THE *MALEDU* AND *BALENI* CASES' IMPACT ON CUSTOMARY COMMUNITIES' VULNERABILITY TO EXPROPRIATION

by

Julie-Hannah Massyn (MSSJUL005)

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Supervisor: Professor Hanri Mostert, DST/NRF SARChI Research Chair: Mineral Law in Africa, Department of Private Law, Faculty of Law, University of Cape Town

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ABSTRACT

In 2018, two disputes between customary communities and entities seeking to exploit mineral resources came before the courts - *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* ("*Maledu*") and *Baleni v Minister of Mineral Resources* ("*Baleni"*). In both cases, the courts found in favour of the communities that resided on the proposed mining sites and whose rights in land are secured by the Interim Protection of Informal Land Rights Act ("IPILRA"). At face value, these cases bolstered the position of communities' rights over mineral-rich land. However, the attempt to empower communities may have rendered them more vulnerable to the expropriation of their land. Given the *Maledu* and *Baleni* decisions, this research considers the position of customary communities whose land is subject to a mining or prospecting right, or where an application for mining or prospecting rights looms. Specifically, this research considers these kinds of communities' vulnerability to expropriation for the purposes of mining in light of these judgments.

The research considers the consent requirement formulated in the *Baleni* judgment and argues that this requirement has made obtaining a valid mining right more difficult. It has also increased the likelihood that expropriation proceedings may be used to bypass the requirement, where community consent promises to be an insurmountable hurdle to resource extraction. The Mineral and Petroleum Resources Development Act ("MPRDA") foresees this possibility by empowering the Minister of Mineral Resources to expropriate land for the purposes of mining. Further, the research shows, the *Maledu* judgment has disabled mining where a dispute resolution process under section 54 of the MPRDA is under way. The lengthy administrative processes involved in section 54 cause costly delays. However, the section 54 process could likewise be bypassed by applying section 55 of the MPRDA, which provides for expropriation.

The dissertation argues that communities whose rights vis-à-vis mining companies are secured under the IPILRA remain vulnerable. Mining operations on their land should be an opportunity for socio-economic development for such communities. In acknowledging historical disadvantage and recognising communities' right to benefit from mineral deposits on their land, communities ought to be in the best position to benefit from mining ventures. However, following the *Maledu* and *Baleni* judgments, expropriation of land emerges as an attractive alternative means of engagement with communities. The research questions whether such an approach would be in the communities' best interests. Being expropriated of their land and then resettled or displaced is unlikely to benefit a community optimally, as it will sever their opportunities to benefit from the ongoing resource extraction.

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CHAPTER ONE: INTRODUCTION

1.1 Introduction

"Even the most cursory of looks at South African expropriation law highlights the role of expropriation in manipulating social change".[1] South Africa is a country marred by its racist history, both during apartheid and under colonialism.[2] Expropriation today is seen as a useful tool in the context of land reform, particularly for achieving an equitable distribution of land ownership.[3] Certainly, expropriation in the context of land reform has an important role to play. However, expropriation has not always been used for admirable ends. Before South Africa became a democracy, expropriation was integral to bringing about racialised spatial segregation.[4] Expropriation is a powerful legal tool that can pose a threat to some of the most vulnerable sectors of our society. Communities that hold "informal" rights over land with mineral resources are such a vulnerable group. The threat of expropriation can arise in some unexpected circumstances. This research expands on such an unexpected threat.

Mineral resources are valuable and desirable, and yet their exploitation disrupts the lives of those occupying mining land. Mineral exploitation also has significant adverse environmental consequences.[5] Disputes between those seeking to obtain mining rights and those occupying the land are therefore common.[6] In 2018, two disputes between customary communities and entities seeking to exploit the mineral resources came before the courts:[7] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* ("*Maledu*")[8] and *Baleni v Minister of Mineral Resources*

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[1] H Mostert "The Poverty of Precedent on Public Purpose/Interest: An Analysis of Pre-Constitutional and Post-Apartheid Jurisprudence in South Africa" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans, LCA Verstappen L (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 2.

[2] The apartheid-era refers to the period between 1948 and 1994, when the National Party governing South Africa implemented their policy of comprehensive racial segregation.

[3] See Chapter 7.

[4] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 13.

[5] F Cronje, J Kane-Berman & L Moloi "Digging for development: The mining industry in South Africa and its role in socio-economic development" (2014) *South African Institute of Race Relations Occasional Report* 3-4 & 9-10.

[6] PJ Badenhorst & CN van Heerden "Conflict Resolution between Holders of Prospecting or Mining Rights and Owners (or Occupiers) of Land or Traditional Communities: What is Not Good for the Goose is Good for the Gander" (2019) 136 *SALJ* 303 305.

[7] Y Meyer "Baleni v Minister of Mineral Resources 2019 2 SA 453 (GP): Paving the Way for Formal Protection of Informal Land Rights" (2020) 23 *PER/PELJ* 1 8.

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

("*Baleni"*).[9] In both cases, the courts found in favour of the communities that resided on the proposed mining sites.[10] At face value, these two cases bolstered the position of communities' rights over mineral-rich land.[11] Both the *Maledu* and *Baleni* disputes involved customary communities who opposed mining ventures on their land on the one hand, and mining entities seeking to obtain or to exercise mining rights on the other.[12]

Given the *Maledu* and *Baleni* decisions, this research considers the position of customary communities where their land is the subject of a mining or prospecting right, or of an application for mining or prospecting rights. Specifically, this research considers these kinds of communities' vulnerability to expropriation for the purposes of mining, given these judgments. While both the *Baleni* and *Maledu* decisions seem to bolster the legal position of communities relative to mining entities, the decisions also make it more difficult to obtain mining rights over certain land.[13] Mining is still one of the biggest contributors to the national economy, and having the right to extract mineral resources can be very lucrative.[14] It is proposed that, in the attempt to strengthen the position of customary communities in relation to mining right holders or applicants, the courts have rendered communities more vulnerable to expropriation of their land to allow for mining.

1.2 Problem Statement

The Constitutional Court adjudicated the first of the disputes, *Maledu* and found in favour of the Lesetlheng Community. The High Court's verdict in favour of the Umgungundlovu Community was set out in *Baleni*. The Lesetlheng and Umgungundlovu communities hold land in terms of customary law, which are secured by the Interim Protection of Informal Land Rights Act

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

[10] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 84-85; *Maledu v Itireleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) paras 110-113.

[11] J Dugard "Unpacking Section 25: What, If Any, are the Legal Barriers to Transformative Land Reform?" (2019) 9 *Constitutional Court Review* 135 153.

[12] In *Maledu*, the mining entities - Itereleng Bakgatla Mineral Resources (Pty) Ltd ("IBMR") and Pilanesberg Platinum Mines (PTY) Ltd ("PPM") – had successfully obtained their mining rights over land occupied by the Lesetlheng Community and had commenced preparations to begin mining operations. In *Baleni*, Transworld Energy and Mineral Resources (SA) Pty Ltd ("TEM") had applied for, but not yet received, mining rights over land occupied by the Umgungundlovu Community.

[13] Dugard (2019) *Constitutional Court Review* 153.

[14] *Maledu v Itireleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 5.

("IPILRA")[15] as "informal rights in land".[16] Mining rights are granted and applied for in terms of the Mineral and Petroleum Resources Development Act ("MPRDA").[17]

The *Maledu* case was the culmination of a prolonged dispute between the occupiers of the land – the Lesetlheng Community – and the holders of mining rights over that land.[18] When the community attempted to halt mining operations on their land, the holders of the mining rights successfully obtained an eviction order and an interdict against the Lesetlheng Community.[19] The community came before the Constitutional Court, asking it to set aside these orders. The court held that a holder of a mining right had to follow the statutory dispute resolution mechanisms set out in the MPRDA before it could have recourse to other remedies.[20] Section 54 of the MPRDA prescribes the process to resolve disputes between holders of mining rights and lawful occupiers of the land. The court ultimately found in favour of the Lesetlheng Community and overturned the eviction order, on the basis that the section 54 dispute resolution process had not been exhausted.[21] An eviction order or interdict against the lawful occupiers of the land could not be granted before the process prescribed by the MPRDA had been followed.[22]

The dispute before the court in *Baleni* also was the product of a longstanding dispute between a mining entity and a customary community.[23] When Transworld Energy and Mineral Resources ("TEM") applied for a mining right over the Umgungundlovu Community's land, significant social and political upheaval broke out in the community.[24] The MPRDA requires that "interested and affected persons" be notified and consulted when a mining right application is accepted.[25] The members of the Umgungundlovu Community, as the lawful occupiers of the land upon which the mining would take place, are "interested and affected persons" and must be consulted. During the consultation proceedings, it became clear that while some members of the community would

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[15] Act 31 of 1996.

[16] The IPILRA gives an extensive definition of "informal right to land" in s 1(1)(iii).

[17] Act 28 of 2002.

[18] See Chapter 4, section 4.2.

[19] *Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another v Maledu and Others* 495/2015 2017 ZANWHC 117 para 87.

[20] *Itireleng Bakgatla Mineral Resources v Maledu* 495/2015 2017 ZANWHC 117 para 87.

[21] *Maledu v Itireleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 111.

[22] Chapter 4, section 4.3.

[23] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 6. See Chapter 5, section 5.2.

[24] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 6. See Chapter 5, section 5.2.

[25] MPRDA, s 22.

stand to benefit from the proposed mining operations, many others would be stripped of their means of earning a living through agriculture and tourism.[26] This upheaval frustrated the mining right application process, and ultimately resulted in the case before the High Court.

The community members who opposed mining operations approached the court seeking declaratory relief that consultation, as prescribed by the MPRDA, would not be sufficient for granting mining rights over land in terms of customary law.[27] The IPILRA provides that a community cannot be deprived of their rights in land without consenting to it.[28] The community argued that consent in terms of the IPILRA, and not merely consultation, was the standard required to grant valid mining rights over their land.[29] The court agreed with the community, and held that consent was the requisite standard of engagement where the IPILRA and MPRDA are both relevant.[30]

Historically, the rights of occupiers of mining land were treated as inferior to the mineral right holder's right to exploit mineral deposits.[31] In acknowledgement of their historical treatment and continuing vulnerability, communities like the Lesetlheng and Umgungundlovu should indeed be specially protected and empowered.[32] Mining operations on their land, if they are to take place at all, should be an opportunity for socio-economic development for such communities.[33] However, in the attempt to empower communities, the courts may have rendered them more vulnerable to the expropriation of their land.

In South Africa, expropriation allows the state to take property in the public interest or for a public purpose and is ultimately governed by section 25 of the Constitution. Land can only be expropriated if there is a law of general application which empowers the state to expropriate that

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[26] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 11-12.

[27] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 28-29.

[28] IPILRA, s 2(1).

[29] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 74 & 84.

[30] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 74 & 84.

[31] Chapter 3, section 3.4.1. See also H Mostert *Mineral Law: Principles and Policies in Perspective* (2012) 35.

[32] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 35-40.

[33] In keeping with the objectives of the MPRDA as contained in section 2. The objectives in this regard include "substantially and meaningfully expand[ing] opportunities for historically disadvantaged persons, including… 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" (MPRDA, s 2(d)).

land.[34] The Expropriation Act[35] governs how all expropriations are to proceed, but the authority that empowers the state to expropriate property in a specific instance can come from various other pieces of legislation. The MPRDA is such a piece of legislation: The Act empowers the state to expropriate property for the purposes of mining.[36] Mining rights are also granted and applied for in terms of the MPRDA.[37]

The *Baleni* judgment provided that the MPRDA and the IPILRA must be read together.[38] The court held that therefore, consulting a community, as required by the MPRDA, is not sufficient to grant a mining right validly over their land.[39] Instead, the community's consent must be obtained, as required by the IPILRA.[40] Consent is a higher standard than consultation.[41] Thus, even if a community has been consulted, it may still not have consented to mining activity proceeding on its land.[42]

By requiring consent, the *Baleni* judgment has made obtaining a valid mining right more difficult.[43] Following the *Baleni* decision, a valid mining right cannot be granted without obtaining the consent of the community.[44] However, expropriation does not require consent. An internal limitation within section 2(1) of the IPILRA recognises this, stating that a person cannot be deprived of their informal rights in land without consent "[s]ubject to the provisions… of the Expropriation Act… or any other law which provides for the expropriation of land or rights in land". The MPRDA empowers the Minister of Mineral Resources to expropriate land for the purposes of mining.[45]

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[34] Constitution of the Republic of South Africa, 1996, s 25(2).

[35] Act 63 of 1975.

[36] Expropriation is empowered by section 55 of the MPRDA.

[37] The MPRDA grants the state custodianship over South Africa's mineral and petroleum resources (s 3); governs the legal nature of prospecting and mining rights and the holders of such rights (s 5); governs the processes for applying for mining or prospection rights (ss 9, 10, 16, 17, 27, 37 and 38A, amongst others); and the rights and obligations of mineral right holders (ss 10, 12, 37 and 38A, amongst others).

[38] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 40.

[39] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 76; Badenhorst & Van Heerden (2019) *SALJ* 315. See also section 22 of the MPRDA, which deals with applying for a mining right, and requires merely consultation with interested and affected parties.

[40] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 76; Badenhorst & Van Heerden (2019) *SALJ* 315. See also section 2 of the IPILRA, which governs deprivation of informal rights in land.

[41] See Chapter 5, section 5.4.4, which deals with the difference between consent and consultation in detail.

[42] Chapter 5, section 5.4.4.

[43] Dugard (2019) *Constitutional Court Review* 153.

[44] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 83-84.

[45] In terms of section 55 of the MPRDA.

That property can be expropriated without the expropriatee's consent is doctrinally sound. Expropriation is a unilateral acquisition of property by the state.[46] When property is expropriated, it transfers by operation of law, and not through the agreement of the transferring parties.[47] Therefore, an owner's consent is not required for a valid expropriation of property. However, in light of the *Maledu* and *Baleni* judgments, this internal limitation has implications for holders of informal rights in land.

Section 54 of the MPRDA provides for circumstances in which holders of mining rights are prevented from mining by the owner or lawful occupier of the land.[48] This provision also sets out the process to be followed if such a dispute occurs.[49] The procedures set out in section 54 of the MPRDA are statutory remedies and provide a dispute resolution process based on reaching consensus mediation.[50] The *Maledu* case concerned a dispute to which section 54 was applicable.[51] The court held that the processes set out in section 54 of the MPRDA, where applicable, must be exhausted.[52] Only once the section 54 process is exhausted can a mining right holder obtain alternative relief from a court to continue or begin mining.[53] The *Maledu* judgment has made it clear that the section 54 process cannot run parallel to an action that allows the mining right holder to continue mining while the dispute is ongoing.[54] It is now more difficult for a mining right holder to continue or begin mining if it is blocked from doing so by the lawful occupier of that land.[55] Since a mining right holder may not mine while the lengthy administrative process involved in section 54 is underway, delays will be costly.[56]

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[46] A Gildenhuys & GL Grobler "Expropriation" in WA Joubert & JA Faris (eds) *LAWSA* 10 2 ed (2012) 2.

[47] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[48] MPRDA, s 54(1).

[49] MPRDA, ss 54(1)-(7).

[50] *Maledu v Itireleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 92.

[51] *Maledu v Itireleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 4.

[52] *Maledu v Itireleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 91.

[53] Alternative relief could be in the form of an eviction order or an interdict to prevent occupiers or owners from preventing mining operations. The reasoning in *Maledu* applies to interdicts, too. Badenhorst & Van Heerden (2019) *SALJ* 325-326; *Maledu v Itireleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 91.

[54] *Maledu v Itireleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 92.

[55] Badenhorst & Van Heerden (2019) *SALJ* 325-326.

[56] Badenhorst & Van Heerden (2019) *SALJ* 326.

The section 54 process could be bypassed through the application of section 55 of the MPRDA, which provides for expropriation.[57] In terms of section 54, if the Regional Manager concludes that further negotiations are detrimental to the purposes of the MPRDA, they may recommend to the Minister that the land in question be expropriated in terms of section 55 of the MPRDA.[58] The MPRDA seeks to, amongst others, "promote economic growth and mineral… resources development" and "promote employment and advance the social and economic welfare of all South Africans".[59] Section 55 of the MPRDA empowers the state to expropriate property in furtherance of these objectives.[60] It is likely that in at least some cases, the MPRDA's objectives would be fulfilled by expropriating land from communities occupying land in terms of the IPILRA. Within the current constitutional and legislative framework, expropriated property may be transferred to a third party (in this case, a mining company) to allow that party to carry out a public purpose.[61] It therefore seems that expropriating property to enable mining would be permissible under the prevailing legal framework. Pursuant to the *Maledu* and *Baleni* judgments, expropriation of land could be an alternative method to allow for mining on that land. This is unlikely to be in the best interests of communities.

The argument could be made that expropriating communities like the Lesetlheng and Umgungundlovu of their land is not a problem per se. Expropriation of property is accompanied by an obligation to compensate the expropriated owner,[62] and so communities like the Lesetlheng and Umgungundlovu would receive financial recompense for the loss of their land. Moreover, expropriation is a constitutionally sanctioned limitation on property rights.[63] However, this argument cannot convincingly be applied in the context of customary communities, given their strong cultural and spiritual bonds with the land.[64] Monetary compensation may not adequately offset the loss of the land – the basis upon which customary communities' spiritual and cultural life is built.

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[57] Badenhorst & Van Heerden (2019) *SALJ* 313-314.

[58] MPRDA, s 54(5).

[59] MPRDA, ss 2(*e*) and (*f*), respectively. See further Chapter 3, section 3.4.

[60] MPRDA, s 55(1).

[61] Chapter 6, section 6.3.3.

[62] Constitution, s 25(2)(b).

[63] Constitution, s 25.

[64] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 7, 9 & 11; Chapter 2, section 2.2.

1.3 Overview of Chapters

This research considers the vulnerability of communities like the Lesetlheng and Umgungundlovu to expropriation for the purposes of mining. This research adopts a three-part structure. Part 1, comprising chapters 2 and 3, identifies and contextualises the core pieces of terminology and legislation necessary for the argument put forward in this research. Part 1, through its historical and social contextualisation, underscores the necessity of protecting communities like the Lesetlheng and Umgungundlovu from being vulnerable to expropriation for the purposes of mining. Part 2, comprising chapters 4 and 5, considers the *Maledu* and *Baleni* cases in more detail. Part 2 shows that the court in *Maledu* inadvertently invites expropriation of land as a solution to disputes between landowners and lawful occupiers, and holders of mining or prospecting rights. The court in *Baleni* overlooked the threat of expropriation of land in similar disputes. Part 3, which consists of chapters 6 and 7, focuses on the constitutional framework within which expropriations occur to determine whether this framework can sustain expropriation of customary communities' rights in land for the purposes of mining. It shows that the Constitution provides no bulwark against expropriating communities holding rights under the IPILRA of their land for the purposes of mining.

Chapter 2 introduces and defines some of the relevant concepts, such as expropriation and deprivation of property,[65] consent and consultation,[66] and customary land rights.[67] It begins by setting out the principles of customary land tenure.[68] It then turns to differentiating between deprivation and expropriation of property.[69] The chapter proceeds to discuss the use of expropriation prior to the advent of the Expropriation Act of 1975 and will show that expropriation was used as a discriminatory tool against black South Africans.[70] The chapter concludes by setting out the differences and similarities between consent and consultation.[71]

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[65] Chapter 2, section 2.3.

[66] Chapter 2, section 2.4.

[67] Chapter 2, section 2.2.

[68] Chapter 2, section 2.2.

[69] Chapter 2, section 2.3.

[70] Chapter 2, section 2.3.

[71] Chapter 2, section 2.4. The requirements for both consultation and consent, and their differences and similarities, are dealt with in greater detail in the discussion of the impact of the *Baleni* decision in Chapter 5, section 5.4.4.

Chapter 3 introduces the three most important pieces of legislation for the purposes of this assessment: the MPRDA,[72] the IPILRA,[73] and the Expropriation Act.[74] The chapter also places these three pieces of legislation within their social and historical context. It begins by considering the nature and extent of rights under the IPILRA.[75] It then considers the historical context to which the IPILRA responds. It shows that communities like those involved in these two cases are vulnerable due to the historical treatment of black land rights.[76] It then considers the Expropriation Act of 1975, which still governs our expropriation law. It shows that expropriation was used as a social engineering tool for the apartheid state.[77] The chapter also considers the strange relationship between the 1975 Expropriation Act and the Constitution.[78] The chapter then turns to the MPRDA, and sets out its objectives.[79] It outlines the historical context to which the MPRDA responds, and shows that black South Africans have been excluded from, and oppressed by, the mining industry throughout its history.[80] Chapter 3 sets out the conflict resolution processes prescribed by section 54 of the MPRDA, which played a pivotal role in the *Maledu* case.[81] The chapter concludes with a discussion on expropriation under the MPRDA.[82]

Chapters 4 and 5 set out the facts, issues, judicial reasoning, and possible impact of the *Maledu* and *Baleni* judgments, respectively. Chapter 4 focuses on the *Maledu* case, and shows how the Constitutional Court's decision regarding the exhaustion of the MPRDA's section 54 dispute resolution processes has made communities more likely to be expropriated. Chapter 5 considers *Baleni*'s decision that customary owners be treated differently from common law owners and questions the wisdom of this approach.[83] It considers the difference between consent and consultation, and shows how this shift in the required level of engagement makes communities more vulnerable to expropriation for mining purposes.[84]

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[72] Chapter 3, section 3.4.
[73] Chapter 3, section 3.1.
[74] Chapter 3, section 3.3.
[75] Chapter 3, section 3.2.1.
[76] Chapter 3, section 3.2.2.
[77] Chapter 3, section 3.3.1.
[78] Chapter 3, section 3.3.2.
[79] Chapter 3, section 3.4.
[80] Chapter 3, section 3.4.1.
[81] Chapter 3, section 3.4.2.
[82] Chapter 3, section 3.4.3.
[83] Chapter 5, sections 5.3.1 and 5.4.3.
[84] Chapter 5, section 5.4.

Part 3 focuses on whether our constitutional framework provides protection against the threat of expropriation in *Maledu*/*Baleni*-type circumstances. Chapter 6 considers whether expropriation of a community like the Lesetlheng or Umgungundlovu for the purposes of mining can be valid within the constitutional framework governing expropriation and deprivation of property. To answer this question, Chapter 6 considers the constitutional distinction between deprivation and expropriation of property.[85] The chapter then focuses on the constitutional requirement that property must be expropriated "in the public interest" or "for a public purpose".[86] The chapter will show that the post-constitutional judicial engagement with the public purpose requirement has meant that expropriation of a community for mining could be considered "in the public interest".[87] Thus, communities who hold land under the IPILRA are vulnerable to expropriation to allow for mining to proceed on their land.

Chapter 7 then considers the proposed amendment to the Constitution's property clause.[88] In particular, the chapter considers the current constitutional framework governing compensation for expropriations and whether the proposed amendment substantially alters what is possible in terms of section 25 of the Constitution as it stands at present. Chapter 7 will show that the proposed amendments will not have any significant impact on this research.

The concluding chapter of this dissertation shows that the effect of the *Baleni* and *Maledu* judgments is, ironically, to render certain communities more vulnerable to having their land expropriated in favour of mining right holders. Chapter 8 summarises the findings of the research and considers whether the most recent attempt to revise South Africa's legislative expropriation law is likely to assist with the problems highlighted.

1.4 Relevance in the Face of Law Revisions

In 2018, the same year that the *Maledu* and *Baleni* cases came before the court, the constitutional and legislative framework for expropriation also came under scrutiny.[89] In the South African State

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[85] Chapter 6, section 6.2.

[86] As required by section 25(2)(a) of the Constitution.

[87] Chapter 6, section 6.3.

[88] Constitution, s 25.

[89] Parliament of the Republic of South Africa "National Assembly Approves Process to Amend Section 25 of Constitution" (4-12-2018) *Parliament of the Republic of South Africa* <https://www.parliament.gov.za/press-releases/national-assembly-approves-process-amend-section-25-constitution> (accessed 27-5-2019).

of the Nation Address 2018, President Ramaphosa indicated that expropriation without compensation to effect land reform would take centre stage in transformation-oriented policy debates.[90] To this end, the National Assembly adopted a motion to review the Constitution's property clause,[91] to allow for expropriation without compensation.[92]

Since the advent of South Africa's constitutional democracy, all attempts to revise expropriation legislation have failed. The first revised expropriation bill was shelved in 2008 after several years of work.[93] Another attempt to bring expropriation legislation up to date began in 2013 when a new expropriation bill was released for public comment.[94] In response to the public comments, yet another expropriation bill was published in 2015.[95] The 2015 Bill also did not materialise into law. However, the constitutional amendment renewed interest in revising South Africa's expropriation legislation.[96] The Draft Expropriation Bill of 2019 was published for public comment late in 2018.[97] The most recent bill was introduced to the National Assembly in October of 2020.[98] As of January 2022, public submissions regarding the Expropriation Bill of 2020 are still being considered.[99]

The most publicised aspect of both the proposed constitutional amendment and the Expropriation Bill of 2020 is the provision made for expropriation without compensation. However, long before the proposed amendment to the Constitution was tabled, Van der Walt argued that "[i]n terms of... the Constitution it is also possible, in suitable cases, that expropriation may be just and equitable without any compensation".[100] That just and equitable compensation could be zero compensation

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[90] C Ramaphosa "State of the Nation Address by President Cyril Ramaphosa" (16-02-2018) *Parliament of the Republic of South Africa* <https://www.parliament.gov.za/state-nation-address-cyril-ramaphosa-president> (accessed 19-02-2019).

[91] Constitution, s 25.

[92] Parliament of the Republic of South Africa "National Assembly Approves Process to Amend Section 25 of Constitution" *Parliament of the Republic of South Africa*.

[93] The shelved attempt was the Expropriation Bill B16-2008. Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 5.

[94] Expropriation Bill (draft) in GN 234 GG 36269 of 20-03-2013.

[95] The Expropriation Bill B4D-2015.

[96] H Mostert & G Mathiba *Commentary on the Draft Expropriation Bill, 2019* (2020) paper prepared by the DST/NRF SARChI: Mineral Law in Africa, University of Cape Town 29-02-2020 3-4.

[97] Expropriation Bill (draft) in GN 1409 GG 42127 of 21-12-2018. Although the Bill was published in 2018, the Bill is known as the "Draft Expropriation Bill of 2019".

[98] Expropriation Bill B23-2020 ("Expropriation Bill").

[99] The status of the Expropriation Bill of 2020 can be monitored at Parliamentary Monitoring Group "Expropriation Bill (B23-2020)" (24-11-2021) *PMG* <https://pmg.org.za/bill/973/> (accessed 28-1-2022).

[100] AJ van der Walt *Constitutional Property Law* 3 ed (2011) 506.

in certain circumstances, is supported by a considerable body of work.[101] Du Plessis argued that courts ought to shift their focus away from market value in determining compensation for expropriation, and instead strive to achieve just and equitable compensation.[102] She argues further that just and equitable compensation in the land reform context could be well below market value.[103] Slade et al, in their submission to Parliament in response to the proposed amendment, argue that no amendment is necessary to implement land reform effectively.[104] These are only a few authorities that have made this assertion.[105]

Given the failure of the 2008, 2013 and 2015 expropriation bills, a cynic might express uncertainty that the most recent Expropriation Bill will be enacted into law soon. The far-reaching effects of the COVID-19 pandemic may also delay or obstruct the legislative process. For now, the Expropriation Act of 1975 remains in force, and this research, therefore, focuses on this piece of enacted legislation. If new expropriation legislation is successfully passed, existing precedent is still likely to influence the understanding and interpretation of the new law's provisions. Moreover, compensation is understood as a necessary *consequence* of a constitutionally valid expropriation.[106] It does not therefore directly bear on the focus of this dissertation, which is whether communities like those in the *Maledu* and *Baleni* cases can be expropriated of their land for mining purposes. Nevertheless, there are aspects of the Expropriation Bill of 2020 which may influence the position of such communities in this regard. These provisions are considered in the concluding chapter of this research.

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[101] Just and equitable compensation as required by section 25(2) of the Constitution and given content by section 25(3).

[102] WJ du Plessis *Compensation for Expropriation under the Constitution* LLD dissertation Stellenbosch University (2009) 298-300.

[103] Du Plessis *Compensation for Expropriation* 131-133.

[104] See BV Slade, JM Pienaar, ZT Boggenpoel & T Kotzé *Submission to Parliament on the review of section 25 of the Constitution of the Republic of South Africa, 1996* (2019) generally. This specific point is made at page 2.

[105] The constitutional amendment and its application to this research are discussed in further detail in Chapter 7.

[106] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 1.

CHAPTER TWO: KEY CONCEPTS AND TERMINOLOGY

2.1 Introduction

Judge Yacoob of the South African Constitutional Court wrote that "rights must be understood in their social and historical context".[107] This wisdom holds true for the land rights of communities like those in *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* ("*Maledu*")[108] and *Baleni v Minister of Mineral Resources* ("*Baleni*"),[109] as well as for holders of mining and prospecting rights. To consider the vulnerability to expropriation for mining purposes of communities like the Lesetlheng in *Maledu* and the Umgungundlovu in *Baleni*, some key concepts need some preliminary clarification, and must be placed into their historical and social contexts.[110] These concepts will be further clarified and discussed throughout this research.

2.2 Customary Communities and Informal Rights in Land

Both the *Maledu* and *Baleni* cases concerned the two core pieces of legislation: the Mineral and Petroleum Resources Development Act ("MPRDA")[111] in terms of which mineral rights are granted, and the Interim Protection of Informal Land Rights Act ("IPILRA")[112] in terms of which

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[107] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 22.

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

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

[110] In *Baleni*, the court had to decide whether consultation, per the MPRDA, would be sufficient for granting mining rights over land in terms of customary law, secured by the IPILRA. The court held that consent, per section 2 of the IPILRA (which deals with deprivation of informal rights), of the community is required for granting mining rights over such land. However, if consent cannot be obtained, then the Minister could expropriate the community's informal rights under section 55 of the MPRDA. *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 43 & 76; PJ Badenhorst & CN van Heerden "Conflict Resolution between Holders of Prospecting or Mining Rights and Owners (or Occupiers) of Land or Traditional Communities: What is Not Good for the Goose is Good for the Gander" (2019) 136 *SALJ* 303 312-315.

In *Maledu* the Constitutional Court considered whether granting a mining right, in terms of the MPRDA, over customary land constituted a deprivation of informal rights to land in terms of IPILRA.[110] The court held that a holder of a mining right had to exhaust the processes set out in section 54 of the MPRDA before they could have recourse to other remedies. This could be very onerous. However, expropriation of the disputed land in terms of section 55 of the MPRDA is available as an alternative avenue. *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) paras 67, 71 & 98.

The cases are dealt with in greater detail in Chapters 4 & 5.

[111] Act 28 of 2002.

[112] Act 31 of 1996.

customary rights in land are secured. Both the IPILRA and MPRDA define "community". Under the IPILRA, a community is "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".[113] The MPRDA contains a more extensive definition, stating that a community is a "group of historically disadvantaged persons" that have interests or rights to land "in terms of an agreement, custom or law".[114] Both the Umgungundlovu and Letsetlheng Communities are "communities" in terms of the IPILRA and the MPRDA.[115] "Customary communities", in relation to the IPILRA, are a group of people who hold rights to land in terms of their customary law. For historical reasons, customary land rights were made insecure.[116] Thus they are referred to as "informal rights", which the IPILRA seeks to secure.[117]

Today, tenure over land held under customary law is often insecure.[118] However, customary tenure is not intrinsically insecure.[119] Customary tenure was misunderstood, warped, and instrumentalised to serve racially oppressive policies.[120] For this reason, the IPILRA seeks to secure informal land rights.[121] Informal rights to land in terms of the IPILRA include "the use of, occupation of, or access to land in terms of any tribal, customary or indigenous law or practice of a tribe".[122] Both the *Baleni* and *Maledu* cases involved the interpretation and application of the IPILRA.[123] The IPILRA responds to the need to secure informal rights in land, including customary rights and rights over land in areas that were set aside for exclusive black use.[124]

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[113] IPILRA, s 1 (Definition of "community").

[114] MPRDA, s 1 (Definition of "community"). The definition has a caveat: "where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community".

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

[116] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 50; Badenhorst & Van Heerden (2019) *SALJ* 305.

[117] IPILRA, s 1 (Definition of "informal rights to land").

[118] HWO Okoth-Ogendo "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" (2005) 24 *Land Reform and Agrarian Change in Southern Africa Occasional Paper Series* 1 11.

[119] Okoth-Ogendo (2005) *Land Reform and Agrarian Change in Southern Africa* 11.

[120] A Pope "Get Rights Right in the Interests of Security of Tenure" (2010) 14 *Law, Democracy & Development* 333 335; B Cousins "Characterising 'Communal' Tenure: Nested Systems and Flexible Boundaries" in A Claassens & B Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 109 110-113.

[121] IPILRA, s 2(1): "no person may be deprived of any informal right to land without his or her consent".

[122] IPILRA, s 1(1)(iii)(*a*)(i).

[123] See Chapter 3 for a detailed discussion on the cases.

[124] IPILRA, s 1(1)(iii)(*a*)(ii); Presidential Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (2019) 28.

In terms of the IPILRA, if land is held on a communal basis, a person can be deprived of their rights in land per "the custom and usage of that community".[125] Customary tenure is often referred to as a system of communal land rights.[126] This diction is misleading, as customary property law emphasizes people's mutual *obligations* in respect of property rather than their *rights* in the property.[127] This emphasis on a network of obligations is different from how property is treated in the common law with its emphasis on exclusionary rights in property.[128]

Customary tenure cannot comfortably be characterised as *communal* tenure, either.[129] Customary tenure law has both communal and individual aspects, and most closely resembles a "system of complementary interests held simultaneously".[130] These interests derive from a social construct, such as a family bond.[131] The principles of customary land tenure are integrated into a complex social and political organisation.[132] In this framework, the relationship between people in respect of a piece of land is more important than the ability for a person, to the exclusion of all others, to assert any right over that land.[133] Many indigenous belief systems include a spiritual ancestral bond with the land.[134] Because interests in the land are embedded within this greater socio-political whole, the content and application of customary land tenure are flexible, dependent on the individual and communal circumstances at the time.[135]

2.3 Expropriation and Deprivation of Property

This research will show that expropriation of land in circumstances like those before the court in *Maledu* and *Baleni* could be an alternative method to allow for mining on that land. Expropriation is an original mode of property acquisition involving the expropriated owner's involuntary loss

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[125] IPILRA, s 2(2).

[126] WJ du Plessis "African Indigenous Land Rights in a Private Ownership Paradigm" (2011) 14 *PER/PELJ* 45 49.

[127] Du Plessis (2011) *PER/PELJ* 49.

[128] Pope (2010) *Law, Democracy & Development* 352.

[129] Cousins "Characterising 'Communal' Tenure" in *Land, Power and Custom* 110-112.

[130] Cousins "Characterising 'Communal' Tenure" in *Land, Power and Custom* 111.

[131] However, outsiders could become a member of that community and gain access to the socio-political network which encompassed land tenure. Cousins "Characterising 'Communal' Tenure" in *Land, Power and Custom* 111.

[132] Cousins "Characterising 'Communal' Tenure" in *Land, Power and Custom* 110.

[133] Du Plessis (2011) *PER/PELJ* 49.

[134] Cousins "Characterising 'Communal' Tenure" in *Land, Power and Custom* 110.

[135] For a detailed discussion on the concept and nature of customary law, see C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 23-39.

of private property, and a vesting of the property in the expropriator.[136] Usually, the expropriated party loses their property permanently and totally.[137] Expropriations can sometimes result in only partial or temporary loss of property, but there must be some loss of private property.[138] Deprivation, in this context, is an involuntary loss of property that does not amount to expropriation.[139] The courts have determined that where a lost right does not vest in the state, the loss of property may not amount to expropriation.[140] Deprivation of property does not require compensation.[141]

It is required that property be expropriated only "in the public interest", or "for a public purpose".[142] Expropriation is a unilateral action in which private property is acquired by, or on behalf of, the state by operation of law.[143] Incorporeal and corporeal, as well as moveable and immovable, property can be expropriated.[144] Real and personal rights, limited real rights, and immaterial property rights can be expropriated.[145]

That expropriation occurs "by operation of law" means that the expropriator's rights do not derive from the previous owner.[146] Rather, rights vest in the expropriator because it is a legal fact that arises when the requirements for a valid expropriation are met.[147] The consent of the expropriatee is therefore not required, and this is reflected in the absence of any consent requirement in section 25(2) of the Constitution. The irrelevance of consent to expropriation is also reflected in section 2(1) of the IPILRA's provision that consent is required to deprive a person of their rights unless the rights or land are expropriated.

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[136] AJ van der Walt *Constitutional Property Law* 3 ed (2011) 345; A Gildenhuys & GL Grobler "Expropriation" in WA Joubert & JA Faris (eds) *LAWSA* 10 2 ed (2012) 2.

[137] Van der Walt *Constitutional Property* (2011) 345.

[138] Van der Walt *Constitutional Property* (2011) 345.

[139] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[140] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2. See also the discussion of *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) in Chapter 5, section 5.4.1.

[141] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[142] Constitution of the Republic of South Africa, 1996, s 25(2)(a).

[143] Van der Walt *Constitutional Property* (2011) 345; Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[144] Van der Walt *Constitutional Property* (2011) 345.

[145] Van der Walt *Constitutional Property* (2011) 345.

[146] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[147] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

The historical use of expropriation in South Africa should serve as a caution against disregarding the threat of expropriation and its effects on communities. Expropriation in pre-constitutional South Africa was used to achieve racial spatial segregation.[148] Thus, *Maledu*/*Baleni*-type communities may now be vulnerable to a legal tool that the state has historically used to effect racially discriminatory social engineering.[149]

The South African state during both the Union- and apartheid-eras used expropriation to achieve comprehensive racial spatial segregation.[150] The state expropriated black immovable property to eliminate "black-spots", which it considered undesirable.[151] White-owned property was also expropriated to consolidate black Group Areas and "homelands".[152] When expropriated, black owners were under-compensated.[153] The judicial engagement with the purpose for the expropriation – the establishment of racial spatial segregation – was also problematic. Courts tended to refrain from assessing the discriminatory aspects of the purpose served by the expropriation.[154] *Minister of the Interior v Lockhat and Others* ("*Lockhat*")[155] is discussed below as an example of this judicial tendency.

To further territorial racial segregation during the Union period, the Development Trust and Land Act of 1936 ("DTLA"), discussed in the following chapter,[156] authorised the expropriation of land owned by black South Africans outside scheduled areas.[157] In terms of the DTLA, such expropriations were justifiable for a range of broad and pejorative reasons: Expropriation of land owned by black South Africans outside scheduled areas for any reason that would "promote public

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[148] H Mostert "The Poverty of Precedent on Public Purpose/Interest: An Analysis of Pre-Constitutional and Post-Apartheid Jurisprudence in South Africa" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans, LCA Verstappen L (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 13.

[149] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 13.

[150] The Union-era refers to the period during which South Africa was under British colonial rule as a self-governing territory of the British Empire. The Union of South Africa was established in 1910 with the unification of the Transvaal, the Cape, the Natal and the Orange River colonies. South Africa gained independence from Britain in 1961, and became a republic. Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 13.

[151] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 13.

[152] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 13.

[153] K Henrard "The Internally Displaced in South Africa: The Strategy of Forced Removals and Apartheid" (1996) 32 *Jura Falconis* 491 507-508; HJ Kloppers & GJ Pienaar "The Historical Context of Land Reform in South Africa and Early Policies" (2014) 17 *PER/PELJ* 677 683.

[154] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 13.

[155] *Minister of the Interior v Lockhat and Others* 1961 2 SA 587 (A).

[156] See Chapter 3, section 3.2.2.

[157] Kloppers & Pienaar (2014) *PER/PELJ* 683.

welfare", be "for a public purpose", or for reasons of "public health".[158] This Act did provide for compensation to be paid to expropriated black owners.[159] Statutorily, compensation was to be calculated by considering the fair market value of the property without improvements, the actual cost of luxurious improvements, inconvenience, and the value of necessary improvements.[160] Although this may be interpreted as fair compensation, the value of previously black-owned land was often severely undervalued, and long-term investments attached to the land were rarely included in the compensation calculation.[161]

In the case of *Lockhat*, the Appellate Division – then the highest court in the land – had the opportunity to assess expropriation for the purpose of bringing about comprehensive racial segregation.[162] This case demonstrates both that expropriation was used for discriminatory purposes, and how the courts tended to defer to Parliament even in the face of grave injustice.[163] The Appellate Division avoided assessing the justice of Parliament's vision of racial segregation as set out in the Group Areas Act of 1957.[164] The court held merely that it was not empowered to pronounce upon the virtues of this policy.[165] Not only did the apartheid judiciary uphold segregationist laws and state actions to implement them; the courts also tended not to remark on the racist nature of the laws.[166]

2.4 Consent and Consultation

While the MPRDA requires a mining or prospecting right applicant to consult with those who will be affected by the application,[167] the IPILRA provides that a holder of an informal right over land must consent to the deprivation.[168] The court in *Baleni* held that the requisite standard of engagement for communities holding rights under the IPILRA is consent and not consultation.[169]

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[158] Development Trust and Land Act, s 13; Kloppers & Pienaar (2014) *PER/PELJ* 683.
[159] Development Trust and Land Act, s 13(4); Kloppers & Pienaar (2014) *PER/PELJ* 683.
[160] Development Trust and Land Act, s 13(4); Kloppers & Pienaar (2014) *PER/PELJ* 683.
[161] Henrard (1996) *Jura Falconis* 507-508; Kloppers & Pienaar (2014) *PER/PELJ* 683.
[162] Group Areas Act 77 of 1957.
[163] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 13.
[164] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 13.
[165] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 13.
[166] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 13.
[167] MPRDA, s 22(4)(b).
[168] IPILRA, s 2(1).
[169] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 74.

This section briefly considers each of these standards of engagement. Chapter 5 will then consider the reasoning behind the court in *Baleni*'s argument that consent was the required standard of engagement,[170] the implications of this decision,[171] and go into greater detail on what each of these standards requires.[172]

Consent is a standard of engagement that requires agreement.[173] Consent must be given freely, and with sufficient time and information to come to an agreement.[174] Consultation, on the other hand, requires engagement in good faith, but does not require agreement.[175] Nevertheless, many commonalities exist between these two standards of engagement. Both the consent and consultation approaches respond to the serious disruption of surface rights resulting from subsurface activity.[176] Moreover, both standards of engagement require that sufficient information be given to the landowners or lawful occupiers of the land to allow for informed decisions.[177]

2.5 Conclusion

The tension between customary communities' rights in land and the rights of mining companies seeking to prospect and mine on a piece of customary land often results in conflict.[178] Such conflicts gave rise to the *Maledu* and *Baleni* cases. In both cases, the courts aimed to reinforce customary communities' informal rights over land, strengthening them in comparison with the rights of mining right holders.[179] Nevertheless, these judgments may ironically have made communities like those in the *Maledu* and *Baleni* cases more vulnerable to being expropriated of their land. This chapter has introduced some key concepts necessary to understand the argument put forward in this research. Given the historical origins of the vulnerability faced by the

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[170] Chapter 5, section 5.3.1.

[171] Chapter 5, section 5.4.4.

[172] Chapter 5, section 5.4.4.

[173] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 71; T Humby "The *Bengwenyama* Trilogy: Constitutional Rights and the Fight for Prospecting on Community Land" (2012) 15 *PER/PELJ* 166 177.

[174] MT Tlale "Conflicting Levels of Engagement under the Interim Protection of Informal Land Rights Act and the Minerals and Petroleum Development Act: A Closer Look at the Xolobeni Community Dispute" (2020) 23 *PER/PELJ* 2 17.

[175] Humby (2012) *PER/PELJ* 177.

[176] Humby (2012) *PER/PELJ* 177; Tlale (2020) *PER/PELJ* 17.

[177] Humby (2012) *PER/PELJ* 177; Tlale (2020) *PER/PELJ* 17.

[178] Badenhorst & Van Heerden (2019) *SALJ* 305.

[179] J Dugard "Unpacking Section 25: What, If Any, are the Legal Barriers to Transformative Land Reform?" (2019) 9 *Constitutional Court Review* 135 153.

communities in the *Maledu* and *Baleni* cases, these concepts have been placed within their historical and social contexts.

The chapter began by considering what the terms "customary community" and "informal rights in land" denote.[180] Both concepts are statutorily and conceptually linked to South Africa's historical racial exclusion of large segments of our population. The chapter then outlined two forms of involuntary loss of property – deprivation and expropriation of property.[181] It also showed how expropriation was to further the segregationist ideals of the Union and apartheid governments. Last, this chapter set out the main differences and similarities between consent and consultation as standards of engagement.[182]

[180] Section 2.2 above.
[181] Section 2.3 above.
[182] Section 2.4 above.

CHAPTER THREE: LEGISLATIVE CONTEXT AND FRAMEWORK

3.1 Introduction

This chapter places the key pieces of legislation considered in this research – the Expropriation Act,[183] the Mineral and Petroleum Resources Development Act ("MPRDA"),[184] and the Interim Protection of Informal Land Rights Act ("IPILRA")[185] – within their historical and social contexts. This chapter, like the previous, therefore also follows Judge Yacoob's advice to understand rights "in their social and historical context".[186] The focus of this research is the vulnerability of communities that hold informal rights to land,[187] where that land is the subject of a mining or prospecting application, or the subject of a validly granted mining or prospecting right.[188] These communities' vulnerability arises from historical policies and practices in South Africa during colonialism and apartheid. Mineral resource exploitation played a major role in organising and motivating the racially discriminatory policies, practices, and laws of the colonial and apartheid eras.[189] Expropriation was used by the state to effect racial segregation and deprive black South Africans of both their land and dignity.[190]

When South Africa became a constitutional democracy, it was faced with the challenge of addressing inequalities caused and maintained by the apartheid system.[191] Various pieces of legislation were adopted to address the legacy of inequality. Two such pieces of legislation are the IPILRA and the MPRDA. The IPILRA seeks to address the insecurity of tenure of customary communities by protecting their informal rights to land.[192] The MPRDA governs

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[183] Act 63 of 1975.
[184] Act 28 of 2002.
[185] Act 31 of 1996.
[186] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 22.
[187] Held in terms of the IPILRA.
[188] Granted in terms of the MPRDA.
[189] See section 3.4.1 below.
[190] See section 3.3.1 below.
[191] *Baleni and Others v Minister of Mineral Resources and Others* 2019 2 SA 453 (GP) para 51.
[192] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 51.

South Africa's mineral and petroleum sector and, per section 25 of the Constitution,[193] affirms "the State's commitment to reform to bring about equitable access to South Africa's mineral and petroleum resources".[194] The Expropriation Act sets out the procedures and method of calculating compensation for almost all expropriations.[195] This legislation was enacted in 1975 but remains in force. So far, all post-constitutional efforts to revise expropriation legislation have failed. That legislation enacted during the height of apartheid, with all its historical interpretive baggage, must give effect to the transformative provisions of the Constitution has been termed "one of the greatest anomalies of South African property law and constitutional law".[196]

That expropriation is now governed by the Constitution and is accompanied by an obligation to pay "just and equitable" compensation, does not mitigate the problem raised by expropriating customary communities of their land. Such communities share an intimate spiritual, social and cultural bond to their land.[197] Moreover, this chapter will make clear that communities like the Lesetlheng Community in *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* ("*Maledu*")[198] and the Umgungundlovu Community in *Baleni v Minister of Mineral Resources* ("*Baleni*")[199] may now be more vulnerable to the very tool – expropriation – that was historically used to effect racial segregation.[200] Moreover, these kinds of communities today are vulnerable to being expropriated to allow for mining. In other words, they are vulnerable to an industry whose history is deeply intertwined with racial oppression.

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[193] Constitution of the Republic of South Africa, 1996, s 25(4)(a): "the public interest includes the nation's commitment… to reforms to bring about equitable access to all South Africa's natural resources".

[194] MPRDA, Preamble.

[195] Some limited exceptions exist in statutes promulgated after 1992. H Mostert "The Poverty of Precedent on Public Purpose/Interest: An Analysis of Pre-Constitutional and Post-Apartheid Jurisprudence in South Africa" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans, LCA Verstappen L (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 9.

[196] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 3.

[197] Chapter 2, section 2.2.

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

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

[200] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 2.

3.2 The Interim Protection of Informal Land Rights Act

In pre-constitutional South Africa, the apartheid regime aimed to bring about comprehensive racial spatial segregation, using a system of property law in which black people could hold only limited rights in land.[201] Section 25(6) of the Constitution acknowledges that the racially discriminatory laws and practices of the past have left many people's and communities' tenure legally insecure. This subsection also affirms such people's and communities' entitlement to legally secure tenure, or "comparable redress".[202] The Constitution strengthens this entitlement, by obligating Parliament to enact legislation that will give effect to section 25(6).[203] The IPILRA is part of the legislative framework dealing with the security of tenure aspect of land reform.[204]

3.2.1 Rights Held under IPILRA

The IPILRA grants legal recognition to informal rights to land and sets out the circumstances in which people or communities can be deprived of those rights.[205] As the name of the Act suggests,[206] this piece of legislation was not intended to be a permanent solution to the problems regarding insecurity of tenure that continue to affect many South Africans today.[207] Anticipating the enactment of more comprehensive legislation, the IPILRA was intended as a temporary instrument to secure tenure for those occupying land without documented formal rights to do so.[208] Lacking such comprehensive legislation, the IPILRA is renewed yearly.[209]

Section 2 of the IPILRA, which played a central role in both the *Maledu* and *Baleni* cases,[210] governs the deprivation of informal rights to land. The IPILRA provides that a person must

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[201] JT Schoombee "Group Areas Legislation: The Political Control of Ownership and Occupation of Land" (1985) *Acta Juridica* 77 77; Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 13.

[202] Constitution, s 25(6).

[203] Constitution, s 25(9).

[204] Presidential Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (2019) 28.

[205] Presidential Advisory Panel Land Reform Agriculture *Final Report* (2019) 28.

[206] The *Interim* Protection of Informal Land Rights Act.

[207] Presidential Advisory Panel Land Reform Agriculture *Final Report* (2019) 28.

[208] Presidential Advisory Panel Land Reform Agriculture *Final Report* (2019) 28.

[209] Presidential Advisory Panel Land Reform Agriculture *Final Report* (2019) 28.

[210] J Dugard "Unpacking Section 25: What, If Any, are the Legal Barriers to Transformative Land Reform?" (2019) 9 *Constitutional Court Review* 135 153.

consent to be deprived of their informal land rights.[211] However, this is subject to certain caveats. First, a person can be deprived of land or a right in land, if it is held on a communal basis, and the deprivation is "in accordance with the custom and usage of that community".[212] Second, one can be deprived of informal rights to land without consent in terms of the Expropriation Act and any other law that provides for the expropriation of land.[213] For the purposes of section 2 of the IPILRA, "the custom and usage of a community" is deemed to include a requirement that decisions on disposing rights require a majority vote.[214]

3.2.2 Historical and Social Context for Rights Held under the IPILRA

The forebears of the Lesetlheng Community purchased the land underlying the dispute in *Maledu* in 1919.[215] However, the racially discriminatory land law at the time of purchase meant that the land could not be registered in the name of the community as joint purchasers.[216] The land instead had to be registered in the name of the Minister.[217] The proceeding discussion provides insight into the discriminatory legal framework that gave rise to this situation.

The Development and Trust Land Act ("DTLA")[218] furthered territorial segregation and diminished the rights and interests that black South Africans could have in land.[219] Black people were no longer allowed to live outside of regions designated by the Act without obtaining permission from relevant authorities.[220] The Act increased the amount of land

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[211] IPILRA, s 2(1). This is subject to section 2(4), which provides that, for the purposes of section 2, "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".

[212] IPILRA, s 2(2). This is also subject to section 2(4), as quoted above.

[213] IPILRA, s 2(1).

[214] IPILRA, s 2(4).

[215] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 2 SA 1 (CC) para 12.

[216] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 12.

[217] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 12.

[218] Development and Trust Land Act 18 of 1936.

[219] HJ Kloppers & GJ Pienaar "The Historical Context of Land Reform in South Africa and Early Policies" (2014) 17 *PER/PELJ* 677 682–684.

[220] Kloppers & Pienaar (2014) *PER/PELJ* 683–684.

available for black occupation from eight to about thirteen per cent of South Africa's landmass.[221]

The DTLA established a government organisation, the South African Development Trust (SADT). Section 2(1) transferred certain areas of land, as identified in the Black Land Act, to the SADT for administration.[222] By vesting land in the SADT, individual black landownership was effectively abolished.[223] Instead, the Act introduced trust-tenure, in terms of which only the SADT could purchase land in areas "released" for black settlement, and all black land was held in trust and administered by a state agency.[224]

The destabilising effect on black ownership of the SADT's land administration in terms of the DTLA is reflected in the IPILRA. The IPILRA aims to secure informal rights in land which are insecure as a result of discriminatory past practices.[225] In defining the informal rights to land that the IPILRA seeks to secure, the IPILRA makes explicit reference to the SADT and DTLA.[226] Indeed, the land underlying the dispute in the *Maledu* case is registered in the name of the Minister of Rural Development and Land Reform.[227] According to the title deed dating back to 1919, the Minister owns the land "in trust for the Bakgatla-Ba-Kgafela community".[228] This trust-tenure is a relic from the legislative framework for black landownership set up by the DTLA.

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[221] This amount of land was increased over time with the establishment of the homelands. However, the amount of land remained inadequate for the needs of South Africa's population, and "black areas" remained underdeveloped, with very few economic opportunities. Kloppers & Pienaar (2014) *PER/PELJ* 683; K Henrard "The Internally Displaced in South Africa: The Strategy of Forced Removals and Apartheid" (1996) 32 *Jura Falconis* 491 495.

[222] Kloppers & Pienaar (2014) *PER/PELJ* 683.

[223] Kloppers & Pienaar (2014) *PER/PELJ* 682.

[224] Kloppers & Pienaar (2014) *PER/PELJ* 682-683.

[225] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 95.

[226] IPILRA, s 1(1)(iii)(*a*)(ii)(*aa*): "In this Act, unless the context indicates otherwise… "informal right to land" means… the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936)".

[227] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 6.

[228] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 6.

3.3 The Expropriation Act

The Expropriation Act of 1975 sets out the administrative procedures for expropriations as well as the requirements for a valid expropriation.[229] Pre-constitutional legislation (including apartheid legislation) remains in force to the extent that it does not conflict with the provisions of the Constitution. As of yet, the Expropriation Act of 1975 has not been repealed, and will remain in force until a new expropriation bill is successfully passed. It is rather odd to have apartheid legislation, with all its pre-constitutional interpretive case law, in operation today.[230] The requirements of a valid expropriation according to the 1975 Act remain South African law, albeit subject to the Constitution.[231] The 1975 Act prescribes the method for calculating compensation and the procedure to be followed for all expropriations,[232] although the authority for expropriation can validly come from several other statutes, such as the MPRDA.

3.3.1 Pre-Constitutional Use of the Expropriation Act of 1975

The previous chapter discussed the discriminatory ways in which expropriation was used prior to the promulgation of the 1975 Expropriation Act. This trend continued under the 1975 Act. Under the pre-constitutional Expropriation Act of 1975, a situation arose in which ownership was strongly protected against almost any interference.[233] The elevated status of ownership is reflected in the 1975 Act's prescribed compensation calculation.[234] The 1975 Act and its predecessor[235] both place market value at the heart of compensation calculations, and use the "willing buyer, willing seller" principle to arrive at the market value.[236] Through the

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[229] WJ du Plessis *Compensation for Expropriation under the Constitution* LLD dissertation Stellenbosch University (2009) 29.

[230] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 3.

[231] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 3.

[232] Expropriation Act, s 26(1) states that where an instance of expropriation is authorised by another statute, "compensation owing in respect thereof shall *mutatis mutandis* be calculated, determined and paid in accordance with the provisions of this act".

[233] Du Plessis *Compensation for Expropriation* 9 & 30.

[234] Du Plessis *Compensation for Expropriation* 9.

[235] Expropriation Act 55 of 1965.

[236] Du Plessis *Compensation for Expropriation* 30.

The willing buyer, willing seller principle in the expropriation context is that the market value of expropriated property is to be calculated with reference to what a willing buyer would pay for that property to a willing seller. Du Plessis *Compensation for Expropriation* 10. See further footnote 234 on page 48, which lays out various principles developed in case law regarding how to estimate what a willing buyer would pay to a willing seller in expropriation cases.

incorporation of the market value requirement, the 1975 Act seeks to indemnify expropriated owners fully.[237]

The Expropriation Act's emphasis on fully compensating the expropriated owner through paying the market value of property gave landowners protection. The pre-constitutional legal culture, within a parliamentary sovereignty framework, also contributed to the protections afforded to owners.[238] When the Act was interpreted in the courts, it was done through the lens of the formalist legal culture that existed in pre-Constitutional South Africa. Formalism attaches weight to the literal meaning of the words in statutes.[239] This allowed the courts to interpret the law in favour of the expropriated owner's interests. Moreover, one of the pre-constitutional presumptions of statutory interpretation was that the legislature did not intend to take away rights without paying compensation.[240] This further added to the protection of white landowners.[241]

The elevated status that the right of ownership was traditionally afforded in South Africa is a hallmark of its Roman-Dutch heritage.[242] Not all forms of ownership were granted equal protections. Customary ownership and black claims to land and minerals were routinely denied or undervalued.[243] However, once ownership of land and mineral claims were concentrated in white hands, rights of ownership were afforded a high level of protection.[244] Both the 1965 and

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This is not to be confused with the "willing buyer, willing seller" principle in the context of land reform. In the context of land reform, "willing buyer, willing seller" refers to the policy adopted in relation to land redistribution as set out in the 1997 *White Paper on South African Land Policy.* Due to the expected expense of expropriation as a method for land redistribution, the government endeavoured instead to facilitate purchases of land between willing buyers and willing sellers. This arrangement, in which Government was generally neither buyer nor seller, is the meaning of "willing buyer, willing seller", in the context of land reform. Department of Land Affairs *White Paper on South African Land Policy* (1997) DLA, Pretoria 38. See generally E Lahiff "'Willing Buyer, Willing Seller': South Africa's Failed Experiment in Market-Led Agrarian Reform" (2007) 28 *Third World Quarterly* 1577.

[237] Du Plessis *Compensation for Expropriation* 9.

[238] Du Plessis *Compensation for Expropriation* 9.

[239] Du Plessis *Compensation for Expropriation* 9.

[240] Du Plessis *Compensation for Expropriation* 9.

[241] Du Plessis *Compensation for Expropriation* 9.

[242] Du Plessis *Compensation for Expropriation* 9.

[243] Du Plessis *Compensation for Expropriation* 9-10. See sections 3.2 above, and Chapter 2, section 2.2.

[244] Du Plessis *Compensation for Expropriation* 9-10. See also sections 3.3 and 3.4 below.

1975 Expropriation Acts sought to compensate expropriated owners fully, and did this by paying the full market value of the expropriated property.[245]

While white landowners were afforded this high degree of protection, the property and ownership rights of black people were not strictly protected.[246] This must be considered in the context of colonial-era indigenous land dispossessions, and apartheid-era unequal patterns of ownership. This protection of ownership meant that the racially unequal distribution of ownership and wealth became ever more entrenched and harder to dismantle.[247] Today, *Maledu*/*Baleni*-type communities may be vulnerable to expropriation – the tool which, historically, was used to create a racist system that discriminated against them.

3.3.2 Reconciling the Expropriation Act with the Constitution

That a statute enacted at the height of apartheid must give effect to the Constitution's provisions regarding expropriation causes several problems.[248] To ascertain whether the constitutional framework allows for the expropriation of land from *Maledu*/*Baleni*-type communities for mining, the relationship between the Expropriation Act and the Constitution must be clarified. This relationship is important particularly with regard to the public purpose requirement, discussed in detail in Chapter 6.[249] While the Constitution requires that expropriation be "in the public interest" or "for a public purpose", the Expropriation Act only refers to "public purposes".[250] The following discussion on the relationship between the Expropriation Act and Constitution clarifies how to deal with such disparities.

The advent of the Constitution changed the framework within which expropriations occur.[251] The Constitution is now the supreme law in South Africa, and so the Expropriation Act is valid only to the extent that it is consistent with the Constitution.[252] Indeed, the Constitutional Court

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[245] Du Plessis *Compensation for Expropriation* 9.
[246] Du Plessis *Compensation for Expropriation* 9.
[247] Du Plessis *Compensation for Expropriation* 9-10.
[248] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 3.
[249] See Chapter 6, section 6.3.
[250] See section 25(2)(a) of the Constitution as compared to sections 1 of the 1975 Expropriation Act.
[251] *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 26.
[252] *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 26; Du Plessis *Compensation for Expropriation* 99.

holds that the Constitution, and not subsidiary legislation,[253] provides the values and principles for valid expropriations.[254] The Constitution requires that each instance of expropriation conform to the requirements of section 25 and accord with the Bill of Rights' "spirit, purport and objects".[255]

The Expropriation Act, promulgated and used for social engineering purposes during apartheid, does not contain the transformative ideals and intent of the Constitution.[256] However, an interpretative mechanism exists that allows for more congruence between the Expropriation Act and the Constitution.[257] Where the provisions of pre-Constitutional legislation, such as the Expropriation Act, are capable of a construction that aligns with constitutional objectives, that construction is to be favoured.[258] This process is called "reading down".[259] Courts are empowered "read down" in this way by section 39(2) of the Constitution, which requires a court to "promote the spirit, purport and objects of the Bill of Rights" when interpreting legislation.[260]

Mechanisms to ensure constitutional congruence also exist for instances where legislation is incapable of a construction that aligns with constitutional ideals and objectives.[261] In such a case, section 172 of the Constitution empowers the courts to "make any order that is just and equitable".[262] Offending provisions can be severed from the legislation if doing so would bring

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[253] Like the MPRDA, as provided for in section 55. Expropriations authorised by the MPRDA are subject to sections 6, 7 and 8 of the Expropriation Act (MPRDA, s 55(2)(a)).

[254] *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 26.

[255] This requirement arises from section 39(2) of the Constitution. *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 26.

[256] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 4.

[257] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 4.

[258] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* CCT10/99 1999 ZACC 17 para 23; Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 4.

[259] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 4.

[260] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* CCT10/99 1999 ZACC 17 para 24.

[261] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* CCT10/99 1999 ZACC 17 paras 24-25.

[262] Constitution, s 172(1)(b). Before section 172(1)(b) can apply, a court must first make a declaration of constitutional invalidity in terms of section 172(1)(a) of the Constitution. *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* CCT10/99 1999 ZACC 17 para 24.

the rest of the statute into conformity with the Constitution.[263] Alternatively, discrepant provisions may not be applied.[264]

Severance and non-application of provisions are available to the court where something included in the legislation renders it contrary to the Constitution.[265] However, circumstances may arise where an omission renders legislation incongruent with the Constitution.[266] In such a case, the court may read words into the offending provision to render it constitutionally compliant.[267]

Though a fresh attempt to revise South Africa's expropriation law is underway, the Expropriation Act has not been repealed remains in force. Until the 1975 Act is successfully replaced, courts may employ these interpretive and remedial measures to bridge the gap between the legislation and the Constitution's objectives.[268]

3.4 The Mineral and Petroleum Resources Development Act

As part of the Constitution's vision to promote dignity, freedom and equality, the MPRDA's objective is to advance sustainable development and equitable access to South Africa's mineral and petroleum resources.[269] In recognition of the South African mining sector's dark history,[270] the objectives of the MPRDA include "substantially and meaningfully [expanding] opportunities for historically disadvantaged persons" in the extractives industry,[271] and to provide for security of tenure with respect to mining operations.[272] The MPRDA also aims to

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[263] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* CCT10/99 1999 ZACC 17 paras 24 & 76.

[264] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 4.

[265] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* CCT10/99 1999 ZACC 17 paras 24-25 & 75-76.

[266] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* CCT10/99 1999 ZACC 17 paras 24-25 & 75-76.

[267] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* CCT10/99 1999 ZACC 17 paras 75-76.

[268] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 4.

[269] See MPRDA, ss 2(h) & (c). T Humby "The *Bengwenyama* Trilogy: Constitutional Rights and the Fight for Prospecting on Community Land" (2012) 15 *PER/PELJ* 166 168.

[270] See section 3.4.1 below.

[271] MPRDA, s 2(d).

[272] MPRDA, s 2(g).

ensure that mining right holders "contribute towards the socio-economic development of the areas in which they are operating".[273] This section first sets out some pertinent aspects of the historical context to which the MPRDA seeks to respond.

The MPRDA does not only seek to address the wrongs of the past. The extractives industry is a major contributor to the national economy and is also one of South Africa's chief employers.[274] Thus, the Act aims to encourage and facilitate economic growth, as well as the growth of the extractives industry more generally.[275] To achieve these objectives, the MPRDA grants the state control over these resources.[276] The Department of Mineral Resources ("DMR"), is responsible for monitoring compliance with the MPRDA.[277] The MPRDA sets out the requirements for applying for a mining or prospecting right.[278] It also regulates the extractives industry generally. Crucially for this research, the MPRDA empowers the Minister of Mineral Resources and Energy ("the Minister") to expropriate property for mining and prospecting purposes.[279] This research considers whether communities like those in the *Maledu* and *Baleni* cases are now more vulnerable to being expropriated of their land rights to allow for mining. Therefore, this section reviews the conditions under which expropriation can take place in terms of the MPRDA.[280]

3.4.1 Responding to Historical Injustices in South Africa's Mining Sector

From the mining sector's earliest days, black South Africans were barred from accumulating benefits from mining as rules were established to keep black diggers from getting licences.[281] Moreover, indigenous communities' and black peoples' claims to minerals and land were

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[273] MPRDA, s 2(i).

[274] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 5.

[275] See, for instance, MPRDA, s 2(e).

[276] MT Tlale "Conflicting Levels of Engagement under the Interim Protection of Informal Land Rights Act and the Minerals and Petroleum Development Act: A Closer Look at the Xolobeni Community Dispute" (2020) 23 *PER/PELJ* 2 3.

[277] Tlale (2020) *PER/PELJ* 12.

[278] MPRDA, ss 16, 22 and 27.

[279] MPRDA, s 55(1).

[280] This is discussed in further detail in Chapter 6.

[281] H Mostert *Mineral Law: Principles and Policies in Perspective* (2012) at 31-33.

routinely disregarded.[282] The exclusion of black people from the mining sector was often justified by spurious assertions of racist stereotypes. For instance, in 1872 a resolution was passed at a digger's meeting in Dutoitspan, Northern Cape, which stated:

> "[I]n the opinion of this meeting it is undesirable that licenses (*sic*) for claims be granted to natives, for the following reasons – first, because it would render the checking of theft of diamonds an impossibility; secondly, because any native allowed to dig for diamonds must also be allowed to sell them, and consequently no check could be placed on native holders of licenses (*sic*) turning diamond brokers for dishonest servants; thirdly, because … it might cause great poverty and destitution amongst those unlucky, while, in all probability, the more fortunate would spend their money in liquor, and frequent crimes and disturbances of would be the result." [283]

This extract illustrates that black exclusion was not merely instrumental. Rather, the economic benefit of black people was inherently undesirable for whites with an interest in South Africa. Indeed, the few digging and claim licences held by black people were ultimately suspended.[284]

The rapid expansion of the mining industry brought with it a sharp increase in the demand for cheap labour.[285] Mining is a notoriously capital- and labour-intensive activity.[286] Thus, individual diggers were soon replaced by larger, incorporated mining ventures with the capital necessary to sink deeper mines.[287] These mining companies were afforded significant investor protection because mining rights could be held separately from the ownership of the land.[288] The crowded mines proved fertile ground for class and race disputes, often caused by competition over two limited resources: the precious minerals themselves, and skilled work.[289]

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[282] See, for instance, the discussion of the Kimberley diamond fields and the Richtersveld community's land restitution claim in Mostert *Mineral Law* (2012) 30-33. These are two documented and judicially recognised instances of the colonial powers' propensity to overlook indigenous land and mineral claims.

[283] As quoted in Mostert *Mineral Law* (2012) 33.

[284] Mostert *Mineral Law* (2012) 33.

[285] JS Harrington, ND McGlashan & EZ Chelkowska "A Century of Migrant Labour in the Gold Mines of South Africa" (2004) 104 *Journal of the South African Institute of Mining and Metallurgy* 65 70.

[286] Mostert *Mineral Law* (2012) 37.

[287] Mostert *Mineral Law* (2012) 33 & 37.

[288] Mostert *Mineral Law* (2012) 37. This division between ownership of land and the right to mine is known as "severance", and still forms part of our law today.

[289] Mostert *Mineral Law* (2012) 33. For a detailed discussion of labour and inequality in South Africa under colonialism and apartheid, see SJ Terreblanche *A History of Inequality in South Africa 1652-2002* (2002).

Over time, well-paid, skilled positions on the mines became reserved for white workers, while unskilled work was performed by black workers for much smaller wages.[290]

The process of severance meant that the ownership of the land, and the mining right over that land, could be held separately.[291] However, clashes between mineral right holders and landowners were inevitable.[292] Despite the elevated status of ownership in South Africa, in the case of mining, the landowner's right to use the land was considered secondary to the mineral right holder's right to exploit mineral deposits.[293] Moreover, the Base Minerals Development Act[294] empowered the state to intercede when a landowner, who held a right to mine or prospect, was not exercising these rights.[295] In this case, the right to mine or prospect could, in the "national interest", be transferred to a third party.[296]

This ranking of interests is pertinent to the vulnerability of customary communities situated on land that is the subject of a mining or prospecting right – surface rights have been treated as inferior to mineral rights for more than a century.[297] Moreover, the state has a long-standing commitment to the exploitation of mineral deposits, regardless of the landowner's wishes.[298] This commitment by the state should be taken into account when considering implications for vulnerable surface dwellers, like the communities in the *Maledu* and *Baleni* cases, today.

3.4.2 Conflict Resolution between Landowners and Mining Rights Holders

Both *Maledu* and *Baleni* involved conflicts between the holders of surface rights over land and the holders of subsurface rights. Section 54 of the MPRDA governs the resolution process to

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[290] Mostert *Mineral Law* (2012) 34.

[291] See *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 7-12 for a discussion on the technicalities of the historical status of landownership versus mineral right-holding. See also Mostert *Mineral Law* (2012) 35.

[292] Mostert *Mineral Law* (2012) 35.

[293] Mostert *Mineral Law* (2012) 35.

[294] Base Minerals Development Act 39 of 1942.

[295] J Dehm *Property Rights from Above and Below: Mining and Distributive Struggles in South Africa* (2019) paper prepared for the Bernard and Audre Rapoport Center for Human Rights and Justice 15.

[296] Dehm *Property Rights* at 15.

[297] Mostert *Mineral Law* (2012) 35.

[298] Mostert *Mineral Law* (2012) 35.

be followed in the event of a conflict between the landowners or lawful occupiers and holders of mining or prospecting rights. The procedures set out in section 54 of the MPRDA are statutory remedies.[299] The statutory dispute resolution process is based on reaching consensus through mediation.[300] This section played an important role in the case before the court in *Maledu*. In *Maledu*, the Constitutional Court held that the dispute resolution process, if triggered, must be exhausted before the alternative judicial relief can be sought.[301] This finding and its implications are dealt with in further detail in Chapter 4.[302] Here, the circumstances under which the section 54 process is triggered are discussed. This section also briefly reviews the dispute resolution process prescribed by this provision.

First, section 54 is applicable where a mining right holder is prevented from mining by the landowner or lawful occupier of the land's refusing access to the land.[303] Second, where the landowner or lawful occupier of the land "places unreasonable demands in return for access to the land", the MPRDA's dispute resolution process will be triggered.[304] Third, if the landowner or lawful occupier "cannot be found in order to apply for access" to the land in question, section 54 will apply.[305]

If any of the first three abovementioned trigger events occur, the mining right holder in such a case must notify the Regional Manager of the dispute.[306] Within 14 days, the Regional Manager must then liaise with the landowner or lawful occupier.[307] The Regional Manager must consider the representations of both sides of the dispute and decide whether the landowner or occupier is suffering, or is likely to suffer, loss because of the mining operations.[308] If such a

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[299] K Louw & C Stevens "Far-Reaching Consequences for Right Holders" (2018) 18 *Without Prejudice* 15 15.

[300] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 92.

[301] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) paras 8 & 90.

[302] Chapter 4, section 4.4.

[303] MPRDA, s 54(1)(a).

[304] MPRDA, s 54(1)(b).

[305] MPRDA, s 54(1)(b).

[306] MPRDA, s 54(1).

[307] MPRDA, ss 54(2)(a)-(d): "The Regional Manager must… (a) call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder [the mining or prospecting right]; (b) inform that owner or occupier of the rights of the holder [of a mining or prospecting right]… 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."

[308] MPRDA, s 54(3).

loss has occurred is likely to occur, the Regional Manager must instruct the parties to negotiate an amount of compensation to be paid to the landowner or occupier in recompense for the loss.[309] If the parties cannot agree on an amount of compensation to be paid, they may proceed with arbitration or approach a court.[310]

Last, the section 54 procedure can also be put in motion by the landowner or lawful occupiers. If the landowner or lawful occupier "has suffered or is likely to suffer any loss or damage as a result of the prospecting or mining operation", they must notify the Regional Manager.[311] The same process described in the previous paragraph will then be followed, albeit subject to various contextual changes.[312]

3.4.3 Expropriation under the MPRDA

Due to the disruptive nature of mining ventures, it is sometimes impossible for subsurface and surface activities to continue simultaneously. In such circumstances, the state may be able to expropriate surface rights to allow mining ventures to go ahead. Both surface and subsurface rights can be expropriated.[313] However, this research focuses on expropriation of surface rights to enable mining. To date, expropriation of surface rights to allow for mining has not been attempted, and so the courts have not yet had an opportunity to pronounce on the legitimacy of this option.[314] Nevertheless, the MPRDA empowers the state to expropriate land in various circumstances.

The MPRDA is a law of general application, and so complies with the constitutional requirement that "[p]roperty may be expropriated only in terms of law of general

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[309] MPRDA, s 54(3).

[310] MPRDA, s 54(4).

[311] MPRDA, s 54(7).

[312] MPRDA, s 54(7).

[313] The argument put forward in *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC), was that the MPRDA in effect expropriated subsurface rights – specifically, "old order" rights to mine. See Chapter 5, section 5.4.1.

[314] Chapter 6 of this research grapples with the issue of whether expropriation of land rights held by communities like those in the *Maledu* and *Baleni* cases is possible under section 25 of the Constitution, which sets out the parameters for legitimate expropriations. Specifically, Chapter 6 focuses on whether expropriation in this context could fulfil the requirement that expropriations be "for a public purpose or in the public interest" as required by section 25(2)(a) of the Constitution.

application".[315] As previously mentioned,[316] though the power to expropriate property for the purposes of mining is granted by various provisions in the MPRDA, the process to be followed in expropriating property is governed by the Expropriation Act.[317] The relevant provisions of the MPRDA that empower the state to expropriate property for this research are sections 54 and 55.[318]

Section 54 of the MPRDA, discussed in the previous section, governs the dispute resolution process in the case of conflicts between landowners or lawful occupiers and subsurface right holders. In terms of section 54(5), where the Regional Manager reaches the conclusion that the parties' continued negotiation would run counter to certain objectives of the MPRDA, they may recommend expropriation of the land in terms of section 55. The objectives of the MPRDA, as mentioned above, are set out in section 2 of the Act. Specifically, the objectives referred to in section 54(5) are to "promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa";[319] "substantially and meaningfully expand opportunities for historically disadvantaged persons" to participate in and benefit from the exploitation of South Africa's mineral and petroleum resources;[320] "promote employment and advance the social and economic welfare of all South Africans";[321] or to "provide for security of tenure in respect of prospecting, exploration, mining and production operations".[322]

Section 55 of the MPRDA empowers the state to expropriate property to allow for mining or prospecting. Like section 54(5), section 55(1) provides for expropriation of property where it is necessary to achieve certain objectives laid out in section 2. The objectives referred to

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[315] Constitution, s 25(2).

[316] See section 3.3 above.

[317] MPRDA, s 55(2)(a). The court in *Baleni* erred in its assertion that expropriation could not occur under the MPRDA. This conclusion was based on an incorrect reading of *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC). See Chapter 5, section 5.4.1.

[318] A third provision also has implications for expropriation under the MPRDA. Item 12 of Schedule II to the MPRDA deals with the payment of compensation for expropriated property. However, as this research focuses on communities' vulnerability to expropriation for the purposes of mining in the first place, the issue of compensation – a constitutionally mandated consequence of a valid expropriation – is beyond the scope of this research. See Chapters 6 and 7 for further justification on the exclusion of issues of compensation from this research.

[319] MPRDA, s 2(c).

[320] MPRDA, s 2(d).

[321] MPRDA, s 2(f).

[322] MPRDA, s 2(g).

sections 54(5) and 55(1) do not entirely overlap, as section 55 at first glance seems to be broader.[323] Some of the relevant objectives for the purposes of section 55 are laid out in the previous paragraph's discussion on section 54. The objectives that section 55 refers to additionally is to "promote economic growth and mineral and petroleum resources development in [South Africa], particularly development of downstream industries…",[324] and to "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".[325] Section 24 is the constitutional environmental protection clause, which grants everyone the right to a healthy environment,[326] and aims to protect and conserve the environment for future generations.[327]

3.5 Conclusion

In *Maledu* and *Baleni*, customary communities' rights in land came into conflict with those of mining companies seeking to mine the land. As such, both cases involved the co-applicability of IPILRA and the MPRDA. The IPILRA protects informal rights in land, while the MPRDA regulates mineral exploitation.[328] The way in which these pieces of legislation interact means that, in similar circumstances, the *Maledu* and *Baleni* judgments also have implications for expropriation.[329]

The IPILRA is a direct response to the racially oppressive land laws of South Africa's colonial and apartheid history.[330] The IPILRA requires a person's consent for them to be deprived of their informal rights in land.[331] Therefore, the court in *Baleni* held that to grant a mining right

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[323] While section 54(5) of the MPRDA refers to objectives laid out "in section 2 (c), (d), (f) or (g)", section 55(1) refers to the objectives "in section 2 (d), (e), (f), (g) and (h)".

[324] MPRDA, s 2(e).

[325] MPRDA, s 2(h).

[326] Constitution, s 24(a).

[327] Constitution, s 24(b).

[328] PJ Badenhorst & CN van Heerden "Conflict Resolution between Holders of Prospecting or Mining Rights and Owners (or Occupiers) of Land or Traditional Communities: What is Not Good for the Goose is Good for the Gander" (2019) 136 *SALJ* 303 312-315.

[329] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 43 & 76; Badenhorst & Van Heerden (2019) *SALJ* 312-315; *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) paras 67, 71 & 98.

[330] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 50.

[331] IPILRA, s 2(1).

validly in terms of the MPRDA, the community's consent is required in terms of the IPILRA.[332] However, the IPILRA's consent provision is subject to the Expropriation Act or any other statute that authorises expropriation.[333] Historically, the state used its power to expropriate land to set up a system in which black people could own land only in very limited circumstances and in specific areas.[334]

Mining is potentially very lucrative, but it can deprive occupants of the land being mined of their homes and means of earning a living.[335] The court in *Maledu* noted the tension that this can cause.[336] The history of mineral resource exploitation ought to serve as a caution – the exploitation of South Africa's mineral resources has historically been closely associated with the exploitation of black South Africans.[337]

[332] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 40.
[333] IPILRA, s 2(1).
[334] See section 3.2.2 above.
[335] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 5.
[336] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 5.
[337] See section 3.4.1 above.

CHAPTER FOUR: MALEDU v ITERELENG BAKGATLA MINERAL RESOURCES: INVITING EXPROPRIATION?

4.1 Introduction

Disputes between mining right-holders and communities who occupy the mining land are common.[338] Balancing customary communities' land rights with those of mining or prospecting right-holders lay at the core of two landmark cases from 2018.[339] In both cases, the courts emphasised the rights of customary communities in such disputes.[340] The objective of this research is to assess whether these two cases, in their attempt to empower communities and their rights in land, have rendered them more vulnerable to expropriation. Keeping this objective in mind, this chapter discusses *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* ("*Maledu*")[341] in greater detail.

The question in *Maledu* was whether granting a mining right over customary land constituted a deprivation of informal rights to land.[342] The *Maledu* judgment has practical implications for holders of mineral rights, and for landowners and lawful occupiers of land.[343] In this case, the Constitutional Court held that a holder of a mining right had to exhaust the processes set out in section 54 of the Mineral and Petroleum Resources Development Act ("MPRDA")[344] before they could have recourse to other remedies. Should all else fail, section 54 makes expropriation in terms of section 55 available as an avenue to resolve a dispute.[345]

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[338] JM Pienaar, W du Plessis & E Johnson "Land Matters and Rural Development: 2018" (2019) 34 *South African Public Law* 1 1.

[339] Pienaar, Du Plessis & Johnson (2019) *South African Public Law* 1.

[340] Pienaar, Du Plessis & Johnson (2019) *South African Public Law* 1; PJ Badenhorst & CN van Heerden "Conflict Resolution between Holders of Prospecting or Mining Rights and Owners (or Occupiers) of Land or Traditional Communities: What is Not Good for the Goose is Good for the Gander" (2019) 136 *SALJ* 303 305.

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

[342] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) paras 67, 71 & 98.

[343] Badenhorst & Van Heerden (2019) *SALJ* 303-312; Pienaar, Du Plessis & Johnson (2019) *South African Public Law* 8-10; K Louw & C Stevens "Far-reaching consequences for right holders" (2018) 18 *Without Prejudice* 15 15. These implications are discussed in section 4.4 below.

[344] Act 28 of 2002.

[345] Section 55 of the MPRDA is discussed in Chapter 3, section 3.4.3 and section 4.4 below.

4.2 Facts

In 2014, Itereleng Bakgatla Mineral Resources (Pty) Ltd ("IBMR") – alongside Pilanesberg Platinum Mines (PTY) Ltd ("PPM") – commenced preparations to mine on a farm in North West.[346] The Lesetlheng Community has occupied this farm for generations.[347] The community's peaceful residency on the farm would be disturbed by mining operations.[348] Representatives of the Lesetlheng Community, therefore, applied for a spoliation order against IBMR and PPM to stop the further proposed mining activities on the farm.[349] The Lesetlheng Community successfully obtained this spoliation order from the High Court.[350]

In response, IBMR and PPM sought and were granted an order from the High Court to evict members of the Lesetlheng Community from the farm.[351] Additionally, the High Court granted an interdict, which prevented members of the community from interfering with IBMR and PPM's mining operations.[352] The interdict also prohibited the community from remaining on the farm, entering it, and continuing farming activities on it.[353] These orders from the High Court – comprising the eviction order and interdict – formed the basis for the eventual appeal to the Constitutional Court.

The community sought leave to appeal the High Court's interdict and eviction order against them. They sought this on several grounds including that section 54 of the the MPRDA had not been complied with.[354] Both the High Court and the SCA dismissed the community's

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[346] The facts underlying *Maledu* stretch back to 2003, when Itereleng Bakgatla Mineral Resources ("IBMR") was registered by the Traditional Council of the Bakgatla-Ba-Kgafela Community ("the Bakgatla Community") to obtain a prospecting right for a farm in the province of North West. A year later, a prospecting right was awarded to IBMR in terms of the MPRDA, and in 2008 IBMR gained a mining right for that farm also in terms of the MPRDA. *Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another v Maledu and Others* 2017 495/2015 ZANWHC 117 para 7.

[347] The Lesetlheng Community is a subgroup of the Bakgatla Community. *Itireleng Bakgatla Mineral Resources v Maledu* 2017 495/2015 ZANWHC 117 para 11; Pienaar, Du Plessis & Johnson (2019) *South African Public Law* 8.

[348] *Itireleng Bakgatla Mineral Resources v Maledu* 2017 495/2015 ZANWHC 117 paras 11-12; Pienaar, Du Plessis & Johnson (2019) *South African Public Law* 8.

[349] *Itireleng Bakgatla Mineral Resources v Maledu* 2017 495/2015 ZANWHC 117 paras 11-12.

[350] Louw & Stevens (2018) *Without Prejudice* 15.

[351] The respondents in the High Court were 37 members of the Lesetlheng Community and the Lesetlheng Village Community. *Itireleng Bakgatla Mineral Resources v Maledu* 2017 495/2015 ZANWHC 117 para 87.

[352] *Itireleng Bakgatla Mineral Resources v Maledu* 2017 495/2015 ZANWHC 117 para 87.

[353] *Itireleng Bakgatla Mineral Resources v Maledu* 2017 495/2015 ZANWHC 117 para 87.

[354] *Itireleng Bakgatla Mineral Resources v Maledu* 2017 495/2015 ZANWHC 117 paras 7 & 14.

application for leave to appeal.[355] The Lesetlheng Community then approached the Constitutional Court.

4.3 Issues

The Constitutional Court had to decide whether to uphold or set aside the order granted against the Lesetlheng Community by the High Court.[356] Occupiers of land were on one side of the dispute, while holders of mining rights under the MPRDA were on the other.[357] In a unanimous decision penned by Petse AJ, the court identified the tension at the core of the dispute as between the right to engage in economic activity and the right to security of tenure.[358] Though mining contributes significantly to the South African economy, regard must be given to the constitutional imperative to ensure tenure security for those who have been historically disadvantaged.[359]

The High Court had granted an eviction order against the Lesetlheng Community, who opposed the mining venture.[360] The High Court also interdicted the community from remaining on the farm, re-entering it, bringing or keeping their livestock on this land, or erecting any structures thereon.[361] This decision, comprising the interdict and eviction order formed the basis of the appeal lodged with the Constitutional Court, which granted leave to appeal.[362]

The Constitutional Court maintained that the case ought to be decided primarily on section 54 of the MPRDA[363] and section 2 of the the Interim Protection of Informal Land Rights Act ("IPILRA").[364] The principal issue was whether the respondents had section 54 of the MPRDA

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[355] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 25.

[356] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) paras 3-4.

[357] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 4.

[358] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) paras 4-5.

[359] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 5.

[360] Louw & Stevens (2018) *Without Prejudice* 16.

[361] *Itireleng Bakgatla Mineral Resources v Maledu* 2017 495/2015 ZANWHC 117 para 87.

[362] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 32.

[363] Section 54 of the MPRDA sets out mechanisms for dispute settlement between landowner or lawful occupier on the one hand, and holders of mining rights granted in terms of the MPRDA on the other.

[364] Act 31 of 1996. Section 2 of the IPILRA deals with deprivation of informal rights to land. Section 2(1) provides that, subject to subsection (4), "no person may be deprived of any informal right to land without his or her consent". Section 2(2) provides that, subject to subsection (4), "[w]here land is held on a communal basis, a person may... be deprived of such land or right in land in accordance with the custom and usage of that

at their disposal.[365] If the respondents did, the first question was whether they were barred from obtaining an interdict before exhausting the mechanisms contained in section 54.[366]

To determine whether section 54's dispute resolution processes were available to the mining right holders, the Court had to determine whether the community's occupation of the land was lawful.[367] The occupation would be unlawful if the community's informal rights had been terminated in terms of section 2 of the IPILRA.[368] The second, related question before the Court thus was whether the Lesetlheng Community "had consented to being deprived of their informal land rights to or interests in the farm".[369] The Constitutional Court eventually found in favour of the community and accordingly overturned the High Court judgment and eviction order.[370]

4.3.1 Deprivation and Termination of Informal Rights to Land

Section 54 of the MPRDA does not apply where the occupation of land is unlawful.[371] The parties agreed that the applicants had been informal holders of land rights over the farm in terms of IPILRA.[372] However, the respondents argued that, when they were granted the mining right over the farm and/or entered into the surface lease agreement, the applicants' rights were terminated in terms of section 2 of IPILRA.[373] Upon the termination of these informal rights, argued the respondents, the community had become unlawful occupiers of the farm.[374]

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community". Section 2(3) provides that "[w]here 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". Last, section 2(4) provides that, for the purposes of section 2, "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".

[365] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 42.

[366] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 42.

[367] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 93.

[368] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 93.

[369] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 42.

[370] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 111.

[371] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 93.

[372] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 93.

[373] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 93.

[374] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 93.

Therefore, section 54 of the MPRDA did not apply to the situation before the Constitutional Court.[375]

However, the existence of a valid mining right does not *per se* render the applicants' occupation of the land unlawful.[376] This approach is supported by section 54 of the MPRDA itself, which foresees situations in which occupation of land and a mining right over that same land co-exist.[377] In terms of the IPILRA, a holder of an informal land right could consent to award a mining right, but retain the right to occupy the land in question.[378] It would depend on the conditions of the consent granted.[379]

Generally, in terms of section 2 of IPILRA, holders of informal land rights cannot be deprived of their rights without their consent.[380] However, if the land is held on a communal basis, a person may be deprived of rights in the land in accordance with the custom or usage of the relevant community.[381] Even where land is held on a communal basis, affected parties must be given a reasonable opportunity to participate "at any meeting where a decision to dispose of their rights in the land is to be taken".[382] Additionally, the affected parties must be given sufficient notice of such a meeting.[383] A decision to dispose of rights in the land will only be valid if the majority of those present at the meeting with a right or interest in the land supports the decision.[384] Thus, the court concluded that on the facts of this case, there was no valid deprivation of land rights in terms of the IPILRA.[385]

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[375] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 93.
[376] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 103.
[377] Pienaar, Du Plessis & Johnson (2019) *South African Public Law* 10.
[378] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 105.
[379] Pienaar, Du Plessis & Johnson (2019) *South African Public Law* 10.
[380] IPILRA, s 2(1); *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 96.
[381] Except where the land in question is expropriated. IPILRA, s 2(2). *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 96.
[382] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 97.
[383] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 97.
[384] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 97.
[385] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) paras 96-97.

4.3.2 Exhaustion of the MPRDA's Section 54 Mechanisms

Considering the interdict granted by the High Court, the Constitutional Court held it to be well-established law that an interdict may not be granted before all other satisfactory remedies have been exhausted.[386] Section 54 of the MPRDA provides for what the Court termed a "speedy dispute resolution process".[387] Section 54 prescribes the process for resolving disputes between mining right holders, and lawful occupiers and landowners.[388]

Section 54 foresees that, in some circumstances, further negotiation between the disputing parties could be detrimental to the objectives of the MPRDA.[389] In such circumstances, the Regional Manager may recommend to the Minister of Mineral Resources ("the Minister") that the land underlying the dispute be expropriated in terms of section 55 of the MPRDA.[390] Section 55 of the MPRDA empowers the Minister to expropriate land if it is necessary to do so to give effect to the objectives of the MPRDA.[391]

The Constitutional Court held that holders of mining rights are obliged to take all reasonable steps to exhaust mechanisms provided by section 54 of the MPRDA.[392] The purpose of section 54 is to balance the interests of landowners and lawful occupiers on the one hand, and holders of mining rights on the other.[393] Section 54 itself provides for judicial engagement. If the parties cannot come to a negotiated agreement, they may approach a court in terms of the provision.[394] It would be inappropriate to allow a mining right holder to continue with mining operations while a section 54 dispute resolution process is underway.[395] To do so would undermine the balancing purpose of section 54.[396]

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[386] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) paras 8 & 90; Louw & Stevens (2018) *Without Prejudice* 15.
[387] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 92.
[388] See Chapter 3, section 3.4.2.
[389] MPRDA, s 54(5).
[390] MPRDA, s 54(5). This is discussed further in section 4.4 below.
[391] MPRDA, s 55(1). The objectives of the MPRDA are set out in section 2 of the Act.
[392] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 91.
[393] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 92.
[394] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 92.
[395] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 92.
[396] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 92.

To conclude its argument, the Constitutional Court considered section 4(2) of the MPRDA, which states that in the event of inconsistency, the MPRDA prevails over the common law.[397] The court held that this provision meant that, because section 54 of the MPRDA provided for a statutory remedy, a mining right holder could not have recourse to common law remedies before the mechanisms within section 54 were exhausted.[398] Thus, the court found in favour of the Lesetlheng Community and overturned the eviction order and judgment of the High Court.[399]

4.4 Impact of the Judgment

The Constitutional Court held that the IPILRA and the MPRDA had to be read such that their underlying purposes were served.[400] The IPILRA aimed to provide security of tenure and protection to those left vulnerable due to past discriminatory laws.[401] Section 54 of the MPRDA provided processes for resolving disputes and protecting mining right holders' interests.[402] These processes had to be exhausted before eviction orders and interdict orders could be sought.[403] Thus, the Constitutional Court overturned the decision of the High Court.[404]

A mining right holder, prevented from mining by a lawful occupier of the mining site, must now exhaust the dispute resolution mechanisms as contained in section 54 of the MPRDA before being entitled to alternative recourse.[405] One of section 54's dispute resolution mechanisms is a recommendation of expropriation of the land authorised by section 55 of the MPRDA.[406] By ensuring that mining right holders exhaust section 54 in disputes, a recommendation of expropriation will now be considered in situations where it may otherwise not have been considered. Moreover, section 54's dispute resolution process is administratively

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[397] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 110.
[398] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 110.
[399] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) paras 110-111.
[400] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 106.
[401] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 105.
[402] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) paras 110 & 92.
[403] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 110.
[404] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 111.
[405] Louw & Stevens (2018) *Without Prejudice* 16.
[406] MPRDA, s 54(5).

onerous, time-consuming, and sometimes costly.[407] The court held that mining activities could not continue while section 54's processes are underway. Therefore, holders of mining rights could potentially be prevented from mining for years while the dispute resolution process runs its course.[408]

4.4.1 Overlooking Recommendation of Expropriation in Section 54 of the MPRDA

Although the Constitutional Court Case dealt with an eviction order, the impact of this judgment applies to interdicts as well. The Constitutional Court rejected the submission that section 54 dealt only with issues of compensation, and thus that the dispute resolution process prescribed by this section could run parallel to access for mining.[409] The Court did not, however, provide any justification for why it rejected this assertion.[410] This means that the holder of a mining right may, in certain circumstances, not have access to land for mining purposes and cannot gain such access until the processes in section 54 are exhausted. One mechanism provided for in section 54 is expropriation.[411]

Another potentially problematic aspect of the *Maledu* judgment is that the Court did not consider section 54(6) of the MPRDA. Section 54(6) of the MPRDA provides that if the Regional Manager is satisfied the mining right holder is at fault in the dispute, the Manager may prohibit the holder from continuing with mining operations while negotiations are underway. The provision requires this prohibition against continued mining to be in writing.[412] Section 54, therefore, provides a mechanism to prohibit continued mining operations before the completion of the dispute resolution process. This prohibitive mechanism has requirements that must be met – the mining right holder must be considered to be at fault and the prohibition must be in writing. It is unclear why section 54(6)'s prohibitive mechanism exists if, as the Constitutional Court argues, mining operations should not be allowed to continue while the

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[407] Badenhorst & Van Heerden (2019) *SALJ* 325-326.
[408] Badenhorst & Van Heerden (2019) *SALJ* 325-326.
[409] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 86.
[410] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 86; Louw & Stevens (2018) *Without Prejudice* 16.
[411] MPRDA, s 54(5).
[412] MPRDA, s 54(6).

negotiations envisaged by section 54 continue.[413] It is even less clear why this prohibitive mechanism has certain requirements if mining operations may not run parallel to the section 54 process in the first place.

The intention of the Court was to ensure that holders of mining rights could not bypass the protections given to informal right holders by the MPRDA in disputes.[414] However, one of the avenues for dispute resolution in terms of section 54 is a recommendation of expropriation of land in terms of section 55 of the MPRDA.[415] Under the MPRDA, the Regional Manager is the Director General's delegate, mandated with administering and implementing the MPRDA.[416] The Court concluded that circumventing section 54's provisions undermined the Regional Manager's supervisory role and powers.[417]

In terms of section 54, if the Regional Manager concludes that further negotiations are detrimental to the purposes of the MPRDA, they may recommend to the Minister that the land in question be expropriated in terms of section 55 of the MPRDA.[418] The Court recognised that a recommendation of expropriation in terms of section 55 of the MPRDA is one of the options to be considered in terms of section 54.[419] However, the Court did not engage with this possibility, other than making only a passing reference to it. This research suggests that the Court was mistaken in not considering the matter of vulnerability to expropriation further.

Section 54 of the MPRDA refers to situations in which further negotiations would be detrimental to the objects of the Act. [420] Expensive delays could well be construed as such. As is shown in the following subsection, section 54's processes are neither necessarily speedy nor cheap.[421] Moreover, the Court has held that mining operations cannot continue while a section 54 process is underway.[422] This prohibition on mining ensures that delays will indeed be

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[413] Louw & Stevens (2018) *Without Prejudice* 16.
[414] See *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 109.
[415] See Chapter 3, sections 3.4.2 and 3.4.3.
[416] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 109.
[417] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 109.
[418] MPRDA, s 54(5).
[419] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 92.
[420] MPRDA, s 54(5).
[421] See section 4.4.2 below.
[422] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 92.

expensive.[423] Where further negotiations would be detrimental to the purposes of the MPRDA, section 54 empowers the Regional Manager to recommend expropriation in terms of section 55.[424] The recommendation of expropriation is inherent to section 54. By requiring mining right holders to exhaust section 54 before approaching a court for alternative relief,[425] the Court may have ensured that expropriation will be considered where expropriation would otherwise not have been considered.

As laid out in Chapter 3,[426] both sections 55 and 54 provide that expropriation of land for the purposes of mining can only occur if certain objectives listed in section 2 of the MPRDA are implicated. Though more objectives are contemplated in section 55 than in section 54, expropriation of land may in practice be more easily justified under the section 54.[427] Dale et al[428] draw attention to the use of the word "and" in section 55's list of objectives.[429] They argue that this indicates that all of the listed objectives must be implicated cumulatively in order to justify an expropriation under section 55.[430] This cumulative wording yields a rather narrow set of circumstances under which communities like the Lesetlheng could be expropriated of their land. The situation is quite different with regards to section 54.

Dale et al point out that section 54 of the MPRDA uses the word "or" when listing the objectives which may justify expropriation.[431] This use of "or" rather than "and", they argue, means that a recommendation of expropriation under section 54 of the MPRDA could be justified by the consideration of just one of the listed objectives.[432] The objectives listed in section 54(5) of the MPRDA which could justify expropriation are broadly worded. They

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[423] This is dealt with in more detail in section 4.4.2 below.

[424] In terms of section 54 of the MPRDA.

[425] Such as an interdict or eviction order against the owners or lawful occupiers of the land over which a mining right has been granted.

[426] See Chapter 3, section 3.4.3.

[427] Section 54 of the MPRDA refers only to expropriation of land, whereas section 55(1) refers to expropriation of land "or any rights therein". See MO Dale et al *South African Mineral and Petroleum Law* (OS 29 2020) 475.

[428] Dale et al *SA Mineral and Petroleum Law* 478.

[429] MPRDA, s 55(1): "If it is necessary for the achievement of the objects referred to in section 2 (d), (e), (f), (g) *and* (h) the Minister may… expropriate any land or any right therein…". Emphasis added.

[430] Dale et al *SA Mineral and Petroleum Law* 478.

[431] MPRDA, s 54(5): "If the Regional Manager… 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".

[432] Dale et al *SA Mineral and Petroleum Law* 478.

include "substantially and meaningfully [expanding] opportunities for historically disadvantaged persons" to participate in and benefit from the exploitation of mineral and petroleum resources,[433] and "[promoting] employment and [advancing] the social and economic welfare of all South Africans".[434] Either of these objectives could theoretically justify an expropriation of land for the purposes of mining. This is especially the case when the landowning community is itself divided on the issue of whether to allow mining to proceed, as was the case in the *Maledu* dispute – a fact not remarked upon by the court.[435]

4.4.2 Section 54: "Speedy" Dispute Resolution?

The mining right holders in this dispute, IBMR and PPM, argued that requiring the provisions of section 54 to be exhausted before being entitled to obtain an interdict constituted an unjustifiable prevention of their right to mine.[436] In response, Petse AJ held that this line of reasoning overlooked the fact that section 54 of the MPRDA provided for a "speedy dispute resolution process".[437] Therefore, preventing mining right holders from mining before the completion of the section 54 process would not be an unjustifiable prevention.[438]

However, the section 54 process is more onerous and lengthier than the Constitutional Court suggests here.[439] Section 54(3) requires the parties to negotiate compensation if the landowner or occupier has suffered or is likely to suffer loss. Section 54(4) provides that if the parties cannot come to an agreement, the dispute is to be decided by arbitration or by a competent court. Outcomes are usually reached faster in arbitration proceedings than in court proceedings.

The MPRDA provides no guidance on who – Regional Manager, mining right holder, or landowner or occupier – may elect whether to proceed with arbitration or court proceedings.[440]

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[433] MPRDA, s 2(d).

[434] MPRDA, s 2(f).

[435] The Lesetlheng Community opposed the mining ventures on their land. However, the Lesetlheng is a sub-division of the broader Bakgatla-Ba-Kgafela Community, and many members of this broader community supported the proposed mining. See *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 12.

[436] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 92.

[437] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 92.

[438] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 92.

[439] Badenhorst & Van Heerden (2019) *SALJ* 325-326; Louw & Stevens (2018) *Without Prejudice* 16.

[440] Louw & Stevens (2018) *Without Prejudice* 16.

Without statutory guidance on the power to elect arbitration or court proceedings, the parties must agree to arbitration.[441] However, if the parties to the dispute cannot agree to arbitration, the matter will have to be referred to the courts.[442] Unless the matter is referred to the courts on an urgent basis, the dispute will then be subject to the same lengthy delays and obstacles facing all South African civil litigants.[443]

Some have argued that the effect of the *Maledu* judgment is to make access to the courts subject to "a suspensive condition that the [section] 54 process first be exhausted".[444] This may be too extreme an interpretation, given that section 54(4) of the MPRDA provides that if the parties cannot reach an agreement, they may approach a court. However, the fact remains that if the administrative process in terms of section 54 is delayed or halted, mining right holders now cannot approach the court for an interdict, eviction order, or claim damages until the delay is resolved.[445] This means that mining right holders could potentially be kept from exercising their mining rights for years.[446]

In the wake of this decision communities like the Lesetlheng are more vulnerable to having their rights to land expropriated for mining purposes. This is especially concerning, as the community may be left worse off in the long run if their land is expropriated for mining. This is because the community can then, at most, only gain a once-off benefit from the mining activities. Therefore, this judgment has potentially detrimental implications for communities.[447]

4.5 Conclusion

Maledu has been praised for their enforcement of the constitutional obligation to ensure protection for communities whose tenure of land is insecure due to past racially discriminatory

[441] Louw & Stevens (2018) *Without Prejudice* 16.
[442] Louw & Stevens (2018) *Without Prejudice* 16.
[443] Badenhorst & Van Heerden (2019) *SALJ* 325-326.
[444] Badenhorst & Van Heerden (2019) *SALJ* 326.
[445] Badenhorst & Van Heerden (2019) *SALJ* 326.
[446] Badenhorst & Van Heerden (2019) *SALJ* 326.
[447] Louw & Stevens (2018) *Without Prejudice* 16.

laws and practices.[448] However, this research suggests that this judgment increases the vulnerability of communities' informal rights to being expropriated for mining purposes.

One of the effects of *Maledu* is that mining right holders may face significant delays and expenses in respect of the enforcement of their rights.[449] Section 54 must be exhausted before they can have access to the land for mining in the event of a dispute. Expensive delays could be construed as a situation in which further negotiations would be detrimental to the objects of the Act.[450] In this case, expropriation could be recommended.[451]

In fact, because the *Maledu* judgment requires section 54 of the MPRDA to be exhausted before alternative relief can be sought, it ensures that expropriation will be considered. Section 54(5) of the MPRDA empowers the Regional Manager to recommend expropriation in terms of section 55 if negotiations have failed. This increases the vulnerability of communities like the Lesetlheng Community, who may be left worse off in the long run due to such expropriation.

[448] Badenhorst & Van Heerden (2019) *SALJ* 304-305; Louw & Stevens (2018) *Without Prejudice* 16.
[449] Louw & Stevens (2018) *Without Prejudice* 16.
[450] Per section 54(5) of the MPRDA.
[451] MPRDA, s 54(5).

CHAPTER FIVE: *BALENI v MINISTER OF MINERAL RESOURCES*: OVERLOOKING THE THREAT OF EXPROPRIATION

5.1 Introduction

In *Baleni v Minister of Mineral Resources* ("*Baleni*"),[452] the court reinforced customary communities' land rights in terms of the Interim Protection of Informal Rights Land Act ("IPILRA"),[453] aiming to bolster them in comparison with the rights of mining right holders.[454] However, this decision may have unintended consequences for communities – it may conversely render them more vulnerable to expropriation. This chapter considers the *Baleni* decision, and will demonstrate the ways in which this case overlooked the option of expropriation of land for mining purposes.

In *Baleni*, the court had to decide whether consultation, as prescribed by the Mineral and Petroleum Resources Development Act ("MPRDA"),[455] would be sufficient for granting mining rights over land in terms of customary law.[456] The court held that consent, as referred to in section 2 of the IPILRA,[457] of the community is required for granting mining rights over such land.[458] However, if consent cannot be obtained, the Minister could expropriate the community's informal rights in terms of section 55 of the MPRDA.

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

[453] Act 31 of 1996.

[454] J Dugard "Unpacking Section 25: What, If Any, are the Legal Barriers to Transformative Land Reform?" (2019) 9 *Constitutional Court Review* 135 153.

[455] Act 28 of 2002. In terms of section 10 of the MPRDA, the Regional Manager must consult with interested and affected parties within 14 days of a mining right application being lodged.

Per section 22 of the MPRDA, if an application for a mining right has been successfully lodged, the applicant for the mining right must "notify and consult with interested and affected parties within 180 days".

[456] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 43; PJ Badenhorst & CN van Heerden "Conflict Resolution between Holders of Prospecting or Mining Rights and Owners (or Occupiers) of Land or Traditional Communities: What is Not Good for the Goose is Good for the Gander" (2019) 136 *SALJ* 303 312.

[457] Section 2 of the IPILRA deals with deprivation of informal rights in land.

[458] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 76; Badenhorst & Van Heerden (2019) *SALJ* 315.

5.2 Facts

The Umgungundlovu Community has lived on a piece of land on the Wild Coast for nearly 200 years.[459] The community holds informal rights to this land in terms of IPILRA.[460] Transworld Energy and Mineral Resources (SA) Pty Ltd ("TEM") applied for a mining right to extract titanium and other heavy minerals.[461] TEM proposed to conduct open-cast mining operations.[462]

The majority of the community lives on or near the site of the proposed mining operations and opposed the operations' proceeding.[463] Certain members of the community would benefit from the proposed mining operations, whilst others would be left destitute.[464] Due to political and social upheaval in the community in the wake of the mining right application, a moratorium was placed on TEM's application.[465] Members of the community opposing the proposed mining operations approached the High Court seeking declaratory relief stating that their consent was required for a mining right to be granted over their land.[466]

5.3 Issues

This case also involved the co-applicability of the IPILRA and MPRDA and concerned a dispute between a mining company and a community.[467] The High Court in this case had to decide whether, in the customary law setting, consultation with a community in terms of the MPRDA would suffice for validly granting a mining right.[468] The community argued that their consent, as required by section 2 of the IPILRA, was required for a mining right to be granted to TEM and that they had not consented to mining operations on their land.[469] TEM maintained

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[459] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 2 & 9.

[460] The community occupies the land in terms of their customary law and custom, secured by the IPILRA. *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 3.

[461] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 4.

[462] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 5.

[463] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 2, 3, 4 & 11.

[464] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 20-23.

[465] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 6.

[466] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 28-29.

[467] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 39.

[468] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 31-32.

[469] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 24 & 39.

that the MPRDA superseded the IPILRA and that in terms of the MPRDA, no owner of land could refuse consent to mining.[470] Consultation in terms of the MPRDA was all that was required before granting a mining right.[471] The community rejected this argument on the basis that it failed to distinguish between customary communities, who are particularly vulnerable, and common law owners.[472] They held further that consent had to be free, prior, and informed.[473]

The court had to decide whether section 2(1) of the IPILRA, which requires consent for deprivation of rights, was applicable.[474] To decide this, the court had to consider whether the granting of a mining right in terms of the MPRDA constituted a deprivation of the community's informal rights to land.[475] The court held that granting a mining right did constitute a deprivation of informal rights to land as contemplated in section 2(1) of the IPILRA.[476] Therefore, consultation per the MPRDA would not be sufficient to grant a valid mining right.[477] Instead, consent in terms of the IPILRA had to be obtained from the community.[478]

The court made two declaratory orders. First, that the Minister of Mineral Resources ("the Minister") could not lawfully grant a mining right in terms of the MPRDA to TEM without complying with the IPILRA.[479] Second, in terms of the IPILRA, before granting a mining right under the MPRDA, the Minister had an obligation "to obtain the full and informed consent" of holders of rights in land.[480]

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[470] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 26.

[471] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 26.

[472] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 27.

[473] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 27.

[474] As discussed, section 2(1) of the IPILRA requires the community's consent if they are to be deprived of their informal rights.

[475] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 57-63.

[476] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 63 & 83.

[477] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 63.

[478] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 83.

[479] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 84.

[480] The order is given at *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 84. However, under the MPRDA, neither the Minister of Mineral Resources nor the Department of Mineral Resources is a party to consultation proceedings. It is unclear whether the court takes this fact into account. MPRDA, s 27(5)(b); MT Tlale "Conflicting Levels of Engagement under the Interim Protection of Informal Land Rights Act and the Minerals and Petroleum Development Act: A Closer Look at the Xolobeni Community Dispute" (2020) 23 *PER/PELJ* 2 12.

5.3.1 Common and Customary Law Landowners: Consent or Consultation?

In *Baleni*, the court held that occupiers of land with informal rights in terms of the IPILRA are treated differently from common-law owners in granting mining rights under the MPRDA.[481] While common law landowners need only be notified and consulted regarding an application for a mining right, holders of customary rights must consent to the granting of a mining right over their land.[482] As is shown below, the application process for a mining right in terms of the MPRDA is more onerous than this implies.[483] The court's approach is termed "the consent approach" in this research. This refers to the court's approach to the mining right application process, in which common law and customary owners are to be treated differently in that customary communities must consent to the mining operations and not merely be consulted.

The court's conclusion that the required level of engagement for granting valid mining rights over customary land is consent, seems to have been based on several premises. First, in considering the seemingly conflicting levels of engagement required under the IPILRA and the MPRDA, the court emphasized the need to interpret the provisions in the "broader social and historical context" within which they operate.[484] The historical suffering from black South Africans, and particularly the suffering of people who now hold land in terms of the IPILRA, was considered part of why the consent requirement under the IPILRA ought to prevail in this case.[485] Chapters 2 and 3 of this research demonstrated the overwhelming historical injustices suffered by customary communities resulting in widespread insecurity of tenure.

Second, the court held that while the MPRDA prevails over the common law, it "does not purport to regulate customary law at all".[486] This assertion was founded on section 4(2) of the MPRDA, which states that if the MPRDA and common law conflict, the MPRDA prevails. There is no similar provision in the MPRDA relating to conflicts between customary law and

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[481] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 74.
[482] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 76.
[483] See sections 5.4.2 and 5.4.4 below.
[484] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 34-35.
[485] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 33-40, 50-51, 66 & 75.
[486] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 74.

the MPRDA.[487] Thus, the court held that the IPILRA, and not the MPRDA, prescribed the requisite level of engagement (consent) for the granting of a valid mining right over customary land.[488]

Third, the court relied on section 23(2A) of the MPRDA to support the consent approach when dealing with granting mining rights over land held under customary law.[489] Section 23(2A) of the MPRDA allows the Minister of Mineral Resources to attach conditions to a mining right that foster the rights and interests of communities affected by mining. Such a condition could include community participation.[490] The court found that section 23(2A) of the MPRDA therefore "speaks to the greater interests of the community by seeking to ensure that they are fully protected".[491] The court argued that this provided support for the consent approach.[492]

Fourth, the court considered section 10 of the MPRDA to support the consent approach.[493] Under the MPRDA, both common law landowners and customary law occupiers constitute "interested and affected persons".[494] When an application for a mining or prospecting right is accepted by the Regional Manager, they must notify and consult with "interested and affected persons".[495] The Regional Manager must also call upon "interested and affected persons" to submit comments regarding the application.[496] Thus, in terms of the MPRDA, both owners (common law) and lawful occupiers (customary law), must be consulted.[497] However, in the case of customary law occupiers of the land, the IPILRA is also applicable and must be read together with the MPRDA.[498]

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[487] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 74.
[488] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 74.
[489] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 67 & 74.
[490] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 67.
[491] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 74.
[492] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 74.
[493] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 74.
[494] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 74.
[495] MPRDA, ss 16(4)(b) (prospecting right), 22(4)(b) (mining right) & 27(5)(b) (mining permit).
[496] MPRDA, ss 10(1)(b), 16(4)(b) & 22(4)(b).
[497] As both common law landowners and customary law owners are "interested and affected parties" as referred to in section 22(4)(b) of the MPRDA.
[498] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 40.

Fifth, the court considered international law principles of free and informed consent as they relate to the recognition of indigenous rights.[499] The court held that the consent approach afforded "special protection" to indigenous communities in line with international law.[500] Thus, the court concluded that consent was the required level of engagement for customary communities to grant a valid mining right.[501]

5.3.2 Deprivation of Informal Rights to Land

The court found that granting a mining right in terms of the MPRDA constituted a deprivation of informal rights per IPILRA and the Constitution.[502] The court applied the deprivation test as set out in *Mkontwana v Nelson Mandela Metropolitan Municipality*,[503] which requires "substantial interference with use and enjoyment of property" for something to amount to a deprivation.[504] Open-cast mining would substantially interfere with the community's dignity, way of life, sources of income, and agricultural activities.[505] Because the granting of a mining right constituted a deprivation of informal rights, the community's consent was required for such a right to be granted.[506]

However, where informal land rights are lost through expropriation, consent is not required. Section 2(1) of the IPILRA is subject to the Expropriation Act,[507] and "any other law that provides for expropriation of land or rights in land".[508] Thus, the communities' consent is not required where their informal rights are lost through expropriation.[509]

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[499] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 78-82.

[500] The court quoted from multiple international instruments, such as the International Covenant on Economic Social and Cultural Rights (General Comment 21) and the General Recommendation No. 23: Indigenous Peoples issued in terms of the Convention on the Elimination of All Forms of Racial Discrimination. *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 78.

[501] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 74 & 84.

[502] Section 2 of IPILRA and section 25 of the Constitution of the Republic of South Africa, 1996. *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 58 & 59.

[503] *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC).

[504] *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 32.

[505] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 59.

[506] IPILRA, s 2(1). *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 47, 61 & 83.

[507] Act 63 of 1975.

[508] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 27.

[509] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 71.

The court disregarded the threat of expropriation of land for mining purposes as empowered by section 55 of the MPRDA. The court held that the reference to "any other law [providing for expropriation]" did not refer to the MPRDA.[510] The court adopted this interpretation because, citing *Agri SA v Minister of Minerals and Energy* ("*Agri SA*"),[511] granting a statutory mining right did not amount to an expropriation, merely a deprivation.[512] The court's conclusion here is born from an apparent misreading of *Agri SA*.[513] The MPRDA does constitute "any other law [providing for expropriation]" in terms of section 2 of IPILRA.[514] This misreading of *Agri SA* does not render the court's decision incorrect, as expropriation did not occur in this case.[515] However, the effect of the *Baleni*-decision, based on a misreading of *Agri SA*, may have implications for expropriation, as will become clear.

5.4 Impact of the *Baleni* Judgment

The court held that the IPILRA prevailed in customary law settings.[516] Based on this assessment, it was decided that customary communities must consent to the granting of a valid mining right.[517] Common law landowners need only be notified and consulted.[518] Though this decision at face value strengthens the rights of communities in disputes against mining right applicants, it also makes it more difficult to obtain mining rights over certain land.[519] If consent cannot be obtained, and if the economic benefits of mining on that land are great enough, it could be tempting to expropriate that land for mining. The result is that this judgment increases the vulnerability of customary communities to having their land expropriated for mining purposes.

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[510] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 63.
[511] *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 51.
[512] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 63.
[513] See section 5.4.1 below.
[514] Badenhorst & Van Heerden (2019) *SALJ* 313.
[515] Badenhorst & Van Heerden (2019) *SALJ* 313.
[516] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 74-75 & 83.
[517] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 83-84.
[518] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 71-74.
[519] Badenhorst & Van Heerden (2019) *SALJ* 314-315.

5.4.1 Misreading of the Agri SA Judgment: Overlooking the Threat of Expropriation

Contrary to the High Court's interpretation, the *Agri SA* decision does not support the conclusion that expropriation cannot occur under the MPRDA at all.[520] *Agri SA* concerned the effect of introducing the MPRDA's legislative framework.[521] The issue was whether the conversion of rights necessitated by the MPRDA constituted an expropriation of unconverted, and subsequently lapsed, rights.[522] The MPRDA requires the conversion of "old order" rights to mine, as granted under previous legislation, to "new order" rights granted in terms of the MPRDA.[523] According to the transitional arrangements stipulated in the MPRDA, holders of "old order" rights had a year within which to convert to unused "new order" rights.[524] If the right holder failed to effect this conversion, their rights to mine would lapse.[525] The question before the court was whether the lapsed rights that had lapsed because of the MPRDA's required conversion amounted to expropriation.[526]

The Court in *Agri SA* held that the lapsing of "old order" rights constituted a deprivation,[527] but did not amount to expropriation.[528] Expropriation requires the deprivation of an expropriatee's right on the one hand and the vesting of a substantially similar beneficial right in the state.[529] Without the vesting of a similar right, the action constitutes a deprivation but does not amount to expropriation.[530] The MPRDA stipulates South Africa's mineral and petroleum resources belong to South Africa's people, but that custodianship of these resources vests in the state.[531] As custodian of mineral and petroleum resources, the state not does acquire

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[520] Badenhorst & Van Heerden (2019) *SALJ* 313-314.
[521] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 2-4; Badenhorst & Van Heerden (2019) *SALJ* 313-314.
[522] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 4.
[523] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 2-3.
[524] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 14.
[525] MPRDA, s 56(d); *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 52-53.
[526] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 53.
[527] As described in section 25(1) of the Constitution.
[528] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 68.
[529] A Gildenhuys & GL Grobler "Expropriation" in WA Joubert & JA Faris (eds) *LAWSA* 10 2 ed (2012) 2.
[530] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 58-59 & 67-69.
[531] MPRDA, "Preamble".

mineral rights under the MPRDA, and so the MPRDA did not effect an expropriation in this case.[532]

Pre-MPRDA, mineral rights holders could freely sell, cede and lease their mineral rights.[533] The MPRDA removes this ability and instead gives the state the sole power to grant mining rights.[534] The Constitutional Court held that this legislative intervention does not mean that expropriation had occurred.[535] The state's power to grant mining rights, and the simultaneous deprivation of "old order" mineral right holders' ability to do the same, do not amount to granting the state ownership.[536] The deprivation occurred in the course of the state acting as a "facilitator or conduit through which broader and equitable access to mineral and petroleum resources can be realised".[537] Thus, if the state seeks to effect transformation, and if it acts as a facilitator in the course of doing so, its actions may not amount to expropriation.[538] If a deprivation does not amount to expropriation, no compensation is required.[539]

The High Court in *Baleni,* therefore, misconstrued the scope of the *Agri SA*'s decision: The MPRDA indeed constitutes "any other law [providing for expropriation]" for the purposes of section 2 of IPILRA.[540] Expropriation can occur in terms of section 55 of the MPRDA, but the transitional arrangements arising from the introduction of the MPRDA did not constitute an expropriation.[541] The effect of this misreading of *Agri SA* results in the court overlooking the very real threat of expropriation for mining purposes.

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[532] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 67-68.
[533] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 66.
[534] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 66-68.
[535] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 68.
[536] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 68.
[537] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 68.
[538] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 66-69.
[539] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 1-2.
[540] Badenhorst & Van Heerden (2019) *SALJ* 313.
[541] Badenhorst & Van Heerden (2019) *SALJ* 313.

5.4.2 Overlooking Impact Assessments in Mining Applications under the MPRDA

Two statutory imperatives accompany mining right applications, the first of which is to ensure that customary land rights are sufficiently respected and protected.[542] This imperative is served by the IPILRA.[543] The second imperative is to assess the impact of a proposed mining venture as set out in the National Environmental Management Act ("NEMA").[544] The court in *Baleni* found that granting a mining right over customary land constituted a deprivation of rights, and thus that the community's consent per IPILRA was required for granting a mining right.[545] In reaching this decision, however, the court considered only the first of these statutory imperatives. The impact assessment processes under NEMA, which take environmental and socio-economic considerations of proposed mining operations into account, are entirely overlooked by the court.[546]

At face value, the MPRDA and the IPILRA require conflicting levels of engagement.[547] Whereas the MPRDA requires consultation with landowners and lawful occupiers, the IPILRA requires consent from lawful occupiers who hold informal land rights.[548] The court held that for common law landowners, only the MPRDA governed the requisite level of engagement (consultation) for the granting of a valid mining right.[549] However, the IPILRA applies to mining applications concerning land held by communities in terms of customary law.[550] In recognition of the historical injustices faced by communities like the Umgungundlovu Community and the concomitant need to protect them, consent per IPILRA is required to validly grant a mining right over their land.[551]

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[542] K Cameron "To Protect or Empower? Another Take on Informal Land Rights and Mining" (2020) *Without Prejudice: Mining Feature* 8 8.

[543] Cameron (2020) *Without Prejudice* 8.

[544] National Environmental Management Act 107 of 1998 ("NEMA").

[545] Section 2(1) of the IPILRA requires consent from the occupier should they be deprived of their rights. *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 47, 61 & 83.

[546] The court in *Baleni* mentions the environmental impact assessments as required by NEMA only in passing in the context of summarising some preliminary, uncontested requirements for granting mining rights. See *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 44.

[547] Tlale (2020) *PER/PELJ* 7.

[548] See section 2 of the IPILRA as compared to section 22 of the MPRDA. Tlale (2020) *PER/PELJ* 7.

[549] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 68 & 73-75.

[550] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 66 & 74.

[551] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 83.

The court arrived at its decision that the community had to consent to mining operations in part because of how disruptive mining would be to the environment and the community's way of life.[552] The court sets out the social, cultural, and economic significance of the land at length.[553] The community relies on the land for sustenance and income, through agriculture and tourism.[554] These activities would be curtailed or be made entirely impossible should the mining operations go ahead. There were serious concerns about the mining operation's social, ecological, and economic effects on the interconnected and interdependent community.[555] Should TEM be granted the mining right, the community would not only be physically displaced from their homes, but their cultural way of life and economic well-being would also be jeopardised.[556]

These are all salient points, and the court is correct to acknowledge the disruptive potential of mining.[557] However, these social, environmental, cultural, and economic considerations form part of the impact assessment that is already a prerequisite for applying for and being granted, a mining right under the MPRDA.[558] Under the MPRDA, it is a criminal offence to mine or prospect without an approved environmental management plan or programme ("EMP").[559] If a mining right is granted to an applicant, that right becomes effective only when the Minister of Mineral Resources approves the right holder's EMP.[560]

To prepare an EMP, an applicant for a mining right must meet some rigorous requirements.[561] The socio-economic implications of the proposed mining ventures are considered as part of the EMP preparation process.[562] For an EMP to be approved it must "establish baseline information" in the projected environmental impact, how to manage it, what remedial measures

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[552] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 7-18.
[553] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 7, 9 & 11.
[554] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 11-12.
[555] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 13-14.
[556] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 18.
[557] Tlale (2020) *PER/PELJ* 25.
[558] Mining rights are granted in terms of section 23 of the MPRDA.
[559] MPRDA, s 5(4)(a) read with s 98(a)(i).
[560] MPRDA, s 23(5). EMPs are approved in accordance with section 39 of the MPRDA.
[561] Listed in section 39(3) of the MPRDA.
[562] MPRDA, s 39(3)(c).

can be taken, and how the environment can be additionally protected.[563] It must also "investigate, assess and evaluate" the effect of the proposed mining operations will have on the socio-economic conditions of people affected by the operations.[564] The EMP must also set out a proposal for how to remedy or mitigate the harmful consequences of mining operations.[565] If the impact of proposed mining operations is so destructive that neither compensation nor management can mitigate it, the mining right – statutorily at least – may not be granted.[566] When the community approached the court, these assessments had not been completed yet.[567]

The decision to award a mining right to an applicant in terms of the MPRDA requires more than consulting with "interested and affected persons".[568] This decision is informed by an extensive impact assessment process, which considers the socio-economic and environmental implications of any proposed mining venture.[569] The court in *Baleni* entirely overlooks this.[570]

Neither the Minister of Mineral Resources nor, indeed, the Department of Mineral Resources ("DMR"), is a party in consultation proceedings.[571] Section 27(5)(b) of the MPRDA requires the mining right applicant to notify and consult with the landowner, and then to submit the consultation's result to the DMR. The DMR's role in the consultation process is in fact simply to make sure that the consultation with the landowner is of an acceptable standard.[572] The state does not bear the cost of preparing the assessments needed for a mining right application, rather, it is borne by the company. This raises legitimate questions about biases in the EMP. However, this research does not suggest that impact assessments ought to be considered as substitutes for

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[563] MPRDA, s 39(3)(a).

[564] MPRDA, s 39(3)(b).

[565] MPRDA, s 39(3)(d).

[566] MPRDA, ss 23(1)(d) & (e) read with s 23(3): The Minister must refuse a mining right application if the mining operation will result in "unacceptable" damage to the environment or if the applicant cannot finance a social and labour plan.

[567] Cameron (2020) *Without Prejudice* 8.

[568] MPRDA, s 38A(2): "An environmental authorisation [per the NEMA] issued by the Minister shall be a condition prior to the issuing of a permit or the granting of a right in terms of this Act."

[569] MPRDA, s 98(a)(i) read with s 5(4)(a): it is a criminal offence to prospect or mine without an approved environmental management plan.

MPRDA, s 37(1): The principles as set out in section 2 of the NEMA apply to all prospecting and mining operations and related matters.

[570] Cameron (2020) *Without Prejudice* 8.

[571] Tlale (2020) *PER/PELJ* 12.

[572] Tlale (2020) *PER/PELJ* 12.

consultation. Rather, the argument being made is that the process of preparing and approving an EMP is onerous and expensive.[573] It is unclear whether a mining right applicant would go to the trouble and expense of preparing an EMP if the community could at any point refuse consent to the proposed mining operations. This also means that the community will not have the information gathered within the EMP to base their decision on. This is dealt with in more detail in the consideration of what consent and what consultation require.[574]

5.4.3 Differential Treatment of Common and Customary Law Landowners

The court argued that customary and common-law landowners are treated differently in the required process for granting a mining right over a piece of land.[575] The justifications offered by the court for this assertion are canvassed above.[576] From the outset, it must be said that the differential approach taken by the court was aimed at giving special protections to customary communities. This is laudable. However, the court's conclusion regarding the differential treatment of customary and common law owners does not necessarily afford customary owners more protection. It may in fact render them more vulnerable, particularly to the expropriation of their land for mining purposes, as will be made clear in section 4.3.3 below. Indeed, our history ought to serve as a serious warning against the creation of separate legal systems, particularly where the subjects of the separate system are socio-economically vulnerable.

First, it is unclear to what extent the court based its decision on the international instruments quoted in the judgment. Nevertheless, the court's use of international law in this case poses some issues. The concept of free and informed consent is enshrined in many international instruments, to many of which South Africa is a signatory.[577] The Constitution requires courts

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[573] T Humby "The *Bengwenyama* Trilogy: Constitutional Rights and the Fight for Prospecting on Community Land" (2012) 15 *PER/PELJ* 166 169-170; PF Ledwaba "The status of artisanal and small-scale mining sector in South Africa: tracking progress" (2017) 117 *Journal of the Southern African Institute of Mining and Metallurgy* 33 36.

[574] See section 5.4.4 below.

[575] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 74.

[576] See section 5.3.1 above.

[577] Though this is by no means an exhaustive list, these international instruments include the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the African Charter on Human and People's Rights (1981); and the Committee on the Elimination of Racial

to prefer reasonable interpretations consistent with international law when interpreting South African legislation.[578]

However, it does not follow that the decision-making and assessment processes under South Africa's domestic law are to be disregarded or that international law prevails.[579] The Constitution requires an international agreement to be enacted into national legislation before it becomes domestic law.[580] Customary international law is law in South Africa, but only to the extent that it is consistent with the Constitution and South African legislation.[581] The MPRDA's provisions, at least on paper, take heed of the historical injustices suffered by black South Africans in general, and customary communities in particular.[582] The application process for mining rights assesses the socio-economic and cultural significance of the impact of mining operations on communities.[583]

The court's reliance on section 23(2A) of the MPRDA in support of the consent approach is unconvincing. Section 23(2A) allows the Minister of Mineral Resources to add conditions to a mining right that will promote the interests of communities lawfully occupying the land. However, this provision only applies to mining rights that have already been granted.[584] The court in *Baleni,* therefore, misused this provision, as in the circumstances a mining right had not yet been granted.[585] Indeed, the court had employed section 23(2A) to support the decision that community consent was required to grant a valid mining right in the first place.[586]

The court's conclusion that customary landowners and common law landowners are to be treated differently in terms of the mining application process is concerning for a more

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Discrimination General Recommendation 23: Rights of Indigenous Peoples UN Doc A/52/18 (1997). Tlale (2020) *PER/PELJ* 18.

[578] Constitution, s 233.

[579] Cameron (2020) *Without Prejudice* 9.

[580] Constitution, s 231(4).

[581] Constitution, s 232.

[582] Cameron (2020) *Without Prejudice* 9.

[583] See section 5.4.2 above.

[584] Cameron (2020) *Without Prejudice* 9.

[585] Cameron (2020) *Without Prejudice* 9.

[586] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 74.

fundamental reason. The court looks to our history to justify this differential treatment.[587] The history of injustice and discrimination suffered by communities like the Umgungundlovu Community was considered in previous chapters.[588] South Africa's past does indeed render such communities particularly vulnerable and justifies granting them special consideration and protection. However, our history should also be a serious caution against creating separate processes for vulnerable communities.

5.4.4 Consent versus Consultation: Not a Simple Strengthening of Communities' Position

The last aspect of the *Baleni* judgment to consider is what the shift in the required degree of engagement for granting a valid mining right entails. It is necessary to determine what consent per the IPILRA requires, and what consultation per the MPRDA involves. As identified by the court, the fundamental difference between consent and consultation is that consent requires agreement, whereas consultation involves a consensus-seeking process, which might not end in an agreement.[589]

It has already been shown that the consultation process is accompanied by impact assessment processes.[590] These impact assessment processes, at least on paper, aim to minimise the detrimental socio-economic and environmental disruptions caused by mining operations.[591] The assessments also require establishing plans to maximise the benefits of mining operations for communities resident close to the mines.[592] The level of engagement required with owners and lawful occupiers is therefore not the only aspect of the mining application process that takes their rights and interests into account.

Some early case law did indeed set a low bar for compliance with the MPRDA's consultation requirements.[593] "Awareness" was used as the test for compliance with the MPRDA's

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[587] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 33-40, 50-51, 66 & 75.
[588] See Chapters 2 and 3.
[589] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 71.
[590] See section 5.4.2 above.
[591] Cameron (2020) *Without Prejudice* 9.
[592] Environmental Management Plans as considered in section 5.4.2 above.
[593] Humby (2012) *PER/PELJ* 177.

provisions on consultation.[594] The test required only that the mining applicant and landowner communicate, and that the landowner is aware that the applicant intends to apply for a mining right.[595] However, this early interpretation was quickly replaced by a much more rigorous standard, requiring *inter alia* good faith.[596]

The Constitutional Court in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* ("*Bengwenyama*") dealt with the consultation process as required by the MPRDA.[597] The Constitutional Court's discussion of the consultation requirement is underpinned by a certain understanding of the invasive nature of prospecting and mining rights.[598] The Court regarded the granting of such rights as representing "a grave and considerable invasion of the use and enjoyment of the land".[599] In recognition, the MPRDA's consultation and notice requirements denote "a serious concern for the rights and interests of landowners and lawful occupiers in the process".[600] The Constitutional Court laid out its "good faith" approach to the MPRDA's consultation requirements against this interpretive backdrop.[601]

The Court in *Bengwenyama* argued that the purpose of the consultation process must be connected to the impact that mining or prospecting will have on the lawful occupier of the land or the landowner.[602] This view is in acknowledgement of the seriousness of mining and prospecting's infringement on the use and enjoyment of land.[603] According to the *Bengwenyama* judgment, the MPRDA's consultation requirements serve two main purposes.[604]

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[594] Humby (2012) *PER/PELJ* 177; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* TPD 18-11-2008 case no 39808/2007 para 38.

[595] *Bengwenyama Minerals v Genorah Resources* TPD 18-11-2008 case no 39808/2007 para 38.

[596] Humby (2012) *PER/PELJ* 177.

[597] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* CCT 39/10 2010 ZACC 26. The consultation requirements for mining right applicants are set out in sections 10(1) and 22(4) of the MPRDA.

[598] The *Bengwenyama* case considered only prospecting rights. However, the Constitutional Court's reasoning and logic extend easily to mining rights, as will become apparent. Humby (2012) *PER/PELJ* 177.

[599] *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 para 63.

[600] *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 para 63.

[601] Humby (2012) *PER/PELJ* 177.

[602] *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 para 64.

[603] *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 paras 63-64; Humby (2012) *PER/PELJ* 177.

[604] *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 paras 65-66.

First, to ascertain whether the landowner's right to use the land can be accommodated, and to what extent that the impact on the landowner's rights can be mitigated.[605] This purpose does not require that the landowner agree or consent to the deprivation of their rights.[606] It does, however, require that the applicant engages with the landowner in good faith.[607]

The second purpose of consultation identified by the Court is to provide the landowners and lawful occupiers with sufficient information on what the mining or prospecting operation will entail.[608] The MPRDA, through the consultation process, aims to ensure that landowners are furnished with the information necessary to make informed decisions.[609] The consultation procedures require sufficient information for the landowner or lawful occupier to make informed decisions.[610] The informed decision does not relate to agreeing to granting a mining or prospecting right over land – the Court expressly states that the MPRDA does not require agreement from the landowner.[611] The MPRDA requires that the landowner or lawful occupier be given sufficient information to make an informed decision on whether to institute appeal or compensation procedures.[612] Landowners should have information in sufficient detail to allow them to make their representations, should they decide to oppose the right.[613] The landowner or lawful occupier must also have sufficiently detailed information on what the impact of the mining or prospecting right will be.[614]

There are, perhaps obviously, three central requirements for free, prior and informed consent: it must be freely given, it must be prior (to the proposed activity), and it must be informed.[615] The first requirement entrenches the need for consent to be given voluntarily.[616] Consent will

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[605] *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 para 65.
[606] *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 para 65.
[607] *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 para 65.
[608] *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 paras 66-67.
[609] *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 paras 65-66.
[610] *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 paras 65-66.
[611] *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 para 66.
[612] *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 para 66; Humby (2012) *PER/PELJ* 177-178.
[613] MPRDA, s 16(4)(b); *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 para 67; Humby (2012) *PER/PELJ* 177-178.
[614] *Bengwenyama Minerals v Genorah Resources* CCT 39/10 2010 ZACC 26 paras 66-67.
[615] Tlale (2020) *PER/PELJ* 17.
[616] Tlale (2020) *PER/PELJ* 17.

not be free if it is obtained through coercion or manipulation.[617] Secondly, consent must be sought and given sufficiently in advance of the activity for which consent is being sought.[618] Importantly, consent once given can be withdrawn at any time.[619] Third, consent will be informed when the consenting party has been granted information as to the nature and type of the activity being proposed.[620] This information must be given to the consenting party before consent is sought and must be given ongoing information as the activities commence.[621]

Consultation, when properly undertaken, therefore requires recognition of the impact that the granting of a mining or prospecting right will have on the occupiers of that land.[622] The consultation requirements under the MPRDA are more rigorous and are more protective of landowners and lawful occupiers than the court in *Baleni* seems to acknowledge.[623] Nevertheless, the court in *Baleni* held that consent was a requirement for granting a valid mining right over land held in terms of customary law.[624] The court looked to international law to argue that the required standard was free, prior, informed consent ("FPIC").[625] As the court points out, FPIC is a right afforded specifically to indigenous people under international law.[626]

There is therefore quite a lot of overlap between the requirements for consulting to a sufficient standard and the requirements for free, informed, prior consent. Both approaches emphasize the invasive nature of mining and prospecting operations, and both prioritize arming the landowners or lawful occupiers with sufficiently detailed information to make informed decisions.[627] However, consent may be revoked and can serve as a veto against mining operations, whereas neither is the case with consultation.[628] On the face of it, this strengthens customary communities' legal position.

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[617] Tlale (2020) *PER/PELJ* 17.
[618] Tlale (2020) *PER/PELJ* 17.
[619] Tlale (2020) *PER/PELJ* 17.
[620] Tlale (2020) *PER/PELJ* 17.
[621] Tlale (2020) *PER/PELJ* 17.
[622] Humby (2012) *PER/PELJ* 177.
[623] See Chapter 2, section 2.4.
[624] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 74 & 84.
[625] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 78-82.
[626] Tlale (2020) *PER/PELJ* 17.
[627] Humby (2012) *PER/PELJ* 177; Tlale (2020) *PER/PELJ* 17.
[628] Humby (2012) *PER/PELJ* 177; Tlale (2020) *PER/PELJ* 17

The result may be somewhat different in practice. The consultation process is accompanied by impact assessments and the development of Environmental Management Plans ("EMPs"), as discussed above.[629] Properly assessing the impact of proposed mining operations, developing EMPs, and negotiating and informing landowners is already costly, and requires a lot of time and effort.[630] These assessments and preparations occur at the expense of the mining right applicant.[631] An applicant may be reluctant to incur these expenses if their application may fail at any moment, as it may with the revocable consent requirement. The fact that the MPRDA does not require the landowner's consent balances this expense. At the very least, the threat of withheld consent may tempt applicants to be less forthcoming with information. However, expropriation inherently does not require the landowner's agreement or consent. If a large investment, with many potential jobs, is at stake, the Minister may be tempted to expropriate the land for mining purposes.

Subsequent to the *Baleni* case, amendments to the MPRDA Regulations have been promulgated.[632] As discussed, applicants under the MPRDA to engage in "meaningful consultation" with "interested and affected persons". The definition of "meaningful consultation" introduced by the regulations retains the requirement that the applicant must act in good faith.[633] The applicant must give landowners, lawful occupiers and other interested and affected persons a "reasonable opportunity" to comment on how the proposed mining ventures will affect their use of the land. They must also have access to "all relevant information pertaining to the proposed activities enabling these parties to make an informed decision".[634] The MPRDA Regulations therefore enshrine much of the *Bengwenyama* jurisprudence, set out above, on consultation processes. However, the amended MPRDA regulations will not affect the dictum laid down by the court in *Baleni*. This is because the *Baleni* decision provides that

[629] See section 5.4.2 above.

[630] See section 5.4.2 above. See also Humby (2012) *PER/PELJ* 169-170; Ledwaba (2017) *Journal SA Institute Mining Metallurgy* 36.

[631] Ledwaba (2017) *Journal SA Institute Mining Metallurgy* 36.

[632] Mineral and Petroleum Resources Development Regulations in GN 420 GG 43172 of 27-03-2020.

[633] Mineral and Petroleum Resources Development Regulations, reg 1(e).

[634] Mineral and Petroleum Resources Development Regulations, reg 1(e).

where such "interested and affected" persons hold land in terms of the IPILRA, the IPILRA sets the standard for engagement and not the MPRDA.[635]

5.5 Conclusion

In *Baleni*, the court overlooked the option of expropriation in terms of section 55 of the MPRDA. Although this does not render the judgment incorrect, the effect of this oversight – alongside the need for consent from a community to grant a mining right – ultimately increases the risk of expropriation of communities' rights to land in the mining context. If consent cannot be obtained, and if it is in the public interest to grant the mining right, the Minister may expropriate the community's rights in the land for mining purposes.

The court in *Baleni* seems to misunderstand the ambit of *Agri SA*'s reasoning: Expropriation is possible in terms of the MPRDA, but extinguishing unconverted "old order" rights is merely a deprivation.[636] Section 55 of the MPRDA provides expressly for formal expropriation of land. If the Minister expropriates the community's informal rights in terms of section 55, the community's consent would not be required.[637]

The IPILRA was not intended to be the sole and permanent solution to South Africa's problem of tenure insecurity.[638] In the court's attempt to protect customary communities sufficiently, it seems that it assigned too many functions to provisions of the IPILRA. Section 2 of the IPILRA was held to set up a separate system for engaging with customary communities (*viz* common law landowners) in the process of granting mining rights.[639] Paired with the abovementioned misreading of the *Agri SA* judgment,[640] section 2 of the IPILRA was also held to insulate customary communities' from having their land expropriated for the purposes of mining.[641]

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[635] See section 5.3 above.
[636] Badenhorst & Van Heerden (2019) *SALJ* 313.
[637] Badenhorst & Van Heerden (2019) *SALJ* 313.
[638] Badenhorst & Van Heerden (2019) *SALJ* 324.
[639] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 74-76.
[640] See section 5.4.1 above.
[641] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 63. See section 5.3.1 above.

The overreliance on section 2 of the IPILRA also led the court to overlook the entire body of law governing the socio-economic and environmental impacts of mining operations.[642]

The effects of the court's decision in *Baleni* are, therefore, perhaps not the simple strengthening of customary and traditional communities' position in relation to companies seeking mining rights. It is possible that if consent cannot be obtained, the Minister may expropriate them of their rights in the land in terms of section 55 of the MPRDA. This could leave communities worse off in the long run than if they had agreed to the mining ventures.[643] Agreement to the mining right leaves open the possibility of the community gaining long-term benefits from the venture. However, an expropriation to facilitate mining operations can give the community only a once-off payment.

[642] See section 5.3.2 above.

[643] Cameron (2020) *Without Prejudice* 9-10.

CHAPTER SIX: CONSTITUTIONAL FRAMEWORK FOR EXPROPRIATION IN *MALEDU*- AND *BALENI*-TYPE CASES

6.1 Introduction

This research now turns to consider the framework for *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* ("*Maledu*")[644] and *Baleni v Minister of Mineral Resources* ("*Baleni"*),[645] as governed by the Constitution.[646] This chapter establishes whether the Constitution permits expropriating land or rights in land from a *Maledu*/*Baleni*-type community for the purposes of mining. If it does, then the *Maledu* and *Baleni* cases, read together, increase the risk that such communities will be expropriated of their land – this is the focus of this research. In acknowledgment of historical disadvantage, and in recognition of communities' right to benefit from mineral deposits on their land, communities ought to be in the best position to benefit from mining ventures.[647] Being expropriated of their land is not likely to benefit a community optimally, as they will be cut out of the extraction process from then on.

The previous chapter showed that holders of mining rights could now be subject to expensive delays if a dispute arises with the community that holds rights over the land.[648] Obtaining a mining or prospecting right is now also more difficult, as customary communities must now consent to having such a right granted over their land.[649] However, extracting mineral deposits is potentially lucrative for the mining right holder. The mining industry is a major employer

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

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

[646] Constitution of the Republic of South Africa, 1996.

[647] In keeping with the objectives of the Mineral and Petroleum Resources Development Act 28 of 2002 as contained in section 2. The objectives in this regard include "substantially and meaningfully expand[ing] opportunities for historically disadvantaged persons, including… 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" (MPRDA, s 2(d)).

[648] PJ Badenhorst & CN van Heerden "Conflict Resolution between Holders of Prospecting or Mining Rights and Owners (or Occupiers) of Land or Traditional Communities: What is Not Good for the Goose is Good for the Gander" (2019) 136 *SALJ* 303 326.

[649] J Dugard "Unpacking Section 25: What, If Any, are the Legal Barriers to Transformative Land Reform?" (2019) 9 *Constitutional Court Review* 135 153.

and contributor to the South African national economy.[650] In the face of these considerations, it is practically unlikely that mineral deposits will remain untouched simply because a community's consent is withheld if a legally permissible method to access those minerals exists. South Africa's mining sector's dark history supports this projection.[651]

The situation becomes even more complicated when one considers that a community may be divided on whether to consent to the mining venture. For instance, the Lesetlheng Community – which opposed the mining venture in the *Maledu* case – is a sub-group of the larger Bakgatla-Ba-Kgafela Community. The land underlying the dispute in *Maledu* is registered "in trust for the Bakgatla-Ba-Kgafela community" according to the title deed.[652] If expropriation were proposed to facilitate mining in a case where part of the community supported the mining, it could be "in the public interest" to do so.

6.2 Conceptualising Expropriation and Deprivation in the Constitutional Framework

To answer the question of whether expropriation in a *Maledu*/*Baleni* type situation is constitutionally valid, this section considers the requirements for a valid expropriation as well as the distinction between expropriation and deprivation of property. Both the *Maledu* and *Baleni* cases concerned the application of section 2(1) of the Interim Protection of Informal Land Rights Act ("IPILRA"),[653] which has implications for expropriation and deprivation of property.[654] Deprivation and expropriation of property are governed by section 25 of the Constitution.[655] Apparent in the property clause is the tension caused by the state's conflicting

[650] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 6.

[651] See Chapter 2, section 2.3, and Chapter 3, section 3.3.

[652] Note that the land is registered in the name of the Minister of Rural Development and Land Reform. The title deed provides that the Minister owns the land "in trust for the Bakgatla-Ba-Kgafela community". *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 6.

[653] Act 31 of 1996.

[654] Section 2(1) of the IPILRA states that no one can be deprived of their informal rights in land without their consent, subject to the Expropriation Act, and any other law providing for the expropriation of land and rights in land.

[655] Constitution, ss 25(1)-(4).

obligations to protect private property rights inherited from the past, and to fulfil the state's social responsibility to redistribution of property.[656]

6.2.1 Constitutional Requirements for Deprivation and Expropriation

The constitutional property clause aims to reconcile the divergent needs of a society divided by its past.[657] Section 25 of the Constitution attempts this reconciliation by sufficiently protecting private property rights, whilst also promoting the public interest.[658] The Constitutional Court has affirmed this position, stating that the constitutional property clause's principal objective is to strike a "proportionate balance" between safeguarding existing property rights and promoting the public interest.[659] The public interest includes promoting land reform and equitable access to South Africa's mineral resources.[660]

The Constitution entrenches equality before the law and grants everyone the "right to equal protection and benefit of the law".[661] Nonetheless, South Africa is one of the most unequal societies in the world in terms of both wealth and income, and this is in large part due to its history.[662] Section 25 of the Constitution – the constitutional property clause – is intended to do the difficult task of striking a balance between the interests of the wealthy and those who have been historically systematically disadvantaged.[663] The tension between these divergent

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[656] *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 62. The private property rights were the existing rights brought forward from South Africa's pre-constitutional dispensation. The state's social responsibilities include redistributing land, land reform and securing tenure for those whose tenure was made insecure by the racist laws and policies of the colonial and apartheid eras.

[657] *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* CCT19/01 2002 ZACC 5 para 50; *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 88.

[658] *First National Bank v Commissioner SARS; First National Bank v Minister of Finance* CCT19/01 2002 ZACC 5 para 50.

[659] *First National Bank v Commissioner SARS; First National Bank v Minister of Finance* CCT19/01 2002 ZACC 5 para 50.

[660] Constitution, s 25(4)(a).

[661] Constitution, s 9(1).

[662] South Africa's Gini coefficient for income inequality in 2015 was 0.68. The Gini coefficient is a measure of inequality, scaled between 0 and 1. A Gini coefficient of 0 indicates absolute equality, while a coefficient of 1 indicates absolute inequality. An income inequality Gini coefficient of 0.68 is very high. Matters worsen significantly when one considers South Africa's *wealth* inequality Gini coefficient, which stood at a staggering 0.95 in the same year. SAHRC *South African Human Rights Commission Submission to the Joint Constitutional Review Committee Regarding section 25 of the Constitution* (2018) 3.

[663] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 60.

interests, and the difficulty facing the state in balancing these interests, are apparent in the *Maledu* and *Baleni* cases.

The state has the power to deprive or expropriate property unilaterally from its citizens.[664] To protect property rights, the Constitution prohibits arbitrary deprivations of property.[665] A person may be deprived of their property only in terms of a law of general application.[666] The IPILRA, which played a central role in the *Maledu* and *Baleni* cases, is such a law.[667] Section 2(1) of the IPILRA states that a person may not be deprived of their informal rights to land without their consent.

Likewise, the Constitution allows property to be expropriated only in terms of a law of general application.[668] Land may be expropriated for mining purposes in terms of the Mineral and Petroleum Resources Development Act ("MPRDA").[669] The MPRDA was the other critical piece of legislation under consideration in the *Maledu* and *Baleni* cases. Moreover, section 2(1) of the IPILRA is subject to the Expropriation Act.[670] In other words, a person may be deprived of their informal rights to land without granting consent, if that land is expropriated. Thus, the "law of general application" requirement would be fulfilled should an expropriation occur in *Maledu*/*Baleni*-type circumstances as the IPILRA and MPRDA are laws of general application providing for expropriation.

Expropriation of property must be in the public interest or for a public purpose.[671] Additionally, the Constitution requires expropriations to be subject to compensation.[672] This compensation

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[664] A Gildenhuys & GL Grobler "Expropriation" in WA Joubert & JA Faris (eds) *LAWSA* 10 2 ed (2012) 2.

[665] Constitution, s 25(1).

[666] Constitution, s 25(1).

[667] IPILRA, s 2(1); *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 43 & 76; *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) paras 67, 71 & 98.

[668] Constitution, s 25(2).

[669] Act 28 of 2002. The MPRDA amounts to a "law which provides for expropriation of land or rights in land" per section 2(1) of the IPILRA, as the MPRDA in section 55(1) empowers the Minister of Mineral Resources and Energy to expropriate property for mining and prospecting purposes. Section 55(2)(a) of the MPRDA states that sections 6, 7 and 8 of the Expropriation Act apply to expropriations authorised by section 55.

[670] Act 63 of 1975.

[671] Constitution, s 25(2)(a).

[672] Section 25(2)(b) of the Constitution states that "[p]roperty may be expropriated only… subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court".

must be "just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances".[673] In determining just and equitable compensation, the Constitution prescribes five factors that must be taken into account.[674] These factors are the expropriation's purpose,[675] the use the property is currently being put to,[676] the property's market value,[677] the property's history,[678] and "the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property".[679] The compensation requirement is a constitutionally mandated consequence of an expropriation.[680] As such, the compensation requirement does not assist in ascertaining whether an expropriation of a *Maledu*/*Baleni* can be validly expropriated in terms of the Constitution.[681]

6.2.2 Determining Whether Deprivation Amounts to Expropriation

The constitutional property clause distinguishes between deprivation and expropriation of property.[682] This section discusses the constitutional distinction between these two concepts, both of which play a role in section 2(1) of the IPILRA. Both the *Maledu* and *Baleni* cases concern the application of this provision, which prohibits the deprivation of informal rights to land without the right holders' consent.[683] However, section 2 of the IPILRA is internally limited, as it is subject to the Expropriation Act and "any other law which provides for the expropriation of land or rights in land". Distinguishing clearly between expropriation and

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[673] Constitution, s 25(3). The "just and equitable" requirement extends to the compensation's amount as well as the manner and time of its payment.

[674] These factors are set out in section 25(3) of the Constitution, which seems to be an open list, as indicated by phrasing "having regard to all relevant circumstances, *including*…". Emphasis added.

[675] Constitution, s 25(3)(e).

[676] Constitution, s 25(3)(a).

[677] Constitution, s 25(3)(c).

[678] Constitution, s 25(3)(b). The property's historical use and acquisition are to be considered in this regard.

[679] Constitution, s 25(3)(d).

[680] H Mostert "The Poverty of Precedent on Public Purpose/Interest: An Analysis of Pre-Constitutional and Post-Apartheid Jurisprudence in South Africa" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans, LCA Verstappen L (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 1.

[681] However, the compensation requirement is at the heart of debates regarding the state's obligation to promote land redistribution and restitution, as discussed in the Excursus at the end of this research.

[682] Constitution, s 25(1) & (2).

[683] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 76; PJ Badenhorst & CN van Heerden "Conflict Resolution between Holders of Prospecting or Mining Rights and Owners (or Occupiers) of Land or Traditional Communities: What is Not Good for the Goose is Good for the Gander" (2019) 136 *SALJ* 303 315. See also section 2 of the IPILRA, which governs deprivation of informal rights in land.

deprivation in constitutional jurisprudence is necessary to determine whether the Constitution's framework sustains land expropriation of *Maledu*/*Baleni*-type communities for mining purposes.

Expropriation, as contained in section 25(2) of the Constitution, is a subspecies of deprivation, as contained in section 25(1).[684] The distinction between expropriation and deprivation is made to allow the state to undertake actions for the public good.[685] These state actions may interfere with the use of some property.[686] Section 25(1) of the Constitution allows the state to proceed without incurring liability from those whose property rights have been interfered with.[687] Section 25(2) brings a balance, as it protects property rights.[688]

Per *Baleni* and *Maledu*, granting a mining right constitutes a deprivation of the rights of the lawful occupiers of the mining site land.[689] Deprivation requires interference with at least one ownership entitlement and does not require the physical removal of property.[690] Whether a deprivation has occurred depends on the extent to which the use and enjoyment of the property have been interfered with.[691] However, certain interferences with property rights will not be considered deprivations. Where an interference is very widely considered as acceptable or trivial "in an open and democratic society", it will not amount to a deprivation of property for the purposes of section 25(1) of the Constitution.[692]

To determine whether an instance of deprivation amounts to expropriation, courts have developed a two-stage enquiry.[693] First, a court must determine whether an act of deprivation

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[684] *First National Bank v Commissioner SARS; First National Bank v Minister of Finance* CCT19/01 2002 ZACC 5 para 57; Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[685] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[686] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[687] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[688] Subject to land reform.

[689] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 61; *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 102.

[690] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[691] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[692] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2; *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 67.

[693] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

passes scrutiny in terms of section 25(1) of the Constitution.[694] If this first stage of the enquiry yields a positive answer, the question is then whether the deprivation amounts to expropriation as contemplated in section 25(2).[695] A deprivation will amount to an expropriation where the property, as a result of the deprivation, vests in the state or a third party.[696]

The Constitutional Court in *Agri South Africa v Minister for Minerals and Energy* ("*Agri SA*") dealt with the distinction between expropriation and deprivation of property.[697] The court held that the lapsed "old order" rights were a deprivation,[698] but not an expropriation.[699] Expropriation requires the deprivation of an expropriatee's right on the one hand and the vesting of a substantially similar beneficial right in the state.[700] Without the vesting of a similar right, the action constitutes a deprivation but does not amount to expropriation.[701] The state does not acquire mineral rights under the MPRDA, and so the lapsing of old order rights MPRDA did not amount to expropriation.[702]

An expropriation within the constitutional framework is therefore a legal act in which an expropriatee is deprived of a right and a similar right is vested in the expropriator.[703] The *Baleni* case confirms that granting a mining or prospecting right over land constitutes a deprivation of the occupier's right to the land.[704] The IPILRA requires consent for deprivation, but not for expropriation.[705] Thus, the question is whether the constitutional framework sustains a valid expropriation of a *Maledu*/*Baleni*-type community's land to allow a third party to mine the land. This question, discussed in the following section, depends on whether this expropriation

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[694] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[695] *First National Bank v Commissioner SARS; First National Bank v Minister of Finance* CCT19/01 2002 ZACC 5 para 59; Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[696] See section 6.3.3 below for more on the expropriated property vesting in a third party. Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[697] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC). See Chapter 5, section 5.4.1 further.

[698] As described in section 25(1) of the Constitution.

[699] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 68.

[700] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[701] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 58-59 & 67-69.

[702] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 67-68.

[703] Gildenhuys & Grobler "Expropriation" in *LAWSA* 10 2.

[704] In terms of section 2(1) of the IPILRA and section 25(1) of the Constitution. Mining and prospecting rights are granted in terms of the MPRDA, while the rights to land are secured by the IPILRA. *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 47, 61 & 83.

[705] IPILRA, s 2(1).

is "for a public purpose or in the public interest", as required by section 25(2)(a) of the Constitution.

6.3 The Public Purpose and the Public Interest

The question at hand is whether South Africa's constitutional framework allows for the valid expropriation of *Maledu*/*Baleni*-type communities' land rights for mining purposes. To answer this question, this section considers whether such an expropriation could be considered to be "for public purpose or in the public interest".[706] This requirement has a preventative function and a control function. The requirement prevents compulsory loss of private property for unlawful or improper purposes.[707] As for the control function, the requirement provides a check against the exercise of the state's power to expropriate property in a way that is capricious or fraudulent.[708] The constitutional requirement that expropriation must be "for a public purpose" or "in the public interest" will be termed "the public purpose requirement" for expediency. However, this diction should not be taken to suggest that the concept of the public interest is subsumed by, or subservient to, the concept of the public purpose.

6.3.1 Preliminary Areas of Uncertainty

At least three important questions regarding the public purpose requirement have come under judicial scrutiny.[709] First, courts have grappled with the consequences of expropriating property for a specific purpose, and that purpose is never realised.[710] The question is whether the expropriated owner is entitled to anything when the purpose of the expropriation subsequently changes or is entirely abandoned.[711] However, this question does not relate to the

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[706] As required by section 25(2(a) of the Constitution.

[707] AJ van der Walt *Constitutional Property Law* 3 ed (2011) 459; Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 1.

[708] Van der Walt *Constitutional Property Law* 459; Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 1.

[709] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 3.

[710] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 3.

[711] See *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP) on the question of the change or non-realisation of the purpose for expropriation.

issue of whether expropriation of *Maledu*/*Baleni*-type communities' land for the purposes of mining is permissible under the Constitution, and so will not be considered further here.[712]

The second issue regarding the public purpose requirement is central to the enquiry of whether a *Maledu*/*Baleni*-type community can be expropriated of their land for mining purposes.[713] In such a case, the community's land would be expropriated so that a mining right holder – a private third party – could commence mining. South African courts have discussed whether an expropriation could be legitimate where the purpose is to benefit a private third party, or to transfer the property to them.[714] A compounding concern is where the third party transfer is for economic development, as would be the case where land is expropriated to allow for mining.[715]

The third question is whether the public purpose requirement can be satisfied where the purpose served could be achieved without expropriating the property, or by expropriating less of it.[716] In other words, the question is whether an expropriation can be valid if the purpose or interests served can be achieved by an action that does not intrude so severely on the expropriatee's rights.[717] This issue bears on the legitimate expropriation of land from *Maledu*/*Baleni* type communities, as the *Maledu* and *Baleni* decisions have curtailed the less invasive means available under the MPRDA to allow for mining.[718]

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[712] For a comprehensive discussion of this issue, see BV Slade *The Justification of Expropriation for Economic Development* LLD dissertation Stellenbosch University (2012) 163-191.

[713] See section 6.3.2 below.

[714] The issue of expropriation for the benefit of, or transfer to, a third party was discussed in *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP).

[715] Ownership of land, and the right to mine that land, can vest in two separate entities. Thus, if a *Maledu*/*Baleni*-type community were expropriated of their land for mining purposes, the land would not necessarily need to be transferred to the mining company. Rather, the expropriation would be for the benefit of the mining right holder.

Expropriation of property for economic development, involving a third party transfer, was considered in *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* 4415/2008 2010 ZAFSHC 11 4-2-2010; *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2009 5 SA 661 (SE); and *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 4 SA 242 (SCA).

[716] Slade *Expropriation for Economic Development* 132; Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 3.

[717] This issue came before the courts in *Bartsch Consult v Mayoral Committee Maluti-A-Phofung Municipality* 2010 ZAFSHC 11; *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* 2010 ZAGPPHC 154; and *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* 2011 ZASCA 246.

[718] See section 6.3.4 below.

6.3.2 Defining "Public Purpose" and "Public Interest"

This research considers the vulnerability of communities who hold informal rights to land in terms of IPILRA, where that land is the subject of an application for a mining or prospecting right, or the subject of a validly granted mining or prospecting right. Specifically, the research concerns the possibility of increased vulnerability to expropriation pursuant to the *Maledu* and *Baleni* cases. An expropriation will be unconstitutional unless it is subject to "just and equitable" compensation and "for a public purpose or in the public interest".[719] The former requirement is a compulsory *consequence* of a constitutionally valid expropriation.[720] As such, consideration of the compensation requirement does not assist in establishing whether an expropriation of a *Maledu*/*Baleni*-type community can be undertaken in the first place.[721] On the other hand, the public purpose requirement provides the constitutionally acceptable justification for an expropriation.[722] This section, therefore, focuses on whether expropriation in these circumstances could be considered "for a public purpose or in the public interest".[723] If such an expropriation fulfils the public purpose requirement, it is likely to be constitutionally valid, and *Maledu*/*Baleni* type communities are vulnerable to expropriation for mining purposes.

6.3.2.1 Introduction of the Public Interest Requirement into South African Law

The term "public purpose" is the elder of the two aspects to the requirement, having been included in South Africa's first general expropriation legislation, the Expropriation Act of 1965.[724] The term "public interest" in relation to expropriation only entered South African

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[719] The compensation requirement is stated in section 25(2)(b) and given content by section 25(3) of the Constitution. The public purpose requirement is contained in section 25(2)(a) of the Constitution.

[720] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 1.

[721] The compensation requirement for expropriation is an important and controversial aspect of the constitutional property clause. The requirement is at the heart of debates regarding how best to discharge the state's obligation to promote land redistribution and restitution, and is currently subject to amendment. This is discussed in the Excursus to this research. However, the compensation is a necessary consequence of a constitutionally valid expropriation. The compensation requirement is therefore not directly relevant here, as we determine whether *Maledu*/*Baleni*-type communities can be expropriated of property for mining in the first place.

[722] *Harvey v Umhlatuze Municipality* 4387/08 2010 ZAKZPHC 86 para 82; Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 1.

[723] As required by section 25(2)(a) of the Constitution.

[724] Act 55 of 1965. BV Slade "'Public purpose or public interest' and third party transfers" (2014) 17 *PER/PELJ* 167 180.

jurisprudence in 1990, in *Administrator, Transvaal v Van Streepen (Kempton Park) (Pty) Ltd* ("*Van Streepen*").[725] At the time of drafting the Constitution, the concern was that the "public purpose" requirement, as it was then understood, could not be satisfied where property was expropriated for the purpose of land reform.[726] Expropriation in the context of land reform involves the expropriation of land so that it can benefit, or be transferred to, another private party.[727] It was unclear whether the public purpose requirement could be met where the beneficiaries of an expropriation were private individuals or groups of individuals.[728] The term "public interest" was included in the constitutional clause to ensure that expropriation for land reform would be permissible.[729]

The *Van Streepen* decision did not concern expropriation in terms of the Expropriation Act of 1975, but rather in terms of the provisions of the *Transvaal Road Ordinance of 1957* (*"Road Ordinance*").[730] Nevertheless, it assists in understanding the constitutional construction of the public purpose requirement.[731] The case involved a complex set of facts in which a public road had to be widened.[732] Widening the public road would require the relocation of a railway line, and so land was expropriated for the new location of the line.[733] The railway line was privately owned by a railway company.[734]

The court in *Van Streepen* held the central question to be whether the *Road Ordinance* allowed the expropriating authority to acquire the property of a private party for the benefit of a private third party.[735] To answer, the court held that "generally speaking" an expropriation must be for

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[725] *Administrator of the Transvaal and Another v J Van Streepen (Kempton Park) (Pty) Ltd* 640/88 1990 ZASCA 78.

[726] Slade (2014) *PER/PELJ* 184; Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 6.

[727] Slade (2014) *PER/PELJ* 184; Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 6.

[728] Slade (2014) *PER/PELJ* 184.

[729] Slade (2014) *PER/PELJ* 184; Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 6.

[730] *Administrator Transvaal v Van Streepen* 640/88 1990 ZASCA 78 19.

[731] For detailed discussions of the *Van Streepen* decision and its importance for constitutional expropriation jurisprudence, see Slade (2014) *PER/PELJ* 182-185; Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 12-18; Slade *Expropriation for Economic Development* 33-36.

[732] The facts are set out in *Administrator Transvaal v Van Streepen* 640/88 1990 ZASCA 78 2-19.

[733] The land was expropriated in terms of section 7(1) of the Transvaal Road Ordinance of 1957, which empowered the administrator to acquire land "for the construction or maintenance of any road or for any purpose in connection with the construction or maintenance of any road". See *Administrator Transvaal v Van Streepen* 640/88 1990 ZASCA 78 7 & 22-23.

[734] *Administrator Transvaal v Van Streepen* 640/88 1990 ZASCA 78 7.

[735] *Administrator Transvaal v Van Streepen* 640/88 1990 ZASCA 78 47.

a public purpose or in the public interest.[736] The court held that "[the] acquisition of land by expropriation for the benefit of a third party cannot conceivably be for a public purpose".[737] However, it could be in the public interest to do so.[738]

6.3.2.2 Distinguishing the Public Purpose from the Public Interest

The reason for the inclusion of both the terms "public interest" and "public purpose" in section 25 of the Constitution may be clear enough.[739] However, the relationship between these two terms is less clear. Only partial definitions for each term can be found in statute or the Constitution. The Constitution states only that "the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources".[740] This confirms that the reason for introducing the term "public interest" into the property clause was to ensure that expropriation could be used as a tool for transformative purposes.[741] However, this partial definition does not give any new insights into what the term may mean, or what its relationship to the term "public purpose" may be.[742] Regarding "public purpose", the Expropriation Act provides only that it "includes any purposes connected with the administration of the provisions of any law by an organ of State".[743] The word "includes" indicates that the Act foresees that purposes outside this definition may still be considered public and constitute a justifiable purpose for an expropriation.[744] The distinction and scope of the terms must thus be found in case law.

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[736] *Administrator Transvaal v Van Streepen* 640/88 1990 ZASCA 78 47.

[737] *Administrator Transvaal v Van Streepen* 640/88 1990 ZASCA 78 47.

[738] *Administrator Transvaal v Van Streepen* 640/88 1990 ZASCA 78 47.

[739] As discussed in section 6.3.2.1 above.

[740] Constitution, s 25(4)(a).

[741] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 7.

[742] Slade (2014) *PER/PELJ* 173.

[743] Expropriation Act, s 1(xiii). The Expropriation Act uses the plural "purposes". However, this does not alter the meaning of the word. For consistency, this research will use the singular, as it appears in section 25(2)(a) of the Constitution.

Under section 2(1) of the the Expropriation Act, the state may "expropriate any property for public purposes or take the right to use temporarily any property for public purposes". This expropriatory power is subject to the obligation to pay compensation, which must be calculated in terms of section 12 of the Act.

[744] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 9-13.

It is generally accepted that the public interest is a wider concept than the public purpose.[745] Before the introduction of the term "public interest" into expropriation law, however, case law distinguished between a narrow and a broad understanding of "public purpose".[746] Under the narrow interpretation of the term, "public purpose" means serving some government goal.[747] The broad interpretation means matters that have an impact on the whole or local population, or a significant portion thereof.[748] The broad understanding of public purpose (matters affecting the public) includes the narrow understanding of public purpose (government purposes).[749] Whether to apply the broad or narrow meaning depends on the context of each case.[750]

Given the breadth and flexibility of the courts' pre-constitutional understanding of public purpose, the *Van Streepen,* considered above, is problematic.[751] *Van Streepen* did not refer to the well-established distinction between the narrow and wide understanding of the term "public purpose", and instead used the term "public interest" for the first time.[752] It has been therefore been criticised for not sufficiently motivating its assertion that expropriation for the benefit of a third party can never be in the public purpose, but can be in the public interest.[753] However, earlier scholarship did not foresee trouble arising due to the vagueness of the distinction between the "public purpose" and "public interest". Because of the distinction between

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[745] Slade (2014) *PER/PELJ* 171; H Mostert *The Constitutional Protection and Regulation of Property and Its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 394-395.

[746] "Public purpose" is used both in the context of assessing justifications for expropriations, and outside of the expropriation context. The court in *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271 ("*Rondebosch"*) considered the meaning of the term "public purposes" outside the expropriation context. The *Rondebosch* decision distinguished between the narrow and broad meaning of "public purpose" but went on to apply the narrow interpretation (purposes relating to the government or state). See further Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 9; Slade (2014) *PER/PELJ* 176-178.

[747] See for instance *Slabbert v Minister van Lande* 1963 3 SA 620 (T).

[748] *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 3 SA 785 (N) 793I. See also *Slabbert v Minister van Lande* 1963 3 SA 620 (T) 621.

[749] Slade (2014) *PER/PELJ* 177.

[750] Slade (2014) *PER/PELJ* 178.

[751] See *Offit Enterprises v Coega Development* 2010 4 SA 242 (SCA) para 15; Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 16.

[752] *Administrator Transvaal v Van Streepen* 640/88 1990 ZASCA 78 47; Slade (2014) *PER/PELJ* 184-185.

[753] See *Offit Enterprises v Coega Development* 2010 4 SA 242 (SCA) para 15. Further, Slade posits that the court could be referring to the broad understanding of "public purpose" when it mentions "the public interest". He suggests further that, when the court stated that expropriation for the benefit of a third party could never be for a public purpose, the court equated "public purpose" with the narrow meaning (governmental purposes). Slade (2014) *PER/PELJ* 185.

deprivation of property and expropriation of property,[754] it was thought that the public purpose requirement as contained in section 25(2)(a) of the Constitution would play an insignificant role in property cases to come.[755] This has not been the case.[756]

The generous judicial interpretation of the public purpose has continued into the Constitutional era.[757] This being the case, it does indeed seem that the broad understanding of the public purpose "leaves very little scope for attributing a non-synonymous meaning to the term public interest in the constitutional context".[758] The only area in which there seems to be no overlap between the concepts is in justifying expropriations for the benefit of a third party.[759]

With the benefit of several more years' worth of judicial engagement with the bifurcated public purpose requirement as contained in section 25(2)(a) of the Constitution, recent scholarship has shown that the distinction between the two concepts does make a practical difference. Slade argues that the distinction takes on practical importance in matters concerning expropriations involving third party transfers.[760] He argues that the distinction becomes even more important in matters involving third party transfers, where the purpose for the expropriation is economic development.[761]

This chapter aims to assess whether a *Maledu*/*Baleni*-type community can be validly expropriated for mining purposes in terms of South Africa's constitutional framework.[762] If it can, then the *Maledu* and *Baleni* judgments read together may inadvertently have rendered similar communities more vulnerable to the expropriation of their land. The purpose of the expropriation in such a case would be to allow a third party to mine the land. The exploitation of mineral resources is a vehicle for economic development. Thus, the distinction between the

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[754] This is considered above in section 6.2.

[755] See Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 5 and Van der Walt *Constitutional Property Law* 458-460.

[756] Van der Walt *Constitutional Property Law* 458-460.

[757] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 16.

[758] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 16.

[759] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 16.

[760] Slade (2014) *PER/PELJ* 173-174.

[761] Slade (2014) *PER/PELJ* 173-174.

[762] And its requirement that an expropriation may only occur if it is in the public interest for a public purpose. Constitution, s 25(2)(a).

public purpose and public interest is relevant in assessing these communities' vulnerability to being expropriated. The meaning and scope of the public purpose requirement in the constitutional era will be made more clear in the discussions below on intrusiveness in expropriations, and expropriations for the benefit of a third party and for economic development.

Given the Constitution's commitment to land reform and the intimate ties between the public interest and land reform,[763] it seems strange to consider that expropriating a *Maledu*/*Baleni*-type community to allow for mining might fall within the ambit of the "public interest". The Constitution's supremacy over expropriation allows for an analysis of the public purpose requirement in terms of economic and social justice.[764] In land reform cases, the term "public interest" is usually assessed in the context of balancing the public interest against private interests.[765]

However, Mostert highlights an irony regarding the public purpose requirement that becomes clear in the social justice context.[766] The public interest was included to enable land reform, which is clearly in the realm of social justice.[767] However, the public interest is typically used in social justice cases not involving expropriation (such as eviction proceedings and land restitution claims) "to curtail expectations" of what actions can be taken in the name of social justice.[768] Thus, instead of enabling government intervention in the name of social justice, the public interest tends to be used to delineate the boundaries of what may *not* be done in the name of social justice.

Moreover, the public purpose requirement has not featured much in case law on land reform-related expropriations.[769] Rather, it has featured much more frequently in post-constitutional in "run-of-mill expropriation cases".[770] The courts in *Harvey v Umhlatuze Municipality*

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[763] See section 25(4)(a) of the Constitution, which states that "the public interest includes the nation's commitment to land reform".
[764] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 23-24.
[765] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 23.
[766] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 26-27.
[767] See section 6.3.2.1 above.
[768] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 29.
[769] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 29.
[770] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 29.

("*Harvey*")[771] and *Bartsch v Maluti-A-Phofung Municipality* ("*Bartsch*")[772], as in *Van Streepen*,[773] state quite clearly that expropriations for the benefit of a third party cannot be "for a public purpose".[774] However, as Mostert points out, even though these three cases each involved an expropriation with third party transfer, none of the cases resulted in the expropriation being declared invalid on that score.[775] Instead, the expropriations were held to be valid because they were "in the public interest".[776] None of the cases involved expropriation for land reform, but rather where the purpose of the expropriation was linked to economic development.[777] In these cases, particularly in *Bartsch*, "the public interest" seems to be used to allow expropriations that would have failed under "the public purpose", notwithstanding its consistently applied broad meaning.[778] The judicial approach to the public interest in this regard is why expropriation from a *Maledu*/*Baleni*-type community for mining may be considered valid within the constitutional framework.

6.3.3 Expropriation for the Benefit of a Third Party

It is generally accepted that the public interest contains the narrower concept of the public purpose.[779] Notwithstanding the Constitution's partial definition of the term "public interest",[780] the precise scope of the public interest requirement remains rather unclear.[781] This lack of clarity has been evident in a number of post-constitutional cases, in which expropriations involving third party transfer were considered.

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[771] *Harvey v Umhlatuze Municipality* 4387/08 2010 ZAKZPHC 86.

[772] *Bartsch Consult v Mayoral Committee Maluti-A-Phofung Municipality* 4415/2008 2010 ZAFSHC 11 (4-2-2010).

[773] *Administrator Transvaal v Van Streepen* 640/88 1990 ZASCA 78 47.

[774] *Bartsch Consult v Mayoral Committee Maluti-A-Phofung Municipality* 4415/2008 2010 ZAFSHC 11 (4-2-2010) para 5.2; *Harvey v Umhlatuze Municipality* 4387/08 2010 ZAKZPHC 86 103-105.

[775] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 30.

[776] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 30.

[777] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 30.

[778] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 30.

[779] Slade (2014) *PER/PELJ* 188.

[780] Section 25(4)(a) of the Constitution states that "the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources".

[781] Slade (2014) *PER/PELJ* 188-189; Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 29.

Slade[782] points out that there are two kinds of expropriations involving third party transfers, which need to be distinguished from one another.[783] On the one hand, there are expropriations where the property will be transferred to a private third party so that it can carry out a public purpose.[784] On the other hand, there are expropriations where the property will be transferred to a private third party for their use and benefit.[785] The latter situation is considered below in relation to the *Bartsch* decision. The court in *Offit* referred to the former situation when it stated that "[t]here is no apparent reason why the identity of the party undertaking the relevant development as opposed to the character and purpose of the development should determine whether it is undertaken for a public purpose".[786]

Slade argues convincingly that therefore, where the expropriated property is transferred to a third party to enable them to conduct a public purpose, the expropriation may be lawful.[787] This is desirable, as many private or semi-private entities now carry out what would have been considered state functions in the past.[788] However, it would be a stretch to consider a mining right holder or applicant as undertaking a state function, and so *Offit* would not allow for an expropriation in the case of a *Maledu* or *Baleni* type situation.

The difficulty with the judicial engagement with the public purpose requirement is well illustrated in the *Bartsch* judgment.[789] In *Bartsch*, the court considered an expropriation of property to build a public road and "undertake ancillary purposes".[790] The expropriated owner objected to the expropriation on the basis that part of the property was to be transferred to a

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[782] Slade (2014) *PER/PELJ* 188-194; Slade *Expropriation for Economic Development* 60-65.

[783] Slade *Expropriation for Economic Development* 51; Slade (2014) *PER/PELJ* 189.

[784] *Offit Enterprises v Coega Development Corporation* 2010 4 SA 242 (SCA) para 15 makes reference to such a circumstance.

[785] Slade (2014) 17(1) *PER/PELJ* 189.

[786] The court is emphatic in stating that it cannot "be said in our modern conditions and having regard to the Constitution that an expropriation can never be for a public purpose merely because the ultimate owner of the land after expropriation will be a private individual or company." *Offit Enterprises v Coega Development Corporation* 2010 4 SA 242 (SCA) para 15.

[787] Slade (2014) *PER/PELJ* 189-190.

[788] *Offit Enterprises v Coega Development Corporation* 2010 4 SA 242 (SCA) para 15; Slade (2014) *PER/PELJ* 192.

[789] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 29-30.

[790] *Bartsch Consult v Mayoral Committee Maluti-A-Phofung Municipality* 4415/2008 2010 ZAFSHC 11 (4-2-2010) para 5.

private third party to build a shopping complex.[791] Thus, the expropriatee argued that the expropriation was invalid because only part of the property needed to be expropriated to build the road.[792] This speaks to the issue of intrusiveness in expropriations which is dealt with in further detail in the following section.[793] The expropriatee also argued that the expropriation was unlawful because it was unreasonable to expropriate property for it to be transferred to another private third party to build a shopping complex.[794] They argued that an expropriation in such a circumstance "could not be said to be for a public purpose".[795]

Although the court in *Bartsch* stated that "the act of dispossessing the applicant for the benefit of a third party… can never be characterised as a public purpose",[796] it nevertheless found that the expropriation was valid.[797] It stated that an expropriation for the benefit of a third party could "could qualify as a valid act of expropriation if it could be brought within the realms of an act performed in the public interest".[798] Here is an illustration of Mostert's point, mentioned above,[799] that the public interest seems to be used in constitutional-era "run-of-mill" expropriation cases[800] to allow expropriations to proceed which would otherwise have been unlawful.[801]

The judicial decision in *Bartsch* is deeply problematic because it provides a precedent for allowing an expropriation on the basis that it will lead to economic development or stimulate

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[791] *Bartsch Consult v Mayoral Committee Maluti-A-Phofung Municipality* 4415/2008 2010 ZAFSHC 11 (4-2-2010) para 5.

[792] *Bartsch Consult v Mayoral Committee Maluti-A-Phofung Municipality* 4415/2008 2010 ZAFSHC 11 (4-2-2010) para 5.

[793] See also Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 19; Slade (2014) *PER/PELJ* 189; Slade *Expropriation for Economic Development* 109.

[794] *Bartsch Consult v Mayoral Committee Maluti-A-Phofung Municipality* 4415/2008 2010 ZAFSHC 11 (4-2-2010) para 1.5.

[795] *Bartsch Consult v Mayoral Committee Maluti-A-Phofung Municipality* 4415/2008 2010 ZAFSHC 11 (4-2-2010) para 1.5.

[796] *Bartsch Consult v Mayoral Committee Maluti-A-Phofung Municipality* 4415/2008 2010 ZAFSHC 11 (4-2-2010) para 5.2.

[797] *Bartsch Consult v Mayoral Committee Maluti-A-Phofung Municipality* 4415/2008 2010 ZAFSHC 11 (4-2-2010) para 5.3.

[798] *Bartsch Consult v Mayoral Committee Maluti-A-Phofung Municipality* 4415/2008 2010 ZAFSHC 11 (4-2-2010) para 5.2.

[799] See section 6.3.2.2 above.

[800] Expropriation cases not relating to land reform or transformative justice goals. See Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 29-30.

[801] See Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 29-31.

the economy.[802] Following *Bartsch*, it seems completely possible to expropriate from a community like the Lesetlheng or Umgungundlovu for the purposes of mining. As the court in *Maledu* points out, mining is a major contributor to the national economy and is also a major employer.[803] These factors are likely to weigh in favour of the expropriation being "in the public interest".[804] To add to the confusion, in both the *Baleni* and *Maledu*, the communities were divided on the matter of allowing mining to go ahead.[805] The reasoning in *Bartsch* would certainly lead one to conclude that, given the economic advantages of mining for at least part of the community, an expropriation may be justifiable if obtaining a mining right is otherwise impossible.

6.3.4 Intrusiveness in Expropriations

This research now turns to the intrusiveness or "less invasive means" issue, mentioned above.[806] The intrusiveness issue can arise in situations more property is expropriated than is strictly required to carry out the stated purpose for the expropriation.[807] *Bartsch* illustrates this version of the intrusiveness issue in expropriation cases.[808] In this case, the expropriatee asked the court to find the whole of the expropriation to be invalid on the basis that more property was being expropriated than was necessary to carry out the stated purpose of the expropriation; namely to build a road.[809] The court here rejected the expropriatee's argument based on intrusiveness and found the expropriation valid because the expropriator had acted in good faith.[810] In any event, this iteration of the intrusiveness issue does not directly relate to the focus of this section: whether a *Maledu*/*Baleni*-type community being expropriated for mining purposes can be said to fulfil the public purpose requirement.

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[802] Slade *Expropriation for Economic Development* 117; Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 31.

[803] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 5.

[804] Following the economic development-oriented approach followed in *Bartsch v Mayoral Committee Maluti-A-Phofung Municipality* 4415/2008 2010 ZAFSHC 11 (4-2-2010) paras 5.2-5.3.

[805] See *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 12 & *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 18.

[806] See section 6.3.1 above.

[807] Slade *Expropriation for Economic Development* 133.

[808] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 20.

[809] *Bartsch v Mayoral Committee Maluti-A-Phofung Municipality* 4415/2008 2010 ZAFSHC 11 (4-2-2010) para 5.

[810] *Bartsch v Mayoral Committee Maluti-A-Phofung Municipality* 4415/2008 2010 ZAFSHC 11 (4-2-2010) para 5.3.

The intrusiveness issue can also arise where the purpose of the expropriation could be achieved without expropriating the property.[811] Here, the question is whether the existence of a less invasive means of achieving a purpose (that does not require expropriation) is a valid defence against an ensuing expropriation.[812] This argument was raised in *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* ("*Erf Bryntirion*")[813] and *eThekwini Municipality v Spetsiotis* ("*eThekwini*").[814] *Erf Bryntirion* concerned an expropriation to secure state residences, amongst others.[815] *eThekwini* involved an expropriation for a development for hosting the 2010 FIFA Soccer World Cup.[816] Neither court found the expropriation to be invalid because means other than expropriation were available to achieve the stated purpose.[817] Instead, the courts were both ready to defer decisions about the need for an expropriation to the expropriating organ of state.[818]

Mostert and Slade criticise the judicial decisions in *Erf Bryntirion* and *eThekwini* for not scrutinising the invasiveness issue more fully.[819] They argue that section 25(1) of the Constitution's prohibition against arbitrary deprivation of property requires scrutiny in this regard.[820] Be that as it may, these two cases show that courts are still willing to defer decisions regarding the legitimacy of the purpose for an expropriation to the organ of state effecting the expropriation.[821] This deference is problematic as, if anything is to be learned from South Africa's history, it is that "courts cannot allow the state to play loose and fast with private property".[822]

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[811] Slade *Expropriation for Economic Development* 133.

[812] Slade *Expropriation for Economic Development* 132.

[813] *Erf 16 Bryntirion v Minister of Public Works* 2010 ZAGPPHC 154.

[814] *eThekwini Municipality v Spetsiotis* 2009 JOL 24536 (KZD).

[815] The facts for the case are set out in *Erf 16 Bryntirion v Minister of Public Works* 2010 ZAGPPHC 154 paras 3-17.

[816] *eThekwini Municipality v Spetsiotis* 2009 JOL 24536 (KZD) paras 1-3.

[817] *Erf 16 Bryntirion v Minister of Public Works* 2010 ZAGPPHC 154 paras 63-64; *eThekwini Municipality v Spetsiotis* 2009 JOL 24536 (KZD) para 13.

[818] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 22.

[819] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 22; Slade *Expropriation for Economic Development* 142.

[820] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 22; Slade *Expropriation for Economic Development* 142.

[821] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 22.

[822] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 32.

Moreover, the decisions in *Maledu* and *Baleni* effectively foreclose the possibility of raising the intrusiveness of the expropriation as a defence against the expropriation. What the cases have done instead is to strip away the alternative legal routes to extracting minerals from the land in question. The court in *Baleni* held that the communities' consent is required to grant a valid mining right over their land.[823] Therefore, if consent is withheld, mineral deposits will not be lawfully extracted while the community holds rights over that land. The only way to obtain a valid mining right over that land will be to expropriate the land in terms of the MPRDA.[824]

Subsequent to *Maledu*, a mining right holder must exhaust the dispute resolution mechanisms contained in section 54 of the MPRDA before they can have recourse to alternative judicial relief.[825] Moreover, a mining right holder cannot continue mining operations while the section 54 process is underway.[826] Section 54(5) provides for a recommendation of expropriation in certain circumstances: "If the Regional Manager, having considered the issues raised by the holder… and any representations by the owner or occupier of land… concludes that any further negotiation may detrimentally affect the objects of this Act… the Regional Manager may recommend to the Minister that such land be expropriated in terms of section 55". Thus, the *Maledu* decision has ensured that expropriation will be considered in such disputes.[827] By the time a recommendation of expropriation is made under section 54(1) of the MPRDA, expropriation of property will be the only way to extract the mineral deposits.

6.4 Conclusion

At face value, it seems that expropriating a *Maledu*/*Baleni*-type community would in general be contrary to the objectives of the Constitution, given the constitutional commitment to

[823] The order is given at *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 84.

[824] Section 55(1) of the MPRDA allows for expropriation of land or rights in land to further the objectives of the Act, as set out in section 2 of the MPRDA.

[825] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 86.

[826] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 86.

[827] See Chapter 4, section 4.4.

securing tenure.[828] The core objective of the constitutional dispensation was to take South Africa from "the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice" to "a future founded on the recognition of human rights, democracy, and peaceful co-existence and development opportunities for all South Africans".[829] This bridging function is particularly visible in the constitutional property clause,[830] as it attempts to reconcile the tension between the interests of historically disadvantaged persons,[831] and the interests of property owners who have benefitted from the previous dispensation.[832]

At first glance, it would seem contrary to the transformative ideals of the Constitution to expropriate a community like the Lesetlheng or Umgungundlovu to allow for mining. However, this chapter has shown that in terms of the current constitutional jurisprudence surrounding expropriation of property, it is likely possible to expropriate a *Maledu/Baleni*-type community for the purposes of mining. Particularly, the difficulty the courts evidently have in conceptualising the public interest requirement has meant that expropriation in a *Maledu/Baleni*-type circumstance could be considered lawful.[833] Mining is an important contributor to the economy, brings a good deal of employment, and is potentially very lucrative.[834] This means that, if a legal means of extracting those minerals exists, it is likely to be used. This renders communities like the Lesetlheng and Umgungundlovu vulnerable to being expropriated for the purposes of mining.

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[828] The constitutional commitment to securing tenure is affirmed in *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 51. Section 25(4)(a) of the Constitution states explicitly that the public interest includes promoting land reform.

[829] Constitution of the Republic of South Africa Act 200 of 1993 ("Interim Constitution") Postamble; P Langa "Transformative Constitutionalism" (2006) 3 *Stellenbosch LR* 351 352.

The historical origins of customary communities' vulnerability in relation to expropriation, land and tenure security, and the mining industry, were discussed in Chapters 2 and 3 of this research.

[830] The property clause is contained in section 25 of the Constitution. Section 28 of the Interim Constitution was an early version of the property clause.

[831] Like the communities represented in the *Maledu* and *Baleni* cases.

[832] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 60.

[833] See sections 6.3.2.2, 6.3.3 and 6.3.4 above.

[834] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 (2) SA 1 (CC) para 6.

CHAPTER 7: THE IMPACT OF THE PROPOSED CONSTITUTIONAL AMENDMENT

7.1 Introduction

During the writing of this thesis, proposed amendments to the constitutional expropriation framework have been placed before the National Assembly. The proposed amendment to the constitutional property clause – section 25 of the Constitution[835] – will allow for land to be expropriated at nil compensation in certain circumstances, most notably to allow for land reform.[836] The proposed constitutional amendment deals with the compensation requirement for expropriation.[837] Even if some version of this amendment is eventually passed, it would be unlikely to influence the course of the argument pursued here. The compensation requirement describes a necessary consequence of a constitutionally valid expropriation.[838] Compensation is a *consequence* of an expropriation, whereas this research considered particularly the *prerequisites* for valid expropriations.[839] Therefore, the constitutional jurisprudence considered in this research remains good law.

The Amendment Bill was ultimately rejected by the National Assembly in December 2021, as it failed to garner the required two-thirds majority to effect a constitutional amendment.[840] The South African State already has a number of constitutionally sanctioned options available to effect transformation through the removal of property from a private owner for redistributive purposes.[841] It is proposed that the current construction of section 25 already allows the State to expropriate property for transformative purposes at nil compensation or compensation (well)

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[835] Constitution of the Republic of South Africa, 1996.

[836] See Constitution Eighteenth Amendment Bill B18-2021.

[837] As contained in section 25(2)(b), and given content by section 25(3) of the Constitution.

[838] H Mostert "The Poverty of Precedent on Public Purpose/Interest: An Analysis of Pre-Constitutional and Post-Apartheid Jurisprudence in South Africa" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans, LCA Verstappen L (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 1.

[839] Particularly, the requirement that an expropriation be "for public purpose" or "in the public interest" as contained in section 25(2)(a) of the Constitution. See Chapter 6, section 6.3.

[840] Since the Bill was rejected, it has lapsed. No subsequent efforts to put forward an alternative Bill dealing with nil compensation for expropriation has so far been put forward. Parliamentary Monitoring Group "Constitution Eighteenth Amendment Bill (2021)" *PMG* <https://pmg.org.za/bill/913/> (accessed 21-12-2022).

[841] These are canvassed in section 7.3 below.

below market value.[842] Indeed, the preamble to the Constitution Eighteenth Amendment Bill ("the Amendment Bill") acknowledges that the aim is to "make explicit that which is implicit" within the current construction of the constitutional property clause.[843] Our constitutional jurisprudence regarding expropriation will therefore remain relevant even after section 25's amendment.

7.2 Constitution Eighteenth Amendment Bill

At first glance, it appears that the current construction of the constitutional property clause places an embargo on expropriation effected without compensation.[844] Compensation has generally been set at the market value of the property, with the compensation requirement in the 1975 Expropriation Act being roughly equated with payment of compensation at the market value of the expropriated property.[845] Largely due to the expense of compensating expropriatees at the market value, expropriation was not a preferred mode of achieving land reform.[846]

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[842] See for instance R Hall *The Land Question: What is the Answer?* (2018) public lecture presented on behalf of the Institute for Poverty, Land and Agrarian Studies ("PLAAS") at the University of the Western Cape & AJ van der Walt *Constitutional Property Law* 3 ed (2011) 506, where Van der Walt states that compensation set at nil could be constitutionally sanctioned in certain circumstances. See also NS Terblanche *The challenges to valuers with regard to compensation for expropriation and restitution in South African statutes* (2004) paper presented at the PRRES Tenth Annual Conference 12: "compensation calculated at less than market value (perhaps even at nil value) may be just and equitable. This is particularly likely to be the case where the property in question is a scarce and needed resource, such as land or water rights". See further WJ du Plessis *Compensation for Expropriation under the Constitution* LLD dissertation Stellenbosch University (2009)130-132, which concludes that compensation for expropriation in the land reform context can be well below the market value of the expropriated property.

[843] See Constitution Eighteenth Amendment Bill.

[844] See section 25(2)(b) of the Constitution, which states that "[p]roperty may be expropriated only in terms of law of general application... subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court". Further, ANC MP Phumuzile Ngwenya-Mabila (Chairperson of the Portfolio Committee on Rural Development and Land Reform in the Fifth Parliament (2014 - 2019)) in 2017 stated that "expropriation without compensation is unconstitutional. We need to respect and uphold the Constitution as citizens of this country and, moreover, as members of this House": PoliticsWeb "Malema and the section 25 land debate (full transcript, Hansard): Debate in the National Assembly on possibly amending section 25 of the Constitution, Tuesday, 28 February 2017" *PoliticsWeb* (05-03- 2017) <available https://www.politicsweb.co.za/news-and-analysis/malema-and-the-section-25-land-debate-full-transcr> (accessed 06-06-2019).

[845] Expropriation Act 63 of 1975, s 12(1)(a)(i). See also section 25(2)(b) of the Constitution which states that "Property may be expropriated only... subject to compensation..." read with s 25(3) which provides that "[t]he amount of the compensation... must be just and equitable... having regard to all relevant circumstances, including... the market value of the property".

[846] T Ngcukaitobi & M Bishop *The constitutionality of expropriation without compensation* (2018) paper presented at the Constitutional Court Review IX Conference (02-08-2018). The authors argue at page 2 that compensation at market value in the expropriation context may be a barrier to effective land reform, as it drives up the cost to the State in two ways. First, due to the amount to be paid in compensating the expropriatee and,

The cost associated with the market value-based compensatory requirements as contained in the 1975 Expropriation Act, amongst other considerations, meant that the willing buyer, willing seller model formed the basis of the policy for constitutionally mandated land redistributions.[847] However, the willing buyer, willing seller model was heavily criticised, and government-led land reform efforts have not succeeded.[848] The preamble to the Amendment Bill makes it clear that the issue to which it is responding is the lack of progress in land reform.[849]

The Amendment Bill adds a caveat to the constitutional obligation to pay compensation for expropriation,[850] adding that "where land and any improvements thereon are expropriated for purposes of land reform… the amount of compensation may be nil".[851] The precise circumstances under which nil compensation for expropriation will be acceptable must be set out in national legislation.[852]

The intention behind the amendment to the compensation requirement is not to overhaul the constitutional framework governing expropriation, but rather "to make explicit that which is implicit", i.e. that nil compensation is constitutionally sanctioned in the context of land reform.[853] That nil compensation is already implicit under the current construction of section 25 of the Constitution is dealt with in further detail in the following section.

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second, due to the cost of litigation, should a dispute over the market value arise. See also A Claassens "Compensation for Expropriation: The Political and Economic Parameters of Market Value Compensation" (1993) 9 *South African Journal of Human Rights* 422 422-423; E Lahiff "'Willing buyer, willing seller': South Africa's Failed Experiment In Market-Led Agrarian Reform" (2007) 28 *Third World Quarterly* 1577 1577-1578.

[847] See Lahiff (2007) *Third World Quarterly* 1577-1578. See also BV Slade, JM Pienaar, ZT Boggenpoel & T Kotzé *Submission to Parliament on the review of section 25 of the Constitution of the Republic of South Africa, 1996* (2018) 2, where the authors note that the willing buyer, willing seller principle is not contained in the Constitution.

[848] H Mostert & CL Young "Natural resources as "regulated property": The challenges of resource stewardship in South Africa" in C Godt (ed) *Regulatory Property Rights: The transforming notion of property in transnational business regulation* (2017) 141 158-159; Lahiff (2007) *Third World Quarterly* 11577-1578; Slade et al *Submission to Parliament* (2018) 2.

[849] The preamble to the Constitution Eighteenth Amendment Bill begins with "W[hereas] there is a need for urgent and accelerated land reform in order to address the injustices of the past that were inflicted on the majority of South Africans…".

[850] As contained in the current construction of section 25(2) of the Constitution.

[851] Constitution Eighteenth Amendment Bill, s 1(a).

[852] Constitution Eighteenth Amendment Bill, s 1(c). The legislation that will fulfil these criteria is the Expropriation Bill B23-2020, and is also currently under consideration by the National Assembly. This Bill is discussed further in Chapter 8, section 8.3 of this research.

[853] Constitution Eighteenth Amendment Bill, Preamble.

7.3 Expropriation at Nil Compensation under the Current Constitutional Property Clause

The proposed amendment will not alter the constitutional jurisprudence concerning expropriation significantly. This is because the amendment will not significantly change what is already permissible in terms of section 25 of the Constitution. The current construction of the property clause does not require compensation at market value of the expropriated property in all cases.

7.3.1 Nil Compensation under the Property Clause

The current construction of section 25 could sustain expropriation subject to compensation below the market value of the property,[854] as well as expropriation without compensation.[855] Some argue that "just and equitable" compensation in the expropriation context could mean nil compensation.[856] In other words, expropriation without compensation is an option available to the State which is inherent to the constitutional property clause, as it currently stands.

Currently, section 25 of the Constitution obliges the State to make "just and equitable" compensation to those who have been expropriated of their property.[857] To determine compensation that is "just and equitable", all relevant factors must be taken into account, including those specifically listed in section 25(3).[858] More comprehensive specifications regarding what precisely must be compensated and how compensation is to be calculated are found in the Expropriation Act.[859] Under the Expropriation Act, the market value of the expropriated property plays a central role in determining compensation.[860] However, per the

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[854] Du Plessis *Compensation for Expropriation* 130-132.

[855] Van der Walt *Constitutional Property Law* 506; Constitutional Review Committee "Report of the joint constitutional review committee on the possible review of section 25 of the Constitution" in *Announcements, Tablings and Committee Reports No. 169 – 2018* (15-11-2018) 34.

[856] Van der Walt *Constitutional Property Law* 506; Constitutional Review Committee "Review of section 25" in *Committee Reports* 34.

[857] Constitution, s 25(3).

[858] The factors contained in section 25(3) of the Constitution are: "the current use of the property" (s 25(3)(a)); "the history of the acquisition and use of the property" (s 25(3)(b)); "the market value of the property" (s 25(3)(c)); "the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property" (s 25(3)(d)); and "the purpose of the expropriation" (s 25(3)).

[859] Expropriation Act, s 12; Du Plessis *Compensation for Expropriation* 99.

[860] Expropriation Act, s 12(1)(a)(i).

doctrine of constitutional supremacy, legislation – including the Expropriation Act and any other legislation dealing with expropriation – is valid only to the extent that it is consistent with the Constitution.[861]

The Constitutional Court in *Du Toit v Minister of Transport*[862] stipulated that the supreme values, principles, and standards for lawful expropriations are contained in the Constitution, not the Expropriation Act.[863] To calculate compensation which complies with constitutional standards, the circumstances listed in section 25(3) of the constitutional property clause must be balanced.[864] None of these circumstances is more important than the others.[865] This means that the market value of the expropriated property is just one of the circumstances to be considered when calculating "just and equitable" compensation, and it could be counterbalanced by other considerations.[866]

Determining "just and equitable" compensation cannot be done in the abstract.[867] Section 25(3) of the Constitution's core tenet is that compensation for expropriation should represent an equitable balance between the public interest on the one hand, and the interests of those affected by the expropriation on the other.[868] To achieve this balance, the Constitution requires that all the relevant factors be considered, including – but not limited to – those factors explicitly listed in section 25(3).[869] To determine just and equitable compensation, both the overarching objectives of the Constitution, including the commitment to land reform, as well as the context of the specific expropriation, must be taken into account.[870] Under certain conditions,

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[861] Constitution, s 2; *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 31.

[862] *Du Toit v Minister of Transport* 2006 1 SA 297 (CC).

[863] *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 26.

[864] *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) paras 33-36.

[865] *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 34. However, despite the court's acknowledgement that all the factors listed in section 25(3) must be balanced in determining compensation for expropriation, and that none of these factors is privileged over the others, the Constitutional Court actually applied a test that places market value at the heart of the compensation calculation. The test used by Constitutional Court here was the test set out by the Land Claims Court in *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs* 2000 2 All SA 26 (LCC) paras 3–35.

[866] Du Plessis *Compensation for Expropriation* 100.

[867] Du Plessis *Compensation for Expropriation* 99.

[868] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 50; *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 88.

[869] Du Plessis *Compensation for Expropriation* 99.

[870] Du Plessis *Compensation for Expropriation* 99.

compensation below – or even far below – the market value of the property could therefore be justified.[871]

7.3.2 Limitation of the Right to Compensation under the General Limitations Clause

The right to receive compensation for expropriated property could be limited in terms of section 36 of the Constitution.[872] Section 36 is the general limitations clause, in terms of which rights contained in the Bill of Rights can be justifiably limited. If section 36 does find application to the right to receive compensation,[873] the State could in certain cases justifiably expropriate without compensation.

Section 25 of the Constitution makes explicit mention of the general limitations clause within the context of "land, water and related reform".[874] Section 25(8) reaffirms the constitutional commitment to transformation, stating that none of property clause's provisions may hamper the State's efforts to "redress the results of past racial discrimination". However, any derogation from the provisions of section 25 must be in accordance with section 36(1) of the Constitution.[875] Despite this, Currie, Erasmus and De Waal argue that, given the extent of the internal limitations[876] contained in section 25, section 36 can have no *meaningful* application to this right.[877] On the other hand, Van der Walt argues that the limitations contained in section 25 and section 36 may apply to the right to receive compensation cumulatively.[878] If section 36 does apply to this right, this could allow the State justifiably not to pay compensation for certain expropriations.

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[871] Du Plessis *Compensation for Expropriation* 99-100.

[872] AJ van der Walt *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) 92-98.

[873] As contained in section 25(2)(b) of the Constitution, and given content by section 25(3).

[874] Section 25(8) of the Constitution reads: "No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)."

[875] Constitution, s 25(8).

[876] As contained in sections 25(1)-(3) of the Constitution.

[877] J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* 4 ed (2001) 427; Terblanche *Compensation for expropriation* (2004) 4.

[878] Van der Walt *The Constitutional Property Clause* (1997) 95.

In *Nhlabathi v Fick*,[879] the Land Claims Court ("LCC") stated explicitly that there exist "circumstances where the absence of a right to compensation on expropriation is reasonable and justifiable, and in the public interest".[880] The LCC agreed with Van der Walt's view that the specific limitations contained in section 25(2) and (3) of the Constitution apply cumulatively with the general limitations clause.[881] Applying section 36 of the Constitution to the matter at hand, the LCC ruled that the right to be compensated was justifiably limited in that instance.[882] Therefore, it seems likely that – especially in the land and natural resource reform context – in cases where expropriation at nil compensation is mandated by law, section 36 of the Constitution likely applies to the constitutional property clause.[883]

7.3.3 Scope of the Deprivations Clause

The State could effect a deprivation of property, rather than an expropriation thereof. If it is found that a deprivation of private property does not amount to expropriation, compensation need not be paid for that act.[884] In *Agri South Africa v Minister for Minerals and Energy* ("*Agri SA*"),[885] the majority reasoned that the State did not receive any mineral rights upon the commencement of the MPRDA, but rather acted only as "a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised".[886] Because of the facilitative role of the State and the fact that no beneficial rights were acquired by the State, the act did not amount to an expropriation, but merely a deprivation.[887] Thus, no compensation would be payable.[888] This reasoning could apply equally to the land reform context.

In *Agri SA*, the question was whether the provisions of the MPRDA necessitating the conversion of "old order" rights to "new order" rights amounted to an expropriation of mining

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[879] *Nhlabathi and Others v Fick* 2003 7 BCLR 806 (LCC).
[880] *Nhlabathi v Fick* 2003 7 BCLR 806 (LCC) para 33.
[881] *Nhlabathi v Fick* 2003 7 BCLR 806 (LCC) para 33.
[882] *Nhlabathi v Fick* 2003 7 BCLR 806 (LCC) paras 33-34.
[883] Du Plessis *Compensation for Expropriation* 92.
[884] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 46, 48 & 67.
[885] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC).
[886] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 68.
[887] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 67-68.
[888] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 48, 67-68.

rights.[889] The majority found that the State was not a beneficiary of the new legal framework.[890] This was the case because the State did not acquire any mining rights in terms of the MPRDA, even when the "old order" rights – if not converted – lapsed.[891] In these circumstances, the State acted as no more than a facilitator to foster equitable access to South Africa's mineral resources.[892] Importantly, the majority held that if the State did not acquire any beneficial rights in the property, the deprivation of that property would not amount to expropriation.[893] Because the MPRDA's provisions relating to the conversion of mining rights did not amount to expropriation, the State was not obliged to pay compensation.[894] Therefore, if the State does not acquire beneficial rights in the property, and if it to bring about transformation, the action may amount only to a deprivation of property. If this were the case, the former owner would not be entitled to compensation. This gives the State scope to effect transformation through deprivation of property without having to disburse compensatory funds.

7.3.4 Compensation in Kind

Section 25 of the Constitution's obligation to compensate expropriatees could sustain "compensation in kind" as introduced by Froneman J's minority judgment in *Agri SA* (Van der Westhuizen J concurring). [895] This is a novel mechanism in which compensation for expropriation need not sound in money.[896] Though Froneman agreed with the majority that the appeal should be dismissed, he disagreed with the finding that the MPRDA had not expropriated any rights.[897] He reasoned that though the MPRDA did expropriate mineral rights, they had been replaced with unused "old order" rights granted in terms of the MPRDA.[898] Froneman argued that this replacement satisfied section 25(2)(b) of the Constitution's 'just and equitable' compensation requirement.[899]

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[889] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 2-3.
[890] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 68.
[891] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 68.
[892] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 68.
[893] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 67.
[894] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 67-68.
[895] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 88-90.
[896] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 91.
[897] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 79.
[898] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 79.
[899] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 79.

Froneman argued that where beneficiaries of apartheid policies are expropriated of their property, "just and equitable" compensation must be determined within the context of needing to remedy the injustices which arose from apartheid.[900] In such cases, compensation that is "just and equitable" will not necessarily correspond to the market value of the loss inflicted by the expropriation.[901] Froneman held that the MPRDA's transitional measures for phasing out mineral rights granted under previous mining legislation should be considered "compensation in kind" that satisfies the constitutional "just and equitable" compensation requirement.[902]

7.4 Conclusion

In September 2021, the Constitution Eighteenth Amendment Bill was introduced to the National Assembly. However, the Bill did not receive the requisite two-thirds support and has been rejected.[903] It is therefore unclear when the amendment process will be completed. Regardless, this research will remain relevant even after this amendment comes into effect. Compensation is a required consequence of, not a prerequisite for, a constitutionally valid expropriation.[904] This research has focused on section 25(2)(a) of the Constitution's public purpose and public interest requirement, which is not being amended.

The proposed amendment to section 25 will not substantially alter what is already permissible under the constitutional property clause's current construction.[905] In *Agri SA*, it became apparent that the State has scope to effect transformation through the deprivation of property

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[900] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 89.

[901] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 89.

[902] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 90. Under the MPRDA, mineral rights granted under previous mining legislation (so-called 'old order' rights) had to be converted into new order mining rights. For the conversion from old order to new order rights, various conditions had to be met. If this conversion did take place, old order rights would lapse after one year. Old order rights could not be ceded, leased or alienated in the interim. See *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 2-3.

[903] PMG "Constitution Eighteenth Amendment Bill (B18-2021)" < https://pmg.org.za/bill/913/> (accessed 06-12-2021).

[904] Mostert "Poverty of Precedent" in *Rethinking Expropriation* (2015) 1.

[905] Constitutional Review Committee "Review of section 25" in *Committee Reports* 34. The Committee acknowledged that expropriation without compensation is already permissible under the current construction of section 25. This is reflected in their final recommendations, where it is noted "[t]hat Section 25 of the Constitution must be amended to make explicit that which is implicit in the Constitution, with regards to Expropriation of Land without Compensation, as a legitimate option for Land Reform, to address the historic wrongs caused by the arbitrary dispossession of land...".

without compensation.[906] Further, Froneman J in his minority judgment also raises the possibility that "compensation in kind" would satisfy the constitutional compensation requirement.[907] Moreover, there is a convincing case to be made that that expropriation without compensation, or compensation below market value, is already permissible in terms of section 25 of the Constitution.[908] Beyond this, it is also possible that the right to receive compensation in terms of section 25(2)(b) could be limited through the application of section 36 of the Constitution.[909] If the cost of compensating expropriatees at market value is a serious impediment to reform, there are many options available to the State which do not require a constitutional amendment.

[906] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 67-68.
[907] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 79 & 89.
[908] Van der Walt *Constitutional Property Law* (2011) 506.
[909] Terblanche *Compensation for expropriation* (2004) 3-5.

CHAPTER EIGHT: CONCLUSION

8.1 Introduction

This research has considered the position of customary communities whose land is subjected to a mining or prospecting right, or an application for mining or prospecting rights. Specifically, it has considered whether the decisions in *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* ("*Maledu*")[910] and *Baleni v Minister of Mineral Resources* ("*Baleni*")[911] have rendered communities like the Lesetlheng and Umgungundlovu more vulnerable to being expropriated for the purposes of mining.[912]

This research has shown that the *Maledu* and *Baleni* decisions have rendered communities like those in the cases more vulnerable to being expropriated of their land or rights in land for mining purposes. Given the economic development and opportunities for enrichment that extracting mineral deposits can bring, it is unlikely that those deposits will remain untapped merely because the community opposes mining. South Africa's dark history of using expropriation and prioritising mining over black land rights warns against this.[913]

Communities should be specially protected and empowered, considering this history.[914] Moreover, mining operations on their land should be an opportunity for socio-economic development for such communities.[915] However, in the courts' attempts to empower communities, such communities have been rendered more vulnerable to being expropriated.

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

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

[912] The Lesetlheng Community opposed mining ventures in the *Maledu* case, while the Umgungundlovu Community opposed mining ventures in the *Baleni* case.

[913] As argued in Chapters 2 and 3.

[914] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 35-40.

[915] In keeping with the objectives of the Mineral and Petroleum Resources Development Act 28 of 2002 as contained in section 2 of the Act. Especially, the objective to "substantially and meaningfully expand[ing] opportunities for historically disadvantaged persons, including… 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" (s 2(d)) is pertinent in this regard.

8.2 Argument in Review

This research has shown that communities like the Lesetlheng and Umgungundlovu are now more vulnerable to being expropriated to allow mining to proceed on their land. Part 1 of this research introduced and defined the key concepts and legislation involved in this research. It also placed these concepts and pieces of legislation within their social and historical context. This contextualisation of mineral resource exploitation, expropriation, and land dispossession provides the requisite backdrop for understanding the protective approach taken by the courts in *Maledu* and *Baleni*.

Chapter 2 clarified what is meant by the terms "customary community",[916] "informal rights to land",[917] "expropriation",[918] "deprivation,[919] "consent",[920] and "consultation".[921] It gave an overview of the central tenets of land held under customary law (which is secured by the IPILRA).[922] It also showed that expropriation prior to the advent of the 1975 Expropriation Act[923] was used for the purposes of social engineering in a deeply discriminatory way.[924]

Chapter 3 introduced and contextualised the three major pieces of legislation implicated by this research, namely, the Interim Protection of Informal Land Rights Act ("IPILRA"),[925] the Mineral and Petroleum Resources Development Act ("MPRDA"),[926] and the Expropriation Act.[927] It also introduced the provisions of the IPILRA and MPRDA that the courts in *Maledu* and *Baleni* considered.[928] The chapter showed that black land rights were severely restricted under colonialism and apartheid, and that the IPILRA attempts to respond to this side-lining of

[916] Chapter 2, section 2.2.
[917] Chapter 2, section 2.2.
[918] Chapter 2, section 2.3.
[919] Chapter 2, section 2.3.
[920] Chapter 2, section 2.4.
[921] Chapter 2, section 2.4.
[922] Chapter 2, section 2.2.
[923] Act 63 of 1975.
[924] Chapter 2, section 2.3.
[925] Act 31 of 1996. See Chapter 3, section 3.2.
[926] Act 28 of 2002. See Chapter 3, section 3.4.
[927] Chapter 3, section 3.3.
[928] Section 2 of the IPILRA and sections 54 and 55 of the MPRDA.

indigenous landownership.[929] The Expropriation Act, and its incompatibility with South Africa's Constitution,[930] then became the focus of Chapter 3. This research showed that the Expropriation Act of 1975 is out of step with our constitutional framework,[931] and considered the interpretive methods by which the courts can reconcile the Expropriation Act with the Constitution.[932]

Chapter 3 also spent considerable time setting out the relevant provisions of the MPRDA implicated by the *Maledu* and *Baleni* decisions. Particularly, the dispute resolution procedure as contained in section 54 was laid out.[933] Sections 54 and 55 were set out to clarify how expropriation may occur under the MPRDA.[934] The chapter also considered the historical context to which the MPRDA responds.[935] The history of mineral resource exploitation ought to serve as a caution – the exploitation of South Africa's mineral resources has historically been closely associated with the exploitation of black South Africans.[936] Looking forward, customary communities like those in *Maledu* and *Baleni* ought to be specially protected and empowered in acknowledgement of the historical discrimination against them and their continuing vulnerability.[937]

Part 2 of this research took a closer look at the *Maledu* and *Baleni* decisions and reasoning. Chapter 4 considered the *Maledu* decision, and showed that the court inadvertently invited the option of expropriation of land in the event of a conflict between holders of surface rights and holders of mining rights. The *Maledu* judgment provided that the dispute resolution mechanisms contained in section 54 of the MPRDA must be exhausted before a mining right holder can approach the court for alternative judicial relief.[938] It also provided that mining cannot continue while a section 54 dispute resolution process is underway.[939] Chapter 4

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[929] Chapter 3, section 3.2.2.
[930] Constitution of the Republic of South Africa, 1996.
[931] Chapter 3, section 3.3.1.
[932] Chapter 3, section 3.3.2.
[933] Chapter 3, section 3.4.2.
[934] Chapter 3, section 3.4.3.
[935] Chapter 3, section 3.4.1.
[936] Chapter 3, section 3.4.1.
[937] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) paras 35-40.
[938] Chapter 4, sections 4.3.1 and 4.3.2.
[939] Chapter 4, sections 4.3.1 and 4.3.2.

highlighted the fact that section 54(6) of the MPRDA allows the Regional Manager to prohibit the mining right holder from continuing to mine while there is a dispute and the mining right holder seems to be at fault.[940] The chapter argued that, if mining operations may not run parallel to the section 54 process, section 54(6)'s prohibitive mechanism makes little sense.[941] The chapter also showed that section 54(5) of the MPRDA provides for a recommendation of expropriation.[942] It was therefore argued that the *Maledu* decision has now ensured that expropriation will be considered in circumstances where expropriation might otherwise not have been considered.[943]

Chapter 5 focused on the *Baleni* decision, and demonstrated that the court in this case overlooked the threat of expropriation of land from customary communities for the purposes of mining. The court in *Baleni* held that, in the mining right application process, customary owners and common law landowners are to be treated differently.[944] Customary owners must consent to having a mining right granted over their land, while common law owners must be consulted.[945] Chapter 5 showed that the *Baleni* judgment relied on a mistaken reading of *Agri South Africa v Minister for Minerals and Energy* ("*Agri SA*").[946] This mistake results in the court not taking the threat of expropriation for mining purposes into account.[947] The chapter also showed that the court overlooked the impact and assessment processes required under the MPRDA to apply for a mining right.[948] The chapter questioned the wisdom of separate requirements for customary and common law owners, given South Africa's racially divided history.[949]

Part 3 focused on the constitutional framework for expropriation of land for the purposes of mining. Chapter 6 showed that the current constitutional framework governing expropriation could indeed support expropriation for mining purposes in a *Maledu* or *Baleni*-type context.

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[940] Chapter 4, section 4.4.1.
[941] Chapter 4, section 4.4.1.
[942] Chapter 4, section 4.4.
[943] Chapter 4, section 4.4.
[944] Chapter 5, section 5.3.
[945] Chapter 5, section 5.3.
[946] *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC); Chapter 5, section 5.4.1.
[947] Chapter 5, section 5.4.1.
[948] Chapter 5, sections 5.4.2 and 5.4.4.
[949] Chapter 5, section 5.4.3 and 5.4.4.

Holding a valid mining right over land was considered to be a deprivation of the communities' rights to land in terms of section 2(1) of the IPILRA in both cases.[950] Chapter 6 therefore considered when a deprivation will amount to expropriation.[951] Chapter 6 considered particularly whether expropriation of a *Maledu*/*Baleni*-type community for the purposes of mining could fulfil the requirement that expropriation be "in the public interest" or "for a public purpose".[952] In considering the difference between the two concepts, especially in the context of expropriations involving the subsequent transfer of the expropriated property to a third party, Chapter 6 showed that expropriation for mining could not be "for a public purpose".[953]

However, due to the way in which the courts have engaged with the public interest requirement, it seems that expropriation from a community for the purposes of mining could be considered to be in the public interest.[954] Chapter 6 also showed that the *Maledu* judgment has effectively foreclosed the option of using the existence of a less invasive means of serving the purpose as a defence against expropriation.[955] Communities holding customary rights over land are now, therefore, more vulnerable to having their land or rights in land expropriated for the purposes of mining.

Chapter 7 considered the possible effect of the proposed constitutional amendment on this research. The amendment's primary objective is to allow for expropriation without compensation to further land reform.[956] Although the subject matter of this research has implications for security of tenure – one of the pillars of land reform – expropriation in *Maledu*/*Baleni*-type cases will not be for the purposes of land reform.[957] As such, the constitutional amendment will not affect this research. Another reason for the amendment not having an impact on the issues raised in this dissertation is that compensation for expropriation is a necessary *consequence* for a constitutionally valid expropriation. Because this research focused on whether customary communities are vulnerable to expropriation in *Maledu*/*Baleni*-

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[950] See Chapter 4, section 4.3 and Chapter 5, section 5.3.
[951] Chapter 6, section 6.2.
[952] Chapter 6, section 6.3.
[953] Chapter 6, section 6.3.2.
[954] Chapter 6, sections 6.3.3 and 6.3.4.
[955] Chapter 6, section 6.3.4.
[956] Chapter 7, section 7.2.
[957] Chapter 7, section 7.2.

type contexts in the first place, the proposed amendment will not affect this research. Chapter 7 also showed that the amendment will not substantially alter what is already possible in terms of our constitutional jurisprudence.[958] The Constitution's current construction already contains various methods by which expropriation can occur without paying compensation at market value.[959] In the course of this discussion, the constitutional requirements for compensation were also clarified. The Constitution, both under its current construction and under the proposed amendment, ultimately does not provide any fool-proof protection against expropriation of land held under the IPILRA for the purposes of mining.

8.3 Assistance from the Expropriation Bill 2020?

The most recent attempt to revise South African expropriation culminated in the Expropriation Bill of 2020 being published in October of that year.[960] As of January 2022, the Expropriation Bill is still under consideration by the National Assembly.[961] The most publicised aspect of the 2020 Bill is its provisions concerning expropriation without compensation.[962] This research has not focused particularly on compensation for expropriation. The emphasis has been on communities' vulnerability to being expropriated for mining purposes in light of the *Maledu* and *Baleni* cases. As compensation has been considered a necessary *consequence* of a constitutionally valid expropriation,[963] it is not directly relevant to the question of whether the communities are more vulnerable to being expropriated in the first place. Of course, the amount of compensation that a community can look forward to being paid for expropriated property does influence the community's well-being, but that is beyond the scope of this research. The important point for this research is that being expropriated, regardless of the amount of compensation paid, means that a community is cut off from gaining ongoing benefits from mining ventures on their land.

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[958] Chapter 7, section 7.3.

[959] These are canvassed in Chapter 7, section 7.3.

[960] Expropriation Bill B23-2020 ("Expropriation Bill").

[961] The status of the Expropriation Bill of 2020 can be monitored at Parliamentary Monitoring Group "Expropriation Bill (B23-2020)" *PMG* <https://pmg.org.za/bill/973/> (accessed 10-01-2022).

[962] Expropriation Bill, s 12(3).

[963] H Mostert "The Poverty of Precedent on Public Purpose/Interest: An Analysis of Pre-Constitutional and Post-Apartheid Jurisprudence in South Africa" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans, LCA Verstappen L (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 1.

8.3.1 Clarifications in Section 12

Some aspects of section 12 of the Expropriation Bill – which deals with calculating compensation – do relate to the issue of expropriating a community like the Lesetlheng or Umgungundlovu for the purposes of mining, albeit in clarificatory points. First, section 12(3) makes it clear that land held by an organ of state can be expropriated (by another organ of state).[964] In *Maledu*, the land underlying the dispute was "held in trust for the Bakgatla-Ba-Kgafela community" by the Minister of Rural Development and Land Reform according to the title deed.[965] It may have seemed odd to expropriate property held by an organ of state, and not by a private party,[966] but it is now clear – albeit by implication – that this does not impede expropriation.

Moreover, the Expropriation Bill states that in calculating the amount of compensation to be paid for an expropriation, "the expropriating authority must not… take account of the fact that the property has been taken without the consent of the expropriated owner or expropriated holder".[967] This underscores the point made throughout this dissertation that withholding consent does not impede expropriation. Consent may now be required to grant a valid mining right over land held by a customary community.[968] This may strengthen community land rights in comparison to the rights of mining right applicants.[969] However, consent simply does not affect expropriation, and section 55 of the MPRDA does indeed allow for expropriation of land for the purposes of mining.

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[964] *Maledu v Itereleng Bakgatla Mineral Resources* 2019 2 SA 1 (CC) para 6.

In illustrating the kind of situation that would justify expropriation at nil compensation, section 12(3)(b) of the Expropriation Bill of 2020 states that "[it] may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration".

[965] The land is registered in the name of the Minister of Rural Development and Land Reform. Per the title deed, the Minister owns the land "in trust for the Bakgatla-Ba-Kgafela community". That the land is registered in the name of the Minister is a relic of the South African Development Trust under the Development Land and Trust Act. See Chapter 3, section 3.2.2.

[966] As discussed in Chapter 2, section 2.3, and Chapter 6, section 6.2.

[967] Expropriation Bill, s 12(2)(a).

[968] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 76. See also Chapter 5, sections 5.4.3 and 5.4.4.

[969] Badenhorst & Van Heerden (2019) *SALJ* 314-315.

Section 12 of the Expropriation Bill, therefore, clarifies and reinforces several points made throughout this research. However, none of these clarifications tends to guard against the threat of expropriations of communities like the Lesetlheng and Umgungundlovu for mining purposes.

8.3.2 Clarification for the Public Purpose Requirement?

As was made clear in Chapter 6 of this research, the public purpose requirement is problematic in South African law.[970] The concept of the public interest, in particular, has proven difficult to define. The Expropriation Bill includes definitions of both "public purpose" and "public interest.[971] Unfortunately, this inclusion does not assist in clarifying the meaning of "public purpose" or "public interest", nor does it resolve any of the issues related to the public purpose requirement raised in Chapter 6.[972]

The Expropriation Bill's definition of the public purpose is almost precisely the same as the Expropriation Act of 1975's definition.[973] The Expropriation Bill provides only that the public purpose "includes any purposes connected with the administration of the provisions of any law by an organ of state". The only difference between the Expropriation Act and Bill's definitions is that the 1975 Act uses the plural "purposes".[974] The jurisprudence on what it means to be "for a public purpose" in the expropriation context will therefore remain unchanged.

Regarding the "public interest", the Bill, unfortunately, does not clarify or reconceptualise the term. Section 1 of the Expropriation Bill states that the public interest "includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources in order to redress the results of past racially discriminatory laws or practices". The Expropriation Bill therefore merely adopts the partial definition of the public interest as contained in section 25(4)(a) of the Constitution. Thus, lacking new information, the jurisprudence of, and the problems with, the public interest requirement will remain.

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[970] See Chapter 6, section 6.3.
[971] See Expropriation Bill, s 1.
[972] See Chapter 6, section 6.3.
[973] Compare 1(xiii) of the Expropriation Act, s 1(xiii) and Expropriation Bill, s 1 (Definition "public purpose").
[974] Expropriation Act, s 1(xiii).

Communities such as those in the *Maledu* and *Baleni* cases are therefore still vulnerable to being expropriated for mining purposes.

8.3.3 Definition of Expropriation

The Expropriation Bill commendably incorporates the jurisprudence as laid out in *Agri SA* into its definition of expropriation. The Bill provides that "expropriation'' means the compulsory acquisition of property by an expropriating authority or an organ of state upon request to an expropriating authority, and ''expropriate'' has a corresponding meaning".[975] The principle that, if a right of ownership or exploitation is not acquired by the state, it will not amount to an expropriation was implied in the *Agri SA* judgment.[976] It is helpful to have this definition in our law, as it may prevent further misreading of the *Agri SA*.[977]

8.4 Concluding Thoughts

The Constitution aimed to be "a historic bridge" from "the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice" to "a future founded on the recognition of human rights, democracy, and peaceful co-existence and development opportunities for all South Africans".[978] Social and economic transformation, however, is not a simple matter. The rights and interests of a heterogeneous nation like South Africa simply do not allow for simple solutions. Overall, it seems that the Expropriation Bill will make little difference to the problem set out in this research. The Bill does not provide any new insights into the meaning of the public purpose and the public interest,[979] nor does it provide any additional protective mechanisms which a community like the Lesetlheng or Umgungundlovu community might employ to militate against expropriation for mining purposes.

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[975] Expropriation Bill, s 1 (Definition "Expropriation").

[976] See the discussion of *Agri SA* in Chapter 5, section 5.4.1 and the discussion on distinguishing expropriation from deprivation in Chapter 6, section 6.3.2.2.

[977] Chapter 5, sections 5.3 and 5.4.1.

[978] Constitution of the Republic of South Africa Act 200 of 1993 ("Interim Constitution"), Postamble; P Langa "Transformative Constitutionalism" (2006) 3 *Stellenbosch LR* 351 352.

[979] See section 8.3 above.

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