiring the exhaustion of Section 54 before approaching a court (Badenhorst, 2019).

Lastly, the Draft Amendments proposed regulations relating to the manner in which disputes should be addressed under Section 54. However, the proposal was not retained in the Amended Regulations (Veeran and Bishunath, 2020). It would be interesting to see if this would be revisited by the DMRE.

### Compensation

Except for expropriation or through arbitration, the MPRDA does not provide for compulsory compensation to land owners in respect of the surface use of their land via prospecting or mining (van der Schyff, 2019). Barring the right to be consulted, surface rights landowners are allowed to claim compensation only if the Regional Manager believes that they have suffered or are likely to suffer a loss or damage due to mining activities conducted on their land.

It is therefore recommended that consideration be given to the suggestions by scholars in relation to the approach taken in Western Australia. In Western Australia, mining companies cannot commence operations without concluding a Compensation Agreement (Thomas, 2018) with the surface rights landholder. This system encourages mining companies to negotiate in good faith in order to avoid delays in the process and provides assurances needed to manage the relationship between mines and landholders. Therefore, it is recommended that Section 54 be amended to include a similar provision; namely that entry/access to the land should not be permitted until provisional and or an adequate compensation and or surety has been settled in the SLP (Thomas, 2018).

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## Access to information

The judgement in Baleni neglected to refer to TEM's argument relating to the provisions in the MPRDA of information disclosure. Namely, that the community were not entitled to a copy of the mining application per the MPRDA, but rather per the PAIA. Perhaps the reluctance around such disclosure rests purely on the right to protect confidential information, and specifically industry-competitive information. Section 88 of the MPRDA refers expressly to PAIA. To this end, provision is made for the person or entity submitting the information to the Regional Manager to indicate which information must be treated as confidential. Furthermore, Section 88 does not override the obligations as contained in PAIA (Section 88 of the MPRDA). Therefore, where concerns regarding confidentiality exist, future mining applications should include a redacted version as regards confidential information.

## The MPRDA and IPLIRA

Some scholars believe that if the MPRDA is applied subject to the IPLIRA, the consent requirement would be a prerequisite in all mineral right applications, and communities would be selective as regards which activities to allow on their land (Tlale, 2020). It is questionable whether this was the intention behind the Baleni judgement. However consideration ought to be given to the streamlining of the MPRDA and IPLIRA, insofar as they relate to community, consultation, compensation and consent. If this is even possible, given the objectives of each Act. In the interim the sections of the MPRDA providing for consultations between an applicant for and/or a holder of a prospecting right and a landowner should be widely construed (Sechaba v Kotze, 2007).

## Social and Labour Plans (SLPs)

SLPs are entered into between the mining company, community, and the DMRE. The eligibility for a mining right and renewal thereof is conditional upon the submission by a mining company of a SLP. SLPs are developed in consultation with affected communities. Since it contains commitments to the DMRE, upon granting of the mining right, these plans/programmes are binding conditions (Thambi, 2019). However, the basis of the SLP system is very much a 'carrot and stick approach' (Centre for Applied Legal Studies, 2016). Hence, in the case of Baleni the acceptance of a draft SLP without proper consultation by the DMRE is reproachable. Nevertheless, in terms of the Amended Regulations, applicants for mining rights (and prospecting rights) are required to consult meaningfully with mine communities and interested and affected persons regarding SLPs. Moreover, public participation must take place in terms of the prescribed process per the EIA (Environmental Impact Assessment) Regulations. However, the success of implementation and application of SLPs may hinge on the broader definition of 'interested and affected persons'.

## Interplay between the MPRDA and National Environmental Management Act 107 of 1998 (NEMA)

In terms of the National Environmental Management Act 107 of 1998 (NEMA), Regulation 39(2)(b) (now deleted), landowner consent for an environmental authorization (EA) was not required for mining-related activities. This has changed with the amendments to NEMA in 2014 and the Environmental Impact Assessment Regulations (EIA Regulations) which came into effect in 2021. Included therein was an amendment to this

requirement for landowner consent in respect of applications for environmental authorization (EA) for mining and mining-related activities. In terms of the amendment, a person intending to submit an application for EA must obtain written consent of the landowner or person in control of the land before undertaking any environmental authorization (Sections 24(5) and 44 of NEMA).

The MPRDA makes provision for an internal remedy in relation to access to land. However, no internal remedies are currently provided for under NEMA and the MPRDA, where landowner consent in relation to an EA is unreasonably withheld (Reid *et al.*, 2021). This amendment will likely have the effect of vesting considerable power in landowners which may defeat the MPRDA's goal of ensuring equitable access to mineral and petroleum resources in South Africa (Reid *et al.*, 2021).

## Conclusion

The advent of the MPRDA created a cauldron of complex mining issues which collided with established settlements and ecosystems (Hermanus *et al.*, 2015). In spite of this, the Minister of DMRE has expressed the importance of communication of a positive image of mining in efforts to attract foreign investment into the mining sector (Leon, 2021). The lack of adequate consultation speaks to the fact that sustainability in mining was revered more than the mining sectors social responsibilities (Hermanus *et al.*, 2015). The Baleni case demonstrates how the MPRDA and associated legislation have crossed the historical relationship between mines and communities (Mitchell *et al.*, 2012), and not to mention the fragilities between mining operations and socio economic rights in South Africa (Meyer, 2020). While it clarifies that consultation has become a pivotal aspect of community involvement in mining operations (Mitchell *et al.*, 2012), it does not quite dispel the contradictions regarding informal land tenure and the requirements for granting mining rights over such land (Meyer, 2020). Furthermore, where judgements such as Baleni remain reliant on the IPLIRA, some argue that the IPLIRA has not been accepted (formally) as binding and permanent legislation (Meyer, 2020). Given their distinctive objectives, and the MPRDA and IPLIRA 'never the two shall meet' impression, a formalized consultation process is needed which could lay the foundation for the achievement and concrete application of their respective objectives (Mitchell *et al.*, 2012). Ultimately, each case has to be decided on the facts and merits. Furthermore, while the MPRDA contains internal mechanisms for addressing impediments between landowners and mining right holders, these mechanisms will require adaptation, especially given the Baleni decision (Thomas, 2018).

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