IN THE LAND COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: LCC 96/2024

Before: **The Honourable Judge Ncube and Acting Judge Maluleke**

Heard on: **03 – 04 November 2025**

Delivered on: **04 February 2026**

(1)	REPORTABLE: Yes ☒ / No ☐
(2)	OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3)	REVISED: Yes ☐ / No ☒

[redacted]

Date: 04 February 2026

In the matter between:

RUSTENBURG PLATINUM MINES LIMITED	First Applicant
MOGALAKWENA PLATINUM LIMITED	Second Applicant

and

ELISA RAMASELA LANGA	First Respondent
ALBERT LESETJA CHABA	Second Respondent
GLEN PHAKGADI	Third Respondent

FRANS RENELANE PHAKGADI	Fourth Respondent
POLVIANCE RANKOTSANA PHAKGADI	Fifth Respondent
JACK MADIMETJA PHAKGADI	Sixth Respondent
PINNY MOKGAETJI PHAKGADI	Seventh Respondent
RENNIE PHAKGADI	Eighth Respondent
SELINAH MOKGAETJI MOTHAPO	Ninth Respondent
LERATO MOTHAPO	Tenth Respondent
MARIA NONG	Eleventh Respondent
THE MINSTER OF MINERAL RESOURCES AND ENERGY	Twelfth Respondent
THE DIRECOR-GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY: MINERAL AND PETROLEUM REGULATION	Thirteenth Respondent
THE DEPUTY DIRECTOR-GENERAL DEPARTMENT OF MINERAL RESOURCES AND ENERGY	Fourteenth Respondent
THE REGIONAL MANAGER: LIMPOPO REGION THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY	Fifteenth Respondent
THE MOGALAKWENA LOCAL MUNICIPALITY	Sixteenth Respondent
THE CHIEF DIRECTOR, LIMPOPO: DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT: WATERBERG DISTRICT	Seventeenth Respondent

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ORDER

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1. The application is dismissed.

2. The Applicants are ordered to pay party and party costs on scale "C," of this application, such costs to include costs of two counsel, where such employed.

JUDGMENT

MALULEKE AJ (Ncube J concurring)

Introduction

[1] The First and Second Applicants apply to evict and relocate the First to Eleventh Respondents from the farm Zwartfontein 818 LR (Zwartfontein), situated within the jurisdiction of the Mogalakwena Local Municipality, Limpopo. The eviction application is instituted in terms of section 10 of the Extension of Security of Tenure Act 62 of 1997 (ESTA). The relief sought by the Applicants is as follows:

1. A declaration that the process in terms of section 54 of the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA) has concluded, save for the right of the First to Eleventh Respondents to, in terms of section 54(4) of the MPRDA, refer any dispute regarding compensation to arbitration in accordance with the Arbitration Act, 42 of 1965 or to a competent court;
2. An order evicting the First to Eleventh Respondents and all persons claiming rights of residence through them, from the farm Zwartfontein in the Mogalakwena Local Municipality, Limpopo within 30 days of the granting of the order;
3. An order conforming that the Applicants are entitled to demolish the dwellings occupied and / or retained by the First to Eleventh Respondents on Zwartfontein upon their vacating of Zwartfontein, and the return of any salvaged material to such Respondents;
4. In respect of the Third to Eleventh Respondents, a final order directing them to make a selection of alternative permanent housing in accordance with the Relocation Agreement concluded in August 2012, and the Addendum

thereto concluded in February 2018 to be constructed for them by the Applicants.

[2] Historically, the mining area was occupied by the communities comprising almost 1000 households that made up Motlhotlo community. It included the Ga-Sekhaolelo community which resided on the farm Overysel 815 LR and the Ga-Puka community which resided on the farm Zwartfontein, which the First to Eleventh Respondents are part of.

[3] The Applicants state that the Ga-Sekhaolelo community that occupied Overysel has successfully resettled and the vast majority of the households that resided on the farm Zwartfontein have vacated in accordance with the relocation agreements concluded with the communities. The Applicants contend that the Respondents, who are presently living on the farm Zwartfontein and claiming rights over it, are unreasonably refusing to vacate the property. They argue that this refusal violates the binding relocation agreement entered into between the community (to which the Respondents are part of) and the Second Applicant, and it is in breach of the First Applicant's mining right.

Parties

[4] The First Applicant is Rustenburg Platinum Mines Limited (RPM), a holder of a mineral right in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which includes a part of the mining area within the Zwartfontein.

[5] The Second Applicant is Mogalakwena Platinum Limited (MPL), a lessee of farm Zwartfontein.

[6] The Applicants are wholly owned subsidiaries of Anglo-American Platinum Limited (AAPL). Mr Tebogo Makhubedu (Mr Makhubedu) is a Senior Land Rights Manager at AAPL. He is the deponent to the founding affidavit.

[7] The First to Eleventh Respondents are, Elisa Ramasela Langa, Albert Lesetja Chaba, Glen Phakgadi, Frans Renelane Phakgadi, Polviance Rankotsana Phakgadi, Jack Madimetja Phakgadi, Penny Mokgaetji Phakgadi, Rennie Phakgadi, Selina Mokgaetji Mothapo, Lerato Mpthapo and Maria Nong, respectively.

[8] The Twelfth to Seventeenth Respondents are, the Minister of Mineral Resources and Energy (Minister) who is cited in his capacity as the Head of the Department of Mineral Resources and Energy (DMRE), the Director General of the Department of Mineral Resources and Energy: Mineral and Petroleum Regulation (Director General), the Director General of the Department of Mineral Resources and Energy (DDG), the Regional Manager, Department of Mineral Resources and Energy (Regional Manager), the Mogalakwena Local Municipality and the Chief Director, Limpopo Department: Agriculture and Rural Development: Waterberg District respectively.

The process leading to the eviction application

[9] In the founding affidavit, Mr. Makhubedu, sets out in detail the processes RPM engaged in to reach agreements with the affected communities, including the First to Eleventh Respondents.

[10] RPM is the holder of a mining right converted in terms of item 7 of Schedule II of the MPRDA which was originally granted to Potgietersrus Platinum Limited (PPL) on 23 July 2010. PPL later changed its name to MPL and ceded its mining right to RPM on 2 December 2016. The mining right commenced on 23 July 2010 and is in force for a period of 30 years ending 22 July 2040.

[11] The mining right covers the following properties situated in Mokopane Administrative District measuring a total of 13675, 9721 hectares in extent: Overysel 815 LR; Zwartfontein 818 LR; Vaalkop 819 LR; Portion 1, Remaining Extent of Portion 2 and Portion 3 of Tweefontein 238 KR; Sandsloot 236 KR; Rietfontein 240 KR; and Knapdaar 234 KR, (Collectively, the "Mining Area")

[12] The farms Overysel, Vaalkop, Rietfontein, Knapdaar and Sandsloot are owned by the Government of South Africa and are held in trust on behalf of the Langa-Mapetla Tribe. Portion 1, Remaining Extent of Portion 2 and Portion 3 of Tweefontein are owned by the Government of South Africa and are held in trust on behalf of the Kekana Traditional Authority. The farm Zwartfontein is owned by the Langa-Mapetla Tribe on behalf of the Ga-Puka community.

[13] Historically, members of the Ga-Puka community resided on the farm Zwartfontein in a village known as the Ga-Puka village, whilst the members of the Ga-Sekaolelo community resided on the adjoining farm, Overysel, in the village known as Ga-Sekaolelo village. These communities are jointly known as the Motlhotlo Community.

[14] Except for the First to the Eleventh Respondents, the communities that occupied the mining area have been successfully resettled to areas and housing of their choosing, in accordance with the Relocation Agreement and the Relocation Addendum respectively.[1]

[15] The mining right granted in terms of section 5 (2) of the MPRDA is a limited real right in respect of the mineral and land to which such right relates; and the holder of the mining right is entitled to rights referred to in section 5 and such other rights as may be granted to or acquired by or conferred upon such holder under the MPRDA or any other law. The entitlements of a mining right holder are set out under section 5 (3) and include the entitlement to, *inter alia*:

> 'Section 5 (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 may bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of prospecting, mining, exploration or production, as the case may be;

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[1] 2012 Relocation Agreement and the 2018 Relocation Addendum.

(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;

(c) remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be;

(cA) subject to section 59B of the Diamonds Act, 1986 (Act No. 56 of 1986), (in the case of diamond) remove and dispose of any diamond found during the course of mining operations;

(d) subject to the National Water Act, 1998 (Act No. 36 of J 998), use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land; and

(e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act.'

[16] MPL established Mogalakwena Mine in 1993, in that year, during the establishment of the Mogalakwena mine, MPL, identified the need to resettle the community. At the time, the community comprised of 956 households.

[17] On or about 6 October 1993, at Lebowakgomo and Mokerong, MPL represented by Jimmy Johnston, duly authorised, and the Self-Governing Territory of Lebowakgomo, represented by Morawangwato Matlebjane Marishane, duly authorised, concluded a Memorandum of Agreement of Lease (the "1993 Lease Agreement").

[18] Some of the relevant material express terms of the 1993 Lease agreement are as follows:

a. The Langa-Mapetla Tribe would be entitled to occupy and use, free of any rental, a portion of the farm Armoede for the duration of the agreement (clause 3.3);

b. MPL would have exclusive right to occupy and use the leased area for prospecting, mining, refining and for any other purpose incidental thereto, including but not limited to the construction of plant, rock dumps, reservoirs and slimes dams, as well as the laying of pipelines and electric cables (clause 4);

c. No person would be entitled to erect any dwelling or immovable structure in, on or under the leased area (clause 5.5).

Negotiations for the resettlement of the Motlhotlo Community

[19] In the Founding Affidavit, Mr. Makhubedu declares that, in 1998, MPL started engaging the community on the issue of relocation. These engagements were undertaken through the Mapetla Traditional Authority, as well as the Department of Land Reform and Rural Development (the Department), as the custodian of the two villages comprising of the community. The Steering Committee was established and legal advisers were appointed to represent them in the resettlement process.

[20] A site selection process commenced in 2002, through which households were able to indicate the areas of preference for purposes of relocation. The site selection was necessitated by the expansion of operations at the mine, which was a culmination of years of consultation and negotiations involving communities, tribal authorities and provincial government.

[21] In 2004, MPL initiated the process of compiling and implementing a Resettlement Action Plan[2] (RAP), at the time there was no legislation, or legally binding directive regulating the manner in which relocations were to be effected. The RAP set out the framework for the provision of compensation and livelihood-restoration measures. Such measures included compensating members of the

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[2] In accordance with the International Finance Corporation's Performance Standard 5 on Land Acquisition and Involuntary Resettlement (FIC), which recognizes that project-related land acquisition and restrictions on land use can have adverse impacts on communities and persons that use this land.

community for any losses suffered as a result of the resettlement process, in order to restore the community members' livelihood and standards of living of the affected households.

[22] The physical relocation of households commenced on 29 May 2007. By 2008, the majority of the 956 households had agreed to relocate to the nearby locations of Armoede, and Rooibokfontein.[3] Approximately 64 households resisted resettlement. However, by 2010, the number of households resisting resettlement had grown to 176 households. Therefore, the process of negotiations ensued.

[23] On or about 15 August 2012 at Motlhotlo and at Johannesburg, MPL (represented by Mr. Ben Magara, duly authorised) and Motlhotlo Community (represented by ten members of the Motlhotlo Community duly authorised, namely David Masubelele, Solomon Masubelele, Selinah Mokgaetji Phakgadi (the Ninth Respondent), Solomon Mphela, Johannes Chaba, Peter Mphela, Hellen Matjui, Johannes Mothupi, James Notwana and Maria Ledwaba) entered into the Motlhotlo Community Relocation Agreement (the "2012 Relocation Agreement"[4]).

[24] Clause 21.2 of the 2012 Relocation Agreement provides that: "Should any household or member of any household not have relocated within 30 days of the date, upon which suitable alternative accommodation was made available to that person or household, then MPL would be entitled to approach an appropriate court of jurisdiction for the eviction of the person or household and to do all things incidental to such process including the giving of notice, terminating rights of residence or occupation and noting or opposing any appeal or review".[5]

[25] On or about 12 December 2012 at Sandton, MPL represented by Mr. Etienne Espag, duly authorised, concluded a Notorial Lease Agreement with the Langa Tribe

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[3] All households that relocated received compensation in the sum outlined in the Relocation Agreements, in respect of the hardship and inconvenience associated with the relocation.

[4] The 2012 Relocation Agreement was concluded in order to govern the relocation of the Community from their location to another location of their choosing and provided various options, with agreement. Its relevant express material terms are that: households may elect to be relocated to:

1. De Berg, or another suitable agreed agricultural farm; or
2. To the settlement at Armoede and Rooibokfentein; or
3. A place of their own choosing within a 50 km radius of Mogalakwena Mie.

[5] Similar to clauses 7.3.1.1, 7.3.1.2 and 7.3.1.3 of the 2012 Zwartfontein Notarial Lease Agreement.

(also known as Langa-Mapela Tribe), represented by Kgoshi David Kgabagare Langa, duly authorised and acting in his capacity as Kgoshi and trustee of the Tribe in respect of Zwartfontein (the "2012 Zwartfontein Notarial Lease"). The 2012 Zwartfontein Notarial Lease pertains to Zwartfontein, which was part of the leased area in the 1993 Lease Agreement.[6]

[26] In February 2018, Environmental Resources Management (ERM), an independent consultant firm, was appointed to progress engagement activities to support the preparation of the 2018 Relocation Addendum[7] and lay the basis for implementation of the 2018 Relocation Addendum.

[27] Prior to the conclusion of the 2018 Relocation Addendum, in March 2018, an asset and census survey of the community was conducted to determine appropriate resettlement options. The 68 households that remained in the Motlhotlo community were represented by the CPA and Richard Spoor Inc. These households are referred to as the CPA occupiers; they were engaged fortnightly with the broader Motlhotlo community.

[28] However, while the majority households surveyed expressed a preference for a relocation to Mokopane Extension 14A, 18 households refused to engage in the census process, and distanced themselves from the Communal Property Association (CPA). The breakaway group comprised of *inter alia*, the Phakgadi family, to which the Third to Eight Respondents belong (the "Phakgadi Group") and the Mothapo/ Masubelele family, to which the Ninth to Eleventh Respondents belong (the "Masubelele Group"). The Phakgadi Group and Masubelele Group are referred to collectively as the "Breakaway Group".

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[6] The 2012 Zwartfontein Notarial Lease commenced on November. 2011 and will expire 25 years after the commencement date, with the option to renew.

[7] The relevant material express terms of the 2018 Relocation Addendum were to afford the Motlhotlo Community the opportunity to select from the following relocation options: Mokopane Ext 14A; Armoede or Rooibokfontein on terms and conditions as set out in the 2012 Relocation Agreement; or a place of their choosing within 50KM radius. That those who would have elected to relocate to Extension 14A would remain members of the Phomolong Communal Property Association ("CPA") (Clause 5.1). Clause 5.2 describes the sizes of the yard and houses for those who elected Extension 14A, the question is, what were the sizes of the yards of the communities before the relocation or attempt thereof?

[29] Engagements with the Breakaway Group revealed that its members did not identify with the majority of the Motlhotlo Community and sought a relocation option tailored to their individual preferences.

[30] Despite several meetings between 2019 to 2020, and attempts to engage, the Breakaway Group and the CPA occupiers did not relocate. On 9 December 2020, RPM issued a notice in terms of section 54 of the MPRDA to the Regional Manager, expressly referring to the First, Second and Tenth Respondents. To date the First, Second and Tenth Respondents have failed to take occupation of their houses. Only 22 out of 43 households forming part of the CPA occupiers had taken occupation of their completed homes.

[31] The Regional Manager failed to take any of the steps prescribed by section 54 of the MPRDA.

[32] On 1 February 2023, RPM issued a further notice in terms of section 54 of the MPRDA to the Regional Manager, on certain individuals (including the Third, Sixth, Seventh, Ninth and Eleventh Respondents), who despite being party to the 2012 Relocation Agreement, had unreasonably refused to take occupation of houses that had been constructed for them at Ext 14A,

[33] There were further facilitated engagements between the DMRE, AAPL and the remaining Motlhotlo Community (which the First to Eleventh Respondents are part of) However, despite all RPM's efforts, the parties deadlocked and the facilitated negotiations had to be terminated.

[34] The Applicants state that there is no obligation in terms of the MPRDA for a mining right holder to consult with occupiers of land regarding its mining once it has obtained the mining right and once it has commenced mining. Further, that RPM has gone above and beyond good faith obligation it might owe to the First to Eleventh Respondents by extensively consulting them.

[35] The Applicants state that they issued and served section 8 notices of termination of right of residence, in terms of ESTA by the sheriff at each of the First to

Eleventh Respondents' households on 14 May 2024. The Applicants argue that the farm Zwartfontein does not fall within the exclusion under section 2 of ESTA.

[36] The Applicants submit that when regard is had to the events and interactions described above, it is clear that the rights of residence of the First to Eleventh Respondents have been terminated on lawful grounds and that such termination is just and equitable, having regard to the factors identified in sections 8 to 10 of ESTA.

The Respondents' Defence

[37] Ms. Selinah Makgaetji Mothapo is the Ninth Respondent and the deponent to the Second to Eleventh Respondents' answering affidavit. The answering affidavit mounts a defence to issues raised in the founding affidavit and states:

> "The Applicants create an impression in the founding papers, read as a whole that there has been compliance with all the relevant or applicable statutory provisions. They further create an impression that they have complied with all their obligations in terms of the purported relocation agreement and the purported addendum thereto. In particular, an impression is created in this regard that all the houses which they have already built for members of the community for purpose of relocation are suitable standards. In fact, they make it sound as if the houses we built in Zwartfontein are nothing compared to those houses [size of the houses built by RPM compared to the yards in rural areas]. They place emphasis on the amount of money they have spent and still have to spend on the relocation. They present us to the Court as individuals who are completely unreasonable, greedy and incapable of being satisfied by anything from them…".

[38] The Respondents state that the Applicants are aware that there has been no compliance with any relevant or applicable legislation at all, which is clear from prayer 1 of the notice of motion, that there has been no compliance with section 54 of the MPRDA. They referred to the Constitutional Court's decision of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another*[8] that emphasized that Applicants *"were required to take all reasonable steps to exhaust the section 54*

[8] 2019 (2) SA 1 (CC) (*Maledu*).

process-which they had in fact initiated – before approaching a court for an eviction and an interdict."

[39] The Respondents state that the relocation agreement, and the addendum thereto, is not binding on them at all, because of the failure by the Applicants to comply with the relevant provisions, in particular section 2(4) of the Interim Protection of Informal Rights Act 31 of 1996 (IPILRA) before that agreement, and the addendum thereto were purportedly concluded between MPL and the community.

[40] The Respondents state that the Applicants seek their eviction on the ostensible basis that their refusal to vacate and/or relinquish their rights over Zwartfontein is unreasonable and aver that their refusal to vacate and/or relinquish their rights over Zwartfontein is reasonable. Apart from the fact that there was no compliance with IPILRA, they do not want to be exposed to the same intolerable conditions which other members have been exposed to.

[41] The Respondents argue that there was no legitimate basis for the Applicants to institute this application. The Respondents argue that the Applicants seem to be of the view that the mining right trumps the Respondents' right to Zwartfontein, which is wrong, they say.

[42] The Respondents further, argue that the Applicants allege that Zwartfontein is owned by the Langa-Mapela Tribe on behalf of the Ga-Puka community. This suggests that their residence on or their occupation of the land, "was" informal as they are not the registered owners of the land. Effectively, the Applicants claim that the Respondents have disposed of that informal right.

[43] The Respondents then outline the fact that section 2(1) of IPILRA prohibits the deprivation of any informal rights to land without the holder's consent. Further that, in terms of section 2 (2), where land is held on a communal basis, the deprivation of the right should occur "*in accordance with the custom and usage of that community*". In terms of section 2 (3), '*where the cause of the deprivation is a disposal of the land or right in land by the community, the community is obliged to pay compensation to the person deprived of the land as a result of such deprivation*'. Section 2(4) provides:

"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."[9]

[44] The Respondents refer to the mechanisms provided in section 54 of the MPRDA for resolving disputes between a mining/prospecting right holder and a landowner or lawful/informal right occupier. Further that it provides a framework for consultations, negotiations and compensation if mining activities are likely to cause loss or damage, and a path for the right holder to gain land access if the landowner refuses, by referring the dispute to the Regional Manager for resolution. They argue that the Applicants have not exhausted the dispute resolution mechanism provided for by the MPRDA. They argue that ESTA finds no application in this case.

[45] The Respondents state that the Applicants allege that they are bound by relocation agreement, whether they personally signed it or not, as provided for in clause 21.3.1 of the relocation agreement. The Respondents argue that the relocation agreement is with the Mapela Tribal Council and therefore does not comply with section 2(4) of IPILRA and that there is no evidence that their community consented to being deprived of their informal right to Zwartfontein.

[46] The Respondents further challenge the suitability of the houses built by the Applicants, that they are not suitable for habitation, that there are termites and the Applicants did not treat the land where they build the houses. They argue that some of the houses they live in at Zwartfontein are better than what has been built by the Applicants.

[47] The Respondents argue that the relief sought by the Applicants in prayer 1, for the Court to declare that the processes initiated by RPM in terms of section 54 of the

[9] Section 4 of Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA).

MPRDA have been concluded, except for that relating to the determination of compensation by arbitration in accordance with the Arbitration Act[10] or by a competent court. They argue further that the Constitutional Court made it clear in *Maledu* that the Applicants 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.

[48] The Respondents state that the Applicants have not pleaded any case of compliance with IPILRA. Further that, the 1993 lease agreement had the effect of depriving them (Ga-Puka / Zwartfontein community) of their right to occupy the land without their consent. [retrospectivity]. They state that the Applicants at paragraph 40 of the founding affidavit made it clear that it is Ga-Puka community that 'resided' on Zwartfontein, and that no where do they claim that the Langa Mapela tribe resided on that land at any time.

[49] The Applicants reply that they have complied with IPILRA despite not mentioning it in the founding affidavit and contend that ESTA is the proper legislation in terms of which the Applicants should seek, and have sought, relief. Therefore, the Applicants have made the necessary averments to demonstrate compliance with ESTA.

Legal Principles Applicable

<u>Mineral and Petroleum Resources and Development Act 28 of 2002</u>

[50] Section 54 of the MPRDA deals with compensation payable under certain circumstances and provides that:

> "(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;

[10] Arbitration Act 42 of 1965.

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 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.

4) If the parties fail to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act, 1965 (Act 42 of 1965), or by a competent court.

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.

7) The owner or lawful occupier of land on which reconnaissance, prospecting or mining operations will be conducted must notify the relevant Regional Manager if that owner or occupier has suffered or is likely to suffer any loss or damage as

a result of the prospecting or mining operation, in which case this section applies with the changes required by the context.

The Interim Protection of Informal Land Rights Act 31 of 1996.

[51] The South African customary land tenure system is currently administered in terms of the IPILRA, which was promulgated to give effect to section 25(6) and section 25(9) of the Constitution of the Republic of South Africa, 1996 (the Constitution). Section 25(6) of the Constitution guarantees that a person or community whose land tenure is legally insecure due to past racially discriminatory laws or practices is entitled, through an Act of Parliament, to legally secure tenure or comparable redress. Section 25(9) places a direct mandate on Parliament to enact the national legislation required to give effect to this right to tenure security.

[52] IPILRA was introduced as a temporary measure in 1996 to provide immediate protection for holders of informal land rights in former homeland areas until comprehensive, permanent legislation could be passed. Informal rights in land are defined as the use, occupation or access to land in terms of any tribal, customary or indigenous law or practice of a tribe.[11]

[53] The objective of IPILRA is 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, however, the objective has been overridden by the Court decisions that have concretised the protection.[12]

[54] The specific aim of IPILRA is to protect insecure rights held by many South Africans, especially in the previous so-called independent states, self-governing territories and the South African Development Trust Land. These so-called 'informal rights' enjoy protection against deprivation similar to that afforded to traditional

[11] Section 1(1)(i) of the IPILRA; *Baleni and Others v Minister of Mineral Resources and Others 2019 (2) SA 453 (GP)* paras 54-56; *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another 2019 (2) SA 1 (CC)* paras 60-61.

[12] *Maledu v Itireleng Bakgatla Mineral Resources (Pty) Ltd* 2018 ZACC 41; *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP); *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others* 2022 (1) SA 251 (KZP).

property rights. 'Informal right' is broadly defined in section 1(1)(iii) of IPILRA. It includes the use or occupation of or access to land in terms of:

> '(a) any tribal, customary or indigenous law or practice of a tribe;
> (b) the custom, usage or administrative practice in a particular area or community;
> (c) the rights or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established under an Act of Parliament;
> (d) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997.
> (e) the use or occupation of any erf as if the person is the holder of Schedule 1 or 2 rights under the upgrading of Land Tenure Rights Act 112 of 1991, although that person is not formally recorded as such in a land rights register.'

[55] Section 1 of IPILRA defines a "community" as "any group or portion of a group of persons whose rights in land are derived from shared rules determining access to land held in common by such group". *Baleni*[13] held the Umgungundlovu community (Applicants) to be such a community.

[56] Section 1(2)(b) of IPLIRA states that the holder of an informal right in land shall be deemed to be an owner of land for the purposes of section 42 of the Minerals Act 50 of 1991.

[57] Section 2 of IPILRA regulates the 'Deprivation of informal rights to land', and states that:

> "(1) Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of1975), or any other law which provides for the expropriation of land or rights in land, states 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.

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[13] *Baleni and Others v Minister of Mineral Resources and Others 2019 (2) SA 453 (GP) para 54.*

(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 bad a reasonable opportunity to participate."

[58] Section 3 of IPILRA provides that: "Subject to the provisions of section 2, any sale or other disposition of any land shall be subject to any existing informal rights to that land".

<u>The Extension of Security of Tenure Act 62 of 1997</u>

[59] ESTA was promulgated to give effect to key constitutional rights of section 25 on property, including the right to security of tenure, the right not to be arbitrarily evicted, and section 26 which is the right of access to adequate housing. It seeks to protect vulnerable occupiers living on land falling within the ambit of ESTA from unjustified evictions and the risk of homelessness. In line with its purpose, ESTA must be interpreted in a manner that promotes these constitutional values and ensures that those who fall within its scope are afforded the fullest possible protection. Any termination of such occupiers' right of occupation must therefore comply strictly with the provisions of ESTA.[14]

[60] The aspirations of ESTA as articulated in its Preamble is to provide measures with State assistance to ensure long-term security of tenure on land, for vulnerable individuals or families residing on rural or peri-urban land with the owner's consent. It was enacted to *inter alia*, regulate conditions of residence on certain land as well as

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[14] *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC) para 7; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53 *(Goedgelegen).*

the conditions on and circumstances under which the right of persons to reside on land may be terminated.

[61] The Preamble further states that ESTA also regulates the conditions and circumstances under which persons, whose rights of residence has been terminated, may be evicted from land and to provide for matters connected therewith.

[62] Applications for eviction must comply with sections 8, 9,10 ,11 of ESTA. Section 8[15] of ESTA provides for the termination of right of residence. Section 9[16] of ESTA is entitled 'limitation on eviction'. Section 10[17] deals with the order for eviction of person who was occupier on 4 February 1997.

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[15] **8. Termination of right of residence**
(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to-
(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
(b) the conduct of the parties giving rise to the termination;
(c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
(d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises after the effluxion of its time; and
(e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an adequate opportunity to make representations before the decision was made to terminate the right of residence."

[16] **Section 9 limitation on eviction**
(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.
(2) A court may make an order for the eviction of an occupier if—
(a) the occupier's right of residence has been terminated in terms of section 8;
(b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
(c) the conditions for an order for eviction in terms of sections 10 or 11 have been complied with; and
(d) the owner or person in charge has, after the termination of the right of residence, given—
(i) the occupier;
(ii) the municipality in whose area of jurisdiction the land in question is situated; and
(iii) the head of the relevant provincial office of the Department of Rural Development and Land Reform, for information purposes, not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with." (Emphasis added.)

[17] **Section 10 Order for eviction of person who was occupier on 4 February 1997**
(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if—
(a) the occupier has breached section 6(3) and the court is satisfied that the breach
(b) is material and that the occupier has not remedied such breach;
(c) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the

Case law

[63] The decision of *Exxaro Coal (Pty) Ltd and Another v Sindane and Others*[18] handed down by my sister, Cowen J, where the Applicants sought a declaratory order to enforce the resettlement agreements signed between the Applicants and the late Mr Frans Sindane, representing his family, and between the Applicants and the First Respondent representing his family. They sought an order for relocating the Sindane family to the Phumulani Agri-Village within 30 days of the court order. In the alternative, the Applicants sought an eviction order in terms of section 9 of ESTA coupled with a relocation order to the Phumulani Agri-Village within 30 days of the court order.

[64] The Court in paragraph 27 indicated that the Sindane family did not place material features of the history or evidence recounted in the founding affidavits in

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occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar months' notice in writing to do so;
(d) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or
(e) the occupier—
(i) is or was an employee whose right of residence arises solely from that employment; and
(ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act.
(e) the owner or person in charge or the occupier have attempted mediation to settle the dispute in terms of section 21 or referred the dispute for arbitration in terms of section 22, and the court is satisfied that the circumstances surrounding the order for eviction is of such a nature that it could not be settled by way of mediation or arbitration.
(2) Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection (1) applies, a court may grant an order for eviction if it is satisfied that suitable alternative accommodation is available to the occupier concerned.
(3) If—
(a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;
(b) the owner or person in charge provided the dwelling occupied by the occupier; and
(c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge.
The court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to—
(i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and
(ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted."

[18] *Exxaro Coal (Pty) Ltd and Another v Sindane and Others (LCC66/2022) [2023] ZALCC 41* (*Exxaro*).

dispute and the Court had to resolve the factual disputes on the principles articulated in *Plascon Evans and Wightman.*[19]

[65] The Court ordered the Sindane family to relocate from their ancestral land to a new housing development to facilitate ongoing mining operations. The court based its decision on ESTA, finding it "just and equitable" to terminate the family's residence due to unsafe mining activities, and dismissed challenges to resettlement agreements. The Sindane family's subsequent application for leave to appeal the judgment was dismissed by the Land Claims Court in March 2024.

[66] *In casu*, this Court cannot follow the precedent set in *Exxaro* for two reasons:

a. Firstly, the Respondents raised significant challenges and argument against the Applicants' claims and prayers, therefore, the principles laid in *Plascon Evans and Wightman* cannot apply in this matter.

b. Secondly, there are few Constitutional Court judgments between 2018 and 2021 upholding IPILRA rights, introducing a major shift in the mining terrain and the relationship of IPILRA and ESTA. The Constitutional Court decisions are binding to all Courts, including itself, therefore, the decision of *Exxaro* or anything similar, cannot be followed.

[67] There are few judgments that have far reaching implications for the interaction of IPILRA and the MPRDA, these are: *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*[20] ("Maledu"); *Baleni and Others v Minister of Mineral Resources and Others*[21] ("Baleni"); *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others*[22] ("Ingonyama").

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[19] *Plascon Evans Paints v Van Riebeeck Paints 1984(3) 623 (A)* at 634H-635C; *Wightman t/a JW Construction v Headfour (Pty) Ltd and another 2008(3) SA 371 (SCA)* para 13; *Exxaro Coal (Pty) Ltd and Another v Sindane and Others (LCC66/2022) [2023] ZALCC 41* para 27.

[20] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another 2019 (2) SA 1 (CC).*

[21] *Baleni and Others v Minister of Mineral Resources and Others 2019 (2) SA 453 (GP).*

[22] *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others 2022 (1) SA 251 (KZP).*

[68] The Court in *Maledu* asked the following question in paragraph 85:

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

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."

[69] The Court answered the above question in the following manner:

'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.[23] However, there is no evidence as to what finally became of that process.'[24]

[70] In conclusion the Court held in paragraphs 109 to 110 that:

"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 Regional Manager who is charged

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[23] 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.

[24] *Maledu* supra n 6 para 86.

with the responsibility of administering and implementing the MPRDA as the Director General's delegate.[25]

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".

[71] The Gauteng decision of *Baleni* can be summarised as follows:

71.1. The case involved the Umgungundlovu community in Xolobeni and an Australian mining company. The community held informal land rights under customary law and IPILRA. It concerned the level of consent required to obtain a mining right over property held by a community with informal or customary land rights. The issue was whether the "consultation" required by the Mineral and Petroleum Resources Development Act (MPRDA) was sufficient or "consent" required under IPILRA.

71.2 The court, duly following the judicial guidance provided in Maledu, made an important pronouncement on the rights of people who hold informal land tenure. It found that the state may not grant mining rights without the prior consent of those whose IPILRA and customary land rights would be affected by mining, and further that the process of granting and obtaining consent must be done in accordance with the customary law of those whose land rights are affected. Such consent must be 'free, prior and informed'.

71.3 The court specifically considered provisions of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) and the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and concluded that the provisions of these Acts should be read together when determining the level of consent required. The court found that a community's consent, as required by IPILRA, and not merely consultation with a community, as required by the MPRDA, is necessary before a mining right can be obtained over a community's property.

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[25] Ibid para 109.

71.4 The Court held that the government cannot grant a mining right over land occupied by a community under customary law without their full, prior, and informed consent (FPIC).

71.5 The court highlighted that IPILRA protects communities with informal land tenure. It found that Section 2(1) of IPILRA, which prevents the deprivation of informal land rights without consent, applied because granting a mining right constitutes a deprivation.

71.6 The court differentiated "consultation" (exchanging views without requiring agreement) from "consent" (requiring agreement) as provided for in terms of section 10 of the IPILRA. It ruled that IPILRA's enhanced protection demands consent. The Court was satisfied that the matter be resolved on the premise of Section 54 of the MPRDA of 2002 and Section 2 of the IPILRA of 1996.

[72] The Court's decision on *Ingonyama* can be summarised as follows:

72.1 The *Ingonyama* judgment found the Ingonyama Trust's actions of converting customary land rights to leases unlawful and unconstitutional. The court ruled that the beneficiaries of the Trust, members of communities living on Trust land, are the true owners, therefore invalidating all residential lease agreements. The court ordered the Trust to refund all money collected from these leases and to take steps to reinstate proper land rights for the communities.

72.2 The court declared that residential lease agreements for land held by the Ingonyama Trust were unlawful and unconstitutional, because they were imposed on individuals who are the land's beneficial owners under Zulu customary law. The judgment affirmed that the people living on Trust-held land are the true and beneficial owners, with the Ingonyama Trust acting merely as a custodian. The court ordered the Trust to restore the statutory and customary law rights of residents upon request and to permit the proper granting of Permission to Occupy (PTO) rights.

72.3 The judgment highlighted that residents were often unaware of what they were signing, with contracts frequently in English and a lack of genuine informed consent. The court instructed the Minister of Rural Development and

Land Reform to implement measures to protect the land rights of affected people and to formalize their customary rights.

[73] The judgment provides at paragraph 96 that:

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

[74] It goes further to state at paragraph 101 that:

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

Discussion

[75] The Applicants did not dispute that the Respondents held informal rights to the land as defined in section 1 of IPILRA and that they occupied such land in accordance with their laws and customs. Further, the Applicants stated in the founding affidavit that some of the farms in question are owned by the Government of South Africa and are held in trust on behalf of the tribes and that the farm Zwartfontein is owned by the Langa-Mapetla Tribe on behalf of the Ga-Puka community. This confirms the status of the community in Zwartfontein, that they have informal rights in the land alleged to be owned by the Langa-Mapetla Tribe, and that they fall under the purview of IPILRA.

[76] The Applicants pray for this Court to declare that the processes in section 54 of MPRDA have been concluded except for section 54(4) on arbitration, arguing that the

Respondents will have a right to pursue the arbitration process after their eviction. This Court cannot give such an order because precedent established that consent is a precondition in a mineral rights application[26] and that compensation must be determined and paid before mineral rights can be exercised.[27] In the Applicants' founding affidavit, it states that they reported the matter to the Regional Manager, however, the Regional Manager is non-responsive, while in paragraphs 35-37 of the founding affidavit, the Applicants indicate that there were few meetings with the DG, DDG, Regional Manager and the Adviser to the Minister, where the Applicants were informed that following the Constitutional Court decision in *Maledu*, the launch of the application for eviction was pre-mature.

[77] The Applicants in the replying affidavit, argue that they have complied with IPILRA despite not mentioning it in the founding affidavit. *Maledu* has particularly reinforced the position that the MPRDA must be read in conjunction with the IPILRA, it cannot be implied.

[78] The Applicants argue that a mining right granted in terms of section 5 (2) of the MPRDA is a limited real right in respect of the mineral and land to which such right relates; and that the holder of the mining right is entitled to rights referred to in section 5 and other such rights as may be granted to or acquired by or conferred upon such holder under the MPRDA or any other law. The entitlements of a mining right holder are set out under section 5 (3), which gives the Applicants limited real right that trumps the rights of the Respondents that hold informal rights to land.

[79] This is the mischief that the Constitutional Court in *Maledu* addressed, it noted that the existence of a mineral right does not in itself extinguish the rights of a landowner or occupier.[28] See also *Maccsand (Pty) Ltd v City of Cape Town*[29] where the Constitutional Court decided that the application of the MPRDA does not override

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26 *Baleni* supra n13 paras 24 and 25

27 In regard to the claim for compensation, the Applicants argued that as part of the discretion vested in the Minister in terms of s 23(2A) of the MPRDA (which section authorises the Minister to impose conditions on the award of the right when it is necessary to protect the community's interests), there should be a precondition that compensation should be determined before, as opposed to after, the granting of mineral rights. See *Baleni* para 46.

28 *Maledu* supra n 20 *para* 103.

29 *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) (*Maccsand*).

other statutes. In this case, the issue before the court was whether a holder of a mineral right could exercise mineral rights in an area where the Land Use Planning Ordinance (LUPO) was applicable, without getting a permit from the City of Cape Town. Confirming the decisions of the courts *a quo*,[30] the Constitutional Court held that it was wrong to assume that the DMR possessed overriding powers against other government authorities.[31] This decision infers that LUPO and the MPRDA can and should operate alongside each other.[32] Reading LUPO and the MPRDA together creates the expectation that the MPRDA and the IPILRA can potentially be read in conjunction with each other. This would mean that the communities would have to be consulted under the MPRDA, but they would first have to consent to the mining in terms of the IPILRA.[33] Similarly, MPRDA and IPILRA should operate alongside each other. Therefore, the Applicant, should have had regard to IPILRA.

[80] The Applicants argue that the community signed the relocation agreement, consenting to eviction. An informal "consent" given by an occupier outside of the court process is not legally binding for the purposes of a lawful authority. Section 25 of ESTA[34] overrides such an agreement to ensure the occupier's constitutional rights to housing and dignity are protected, ESTA also prohibits evictions that are not court ordered.[35]

[81] IPILRA on 'Deprivation of informal rights to land' provides:

"Section 2 (1) Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of1975), or any other law which provides

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30 In the High Court decision (*City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC) (*Maccsand*) Maccsand was interdicted from commencing or continuing with mining operations on the property in question unless and until the provisions of LUPO and NEMA had been complied with. Similarly, the Supreme Court of Appeal (*Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA)) held that the MPRDA and LUPO must operate alongside each other because they have different objects and each did not purport to serve the purpose of the other. As a result, there was no merit in the assertion that LUPO would usurp the functions of the MPRDA.

31 *Maccsand supra n 32* para 51.

32 *Ibid*.

33 *Maledu* supra n 8 para 103. Also see *Baleni* supra n13 para 28.

34 **25. Legal status of agreements**
(1) The waiver by an occupier of his or her rights in terms of this Act shall be void, unless it is permitted by this Act or incorporated in an order of the Court.
(2) The Court must have regard to, but not be bound by, any agreement in so far as that agreement seeks to limit any of the rights of an occupier in terms of this Act.

35 In terms of section 23 (1) of ESTA, on Offences, no person shall evict an occupier except on the authority of an order of the Court.

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."

81.1 This sub-section provides that no person may be deprived of any informal right to land without his or her consent, but for expropriation, and the dispute resolution mechanism in section 54 of the MPRDA, refers to expropriation and not eviction, this implies that ESTA has no application in resolving disputes on IPILRA and MPRDA.

[82] The Applicants stated that MPL established Mogalakwena Mine in 1993. In 1993, during the establishment of the Mogalakwena mine, MPL, identified the need to resettle the Community. At the time the Community comprised of 956 households. On or about 6 October 1993, at Lebowakgomo and Mokerong, MPL represented by Jimmy Johnston, duly authorized, and the Self-Governing Territory of Lebowakgomo, represented by Morawangwato Matlebjane Marishane, duly authorised, concluded a Lease Agreement.[36]

[83] In 2004, MPL initiated the process of compiling and implementing the RAP, at the time there was no legislation, or legally binding directive regulating the manner in which relocations were to be effected. The RAP set out the framework for the provision of compensation and livelihood-restoration measures. Such measures included compensating members of the Community for any losses suffered as a result of the resettlement process, in order to restore the Community members' livelihood and standards of living of the affected households. The physical relocation of households commenced on 29 May 2007.

[84] The mining right commenced on 23 July 2010 and is in force for a period of 30 years ending 22 July 2040. IPILRA was already in existence, as it was promulgated in 1996. The Applicants, despite having signed the lease in 1993, should have known that IPILRA was promulgated to address the mischief, where communities with informal rights to land were deprived of their land without their consent. The Applicants continued and signed another lease without the consent of the Respondents.

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36 The content of the Lease Agreement are discussed in paragraph 18 above.

[85] The Applicants stated that on 12 December 2012 at Sandton, MPL and the Langa-Mapela Tribe concluded a Notorial Lease Agreement in respect of Zwartfontein ('the 2012 Zwartfontein Notarial Lease') with Kgoshi David Kgabagare Langa, duly authorized and acting in his capacity as Kgoshi and trustee of the Tribe. The 2012 Zwartfontein Notarial Lease pertains to Zwartfontein, which was part of the leased area in the 1993 Lease Agreement. Again, MPL failed to have regard to IPILRA.

[86] The Applicants stated that there is no obligation in terms of the MPRDA for a mining right holder to consult with occupiers of land regarding its mining once it has obtained the mining right and once it has commenced mining. However, RPM has gone above and beyond their good faith obligation it might owe to the First to Eleventh Respondents by extensively consulting them. The Court in *Baleni* found that a community's consent, as required by IPILRA, and not merely consultation with a community, as required by the MPRDA, is necessary before a mining right can be obtained over a community's property.

[87] The *Maledu* judgment essentially invalidated the prior understanding that a mining right trumped IPILRA rights, confirming the primacy of the consent requirement for existing informal right holders. This effectively meant that past actions which did not obtain proper consent were challengeable and will be invalidated by the court if taken to court.

[88] With regard to the order sought by the Applicants, '*for this Court to declare that the process in terms of section 54 of the MPRDA concluded, save for the right of the First to Eleventh Respondents, in terms of section 54 (4) of the MPRDA, to refer any dispute regarding compensation to arbitration in accordance with the Arbitration Act 42 of 1965 or to a competent court*,' this Court cannot grant such an order because the Constitutional Court in *Maledu,* paragraph 91, held as follows, regarding compliance with section 54 of the MPRDA:

> '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.'

[89] The Gauteng High Court in the matter of *Baleni*, following on the principles laid in the *Maledu*, stated that, in terms of IPILRA, consent is a precondition in a mineral rights application and that compensation must be determined and paid before mineral rights can be exercised.[37]

[90] The Applicants in their founding affidavit state that they reported the matter to the Regional Manager, however, the Regional Manager is non-responsive, however, in paragraphs 35 to 37 of the founding affidavit, the Applicants indicate that there were few meetings with the DG, DDG, Regional Manager and the Adviser to the Minister, where the Applicants were informed that following the Constitutional Court decision of *Maledu*, the launch of the application for eviction was pre-mature.

[91] Further, the Applicants did not dispute the allegation by the Respondents that RPM demolished some of the houses when owners were not present. That is illegal, whether under ESTA[38] or IPILRA[39]. This shows that there is no full, prior, and informed consent (FPIC) in the signing of the relocation agreement.

[92] With regards to an order evicting the First to Eleventh Respondents and all persons claiming rights of residence through them, from the farm Zwartfontein in the Mogalakwena Local Municipality, Limpopo within 30 days of the granting of the order; the Maledu judgment also found that mining companies cannot resort to eviction proceedings before, or without complying with the dispute resolution provisions in section 54 of the MPRDA.

[93] The Applicants in their replying affidavit, insist that they pray for eviction of the First to Eleventh Respondents under ESTA, despite the fact that they argue that they complied with IPILRA requirements. The challenge for the Applicants is that ESTA and

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[37] In regard to the claim for compensation, the Applicants argued that as part of the discretion vested in the Minister in terms of s 23(2A) of the MPRDA (which section authorises the Minister to impose conditions on the award of the right when it is necessary to protect the community's interests), there should be a precondition that compensation should be determined before, as opposed to after, the granting of mineral rights. See *Baleni supra n13,* para 46.

[38] ESTA, section 23 (1) on Offences, no person shall evict an occupier except on the authority of an order of the Court.

[39] IPILRA, Section 2 (1) Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of1975), 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.

IPILRA are generally mutually exclusive in their primary application, so sections 8 to10 of ESTA would not apply where IPILRA applies.

[94] ESTA's scope of application is as follows: ESTA applies to people who reside on land with the owner's consent (or another right in law) and whose tenure is legally insecure, but it specifically excludes certain categories, including people with rights protected under IPILRA. ESTA regulates the conditions for the termination of the right of residence (Section 8) and the circumstances and conditions under which evictions may occur (Sections 9, 10, and 11).

[95] IPILRA protects individuals and communities who hold "informal rights to land" (often in the former Bantustans or on communal land) in terms of customary law, custom, or usage, or specific historical certificates like Permission to Occupy (PTO) certificates.

[96] The main protection under IPILRA is that a person or community cannot be deprived of their informal land rights without their informed consent, except through a formal expropriation process with compensation. This "consent" requirement is a distinct and stronger protection than the "just and equitable" eviction process under ESTA.

[97] The key principle is that the two Acts deal with different types of land rights and different factual scenarios. A person is typically protected by one or the other, depending on the nature of their land holding.

[98] Based on the above, if a person's rights are protected under IPILRA, they cannot be evicted simply by following the ESTA process outlined in sections 8 to 10. Instead, the stringent requirements of IPILRA, particularly the need for informed consent, would have to be met. Therefore, the Court cannot grant such an order; the Applicants must exhaust the section 54 MPRDA process.

[99] The Court cannot grant an order confirming that the Applicants are entitled to demolish the dwellings occupied and / or retained by the First to Eleventh

Respondents on Zwartfontein upon their vacating of Zwartfontein, and the return of any salvaged material to such Respondents because the eviction order is not granted.

[100] In respect of the Third to Eleventh Respondents, the court cannot grant a final order directing them to select alternative permanent housing in accordance with the Relocation Agreement concluded in August 2012, and the Addendum thereto concluded in February 2018 to be constructed for them by the Applicants because the Section 54 MPRDA processes have not yet been exhausted.

Costs

[101] Rule 61(1) of the Rules of the Land Claims Court, on orders for costs, provides that: 'The Court may make orders in relation to costs which it considers just, and it may, in exercising that discretion—

> (a) elect not to award costs against an unsuccessful party—
>
> (i) who has put a case or made submissions to the Court in good faith in order to protect or advance his or her legitimate interest; or
>
> (ii) for any other sufficient reason;
>
> (b) award costs on the scale of party and party or attorney and client;
>
> (c) award costs against any legal representative or office bearer of a party *de bonis propriis*; and ...'

[102] As a result, this Court does not usually grant costs orders because it deals with social legislation, it only does so in special circumstances. Also Courts[40] have established, the proposition that in constitutional litigation a court can depart from the normal rule that costs follow the event by insulating an unsuccessful party from liability for costs depends on whether the case raises a matter of constitutional import. However, the question to be answered in that case, is whether the dispute concerned an issue of public interest transcending the immediate interest of the named parties, and which have not been previously resolved.

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[40]See, for example, *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC); *Motsepe v CIR* 1997 (6) BCLR 692 (CC) para 30; *Chonco v Minister for Justice and Constitutional Development*2010 (6) BCLR 511 (CC) para 47; *Department of Land Affairs v Goedelegen Tropical Fruits (Pty)*2007 (6) SA 199 (CC); *Kwalindile Community v King Sabata Dalindyebo Municipality* 2013 (6) SA 193 (CC).

[103] The question of whether the requirements of section 54(4) of the MPRDA have been exhausted or not have been addressed by the courts. The Court in *Maledu* asked the following question in paragraph 85:

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

> 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."

[105] The Court in paragraph 86 answered the question above in the following manner :

> '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.[41] However, there is no evidence as to what finally became of that process'.

[106] In conclusion the Court held in paragraphs 109 to 111:

> "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

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[41] 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.

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

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".

For the abovementioned reasons the judgment and order of the High Court fall to be overturned."

[107] *In casu*, the Applicants' case does not concern an issue of public interest transcending the immediate interest of the named parties, and which have not been previously resolved, as indicated above that the Constitutional Court in Maledu addressed the issue of exhausting section 54 of the MPRDA. However, the Applicants are adamant that they have exhausted section 54 and yet they are aware that they did not exhaust it and they were informed by the Officials of the Department that launching the eviction process was immature.

[108] The Respondents prayed for punitive cost, however, this court cannot order punitive costs because there was no fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process[42]

[109] The Applicants abandoned the section 54 MPRDA processes and did not complete them, therefore the Applicants are placed on terms to resume the section 54 MPRDA processes, if they so wish or if they are so advised.

[42] Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) at para 8 where Mogoeng CJ noted that '[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process.'

[110] Accordingly, for the abovementioned reasons the application is dismissed with costs

Order

[111] In the circumstances, the following order is granted:

1. The application is dismissed.
2. The Applicants are ordered to pay party and party costs on scale "C" of this application, such costs to include costs of two counsel, where such employed.

[redacted]

J MALULEKE

Acting Judge of the Land Court

I concur

[redacted]

T NCUBE

Judge of the Land Court

APPEARANCES:

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