CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 265/17

In the matter between:

GRACE MASELE MPANE MALEDU	First Applicant
FURTHER 37 APPLICANTS	Second to Thirty Eighth Applicants
and	
ITERELENG BAKGATLA MINERALS RESOURCES (PTY) LIMITED	First Respondent
PILANESBERG PLATINUM MINES (PTY) LIMITED	Second Respondent
and	
MDUMISENI DLAMINI	First Amicus Curiae
LAND ACCESS MOVEMENT OF SOUTH AFRICA	Second Amicus Curiae

Neutral citation:	*Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41
Coram:	Zondo DCJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ, Theron J.
Judgments:	Petse AJ (unanimous)
Heard on:	24 May 2018
Decided on:	25 October 2018

Summary: Mineral and Petroleum Resources Development Act 28 of 2002 — Section 54 — Other satisfactory remedy

Interim Protection of Informal Land Rights Act 31 of 1996 — Section 2 — Deprivation of informal land rights

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ORDER

On appeal from the High Court of South Africa, North West Division, Mahikeng:

1. Leave to appeal is granted.
2. Both Mr Mdumiseni Dlamini and the Land Access Movement of South Africa are admitted as amici curiae.
3. The applications by the amici curiae to introduce new evidence are dismissed.
4. The appeal is upheld.
5. The order of the High Court is set aside and substituted with the following:

   "The application is dismissed with costs, including the costs of two counsel."
6. The order of the Supreme Court of Appeal dismissing the applicants' application for leave to appeal in that Court is set aside.
7. The respondents must pay the applicants' costs in this Court and the Supreme Court of Appeal, including the costs of two counsel where employed.

JUDGMENT

PETSE AJ (Zondo DCJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J and Theron J concurring):

Introduction

[1] The statement by Frantz Fanon in his book titled "The Wretched of the Earth"[1] is, in the context of this case, apt. It neatly sums up what lies at the core of this application. He said that "[f]or a colonised people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity". Thus, strip someone of their source of livelihood, and you strip them of their dignity too.

[2] That since ancient times land has been the most treasured possession to all and sundry throughout all generations is a truism that brooks no argument to the contrary. Currently, in South Africa, the clamour for redistribution of land has not only heightened interest in land but has also put at the centre stage the socio-political discourse raging on in the country.

[3] This is an application for leave to appeal against a judgment of the High Court of South Africa, North West Division, Mahikeng (High Court). At the suit of the respondents, the High Court granted an order evicting the first to 37th applicants and all persons occupying through or under them from the farm known as Wilgespruit 2 J.Q. in the North West Province (farm). It also granted an interdict restraining the first to 37th applicants from entering the farm, bringing their livestock onto the farm and erecting any structures on the farm.[2] For convenience, the first to 37th applicants will be referred to collectively as the applicants unless context dictates otherwise.

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[1] Fanon *The Wretched of the Earth* (Grove Press, New York 1963) (Translated: Fanon *Les Damnés de la Terre* (Éditions Maspero, 1961)) at 43.

[2] For completeness, the full text of the order granted by the High Court is set out below:

> "1. That the 1st to 37th respondents and all persons occupying through. or under them be evicted from the property known as the farm Wilgespruit 2 J.Q., North West Province ('the property');
>
> 2. That the 1st to 37th respondents are ordered to vacate the property, move all their cattle and other animals and remove all their possessions from the property within 30 days from the date of service of this order upon them;

[4] While the applicants themselves never used the farm for residential purposes, some of the labourers they employed were housed on the farm. The eviction of those labourers is not at issue before this Court.[3] This case primarily concerns two competing rights in the context of evictions. The first is the right of the applicants to occupy and enjoy the farm which they and their predecessors-in-title had occupied for nearly a century.[4] As against this is the right of the respondents to mine on the farm, hitherto occupied by the applicants. Thus, at its simplest, this case concerns a dispute between occupiers of land on the one hand and entities that have been granted mining rights to mine platinum group metals under the Mineral and Petroleum Resources Development Act[5] (MPRDA) on the self-same land on the other.

[5] Mining is one of the major contributors to the national economy. But there is a constitutional imperative that should not be lost from sight, which imposes an obligation on Parliament to ensure that persons or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices are entitled either to tenure which is legally secure or to comparable redress.[6] Accordingly, this case implicates the right to engage in economic activity on the one hand and the right to security of tenure on the other.

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3. That the 1st to 37th respondents and the members of the 38th respondent be interdicted and restrained from accessing the property; from bringing cattle onto the property and from erecting or re-erecting any structures whatsoever on the property;

4. In the event that any of the said respondents falls to vacate the property as directed in paragraph 2 above or unlawfully accesses the property as set out in paragraph 3 above, that the Sheriff for the district be and is hereby authorised and directed forthwith to give effect to the eviction order;

5. The costs of this application be paid by the 1st to 38th respondents, jointly and severally, the one paying the other to be absolved, which costs are to include the costs of three counsels, as well as the costs that were reserved on the 22 February 2016 and 25 August 2016."

[3] That matter is before the Land Claims Court under the Extension of Security of Tenure Act 62 of 1997.

[4] This is disputed by the respondents. More about this later.

[5] 28 of 2002.

[6] See section 25(6) of the Constitution.

[6] The farm is currently registered in the name of the Minister of Rural Development and Land Reform (Minister) who, according to the title deed, owns it "in trust for the Bakgatla-Ba-Kgafela community". The farm was transferred to the Minister from its immediate predecessor-in-title in 1919 under deed of transfer 1230/1919. The applicants assert that they are the rightful owners of the farm. All of the parties accept that the applicants are also informal land right holders under the Interim Protection of Informal Land Rights Act[7] (IPILRA).

[7] The applicants contend that their forebears – the alleged purchasers of the farm – were members of the Lesetlheng Community who were previously precluded from owning land because of institutionalised racially discriminatory practices of the past. Hence, the farm was, upon transfer from its previous owners, registered in the name of the Minister and not the purchasers.

[8] The stage is now set to describe the parties, recount the salient facts and set out the issues to be determined in this case. Thereafter, it will be necessary to refer to the legal framework that is relevant to those issues. In the main, this will entail investigating whether the MPRDA creates an alternative avenue for relief that must be exhausted before the respondents could approach a court for eviction and an interdict as they did. This is in line with the well-entrenched rule of our law that an application for an interdict cannot succeed if the requirements set out in *Setlogelo* are not met. The requirements include, among others, "the absence of any other satisfactory remedy".[8]

[9] The applicants and respondents raised a variety of arguments before this Court. The contentions of the parties, including those of the amici, will be addressed and analysed throughout this exercise. Ultimately, this exercise will breed this judgment.

[7] 31 of 1996.

[8] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

Parties

[10] The first applicant is Ms Grace Masele Mpane Maledu. She, together with the second to 37th applicants, are members of the Lesetlheng village community. The Lesetlheng village community is a community-based organisation consisting of persons claiming to be owners of the farm. It is the 38th applicant in this application. For convenience, I shall refer to the first to 37th applicants collectively as the applicants. They all reside in the Rustenburg district in the North West Province. The applicants assert that they occupy and own the farm and conduct farming operations thereupon.

[11] The first respondent is Itereleng Bakgatla Mineral Resources (Pty) Limited (IBMR). The second respondent is Pilanesberg Platinum Mines (Pty) Limited (PPM). The respondents are holders of the rights to mine for platinum group metals and associated minerals on the farm, awarded to them under section 23 of the MPRDA. PPM is currently the contractor appointed by IBMR under section 101 of the MPRDA to mine on the farm. PPM is also a cessionary of a portion of IBMR's mining right in relation to the Sedibelo-West portion of the farm which was excised from the latter's mining right. The cession is still subject to Ministerial approval under the MPRDA.

Facts

[12] The applicants contend that their forebears purchased the farm in 1919 pursuant to a decision taken by the Lesetlheng Community in 1916. Because of racially discriminatory laws of the past, the farm could not be transferred into the names of the purchasers as joint owners. Consequently, transfer of ownership of the farm was passed to the Minister who, to date, holds it in trust for the community. Then a further obstacle emerged as the Lesetlheng Community was not recognised as an autonomous and separate entity by the government of the day. To overcome this hurdle, the title deed of the property reflected that the Minister held it in trust on behalf of the entire Bakgatla-Ba-Kgafela Community. According to the applicants, this was, however, on the clear understanding that only members of the Lesetlheng

Community who had contributed to the purchase price had a legal interest in the farm and not all of the members of the Bakgatla-Ba-Kgafela Community.

[13] The farm was informally sub-divided into 13 portions or plots which were allocated to 13 families. The 13 families who owned the farm conducted crop and stock farming operations on the farm over which they exercised exclusive control. With the passage of time, the families erected houses and shacks on the farm for their occupation or that of their employees. Stock kraals and pig pens were also erected in the course of their farming operations.

[14] In 2004, IBMR obtained a prospecting right over the farm from the Department of Mineral Resources (Department). On 19 May 2008, IBMR was awarded a mining right over the farm by the Department. On 20 June 2008, an environmental management programme required in terms of section 39 of the MPRDA was approved. On 28 June 2008, IBMR concluded a surface lease agreement with the Bakgatla-Ba-Kgafela Tribal Authority and the Minister in respect of the farm. In 2014, preparations for full-scale mining operations on the farm commenced. In 2012, IBMR and PPM concluded an agreement in terms of which the former undertook to cede its mining right in relation to a portion of the farm known as Sedibelo-West to the latter conditional upon the approval of the Minister of Mineral Resources being granted as required by section 11(1) of the MPRDA. This had the inevitable consequence of negatively impacting upon the peaceful and undisturbed occupation and enjoyment of the farm by the applicants. In 2015, and in order to relieve themselves of the intolerable situation that had arisen as a consequence of the respondents' mining operations, the applicants obtained a spoliation order against the respondents.

[15] However, the applicants' success in obtaining a spoliation order was short-lived for this prompted the respondents to approach the High Court. In the High Court, the respondents sought an order evicting the applicants, and all persons whose right of occupation derived from that of the applicants, from the farm. They

also sought an interdict restraining the applicants from entering, remaining or conducting farming operations on the farm. The respondents asserted that they had consulted with interested parties as required by the MPRDA and other statutory prescripts at all the stages of the process both when they applied for a prospecting right and a mining right in relation to the farm. I shall revert to this later.

[16] The applicants opposed the respondents' application on several bases. First, they contended that they were the true owners of the farm and that they were never consulted as owners of the farm in the manner contemplated by the MPRDA. Second, they asserted that they were also not consulted by the respondents as required by section 2(1) of IPILRA. Nor did they consent to being deprived of their informal rights to the farm. Therefore, their informal rights to the farm were not validly extinguished. Third, the respondents had not complied with section 25(2)(d) of the MPRDA which requires a holder of a mining right to comply with all applicable laws, in particular the zoning scheme of the relevant local authority. Fourth, they alleged that the mining right upon which the respondents relied was invalid by virtue of the fact that they were not consulted before the respondents were awarded the mining right. Fifth, the respondents were precluded from securing an interdict against them until and unless any dispute relating to their surface rights over the farm had been resolved in terms of section 54 of the MPRDA.

[17] The High Court rejected all of the defences raised by the applicants. It held that: (a) the applicants were not the owners of the farm and therefore there was no duty on the respondents to consult with them qua owners;[9] (b) the farm was owned by the Minister in trust for the Bakgatla-Ba-Kgafela Community, of which the applicants were a constituent part, who was consulted and who agreed, at a *kgotha kgothe*[10] held on 28 June 2008, to request the Minister to conclude a lease with IBMR for the latter to conduct mining operations on the farm; and (c) the applicants had not impugned the validity of the mining right by way of review as they should have done and that a

[9] High Court judgment at para 14.

[10] An open community meeting that all adult community members are eligible to attend.

collateral challenge did not avail them, for the respondents – in exploiting their mining rights – were not exercising public power.

[18] Concerning the surface lease, the High Court added that in any event the conclusion of the surface lease was not a pre-requisite before the respondent could exercise their mining rights because section 5(3) of the MPRDA granted a mining right holder access to the land to which the mining right relates.[11] Consequently, the High Court issued an order evicting the applicants from the farm. It also granted an interdict restraining the applicants from entering or remaining, and erecting any structures on the farm.

[19] In the High Court, the respondents accepted that a mining right itself does not extinguish other surface rights, including ownership, on the land to which the right relates. The owner or other person in whom surface rights vest is at liberty to enjoy his or her surface rights subject to the limited real right of the mining holder.

[20] The High Court further referred to the consultative process that it found had taken place in terms of which, the Court held, members of each household were "informed" of the fact that the respondents were holders of mining rights relating to the farm. Therefore, once it was found that the applicants had been consulted, the High Court concluded that it did not lie in their mouth now to complain that they were never consulted.

[21] In support of its approach in this regard the Court relied, amongst others, on the following considerations: (a) it accepted the respondents' say-so that all members of the Bakgatla-Ba-Kgafela community, inclusive of the applicants, were consulted both before and after the grant of the mining right; (b) that the community resolution taken at the *kgotha kgothe* of 28 June 2008 to conclude a surface lease agreement with IBMR supported the respondents' assertion that they had consulted with the affected parties; (c) that agreement had been reached with the affected parties to relocate them

[11] Id at para 22.

to alternative land that had been identified; (d) that the respondents had engaged Managing Transformation Solutions (Pty) Limited as project managers "to consult, negotiate, plan and implement the relocation" of the affected parties.[12]

[22] Dealing with the provisions of section 2 of IPILRA, the High Court found that this provision does not contemplate that each person who is a holder of informal rights to land should be consulted. It found that section 2(4) makes plain that when land is held on a communal basis – as was the case with the farm – it suffices that a decision was taken by a majority of the affected persons. In coming to this conclusion, it found that the resolution adopted at the *kgotha kgothe* on 28 June 2008 was binding on the applicants by virtue of them being members of the Bakgatla-Ba-Kgafela Community. Consequently, it concluded that the applicants' informal rights were lawfully terminated "in accordance with the customs or usages of the Bakgatla-Ba-Kgafela Community when the *kgotha kgothe* resolved to enter into the surface lease agreement as contemplated in section 2(2) of IPILRA".[13]

[23] The High Court rejected the contention advanced on behalf of the applicants to the effect that the respondents were precluded from commencing with their mining operations until the process provided for in section 54 of the MPRDA had run its course. It held, with reference to the Supreme Court of Appeal's decision in *Maranda*,[14] that the respondents were free to commence with their mining operations notwithstanding the fact that "the process envisaged in section 54 [had not been] finalised".[15] Having held that the respondents had "attempted in good faith to comply with [their] consultative duties" under the MPRDA,[16] the High Court concluded that the applicants were not without a remedy for they "[retained] their rights to claim compensation in terms of section 54".[17]

[12] Id at paras 49-52.

[13] Id at para 43.

[14] *Joubert v Maranda Mining Company (Pty) Ltd* [2009] ZASCA 68; 2010 (1) SA 198 (SCA) (*Maranda*).

[15] High Court judgment at para 40.3.

[16] Id.

[17] Id at para 40.4.

[24] In conclusion the High Court made the observation that it was satisfied that the respondents had complied with the prescripts of the consultative process provided for in the MPRDA.[18]

[25] The High Court subsequently refused leave to appeal. The applicants also petitioned the Supreme Court of Appeal which likewise refused leave on the ground that the envisaged appeal lacked reasonable prospects of success. It is therefore the decision of the High Court that the applicants, in the main, now seek to assail in this application.

In this Court

[26] As already alluded to above, in this Court the applicants seek leave to appeal against the decision of the High Court granting the respondents' application. They also persist in all of the defences that they advanced in the High Court.

Amici curiae

[27] A few days prior to the hearing, an application was made by Mr Mdumiseni Dlamini (Mr Dlamini) to be admitted as an amicus curiae.[19] He also sought leave to make written and oral submissions and to lead further evidence.[20] The evidence sought to be introduced relates to the content of the customary law and customs of the Bakgatla-Ba-Kgafela Community.[21]

[18] Id at para 40.3.

[19] Applications for admission as amicus curiae are governed by rule 10 of this Court's Rules.

[20] Applications to lead further evidence are regulated by rule 31 of this Court's Rules.

[21] Mr Dlamini brings his application in his personal capacity and as a representative of a group of persons who are applicants in proceedings pending in the Gauteng Division of the High Court of South Africa, Pretoria. In those proceedings, Mr Dlamini and his co-applicants are impugning the decision of the Minister of Mineral Resources in awarding a mining right. The case has already been heard and judgment is awaited.

[28] There was also an application made by the Land Access Movement of South Africa[22] (LAMOSA) to be admitted as amicus curiae, which is supported by an affidavit deposed to by LAMOSA's National Director, Ms Emily Tjale. LAMOSA's application too is coupled with a request to make written and oral submissions and to introduce further evidence based on a report prepared by Professor Bernard Kachama Mbenga. Professor Mbenga is a renowned historian and a professor at the Department of History of the Mahikeng campus of the North-West University. He has written extensively about the history of the traditional community known as the Bakgatla-Ba-Kgafela. His report, likewise, seeks to enlighten this Court, so says LAMOSA, about the content of the customary law relevant to a proper determination of this case.

[29] The applications of Mr Dlamini and LAMOSA for admission as amici in this case are, in their entirety, not opposed by the applicants. But the respondents oppose Mr Dlamini's application for admission as an amicus, albeit only tentatively, but not that of LAMOSA. Both applications for leave to introduce new evidence were strenuously opposed by the respondents.

[30] Due to the proximity of the date of hearing, it was not feasible to determine the fate of the applications made by Mr Dlamini and LAMOSA. This situation was compounded by the fact that this Court did not at that stage have the benefit of written argument from the parties. Accordingly, on 15 May 2018, the Chief Justice issued directions in terms of which both amici applicants were directed to file written submissions and present oral submissions on three cardinal issues. These were whether they should be: (a) admitted as amici curiae; (b) allowed to tender further evidence; and (c) permitted to canvas the merits of the issues they wished to argue.

[22] LAMOSA is a non-profit and non-governmental organisation registered in 2001. Its founding members were drawn from communities which were forcibly removed by the apartheid government in what was then known as Transvaal. It is active and operates in Limpopo, Mpumalanga, Northwest and Gauteng. One of its objects is to advocate for the proper and constitutionally sound application of living customary law in the communities it represents.

Jurisdiction

[31] The Constitution confers jurisdiction on this Court to hear cases of a constitutional nature or cases which raise arguable points of law of general public importance which ought to be considered by it.[23] The concept of an arguable point of law was explained by this Court in *Paulsen* thus: [24]

> "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. . . . Not surprisingly, in [*Beatley & Co v Pandor's Trustee* 1935 TPD 365 at 366] Tindall AJP held that the word 'arguable' is used 'in the sense that *there is substance in the argument advanced*'."

Indubitably, this case does engage the jurisdiction of this Court. It implicates both sections 25 and 211(3) of the Constitution.[25] In particular, it brings to the fore the question whether the applicants are without a legal remedy simply by virtue of the fact that they constitute a community whose tenure of the farm in issue here is legally insecure as a result of past racially discriminatory laws or practices.

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[23] Section 167(3)(b) reads:

> "(3) The Constitutional Court—
>
> . . .
>
> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

[24] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) (*Slip Knot Investments*) at para 21. This theme was endorsed in *DE v RH* [2015] ZACC 18; 2015 (5) SA 83 (CC); 2015 (4) BCLR 1003 (CC) at paras 8-10.

[25] Section 211(3) provides:

> "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

The full text of section 25(6) is found in 41.

Leave to appeal

[32] The question that arises is whether the interests of justice dictate that leave to appeal ought to be granted. Leave may be refused if it is not in the interests of justice that the court should hear the appeal. In *Boesak* this Court explained the import of this requirement in these terms:

> "The decision to grant or refuse leave is a matter for the discretion of the Court, and in deciding whether or not to grant leave, the interests of justice remain fundamental. In considering the interests of justice, prospects of success, although not the only factor, are obviously an important aspect of the enquiry. An applicant who seeks leave to appeal must ordinarily show that there are reasonable prospects that this Court will reverse or materially alter the decision of the Supreme Court of Appeal."[26] (Footnotes omitted.)

The applicants seek to vindicate their land tenure rights. With eviction hovering ominously over their heads, the livelihood of the applicants and their families is likely to be severely and adversely affected if not perpetually ruined. This is a matter of great public importance transcending the immediate interests of the litigants in this case. For reasons that will become apparent later, this case enjoys reasonable prospects of success. Accordingly, the interests of justice dictate that leave to appeal ought to be granted.

Should the amici applicants be admitted?

[33] The principles governing the admission of a party as an amicus curiae are now well-settled. An applicant for admission as an amicus curiae must: (a) advance relevant, useful and new contentions going beyond those of the litigants;[27] (b) not

[26] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 11-2.

[27] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*OUTA*) at para 14; *Institute for Security Studies: In re S v Basson* [2005] ZACC 4; 2006 (6) SA 195 (CC) at para 9.

adopt a partisan stance "better suited to a litigant than a friend of the court"; [28] and (c) advance submissions aimed at assisting the court to reach a just outcome.[29]

[34] The respondents tepidly argued that because Mr Dlamini was at the time involved in High Court litigation in a dispute that is virtually similar to the one raised in this application in which a judgment is pending, he should not be admitted as amicus in this case. I do not agree. Contrary to what the respondents argued in relation to Mr Dlamini, his position is not manifestly partisan to a degree that should preclude him from being admitted as a friend of this Court.[30] As will become apparent later in this judgment, both Mr Dlamini and LAMOSA make novel and useful submissions relating to the nature of a mining right and IPILRA. Consequently, they should be admitted as amici curiae.

Should the amici curiae be permitted to introduce new evidence?

[35] As already mentioned, the amici sought leave to introduce new evidence. Both amici contend that the evidence in question is relevant for the proper determination of the issues raised in this application. Dlamini sought to introduce the expert evidence contained in an affidavit deposed to by Dr Aninka Claassens. In broad terms, this affidavit sets out a historical exposition of how customary law land rights were treated prior to the advent of democracy. Most significantly, it deals with: (a) the entrenchment of the autocratic powers of traditional leaders under the system of colonialism and apartheid; (b) the manner in which tribal resolutions affected the encumbrance and disposal of land owned by black people; and (c) the mischief that section 25(6) of the Constitution seeks to prevent.

[36] Likewise, LAMOSA sought to introduce new evidence relating to the content of customary law. On this score, it relies both on the evidence adduced before the Maluleke Commission by Mr Kwantlwale Pilane (the head of the clans of Bakgatla-

[28] *OUTA* id at para 13.

[29] Id.

[30] Compare id at paras 14-5.

Ba-Kgafela); Mr Kobedi Pilane (the chairperson of the Traditional Council); and a report compiled by Professor Mbenga. Professor Mbenga's report provides information on the customary law of governance and decision-making processes of the Bakgatla-Ba-Kgafela. The amici argue that the new evidence will enable this Court to gain better insight into how power is exercised and decisions are taken by traditional leaders in collaboration with members of their communities at a local level as dictated to by their custom.

[37] Rule 31 of this Court's rules makes provision for any party to any proceedings, including an amicus curiae, to canvas relevant factual material in documents lodged with the Registrar that do not form part of the record in certain defined circumstances. Those facts must be of an official scientific, technical or statistical nature and capable of easy verification. The respondents resist the introduction of the new evidence. Their objection is predicated on two bases. First, they complain that they have been effectively denied a fair opportunity to respond fully to the additional factual material presented by the amici. Second, they argue that the factual material is in any event controvertible and incapable of resolution on the papers.

[38] The new evidence sought to be introduced by the amici ought not to be allowed essentially for two reasons. The respondents' complaint in relation to time constraints is not only understandable but is also perfectly justified. Most importantly, the new evidence tendered does not satisfy the test in rule 31(1)(a) and (b).[31] It is neither common cause nor otherwise incontrovertible or capable of easy verification. To the contrary, it has the potential to give rise to a factual dispute on the papers. Accordingly, the applications to introduce new evidence fall to be dismissed.

[31] *Prince v President, Cape Law Society and Others* [2002] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 22. See also *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 37-8; *In re Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign* [2002] ZACC 13; 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023 (CC) at paras 9-10.

Issues

[39] The parties in this matter raised numerous issues in both their written submissions and at the hearing. The issues related to the ownership of the land in question; the validity of the respondents' mining right; the applicants' legal competence to raise a collateral challenge to the validity of the respondents' mining right; and the validity of the surface lease agreement entered into between the respondents and the Minister.

[40] In my view, it is unnecessary and undesirable to decide this matter on any of the grounds set out in the preceding paragraph. The ownership issue, as will be explained below, should not be dealt with because it is still pending before another forum. Moreover, in the view I take of the matter - as will become apparent later - it is not necessary to consider and decide the question relating to ownership. The validity of the mining right, and the vexed and interesting question whether it is legally permissible for the applicants to impugn the validity of the mining right by way of a collateral challenge, should also not be decided in this matter. The difficulty is that the collateral challenge mounted by the applicants is not directed against the functionary who, in the exercise of public power under the MPRDA, awarded mining rights to the respondents. Instead, it is sought to be invoked against the holders of the mining rights which are private entities and are themselves not exercising public power in the conventional sense of that expression but are merely the beneficiaries of the exercise of public power by the Minister of Mineral Resources or his or her delegate. This is a complex question that must be left open for another day when it has more appropriately arisen and been exhaustively ventilated after thoughtful consideration.

[41] I also do not consider it necessary to deal with the applicants' further alternative argument premised on the land use scheme under the Moses Kotane Town-Planning Scheme, 2005.[32]

[32] The farm is situated within the Moses Kotane Local Municipality.

[42] Instead, this matter should be decided principally on the basis of section 54 of the MPRDA and section 2 of IPILRA. The central issue is whether section 54 was available to the respondents, and if it was, whether they are precluded from obtaining an interdict before exhausting the mechanisms for which section 54 provides. Allied to this is the second question whether the applicants had consented to being deprived of their informal land rights to or interests in the farm. These issues were fully argued before us, and arise directly from the facts of this case. Unlike some of the other issues, they do not involve a dispute of fact.

Constitutional and statutory framework

[43] It is now convenient to make reference to the constitutional and statutory provisions that are relevant to the determination of this case. The decision in this matter, in relation to the core issues identified in the preceding paragraph, hinges on the interpretation of the relevant provisions of the Constitution, the MPRDA and IPILRA.

[44] In this regard, the logical point of departure is section 39(2) of the Constitution. It provides that a statutory provision should be interpreted in accordance with the spirit, purport and objects of the Bill of Rights.[33] Allied to this principle is also the principle restated in *Affordable Medicines* that "where possible, legislation ought to be construed in a manner that is consistent with the Constitution".[34] Another cardinal rule of statutory interpretation is that the ordinary meaning of the words in a statute must be ascertained in the context of the statute in its entirety and its apparent purpose.[35]

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[33] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Limited v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 21.

[34] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at fn 31.

[35] *Mistry v Interim National Medical and Dental Council* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) at paras 17-8 where it was 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.

[45] As this Court made plain in *Goedgelegen*, albeit in a different context,[36] the purpose of the legislation underpinning the provisions being interpreted plays a critical role in statutory interpretation. There, Moseneke DCJ emphasised that:

> "It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing 'as a result of past racially discriminatory laws or practices' in its setting of section 2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. 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 the social and historical background of the legislation."[37]

[46] Finally, section 233 of the Constitution enjoins every court to "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". Furthermore, section 39(1)(b) of the Constitution decrees that every court must consider international law when interpreting the Bill of Rights.

[47] The two constitutional provisions most relevant to this matter are sections 25(6) and 211. Section 25(6) of the Constitution reads:

> "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."

[48] Section 211 of the Constitution provides:

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[36] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) (*Goedgelegen*).

[37] Id at para 53.

"(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

[49] It is with these general principles of statutory interpretation, and constitutional provisions in mind that I proceed to consider the relevant statutory framework.

Mineral and Petroleum Resources Development Act

[50] The objects of the MPRDA are set out in section 2.[38] The MPRDA, recognising that the custodianship of the country's mineral and petroleum resources vests in the state, has as one of its primary objects the transformation of the sector and the empowerment of those of the country's population who were previously excluded

[38] Section 2 of the MPRDA provides that the objects of the MPRDA are to—

"(a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;

(b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;

(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

(e) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;

(f) promote employment and advance the social and economic welfare of all South Africans;

(g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;

(h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and

(i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating."

from participating in the exploitation of the country's mineral and petroleum resources. In *Agri SA*, Mogoeng CJ held that custodianship does not make the state the owner of mineral and petroleum resources.[39] Rather, it empowers the state to be "a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised".[40] At the same time, the state, as custodian, is responsible for ensuring that these resources are exploited for the benefit of the nation as a whole.[41]

[51] To this end, the MPRDA sets out the procedure that must be followed and requirements that must be satisfied when an application for a prospecting or mining right is made under it. In the context of this case the most relevant provisions of the MPRDA are sections 5, 22, 25, 54 and 55.

[52] Section 5 of the MPRDA provides:

> "(1) A prospecting right, mining right, exploration right or production right granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967 (Act No. 16 of 1967), is a limited real right in respect of the mineral or petroleum and the land to which such right relates.
>
> (2) The holder of a prospecting right, mining right, exploration right or production right is entitled to the rights referred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law.
>
> (3) Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may—
>
> (a) enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground

[39] *Agri SA v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 68.

[40] Id.

[41] Section 3(1) of the MPRDA; Mostert and Van den Berg "Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences" in Zillman et al (eds) *The Law of Energy Underground* (Oxford University Press, 2014) at 80.

> or under sea infrastructure which may be required for the purpose of prospecting, mining, exploration or production, as the case may be;
>
> . . .
>
> (b) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted;
>
> . . .
>
> (e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act."

[53] Section 22 provides, amongst others, that any person who wishes to apply for a mining right must simultaneously apply for an environmental approval. It also imposes certain obligations on the Regional Manager to take certain steps within 14 days of receipt of the application.[42] If the Regional Manager accepts the application as being compliant with the procedural requirements of the MPRDA, he or she must notify the applicant to conduct an environmental impact assessment and submit an environmental management plan within 180 days from the date of the notice.[43] In particular, he or she must notify the applicant to consult, in the prescribed manner, with the landowners, lawful occupiers and any interested and affected persons and to include the result of the consultation in the relevant environmental reports.[44]

[54] Section 25(2)(d) provides in explicit terms that the holder of a mining right must comply with the relevant provisions of the MPRDA and any other relevant law and the terms and conditions of the mining right.

[55] Section 54, in turn, reads:

[42] Section 22(4).

[43] Section 22(4)(a).

[44] Section 22(4)(b).

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

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

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

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

(2) The Regional Manager must, within 14 days from the date of the notice referred to in subsection (1)—

(a) call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder of the reconnaissance permission, prospecting right, mining right or mining permit;

(b) inform that owner or occupier of the rights of the holder of a right, permit or permission in terms of this Act;

(c) set out the provisions of this Act which such owner or occupier is contravening; and

(d) inform that owner or occupier of the steps which may be taken, should he or she persist in contravening the provisions.

(3) If 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.

. . .

(5) If the Regional Manager, having considered the issues raised by the holder under subsection (1) and any representations by the owner or occupier of land and any written recommendation by the Regional Mining Development and Environmental Committee, concludes that any further negotiation may detrimentally affect the objects of this Act referred to in section 2 (c), (d), (f) or (g), the Regional Manager may recommend to the Minister that such land be expropriated in terms of section 55.

> (6) If the Regional Manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the holder of the reconnaissance permission, prospecting right, mining right or mining permit, the Regional Manager may in writing prohibit such holder from commencing or continuing with prospecting or mining operations on the land in question until such time as the dispute has been resolved by arbitration or by a competent court."

[56] It is apposite at this juncture to observe that a mining right confers on the holder of such right certain limited real rights in respect of the mineral and the land to which it relates.[45] In particular, it entitles the mining right holder to enter the land to which such right relates "together with his or her employees, and bring onto that land any plant, machinery or equipment, and build, construct or lay down any surface, or underground infrastructure which may be required for the purpose of", amongst others, mining, removal and disposal of any mineral to which such right relates as maybe found during mining. These rights are, however, subject to the other provisions of the MPRDA.[46]

[57] It bears emphasising that the provisions of section 5(3) of the MPRDA echo two fundamental principles of the common law. First, that the owner of the land to which a mining right relates is obliged to allow the holder access to his or her land to do whatever is reasonably necessary for the effective exercise of the mining holder's rights.

[58] Second, the mining right holder is in turn obliged to exercise his rights *civiliter modo* (in a reasonable manner) so as to cause the least possible inconvenience to the rights of the owner. Accordingly, the common law requires of both the landowner and the mining right holder to exercise their respective rights alongside each other to the extent that it is reasonably possible to do so. It therefore fosters a situation where the right of the landowner and the mining right holder co-exist. This

[45] Section 5(1).

[46] Section 5(3)(a).

is buttressed by section 53(2) of the MPRDA which provides that farming or any use incidental thereto – which is what the applicants were doing on the farm before the award of the mining rights – does not fall within the purview of section 53(1). The latter section requires any person who intends to use the surface of any land in a way which may be contrary to any object of the MPRDA or likely to impede such object to apply to the Minister for approval of such intended use.

[59] These common law principles were articulated by Malan J in *Hudson* thus:

> "I have been referred to a number of decisions from which the rights of the holder of mineral rights appear reasonably well defined. Such a holder (and the holder of a notarial mineral lease stands on the same footing) is entitled to go upon the property, search for minerals and if he finds any to remove them. In the course of his operations he is entitled to exercise all such subsidiary or ancillary rights, without which he will not be able effectively to carry on his prospecting and/or mining operations.
>
> When the owners are able reasonably to enjoy their respective rights without any clashing of interests no dispute is, as a rule, likely to arise. The difficulty arises, as has happened in the present case, when the respective claims enter into competition and there is no room for the exercise of the rights of both parties simultaneously.
>
> The principles underlying the decisions appear to be that the grantee of mineral rights may resist interference with a reasonable exercise of those rights either by the grantor or by those who derive title through him. In case of irreconcilable conflict the use of the surface rights must be subordinated to mineral exploration. The solution of a dispute in such a case appears to me to resolve itself into a determination of a question of fact, viz., whether or not the holder of the mineral rights acts bona fide and reasonably in the course of exercising his rights. He must exercise his rights in a manner least onerous or injurious to the owner of the surface rights, but he is not obliged to forego ordinary and reasonable enjoyment merely because his operations or activities are detrimental to the interests of the surface owner. The fact that the use to which the owner of the surface rights puts the property is earlier in point of time cannot derogate from the rights of the holder of the mineral rights."[47]

[47] *Hudson v Mann* 1950 (4) SA 485 (T) at 488B-H.

Hudson was cited with approval in *Finbro Furnishings* in which the following was stated:

> "[T]he tendency of our law [is] to reconcile, as far as possible, the competing claims of the mineral lease holder and the surface owner. Although our law tries to strike such a balance a situation may well arise in which the conflict of rights is insoluble."[48]

Interim Protection of Informal Land Rights Act

[60] The purpose of IPILRA is stated in its preamble as follows: "To provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law; and to provide for matters connected therewith." Implicit in the preamble of IPILRA is that, when it was conceived, it was intended to be a temporary measure and was to endure for a period of one year from the date of its coming into operation.[49] Some of the pertinent definitions contained in section 1 of IPILRA bear special mentioning. "Community" is defined as: "any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group". "Tribe" is defined as including: "(a) any community living and existing like a tribe; and (b) any part of a tribe living and existing as a separate entity". Section 1(2)(b) provides that: "The holder of an informal right to land shall be deemed to be an owner of land for the purposes of section 42 of the Minerals Act, 1991".[50]

[61] Section 1 defines "informal right to land" as:

> "(a) [T]he use of, occupation of, or access to land in terms of—
>
> (i) any tribal, customary or indigenous law or practice of a tribe;

[48] *Finbro Furnishings (Pty) Ltd v Registrar of Deeds, Bloemfontein* [1985] 4 All SA 388 (AD) at 415. See also *Trojan Exploration Company (Pty) Ltd v Rustenburg Platinum Mines Ltd* [1996] 4 All SA 121 (A) at 126A-E.

[49] This period has been extended several times and the last extension was in terms of GN R1303 *GG* 41270 of 24 November 2017 in terms of which it will now remain in operation until 31 December 2018.

[50] The whole of Act 50 of 1991 was repealed in terms of section 101 of the MPRDA.

(ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in—

(aa) the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936);

(bb) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971); or

(cc) the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei;

(b) the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office;

(c) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997; or

(d) the use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991), although he or she is not formally recorded in a register of land rights as the holder of the right in question."

[62] Section 2, which is titled "Deprivation of informal right to land", provides:

"(1) Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.

(2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community.

(3) Where the deprivation of a right in land in terms of subsection (2) is caused by a disposal of the land or a right in land by the community, the community shall pay appropriate compensation to any person who is deprived of an informal right to land as a result of such disposal.

> (4) For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate."

[63] The general principles of statutory interpretation canvassed above have three implications for how IPILRA must be read and understood. First, the purpose of IPILRA, which must be scrutinised, is not hard to find for IPILRA itself spells it out. It is to provide for the protection of informal rights to and interests in land that were not adequately protected by the law because of racially discriminatory laws of the past. Second, the provisions of IPILRA have to be interpreted benevolently in order to afford holders of informal rights to land the fullest possible protection. Third, during the interpretative exercise the mischief that IPILRA seeks to remedy must be kept uppermost in the mind. Allied to this is the constitutional imperative to construe legislation in a manner that is consistent with the Constitution.[51]

Applicants' submissions

[64] In this Court the applicants assailed the judgment of the High Court on several grounds. The applicants argued that the respondents were required to consult with them, as owners of the farm, before commencing with their mining operations on the farm. In the alternative, they argued that as occupiers of the farm in relation to which they were holders of informal rights in terms of IPILRA, the respondents were obliged to consult with each affected person to seek and obtain their consent before they could be lawfully deprived of their surface rights.

[65] As to their claimed ownership of the farm, the applicants argued that as descendants of the original purchasers of the farm who were the true owners despite the fact that the farm was registered in the name of the Minister, they are the only

[51] See [39] above.

legitimate group of persons who should have been consulted and not the entire Bakgatla-Ba-Kgafela Community. In elaboration, they submitted that the fact that the farm is not registered in their names (and had never been registered in the names of the original purchasers) does not detract from the fact that they are the true owners. This is so because – as the argument went – the South African land registration system is by its very nature neither absolutely positive nor negative. For this proposition the applicants place great store on *Ex parte Menzies et Uxor*.[52] There, it was found that the owner of the property registered in the deeds office may not necessarily always be the legal owner.

[66] The further argument advanced by the applicants is that they are covered by section 22(4)(b) of the MPRDA, which imposes a duty on an applicant applying for a mining right to consult in the prescribed manner with the landowner, the lawful occupier and any interested or affected party and to include the outcome of such consultation in the relevant environmental reports. This section, so the argument continued, makes no distinction between owners and lawful occupiers and indeed also brings within its purview affected parties other than owners and lawful occupiers.

[67] The applicants also argued that they are the holders of informal rights to the farm as contemplated in IPILRA. In short, the applicants contended that they could not therefore be deprived of such informal rights without their consent otherwise than in accordance with the prescripts of IPILRA.

Submissions of the amici

[68] The amici have raised further issues for consideration by this Court. Their contentions proceed from the premise that the relevant provisions of the MPRDA and IPILRA are not in conflict with each other and therefore ought to be interpreted and read harmoniously.

[52] *Ex parte Menzies et Uxor* 1993 (3) SA 799 (C) at 805-6.

[69] The amici argued that section 2(1) of IPILRA explicitly provides that, barring expropriation and subject to sub-section (4), no person may be deprived of any informal right to land without his or her consent. Section 2(1) refers to "any" informal right to land. "Any" is a word of wide import.[53] In instances where land is held on a communal basis, a person may be deprived of his or her informal rights only if the deprivation, which must be consistent with the customs and usages of the community, enjoys the support of the majority.

[70] With respect to the MPRDA, the amici argued that the grant of a mining right constitutes deprivation of property in terms of section 25(1) of the Constitution.[54] In elaboration, it was contended that all that is required for deprivation to occur is interference that has a "legally relevant impact on the rights of the affected party".[55] For this proposition the amici relied on *Mkontwana* in which the following was said:

> "Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."[56]

[71] Furthermore, the amici argued that a mining right – which is a limited real right – by its very nature subtracts from the landowner's bare dominium of land. In

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[53] See *Battiss v Elcentre Group Holdings Ltd* 1993 (4) SA 69 (W) at 73 where the court considered the phrase "any business" and held, with reference to *Haynes & Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 363 that "[t]he word 'any' is extremely wide". In *Haynes & Co* the Appellate Division held that the word "any" in its natural and ordinary sense is an indefinite term which includes all of the things to which it relates unless restricted by its context.

[54] Section 25(1) of the Constitution reads:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[55] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 73.

[56] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng, (KwaZulu-Natal Law Society and Msunduzi Municipalilty as Amici Curiae)* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 32.

addition, the amici submitted that the conclusion of a surface lease agreement over the farm likewise constitutes a deprivation. Consequently, the respondents were obliged, under IPILRA, to seek the applicants' consent as affected persons (by virtue of their informal rights to the farm) as the conclusion of the surface lease and the extensive rights accorded the respondents under section 5 of the MPRDA both constituted a deprivation.

[72] The amici also argued that for the consent contemplated in section 2(1) to be effectual it must be free, granted prior to deprivation and be informed. This, the amici argued, is in line with South Africa's international law obligations. Amongst the binding international instruments applicable to determining the nature of consent is the African Charter for Human and Peoples' Rights (African Charter). The African Charter does not expressly provide for the concept of free, prior and informed consent, but it is generally understood that this concept is inherent in certain guarantees such as the right to self-determination (article 20)[57], right to development (article 22(1)),[58] and even arguably the right to information (article 9).[59] The African Commission for Human and Peoples' Rights, in *Endorois*, concluded that:

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[57] Article 20 provides that:

> "1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
>
> 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
>
> 3. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural."

[58] Article 22(1) provides that:

> "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."

[59] Article 9 provides that:

> "1. Every individual shall have the right to receive information.
>
> 2. Every individual shall have the right to express and disseminate his opinions within the law."

> "[In] any development or investment projects that would have a major impact within the [relevant territory], the state has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."[60]

In elaboration, the amici submitted that "free" implies that consent is given voluntarily and is not coerced, induced by misrepresentation or undue influence. "Prior" suggests that consent should be granted before any decision is taken. "Informed" postulates that all the relevant information bearing on the subject matter in relation to which consent is required must be made available to the person from whom the requisite consent is sought.

[73] In addition, the amici argued that the fundamental principles of the concept of free, prior and informed consent seek to ensure that: (a) local communities are not coerced or intimidated; (b) consent is properly sought and freely given; (c) the person whose consent is required is provided with full and reliable information relating to the scope and impact of the subject matter regarding the consultation; and (d) they have the choice to give or withhold their consent.[61]

Respondents' submissions

[74] The respondents oppose the application for leave to appeal, but if granted, they oppose the appeal itself. They argued that the applicants were consulted with as required by section 22(4) before the grant of the mining right at a meeting of the Lesetlheng Community held on 21 April 2007. They contended that the purpose of the meeting was, amongst others, to explain the process and progress made in relation to the mining application and to assess how interested parties would be affected if

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See also Ashukem "Included or Excluded: An Analysis of the Application of the Free, Prior and Informed Consent Principle in Land Grabbing Cases in Cameroon" (2016) 19 *Potchefstroom Electronic Law Journal* at 28.

[60] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya* 2009 *AHRLR* 75 (ACHPR 2009) (*Endorois*) at para 291.

[61] Ashukem above n 61 at 28.

mining proceeded. But none of the attendees at this meeting raised any objection to the proposed mining. To the contrary, the project was supported. They further contended that this consultation was consonant with the dictates of the MPRDA. The respondents accepted in their written submissions that the consultation requirements of the MPRDA are the same both in relation to landowners and lawful occupiers. But the respondents asserted that it was sufficient that the applicants were consulted with and that the award of a mining right was not dependent upon them granting consent.

[75] In their written heads of argument, the respondents emphasised that a mining right enjoys preference over the surface rights over the land to which the mining right relates. They stressed that this is the case not only in relation to the underground mining operations but also in relation to the exercise by the landowner of his or her surface rights to the land in question. This means that – so the argument went – the rights of the landowner must yield to those of the mining right holder to the extent that there is a conflict between these competing rights.

Analysis

[76] Before giving consideration to the parties' contentions, it is prudent to make certain observations concerning two aspects. The first relates to the nature of the consultation required both in terms of the MPRDA and IPILRA and what such consultation entails. The second relates to the identity of the parties that an applicant for a mining right is required to notify and consult with concerning the application.

[77] First, section 10(1) of the MPRDA provides that the Regional Manager must, within 14 days after accepting a mining application, make known in the prescribed manner that such an application has been accepted in respect of the land in question. He or she must then call upon all interested and affected persons to submit their comments within 30 days from the date of the notice. Objections to the application must, in terms of section 10(2), be referred to the Regional Mining Development and Environmental Committee for consideration and for the committee to advise the Minister thereon. The applicant must, amongst others, also consult in the prescribed

manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental report required to be submitted to the Regional Manager.[62] Before the mining right holder commences with mining operations, the landowner or lawful occupier must be notified and consulted in terms of section 5(4)(c).[63]

[78] The purpose and importance of the requirements relating to notification of and consultation with affected parties were underscored by this Court in *Bengwenyama Minerals* in the following terms:

> "These different notice and consultation requirements are indicative of a serious concern for the rights and interests of landowners and lawful occupiers in the process of granting prospecting rights. It is not difficult to see why: 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. This is so irrespective of whether one regards a landowner's right as ownership of its surface and what is beneath it 'in all the fullness that the common law allows', or as use only of its surface, if what lies below does not belong to the landowner but somehow resides in the custody of the state."[64] (Footnotes omitted.)

[79] This Court went on to explain that:

> "One of the purposes of consultation with the [lawful occupier] must surely be to see whether some accommodation is possible between the applicant for a [mining] right and the [lawful occupier] insofar as the interference with the [lawful occupier's] rights to use the property is concerned."[65]

[80] It then emphasised that:

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[62] Section 16(4)(b) of the MPRDA

[63] This section was deleted by section 4(d) of Act 49 of 2008 with effect from 7 June 2013.

[64] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) at para 63.

[65] Id at para 65.

> "The consultation process required by section 16(4)(b) of the Act thus requires that the applicant [for a prospecting right] must: (a) inform the landowner in writing that his application for prospecting rights on the owner's land has been accepted for consideration by the Regional Manager concerned; (b) inform the landowner in sufficient detail of what the prospecting operation will entail on the land, in order for the landowner to assess what impact the prospecting will have on the landowner's use of the land; (c) *consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation*; and (d) submit the result of the consultation process to the Regional Manager within 30 days of receiving notification to consult."[66]

[81] With these general observations relating to the nature of the consultative process under the MPRDA in mind, I revert now to the merits of the case.

Must the question of ownership of the farm be determined?

[82] The applicants asserted that they are the true owners of the farm. Consequently, in 2012 and under the auspices of the 38th applicant, the applicants instituted a claim in terms of the Land Titles Adjustment Act[67] in which they sought rectification of the title deed of the farm to reflect them as co-owners. Therefore, they contended that the respondents were, in terms of the law, required not only to notify them of their application for a mining right but also to consult with them in relation to such application. It is, however, not in dispute that the farm is currently registered in the name of the Minister as trustee of the Bakgatla Community. Section 102 of the Deeds Registries Act[68] provides that the owner of land registered in the Deeds Registry – as the farm is – is the person in whose name the property is registered.

[83] On the face of it, this must then mean that the applicants are not the registered owners of the farm as contemplated in section 102 of the Deeds Registries Act. But it is common cause that the applicants have initiated a process under the Land Titles

[66] Id at para 67.

[67] 111 of 1993.

[68] 47 of 1937.

Adjustment Act in terms of which they seek to have the title deed of the farm rectified to reflect them as registered owners. Thus, depending on the outcome of that process, it is possible that the applicants may well turn out to be the legal owners of the farm. It would therefore be ill-advised of this Court at this stage to make a definitive finding on the ownership of the farm.

[84] For present purposes it suffices merely to record that the applicants' assertion that they are the owners of the farm within the meaning of section 102 is premature. This will then leave it open to them to pursue the process that they have initiated under the Land Titles Adjustment Act to its final determination.

Were the respondents under a duty to exhaust the internal process under section 54 of the MPRDA before approaching the High Court?

[85] Section 54(1) provides that the holder of a mining right or permit—

> "must notify the relevant Regional Manager if that holder is prevented from commencing or conducting . . . mining operations because the owner or the lawful occupier of the land in question . . . refuses to allow such holder to enter the land."

[86] Section 54 employs mandatory language. During oral argument the respondents submitted that section 54 was not triggered as it only relates to disputes concerning compensation. Having regard to the wording of the section, this submission is patently wrong. In fact, on 12 August 2014, the second respondent addressed a section 54(1) written notice to the Regional Manager.[69] However, there is no evidence as to what finally became of that process.

[87] To overcome this difficulty, the respondents called in aid the Supreme Court of Appeal decision in *Maranda*. The respondents placed much store on *Maranda* in support of their proposition that it is not necessary to exhaust the section 54 process

[69] In this notice the second respondent informed the Regional Manager that it was being prevented from conducting mining operations on the farm and sought the Regional Manager's intervention.

before approaching a court for an interdict. However, the applicants countered this submission and contended that *Maranda* is distinguishable from this case on the facts. In *Maranda*, unlike in this case, the mining right holder was denied access to the land by the landowner despite several approaches by both the mining right holder and the Regional Manager.[70] It became clear that the landowner was not only intent on refusing consent but was also not prepared to even enter into negotiations with the mining right holder. Thus the landowner's conduct was found not only obstructive but also subversive of the objects of the MPRDA.

[88] Consequently, the Supreme Court of Appeal in *Maranda* held that in those circumstances it could not lie in the landowner's mouth to complain that he had not been consulted with and therefore frustrate the objects of the MPRDA. It went on to conclude that "it would be absurd for the [MPRDA] to permit an unreasonable refusal of access based on a clear objective to frustrate the legitimate endeavours of a permit holder".[71]

[89] The Supreme Court of Appeal reasoned:

> "Here the appellants simply, and in an unreasonable fashion, refused to allow the respondent access to the land and as a result it is unclear on what conceivable basis the regional manager could be expected to initiate an expropriation process. No basis for expropriation based on this provision was advanced by the appellants' counsel. The submission is in my view clearly misconceived."[72]

[90] *Maranda* is also distinguishable because at the time it was handed down, section 5(4)(c) of the MPRDA was still in force.[73] Section 5(4)(c) prohibited the

[70] *Maranda* above n 49 at paras 16-7.

[71] Id at para 16.

[72] Id at para 17.

[73] I will assume, in favour of the respondents, that section 5(4)(c) was no longer in force when they intended to commence mining on the relevant portion of the farm. Section 5(4)(c) was repealed with effect from 7 June 2013, and the respondents allege that mining was to commence in July 2014. The amendments commenced by proclamation in terms of section 94(1) of the MPRDA Amendment Act 49 of 2008. See Proc R14 *GG* 36512 of 31 May 2013.

commencement of mining activities by a permit holder unless it notified and consulted with the owner or occupier of the land in question. In *Meepo*,[74] which *Maranda* cites with approval, the High Court held that the MPRDA 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".[75] Following the repeal of section 5(4)(c),[76] section 54 must be exhausted to ensure that the MPRDA's purpose of balancing the rights of the mining right holders on the one hand and those of the surface rights holders on the other is fulfilled.

[91] It is evident from the reasoning of the Supreme Court of Appeal in the passage quoted in paragraph 89 above that the facts of the present case are a far cry from the facts in *Maranda*. Accordingly, the High Court's reliance on *Maranda* was misplaced. In the ordinary course, the respondents were required to take all reasonable steps to exhaust the section 54 process – which they had in fact initiated – before approaching a court for an eviction and an interdict.

[92] The respondents further submitted that in the event that this Court holds that section 54 must be exhausted before an interdict can be sought, then mining right holders would be unjustifiably prevented from commencing with mining pending the finalisation of section 54 proceedings. But this submission entirely overlooks the fact that section 54 itself provides for a speedy dispute resolution process that is premised on parties reaching some sort of agreement through mediation. It also provides that if parties fail to reach an agreement, then they may approach a court.[77] It is unclear why, pending the finalisation of this process, a mining rights holder should be entitled to mine. On the contrary, to allow them to do so will undermine the purpose of section 54 and the MPRDA: to strike a balance between the interests of the mining right holder and the owner. It bears mentioning that section 54(5) contemplates that if

[74] *Meepo v Kotze* 2008 (1) SA 104 (NC).

[75] *Maranda* above n 49 at para 12, citing *Meepo* id at para 13.1.

[76] Section 5A(c) effectively replaced section 5(4)(c), but the former only requires the mining right holder to give notice before mining commences. There is no requirement of consultation.

[77] Section 54(4) of the MPRDA.

negotiations between the affected parties and the mining right holder are deadlocked, and the Regional Manager concludes that any further negotiations may detrimentally affect the objects of the MPRDA, he or she may recommend to the Minister that the land be expropriated in terms of section 55.

[93] However, it should be noted that section 54 only applies where the occupation is lawful. Although both parties admitted that the applicants were holders of informal land rights, the respondents nevertheless sought to argue that these rights were terminated in terms of section 2 of IPILRA upon the grant of the mining right and / or entering into the surface lease agreement with the first respondent. This then implies that the applicants' occupation of the farm could well be unlawful. It is to this issue that I now turn.

[94] With the advent of our constitutional democracy, customary law has now been restored to its rightful place in this country. Section 211(3) of the Constitution decrees that courts must apply customary law when that law is applicable. The application of customary law is made subject only to the Constitution and any legislation that specifically deals with customary law. In *Bhe*, Langa DCJ had this to say about the status of the customary law:

> "Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. Sections 30 and 31 of the Constitution entrench respect for cultural diversity. Further, section 39(2) specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. In similar vein, section 39(3) states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights. Finally, section 211 protects those institutions that are unique to customary law. It follows from this that customary law must be interpreted by the courts, as first and foremost answering

> to the contents of the Constitution. It is protected by and subject to the Constitution in its own right."[78]

It is evident from this that customary law was given impetus by the values underpinning our constitutional order such as dignity,[79] the right to participate in the cultural life of one's choice[80] and equality.[81]

[95] Mindful of our past, which was characterised by oppression, deprivation of a significant segment of our society and deep-rooted inequalities, our Constitution places a high premium on the absolute need to redress the injustices of that shameful past. In relation to those members of society who were denied equal access to land and security of tenure, section 25(6) of the Constitution sets out to redress the attendant inequalities. It provides in unequivocal terms that any "person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to tenure which is legally secure or to comparable redress". As is manifest from its preamble, IPILRA seeks to provide for the protection of certain rights to and interest in land that were previously not otherwise protected by law. To provide such protection, IPILRA ensures that communities have a right to decide what should happen to land in which they have an interest. It offers communities legal protection to assume control over and deal with their land according to customary law and usages practiced by them.

[96] Most significantly, IPILRA provides that no person may be deprived of any informal right to land without his or her consent.[82] Where land is held on a communal basis, a person may be deprived of such land or right in land in accordance with the

[78] *Bhe v Khayelitsha Magistrate* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 41.

[79] Section 10 of the Constitution.

[80] Section 30 of the Constitution.

[81] Section 9 of the Constitution.

[82] Section 2(1).

custom or usage of the community concerned, except where the land in question is expropriated.[83]

[97] However, in instances where land is held on a communal basis, affected parties must be given sufficient notice of and be afforded a reasonable opportunity to participate, either in person or through representatives, at any meeting where a decision to dispose of their rights to land is to be taken.[84] And this decision can competently be taken only with the support of the majority of the affected persons having interest in or rights to the land concerned, and who are present at such a meeting.

Did the award of the mining right constitute a deprivation of informal rights to land?

[98] A somewhat curious feature of IPILRA is that whilst it provides that no person may be deprived of any informal right to land without consent, it does not itself spell out what constitutes a deprivation. The Concise Oxford English Dictionary defines the verb "deprive" as meaning: "Prevent (a person or place) from having or using something".[85] The noun "deprivation" is defined as: "The damaging lack of basic material benefits; lack or denial of something considered essential". This, to my mind, is the definition that should be adopted for purposes of section 2 of IPILRA.

[99] Whether there has been a deprivation in any given case, said Yacoob J in *Mkontwana,* depends—

> "on the extent of the interference with or limitation of use, enjoyment or exploitation . . . at the very least, substantial interference or limitation that goes

[83] Section 2(2).

[84] Section 2(4).

[85] Fowler & Fowler (eds.) *The Concise Oxford Dictionary* 12 ed (Oxford University Press, 18 August 2011) at 468.

> beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."[86]

[100] Before *Mkontwana*, this Court had earlier, in the context of section 25(1) of the Constitution, said that:

> "In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned."[87]

As noted above, the MPRDA confers on the holder of a mining right a limited real right in respect of the mineral or petroleum and the land to which such right relates.[88] Moreover, and significantly, it grants to the holder a right of access to the land, even against the wishes of the landowner. The mining right holder is free to enter the land and do everything necessary in the exercise of her right, including constructing or laying down any surface or underground infrastructure, which may be required for the purpose of the mining rights holder's rights.

[101] Before this Court, counsel for the respondents sought to argue that whilst the award of a mining right under section 23 of the MPRDA does not equate to expropriation in the ordinary and conventional sense of that term, its practical effect is tantamount to expropriation as it has the effect of depriving a landowner or occupier of the land to which it relates of certain incidents of his or her rights of ownership or occupation.

[102] Accordingly, given the invasive nature of a mining right, there can be no denying that when exercising her rights, the mining right holder, would intrude into the rights of the owner of the land to which the mining right relates. And the more

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[86] *Mkontwana* above n 58 at para 32.

[87] *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] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (CC) at para 57.

[88] Section 5(1).

invasive the mining operations are the greater the extent of subtraction from a landowner's dominium will it entail. On their own version, the respondents accept that it is not possible for them to undertake their mining operations whilst the applicants remain in occupation of the farm. It must follow from this that the applicants will be deprived of their informal rights to the farm if the order evicting them from the farm were allowed to stand.

[103] But it cannot be that because of this, the applicants are denuded of their informal land rights and are therefore unlawful occupiers. The fact that the respondents' mining rights are valid (which must be assumed in their favour in this case),[89] does not mean that the applicants are, in consequence, occupying the land in question unlawfully. The existence of a mineral right does not itself extinguish the rights of a landowner or any other occupier of the land in question.

[104] Under the common law, the landowner could not use the land in a way which would interfere with the mineral right holder's use, and if the landowner did so, the mineral right holder could interdict the landowner's use or intended use.[90] But section 54, as discussed above, clearly envisages that land to which a mining right relates can still be lawfully occupied notwithstanding the existence of such a mining right. This could be in terms of a lease, servitude, or a statutory right as under IPILRA.

[105] What is more, an informal land rights holder under IPILRA could even consent to the granting of a mining right, but may still be entitled to occupation, depending on the terms and conditions of their consent. This, in my view, is buttressed by the underlying purpose of IPILRA which is to provide security of tenure for the

[89] The issue, as raised by the amici, of whether the mining right is invalid because the applicants did not consent to it being granted, must be left open for another day. The decision to grant a mining right remains valid and lawful until set aside by a court. See *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA (CC); 2014 (5) BCLR 547 (CC).

[90] Dale *South African Mineral and Petroleum Law* (Lexis Nexis 2018) at 145. See also *Nolte v Johannesburg Consolidated Investment Co Ltd* 1943 AD 295 at 314-6.

historically disadvantaged and vulnerable. It was thus incumbent upon the respondents to comply with the prescripts of IPILRA.

[106] This conclusion also finds support in this Court's decision in *Maccsand*.[91] In *Maccsand*, this Court held that the exercise of a mining right was subject to any other laws bearing on such a right. The MPRDA was not read to override the applicability or requirements of other statutes, such as the Land Use Planning Ordinance,[92] that may impact upon mining activity.[93] By parity of reasoning, the MPRDA must be read, insofar as possible, in consonance with IPILRA. In the context of this case, this means that the award of a mining right does not without more nullify occupational rights under IPILRA. More is required to demonstrate that the IPILRA informal right holder was lawfully deprived of his or her right to occupy as required by section 2 of IPILRA. There is no conflict between these two statutes; each statute must be read in a manner that permits each to serve their underlying purpose. Significantly, both statutes make provision for expropriation of land if all else fails.

Did the surface lease deprive the applicants of their informal land rights?

[107] Section 2(2) and (4) of IPILRA provides:

> "(2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community.
>
> . . .
>
> (4) For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such

[91] *Maccsand (Pty) Ltd v City of Cape Town* [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC).

[92] 15 of 1985.

[93] *Maccsand* above n 92 at para 44.

> disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to *participate*." (Emphasis added.)[94]

[108] In short, the respondents submitted that the *kgotha kgothe* of 28 June 2008 deprived the applicants of their informal land rights in terms of the customs and usages of the Bakgatla as contemplated in section 2(2) and (4) of IPILRA. In support of this contention, the respondents relied on a resolution adopted by the Bakgatla-Ba-Kgafela at the *kgotha kgothe* of 28 June 2008. But this resolution does no more than merely indicate that it was adopted and signed by Kgosi Pilane and a representative of Barrick.[95] Thus, there is no shred of evidence to substantiate the respondents' assertions that the applicants were deprived of their informal land rights in conformity with the prescripts of section 2(4) of IPILRA.

Conclusion

[109] Before this Court, counsel for the respondents could not point to any provision in the MPRDA which permits the holder of a mining right to institute eviction proceedings against the landowner or lawful occupier when the latter refuses to allow the former access to the land to which his or her right relates. In response to a question from a member of the Court, counsel said that the respondents invoked their common law remedy. That then raises the question whether it was open to the respondents to do so. I think not. Their rights are derived from the MPRDA, which contains its own internal mechanisms for resolving obstacles of the kind that they encountered when they sought to exercise their mining rights. It makes provision for avenues that can be deployed to resolve disputes between the mining right holder on the one hand and the landowner or lawful occupier on the other, the most drastic of which is expropriation when all else fails. In bypassing the express provisions of section 54, the respondents undermined the supervisory role and powers of the

[94] The section is titled "Deprivation of informal rights to land".

[95] IBMR partnered with a company called Barrick Platinum SA (Pty) Ltd (Barrick) for purposes of conducting prospecting, because IBMR did not have the necessary capital and expertise. The Bakgatla-Ba-Kgafela Community transferred 15% of its shares in IBMR to Barrick in the process. The farm was successfully prospected. Barrick later withdrew and the Bakgatla-Ba-Kgafela Community then bought back the 15% shareholding.

Regional Manager who is charged with the responsibility of administering and implementing the MPRDA as the Director General's delegate.

[110] In addition, and more fundamentally, the fact that section 54 provides for a remedy must mean that resort cannot be had to an alternative remedy available under the common law. This must be so because section 4(2) of the MPRDA expressly provides that "in so far as the common law is inconsistent with [the MPRDA], the [MPRDA] prevails".

[111] For the abovementioned reasons the judgment and order of the High Court fall to be overturned.

Costs

[112] I cannot think of any good reason, and none has been suggested, as to why the applicants should not be awarded their costs in view of the outcome of this case. It is appropriate that the costs in this Court be borne by the respondents.

Order

[113] The following order is made:

1. Leave to appeal is granted.
2. Both Mr Mdumiseni Dlamini and the Land Access Movement of South Africa are admitted as amici curiae.
3. The applications by the amici curiae to introduce new evidence are dismissed.
4. The appeal is upheld.
5. The order of the High Court is set aside and substituted with the following:

   "The application is dismissed with costs, including the costs of two counsel."

6. The order of the Supreme Court of Appeal dismissing the applicants' application for leave to appeal in that Court is set aside.

7. The respondents must pay the applicants' costs in this Court and the Supreme Court of Appeal, including the costs of two counsel where employed.

For the Applicants:	A de Vos SC, J F D Brand and A Thompson instructed by Lawyers for Human Rights.
For the First and Second Respondents:	G L Grobler SC, J L Gildenhuys, I Oschman and M B Moifo instructed by ENS Africa.
For the First and Second Amicus Curiae:	T Ngcukaitobi, M Bishop, Y Ntloko and M Mbikiwa instructed by the Legal Resources Centre and Richard Spoor Inc Attorneys.