TOWARDS A MEANINGFUL ENGAGEMENT APPROACH TO MINING-INDUCED DISPLACEMENTS IN SOUTH AFRICA: A LEGAL COMPARATIVE PERSPECTIVE

By

Gaopalelwe Lesley Mathiba (MTHGAO006)

LLB (NWU); LLM *cum laude* (UWC)

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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

Co-supervisor:

Dr Louie van Schalkwyk

Senior Lecturer, Department of Construction Economics and Management, Faculty of Engineering and the Built Environment, University of Cape Town

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EPIGRAPH

problem

"Now, imagine this: you are asleep in the safety of your home. Without warning the door is smashed in - armed thugs hustle you from your house without the chance to take even a few simple belongings. Outside the streets are swarming with police and you can only watch as your home is bulldozed to the ground. All around you the same thing is happening to your neighbours and soon the community you once lived in is no more."

Centre on Housing Rights and Evictions

COHRE, Geneva *Achieving housing for all* (2005) 2

solution

"A mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents."

Sachs J

Sachs J, *Port Elizabeth Municipality v Various Occupiers* (2004) 12 BCLR 1268 para 39

CUT-OFF DATE

The research for this study was concluded on 31 January 2023. The study reflects the legal position in South Africa and Ghana as to this date. Therefore, any later political, social or legal developments have not been considered.

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NOTE ON REFERENCING

The citation and referencing style adopted in this thesis generally complies with the *Stellenbosch Law Review Writing, Style and Referencing Guide*. In the first instance where I refer to a source, I provide its full reference details as per the guide. I thereafter utilise an abridged reference format throughout. The full details of each source cited and consulted are provided in the bibliography.

DEDICATION

In loving thoughts and memory of my dearly departed mother

Dibakatsatsi Gloria Mathiba

(1966 - 2003)

For she is *thee woman* who prepared and inspired me to endure the path that has taken me through to this moment. I will always love and cherish you to the power of infinity mom!

To my dear wife, Tshiamo Mathiba, and beautiful daughter, Warona Mathiba, whose unwavering love and support inspired me to stay the course and endure the rough yet enriching experience of developing this thesis, especially during the final stages.

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- The Research Office of Rhodes University for the staff research grant for the year 2021. I appreciate.

I wish to further indicate that the opinions expressed and conclusions arrived at in this thesis are entirely mine and should not be attributed to any of the above institutions.

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During the course of this study, I worked at three different universities in different capacities at varying times, and I got the opportunity to meet, interact, share and learn from various colleagues. In 2020, when I started, I was a full-time doctoral researcher under SARChI: MLiA at UCT. Between late 2020 and early 2022, I was a lecturer in the Law Faculty at Rhodes University (Rhodes). In the second quarter of 2022, I joined the University of South Africa (UNISA) College of Law as a lecturer. At the point of completion, I had returned to UCT as a senior lecturer in the Law Faculty. That said, I would like to express my sincerest gratitude to both my current and former colleagues who went out of their way to support my resolve on this mission. Special mention must be made of Professors Mamokgethi Phakeng, Danwood Chirwa, Lawrence Juma, Caroline Ncube and Charlene Lubaale, as well as Dr Aubrey Manthwa and

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And, once again, to the all wise and infinitely loving God do I reserve my deepest gratitude.

Gaopalelwe Mathiba

Cape Town, January 2023

ABSTRACT

A few decades ago, it might have been fair to argue that because mining activity is intrinsic to the country's economic growth and development, then everything else negative about mining should just be excused as a 'necessary evil' or 'acceptable collateral damage'. But not now. One of the negative impacts of mining activity is displacement of people. Gaining access to a mineral resource requires displacing local communities to make way for mining operations. This phenomenon is known as mining-induced displacement. In South Africa, Ghana and elsewhere, mining-induced displacements often result in the loss and damage of both tangible and non-tangible assets belonging to the displaced persons. These include homes, livestock, valuable resources, cultural sites, productive lands, social structures, tenure security over traditional lands and livelihoods. With mining-induced displacements, there is also a risk that displaced persons may find themselves homeless, marginalised, jobless and without access to their sustained livelihoods while having lost social cohesion and a sense of belonging. All these have negative bearing not only on the socio-economic realm of those affected, but cultural and moral interests as well. Beyond all these realities, there is not much we know about how and the extent to which meaningful engagement remedy - a dynamic adjudicative strategy devised by the South African courts - may present a solution to the unresolved issues around mining-induced displacements; how the courts have protected the vulnerable against evictions through this remedy; and how such protection could potentially be extrapolated to cover mine-affected communities against displacements in this context.

That said, this thesis is an attempt at establishing the potential relationship between meaningful engagement and displacements in mining law. The thesis seeks to answer the overarching research question: *How robust and consultative is the regulatory framework in addressing mining-induced displacements in South Africa and Ghana, and to what extent are these frameworks complied with in practice?* As far as could be established, there has not been any comprehensive research undertaken to establish the potential nexus between meaningful engagement and displacement within the broader context of mining law in South Africa and Ghana. As such, this thesis advances the proposition that one way of looking at the problem of mining-induced displacement is by considering how the application of meaningful engagement remedy may be extended into mining law to address this unabated problem.

The study makes several findings, at a broader level, on how consultative (akin to meaningful engagement) are regulatory frameworks on mining-induced displacements in the two examined jurisdictions. It is found that both jurisdictions have varying degrees of legal protection for the

mine-affected communities against displacements. It is also found that there are notable international law norms and standards against displacements that may be instructive to and offer the best frame of reference from which the examined jurisdictions may improve their domestic response to the problem. The stronghold and novelty of this thesis lies in it being the first and by far the most comprehensive analytical research on the potential normative link between meaningful engagement as an adjudicative strategy and mining-induced displacement as a socio-economic and human rights issue from a comparative perspective with a spotlight on Ghana and South Africa; as well as in identifying and analysing more efficient legal mechanisms in international law to deal with the problem.

KEYWORDS

mining-induced displacement;

meaningful engagement;

consultation;

consent;

mine-affected community;

South Africa;

Ghana

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHPR	African Commission on Human and Peoples' Rights
AU	African Union
CC	Constitutional Court
CHRAJ	Commission on Human Rights and Administrative Justice
CSR	Corporate Social Responsibility
DMRE	Department of Mineral Resources and Energy
ESR Review	Economic and Social Rights Review
FPIC	Free, Prior and Informed Consent (Consultation)
GC	General Comment
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IDPs	Internally Displaced Persons
IFC	International Finance Corporation
ILO	International Labour Organization
IMF	International Monetary Fund
IPILRA	Interim Protection of Informal Land Rights Act 31 of 1996
IFC	International Finance Corporation
HRLR	Human Rights Law Review
ME	Meaningful Engagement
MPRDA	Mineral and Petroleum Resource Development Act 28 of 2002
NDP	National Development Plan
OHCHR	Office of the High Commissioner for Human Rights
PAJA	Promotion of Administrative Justice Act 3 of 2000

PELJ	Potchefstroom Electronic Law Journal
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
RMEC	Resettlement Monitoring and Evaluation Committee
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPR/PL	Suid-Afrikaanse Publiekreg / South African Public Law
SAYIL	South African Yearbook of International Law
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
SAHRC	South African Human Rights Commission
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

PART A: INTRODUCTION AND BACKGROUND

CHAPTER ONE
INTRODUCTION

1.1. Introduction

In 2008, the Constitutional Court developed the innovative concept that continues to wield significant influence on the South African approach to evictions and displacements.[1] This development occurred in the case of *Olivia Road*,[2] where the City of Johannesburg sought an order evicting about 400 occupiers from two buildings in the inner city[3] which the City authorities had declared unsafe for habitation.[4] The occupiers, in turn, opposed the application.[5] The apex court, exercising discretionary jurisdiction, then issued an interim order enjoining the parties "to engage with each other meaningfully … in an effort to resolve the differences" before the eviction order could be finalised and executed.[6] Following this judgment, the meaningful engagement concept has since gained currency in the discourse around the adjudication of eviction matters,[7] protection and enforcement of socio-economic rights.[8] In moving this discourse forward, this study considers the meaningful engagement concept as its central object. The context of this consideration is forced evictions and displacements of the often-vulnerable customary communities to make way for mining operations in South Africa.

The meaningful engagement concept is affirmed in literature as a constitutional imperative with procedural and substantive mechanisms.[9] These mechanisms provide temporary relief to those

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1 Terms such as 'evictions' and 'displacements' are often used interchangeably. See B Terminski *Mining-Induced Displacement and Resettlement: Social Problem and Human Rights Issue - A Global Perspective* at http://indr.org/wp-content/uploads/2013/04/B.-Terminski-Mining-Induced-Displacement-and-Resettlement.pdf (accessed 18 April 2020). My view is that these terms have different means that must be observed, as explained in chapter two.

2 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC), hereafter '*Olivia Road*'.

3 *Olivia Road* (2008) para 1.

4 *Olivia Road* (2008) para 1.

5 *Olivia Road* (2008) para 1.

6 *Olivia Road* (2008) para 5.

7 S Liebenberg "Participatory approaches to socio-economic rights adjudication: Tentative lessons from South African evictions law" (2014) 32 *Nordic Journal of Human Rights* 312-330. See introductory chapter in M Pieterse *Rights-based Litigation, Urban Governance and Social Justice in South Africa: The Right to Joburg* (2017).

8 Especially the right of access to adequate housing in section 26 of the Constitution of the Republic of South Africa, 1996. S Liebenberg "Remedial principles and meaningful engagement in education rights disputes" (2016) 19 *PELJ* 1-43; S Van der Berg "Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance" (2013) 29 *SAJHR* 376-398.

9 Liebenberg (2014) *Nordic Journal of Human Rights* 312-330; B Ray "Engagement's possibilities and limits as a socio-economic rights remedy" (2010) 9 *Washington University Global Studies Law Review* 399; L Chenwi

facing forced evictions and displacements.[10] The concept is further conceptualised as an important democratic enterprise.[11] Needless to say, the scholarly opinion varies widely on the effectiveness and applicability of this concept in various contexts.[12] Another point of contention is whether the courts have so far been consistent in faring with the application of this concept.[13] As a case in point, for instance, Landau observes that "there are real questions about the general usefulness of the engagement remedy, at least as it is currently used by the South African Constitutional Court."[14] However, this study is not concerned with the latter inquiries. In this respect, the work of Saul is illuminating.[15] Saul problematises what he terms the "jurisprudential inconsistency" in the application of the meaningful engagement doctrine by the Constitutional Court.[16] The current study seeks to explore how and to what extent can this concept be extrapolated and proceduralised as a potential solution to tackle the global phenomenon of forced evictions and displacements of rural communities in account of mining developments.[17] This is a significant yet largely unexamined gap in the mining practice and policy development literature. For this reason, the study contends that there is a critical need for a robust mechanism and regulation of mining-induced displacements in South Africa and that meaningful engagement, if properly integrated, can be one of the mechanisms to be employed in addressing the phenomenon.

& S Liebenberg "The constitutional protection of those facing eviction from bad buildings" (2008) 9(1) *ESR Review* 12; B Ray "Occupiers of 51 Olivia Road: Enforcing the right to adequate housing through engagement" (2008) *HRLR* 703; B Ray "The eviction model: How *Grootboom* turned into strong-form review" Presentation at the New York Law School (16 November 2014); L Chenwi & K Tissington *Engaging Meaningfully with Government on Socio-Economic Rights – A Focus on the Right to Housing* (2010) 9; C Bundy "Land, law and power: Forced removals in historical context" in C Murray & C O'Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 3–12 and the report compiled by the Centre on Housing Rights and Evictions (2005) *Any Room for the Poor? Forced Evictions* (2005).

[10] Temporary relief in that the approach precedes a final order of court, as in *Olivia Road*.

[11] G Muller "Conceptualising 'meaningful engagement' as a deliberative democratic partnership" in S Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2011) 300.

[12] This arguably includes the mining sector context. Liebenberg engages the opportunities and pitfalls of this doctrine in the broader spectrum of human rights. S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement"' 2012 (12) *African Human Rights Law Journal* 1-29.

[13] D Landau "The reality of social rights enforcement" (2013) 53 *Harvard International Law Journal* 190-247.

[14] Landau (2013) 198.

[15] Z Saul *Developing a Community Engagement Model as a Normative Framework for Meaningful Engagement During Evictions* (unpublished LLD thesis, University of the Western Cape, 2016).

[16] Saul (2016) 7-8.

[17] South African Human Rights Commission (SAHRC) Report *National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa* (2018). The report is available online at https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf (accessed 06 April 2020).

Considering that mining-induced displacement is not an issue peculiar to the South African context, this study took a resolve to adopt Ghana which has for many years grappled with the same phenomenon as a comparator jurisdiction.[18] Thus, the study has a legal-comparative element for several reasons outlined later in the chapter, including to establish whether one country could learn from another about the regulation of the mining-induced displacement and could incorporate good practice norms into its domestic system. Further, the Ghanaian and South African priorities pertaining to the regulation of mining-induced displacements are linked to almost the same historical predispositions in their respective contexts. In the subsequent paragraphs, a background to and explanation of the research title is provided and the problem is identified. So are the questions that the study examines. The objectives of the study and the study hypothesis are outlined. Lastly, the course of inquiry of the study is mapped out and the adopted research methodology[19] is explained.

1.2. Background and explanation of the research title

Development projects, particularly mining operations, are the major hotbeds for numerous human rights violations across the world.[20] Where mining operations are anticipated, forced resettlements and large-scale evictions are most likely.[21] Forced displacements have both short and long term effects on the livelihoods and socio-economic well-being of the affected parties and their local communities.[22] This is a major problem in the global mining industry,[23] to which

[18] Part 1.9.

[19] RD Leedy *Practical Research Planning and Design* (1993) 8.

[20] United Nations Commission on Human Rights Resolutions 1993/77 and 2004/28. In her report (Fact Sheet No. 25/Rev.1), the Special Rapporteur on Forced Evictions observes that "[e]very year, millions of people around the world are threatened by evictions or forcibly evicted, often leaving them homeless, landless, and living in extreme poverty and destitution." This occurs everywhere across the world. JR Owen & D Kemp "Mining-induced displacement and resettlement: A critical appraisal" (2015) 87 *Journal of Cleaner Production* 478.

[21] United Nations Economic Commission for Africa "Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regimes" 49 available at http://www.africaminingvision.org/amv_resources/AMV/ISG%20Report_eng.pdf (accessed 29 March 2020).

[22] TE Downing *Avoiding New Poverty: Mining-Induced Displacement and Resettlement* (2002). The widely accepted position is that communities that were holders of land rights under customary law systems constitute 'indigenous communities'. A Barratt & A Afadameh-Adeyemi "Indigenous peoples and the right to culture: The potential significance for African indigenous communities of the Committee on Economic, Social and Cultural Rights' General Comment 21" (2011) 11 *African Human Rights Law Journal* 563.

[23] J Du Plessis "The growing problem of forced evictions and the crucial importance of community-based, locally appropriate alternatives" (2005) 17 *Journal of Environment and Urbanization* 123. United Nations Habitat *Report on Forced Evictions Global Crisis, Global Solutions* (2004) available at https://unhabitat.org/sites/default/files/download-manager-files/Forced%20Evictions%20%2C%20Global%20Crisis%2C%20Global%20Solutions.pdf (accessed 06 February 2020).

South Africa (and Ghana) is no exception,[24] despite being hailed for its thriving democracy and progressive Constitution.[25] In 2018, the South African Human Rights Commission (SAHRC) released a report on the social, environmental and economic impacts of the mining industry developments on the locally-affected communities.[26] The report documents evidences of the impoverishment effects of the mining industry practice towards the vulnerable communities across the country.[27] This is a serious concern which this study seeks to address. While mining activities boost the economy of the country significantly,[28] their impact on the directly affected communities by displacements and evictions are far-reaching and should not be left unattended.[29] The effects of mining in these communities spread across social, cultural,[30] economic and environmental aspects.[31] Despite the repercussions of mining operations on the livelihoods, the emerging patterns have revealed that mine-affected communities are often denied the opportunity to contribute and engage meaningfully in the decisions pertaining to developments that have an effect of getting them displaced from their lands.[32]

The cause of the problem is arguably the gaps in the primary legislation for the mining sector i.e. the Mineral and Petroleum Resources Development Act[33] on stakeholder consultation *vis-*

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[24] SAHRC Report (2018).

[25] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13(4) *Planning Theory Journal* 428.

[26] SAHRC Report (2018) 16.

[27] Centre for Environmental Rights "New SAHRC report calls authorities, mining industry to order" (2018) https://cer.org.za/news/new-sahrc-report-calls-authorities-mining-industry-to-order (accessed 19 April 2020).

[28] Van der Schyff E *Property in Minerals and Petroleum* (2016) 1. See also Badenhorst PJ, Mostert H & Dendy M "Minerals and Petroleum" in WA Joubert & JA Faris (eds) *The Law of South Africa 18* 2nd ed (2007) para 1; Taušová M et al "The importance of mining for socio-economic growth of the country" (2017) 22 *Acta Montanistica Slovaca* 359. See also *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* (CCT265/17) [2018] ZACC 41 para 5; Antin D "The South African Mining Sector: An Industry at a Crossroads" *Hanns-Seidel-Foundation*, December 2013, available at *https://southafrica.hss.de/fileadmin/user_upload/Projects_HSS/South_Africa/170911_Migration/Mining_Report_Final_Dec_2013.pdf* (accessed 07 February 2020).

[29] SAHRC Report (2018) 16.

[30] In *Daniels v Scribante & Another* 2017 (4) SA 341 (CC) para 2, the Constitutional Court stated that the security of tenure is an indispensable pivot to the right to human dignity and ancestral identity. F Fanon *The Wretched of the Earth* (1963) 43, cited in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (1) BCLR 53 (CC) para 1.

[31] The UN reported, quite correctly, that "forced eviction, when undertaken unlawfully, is one of the most egregious human rights abuses". UN-Habitat *Report on Forced Evictions Global Crisis, Global Solutions* (2004) 2.

[32] This study argues that lack of adequate controls encourages the private sector to carry on with these unjust practices against powerless communities, 'corporate bullying'. The displaced communities often receive low compensations for their lost properties and destroyed livelihoods.

[33] Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

à-vis meaningful engagement and the absence of sector-specific regulations in this regard.[34] The Department of Mineral Resources and Energy (DMRE) acknowledges that the "MPRDA has no explicit provisions for resettlement."[35] Strangely, this omission thrives in the current constitutional dispensation centered on, among others, meaningful consultation and public participation in advancing human rights.[36] Therefore, this study problematises the inadequacies of the MPRDA and the absence of sector-specific regulations on mining-induced displacements and forced evictions in South Africa.

The study proceeds from the premise that to achieve a comprehensive regulation and robust sector practice to protect the communities against displacements, evictions and other threats, it is important to develop a regulatory framework that is based on meaningful engagement between the government, companies, communities and other relevant parties.[37] The evidence of an urgent need to address community displacements to make way for mining expansions and new developments through such a framework has already received an early indication and motivation in three significant judgments. Two of these judgments are of the Constitutional Court and are *Bengwenyama Minerals v Genorah*;[38] *Maledu and Others v Itereleng Bakgatla*

[34] GC Shaffer & MA Pollack "Hard vs. Soft Law: Alternatives, complements, and antagonists in international governance" (2010) 94 *Minnesota Law Review* 707-709.

[35] MPRDA: Draft Mine Community Resettlement Guidelines, 2019 (GG 42884, No: 1566).

[36] Section 33, Constitution & the Promotion of Administrative Justice Act 3 of 200 (PAJA). C Hoexter *Administrative Law in South Africa* 2nd ed (2012) 363.

[37] See the introductory remarks in the *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (2019) 23 at https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_0.pdf (accessed on 10 April 2020). S Rugege "Land reform in South Africa: An overview" (2004) 32(2) *International Journal of Legal Information* 283; G Budlender "The constitutional protection of property rights" in G Budlender, J Latsky & T Roux (eds) *Juta's New Land Law* (2000) 1-3; T Kepe & R Hall "Land redistribution in South Africa: Towards decolonisation or recolonisation?" (2018) 45 *South African Journal of Political Studies* 128-137; A Van der Walt "Property rights, land rights and environmental rights" in D Van Wyk, J Dugard, B De Villiers & D Davis *Rights and Constitutionalism: The New South African Legal Order* (1995) 479 and generally M Chaskalson "The property clause: Section 28 of the Constitution" (1998) *South African Journal of Human Rights* 131-39; H Mostert *Mineral Law: Principles & Policies in Perspective* (2012) 33, as cited by the Constitutional Court in *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) BCLR 212 (CC) para 3; E Van der Schyff "South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals" (2012) 64 *New Contree* 131-153.

[38] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2011] 4 SA 113 (CC) (hereafter "*Bengwenyama*").

Mineral Resources and Another;[39] and *Baleni and Others v Minister of Mineral Resources and Others*.[40] For context purposes, a brief summary of these cases is provided below.[41]

First, the dispute in *Bengwenyama* concerned the lawfulness of the granting of prospecting rights to a company (Genorah), under the MPRDA, on the land owned and lawfully occupied by a community in the district of Sekhukhuneland.[42] The community challenged the allocation of these rights basing its contentions on several irregularities that were noted in the process. Among those contentions, only two are of particular relevance to this study, namely: whether there was proper consultation by Genorah with the community in terms of MPRDA; and whether the DMRE was required to allow the community to engage meaningfully before awarding the prospecting rights to Genorah.[43] On both issues, the Constitutional Court ruled in favour of the community. The court placed more emphasis on the significance of prior consultation with the community before an award of the prospecting rights can be made.[44]

Secondly, in *Maledu*,[45] the dispute centered on the lawfulness of an order evicting the Lesetlheng community from the Wigelspruit farm it occupied. An application for an eviction order was brought by a mining company that was awarded a prospecting right and later mining right under the MPRDA.[46] The Constitutional Court had to balance these two competing rights, namely; on the one hand, the right of the community to occupy the farm which they and their predecessors-in-title had occupied for nearly a century[47] and; on the other, the right of the holder of the prospecting and mining rights to mine on the farm in question.[48] The primary argument by the community was that it was not "consult[ed] in the prescribed manner",[49] and

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[39] *Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2019] 1 BCLR 53 (CC); 2019 (2) SA 1 (CC) (hereafter "*Maledu*").

[40] *Baleni & Others v Minister of Mineral Resources & Others* (73768/2016) [2018] ZAGPPHC 829 (hereafter "*Baleni*").

[41] Part 5.4.

[42] *Bengwenyama* paras 1-4. T Humby "The Bengwenyama Trilogy: Constitutional Rights and the fight for Prospecting on Community Land" (2012) 15(4) *PELJ* 166.

[43] *Bengwenyama* (2011) para 4.

[44] The Constitutional Court indicated that the object of prior meaningful engagement with the community "must surely be to see whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's rights to use the property is concerned." See *Bengwenyama* (2011) paras 65 & 66.

[45] This case was first heard in the High Court: North West Division in Mafikeng and appealed first at the Supreme Court of Appeal, where leave for appeal was refused.

[46] *Maledu* (2019) para 11.

[47] *Maledu* (2019) para 4.

[48] *Maledu* (2019) paras 4; 11 & 14.

[49] *Maledu* (2019) para 66.

arguably meaningfully, before the awarding of the mining right to the company by the DMRE. The Court subsequently ruled in favour of the community and held that it "must be given sufficient notice of and be afforded a reasonable opportunity to participate … where a decision to dispose of their rights to land is to be taken."[50]

Last, drawing from the Constitutional Court's pronouncement in *Maledu*, the High Court in *Baleni* ruled that "the full and informed consent" of the uMgungundlovu community,[51] whose rights in land are protected under the IPILRA,[52] was a mandatory requirement before a mining right could be granted to the company[53] under the MPRDA.[54] Meaningful engagement with mine-affected communities is strongly being recognised by the courts as an important precondition for granting of mineral rights. The common effect of these judgments is that a moratorium can be brought successfully against an awarded mineral right if the affected community can rise in opposition that it was not first engaged in a meaningful way.[55] This engagement prerequisite embodies the duty to consult on mining companies and an obligation to ensure the latter on the DMRE before it can grant the mineral right.[56] This arrangement exists in an uncharted policy terrain, with no comprehensive regulatory model to facilitate how it should unfold. Therefore, this study's immediate objective is to attend to this unchartered policy terrain and close the gap.

1.3. Problem statement

The upsurge in the mining-induced displacements of communities in recent years and the apparent need to develop a more formal consultative framework have been brought to the fore in South Africa. Although there are semblances of community 'consultation' requirements within the MPRDA provisions in South Africa, the existing legal framework is generally inadequate in a number of aspects, thereby creating an ad hoc system with no defined conceptual and legal basis for a compulsory mining community engagement in cases of possible displacements. In fact, the broader policy framework governing the mining landscape in South Africa is problematic. Some of these include several conceptual difficulties,[57] lack of

[50] *Maledu* (2019) para 97.
[51] *Baleni* (2018) para 84.
[52] Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA).
[53] *Baleni* (2018) para 4.
[54] *Baleni* (2018) para 84.
[55] *Bengwenyama* (2011) para 63; *Maledu* (2019) paras 78 & 79.
[56] *Bengwenyama* (2011) para 68.
[57] A Heyns "Mining community development in South Africa: A critical consideration of how the law and development approach the concept 'Community'" (2019) 12(2) *Law and Development Review* abstract.

capacity for change,[58] weak governance,[59] poor oversight and a lack of proper enforcement of the regulations.[60] Owing to these issues, the mining companies have been able to evade compliance with most policy requirements.[61]

For this study, the focus lies in the shortcomings of the provisions on meaningful participation of mining communities in relation to large-scale displacement projects affecting them. It often appears that communities in weak socio-economic circumstances are not always seen as fully-fledged stakeholders equal to the major social groups who benefit from mining developments. The specific concerns of communities displaced by mining development projects in South Africa are mainly characterised by deep social divisions, injustices and marginalisation from the mainstream of society. The decisions with negative socio-economic effects are inevitable to any mining activity. One of these effects is forcing local communities to resettle and abandon their communal lands to make way for mining.[62] For almost two decades,[63] mass displacements owing to mining developments have had adverse effects on some communities across the country.[64] These include cultural and social breakdowns, adverse health effects, economic risk exposure, loss of land and livelihoods; and the exhumation of graves.[65] Owen and Kemp point out that this issue "is steadily emerging as one of the global mining industry's most complex challenges."[66]

With that in mind, this study problematises the lack of robustness of the MPRDA and the lack of a specific set of regulations detailing how consultation *vis-à-vis* meaningful engagement with local communities affected by mining-induced displacements should take place. The study

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[58] See 1.3.5, Green Paper for Public Discussion *Minerals and Mining Policy of South Africa: Green Paper* (1998) at https://www.gov.za/documents/minerals-and-mining-policy-south-africa-green-paper (accessed on 11 April 2020).

[59] L Muswaka "An analysis of the legislative framework concerning sustainable mining in South Africa" (2017) 31(1) *Speculum Juris* 37-38.

[60] See introductory remarks in a *White Paper: A Minerals and Mining Policy for South Africa* (1998) https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperminingmineralspolicy2.pdf (accessed 10 April 2020). See also Muswaka (2017) *Speculum Juris* 37.

[61] Mandela Institute (University of the Witwatersrand) *Public Regulation and Corporate Practices in the Extractive Industry: A South-South Advocacy Report on Community Engagement* (2017) 19-21.

[62] Terminski *Mining-Induced Displacement and Resettlement: Social Problem and Human Rights Issue - A Global Perspective* (2013) 3; and Downing *Avoiding New Poverty: Mining-induced Displacement and Resettlement* (2012).

[63] Since the enactment of the MPRDA in 2002.

[64] SAHRC Report (2018) 16-22.

[65] SAHRC Report (2018) 16-22 & 60-61.

[66] JR Owen & D Kemp "Can planning safeguard against mining and resettlement risks?" (2016) *Journal of Cleaner Production* 1.

acknowledges that some MPRDA provisions exist in community consultation. The problem, however, is the lack of clarity of these provisions,[67] as well as their implementation. While South Africa lacks in this regard, other countries such as Ghana may provide some useful insights into good policies and practices of addressing the problem.[68] The paucity of scholarship on this issue also suggests that this aspect is the most downplayed and neglected domestic policy issue that needs to be confronted and addressed head-on. There is no comprehensive literature engaging at length with the impact of mine-related evictions on communities in South Africa and exploring the potential solutions to the same.[69] This is despite significant evidence pointing to a considerable number of mine resettled communities across the country.[70] This is alone problematic.[71]

The study argues that it is the persistence of this knowledge gap that continues to stifle opportunities for improvements in mining-induced displacement policy and practice in South Africa. A further argument is that greater attention ought to be paid in developing this policy aspect too, as a distinct albeit integrated mining imperative that fits within the bigger scheme of things in the sector practice and policy formulation.

1.4. Making a case for regulating mining-induced displacements and evictions

Why such an urge for appropriate regulation of mining-induced displacements and evictions in South Africa? Any poorly regulated matter is undoubtedly problematic, a ticking time bomb to explode eventually and justify why it should be regulated. Resettling communities to make way

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[67] Only two provisions in the MPRDA, sections 5 & 10 (Consultation with interested and affected parties) make mention of 'consultation'. However, the section lacks clarity. For instance, despite its heading being suggestive of consultation with interested and affected parties, it has no explicit instruction to mining companies to conduct community consultation. Owing to this gap, most mining companies have been treating community consultation as a box-ticking exercise, leading to negative outcomes as highlighted in case law discussed above.

[68] Part 1.11.

[69] There are two most cited seminal works in providing a global perspective in this regard. Downing (2002) and Owen & Kemp (2015).

[70] SAHRC Report (2018).

[71] The study acknowledges that significant empirical research is well documented, albeit at the international level and narrowed to specific countries, on the trends around meaningful consultation with affected groups during development projects. MM Cernea & HM Mathur (eds) *Can Compensation Prevent Impoverishment? Reforming Resettlement Through Investments* (2008); HM Mathur & D Marsden *Development Projects and Impoverishment Risks: Resettling Project-Affected People in India* (1998) and World Bank *Involuntary Resettlement Sourcebook: Planning and Implementation in Development Projects* (2004). The same can also be said with research outputs that engaged the impacts of poor resettlement management practices across various jurisdictions, see for example A Oliver-Smith (ed) *Development And Dispossession: The Crisis of Forced Displacement and Resettlement* (2009) and AK Biswas & C Tortajada (eds) *Impacts of Large Dams: A Global Assessment* (2012).

for development-driven projects, especially mining operations, is a "growing global crisis".[72] It is certainly an unsettling experience to humankind, a special form of social disruption.[73] A review of literature affirms that this "is not a problem that will go away in the foreseeable future."[74] It is thus important to explore what could potentially be the solutions and interventions to avert the persistence of this problem, particularly in South Africa.[75] In most cases of mining-related displacement and resettlements,[76] affected communities are denied the opportunity to participate through meaningful engagements on how this disruptive process should unfold.[77] Instead, they are often resettled involuntarily from the lands they have occupied for generations.[78] The Special Rapporteur of the Human Rights Council on the rights of indigenous peoples reports that indigenous communities in most African countries "retain strong spiritual links with the plants, trees and animals on their lands and protecting their [ancestral] lands is a sacred duty."[79] Unfortunately, many communities continue to be denied the opportunity to observe this sacred practice. Displacements disconnect them inherently and abruptly from their sacred dwellings, oftentimes even resulting in the exhumation of graves,

[72] B Wilmsen & M Webber "Displacement and resettlement as a mode of capitalist transformation: Evidence from China" in J Singer & S Price (eds) *Global implications of development, disasters and climate change: Responses to displacement from the Asia Pacific* (2016) 62. I Satiroglu & N Choi (2015). *Development-induced displacement and resettlement: New perspectives on persisting problems* (2015) giving a global snapshot of this problem and its impact.

[73] TE Downing & C Garcia-Downing "Routine and dissonant cultures: a theory about the psycho-sociocultural disruptions of involuntary displacement and ways to mitigate them without inflicting even more damage" in A Oliver-Smith (ed) *Development and Dispossession: The Crisis of Displacement and Resettlement* (2009) 225–254.

[74] HM Mathur "Resettling people displaced by development projects: Some critical management issues" (2006) 36(1) *Journal of Social Change* 36.

[75] Due to time constraints and lack of financial resources, this study is unable to engage this problem at a global level. It would be unrealistic to make such an attempt here.

[76] This constitutes the author's observation.

[77] The study argues that the main cause of this problem is poor crafting of the MPRDA provisions concerning community consultation, and also the lack of comprehensive regulations in that regard.

[78] One typical case study in point is the resettlement of the Dingleton community to the nearby small town called Kathu in the Northern Cape to make way for Kumba Iron Ore mine expansion. See generally DP Mouton "The power of stories from within the Dingleton community relocation" (2016) 2(1) *Stellenbosch Theological Journal* 305–319. M Curtis *Precious Metal: The Impact of Anglo Platinum on Poor Communities in Limpopo, South Africa* (2008), https://www.actionaid.org.uk/sites/default/files/doc_lib/angloplats_miningreport_aa.pdf (accessed 10 April 2020).

[79] The Special Rapporteur on the Rights of Indigenous Peoples in her 2016 Annual Report (2016) discussion point no.: 15 at http://unsr.vtaulicorpuz.org/site/index.php/en/documents/annual-reports/149-report-ga-2016 (accessed 11 April 2020).

destruction of their hard-earned properties, loss of identity,[80] and loss of hope and purpose.[81] These vulnerable communities are not adequately compensated for their cultural,[82] social and economic losses to be able to re-establish themselves and restore their livelihoods elsewhere.[83] Several studies have shown consistently that most development-induced evictions and displacement projects lead to undesirable outcomes for the affected communities,[84] which are in most cases already disadvantaged economically. These studies are not merely scholarly articulations of theory, they document field reports of what is happening on the ground. For South Africa, as will be discussed,[85] the failed mining-induced resettlement project worth mentioning is that of the Dingleton community in the Northern Cape, among others.[86]

The regulation of mine-induced displacements and evictions has not enjoyed a sustained research focus in South Africa.[87] The traces of its mention in few scholarly works show that it is often treated as an afterthought and an incidental point featuring in a 'by the way' manner into the broader discussion of something else.[88] In this regard, this study is intentional about

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[80] A Verhoef & M Rathbone "A theologically informed ontology of land in the context of South African land redistribution" (2015) *Journal of Theology for Southern Africa* 167.

[81] This is why scholars such as P Hanna & F Vanclay "Human rights, indigenous people and the concept of free, prior and informed consent" (2013) 31 *Journal of Impact Assessment & Project Appraisal* 146-157, have been advocating for the adoption of free, prior and informed consent for development-induced displacements.

[82] The graves were relocated for mining operations at Ga-Pila village in Limpopo. See Curtis (2008) *Precious Metal* 2.

[83] For instance, the Dingleton community resettlement in the Northern Cape left people impoverished. See Mouton (2016) *Stellenbosch Theological Journal* 305–306.

[84] F Vanclay "Project-induced displacement and resettlement: From impoverishment risks to an opportunity for development?" (2017) 35(1) *Journal of Impact Assessment and Project Appraisal* 3-21. See also Scudder T "Development-induced community resettlement" in Vanclay F & Esteves AM (eds) *New directions in Social Impact Assessment: Conceptual and methodological advances* (2011) 186-201; Price S "Is there a global safeguard for development displacement" in Satiroglu I & Choi N (eds) *Development-induced displacements and resettlement: New perspectives on persisting problems* (2015) 127-141; Van der Ploeg L & Vanclay F "A tool for improving the management of social and human rights risks at project sites: The human rights sphere" (2017) 142(4) *Journal of Cleaner Production* 4072.

[85] Chapter five.

[86] Mouton (2016) 305–306.

[87] In other countries such as Ghana, India and Canada, this issue is actively engaged in academic discourses. See AB Adam, J Owen & D Kemp "Households, livelihoods and mining-induced displacement and resettlement" (2015) 2(3) *Journal of the Extractive Industries and Society* 581-589; R Mares "Corporate responsibility and compliance with the law: A case study of land, dispossession, and aftermath at Newmont's Ahafo project in Ghana" (2012) 117 (2) *Business and Society Review* 233-280; D Szablowski *Transnational Law and Local Struggles: Mining, Communities, and the World Bank* (2007). See also Allard International Justice and Human Rights Clinic *Deviations and Double Standards: Canadian Mining Practices at Home and Abroad* (2019) at http://www.allard.ubc.ca/sites/www.allard.ubc.ca/files/uploads/IJHR/deviations_and_double_standards_final.pdf (accessed on April 2020).

[88] BN Shongwe *The Impact of Coal Mining on the Environment and Community Quality of Life: A Case Study Investigation of the Impacts and Conflicts Associated with Coal Mining in the Mpumalanga Province, South Africa* (MPhil thesis University of Cape Town, 2017) 63 & 83; KT Resane "The mining-induced displacement

breaking new ground and bringing about a shift in this regard. The significance of this desired shift in perspective is to encourage academics, policymakers, developers and practitioners in the sector to have a better understanding of the importance of this aspect and to be comprehensive when dealing with policy issues around the management of mine community displacements and evictions. This shift is also intended to demonstrate that the regulation of mining-induced displacements and evictions are secondary to none, but a stand-alone and equally important policy aspect in its own right. Against this background, it is evident that a case exists that the serious socio-economic and cultural impacts of mine related displacements and evictions require robust regulatory approach that is based on meaningful engagement with vulnerable mining communities. One major entry point in developing a desired sector policy is to evaluate its adequacy. Thus, certain themes and indicators will constitute an evaluative framework against which the South African and Ghanaian legal framework on mining-induced displacements and its robustness will be tested. These include:

i. the institutional and structural arrangements for monitoring and supervising resettlement projects in policies;
ii. the degree of clarity on the extent of community engagement and participation in the process;
iii. the extent to which the courts in both jurisdictions have protected surface land rights of the affected mine communities;
iv. human rights considerations in relation to the inclusivity of vulnerable groups such as women i.e. gender equity imperative;
v. the determinants of compensation payable; financial flows, resettlement project funding arrangements and contingencies;
vi. the overall state of the legal framework's conformity with international best practices, especially the norms and standards outlined in the World Bank, United Nations (UN) and the International Finance Corporation (IFC) resettlement policy guidelines.

As will become apparent, one of the two examined jurisdictions will be found to be providing better legal protection against displacement than the other. For instance, South Africa may be found to be offering a better legal protection than Ghana in some thematic areas, and vice versa in some other themes. Thus, South Africa may be better than Ghana in theme one, and Ghana be better than South Africa in theme two. This variance should not be viewed as contradictory.

and resettlement: The church as a leaven and ecclesiology in context's response" (2015) 71(3) *HTS Teologiese Studies/Theological Studies* 1-8.

In this way, the jurisdiction that is found to be offering better protection in most thematic areas, would be the jurisdiction with an improved legal protection in overall. The themes guiding this analysis are based upon the preliminary research,[89] that identified them as the most common and recurring points of interest in this topic.[90]

1.5. Research question

In light of the above exposition, this study seeks to answer the following overarching research question: How robust and consultative is the regulatory framework in addressing mining-induced displacements in South Africa and Ghana, and to what extent are these frameworks complied with in practice?

The following sub-questions will be explored in answering the above overarching research question:

a) From a descriptive appraisal of theory, what does the mining-induced displacement phenomenon generally entail; what it does not entail; and to what extent does it affect the often vulnerable mine communities (chapter 2)?

b) What is meaningful engagement in the South African context; how has it evolved as a remedy and a constitutional mechanism to enforce rights over the years; how and to what extent have the South African courts interpreted and given it content; and what could its specific role be in addressing mining-induced displacements (chapter 3)?

c) Are there policy interventions at the international and regional level on the matter and, if so, what are the good governance and/or best practice standards on the regulation of mining-induced displacements do they proffer (chapter 4); and to what extent does South Africa and Ghana conform to those standards in their respective domestic frameworks (part of chapter 7)?

d) Within the specific constitutional and legislative frameworks, how and to what extent is the law robust and consultative in regulating mining-induced displacements in South Africa and Ghana, and to what extent have the courts in South Africa and Ghana

[89] On 02 March 2020, the candidate (alongside Prof Hanri Mostert) made a presentation on some of these issues at the consultative workshop organised by the DMRE at its Headquarters in Pretoria. This followed the submission of written comments on the published Draft Mine Community Resettlement Guidelines, 2019 at http://webcms.uct.ac.za/sites/default/files/image_tool/images/357/MLiA_PDFs/MLiA%20COMMENTS%20-%20DRG%20OF%20DMRE%20-%20SUBMITTED.pdf (accessed on 17 April 2020).

[90] See Vanclay (2017) 10 & B Terminski (2015) introduction.

interpreted and given content to the legal frameworks in an attempt to address the phenomenon (chapters 5 and 6)?

e) From a comparative point of view, what are the key areas of similarities and differences in how South Africa and Ghana regulate mining-induced displacements; and what are the best practice standards that could be recommended to each jurisdiction (chapter 7)?

f) Which jurisdiction between South Africa and Ghana has a better regulation of mining-induced displacements compared to the other; and what lessons can a jurisdiction with better regulation offer to the one with poor regulatory framework (chapter 8)?

1.6. Aims and objectives

This study problematises the mining-induced displacement phenomenon. It investigates how the meaningful engagement concept can be adopted and integrated in the mining sector regulatory framework aimed at addressing the phenomenon in South Africa[91] and Ghana. How the study seeks to achieve this objective is two-pronged: First, with a view of understanding the core theoretical underpinnings of the subject matter, the study engages academic literature around mining-induced displacement phenomenon, on the one hand, and the meaningful engagement concept on the other. The idea is to gain a better understanding of the mining sector practice and consultative dynamics involved in the carrying out of mine community resettlement projects. Further, this is done to gain some insights into practical concerns, impacts and challenges that arise from mining-induced displacements in these two countries, but with more emphasis on South Africa.

Secondly, to provide an outlook on the regulation of mining-induced displacements and the critical role of meaningful engagement in the fulfilment of that endeavour in South Africa and Ghana, the study aims to offer a conclusive legal-comparative analysis of the extent to which the legal framework in the two examined jurisdictions is robust and consultative. Further, to establish how and what the courts' attitude has always been in dealing with mining-induced displacements and evictions in the two examined jurisdictions respectively.

[91] While scholarly works exist on how this doctrine finds application in other disciplines such as education law, housing law and socio-economic rights, for mining law it remains an unchartered terrain. See Liebenberg (2014) 312-330, Saul (2016); S Mahomedy *The Potential of Meaningful Engagement in Realising Socioeconomic Rights: Addressing Quality Concerns* (unpublished LLM dissertation, Stellenbosch University, 2019). For education law, see Liebenberg (2016) 1-43; G Twambe *The Impact of the Engagement Principle on the Right to have Access to Adequate Housing: From Reasonableness to Engagement* (unpublished LLM dissertation, University of Pretoria, 2018).

1.7. Significance of the study

This study contributes to academic discourse around the meaningful engagement concept[92] by ascertaining its potential, value and utility in the mining sector. However, the study differs from existing accounts on how this meaningful engagement finds application to forced evictions in South Africa, generally, to the extent that it focuses particularly on an understanding of this concept as it relates to specific context of mining-induced displacements and evictions. It is commonplace that "[t]he state of knowledge around resettlement and mining is poor" and underexplored.[93] This study aims to fill this knowledge gap. It is from the latter aim where this study derives its novelty. Not only that, the study conducts a first of its own exploration of the potential of meaningful engagement as a solution to address mine-related evictions through a comparative analysis of best practices from Ghana.[94] Further, flowing from the legal-comparative analysis, the study emulates the international good governance standards, considerations and exemplary benchmarks that could be of useful nature to the South African government in its pursuit of a more a resilient, robust and consultative regulatory framework on mining-induced displacements and evictions.

The quest to identify key determinants of regulating mining-induced displacements through a robust and consultative framework and recommending those for integration by the examined jurisdictions constitutes an original contribution of this study.[95] The big idea behind this comparative exercise is to identify policy and practice areas that need reform and innovation to better address the mining-induced displacements. The study endeavours to analyse the three important judgments briefly discussed above. These judgments make a clear point that community consultation and engagement are important considerations in arrive at the decision of granting or denying a mineral right. The courts emphasise this point mindful, in part or whole, of the fact that "issues around consultation have been problematic in that there have been no guidelines on how it should be conducted."[96]

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[92] Liebenberg (2014) 312-330; Ray (2010) 399; Chenwi & Liebenberg (2008) 12; Ray (2008) 703; B Ray "The eviction model: How Grootboom turned into strong-form review" Presentation at the New York Law School (16 November 2014); Chenwi & Tissington (2010) 9; Bundy "Land, law and power: Forced removals in historical context" in C Murray & C O'Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 3–12; the report by the Centre on Housing Rights and Evictions (2005).

[93] Adam, Owen & Kemp (2015) 582. Terminski (2013).

[94] Part 1.11.

[95] While Ghana is selected as a comparator, lessons on various aspects from other countries will be drawn where necessary.

[96] DMRE *Guideline for Consultation with Communities and Interested and Affected Parties* (Preamble) available online at https://www.dmr.gov.za/Portals/0/consultation_guideline.pdf (accessed on 16 April 2020).

1.8. Research hypothesis

The central hypothesis for this study is that the meaningful engagement concept can address the prevailing concern of mining-induced displacements in South Africa, like it has proven to be with other ordinary evictions. However, meaningful engagement concept means nothing for the mining sector evictions and displacements if it is not attuned and conceptualised as an implementable strategy to operate in that context. Therefore, novel ideas for strengthening the current regulatory framework should be mapped to achieve this endeavour.

1.9. Delimitation of the study

The purpose of delimiting the study is to maintain focus, with the understanding that literature on meaningful engagement concept, evictions and displacements has great depth and is multi-dimensional and wide ranging. Thus, no single research output could address at once the full range of issues in that regard. As such, the following limitations and caveats are noted:

First, the study is non-empirical.[97] Therefore, the discussions rely on existing literature and do not involve data or information that is to be collected through field work research. However, where such relevant data or information is readily available from work already completed and published, it will be presented in the discussion and indication will be made to that effect.

Second, the study is theoretical. It explores the social, economic and cultural impacts of mining-induced displacements and evictions on the local communities in South Africa and Ghana. On a cautious note, however, this approach should not create the impression that the study would be simply theoretical and thus of little significance in changing the landscape of the mining sector practice in South Africa and Ghana. If foundational concepts and norms lack clarity and precision, management of a problem for resilience and efficiency will be hampered, if not impossible. Therefore, the aim is to demystify and conceptualise meaningful engagement[98] for a better understanding in the South African mining law and sector context.

Third, the study will only focus on the meaningful engagement concept to an extent that it relatable and applicable to mining law[99] in South Africa. This is because South Africa does not

[97] Given this approach, field-based research will therefore not be applicable.

[98] The use of the word 'conceptualising' in this context is to emphasise the in-depth nature of the discourse on various areas that pertain to the topic.

[99] This study does not cover resettlements caused by other factors such as wars, political conflicts and natural disasters. There is overwhelming literature on these types of resettlements. S Price & J Singer (eds) *Global Implications of Development, Disasters and Climate Change: Responses to Displacement from Asia Pacific*

yet have a properly conceptualised and well-developed model of meaningful engagement specifically designed to manage community resettlements and evictions owing to proposed mining operations. Lastly, it is not the primary aim of the thesis to alter the discourse[100] and ideas on meaningful engagement concept,[101] but rather to understand it in the dimension of mining law.

1.10. Research approach and methodology

The research for this study focuses, primarily, on doctrine and theory.[102] This is not to discount emerging trends that favour contextual and interdisciplinary approach.[103] On the contrary, the subject matter of this thesis lends itself well to interdisciplinary perspectives,[104] in that this study seeks to address a social problem in the form of mining-induced displacements. The nature of the problem fuses together the field of law and social sciences i.e. the living conditions of people and reasons or factors accounting for those conditions. This necessitates the adoption of socio-legal approach which enables the study to consider both legal and social constructs and paradigms of the problem.[105] The thesis employs the doctrinal and interdisciplinary

(2016) and R Muggah "Through the Developmentalist's Looking Glass: Conflict-Induced Displacement and Involuntary Resettlement in Colombia" (2000) 13(2) *Journal of Refugee Studies* 133-162.

100 S Van der Berg "Meaningful engagement: proceduralising socio-economic rights further or infusing administrative law with substance?" (2013) 29 *South African Journal on Human Rights* 376-398; B Ray "*Occupiers of 51 Olivia Road v City of Johannesburg*: enforcing the right to adequate housing through 'Engagement'" (2008) 8 *Human Rights Law Review* 703-713; L Chenwi "Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions" (2008) 8 *Human Rights Law Review* 105-137; L Chenwi "A new approach to remedies in socio-economic rights adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others" (2009) 2 *Constitutional Court Review* 371-393; Saul (2016); Mahomedy (2019); Twambe (2018).

101 Landau (2013) 198; Liebenberg (2012) 1-29; Landau (2013) 198; Liebenberg (2014) 312-330; Saul (2016); Ray (2010) 399; Chenwi & Liebenberg (2008) 12 and Ray (2008) 703.

102 A doctrinal legal research approach or method entails an analysis of legal doctrine or concept and how it has been developed and applied. See VM Gawas "Doctrinal legal research method a guiding principle in reforming the law and legal system towards the research development" (2017) 3 *International Journal of Law* 128-12; D Coetsee & P Buys "A doctrinal research perspective of master's degree students in accounting" (2018) 32 *South African Journal of Higher Education* 71; T Hutchinson & N Duncan "Defining and describing what we do: Doctrinal legal research" (2012) 17 *Deakin Law Review* 84; P Chynoweth "Legal Research" in A Knight & L Ruddock (eds) *Advanced Research Methods in Built Science* (2008) 28-38 and AK Singhal & I Malik "Doctrinal and socio-legal methods of research: merits and demerits" (2012) 2 *Educational Research Journal* 252–256.

103 IJ Kroeze "Legal research methodology and the dream of interdisciplinarity" (2013) 16(3) *PELJ* 36. See also T Hutchinson "The doctrinal method: incorporating interdisciplinary methods in reforming the law" (2015) 3 *Erasmus Law Review* 130.

104 Hutchinson (2015) 136; BZ Tamanaha *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (1997) 2.

105 Chapter one.

research methods through a desktop study of all the relevant material.[106] Therefore, the study is mainly constituted of descriptive analysis of the relevant primary (international instruments, resolutions, commissioned reports, national legislation, policies and case law) and secondary sources (books, journal articles, conference papers, dissertations, newspaper articles and any reliable online source) on the concept of meaningful engagement and mining-induced displacements.

Lastly, the study features a legal-comparative element. This element is set to determine how the examined jurisdictions have responded to the problem of mining-induced displacements and what mechanisms they have developed in addressing the problem. These jurisdictions are South Africa and Ghana, The South African courts have always adopted a legal-comparative analysis to resolve issues that enjoy less coverage in the domestic regulatory framework and at certain instance given a directive to the legislature to enact certain laws shaping the future developments.[107] The idea is to use the legal-comparative analysis to draw best-practice lessons to inform law reform proposals for South Africa and to determine what institutional and legal implications are attached to doing so. Effective comparative analysis is that which appreciates "first, a clear and realistic notion of what is being compared; second, an understanding of and interest in the purpose of the comparison … and, finally, techniques of comparison adequate to yield knowledge relevant to [the established purpose]".[108] In this light, the study compares the legal frameworks of South Africa and Ghana pertaining the regulation and management of mining-induced displacements, with particular focus on the aspect of community engagement and participation in the process leading to the granting of a mineral right.[109] A clear framework of what is being compared in this study encompasses various themes. These include, broadly:

i. the general fitness for purpose of the relevant national regulatory framework; the institutional and structural arrangements for monitoring and supervising resettlement projects in policies;

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[106] Any research project is limited by various factors such as time, resources and finances. The same applies to this study.

[107] Section 39(1), Constitution, that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity. equality and freedom; (b) must consider international law and (c) may consider foreign law."

[108] MS McDougal "The comparative study of law for policy purposes: value clarification as an instrument of democratic world order" (1952) 1 *The American Journal of Comparative Law* 29-30.

[109] The candidate argues that although these jurisdictions might have different systems and structures, they have a similar challenge of mining-induced resettlements, as discussed in section 8.1.

ii. the degree of clarity on the extent of community engagement and participation in the process;
iii. the extent to which the courts in both jurisdictions have protected surface land rights of the affected mine communities;
iv. human rights considerations pertaining the inclusivity of vulnerable groups such as women i.e. gender equity imperative;[110]
v. the determinants of compensation payable; financial flows, resettlement project funding arrangements and contingencies;
vi. the overall state of the legal framework's conformity with international best practices, especially the norms and standards outlined in the World Bank, United Nations (UN) and the International Finance Corporation (IFC) resettlement policy guidelines. These themes are based upon the preliminary research that identified them as the most common and recurring points of interest in this topic,[111] and thus the list is not exhaustive.

1.11. Justification for selection of Ghana as a comparator

The management of large-scale mining-related displacements and resettlements is one of the most complex domestic policy issues that remains controversial in both South Africa and Ghana. In each of these examined jurisdictions, the regulatory framework on this issue is designed and implemented differently, with commonalities here and there. For one, the framework is almost comprehensive, robust and well-fitted for purpose, while for the other it is still lacking in several aspects. South Africa, on one side of the spectrum, is grappling with a surging crisis of mining-induced displacements and evictions of mine communities due to inadequate policy framework on the subject.[112] It is only recently (March 2022) that the DMRE showed some effort to attend to this dearth by developing ad hoc guidelines in this regard.[113] These guidelines are not assisting much and it will be argued later that much more is still needed to address this complex issue in a comprehensive manner than through a simple sketch

[110] This includes the poor, children and people living with disabilities.

[111] Vanclay (2017) 10, B Terminski *Development-Induced Displacement and Resettlement: Causes, Consequences, and Socio-Legal Context* (2015) introduction.

[112] SAHRC Report (2018); DMRE *Guideline for Consultation with Communities and Interested and Affected Parties* (Preamble).

[113] GN R1939 *GG* 46125 of 30 March 2022. The immediate problem with these guidelines is that they are not democratically negotiated in Parliament since they are subordinate to the principal legislation, i.e. MPRDA. Not only that, but the guidelines are also not binding, which makes them useless.

of guidelines[114] constituting an unbinding soft-law.[115] On the other side of the spectrum is Ghana which is considered "a mining policy trailblazer" across the African region, with a relatively advanced mineral policy framework compared to South Africa.[116] The study will test this theory. Ghana has passed a theme-specific legislation on various aspects of its mining policy and practice, including community displacements and resettlements,[117] as well as functional institutions to ensure the implementation of these frameworks.[118] With these adequate measures in place, Ghana has been able to manage, though not adequately, its cases of mining-induced displacements.[119] It has to be for this progressiveness that Ghana has been recognised in recent years as "a success story for Africa"[120] by the international community.[121] For these reasons and others that will be delineated later, the choice of comparator is appropriate and fitting. There are considerable variances between the two examined jurisdictions in terms of legal systems, governance structures, political history, economic performances, demographics and other factors, and this provide the study with a wider pool to draw a bigger takeaway from the comparative exercise.

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114 Part 5.3.3.

115 Kabumba highlights that the "idea of 'soft law' is one of the more controversial issues in contemporary … legal discourse" and many other authors have also challenged the validity and utility of this concept stating, among others, that soft laws are not effective and easily enforceable. B Kabumba "Soft Law and Legitimacy in the African Union: The Case of the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the AU Constitutive Act" in O Shyllon *The Model Law on Access to Information for Africa and other regional instruments: Soft law and human rights in Africa* (2018) 166; J Klabbers "The redundancy of soft law" (1996) 65 *Nordic Journal of International Law* 167; L Blutman "In the trap of a legal metaphor: International soft law" (2010) 59 *International and Comparative Law Quarterly* 605; J d'Aspremont "Softness in international law: A self-serving quest for new legal materials" (2008) 19 *European Journal of International Law* 1075.

116 AB Adam *Conceptualizing Household Livelihood Needs in Mining-Induced Displacement and Resettlement: A Case Study from Ghana* (unpublished PhD thesis, University of Queensland, 2019) 9; MK Ayisi "The Review of Mining Laws and the Renegotiation of Mining Agreements in Africa: Recent Developments from Ghana" (2015) 16(3) *Journal of World Investment & Trade* 467-505; T Akabzaa "Mining in Ghana: Implications for National Economic Development and Poverty Reduction" in C Bonnie (ed) *Mining In Africa: Regulation and Development* (2009) 25-66 and T Akabzaa & A Darimani *Impact of Mining Sector Investment in Ghana: A Study of the Tarkwa Mining Region* (2001).

117 JR Owen & D Kemp *The Weakness of Resettlement Safeguards in Mining* (2016) 78-81 at https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/solutions/owen-kemp.pdf (accessed 18 April 2020).

118 Adam (2019) 87 & 100.

119 Owen & D Kemp (2016) 78-81; J Taabazuing et al "Mining, Conflicts and Livelihood Struggles in a Dysfunctional Policy Environment: The Case of Wassa West District, Ghana" (2012) 31(1) *African Geographical Review* 33-49.

120 CS Maher "The Republic of Ghana: A Success Story?" in CE Menifield (ed) *Comparative Public Budgeting: A Global Perspective* (2011) 21-42.

121 AG Abdulai "Ghana: A Success Story and a Model for Africa?" in KA Osei et al (eds) *Contemporary Issues in Management Development in Africa* (2016) 23.

1.12. Course of Inquiry

The study is presented in five parts and eight chapters.

1.12.1. Part A: Introduction and background

Part A is constituted by this introductory chapter which provides a background to the study, identifies the problem and presents the questions to be examined. It also outlines the key objective sought to be achieved by the study, as well as the central hypothesis. At last, it delimits the study, describes the adopted research methodology and charts the course of inquiry.

1.12.2. Part B: Theoretical and conceptual basis

Part B comprises two foundational chapters that set the conceptual and theoretical basis of the study. Chapter two begins by providing a review of the global literature on mining-induced displacements. This is undertaken with a view of establishing the state of knowledge on the subject and to explore how commentators in the field have come to terms with this phenomenon and the extent to which it affects the vulnerable communities.

Chapter three discusses, in general terms, the meaningful engagement concept in South Africa. It traces its jurisprudential developments from how it has been interpreted and applied by the courts to how it eventually found its way into mining law as a proceduralised norm by the courts. With this discussion, the chapter seeks to establish how the concept could conceptually and successfully inform a regulatory framework necessary to address mining-induced displacements. Thus, the chapter concludes with a detailed indication of the potential role the concept could assume in that regard.

1.12.3. Part C: International law perspective

Part C comprises of chapter four which is aimed at reviewing the international and regional instruments that are relevant to displacements and evictions in general and mining-induced displacements in particular. The chapter will identify the best practice standards that the examined jurisdictions could adopt and integrate in their respective regulatory frameworks dealing with mining-induced displacements.

1.12.4. Part D: A Comparative analysis of law and practice

This part considers how the examined jurisdictions fare in terms of regulating mining-induced displacements and evictions, and to determine the extent to which these regulatory frameworks are integrative of meaningful engagement (as conceptualised in chapter three). In doing so, the

study assesses the institutional, structural and regulatory mechanisms that are put in place to achieve the latter in the two examined jurisdictions. Each jurisdiction is examined in its designated chapter i.e. chapter five (South Africa) and chapter six (Ghana) respectively. While it is often ideal to compare certain themes rather than individual jurisdictions, such is not the case with this study because the countries' systems, institutions and terminology vary significantly. It is for this reason that there is chapter seven where a comparative analysis will be made to explore and appraise the key similarities and differences observed from the individually examined jurisdictions in the preceding two chapters.

1.12.5. Part E: Summary, conclusion and recommendations

Part E comprises chapter eight which provides a generalised summary of the study. The research question is also answered on how and to what extent the regulatory framework on mining-induced displacements is robust and consultative in South Africa and Ghana, and whether these frameworks complied with in practice drawing from case law analysis. The chapter then concludes with recommendations on how each examined jurisdiction can improve the resilience of its regulatory framework in addressing mining-induced displacements. Then the last part of this chapter share some insights on related issues that can inform a future research agenda.

PART B: THEORETICAL AND CONCEPTUAL BASIS OF THE THESIS

CHAPTER TWO

THEORETICAL POSITIONING OF MINING-INDUCED DISPLACEMENTS

2.1. Introduction

When communities located in rich mineral deposit areas are relocated and displaced from those areas by mining companies, that occurrence is termed "mining-induced displacement".[122] Mining-induced displacement is a category within the broader concept of development-induced displacements and resettlements (DIDRs).[123] The DIDRs pose multiple human rights violations,[124] several risks on those that stand to be affected by them and they also have enormous negative socio-economic, cultural and environmental effects.[125] And so is mining-induced displacement.[126] The pattern of displacements of communities due to mining developments has long been known to be a serious threat to socio-economic rights.[127] While the extent of this threat has been documented in global literature,[128] specific accounts of South

[122] B Terminski *Development-Induced Displacement and Resettlement: Theoretical Frameworks and Current Challenges* (2013) 6-24 & B Terminski *Mining-induced Displacement and Resettlement: Social Problem and Human Rights Issue (A Global Perspective)* (2012) 2-43.

[123] T Scudder "Development-induced relocation and refugee studies: 37 years of change and continuity among Zambia's Gwembe Tonga" (1993) 6(2) *Journal of Refugee Studies* 123-152; M Cernea "Understanding and preventing impoverishment from displacement: reflections on the state of knowledge" (1995) 8 (3) *Journal of Refugee Studies* 245-264; M Cernea "The risks and reconstruction model for resettling displaced populations" (1997) 25(10) *World Development Review* 1569-1587; M Cernea (ed) *The Economics of Involuntary Resettlement: Questions and Challenges* (1999); M Cernea "Risks, safeguards and reconstruction: a model for population displacement and resettlement" (2000) 35(41) *Econ. Polit.l Wkly* 3659-3678; TE Downing "Creating poverty: the flawed economic logic of the World Bank's revised involuntary resettlement policy" (2002) 12 *Forced Migration Review* 13-14; TE Downing & C Garcia-Downing "Routine and dissonant culture: a theory about the psycho-socio-cultural disruptions of involuntary displacement and ways to mitigate them without inflicting even more damage" in A Oliver-Smith (ed) *Development and Dispossession: the Anthropology of Displacement and Resettlement* (2009) 225-320; J Stanley "FMO Research guide: Development-induced displacement and resettlement" Research Paper (2002) 4; J Koppel-Maldonado "A New Path Forward: Researching and Reflecting on Forced Displacement and Resettlement Report on the International Resettlement Conference: Economics, Social Justice, and Ethics in Development-Caused Involuntary Migration, the Hague, 4–8 October 2010" (2012) *Journal of Refugee Studies*; KJA Thomas "Development projects and involuntary population displacement: The World Bank's attempt to correct past failures" (2002) 41(4) *Population Research and Policy Review* 339-349.

[124] B Pettersson "Development-induced displacement: internal affair or international human rights issue" (2002) 12 *Forced Migration Review* 16-19.

[125] JR Owen & D Kemp "Mining-induced displacement and resettlement: A critical appraisal" (2015) 87 *Journal of Cleaner Production* 478.

[126] Owen & Kemp (2015) 478.

[127] Owen & Kemp (2015) 478.

[128] Pettersson (2002) 16-19.

Africa and Ghana are still relatively limited in scope and rigour.[129] Thus, the objective of this chapter is to review the global literature on mining-induced displacements. This review is undertaken with a view of establishing the state of knowledge on the issue and to establish the extent to which it affects the vulnerable communities across various parts of the world. The review is also undertaken to determine whether the theoretical insights acquired from the global literature could be instructive to, and enrich, the local perception and scholarship insofar conceptualising the mining-induced displacements phenomenon in South Africa is concerned. The immediate arising inclination is that to a great extent, the global literature on the phenomenon could be instructive to and enrich the disciplinary discourse as understood in South Africa and Ghana.

Chapter one[130] observes that there is considerable amount of literature on mining-induced displacements at a global level and it may not be practically feasible to provide a full account of all extant views here. This chapter aims to investigate the state of research around mining-induced displacements and to explore various angles through which this phenomenon impacts those directly affected by it, to identify certain aspects and themes that are associated with the practice or phenomenon of mining-induced displacements. The discussion is strictly limited to identifying common thematic tracks permeating the theory on mining-induced displacement, to the exclusion of any other purpose that is not within the scope of this study. In so doing, the chapter will be feeding into two significant undertakings, namely; to contextualise the research question and to authenticate the observations made in chapter one, that scholarship on mining-induced displacement as experienced in South Africa and Ghana is concerningly limited. Thus, this chapter explains and discusses:

i. the contextual background of mining-induced displacements in examined jurisdictions and elsewhere;

ii. the definitive meaning of mining-induced displacements and related concepts;

iii. the diverse impacts of mining-induced displacements on those affected by them;

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[129] H Mostert & G Mathiba "Mine community displacements and resettlements in South Africa" in N Graham, M Davies & L Godden (eds) *The Routledge Handbook of Property, Law and Society* 1st ed (2022) 61. Please note, the Memorandum of Understanding between myself and my supervisor, as well as obligations attaching to funding I received from the Department of Science and Technology (DST)/National Research Foundation (NRF) through the SARChI Research Chair: Mineral Law in Africa (MLiA), required me to publish from and during my doctoral research. The publication mentioned here is the result of such obligation(s).

[130] Part 1.9.

iv. the aspects and themes associated with mining-induced displacement phenomenon.

2.2. Tracing historical development of mining-induced displacements in the examined jurisdictions and elsewhere

In the previous chapter,[131] it was emphasised that the mining industry is inherently associated with decisions that have significant negative bearing on the environmental, cultural, social and economic constructs of any society they operate within.[132] This chapter observes that contemporary discourse continue to highlight various negative consequences of mining developments in societies.[133] The study is limited to only one negative consequence, namely the forceful removal of rural communities from their homes.[134] In this part, the chapter reflects on the early manifestations to recent occurrences of mining-induced displacements in the examined jurisdictions and elsewhere.

2.2.1. The early manifestations of mining-induced displacements in South Africa & Ghana

The examined jurisdictions have different backgrounds and experiences, in form or magnitude, of mining-induced displacements. The following paragraphs briefly summarise the history and early manifestations of mining-induced displacements in South Africa and Ghana respectively.

2.2.1.1. South African experience

The South African history of mining-induced displacements, stretching over a period of more than a century, is somewhat more extensive when compared to that of Ghana.[135] As far as could be established, the earliest manifestation of mining-induced displacement in South Africa was recorded around the first half of the 20th century with the booming of the country's mineral-driven industrialisation.[136] This resulted in forced relocations of black rural communities from their communal habitats to make way for those mining developments.[137] Notably, this occurred

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131 Parts 1.2; 1.3 & 1.4.

132 Owen & Kemp (2015) 478; Terminski (2013) 6-24; Terminski (2012) 2-43; Pettersson (2002) 16-19 & Downing (2002) 13-14.

133 Terminski (2012) 2-43.

134 Terminski (2012) 2-43 & Downing (2002) 13-14.

135 Chapters five and six.

136 JA Muntingh *Community perceptions of mining: The rural South African experience* (unpublished MBA mini-thesis, North-West University, 2011) 28.

137 M Abel "Long-run Effects of Forced Removal under *Apartheid* on Social Capital" (2015) Working Paper 5 at *https://scholar.harvard.edu/abel/publications/long-run-effects-forced-removal-under-apartheid-social-capital* (accessed on 17 March 2021).

within the wider context of forced removals of black communities from their communal lands by the apartheid administration and its predecessors.[138] In executing the land dispossession project for the benefit of and economic gains for the white minority, the colonial and apartheid regimes had the law and the state's police power at their disposal.[139] Historical archives show that for the period between 1960 and 1982, about 3.5 million black people and households were forcibly removed from their homes and communal lands to uninhabitable places by the apartheid administration with a view of scheduling those lands for mining and other developments to benefit the white minority.[140] These forcible and segregationist removals had pervasive and lasting negative impacts in black communities and, among others, it caused many communities to lose their long-established social unity, customs and ties with their ancestors whose graves were exhumed in some cases.[141]

During those regimes, it was an accepted norm that when a mining company had identified certain mineral deposits in any communal land, it would deploy security forces to execute forceful removals of black communities from their land without any prior arrangements or consultation with them.[142] Where these removals and displacements occurred, they were abrupt, violent and sudden.[143] If any compensation was paid at all, it was mostly minimal.[144] Two specific case studies of forceful removals and displacements from communal lands for

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138 S Rugege "Land Reform in South Africa: An overview" (2004) 32(2) *International Journal of Legal Information* 283-312; S Kgatla "Forced removals and migration: A theology of resistance and liberation in South Africa" (2013) 41(2) *Missionalia: Southern African Journal of Missiology* 120 and G Mathiba "Corruption in land administration and governance: A hurdle to transitional justice in post-apartheid South Africa" (2021) 42(3) *Obiter* 561-579. Please note, the Memorandum of Understanding between myself and my supervisor, as well as obligations attaching to funding I received from the Department of Science and Technology (DST)/National Research Foundation (NRF) through the SARChI Research Chair: Mineral Law in Africa (MLiA), required me to publish from and during my doctoral research. The publication mentioned here is the result of such obligation(s).

139 L Platzky & C Walker *The surplus people: Forced removals in South Africa* (1984) 1.

140 Platzky & Walker (1984) 1.

141 F Demissie "In the shadow of the gold mines: Migrancy and mine housing in South Africa" (1998) 13(4) *Housing Studies* 445-469; H Tutu, TS McCarthy & E Cukrowska "The chemical characteristics of acid mine drainage with particular reference to sources, distribution and remediation: The Witwatersrand Basin, South Africa as a case study" (2008) 23 *Applied Geochemistry* 3666-3684; Y Von Schirnding et al. "A study of paediatric blood levels in a lead mining area in South Africa" (2003) 93 *Environmental Research* 259-263. S Pegg "Mining and poverty reduction: Transforming rhetoric into reality" (2006) 14 *Journal of Cleaner Production* 376-387; EA Aubynn *Community perceptions of mining in Ghana* (Unpublished Master's thesis, University of Alberta, 2003) 7; AGN Kitula "The environmental and socio-economic impacts of mining on local livelihoods in Tanzania: a case study of Geita District" (2006) 14 *Journal of Cleaner Production* 405.

142 R Chauhan "Social justice for miners and mining affected communities: The present and the future" (2018) 39(2) *Obiter* 346.

143 Chauhan (2018) 346.

144 Chauhan (2018) 346.

developmental purposes such as mining by the apartheid regime is the Bakgaga Bakopa community in Maleoskop, as well as the Mapela and Kekana communities in Mokopane.

2.2.1.1.1. The Bakgaga Bakopa Community of Maleoskop, Eastern Transvaal

The Bakgaga Bakopa community was forcefully displaced from their ancestral land called Maleoskop in the then Eastern Transvaal by the Berlin Missionaries in June 1962.[145] This community endured great loss and intimidation from the missionaries before they could be removed.[146] Then they were given an ultimatum, that for the sake of their survival, they ought to vacate the area.[147] It became apparent later that the missionaries were after "a concentration of heavily mineralised magnetite on the surface" of Maleoskop land,[148] a discovery that affirms that the displacement of Maleoskop people was mining-induced. Eventually, the community was relocated to Tafelkop and their ancestral and spiritual ties with Maleoskop were abruptly cut because their forebears were buried there.[149] Further, their building structures, churches and kraals were demolished and minimal compensation was paid afterwards.[150]

2.2.1.1.2. The Mapela and Kekana Communities of Mokopane

As for Mapela and Kekana communities in Mokopane, these two rural communities were displaced permanently from their communal lands between 2014 and 2015 by the Anglo-American platinum mining company that wanted to expand its open-cast mining operations[151] at the Mogalakwena Platinum Mine. Over thousand households were affected as a result,[152] and they were dissatisfied and aggrieved by several issues such as the lack of necessary support by the mining company to ensure that their livelihoods, economic, agricultural and cultural activities were successfully restored.[153] The communities also decried the fact that the graves

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145 In terms of the Group Areas Act 41 of 1950. See NR Nkadimeng *The Bakgaga Bakopa Community's Experience of Forced Removal from the Ancestral Settlement at Maleoskop* (unpublished Master's thesis, University of Johannesburg, 1999) 2.

146 Nkadimeng (1999) 2.

147 Nkadimeng (1999) 2.

148 W Boshoff "The Bakopa of Boleu and the Missionaries from Berlin (1860-1864): The brief existence of Gerlachshoop, first mission station of the Berlin Missionary Society in the ZAR" (2004) 32(3) *Missionalia* 451.

149 Nkadimeng (1999) 2.

150 Nkadimeng (1999).

151 Anglo American "Motlhotlho village relocation Mogalakwena mine" (2014) Symposium Presentation at https://conferences.iaia.org/resettlement/proceedings/9%20-%20Govt%20and%20Private%20Sector/1%20-%20Governance%20Structures%20-%20Motlhtlo%20(Espag).pdf (accessed 14 May 2021).

152 S Mnwana, F Mtero & M Hay *Dispossessing the dispossessed: Mining and rural struggles in Mokopane, Limpopo* (2016) 17.

153 DMS Manamela *The impact of mining on indigenous African communities in Limpopo* (unpublished PhD thesis, University of Johannesburg, 2019) and Mnwana, Mtero & Hay (2016).

where their forefathers had been buried were exhumed and, as a result, they felt culturally, spiritually and socially disarticulated.[154] Consultation and engagement with the communities was never held by the mining company and the relevant state authorities.[155] For this reason, some community members attempted to resist their removal from their communal land that was targeted by the company for purposes of expanding its mining operations.[156] When they resisted their relocation, they were forcibly removed abruptly by the police and private security officers of the company.[157] In the process of their forced removal, their properties and homes were destroyed and they were inadequately compensated, while others received no compensation at all.[158]

2.2.1.2. Ghanaian experience

While mining practice in Ghana is said to have a long history[159] dating back to the fourth Century A.D,[160] there is limited historical account of mining-induced displacements in the mining sector literature in Ghana. During the modern history, the Gold Coast started to experience large-scale mining with the advent of British rule around the 1880s.[161] As the sector evolved, a significant shift from the locally-focused artisanal mining to a more formal and industrialised large-scale mining was noted during the 19th century.[162] This shift resulted in the chieftainship starting to gradually lose control over the mineralised lands due to commercialisation of those lands by the British colonisers.[163] The sector continued to thrive as Ghana's main economic activity throughout the 20th century right into the 1980s, and the interest in the country's mining sector has been growing consistently since then.[164] In some

154 Manamela (2019) and Mnwana, Mtero & Hay (2016).

155 Manamela (2019).

156 Manamela (2019) 142.

157 Manamela (2019) 142.

158 Manamela (2019) 141-42.

159 R Jackson "New mines for old gold: Ghana's changing mining industry" (1992) 77(2) *Geography Association* 175-178.

160 W Peters *History of Gold Mining in Ghana* (2013) 6. See also NR Junner *Annual Reports of the Gold Coast Geological Survey* (1934) 9; W Rodney "Gold and Slave on the Gold Coast" *Transactions of the Historical Society of Ghana* (1969) and R Addo-Fening "The Gold Mining Industry in Akyem Abuakwa C. 1850–1910" (1976) 2 *Sankofa: Legon Journal of Archaeology and Historical Studies* 33-37.

161 Jackson (1992) *Geography Association* 175-178. See also G Hilson "Harvesting mineral riches: 1000 years of gold mining in Ghana" (2002) 28(1) *Resources Policy* 13-26 and FS Tsikata "The vicissitudes of mineral policy in Ghana" (1997) 23(1) *Resources Policy* 9-14.

162 AB Adam *Conceptualizing household livelihood needs in mining-induced displacement and resettlement: A case study from Ghana* (unpublished PhD thesis, University of Queensland, 2019) 70.

163 A Bebbington et al. *Governing Extractive Industries: politics, histories and ideas* (2018) 163.

164 Hilson (2002) 13-26.

limited literature, it is acknowledged that mining in Ghana has over the years exhibited the full gamut of negative impacts including environmental degradation, destruction of livelihoods and most disconcertingly, the displacement of communities for mining projects.[165] The mining ordinance[166] was in place during the period between 1900 and 1957 to regulate various areas of mining such as compensation negotiation between the local chiefs and the mining investors,[167] land acquisition for mining purposes and security of tenure to those holding concessions.[168] However, the ordinance had no provision on the displacements of people for mining purposes.[169] Despite this policy gap, mining operations continued to occur, posing limitations and negative impacts on the undisturbed use of surface land by the rural communities that occupied affected lands, leaving them with no other option than to relocate.[170]

Between 1986 and 2000, the displacement of local communities with the resulting of loss of livelihoods increased significantly,[171] given that the majority of active projects then were open-cast mines which required large tracts of surface land to operate.[172] With the new set of rules in 1994, a requirement was introduced for all the mining companies operating in Ghana to undertake an environmental impact assessment (EIA) aimed at detecting the impacts that could potentially ensue from mining projects and to outline a preventive plan of action for addressing those potential issues.[173] The EIA regulations require the mining companies to consult with the communities that are likely to be displaced to make way for the intended mining operations.[174] Some commentators in Ghana such as Appiah-Opoku and Bawole have decried the lack of clarity of these regulations on mine-affected community consultations.[175] Further, in March

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165 J Taabazuing et al. "Mining, conflicts and livelihood struggles in a dysfunctional policy environment: the case of Wassa West District, Ghana" (2012) 31(1) *African Geographical Review* 33-49. See also generally B Terminski *Mining-Induced Displacement and Resettlement: Social Problem and Human Rights Issue (A Global Perspective)* (2012).

166 Gold Coast Ordinances of 1900; Adm 29/6/42 PRAAD, Koforidua.

167 SA Ntewusu "A social history of gold mining in Bole, Northern Ghana: From pre-colonial to recent times" (2015/17) 17 *Transactions of the Historical Society of Ghana* 7.

168 Tsikata (1997) *Resources Policy* 9-14 and Hilson (2002) *Resources Policy* 13-26.

169 Hilson (2002) *Resources Policy* 13-26.

170 Hilson (2002) *Resources Policy* 13-26.

171 Adam (2019) 78.

172 V Schueler et al. "Impacts of Surface Gold Mining on Land Use Systems in Western Ghana" (2011) 40(5) *AMBIO* 528-539.

173 Part 6.4.

174 Part 6.4.

175 S Appiah-Opoku "Environmental impact assessment in developing countries: The case of Ghana" (2001) 21 *Environmental Impact Assessment Review* 59-71 & JN Bawole "Public hearing or 'hearing public'? An evaluation of the participation of local stakeholders in environmental impact assessment of Ghana's Jubilee oil fields" (2013) 52 (2) *Environ Manage* 385-397.

2008, the Ghana's Commission on Human Rights and Administrative Justice (CHRAJ) released a damning report on the state of human rights in mining communities across the country.[176] The report found several issues around forced displacements, inadequate compensation for those affected and alternative livelihood restoration arrangements, poor communication and consultation channels between mining companies and communities, unfulfilled promises of employment of locals and others.[177]

Thus, a general sense is that the mining community-company consultation and/or engagement in Ghana practice is not adequate and fit for purpose to fulfil the objectives it is intended for. A detailed policy analysis on this aspect is undertaken in part 6.4 of chapter six, where the Ghanaian sector legal framework on mining-induced displacement is analysed in detail. As for the specific case studies of early occurrences of mining-induced displacements in Ghana, the study could not find any. The limited evidence and absence of a detailed record of mining-induced displacement manifestations in the country presents a barrier insofar as historical comparative analysis of mining displacement patterns is concerned.

2.2.2. The historical development of mining-induced displacements across the world

Mining-induced displacement phenomenon is as old as the mining practice itself. However, there is little documented evidence of this phenomenon in the form of literature and thus much about it remains unknown, including its earliest occurrences anywhere in the world.[178] Adam et al have observed that this knowledge gap emanates from the unfeasibility of capturing the several decades long, largely undocumented practice by the sector in remote and governance-weak contexts.[179] For the past two decades there has been a consistent acknowledgement in the relevant literature that mining-induced displacement and resettlement is an underexplored and understudied discipline.[180] Downing has argued in his seminal report that the collective and industrial failure by the past and present mining companies to give a proper account of the

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176 Ghana's Commission on Human Rights and Administrative Justice (CHRAJ) *The State of Human Rights in Mining Communities in Ghana* (2008).

177 CHRAJ *The State of Human Rights in Mining Communities in Ghana* 18-20.

178 AB Adam, JR Owen & D Kemp "Household, livelihoods and mining-induced displacements and resettlements" (2015) 2 *The Extractive Industries and Society* 582.

179 Adam, Owen & Kemp (2015) 582.

180 Downing (2002), O Bennett & C McDowell *Displaced: The human cost of development and resettlement* (2012), M Cernea & JK Maldonado "Challenging the prevailing Paradigm of displacement and resettlement: Its evolution, and constructive ways of improving it" in M Cernea & JK Maldonado (eds) *Challenging the Prevailing Paradigm of Displacement and Resettlement: Risks, Impoverishment, Legacies, Solutions* (2018), MM Cernea "Understanding and preventing impoverishment from displacement; reflections on the state of knowledge" (1995) 8(3) *Journal of Refugee Studies* 245-264.

people and communities affected by displacement is to be blamed.[181] The same observation was made by Owen and Kemp that the continued absence of dedicated mining scholarship within the broader literature of development-induced displacement and resettlement constitute a serious concerning.[182]

Some scholars have remarked that the unfeasibility to obtain adequate information on mining-induced displacements is because mining operations tend to occur in remote regions where governance is weak and publicity is poor, thus encouraging bad corporate culture of hiding inappropriate social practices that goes undocumented.[183] Despite poor empirical data on mining-induced displacements, a number of studies on the topic have consistently found that in most cases where displacements for mining purposes happened, there were poor outcomes and those affected were aggrieved and dissatisfied.[184] These negative outcomes have always been considered against the sector-wide aspiration to improve livelihoods of displaced people through resettlement, an aspiration that is less witnessed in the ground.[185]

Nonetheless, in the very limited historical literature, it is recorded that the first cases of mining-induced displacement can be traced back to the 19th century in India by the British colonists and in the United States, among others.[186] Similar instances of this nature started to spread and be experienced in some parts of the African continent due to the gold rush in America.[187] In many cases where this phenomenon occurred, the downtrodden masses of the natives were victimised, a state of affairs which has remained unchanged to date.[188] Terminski has observed that big corporate mining companies that conduct open pit mining operations in rural areas rarely consider and pay attention to the socio-economic and cultural circumstances of the

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181 Downing (2002).

182 JR Owen & D Kemp "Mining-induced displacement and resettlement: A critical appraisal" (2015) 87 (1) *Journal of Cleaner Production* 479.

183 C Madebwe, V Madebwe & S Mavusa "Involuntary displacement and resettlement to make way for diamond mining: The case of Chiadzwa villagers in Marange, Zimbabwe" (2011) 1 (10) *Journal of Research in Peace, Gender and Development* 292-301; D Kemp, JR Owen & N Collins "Global perspectives on the state of resettlement practice in mining" (2017) 35(1) *Impact Assessment and Project Appraisal* 22-33 & S Narasimham & DV Subbarao "Impact of Mining on Tribal Socio-economic and Environmental Risks in India" (2018) 63(1) *Economic Affairs* 191-202.

184 S Narasimham & DV Subbarao "Impact of mining on tribal socio-economic and environmental risks in India" (2018) 63(1) *Economic Affairs* 191-202 & SA Wilson "Mining-induced displacement and resettlement: The case of rutile mining communities in Sierra Leone" (2019) 18 (2) *Journal of Sustainable Mining* 67-76.

185 Adam, Owen & Kemp (2015) 582.

186 Terminski (2012) 7.

187 Terminski (2012) 7.

188 Terminski (2012) 7.

affected indigenous communities.[189] This observation resonates well with the sentiments held in this study, and this will be demonstrated later in chapters five and six respectively.

2.3. Definitional clarification of (and the state of knowledge on) mining-induced displacement and related concepts

Mining-induced displacement is an understudied field.[190] Given this gap, Cernea has contended that there is a need to build knowledge base around mining-induced displacements and establish it as a fully autonomous research field.[191] Downing has also observed that lack of global survey assessing the magnitude of mining-induced displacements presents a major barrier towards the improvement of mining-induced displacement policy and practice.[192] Terminski has further indicated that the lack of individual national data on this phenomenon and less interest by the relevant international institutions to populate the database makes it difficult to ascertain the exact scale of mining-induced displacements.[193] The phenomenon has also been identified in various studies as a societal issue across several countries.[194] This part considers the definition of mining-induced displacements (and other related concepts) as conceptualised in literature.

2.3.1. Conceptualising mining-induced displacement

In the context of this study, the mining-induced displacement occurs where the displaced persons, which may be individuals, households or even communities, are removed from their places of abodes against their will to make way for mining developments. Displacement is often equated to eviction and this is problematic. While eviction can either be lawful or unlawful, the same cannot be said for displacement. Any manifestation of displacement is unlawful by default (whether it is out of necessity or not). However, opposite displacement is resettlement, and this juxtaposition is explained in heading 2.3.2 below. The next sub-section takes a look at the key tenets of displacements.

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189 Terminski (2012) 7.

190 Adam, Owen & Kemp (2015) 582; Downing (2002); Owen & Kemp (2015) 479; Bennett & McDowell (2012); Cernea & Maldonado (2018); Cernea (1995) 245-264.

191 M Cernea "The risks and reconstruction model for resettling displaced populations" (1997) 25 (10) *World Development* 1569-1587.

192 TE Downing *Does the Kosovo Power Project's Proposed Forced Displacement of Kosovars Comply with International Involuntary Resettlement Standards? The Kosovo Civil Society Consortium for Sustainable Development* (2014) 8, available online at http://allthingsaz.com/wp-content/uploads/2014/04/Final-Draft-Downing-Involuntary-Resettlement-at-KPP-Report-2-14-14.pdf (accessed 13 March 2021).

193 Terminski (2012) 7.

194 Cernea (1997) & Terminski (2012) 7.

2.3.1.1. Use of force

Cambridge Dictionary defines the word 'displacement' as "the situation in which people are forced to leave the place where they normally live."[195] A different version, Oxford English Dictionary, defines the same word as "the act of forcing somebody or something from their home or position".[196] In both definitions, there is common emphasis on the lack of choice, consensus or consent (on the side of the displaced persons) through the usage of words 'forced' and 'forcing' which suggest that the act of displacement occurs against the will of those affected. This construct logically presupposes that there can be no displacement if people choose to move by themselves, voluntarily.[197] It is with this understanding, then, that displacements of people that are occasioned by mining developments are understood to include those acts that were forceful in nature. This understanding underlies the coining of the term "mining-induced displacements".

2.3.1.2. Act of removal

In literature elsewhere, there are synergies and strong overlapping definitional elements of displacement in general.[198] For instance, Stavropoulou has described displacement in any context as "the process of being forcibly removed from one's home and/or land."[199] This author has also postulated that the concept of displacement should be equated to other associated concepts such as population transfers, mass exodus and internal displacements all of which, according to her, are referring "to the same phenomenon (namely removal from one's home and/or land against one's will)."[200] This premise may prove right, even though it places less significance on the critical role played by free and informed consent and/or consensus between those that stand to be displaced or transferred and the entity seeking their displacement or transfer, be it private or the state.

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[195] Cambridge Dictionary "displacement" at https://dictionary.cambridge.org/dictionary/english/displacement (accessed 14 April 2021).

[196] Oxford Advanced Dictionary "displacement' available online at https://www.oxfordlearnersdictionaries.com/definition/english/displacement?q=displacement (accessed 14 April 2021).

[197] M Morel *The Right Not to Be Displaced in International Law* (2014) 17.

[198] B Terminski *Development-Induced Displacement and Resettlement: Theoretical Frameworks and Current Challenges* (2013) 13; M Stavropoulou "Displacement and human rights: Reflections on UN practice" (1998) 20(3) *Human Rights Quarterly* 515–554 & H Mostert & G Mathiba "Mine community displacement and resettlement in South Africa" in N Graham, M Davies & L Godden (eds) *The Routledge Handbook of Property, Law and Society* 1st ed (2022) 62.

[199] Stavropoulou (1998) 552.

[200] Stavropoulou (1998) 517.

2.3.1.3. Absence of consent

The Council of Europe that value the significance of consent of those affected by, say population transfer, which entails "a practice or policy having the purpose or effect of moving persons into or out of an area, either within or across an international border, or within, into or out of an occupied territory, without the free and informed consent of the transferred population and any receiving population."[201] This lack of consent and/or choice is a violation of basic human rights, such as privacy, property and human dignity. This lack further compounds impoverishment risks facing those affected.[202]

2.3.1.4. Arbitrariness

In place of force or lack of consensus, some commentators refer to the term element of arbitrariness[203] of actions that cause displacement. The word 'arbitrary' or 'arbitrariness' connotes unreasonableness and is often used to describe the conduct or act that is against the law or set rules.[204] Cambridge Dictionary defines the word 'arbitrariness' as "the unfair and unlimited use of personal power".[205] In the context of mining-induced displacements, the misuse of power is not only limited to personal, but it may be public power as well. Rigo observes that in its very nature, 'arbitrariness' entails an act of going against reason that occurs randomly and abruptly.[206] The author goes on to explain arbitrariness "as unsystematic in nature, dissociated from specific extra-legal sources, such as race or class, that might exercise a systematic effect".[207] Benahabib adds that an act of arbitrariness inherently features an element of exclusion where, for instance, the displaces persons get excluded by the procedures which establish the rules that affect them.[208] To put it simply, arbitrariness is merely a departure from the rule of law standard.

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201 2011 Draft Resolution of the Committee on Legal Affairs and Human Rights for the Council of Europe titled *Enforced population transfer as a human rights violation* AS/Jur (2011) 49 available online at http://assembly.coe.int/committeedocs/2011/ajdoc49_2011.pdf (accessed 16 April 2021).

202 BR Johnston "Development disaster, Reparations, and the Right to Remedy: The case of the Chixoy Dam, Guatemala" in A Oliver-Smith (ed) *Development and Dispossession: The crisis of forced displacement and resettlement* (2009) 201-224).

203 Mostert & Mathiba (2022) 62.

204 TAO Endicott "Arbitrariness" (2014) Oxford Legal Studies Research Paper No. 2/2014, 49.

205 Cambridge Dictionary "arbitrariness" at https://dictionary.cambridge.org/dictionary/english/arbitrariness (accessed 14 April 2021).

206 E Rigo "Arbitrary law making and unorderable subjectivities in legal theoretical approaches to migration" (2020) 14 (2) *Nordic Journal of Applied Ethics* 79.

207 Rigo (2020) 79, citing JW Bowers "The pervasiveness of arbitrariness and discrimination under post-furman capital statutes" (1983) 74 (3) *Journal of Criminal Law and Criminology* 1067.

208 S Benhabib *The rights of others: Aliens, residents, and citizens* (2004) 15.

2.3.1.5. Loss of place and lack of support

Force, lack of consent and arbitrariness in displacements aside, loss of place is always the result of such displacements, also those in the mining sector. Those affected are often left destitute, unsecured and without shelter and habitual homeland.[209] Further, Terminski has observed another element that acts of displacement features, is that there is often no proper support mechanisms from the displacing entities to lessen the hardships endured by those affected,[210] including socio-economic and cultural hardships and other forms,[211] as will be elaborated further in case study discussions.[212]

2.3.2. Displacement vs Resettlement

While Stavropoulou opines that other terms associated with acts of displacement as indicated above should be equated to be on par and be used interchangeably,[213] Morel cautions against the loose reference to these terms without appreciating the precise course and unique contexts within which they are being used.[214] In her further elaboration of this caution, Morel observes that "[u]universally accepted definitions of these terms are mostly absent, and consequently, the precise relation between many of [them] is unclear."[215] Instead of attempting a breakthrough in differentiating these other terms from displacement, Morel perceive displacement as an overarching notion.[216] Essentially, this perception means that displacement should be conceived broadly enough to cover a diverse forms of forceful and coerced migration and movements of people.[217] If this is the proposition to go by, one may then ask: what is it that does not constitute displacement? This section explores this question by juxtaposing displacement with resettlement.

From the conducted literature survey, the word 'resettlement' is often used interchangeably (and confused) with displacement.[218] From the preceding discussion, it is well ascertained that displacement is characterised by, among others, a loss of home or place of abode and a lack of consent or consensus between the displaced persons and the entity displacing them for

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209 Terminski (2013) 13.
210 Terminski (2013) 13.
211 Cernea (2000) & Downing (2002) 5.
212 Chapters five and six.
213 Stavropoulou (1998) 517.
214 M Morel *The right not to be displaced in international law* (2014) 16.
215 Morel (2014) 16.
216 Morel (2014) 16.
217 Morel (2014) 17.
218 Most readings refer to MIDR, which means 'mining-induced displacements and resettlements'.

whatever cause.[219] This is not the case with resettlement. With resettlement, there is proper planning and monitoring of the process and it occurs with the consent of those affected,[220] as opposed to the abrupt and haphazard connotation associated by displacement. Thus, if the movement of people and communities from their places is one that is carried out after having planned properly and reached consensus i.e. displaced leaving voluntarily, then that is resettlement.[221] Terminski has also observed that unlike with displacement, those affected by resettlement enjoy the benefits of various support mechanisms availed by the entity resettling them.[222] The support mechanisms include numerous programmes focused on livelihood restoration at the new alternative place of settlement.[223] Although resettlement does not always turn out to be a success story, there is consensus among several scholars that the outcomes of resettlement process are particularly better when compared to those where people are just being displaced abruptly with the use of force.[224] Resettlement is also characterised by re-establishment of the displaced persons' economic, social and cultural activities after their relocation.[225]

According to Vanclay, resettlement process is often pre-empted by consideration of preventive measures to avoid it and alternatives to, if unavoidable, reduce the number of those that stand to be affected.[226] The author goes further to argue that in some instances, resettlement presents as having the potential to be an opportunity for development and improved livelihoods for those resettled.[227] The other proponents for resettlement (over displacement) have postulated that the resettlement process embraces active participation and negotiation between the entity

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219 Part 2.3.1.

220 R Chambers *Settlement Schemes in Tropical Africa: A Study of Organizations and Development* (1969) & Terminski (2013) 14.

221 Mostert & Mathiba (2022) 63 & 64.

222 Terminski (2015) 60.

223 F Vanclay & D Kemp "Displacement, resettlement and livelihoods" (2017) 35 (1) *Impact Assessment and Project Appraisal* 2; E Smyth et al "Five 'big' issues for land access, resettlement and livelihood restoration practice: findings of an international symposium" (2015) 33 (3) *Impact Assessment and Project Appraisal* 220-225 & M Rowan "Aligning resettlement planning and livelihood restoration with social impact assessment: a practitioner perspective" (2017) 35 (1) *Impact Assessment and Project Appraisal* 81-93.

224 T Rodhouse & F Vanclay "Is free, prior and informed consent a form of corporate social responsibility?" (2016) 131 *Journal of Cleaner Productions* 785-794; P Hanna & F Vanclay "Human rights, Indigenous peoples and the concept of free, prior and informed consent" (2013) 31 *Impact Assessment & Project Appraisal* 146-157 & E Greenspan *Free, prior, and informed consent in Africa: an emerging standard for extractive industry projects* (2014).

225 S Krech, JR McNeill & C Merchant *Encyclopedia of World Environmental History* (2004) 1046.

226 F Vanclay "Project-induced displacement and resettlement: from impoverishment risks to an opportunity for development?" (2017) 35 (1) *Impact Assessment and Project Appraisal* 7.

227 Although "the empirical evidence for this [proposition] is lacking." See Vanclay (2017) 17.

seeking resettlement and those resettled throughout the whole process.[228] They further contend that resettlement is a staggered process with six steps:[229]

The first step entails conducting the scoping analysis and initial planning to appreciate and understand the local needs and demands.[230] This step also seeks to establish the resettlement monitoring team and presents an opportunity for engagements by all stakeholders with the entity seeking resettlement to minimise its impacts on livelihoods.[231] The second step is about profiling and baseline data collection to ascertain issues such as the number and categories of persons to be resettled; the quantity and types of buildings, community infrastructure, common resources and other properties that stand to be affected and the socio-economic conditions of the affected community and their political structures, land tenure arrangements and land entitlements.[232]

The third step of the process entails developing the resettlement action plan (RAP), an official and working document that covers issues around the legal basis for resettlement and the land acquisition by the entity; the standards to be observed in the process; the schedule and budget for the process; the documented outcomes of all consultations and participatory planning sessions.[233] Further, the RAP must identify the imminent risks and outline risk management measures in place and the proposed compensation arrangements for the loss to be suffered by those affected.[234] Lastly, it must also outline the valuation methods to be used; the selection of alternative site and decisions thereto and the post-resettlement plans about issues concerning resettlement housing, livelihoods restoration and arrangements for vulnerable groups.[235] The fourth step is all about implementation of the process and this is where the construction of resettlement housing and related infrastructure takes off, as well as the payment of agreed compensation.[236] The fifth step demands livelihood restoration and enhancement programmes to be activated to assist the people to settle-in and to transform into new activities that enhance their all-round well-being.[237] Then the last step is more procedural and its entails monitoring

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228 E Smyth & F Vanclay "Land acquisition, resettlement and livelihoods" in R Therivel & G Wood (eds) *Methods of environmental and social impact assessment* 4th ed. (2017).

229 Smyth & Vanclay (2017).

230 Vanclay (2017) 8.

231 Vanclay (2017) 8.

232 Vanclay (2017) 8.

233 Vanclay (2017) 8.

234 Vanclay (2017) 8.

235 Vanclay (2017) 8.

236 Vanclay (2017) 8.

237 Vanclay (2017) 8.

and evaluation of the process against the objectives set earlier in the RAP. It is also at this stage where impact monitoring and a completion audit is undertaken.[238] To this end, it is evident that displacement is completely different from resettlement, although commentators tend to use the words interchangeably.[239] Thus, resettlement is a more organised, planned and a mutually agreed process than displacement process that connotes force and loss as discussed earlier.[240]

2.4. The diverse effects of mining-induced displacements on the displaced persons

Mining-induced displacement is a serious socio-economic and human rights issue experienced not only in South Africa and Ghana, but worldwide.[241] This part of the chapter carry on with this proposition. Like any other unconsented and unplanned physical movement, transfer, relocation and eviction, mining-induced displacements are widely acknowledged as posing enormous risks including socio-economic instability, loss of access to basic resources on which the affected persons and their communities depend on for their social, cultural and economic well-being.[242] Every human being has the most basic need to feel at home somewhere in the world.[243] Displacement disrupts this need whenever it occurs since it is inherently linked to the loss of home.[244] It affects a human desire "to put down roots - to settle in and not to be moved."[245] To others, displacement has had an effect of causing "the trauma of the forced separation from one's homeland and the consequent dislocation of one's identity and traditions, entailing the destruction of historical and emotional links to the native earth, ancestral landscapes, cultural heritage, churches and cemeteries."[246] The most striking effect of displacement is that it often affects those who are already impoverished and disadvantaged, including women, the poor, indigenous groups, people with tenure insecurity and people living with disabilities.[247] It has an after effect of eroding people's livelihoods and taking away their

238 Vanclay (2017) 8.

239 See the earlier discussion on this.

240 Part 2.3.1.

241 Parts 1.2; 1.3 & 1.4.

242 SA Wilson "Mining-induced displacement and resettlement: The case of rutile mining communities in Sierra Leone" (2019) 18 (2) *Journal of Sustainable Mining* 67; D Kemp, JR Owen & N Collins "Global perspectives on the state of resettlement practice in mining" (2017) 35(1) *Impact Assessment and Project Appraisal* 22 & Owen & Kemp (2015) 478.

243 LF O'Mahony *Conceptualisling Home: Theories, Laws & Policies* (2007).

244 Morel (2014) 19.

245 P MacFadden "The right to stay" (1996) 29 (1) *Vanderbilt Journal of Transnational Law* 2.

246 A de Zayas "Forced population transfer" Max Planck Encyclopedia of Public International Law, online (2009) available at www.mpepil.com/ViewPdf/epil/entries/law-9780199231690-e802.pdf?stylesheet=EPIL-display-full.xsl (accessed 12 April 2021) & Morel (2014) 20.

247 Morel (2014) 21.

lands and belongings.[248] Vanclay argues correctly that the tendency to dismiss the negative socio-economic impacts of displacements as being a 'necessary evil' or sometimes 'acceptable collateral damage' is inexcusable.[249]

Cernea describes the impacts of displacement as disruptive, painful and always resulting in a high risks of destitution for those affected.[250] In his impoverishment risks and reconstruction model aimed "to create a theoretical and safeguarding tool capable of guiding policy, planning, and actual development programs to counteract" the effects of displacement, Cernea has identified eight predominant impoverishment risks and effects.[251] These risks and effects are homelessness, joblessness, landlessness, loss of access to common resources, marginalisation, increased morbidity, food insecurity and social disintegration or community disarticulation.[252] Among these, homelessness, landlessness and marginalisation are most prevalent, hence they are also well-established issues of keen interest in the displacement literature.[253]

2.4.1. Homelessness

Since displacement is an act characterised by the loss of home,[254] it then follows logically to conclude that it leads to the state of homelessness. Attempts to define what homelessness entails and the magnitude of its manifestation represent more than an academic exercise, and some of its definitions embody political statements and value judgments. The Special Rapporteur on adequate housing describes homelessness as "a profound assault on dignity, social inclusion and the right to life.[255] It is a prima facie violation of the right to housing and

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248 Morel (2014) 21.

249 Vanclay (2017) 4; N Bugalski "The demise of accountability at the world bank" (2016) 31 *American University International Law Review* 1–56 & HM Mathur *Displacement and resettlement in India: The human cost of developmen*t (2013).

250 M Cernea "Why economic analysis is essential to resettlement: A sociologist's view" in M Cernea (ed) *The economics of involuntary resettlement: Questions and challenges* (1999).

251 See generally M Cernea "The risks and reconstruction model for resettling displaced populations" (1997) 25(10) *World Development* 1569-1587.

252 Cernea (1997) 1569-1587.

253 For instance, V Lassailly-Jacob "Reconstructing livelihoods through land settlement schemes: Comparative reflections on refugees and oustees in Africa" in MM Cernea & C McDowell (eds) *Risks and Reconstruction: Experiences of resettlers and refugees* (2000) 108-123); R Nayak 'Risks associated with landlessness: an exploration toward socially friendly displacement and resettlement" in MM Cernea & C McDowell (eds) *Risks and Reconstruction: experiences of resettlers and refugees* (2000) 79-107 & F Alexandrescu "Gold and displacement in eastern Europe: risks and uncertainty at Rosia Montana" (2011) 22 (1) *Revista Romana de Sociologie* 78-107.

254 Part 2.3.1. Stavropoulou (1998) 552.

255 Report of the Special Rapporteur on Adequate Housing titled *Guidelines for the Implementation of the Right to Adequate Housing* A/HRC/31/54 (2019) para 30 available online at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/353/90/PDF/G1935390.pdf?OpenElement (accessed 16 April 2021).

violates a number of other human rights in addition to the right to life, including non-discrimination, health, water and sanitation, security of the person and freedom from cruel, degrading and inhuman treatment.[256] The Special Rapporteur notes that homeless persons are often subject to criminalisation, harassment and discriminatory treatment because of their housing status.[257] While homelessness may be a temporary effect of displacement on the displaced persons, for some it "remains a chronic condition" that last way beyond the displacement process.[258]

Some commentators have observed that homelessness is not just about "the absence of shelter or home".[259] It may be on the basis of this observation that Baron has noted that homelessness is "a negative, a collection of lacks".[260] Adam has argued that the evaluation of house structures in the context and process of displacement should go beyond a pure "house as a shelter" assessment to include other considerations that constitute a home.[261] These other considerations, according to him, include security of tenure,[262] the wider human functioning and agency that such shelter allows one to exercise.[263] Further, the livelihoods of those affected must also be considered, that their new location of resettlement housing should not be far away from farmlands, markets, and other essential services, lest it becomes a burden.[264]

2.4.2. Landlessness

Landlessness is yet another peculiar impoverishment risk and effect of displacement that has far-reaching consequences to those affected. It is the state of being without land after one has been forcibly dispossessed of it.[265] This problem is well-documented in both empirical and qualitative literature.[266] Wherever displacement has occurred or anticipated, issues around

256 Special Rapporteur on Adequate Housing (2019) para 30.

257 For instance, "[t]hey are denied access to sanitation facilities, rounded up and driven from communities and subjected to extreme forms of violence." See Special Rapporteur (2019) para 31.

258 Cernea (1997) 1573.

259 AB Adam *Conceptualizing household livelihood needs in mining-induced displacement and resettlement: A case study from Ghana* (PhD thesis, University of Queensland, 2019) 171.

260 JB Baron "Property and no property" (2005) 42(5) *Houston Law Review* 1429 & JB Baron "Homelessness as a property problem" (2004) 36(2) *The Urban Lawyer* 273–288.

261 Adam (2019) 171.

262 Adam (2019) 172.

263 Adam (2019) 171.

264 Adam (2019) 171.

265 Part 2.3.1. Stavropoulou (1998) 552.

266 Downing (2000); W Fernandes *Managing the Social and Environmental Consequences of Coal Mining in India, Dhanbad* (2007) Conference Paper, International Mining Conference, Delhi, India; R Mares "Corporate responsibility and compliance with the law: A case study of land, dispossession, and aftermath at

access to land and land-based resources for livelihood purposes arise as the overriding concern,[267] and they eventually invoke the need for meaningful consultation.[268] Further, the landlessness effect entails the decapitalisation of the displaced individuals or communities and it destroys their ability to farm and reproduce, an important consideration insofar as food security is concerned.[269] Since it often occurs in rural areas, displacement affects the poor and indigenous communities the most.[270] This is because most if not all people in rural communities depend significantly on land for their livelihoods and hence the loss of land usually also results in the loss of their livelihoods.[271] As result, food security for these communities becomes threatened.[272] Once the people are unable to produce because of the lack of land, their economic ties get to be negatively affected too.[273] The drop in the level of economic activity and security which affect the displaced persons can also be exacerbated by a host of other factors such as the loss of access to or reduction of previously used resources on which they depended, i.e. water, agricultural land,[274] pastures, forests and others.[275] This shows the direct correlation between land and business risks on those affected.[276]

To this end, displacement features dispossession that leads to landlessness and destruction of livelihoods of those affected.[277] To any proposed mining, displacement is pre-thought of as a planned process designed to enable the mine operations.[278] Some commentators have observed that this planned process often gives rise to what they term 'dispossession by accumulation'

Newmont's Ahafo Project in Ghana" (2012) 117 (2) *Business and Society Review* 233-280; S Lillywhite, D Kemp & K Sturman "Mining, resettlement, and lost livelihoods: Listening to the Voices of resettled communities in Mulaudzi, Mozambique" (2015).

267 Adam (2019) 174.

268 IL Aronsson "The paradox of local participation in forced displacement and resettlement caused by the development process" (2009) 20 (1) *Revista Romana de Sociologie* 37-59 & LJ Laplante & SA Spears "Out of conflict zone: the case for community consent processes in the extractive sector" (2014) *Yale Human Rights and Development Journal* 11.

269 A Oliver-Smith (ed) *Development and Dispossession: The crisis of Forced Displacement and Resettlement* (2009).

270 Vanclay (2017) 7.

271 Vanclay (2017) 7.

272 Oliver-Smith (2009) 12. See also A Oliver-Smith *Defying displacement* (2010).

273 B Terminski *Mining-Induced Displacement and Resettlement: Social Problem and Human Rights Issue- A Global Perspective* (2013) 12.

274 See EK Mburugu *Dislocation of settled communities in the development process: The case of Kiambere Hydroelectric Project* (1993) World Bank Technical Paper No. 227.

275 Terminski (2013) 12.

276 Cernea (1997) 1569-1587 & Adam (2019) 175.

277 MM Cernea *Involuntary Resettlement in Bank-Assisted Projects. A Review of the Application of Bank Policies and Procedures in FY79-85 Projects* (1986) Agriculture and Rural Development Department, World Bank.

278 Adam (2019) 176.

whereby household livelihood assets are subjected to forced expropriation by private entities and sometimes even state authorities.[279] This would even prove correct in that even in instances where avoidance of displacement is an available option, there will still be insistence to carry it out and the mine operations would tend to incrementally adjust land use which end up encroaching on local livelihood systems.[280]

2.4.3. Marginalisation (of women vis-à-vis gender inequity)

That displacement phenomenon is disruptive, painful and "a profound assault on dignity"[281] is now well-established.[282] What is also becoming more evident is that wherever it manifests, it begets serious marginalisation.[283] Messiou posits that marginalisation tends to manifest itself at varying levels of development of the society.[284] Paul and Hemalatha describe the state of being marginalised as having "a sense that one does not belong and, in doing so, to feel that one is neither a valued member of a community and able to make a valuable contribution within that community nor able to access the range of services and/or opportunities open to others."[285] Essentially, marginalisation entails being and outcast and 'excluded'.[286] Thus, marginals are people who lack inclusion and this is "the dangerous forms of oppression that prevent people from participating in social activities."[287] From these constructs, marginals suffer deprivation.

Cernea acknowledges marginalisation as one of the predominant impoverishment risks and effects of displacement.[288] According to Cernea, marginalisation occurs when families or certain groups of the society lose economic power and slide on a 'downward mobility' path.[289]

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279 A Bebbington et al. "Mining and Social Movements: Struggles Over Livelihood and Rural Territorial Development in the Andes" (2008) 36(12) *World Development* 2888-2905; A Gizachew "Refining the impoverishment risks and reconstruction (IRR) model: A study of the models overlooked risks, evidences from the impacts of Tekeze Dam, North East Ethiopia" (2017) 9(4) *Journal of Development and Agricultural Economics* 66-79 & Adam (2019) 176.

280 Downing (2014) & Adam (2019) 176.

281 Special Rapporteur on Adequate Housing (2019) para 30.

282 M Cernea "Why economic analysis is essential to resettlement: A sociologist's view" in M Cernea (ed) *The economics of involuntary resettlement: Questions and challenges* (1999).

283 Cernea (1997) 1574.

284 K Messiou "Collaborating with children in exploring marginalisation: An approach to inclusive education" (2012) 16 (12) *International Journal of Inclusive Education* 1311-1322 & N Paul & K Hemalatha "The Marginalisation of the Displaced of Kerala" (2019) 18(2) *Artha-Journal of Social Sciences* 82.

285 Paul & Hemalatha (2019) 82.

286 JG Mowat "Toward a new conceptualisation of marginalisation" (2015) 14(5) *European Educational Research Journal* 454-76.

287 Paul & Hemalatha (2019) 82.

288 Cernea (1997) 1574.

289 Cernea (1997) 1574.

He further notes that "the coerciveness of displacement also depreciates the image of self."[290] In the context of mining-induced displacement, the great deal of marginalisation is often suffered by women, causing the gross violation and subjugation of women's rights.[291] Women tend to be much more affected by the aftermaths of displacement than their male counterparts.[292] Terminski has observed that women are more risk-averse to the effects of displacement and they often suffer reintegration post displacement, especially in terms of landholding.[293] When they are being deprived of access to land, women cannot carry on with their customary economic activity of crop production and thus cannot maintain and support their families.[294] As a result of their economic marginalisation, women's importance in the family structure reduces and they become extremely dependent on their partners earnings as means for survival.[295] Thus, the displacement phenomenon is an attack at women's dignity and it exacerbates the already strongly marginalised social and economic position, especially in developing countries.[296]

In their empirical study of marginalisation effect on the displaced persons, particularly women, Paul and Hemalatha explore four dimensions of marginalisation flowing from displacement.[297] The first dimension is economic marginalisation which is an outcome of inequality.[298] The authors report that issues such as delayed payment of compensation and distribution of compensatory packages is a great concern to women and their livelihoods.[299] The second dimension is social marginalisation which is directly associated with the social setup and living conditions of those affected by displacement.[300] This dimension is linked with Gaventa's triple foundations of an unequal society that flows from displacement,[301] namely: the denial of access to mainstream society justified with 'lawful inequality';[302] the preferential treatment and favour

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290 Cernea (1997) 1574.

291 J Nelson *Are women really more risk-averse than men?* (2012) INET Research Note 012. See also L Borghans et al. *Gender Differences in Risk Aversion and Ambiguity Aversion* (2009) NBER Working Paper 14713.

292 See, for example, Terminski (2013) 13.

293 Terminski (2013) 13.

294 Terminski (2013) 13.

295 Terminski (2013) 13.

296 Terminski (2013) 13.

297 Paul & Hemalatha (2019) 84.

298 Paul & Hemalatha (2019) 85.

299 Paul & Hemalatha (2019) 85.

300 Paul & Hemalatha (2019) 85.

301 J Gaventa "Citizen knowledge, citizen competence, and democracy building" (1999) *Citizen Competence and Democratic Institutions* 49-65.

302 Gaventa (1999) 49-65.

to a few people; and to keep alienated people who struggle to survive.[303] Therefore, marginalisation consists of the separation of people, gender bias and "stratification that speak of the rule of power over the powerless by which dominant groups contribute to socio-spatial builds of marginalisation".[304] It creates a person different in society,[305] which then generates a new understanding of family structure.[306] The third dimension is psychological marginalisation.[307] The displaced persons face psychological challenges because of their forced shift from familiar surroundings to the new ones.[308] The future prospects of displaced persons often become uncertain due to the loss of income and livelihoods, and this invites high levels of stress and anxiety.[309] Further, the place of abode and personal memories are important part of any human being as they add meaning to their lives, and thus losing connection with those creates a vacuum in their purpose and existence.[310]

The last dimension is political marginalisation which occurs where governments make use of legal and administrative provisions like public purpose or eminent domain to acquire land, sometimes without compensation.[311] The authors observe that displacement is in nature a politically-charged process where power imbalances put the lives and livelihoods of those displaced at risk.[312] The public purpose justification and eminent domain refers to the power of the state to expropriate which tends to mainly affect the poor and vulnerable.[313] It is often exercised against the marginalised because of their weak socio-economic stature, unlike the corporate entities operating in the mining industry.[314] This could only be addressed if there can be active involvement of all stakeholders in the formulation of development policies and in the analysis, planning, implementation, monitoring, and evaluation of mining developments.[315]

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303 Gaventa (1999) 49-65.

304 Paul & Hemalatha (2019) 86 & D Sibely "Introduction-Borders and Boundaries" in D Sibely et al. (eds) *Cultural Geography: A Critical Dictionary of Key Ideas* (2004) 153-54.

305 N Paul "Displacement and Marginalisation: A Case Study on Vallarpadam International Tranship Container Terminal in Kerala" in N Paul (ed) *Development, Displacement and Marginalisation* (2014) 273-289 & M Mohanty "Development and Tribal Displacement: Reflections on Core Issues" (2009) 70(2) *The Indian Journal of Political Science* 345-350.

306 Paul & Hemalatha (2019) 86,

307 JG Mowat "Toward a New Conceptualisation of Marginalisation" (2015) 14(5) *European Educational Research Journal* 456.

308 Paul & Hemalatha (2019) 87.

309 Paul & Hemalatha (2019) 87.

310 Vanclay (2017).

311 Vanclay (2017) & Paul & Hemalatha (2019) 87.

312 Paul & Hemalatha (2019) 87.

313 Paul & Hemalatha (2019) 88.

314 Paul & Hemalatha (2019) 88.

315 Paul & Hemalatha (2019) 88.

This process can only be consultative if participation becomes transparent and includes all those affected.[316] Active participation of those affected has the potential to open avenues for meaningful negotiation.[317]

Women tend to be more risk-averse[318] and are often negatively affected by the consequences of mining-induced displacements than other groups in the society.[319] For instance, in Ghana (an examined jurisdiction) there is a general reluctance by the laws and policies of the country to deal with the male domination in terms of livelihood reconstruction after the displacement.[320] This issue comes at the expense of women whom their plight is often considered less important,[321] resulting in their economic empowerment being stifled.[322] Another study explores how exactly displacement affects women in Ghana.[323] The loss of land comes out strongly as a disconcerting reality for most women.[324]

2.5. Key themes and indicators of poor (or strong) regulation of mining-induced displacements

This part considers the key themes that are indicative of a failing or thriving regulatory framework on mining-induced displacements. These themes will guide case law and statutory analysis on how mining-induced displacements are dealt with in the examined jurisdictions. These are: the protection of surface land rights and compensation for related disturbances; the required standard or level of engagement with mine-affected communities; the statutory obligation(s) of state bodies and administrative authorities; gender equality imperative vis-à-vis women inclusion; and the deterrence measures. While there could be many other themes, these specific ones present as peculiar for the purposes of this study.

316 M Patkar "The People's Policy on Development, Displacement and Resettlement: Need to Link Displacement and Development" (1998) 33(38) *Economic and Political Weekly* 2432-2433.

317 Paul & Hemalatha (2019) 88.

318 J Nelson *Are women really more risk-averse than men?* (2012) INET Research Note 012 and L Borghans et al. *Gender Differences in Risk Aversion and Ambiguity Aversion* (2009) NBER Working Paper 14713.

319 Terminski (2013) 14; R Mandishekwa & E Mutenheri "Mining-induced displacement and resettlement: An analytical review" (2020) 17(1) *Ghana Journal of Development Studies* 127 and R Mandishekwa & E Mutenheri "Quantification and modelling life satisfaction among internal displacees in Arda Transau, Zimbabwe" (2019) 5(4) *Int. J. Happiness and Development* 298-327.

320 Mandishekwa & Mutenheri (2020) *Ghana Journal of Development Studies* 127 and DL Madsen *Feminist Theory and Literary Practice* (2000) Pluto Press.

321 P Abbott, C Wallace & M Tyler *An Introduction to Sociology: Feminist Perspectives* 3rd ed (2005) 5.

322 Mandishekwa & Mutenheri (2020) *Ghana Journal of Development Studies* 127.

323 Cernea (1995) *Journal of Refugee Studies* 245-264.

324 Cernea (1995) *Journal of Refugee Studies* 245-264.

2.5.1. The protection and recognition of surface land rights and compensation for related disturbances

In countries where there is state custodianship of mineral resources, such as in South Africa[325] and Ghana,[326] it is accepted that the State has the powers to grant mineral rights over any land including privately-owned lands. Private landowners upon whose land mineral rights have been awarded lacks the wherewithal to prevent mineral right holders from accessing the land for purposes of exercising their mining rights.[327] The moment mining operations infringes on the rights of surface landowner, already there is a problem and it can only be resolved where the parties agree among themselves and with the payment of a fair and adequate compensation.[328] For South Africa, there is no express provision in the MPRDA which compels the payment of compensation to surface landowners whose surface right have been affected by the exploitation of mineral rights.[329] This is not to say there is no remedy though, for there is a broader constitutional protection of property rights against arbitrary deprivation.[330] Where there is no mutual consensus among the parties, which is often the case, the result is a serious conflict between, on the one hand, the surface landowner who would be seeking to protect their surface rights and, on the other, the mineral right holder who would be seeking to exploit the minerals on land as per the right. Given this setup, surface landowners and sometime lawful occupiers would often approach the courts seeking recourse in the form of recognition and protection of their surface land rights the threatening interference by the mineral right holder.[331]

South Africa's Supreme Court of Appeal has previously been approached to determine whether the rights of a mineral right holder to construct an open-cast (as opposed to underground) mining was not depriving the surface landowner of his surface land rights.[332] The court

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325 Part 5.3.

326 Part 6.4. V Ngaanuma "The constitutionality of nominal trusteeship in the regalian mineral ownership regime in Ghana" (2021) 39(1) *Journal of Energy & Natural Resources Law* 83-104.

327 See the case law discussion on 'access' in chapter five.

328 Parts 5.3 & 6.4 respectively.

329 Part 5.3.2.

330 G Mathiba "The constitutionality of the Covid-19 eviction moratorium on evictions in South Africa" in ZT Boggenpoel et al (eds) *Property and Pandemics: Property Law Responses to Covid-19* (2021) 208-225. Please note, the Memorandum of Understanding between myself and my supervisor, as well as obligations attaching to funding I received from the Department of Science and Technology (DST)/National Research Foundation (NRF) through the SARChI Research Chair: Mineral Law in Africa (MLiA), required me to publish from and during my doctoral research. The publication mentioned here is the result of such obligation(s).

331 Parts 5.4.2 & 6.5.1.

332 *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* (634/05) [2006] ZASCA 118; [2007] 2 All SA 567 (SCA); 2007 (2) SA 363 (SCA) para 6.

observed that a right to exploit minerals in the property belonging to another is in the nature of quasi-servitude over that property.[333] As in the case of a servitude, "the exercise of mineral rights will almost inevitably lead to a conflict between the right of the owner to maintain the surface and the mineral rights holder to extract the minerals underneath."[334] In its determination of the conflict, the court ruled that the surface landowner must endure the inconvenience and impact of open-cast mining on its land and agricultural business.[335] The court also stated that the conflict of rights between the surface landowner and the mineral right holder cannot be resolved at a theoretical level but that each case would have to be decided depending on the competing interests.[336] The same proposition was further held in some of the subsequent judgments.[337] As will be demonstrated in chapters five and six later, the courts in the examined jurisdictions have in most instances demonstrated a definite lean to the protection of surface land rights.

2.5.2. The required standard and/or level of engagement with mine-affected communities (consultation or consent or both?)

The lack of mine-affected communities' participation, consultation and informed consent remains a major issue in many jurisdictions, especially as it relates to development projects and mineral extraction operations on indigenous and communal lands.[338] These rural communities are frequently having to bear a disproportionate burden of the cost of development projects including mining.[339] The far-reaching effects of these developments on their lives underscore the need for these communities to be thoroughly engaged and consulted through informed and meaningful negotiation where they can have a say on developments that affect them. The imperative is closely linked to mine communities' rights to participation, consultation, self-determination and to negotiate constructive deals about their rights on land and resources.[340] A great amount of scholarship has backed up the notion that activities that affect the lands, resources and localities of indigenous mine communities must be subject to full prior informed

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333 *Anglo Operations* (2007) para 18.

334 *Anglo Operations* (2007) para 20.

335 *Anglo Operations* (2007) para 35.

336 *Anglo Operations* (2007) para 6.

337 *Meepo v Kotze and Others* (869/2006) [2007] ZANCHC 47; 2008 (1) SA 104 (NC).

338 SJ Rombouts *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (2014) 94.

339 See the problem statement and background.

340 A Yupsanis "The International Labour Organization and its contribution to the protection of the rights of indigenous peoples" (2011) 49 *Canadian Yearbook of International Law* 143–44 and Rombouts (2014) 95.

consent of and thorough consultation with those communities in line with their customs and traditions.[341]

While the communities are insisting that consent constitutes a precursory requirement in every development affecting them, governments in many jurisdictions have insisted that only consultation is needed.[342] If anything, these communities do not view consultation as an alternative to consent, but they see it "as the most crucial component of a consent process".[343] South Africa is one of those jurisdictions where the government through the DMRE is insistent in holding that it is only consultation that is required, on the one hand, and the Xolobeni indigenous community insisting that it is its informed consent that is required, on the other.[344]

The mine communities' free[345] and informed[346] consent that should be obtained prior to the commencement of any development is described as an evolving convention that should be adaptable to different realities.[347] This convention encompasses in it a further 'right to say no' as it means the negotiation may end with either consent or non-consent.[348] This may prove right in the South African context, the Xolobeni case in particular where the indigenous community refused to give consent to the mining operations on their communal land.[349] Rombouts observes that the consent principle must be maintained and practiced to "build a culture of respect and mutual understanding in the relations between indigenous peoples, states, intergovernmental

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341 B Kingsbury "Indigenous Peoples" Max Planck Encyclopedia of Public International Law, Max Planck Institute for Comparative Public Law and International Law (2012) para 38 & Rombouts (2014) 10.

342 Rombouts (2014) 10.

343 Rombouts (2014) 115.

344 R Campbell "Xolobeni judgment to be appealed" 12 December 2018 *Mining Weekly* available online at https://www.miningweekly.com/article/xolobeni-judgment-to-be-appealed-2018-12-12 (accessed 11 October 2021). See also 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 *PELJ* 7.

345 Consent will be considered freely given where the indigenous communities are involved in decision-making processes in such a manner that they have discursive control in those processes. Rombouts (2014) 138 citing P Pettit "Minority claims under two conceptions of Democracy" in D Ivison (ed) *Political Theory and the Rights of Indigenous Peoples* (2000) 215.

346 Consent will be considered informed if the communities are having access to the information that covers at least the following aspects: the nature, form, size, pace, reversibility and scope of any proposed project or activity; the reason(s) for or purpose(s) of the project; the duration of the above; the locality of areas that will be affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle; personnel likely to be involved in the execution of the proposed project; procedures that the project may entail.

347 Rombouts (2014) 114.

348 Rombouts (2014) 114.

349 *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829, 2019 (2) SA 453 (GP) para 84, order 1.

organizations and the private sector in development projects that affect indigenous peoples' land, territories, resources and their ways of life."[350] Given these firm entrenchment of consent requirement, the states and private mining entities often feel aggrieved and challenge the refusal of consent by communities.[351]

Lastly, it is contended that the major impacts of mining-induced displacements on the affected mine communities presuppose that decisions about these developments should not be taken without giving the communities some say.[352] This imperative is often overlooked because the implementation measures and consultative norms on the national laws of many jurisdictions are often found lacking or even absent.[353] Nonetheless, the engagement imperative remains to be a vibrant theme in displacement discourse, and it is yet another critical dimension that has proven to provide a significant leverage for mine-affected communities when the they adjudicate the protection of their rights in courts.

2.5.3. The statutory obligation(s) of state bodies and administrative authorities

The mining-induced displacement phenomenon is undoubtedly a serious human rights issue.[354] The primary duty bearers in respect of human rights, their realisation and protection, are the states.[355] These state obligations are categorised into different typologies, namely: negative[356] and positive[357] obligations; substantive and procedural obligations; and the obligations to respect, protect and fulfil the guaranteed rights.[358] The in-depth discussion of these varying typologies of state obligations is beyond the scope of this study. They are merely mentioned here to underscore the point that states are under certain obligations imposed by legal instruments to protect human rights against a host of violations that may take the form of, among others, mining-induced displacements. Further, the states are accountable for the conduct and actions of all their organs and agents, including those acting in officially capacities

350 Rombouts (2014) 114.

351 See case law discussion in chapter five and six.

352 Rombouts (2014) 5.

353 Rombouts (2014) 94.

354 B Pettersson "Development-induced displacement: Internal affair or international human rights issue?" (2002) 12 *Forced Migration Review* 16; M Stavropoulou "The right not to be displaced" (1994) 9(3) *The American University Journal of International Law and Policy* 689; Morel (2014) 27 & others.

355 Most human rights are guaranteed in treaties and conventions, and the addressees of these instruments is often member states. See Morel (2014) 272.

356 Imposing the duty on member states to *refrain* from actions that may violate human rights.

357 Imposing the positive duty on member states to *take* action in order to ensure that people can effectively enjoy their guaranteed rights.

358 Morel (2014) 274.

and entities performing public functions.[359] The state may also be held accountable where it had a duty to protect a human right and it had failed to do so.[360] As it turns out, a mine-affected community may approach the court seeking an injunction to hold the relevant state entity accountable where a case exists that the latter had an obligation to protect the rights of the community against displacement but had failed to do so.[361] Further, private entities, such as mining companies and other corporations, may also have human rights obligations of which, if they fail, they may be held accountable.[362] However, an exhaustive discussion of human rights obligations of non-state actors in relation to mining-induced displacements is not possible due to the limited scope of this study, and it is envisaged that it is one of the aspects that will inform the candidate's future research agenda.

2.5.4. The gender equality imperative vis-à-vis women inclusion

To a large extent, the broad discussion of marginalisation earlier[363] as one of the severe effects of displacement overlaps with the current theme, as women are mostly the marginals in displacements.[364] While there may be some notable legislative efforts aimed at achieving the gender-equitable outcomes in land acquisition, economic empowerment, compensation and livelihoods restoration opportunities, this theme is less adjudicated in courts. What is striking, though, is that there are several cases of women marginalisation and subjugation in terms of resettlement beneficiation that have been reported and covered by various empirical studies.[365] In this study, the women empowerment imperative is viewed as yet another critical theme or aspect under which the regulation of mining-induced displacement may be improved for the better.

2.5.5. The deterrence effect

Any existing problem necessitates a critical need to think about measures to deter it from persisting, if not to ameliorate its magnitude. The degree to which the courts advance and protects, through judgments, the rights of mine-affected communities against mining-induced displacements may also prove efficient in addressing or minimising the phenomenon. The courts may stretch and develop a consistent precedence entailing a number of special deterrent

359 Morel (2014) 272.
360 W Kälin & J Künzli *The Law of International Human Rights Protection* (2010) 78-81.
361 See the Xolobeni case in South Africa.
362 A Clapham *Human Rights Obligations of Non-State Actors* (2006).
363 Part 2.4.3.
364 Part 2.4.3.
365 Part 2.4.3.

measures and injunctions for indigenous communities in their judgments. The courts' tendency to affirm and guarantee the mine communities' rights to participation, consultation and consent may also aid in discouraging the prevalence of mining-induced displacements and evictions.

This would require the courts to adopt the post-modern realist approach when dealing with cases concerning mining-induced displacements. Anaya describes a post-modern realist court as one that endeavours to interpret and engage actively in shaping contemporary legal norms.[366] Rombouts also observes that the post-modern realist courts have the potential to adopt an interpretation of laws that is dynamic and inclusive of the collective land rights for tribal and indigenous communities over their traditionally occupied lands and resources.[367] The court also has the capacity to clarify, develop and explain the participatory process and requirements for the protection and exercising of mentioned rights.[368] Progressive as it may sound, there is no guarantee that the award of costs orders or damage injunctions against the defendant mining companies may deter other potential transgressors.[369]

2.6. Concluding remarks

The purpose of this chapter was to provide a theoretical overview of mining-induced displacement phenomenon. In so doing, the chapter sought to ascertain the state of research around mining-induced displacements to gain a better understanding of sector terminologies and other imperatives. The chapter was guided by the following question: what does the mining-induced displacement generally entail; and to what extent does it affect the often vulnerable mine communities? Throughout the chapter, the following issues were explored:

i. the brief contextual background of mining-induced displacements in examined jurisdictions and elsewhere;

ii. the definitive meaning of mining-induced displacements and related concepts;

iii. the diverse impacts of mining-induced displacements on those affected by them;

iv. the aspects and themes associated with mining-induced displacement phenomenon.

366 SJ Anaya "Divergent discourses about international law, indigenous peoples, and land rights over lands and natural resources: towards a realist trend" (2005) 16 *Colorado Journal of International Environmental Law and Policy* 249.

367 Rombouts (2014) 299.

368 Rombouts (2014) 299.

369 J Park "The constitutional tort action as individual remedy" (2003) 38 H*arvard Civil Rights-Civil Liberties Review* 400.

At the outset, the chapter found that mining-induced displacements is a phenomenon that has existed over the years not only in the examined jurisdictions, but across the world as it has a global footprint.[370] For South Africa, the chapter discovered that the history of mining-induced displacements stretch over a period of more than a century,[371] with its earliest manifestation being traced to as far back as the first half of the 20th century with the booming of the country's mineral-driven industrialisation.[372] This industrialisation culminated in many acts of forced relocations targeting black rural communities from their communal habitats to make way for developments such as mining.[373] The chapter argued that these occurrences were reminiscent and further perpetuations of forced removals of the black majority from their communal lands by the apartheid regime.[374] For instance, between 1960 and 1982, about 3.5 million black people and households were forcibly removed from their lands so that those lands could be scheduled for mining and other developments to benefit the white minority.[375] As for Ghana, the chapter discovered that literature on the history of mining-induced displacements is extremely minimal,[376] despite the country having experienced large-scale mining with the advent of the British rule during the 1880s.[377] However, in some limited literature, it is acknowledged that mining in Ghana has had negative impacts including the destruction of livelihoods and most disconcertingly, the displacement of communities for mining projects.[378]

The discussion then considered the definitive meaning and nuances of displacement and other related concepts. The chapter found that displacement is characterised by three key elements, namely the use of force i.e. against the free will of the displaced persons; the loss of land and places of abode and; as a result, the unsecured tenancy and landholding by those displaced.[379] Essentially, there can be no displacement if people had decided to move and relocate voluntarily by themselves.[380] It was also found that with displacement, there is no room for the critical role of free, prior and informed consent or consensus between those that stand to be displaced or transferred and the entity seeking their displacement or transfer, be it private or

370 Part 2.2.2.
371 Chapters five and six.
372 Muntingh (2011) 28.
373 Part 2.2.
374 Rugege (2004) 283-312; Kgatla (2013) 120 & Mathiba (2021) 561-579.
375 Platzky & Walker (1984) 1.
376 Part 2.2.1.2.
377 Jackson (1992) 175-178. See also Hilson (2002) 13-26 & Tsikata (1997) 9-14.
378 Taabazuing et al. (2012) 33-49. See also Terminski (2012) & Downing (2002).
379 Part 2.3.1.
380 Morel (2014) 17.

the state.[381] That displacement is a forceful, arbitrary and perhaps aggressive act of relocating people. Having come to understand displacement to be such a harrowing act, it then became necessary to ponder on what is it that does not constitute displacement, so that it may be the alternative option if one was to choose. It is here where the chapter identified resettlement as an alternative or so. The chapter argued that while resettlement is often treated as being synonymous to displacement, the two have different connotations and should not be construed as being one and the same concepts. Resettlement was found to be a process that is properly planned and monitored and occurring only with the consent of those affected,[382] as opposed to the abrupt and haphazard connotation associated with displacement.[383] Thus, resettlement is a voluntary, organised, pre-planned and monitored process that is often followed by the restoration of livelihoods.[384] These attributes are diametrically opposite to what displacement is known to be.

The chapter then proceeded to consider the diverse impacts of mining-induced displacements and the different forms and manifestations through which they negatively affect the displaced. It was found out that this phenomenon has diverse socio-economic and human rights effects on many mine communities as experienced in South Africa, Ghana and elsewhere in the world.[385] A great body of literature was reviewed and it became apparent that all acts of displacement in any form for whatever reason pose enormous risks including socio-economic instability, loss of access to basic resources on which the affected persons and their communities depend on for their social, cultural and economic well-being.[386] To others affected by it, displacement has had an effect of causing them "the trauma of the forced separation from one's homeland and the consequent dislocation of one's identity and traditions, entailing the destruction of historical and emotional links to the native earth, ancestral landscapes, cultural heritage, churches and cemeteries."[387] The chapter made a further discovery that another effect of displacement that is more striking is that it often affects those who are already impoverished and disadvantaged, including women, the poor, indigenous groups, people with tenure

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381 Part 2.3.2.

382 Chambers (1969) & Terminski (2013) 14.

383 Part 2.3.1.

384 Mostert & Mathiba (2022) 63 & 64.

385 Parts 1.2; 1.3 & 1.4.

386 Wilson (2019) 67; Kemp, Owen & Collins (2017) 22 & Owen & Kemp (2015) 478.

387 A de Zayas "Forced population transfer" Max Planck Encyclopedia of Public International Law, online (2009) at www.mpepil.com/ViewPdf/epil/entries/law-9780199231690-e802.pdf?stylesheet=EPIL-display-full.xsl (accessed 12 April 2021) & Morel (2014) 20.

insecurity and people living with disabilities.[388] It has been described by many as being disruptive, painful and always resulting in a high risks of destitution for those affected.[389] Its effects include homelessness;[390] landlessness;[391] and various forms of marginalisation.[392] It was argued that these negative socio-economic impacts are by no means not the 'necessary evils' or 'acceptable collateral damages' and should be confronted and be dealt with.[393]

Concerning the key indicators and/or themes, the chapter revealed that there are several issues, rights and other aspects through which the mine communities affected by displacements can vindicate their rights and seek legal protection against violations. It was noted that these themes have the potential to be indicative of a failing or thriving regulation of mining-induced displacements. Within the specific context of this study, the chapter explained these themes to be the protection of surface land rights and compensation for related disturbances; the required standard and level of engagement with mine-affected communities; the statutory obligations of state entities and administrative authorities in relation to mining-induced displacements; gender equality imperative vis-à-vis women inclusion; and the deterrence measures. As a qualifier and caveat, it is crucial to indicate that while there could be many other themes and indicators like mining-induced displacements in the context of environmental good governance, the issues listed above present as peculiar for the purposes of what this study seeks to achieve. Therefore, these themes do not represent a closed list and it is hoped that another study could develop and canvass other themes and indicators.

Against this background and context, the next chapter unpacks in generic theoretical terms the meaningful engagement approach developed and utilised by the South African courts as a mechanism for facilitating constitutionally informed deliberation in eviction cases and to establish what the potential role of this approach can be in a quest to address and ameliorate the concentration of mining-induced displacements in South Africa, Ghana and perhaps elsewhere.

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388 Morel (2014) 21.

389 M Cernea "Why economic analysis is essential to resettlement: A sociologist's view" in M Cernea (ed) *The economics of involuntary resettlement: Questions and challenges* (1999).

390 Part 2.4.1.

391 Part 2.4.2.

392 Part 2.4.3.

393 Vanclay (2017) 4; Bugalski (2016) 1–56 & Mathur (2013).

CHAPTER THREE
A DESCRIPTIVE THEORY OF MEANINGFUL ENGAGEMENT CONCEPT IN SOUTH AFRICA

3.1. Introduction

The Constitution of the Republic of South Africa, 1996 has a Bill of Rights as one of its key components.[394] Without remedies, these rights would be pointless. Thus, to protect and enforce these rights, the Constitution vests in the courts the discretionary powers to grant remedies for infringements of constitutional rights.[395] These enforcement provisions enable the courts to grant "appropriate relief, including a declaration of rights"[396] and "any order that is just and equitable".[397] The utility of having the courts crafting remedies for violations of constitutional rights lies in the need to ensure the effective vindication and protection of rights.[398] The crafted remedy is important not only to the immediate and directly affected victims of the violated right, but also to others who might suffer a similar violation.[399]

The Constitutional Court in *Occupiers of Olivia Road v City of Johannesburg*[400] developed and ordered a novel concept of "meaningful engagement".[401] The case concerned the right of access to housing for those that were to be evicted from the rundown buildings in the inner city of Johannesburg.[402] Instead of ordering a direct remedy, the court ordered the parties to engage with each other meaningfully, that the city should consult with the occupiers of the buildings affected by the city's regeneration strategy that had an effect of resulting in evictions.[403] Further, the good about this innovative mechanism for enforcing socio-economic rights is that

394 Chapter 2, the Constitution of the Republic of South Africa, 1996 (Constitution).

395 Sections 38 & 172(1), Constitution.

396 Section 172, Constitution.

397 Section 172(1)(b), Constitution. The provision is clear that 'just and equitable' remedies include an order limiting the retrospective effect of an invalidity order and a suspended declaration of invalidity. See also M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2nd ed (2006) 151-196 & S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 397-450.

398 *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69.

399 *S v Bhulwana; S v Gwadiso* 1996 1 SA 388 (CC), para 32 & S Liebenberg "Remedial principles and meaningful engagement in education rights disputes" (2016) 19 *PELJ* 4.

400 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

401 *Olivia Road* (2008) para 5.

402 *Olivia Road* (2008) para 1.

403 *Olivia Road* (2008) para 5.

it has a good effect of keeping the courts away from interfering with policy decisions, thus avoiding the so-called "polycentric dilemma"[404] that is often associated with socio-economic rights litigation.

Meaningful engagement is "a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives."[405] The court emphasised that "engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process."[406] Thus, since its development, meaningful engagement has so far been ordered by the South African courts in cases concerning eviction matters and housing rights.[407] The confinement of the application of meaningful engagement to eviction litigation is because of the fact that it is the context through which the remedy was developed and it may be simple to apply and order it in subsequent eviction cases, hence there is a sense of reluctance by courts, scholars and policy-makers to extrapolate its potential application in other rights and contexts.

Meaningful engagement concept has already been recognised and applied in a case concerning education rights.[408] Some scholars have conceptualised meaningful engagement in the context of administrative law.[409] Nonetheless, Liebenberg's view is correct that "there is still much work to be done by activists, government officials, scholars and courts before meaningful engagement begins to play a significant role in [other] human rights adjudication in South Africa."[410] Similarly, Ray has remarked that there is a need and "good reason to expect that the Constitutional Court might extend the engagement requirement to situations beyond eviction."[411] In view of this study, the mining law generally and mining-induced displacement

404 Part 3.2.2.

405 *Olivia Road* (2008) para 14.

406 *Olivia Road* (2008) para 15.

407 Liebenberg (2016) 4.

408 *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) para 76.

409 G Quinot "An administrative law perspective on 'bad building' evictions in the Johannesburg inner city: *City of Johannesburg v Rand Properties (Pty) Ltd*" (2007) 1 *ESR Review: Economic and Social Rights in South Africa* 25 & G Muller "Conceptualising 'meaningful engagement' as deliberative democratic partnership" (2011) 3 *Stellenbosch Law Review* 753-756 & Liebenberg (2016) 1.

410 S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *African Human Rights Law Journal* 28.

411 B Ray "*Occupiers of 51 Olivia Road v City of Johannesburg*: Enforcing the right to adequate housing through engagement" (2008) 8(4) *Human Rights Law Review* 713.

particularly is a context that is ripe for such an extension or extrapolation of meaningful engagement. This is yet another critical element where the study meets novelty.

Against this brief background, meaningful engagement is what could be critical in the quest to protect the rights of mine-affected communities against the disruptive and painful effect of mining-induced displacements.[412] Broadly, the study establishes the potential role of meaningful engagement concept in addressing the displacements and evictions of communities on account of mining developments.[413] The study considers the relationship, or what could be the relationship, between meaningful engagement and mining-induced displacements.

The previous chapter reviewed literature on the theoretical underpinnings of mining-induced displacements.[414] The effects of displacement on the communities were also explored. This chapter makes a case for meaningful engagement as a potential solution to the courts whenever approached to determine disputes involving mining-induced displacements. The chapter emphasises meaningful engagement as a concept that can provide a neutral platform where parties can engage and shape solutions to difficult issues of common interest. This chapter contributes to the overall research question by examining the concept of meaningful engagement; its evolution as a constitutional mechanism to enforce rights and the extent to which the South African courts have interpreted and given it content.

To set the guiding framework for this analysis, the chapter considers:

i. the need and legal basis for the crafting of meaningful engagement;

ii. the South African jurisprudence on meaningful engagement;

iii. the scholarly perceptions on meaningful engagement (i.e. adding the critical analytical element to jurisprudence, what are scholars saying about this?);

iv. the extension of meaningful engagement into the mining sector.

In analysing these issues, the discussion will follow the same logical sequence in which the guiding framework is presented.

412 Part 2.4.

413 It was argued in chapter one on the need to regulate this aspect of mining sector practice adequately. The study argues that the extension of meaningful engagement approach into the mining sector's law is an important entry point in achieving such endeavour.

414 Part 2.3.

3.2. The legal basis and utility of meaningful engagement concept

Logically, the central consideration of meaningful engagement remedy, in this study of legal nature, would suggest that there is a legal basis to doing so. This remedy is a product of the South African courts' innovation in enforcing socio-economic rights.[415] A remedy is that which is ordered or granted by a court in response to the claimant's success in showing cause that their right of constitutional nature has been infringed or threatened.[416] At first sight, it might establish the basis and utility for the development of this concept.

3.2.1. The legal basis question

One of the transformative features of the democratic South Africa is the constitutionalisation of socio-economic rights i.e. the inclusion of socio-economic rights in the Constitution.[417] These rights embody various entitlements to the conditions, services and resources necessary for the well-being of the people to whom these rights are addressed and/or enjoyable.[418] These entitlements include housing,[419] which arguably connotes the protection against eviction and displacement (for whatever reasons) as potential violations. The socio-economic rights are said to be 'justiciable', meaning that they can be successfully enforced through judicial mechanisms.[420] The Constitution demands that the "state must respect, protect, promote and fulfil the rights in the Bill of Rights."[421] This provision presupposes that the State has an obligation to fulfil and an active role to play in the realisation and enjoyment of human rights.[422] Where the State fails this obligation, that failure constitutes a violation of a right in question.[423] Where a violation of a right has occurred, a victim may then approach the court to vindicate such violated right. The court must then protect and enforce the right(s) in question by granting

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415 Part 3.3.

416 Bishop (2006) 159 citing K Hofmeyr *Understanding Constitutional Remedial Power* (unpublished Mphil thesis, Oxford University, 2006) 11; P Birks "Rights, wrongs and remedies" (2000) 20 *Oxford Journal of Legal Studies* 9-17.

417 Chapter 2, Constitution; D Bilchitz "The performance of socio-economic rights in the South African Constitution" in R Dixon & T Roux (eds) *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (2018) 45.

418 P de Vos & W Freedman *South African Constitutional Law in Context* (2014) 667.

419 Section 26, Constitution.

420 De Vos & Freedman (2014) 684.

421 Section 7(2), Constitution.

422 DM Chirwa & L Chenwi "The protection of economic, social and cultural rights in Africa" in DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 17 & S Leckie "Another step towards indivisibility: identifying the key features of violations of economic, social and cultural rights" (1998) 20(1) *Human Rights Quarterly* 91.

423 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 34.

an appropriate remedial order for the infringement of the concerned right(s).[424] But are the courts empowered to do this? They are and here is why. Section 38 of the Constitution encourages anyone whom their rights have been infringed or threatened to approach a competent court for an appropriate relief. Section 172(1) of the Constitution complements the latter in that it provides the enforcement provisions enabling the courts to grant "appropriate relief, including a declaration of rights"[425] and "any order that is just and equitable"[426] in protecting the rights against infringements. Thus, remedies mainly come through court orders,[427] just as meaningful engagement that came through in *Olivia Road*.[428]

In the ancient case of *Minister of the Interior v Harris*,[429] Centlivres CJ held that "[t]here can to my mind be no doubt that the authors of the Constitution intended that those [constitutional] rights should be enforced by the Courts of law. They could never have intended to confer a right without a remedy."[430] Having rights with no remedies to vindicate and enforce them through judicial mechanisms would be antithetical to the very spirit of the Constitution guaranteeing the very same rights.[431] Thus, in the specific context of mining-induced displacement too, the courts may similarly order a remedy it deems appropriate in the given circumstances to cure the infringement and this remedy, apart from meaningful engagement, may take the form of damages;[432] declaration of rights[433] and interdicts.[434] Further, meaningful engagement is not a direct relief since the settlement of dispute is determined by the parties among themselves or with the aid of a third party, as occurred in *Olivia Road*.[435] To this end, there can be no gainsaying that the courts have the wherewithal and powers to fashion remedies to any breach of a constitutional right. There would be no point in availing rights in terms of law without equally availing relief measures enforceable through courts to the claimants of violated or threatened rights.

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424 Sections 38 & 172(1), Constitution.

425 Section 172, Constitution.

426 Section 172(1)(b), Constitution.

427 Bishop (2006) 160.

428 Part 3.3.

429 *Minister of the Interior v Harris & Others* 1952 (4) SA 769 (A).

430 The *Ubi jus, ibi remedium* principle i.e. where there is a right, there is a remedy. *Harris* (1952) 780.

431 *Fose* (1997) para 69 citing *Nelles v Ontario* [1989] 2 SCR 170, 196 where the court indicated that "[t]o create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur."

432 To claim compensation for loss suffered.

433 To reinforce the duties and the obligations of other branches of government.

434 This relief can take the form of either mandatory relief or prohibitory relief for someone or the state to do (or not do) something.

435 Part 3.3.

3.2.2. The utility question: A less polycentric remedy

There are good reasons for meaningful engagement. One is arguably the fact that it has the effect of keeping the courts away from interfering with policy decisions, thus preventing the so-called 'polycentric dilemma'[436] which is more acute in socio-economic rights litigation.[437] The problem of polycentricity in the enforcement of socio-economic rights lies in the complex question concerning the "kinds of social tasks [that] can properly be assigned to courts and other adjudicative agencies."[438] The argument is that certain issues are inherently unsuited to be subjected to judicial determination and, instead, should be left to either the executive or legislature.[439] This points to the question of separation of powers, which entails the notion that each of the three arms of government has unique roles to play and that the other arms should respect and not interfere in those roles.[440] As such, the concern with the courts enforcing socio-economic rights has always arisen from the contention that allowing the courts to do so would be tantamount to allowing the judiciary to intrude too far into the prerogatives of the other arms of government in an unconstitutional manner.[441] The reason for this is that the justiciability of socio-economic rights is often strongly contested due to the nature of these rights "involving complex interacting centres of tension".[442] The other reason is that the realisation of socio-economic rights oftentimes involves budgetary policy considerations which are "not within the direct knowledge or expertise of judges."[443] This polycentric debate still presents as a major constraint of some sort towards enforcing and realising socio-economic rights.

However, the polycentric dilemma only arise where the courts happen to grant a direct order with polycentric effect i.e. enjoining other arms of government to take certain steps with budgetary and policy implications in the manner discussed above. With meaningful engagement remedy, though, polycentricity is not triggered. This is because a court ordering meaningful engagement does not directly instruct the political branches (executive or legislature) to implement certain plans with budgetary and policy implications to realise rights.

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436 Part 3.2.2.

437 P de Vos & W Freedman *South African Constitutional Law in Context* 2nd ed (2021) 787.

438 L Fuller "The forms and limits of adjudication" (1978) 92 *Harvard Law Review* 353; DM Davis "The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles" (1992) *South African Journal Human Rights* 354.

439 C Mbazira "Confronting the problem of polycentricity in enforcing the socioeconomic rights in the South African Constitution" (2008) 23 *SARCPL* 36.

440 Bishop (2006) 77.

441 De Vos & Freedman (2021) 787 & Bishop (2006) 77.

442 De Vos & Freedman (2021) 787.

443 De Vos & Freedman (2021) 787.

Instead, a court ordering this remedy is essentially requiring the litigants to work out their own amicable solution and plan of action, through meaningful engagement, to give effect to the court's merits findings of how the violation in question could be cured.[444] Once an amicable settlement has been reached by the parties, the court then makes this settlement central to its order, in whole or some, as occurred in *Olivia Road*.[445] In this way, the courts give political branches the opportunity to negotiate with the claimants of rights what might be possible or not based on the available financial and other resources, the information that is otherwise "not within the direct knowledge or expertise of judges."[446] Thus, the meaningful engagement approach has the benefits of promoting localised and context-sensitive settlements to human rights disputes.[447] It is also beneficial in stimulating political and administrative reforms to facilitate public participation by affected communities in devising solutions to conflicts and implementation of policies and programmes aimed at realising human rights.[448]

Therefore, in short, the process is not strictly and entirely court-directed, but party- or litigant-directed as well. The court's role becomes the one of prodding and encouraging communities, public, private institutions and other stakeholders to develop context-sensitive programmes of realising the rights as influenced by constitutionally-oriented factors.[449] As a caveat, this is by no means saying the courts should consider abdicating their constitutional role of asserting and enforcing the strict contours within which meaningful engagement process on the realisation of socio-economic rights should occur. If anything, it is implied that the courts should be empowered to oversee the deliberative engagement process between the litigants,[450] to satisfy itself that the agreed outcomes are consonant with the normative parameters and objectives initially set by the court.[451] This could be achieved by requiring parties to report back to the court, which will then be acting in its supervisory jurisdiction. Thus, ordering meaningful engagement is one way in which the courts can patrol their borders and refrain from policy development. The separation of powers principle requires this observation of boundaries.[452]

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444 S Liebenberg "Remedial principles and meaningful engagement in education rights disputes" (2016) 19 *PELJ* 10.

445 Part 3.3.

446 De Vos & Freedman (2021) 787.

447 Liebenberg (2012) 26.

448 B Ray "Extending the shadow of the law: Using hybrid mechanisms to develop constitutional norms in socio-economic rights cases" (2009) 3 *Utah Law Review* 797.

449 Liebenberg (2012) 26.

450 The flipside of the coin with this is that it may run contrary to our adversarial system of adjudication.

451 Liebenberg (2012) 28.

452 De Vos & Freedman (2021) 788.

3.3. The judicial approach to meaningful engagement

Meaningful engagement is an old concept.[453] It entails a litigant-oriented relief crafted by the courts for infringements of constitutional socio-economic rights.[454] It has developed and featured in several judgments pertaining to eviction disputes and housing rights over the years. This part considers how the courts in those judgments have interpreted and given content to meaningful engagement. The focus is primarily on *Olivia Road,* for it is a judgment where this concept was substantially expanded. However, there are other earlier judgments where meaningful engagement was first indicated and emphasised. The discussion in this part commences with the analysis of these judgments for context purpose leading to *Olivia Road* and the subsequent developments after it. Put differently, the judicial approach to meaningful engagement pre-*Olivia Road,*[455] in *Olivia Road* and post-*Olivia Road*.[456]

3.3.1. The *Grootboom* case: The earliest indication to engage meaningfully

The first indication of the parties' need to engage with one another in a meaningful manner to reach amicable solutions to human rights disputes occurred in *Government of the Republic of South Africa v Grootboom*.[457] The summary of the relevant facts is that Grootboom and other respondents were first living at an informal settlement of Wallacedene located in a partly waterlogged area that is prone to flooding.[458] Majority of the respondents had applied for subsidised low-cost housing with a hope that such housing might be availed to them speedily so that they can be saved from the dangerous and crisis situation they were living in at Wallacedene.[459] The respondents were placed on a housing waiting list for many years and they had no clue whatsoever as to when such housing will be available.[460] Given their circumstances and the fact that the area was soon to experience the rainy winter season, the respondents left the risky Wallacedene settlement.[461] They started to erect shacks on and unlawfully occupy the

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453 L Chenwi & K Tissington *Engaging Meaningfully with Government on Socio-Economic Rights – A Focus on the Right to Housing* (2010) 9.

454 *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69.

455 Focusing on *Grootboom* and *Port Elizabeth*.

456 Focusing on *Joe Slovo*.

457 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

458 *Grootboom* (2000) para 7.

459 *Grootboom* (2000) paras 5, 6, 7 & 8.

460 *Grootboom* (2000) para 8.

461 *Grootboom* (2000) para 8.

nearby vacant land that had a better drainage pattern, and named the place New Rust.[462] The vacant land was privately owned and the respondents did not obtain the consent of the owner.[463]

Aggrieved by this development, the landowner then approached the magistrate's court seeking an eviction order against the respondents,[464] and the order was granted as sought.[465] The order was served on the respondents ordering them to vacate the land within the specified date and time.[466] This date came and passed but the respondents remained in occupation of the land because, they argued, they had nowhere else to go.[467] The eviction proceedings were resumed few months later, resulting in magistrate's court granting and order requiring the respondents to vacate New Rust and authorising the Sheriff to evict them and to dismantle and remove any of their structures from the land.[468] The magistrate also directed that the parties and the municipality mediate to identify alternative land for the permanent or temporary occupation of the New Rust residents. The order also directed the municipality to engage with the respondents to identify the alternative land for the settlement.[469] This envisaged engagement did not occur.[470] Instead, the eviction order was enforced and the respondents, in Yacoob J's words, were evicted "prematurely and inhumanely: reminiscent of apartheid-style evictions"[471] with their homes bulldozed to the ground and possessions destroyed.[472] After their eviction, the respondents sheltered on a nearby Wallacedene sports field under temporary plastic structures where they "lived in desperate sub-human conditions."[473] It was at this point of indignity where the respondent's attorney approached the High Court with an urgent application asking that the respondents be provided with adequate basic shelter or housing until they obtained permanent accommodation.[474] Put differently, the respondents sought to vindicate their right of access to housing, which implies access to land, health care, food, water, social security and education in respect of the children involved.[475]

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462 *Grootboom* (2000) para 8.
463 *Grootboom* (2000) para 8.
464 *Grootboom* (2000) para 9.
465 *Grootboom* (2000) para 9.
466 *Grootboom* (2000) para 9.
467 *Grootboom* (2000) para 9.
468 *Grootboom* (2000) para 9.
469 *Grootboom* (2000) para 9.
470 *Grootboom* (2000) para 10.
471 *Grootboom* (2000) para 10.
472 *Grootboom* (2000) para 10.
473 *Grootboom* (2000) paras 10 & 80.
474 *Grootboom* (2000) para 15.
475 *Grootboom* (2000) para 19.

Limiting the discussion to the Constitutional Court judgment, the court ruled significantly in favour of the respondents. As a starting point, the court affirmed that despite the considerable jurisprudential and political debate,[476] socio-economic rights are justiciable and that is beyond question.[477] While the low-cost housing government programme was a laudable effort to realise housing rights, the court found it to be invalid to the extent that it failed to make provision for people in immediate and desperate need.[478] The court went on to state that all levels of government are under the statutory obligation, in terms of section 2 of the Housing Act,[479] "to *consult meaningfully* with individuals and communities affected by housing development."[480] The court viewed this meaningful consultation process as having potential to serve as a tool for resolving conflicts arising pertaining housing.[481] The court further ruled that would have the municipality engaged with the respondents about the identification of alternative suitable land as soon as it became aware of their unlawful occupation of New Rust,[482] a different turn out of events that is humane could have probably resulted.[483] The court granted a declaratory order affirming the rights of the respondents and the state's "obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need" of housing.[484]

3.3.2. The *Port Elizabeth Municipality* case: Emphasis on the need to engage

Four years after *Grootboom*, the Constitutional Court had another opportunity to deploy deliberative meaningful engagement in *Port Elizabeth Municipality v Various Occupiers*.[485] This case involved an eviction of 68 unlawful occupiers from a privately owned land in a place called Lorraine where the respondents had erected shacks.[486] The respondents were in unlawful occupation of property for about eight years, and most had come there after being evicted from other lands.[487] The respondents were admitting that their occupation of the land was unlawful, and that they were willing to vacate the land provided the municipality availed an alternative suitable site where they could go and re-establish their lives.[488] The municipality proposed to

476 Part 3.2.2.
477 *Grootboom* (2000) para 20.
478 *Grootboom* (2000) paras 52, 54 & 59.
479 Section 2(1)(b), Housing Act 107 of 1997.
480 Emphasis italicised. See *Grootboom* (2000) para 20.
481 *Grootboom* (2000) para 84.
482 *Grootboom* (2000) para 87.
483 *Grootboom* (2000) para 88.
484 *Grootboom* (2000) para 97.
485 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC).
486 *Port Elizabeth* (2004) paras 1 & 2.
487 *Port Elizabeth* (2004) paras 1 & 2.
488 *Port Elizabeth* (2004) para 2.

the respondents that they could move to an alternative Walmer township, but they rejected the proposal reasoning that Walmer was an unsuitable alternative due to overcrowding and being known to be a crime-ridden area.[489] The respondents also feared that they will once again be vulnerable to eviction at Walmer without any security of occupation.[490] Unlike the respondents in *Grootboom*, the respondents in this case had not applied for low-cost housing.[491]

Aggrieved by the non-cooperation of respondents,[492] the municipality approached the High Court seeking an order evicting the respondents. The High Court agreed that the respondents were in unlawful occupation of Lorraine and that public interest demanded the termination of such unlawful occupation.[493] As such, an eviction order was granted, ordering the respondents to vacate Lorraine and authorising the Sheriff to demolish their building structures.[494] The respondents then appealed the judgment at the Supreme Court of Appeal (SCA), which upheld the appeal and set aside the High Court's order.[495] The SCA reasoned that the High Court should not have ordered eviction without having solicited the assurance from the municipality that the respondents would have security of tenure at the proposed alternative Walmer.[496] The municipality then approached the Constitutional Court to set aside the SCA's decision on the basis that the municipality does not have a constitutional obligation to avail alternative accommodation or land for unlawful occupiers.[497]

The Constitutional Court, contextualising its decision, stated that it "is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads."[498] For this reason, the court emphasised that there is a need for special judicial supervision and control over a process that is socially stressful and potentially conflictual such as eviction.[499] While meaningful engagement was not an ultimate order, Sachs J underscored its critical significance that:

> "In seeking to resolve the … contradictions, … [t]he managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of

489 *Port Elizabeth* (2004) para 2.
490 *Port Elizabeth* (2004) para 2.
491 *Port Elizabeth* (2004) para 2.
492 *Port Elizabeth* (2004) para 4.
493 *Port Elizabeth* (2004) para 4.
494 *Port Elizabeth* (2004) para 4.
495 *Port Elizabeth* (2004) para 5.
496 *Port Elizabeth* (2004) para 5.
497 *Port Elizabeth* (2004) para 6.
498 *Port Elizabeth* (2004) para 6.
499 *Port Elizabeth* (2004) para 6.

> achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents."[500]

It is affirmed that meaningful engagement is one of the innovative ways to enforce socio-economic rights and cure related disputes; an efficient balancing tool where there is conflicting interests, such as between unlawful occupation and illegal eviction,[501] and between the right to housing and the right to property.[502] Finally, the Constitutional Court ruled that for the lack of significant attempts by the municipality to engage meaningfully with respondents who were genuinely homeless, the eviction order was not reasonable, just and equitable.[503] The court indicated that if parties were unable to engage on their own, the municipality had to appoint a skilled negotiator acceptable to all sides.[504] Thus, the court intended meaningful engagement to be a review standard for granting eviction orders.[505] The court further emphasised the critical need to take all the relevant interests and factors into consideration.[506] This emphasis presupposes the imperative of ensuring an exchange of thorough and accurate information between the parties. For the evictees, the information to be shared may include their realities and circumstances on the occupation (i.e. duration, adaptability, livelihoods etc),[507] and for the municipality it may include the arrangements around the envisaged eviction (i.e. relocation details, alternative site, support programmes etc).[508] In this way, meaningful engagement mitigates informational deficits between the parties and improves the quality of their settlement decisions. On this point, the court stated that meaningful engagement allow the parties to be considerate of each other's circumstances and interests, thus mitigating possibilities of stalemates where there is unwillingness to make concessions and arrive at quality decisions on specific issues.[509] The court has also indicated that meaningful engagement safe costs and emotional burden that

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500 *Port Elizabeth* (2004) para 39.
501 *Port Elizabeth* (2004) para 20.
502 *Port Elizabeth* (2004) paras 19, 23 & 32.
503 *Port Elizabeth* (2004) paras 46 & 59.
504 *Port Elizabeth* (2004) para 61.
505 *Port Elizabeth* (2004) para 61.
506 *Port Elizabeth* (2004) para 23.
507 *Port Elizabeth* (2004) para 53.
508 *Port Elizabeth* (2004) para 29.
509 *Port Elizabeth* (2004) para 42.

a combative, unpleasant and polarising nature of court processes put them through.[510] The court also indicated that meaningful engagement fosters respect for human dignity.[511]

The court ruled that it would serve little to no purpose in ordering the parties to engage with each other in a meaningful manner because "too much water [had] flowed under the bridge" already.[512] By implication, meaningful engagement process is beneficial when considered and embarked upon at a pre-litigation stage because, if it turns out successful, there may be no need to approach the court. It spares the parties from forensic expenses, system delays and litigious rancour.[513] In this case, the municipality refused to engage with the respondents in good faith until it had secured an eviction order against them,[514] and thus rendering such engagement futile, ineffective and weak.[515] In conclusion, the Constitutional Court dismissed an appeal and ordered the municipality to pay the costs.[516]

3.3.3. The *Olivia Road* case: Adoption of meaningful engagement

The Constitutional Court had an opportunity to expand and order meaningful engagement for the first time in *Occupiers of Olivia Road v City of Johannesburg*.[517] The case involved attempted eviction by the City of Johannesburg of around 400 impoverished occupiers of 'bad buildings' in the inner city.[518] The occupation of the buildings by the applicants was unlawful, risky and constituted a serious threat to their health and safety, among others.[519] The applicants were in desperate need of housing.[520] Having heard the arguments, the court issued an interim order requiring the City and occupiers to:

> "engage with each other meaningfully … in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned."[521]

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510 *Port Elizabeth* (2004) para 42.
511 *Port Elizabeth* (2004) paras 8 & 42.
512 *Port Elizabeth* (2004) paras 8 & 47.
513 *Port Elizabeth* (2004) para 47.
514 *Port Elizabeth* (2004) para 46.
515 *Port Elizabeth* (2004) para 46.
516 *Port Elizabeth* (2004) para 60.
517 *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC) (*Olivia Road*).
518 *Olivia Road* (2008) para 1.
519 *Olivia Road* (2008) para 1.
520 *Olivia Road* (2008) para 2.
521 *Olivia Road* (2008) para 5 (citing interim order 1).

This engagement process was not all up to the parties and them alone, but was subject to judicial supervision as the parties were ordered to report back to the court on the outcomes of such engagement.[522] The court further indicated that the need for the engagement order was primarily necessitated by the City's constitutional obligations towards all the residents of Johannesburg as well as the democratic imperative to ensure community's active participation in matters of local government.[523] The right to life and human dignity were also cited as being critical to the engagement order and for the City to observe, failing which the City would have contravened its constitutional obligations.[524] In highlighting the significance for meaningful engagement, the court linked this remedy to the reasonableness requirement under section 26(2) of the Constitution which,[525] for it to be met, every single step in the process of providing housing must be reasonable depending on the unique merits of the case.[526] It is then apparent that the engagement between the parties in this case was to be reasonable too.[527]

Through the meaningful engagement order, the parties managed to craft a comprehensive settlement agreement for and between themselves, except for few outstanding issues that were then left to the court to determine.[528] The agreement covered several issues including the plans for rendering the buildings more safer and habitable,[529] and the details around the relocation of applicants to an alternative accommodation by the City within the inner city.[530] The further relocation details addressed issues around the identification of suitable alternative buildings, the nature and standard of those buildings and the calculation of the rental that was to be paid monthly.[531] The agreement further stipulated that this alternative housing provision was a temporary arrangement pending the provision of suitable permanent housing by the City in consultation with the occupiers concerned.[532] The court indicated that meaningful engagement would only be effective if both parties act reasonably and in good faith.[533] That is, the evictees should not have frustrated the engagement process with unreasonable demands,[534] one the one

[522] *Olivia Road* (2008) para 5 (citing interim order 3).
[523] *Olivia Road* (2008) para16.
[524] *Olivia Road* (2008) para 16.
[525] *Olivia Road* (2008) para 17.
[526] *Olivia Road* (2008) para 18.
[527] *Olivia Road* (2008) para 18.
[528] *Olivia Road* (2008) para 6.
[529] *Olivia Road* (2008) para 24 & 25.
[530] *Olivia Road* (2008) para 24 & 26.
[531] *Olivia Road* (2008) para 26.
[532] *Olivia Road* (2008) para 24-26.
[533] *Olivia Road* (2008) para 20.
[534] *Olivia Road* (2008) para 20.

hand, and the municipality should not have treated them as a disempowered mass,[535] on the other. This is because deliberative meaningful engagement is undermined if parties engage with intransigent attitudes and making of unreasonable and non-negotiable demands.[536] Ultimately, the settlement agreement was endorsed by the court.[537]

In the subsequent final order (since the one of engagement was interim), the court explained why it made the engagement order and also shared content on the purpose and nature of such an engagement. It commenced by locating the legal basis for meaningful engagement in a range of constitutional provisions including section 26 on the right of access to adequate housing, which imposes an obligation on the State to act reasonably in realising this right.[538] The court affirmed that it is only fair that in situations where the impoverished are faced with homelessness due to eviction, the public authorities should generally be in a position to engage thoroughly and in good faith with them to explore possible humane and pragmatic solutions to their predicament.[539] The court explained that meaningful engagement "is a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement."[540] The objectives for engagement may be to establish the consequences that eviction may have on the evictees; whether the local authority could help in alleviating those consequences; whether it is possible to render occupation relatively safe and habitable; whether the local authority has any obligations to the evictees in the prevailing circumstances and when and how the local authority could or would fulfil these obligations.[541] The court further held that engagement should feature an element of transparency because secrecy is counter-productive to the objectives of engagement.[542] As for the scope and extent of engagement, the court emphasised that this is dependable on the context of each case.[543] This would mean "the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement" featuring "competent sensitive council workers skilled in engagement."[544] Also, in a small municipality, where evictions are not rampant, an

535 *Olivia Road* (2008) para 20.
536 *Olivia Road* (2008) para 21.
537 *Olivia Road* (2008) para 27.
538 Citing *Grootboom* (2000) para 17.
539 *Olivia Road* (2008) para 9-12.
540 *Olivia Road* (2008) para 14.
541 *Olivia Road* (2008) para 14.
542 *Olivia Road* (2008) para 21.
543 *Olivia Road* (2008) para 19.
544 *Olivia Road* (2008) para 19.

ad hoc engagement may suffice,[545] but definitely not in a big city such as Johannesburg and, I would add, Cape Town, Durban, Port Elizabeth and others.

In concluding its judgment, the court found that the decisions of the High Court and later the SCA to grant an order evicting applicants in the absence of meaningful engagement was unreasonable, and thus set those decisions aside.[546] The court further declared unconstitutional section 12(6) of the NBRSA, which imposes criminal liability for failing to comply with a notice to vacate without judicial oversight.[547] This section was said to be in conflict with section 26(3) of the Constitution.[548] To date, this case and its judgment has been seen as an exemplary point of reference for the potential and advantage of meaningful engagement.[549] Some scholars have lamented the fact that this judgment has declined to pronounce on certain critical issues,[550] but those concerns are beyond the scope of (and less relevant to) this study. Of great relevance to this study, as derived from this judgment, is the advantage and potential of meaningful engagement to facilitate a more participatory and contextualised solution to the problems of common interest between the evictees, authorities and third parties. It is exemplary that an engagement order resulted in a settlement agreement between the parties which substantially met most of the evictees' concerns about the location, quality and affordability of the proposed alternative accommodation.

3.3.4. The *Joe Slovo* case: Further endorsement of meaningful engagement

The case of *Residents of Joe Slovo Community v Thebelisha* also adopted the meaningful engagement.[551] The case concerned an application, by an organ of State in terms of the PIE Act, to evict and relocate a community from the Joe Slovo informal settlement on the outskirts of Cape Town to an alternative 15 kilometre-away area known as Delft.[552] The eviction was sought to make way for the low-cost housing development, the 'N2 Gateway Project'.[553] The living conditions in the Joe Slovo settlement were "deplorable" and "unfit for reasonable

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545 *Olivia Road* (2008) para 19.

546 *Olivia Road* (2008) para 54.

547 *Olivia Road* (2008) para 54.

548 *Olivia Road* (2008) para 54.

549 B Ray "Engagement's Possibilities and Limits as a Socio-Economic Rights Remedy" (2010) 9 *Washington University Global Studies Law Review* 399.

550 For instance, Liebenberg (2012) 18.

551 *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* 2011 (7) BCLR 723 (CC).

552 *Joe Slovo* (2011) para 8.

553 This was carried out as part of the Breaking New Ground (BNG) policy, a national policy aimed at eliminating informal settlements across South Africa.

human habitation".[554] The respondents argued that the *in situ* upgrading of the Joe Slovo settlement was not possible, hence the need for relocation to Delft.[555] The applicants feared that the relocation to Delft would have negative effects on their already fragile livelihoods and communal networks, and that they would lack access to the various amenities such as schools, transport and health care facilities.[556]

The applicants were ordered to vacate the Joe Slovo settlement on a condition that temporary relocation units (TRUs) were availed to them.[557] The court ordered that the parties should engage in a meaningful manner to reach settlement on their issues.[558] The court also ordered that the respondents should give the affected evictees a week-long notice.[559] This engagement was to ventilate issues such as the relevant circumstances of those affected by the eviction and relocation; the description of TRUs; the assistance with transportation and the prospects of permanent housing allocations.[560] The engagement process was judicially supervised as the parties were ordered to report back to the court on the progress and the prospects of allocation of permanent housing to the mostly affected persons.[561] However, the applicants resisted eviction order and launched an appeal against it before the Constitutional Court.

The Constitutional Court found that the authorities were reasonable in seeking the eviction of applicants, and had acted justly and equitably.[562] The court upheld the eviction order on a condition that the applicants would be relocated to the TRUs in Delft area.[563] The court also gave requirements and quality standard of the TRUs.[564] The court emphasised that there should be an ongoing meaningful engagement process between the parties.[565] Few critical points set the Constitutional Court's judgment apart from the one of the High Court. First, the former ordered the respondents to ensure that at least 70 per cent of the new housing units to be built in Joe Slovo area were to be allocated to the applicants.[566] Secondly, the court ordered that the TRUs in Delft were to meet certain specifications insofar as quality and habitability is

554 *Joe Slovo* (2011) para 8.
555 *Joe Slovo* (2011) para 7.
556 *Joe Slovo* (2011) paras 31-34.
557 *Joe Slovo* (2011) para 7.
558 *Joe Slovo* (2011) paras 7 & 139.
559 *Joe Slovo* (2011) para 7.
560 *Joe Slovo* (2011) para 7.
561 *Joe Slovo* (2011) para 7.
562 *Joe Slovo* (2011) para 5.
563 *Joe Slovo* (2011) para 7 (order 4).
564 *Joe Slovo* (2011) para 7 (order 9-10).
565 *Joe Slovo* (2011) para 7 (order 5 & 11).
566 *Joe Slovo* (2011) para 5.

concerned.[567] Lastly, the court required the parties to have an ongoing meaningful engagement concerning the relocation process.[568] Thus, the court's decision in *Joe Slovo* is unfortunate and regrettable. In *Olivia Road*, the court came across as setting a precedent that the absence of meaningful engagement with the evictees should ordinarily be viewed as a weighty consideration against an eviction order.[569] Now in *Joe Slovo*, the same court retreats from this precedence and order a mass eviction.[570]

3.4. An overview of scholarly perceptions on meaningful engagement

Much is now known through case law about meaningful engagement and its potential. The discussions in the following paragraphs explore the scholarly perceptions on the timing, nature, extent and importance of meaningful engagement.

3.4.1. The timing for meaningful engagement: A precursory consideration or not?

Meaningful engagement is beneficial when considered prior to litigation. It has the advantage of "saving on forensic expense, avoidance of the law's delays, and minimisation of litigious rancour."[571] Although it may not be guaranteed that engagement will result in parties reaching consensus on all issues as, per Ngcobo J's words, it does not require them "to agree on every issue",[572] but it does have the potential to get some issues solved and ascertained. Liebenberg observes that to extract the best possible outcome from engagement demands that both parties engage in good faith and reasonableness as well as the willingness to listen and understand each other's concerns.[573] She observes further that if the authorities give engagement a chance, the costly and time-consuming court process could be avoided in the first place.[574] Liebenberg observes that engagement has an effect of channelling the parties' time and energy on finding localised and contextual give-and-take solutions.[575] Similarly, Mahomedy observes that the advantages of meaningful engagement are almost all lost if it is only considered at the point of litigation.[576] This is because the financial resources can no longer be saved and the delays

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567 *Joe Slovo* (2011) para 5.
568 *Joe Slovo* (2011) para 5.
569 *Olivia Road* (2008) para 21.
570 *Joe Slovo* (2011) para 5.
571 *Port Elizabeth* (2004) para 47.
572 *Joe Slovo* (2011) para 244.
573 Liebenberg (2012) 25.
574 Liebenberg (2012) 24.
575 Liebenberg (2012) 25.
576 S Mahomedy *The potential of meaningful engagement in realising socioeconomic rights: Addressing quality concerns* (unpublished LLM dissertation, Stellenbosch University, 2019) 40.

associated with litigation can no longer be avoided and the rancour of litigation can no longer be circumvented.[577] Ray opines that meaningful engagement has the potential to avoid the necessity for litigation.[578] By its nature, engagement "stands as a background requirement, potentially, but not immediately, enforceable by the courts."[579] Thus, the engagement process removes the courts from being directly involved in policy development and, instead, it equips them with enhanced remedial power.[580]

However, there are dissenting scholarly views that do not see greater utility and need for meaningful engagement. Brand argues that meaningful engagement would only "make sense" if it is undertaken after at least the legal issues in a case have been determined authoritatively by the court.[581] Brand argues further that the "[p]arties to a dispute approach a court presumably because they have themselves been unable to resolve that dispute amicably."[582] In this way, Brand's argument presupposes an immediate involvement of the court to ascertain the issues. Similarly, Chenwi opines that treating meaningful engagement as a precursory consideration by parties might be an inappropriate arrangement.[583] She points out that without the immediate court involvement, the parties would engage without knowing their legitimate entitlements and the normative parameters within which they are engaging.[584] Chenwi also problematises the unequal bargaining power that may exist between the State authorities, private entities and potential evictees,[585] and argues that this could result in the engagement being unsuccessful or not meaningful, especially in cases where the poor are not represented by competent lawyers.[586]

While the propositions advanced by Brand and Chenwi may hold for some reasons, it is contended that such early resort to litigation undermines the potential amicable settlement that can be arrived at by the parties themselves and on their own terms. It also denies the parties an opportunity to save on litigation costs (especially the potential evictees and mining-induced displacees who are often poor and underprivileged) since they will incur those costs even if

577 Mahomedy (2019) 40.
578 Ray (2008) 710.
579 Ray (2008) 711.
580 Ray (2008) 712 & Liebenberg (2012) 27-28.
581 D Brand *Courts, Socio-Economic Rights and Transformative Politics* (unpublished LLD thesis, Stellenbosch University, 2009) 162-163.
582 Brand (2009) 162-163.
583 L Chenwi "A new approach to remedies in socio- economic rights adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*" 2009 (2) *Constitutional Court Review* 384.
584 Chenwi (2009) 384.
585 Chenwi (2009) 384.
586 Chenwi (2009) 384.

they approach the court for mere determination of issues.[587] It is further contended that even if the parties might be unable to ascertain the issues on their own, they have an option of soliciting the service of a neutral third party to do so through mediation process. In this way, the parties would have avoided delays often involved in court processes and the litigious rancour.[588]

It is argued that if no consensus is reached from the engagement process, thus compelling the dissatisfied party to approach the court for relief, the outcome of such an engagement process will and should be a weighty consideration for the approached court in its determinisation of whether eviction order would be 'just and equitable'.[589] To this end, in short, this study believes strongly in the undertaking of engagement before considering litigation for reasons expounded above.

3.4.2. The nature of meaningful engagement: A two-way process?

The Constitutional Court in *Olivia Road* described meaningful engagement as "a two-way process" in which the local authority and those facing the risk of homelessness due to eviction would talk to each other meaningfully to arrive at contextualised solutions to their problems.[590] The court stated that meaningful engagement bears the potential to contribute greatly towards finding speedy resolution to the disputes and with "increased understanding and sympathetic care."[591] Some scholars observe that the nature and extent of engagement must always be context-sensitive, meaning that the settlement outcomes arrived at are responsive and alive to the local circumstances and needs.[592] Being a two-way process, the engagement is expected to be meaningful as viewed by the parties. Chenwi offers an informative perspective that there are plenty of laws and judicial decisions from which several guiding elements for determining the 'meaningfulness' of the engagement process can be drawn.[593] According to her, these elements include treating the potentially affected evictees as equal stakeholders in law- and decision-making processes that have a bearing on them; providing comprehensive and accurate information of and about the engagement processes to those affected; having a well-structured, coordinated, consistent and detailed outline of the process and ensuring its accessibility to those

[587] *Port Elizabeth* (2004) para 47.
[588] *Port Elizabeth* (2004) para 47.
[589] The test of lawfulness for evictions as per section 26 of the Constitution.
[590] *Olivia Road* (2008) para 14.
[591] *Olivia Road* (2008) para 15.
[592] Chenwi (2011) 155. See also K Roach "Constitutional, remedial and international dialogues about rights: The Canadian experience" (2004) 40 *Texas International Law Journal* 537.
[593] L Chenwi "'Meaningful engagement' in the realisation of socio-economic rights: the South African experience" (2011) 26 *Journal of Southern African Public Law* 155.

like to be affected; acting transparently and ensuring that the relevant information is accessible to interested stakeholders; approaching the process with openness; and having respect for constitutional rights and values not just in relation to the process but also the outcome must be consistent with rights and values.[594]

3.4.3. The meaningful engagement as a participatory constitutional remedy

Following the *Olivia Road* judgment, several scholars converged in perceptions to describe the concept of meaningful engagement as a 'participatory constitutional remedy' which fosters direct and effective engagement between the parties involved in a dispute concerning the realisation of a socio-economic right.[595] In his explanation of how this concept is constitutive of a participatory constitutional remedy, Muller observes that meaningful engagement is tantamount to "participation that represents a powerful response to the legacy of apartheid by ensuring that excluded voices are empowered in wider participatory processes."[596] He goes further to indicate that the element of participatory democracy that is featured in meaningful engagement "creates a unique link between the obligation of government to respect, protect and promote the fundamental rights in the Constitution and the right of excluded voices to access" those rights, especially the right to housing and not to be evicted unlawfully.[597] Quinot also observe that the core aspect of meaningful engagement is that it promotes active involvement of the marginalised and impoverished in the process of realising their socio-economic rights.[598] In so doing, it rectifies the disconcerting fault-lines of the apartheid regime where public participation was merely, as Chenwi indicates, "spectacular politics"[599] wherein communities were simply endorsers of pre-designed policy initiatives.[600]

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[594] Chenwi (2011) 155.

[595] S Liebenberg "Deepening democratic transformation in South Africa through participatory constitutional remedies" paper presented at a Constitutional Roundtable, University of Toronto, 28 February 2014, available online at http://aspercentre.ca/event/deepening-democratic-transformation-in-south-africa-through-participatory-constitutional-remedies/ (accessed 19 June 2020) and G Muller "Conceptualising 'meaningful engagement' as a deliberative democratic partnership" in S Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2011) 300.

[596] Muller (2011) 750.

[597] Muller (2011) 751.

[598] G Quinot "An administrative law perspective on 'bad building' evictions in the Johannesburg inner city" 2006 (8) *ESR Review* 25.

[599] Chenwi (2011) 129.

[600] JJ Williams "Community participation: lessons from post-apartheid South Africa" (2006) 27 *Journal of Policy Studies* 197. See also Chenwi (2011) 130.

Similarly, Liebenberg perceives meaningful engagement as a workable remedial mechanism to advance the fundamental objectives and transformative aspirations of the Constitution.[601] The engagement remedy aligns with the constitutional imperative of promoting democracy at the grassroots level, which is participatory in nature and approach.[602] The significance of this kind of democracy i.e., participatory, was explained in detail by the Constitutional Court in several cases.[603] Chenwi perceives meaningful engagement as a dialogical process occurring when a group of citizens and their government meet to "talk and listen to each other" with a view of reaching consensus and achieving certain objectives.[604] She alludes further that this process "is more democratic and more flexible and responsive to practical concerns that socio-economic rights raise."[605] The failure by government, and sometimes private entities, to involve potentially affected persons in decision-making processes hinges negatively on the participatory democracy that the Constitution strongly envisages.[606] Chenwi appreciates a conceptual difference between meaningful engagement and other related concepts such as public participation, mediation and the right to be heard.[607] She points out further that meaningful engagement, being developed by the Constitutional Court,[608] is a continuous process that goes far beyond what these related and closely similar concepts provide for.[609] Muller concurs and observes that "meaningful engagement is a type of public participation that transcends procedural fairness in terms of section 33 of the Constitution and sections 3 and 4 of PAJA [among others]".[610]

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601 Liebenberg (2014).

602 Liebenberg (2014).

603 *Doctors for Life International v The Speakers of the National Assembly* 2006 (12) BCLR 1399 (CC), paras 111 & 116, where the Constitutional Court explained the type of democracy that the South African Constitution envisions. See also *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (8) BCLR 872 (CC) paras 111; 625 & 627; *Mamba & Others v Minister of Social Development* 2008 (Case No: 36573/08) Transvaal Division para 1-2.

604 Chenwi (2011) 129.

605 Chenwi (2011) 129.

606 Chenwi (2011) 129.

607 Chenwi (2011) 129; L Chenwi & K Tissington *Engaging Meaningfully with Government on Socio-Economic Rights: A Focus on the Right to Housing* (2010) 9; B Ray "Engagement's possibilities and limits as a socio-economic rights remedy" (2010) 9 *Washington University Global Law Review* 417; K McLean "Meaningful engagement: one step forward or two back? Some thoughts on *Joe Slovo*" (2010) 3 *Constitutional Court Review* 223.

608 In *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69, the court held that "courts have a particular responsibility … and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal", especially given that "so few have the means to enforce their rights through the courts".

609 Chenwi (2011) 129 & Ray (2010) 417.

610 Muller (2011) 756.

According to Chenwi, consultation entails government's action of simply soliciting the views of citizens on its decision-making process.[611] However, these solicited views do not "carry much weight" and the final decision often lies with the government alone.[612] Based on the elaboration of Chenwi, a consultation task would often be undertaken merely as a box-ticking exercise.[613] By contrast, she observes that meaningful engagement involves all the relevant stakeholders with equal bargaining power engaging reasonably and in good faith to reach a mutually acceptable outcome.[614] With meaningful engagement, the final decision by government must be informed by the concerns of those potentially affected by the proposed decision or action.[615] The parties make the final decisions together. Consultation is also seen as a once-off act required to make a decision, whereas meaningful engagement is an ongoing consultative process.[616] And then there is mediation which entails a process wherein the parties seek to resolve their dispute by voluntarily appointing the mediator to assist them in reaching an acceptable decision.[617] Relying on the latter elaboration, meaningful engagement transcends other traditional dispute resolution mechanisms,[618] both in utility and substance. Thus, given the difficulty in fashioning the progressive remedies for socio-economic rights violations,[619] the formulation of a meaningful engagement presents an important development in South African socio-economic rights jurisprudence and must be utilised optimally and widely in various contexts, including in evictions and displacements occurring in the mining context.

3.4.4. The promises and pitfalls of meaningful engagement

Like any other concept, meaningful engagement has a light and a shadow side. As for the good, Brand points out correctly that the process of meaningful engagement "holds great promise" and it does so in two fronts. First, it potentially resolves the practical issues around institutional capacity to realise and protect socio-economic rights.[620] Secondly, he alludes that the

611 Chenwi (2011) 128.
612 Chenwi (2011) 128.
613 Chenwi (2011) 128.
614 *Olivia Road* (2008) para 234.
615 *Olivia Road* (2008) para 234.
616 Chenwi & Tissington (2010) 11.
617 Chenwi (2011) 130.
618 Such as mediation and arbitration etc.
619 D Budlender "The role of the courts in achieving the transformative potential of socio-economic rights" (2007) 8 *ESR Review: Economic and Social Rights in South Africa* 9; K Roach "Crafting remedies for violations of economic, social and cultural rights" in J Squires et al. (eds) *The Road to a Remedy: Current issues in the Litigation Of Economic, Social and Cultural Rights* (2005) 111-126, as well as Chenwi (2009) 371.
620 Brand (2009) 137.

engagement process presents as a flexible alternative remedial options towards institutional relation issues pertaining to remedies in socio-economic rights litigation.[621] Brand also indicates that engagement remedy serves as an innovative mechanism for strong legitimation by the courts of transformative political action.[622] In his consideration of constitutional remedies, Bishop shares sentiments with Brand and adds that meaningful engagement goes beyond remedies that are simply supervisory in nature.[623] Drawing from this complimentary perspectives on the potential of meaningful engagement, Ray contends that the engagement remedy can be viewed as an impetus for change and for the government to consider developing a more robust and multi-faceted housing remedial policy framework that section 26 of the Constitution arguably requires.[624]

Despite the above positive account on meaningful engagement, there are few objections to its relevance and usefulness generally. In this regard, Landau remarks that real questions and gaps exist about the general utility of the engagement remedy as it is currently applied by the Constitutional Court primarily in eviction cases.[625] Without an attempt to elaborate, Landau goes further to remark that "[t]he dialogue-based approach has not really been used outside of South Africa, and … it has not accomplished much."[626] Considering how meaningful engagement has proven to be an effective adjudicative strategy and remedy in *Grootboom*, *Port Elizabeth* and more concretely in *Olivia Road*, it is contended that Landau's observation that the remedy has not accomplished much in South Africa is unconvincing and does not appear to be true.

On a similarly attacking mode, Fowkes objects that the meaningful engagement remedy has greater potential to usurp the courts' role, if not the executive's responsibility to set broader substantive legal standards for evictions.[627] Tushnet contends that meaningful engagement, in its construct from *Olivia Road*, is a "weak form" of judicial review.[628] In contrast, Liebenberg regards meaningful engagement as a significant aspect of the eviction jurisprudence that

621 Brand (2009) 137.

622 Brand (2009) 137.

623 M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2008) 9-199.

624 Ray (2008) 703-713.

625 D Landau "The reality of social rights enforcement" (2013) 53 *Harvard International Law Journal* 198.

626 Landau (2013) 192.

627 J Fowkes *Building the Constitution: The Practice Constitutional Interpretation in Post-Apartheid South Africa* (2016) 301-325.

628 M Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008) 45.

promotes the efficiency and significance of "procedural fairness" and facilitates "participatory democracy" to protect the rights of the potential evictees and not to exert pressure on them to negotiate their rights and entitlements away.[629] Liebenberg, though, highlight that it is important for courts to develop a guiding framework on the nature and substance of obligations imposed by the requirement to meaningfully engage.[630]

On an affirming note, Liebenberg and Young contend that meaningful engagement has good prospects for both deliberative and collaborative decision-making processes between the citizens, relevant government institutions and private actors.[631] However, the authors observe that the remedy still leaves significant decision-making power in government institutions.[632] In so doing, it thus fails to serve as a flexible mechanism for inclusive deliberations on the structural reforms necessary for the realisation of socio-economic rights.[633] This shortcoming underscores a critical need for a better understanding of meaningful engagement as a substantive requirement availing several benefits and advantages at the disposal of the marginalised communities.

3.4.5. Meaningful engagement: More than 'just' a remedy?

As it turns out, the idea imbued in the concept of meaningful engagement is that those who are to suffer as a result of government action (or private action for that matter) must be engaged meaningfully. To be engaged meaningfully, then, is about making decisions together and ensuring that there is no arbitrariness as a result of unequal bargaining power.[634] Ray argues accordingly that meaningful engagement encompasses a substantive element of active participation, democratic accountability and responsiveness that goes beyond the mere proceduralisation of evictions.[635] In his discussion, Ray identifies two classical forms of engagement, namely "litigation engagement" and "political engagement".[636] The author describes "litigation engagement" as engagement that occurs during litigation, as in *Olivia*

629 S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 314.
630 Liebenberg (2010) 314-315.
631 S Liebenberg & G Young "Adjudicating social and economic rights: can democratic experimentalism help?" in H Aliviar-Garcia, K Klare & LA Williams (eds) *Socio-Economic Rights in Theory and Practice: Critical Enquiries* (2015) 242.
632 Liebenberg & Young (2015) 243.
633 Liebenberg & Young (2015) 243.
634 Chenwi (2009) 384.
635 Ray (2010) 400.
636 Ray (2010) 400.

Road, and is serving as a remedy management tool,[637] while "political engagement" occurs at a pre-litigation phase.[638] Ray summarises by arguing that the meaningful engagement remedy has formed mainly as part of litigious process and, as such, its potential has not been fully realised due to lack of measures to facilitate it with unlawful occupiers[639] and, I would add, with mine-affected communities.

From an administrative law perspective, Muller submits that meaningful engagement is a special kind of public participation mechanism that transcends procedural as per sections 3 and 4 of the Promotion of Administrative Justice Act[640] and section 33 of the Constitution.[641] He argues further that meaningful engagement should be understood as "deliberative democratic partnership" resulting in the creation of a "dialogic relationship between local government and the unlawful occupiers."[642] Notably, Muller's conceptualisation of meaningful engagement resonates well with the dictum in the *Joe Slovo* case where the court emphasised the need to maintain this dialogic relationship because "when all is said and done, and the [meaningful engagement] process has run its course, the authorities and the families will still be connected in ongoing constitutional relationships."[643] Closely related to this formulation is an argument by Chenwi and Tissington that realising the right of access to housing and its ancillary right against unlawful eviction give rise to practical concerns which could be dealt with through a democratic, flexible and responsive approach promoting equitable participation.[644] This argument flows mainly from the court's sentiment that meaningful engagement must be a "structured, comprehensive and consistent" process and that the "vulnerable occupiers must have the ability to engage meaningfully."[645] Apparent from the court's construction of meaningful engagement, is that the engagement must be practically comprehensive, well-planned, systematic and should not be extempore or just a mere mediation or consultation.[646]

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637 Ray (2010) 413.

638 Ray (2010) 417.

639 Ray (2010) 420.

640 Promotion of Administrative Justice Act 3 of 2000 (PAJA).

641 Muller (2011) 756.

642 Muller (2011) 757.

643 *Joe Slovo* (2009) para 408.

644 Chenwi & Tissington (2010) 4.

645 *Olivia Road* (2008) para 56. See also Saul *Developing a Community Engagement Model as a Normative Framework for Meaningful Engagement During Evictions* (unpublished LLD thesis, University of the Western Cape, 2016) 126.

646 Chenwi & Tissington (2010) 5. The Constitutional Court in *Olivia Road* attributed a substantive meaning to meaningful engagement, setting it apart from consultation, mediation and the right to be heard which constitute mere procedural steps that are necessary to make a decision within the broader scope of engagement.

Therefore, what encompasses meaningful engagement concept, as well as its potential as a constitutional remedy and a transformative enterprise, has been highlighted. It is also apparent that the remedy is not a once-off event, what Chenwi and Tissington refer to as "simply about ticking of boxes".[647] Instead, it should be construed as a thorough process that must take place before the implementation of any project that could culminate in an eviction process, especially in large-scale proportions.[648] The other significant observation is that the meaningful engagement remedy is deliberate in placing at its core the rights and interests of the marginalised, the vulnerable and the poor. The remedy positions the potential evictees as equal stakeholders, with equal voice and bargaining power to participate actively towards decision-making. In so doing, the doctrine detests centralism, bureaucratic attitude of the State and reductionist approach towards participation in policy-making, all these traceable from the apartheid regime.[649] Lastly, meaningful engagement is a structured process that requires the empowerment of the potential evictees and displaced persons to be able to engage meaningfully as partners in decision-making, instead of just informing them about the decision that has already been taken unilaterally by State institutions.[650]

3.5. The potential role and relevance of meaningful engagement in the mining sector context

Apart from evictions and housing rights case law,[651] the meaningful engagement remedy has already been considered in the context of administrative law[652] and education rights.[653] There is no reason why this proactive remedy should not be extended to mining law and displacement cases that occur in the mining context. To a greater extent, the plight of persons or community evicted from a vacant piece of land by a government or private entity is the same as the plight of mine-affected communities who face displacements undertaken to make way for mining operations. The two categories might be evicted or displaced for different reasons, but they

647 Chenwi & Tissington (2010) 12.

648 *Abahlali BaseMjondolo Movement SA and another v Premier of KwaZulu-Natal and Others* 2010 (2) BCLR 99 (CC) para 123.

649 Williams (2006) 197.

650 *Olivia Road* (2008) para 37.

651 Part 3.3.

652 Muller (2011) 756.

653 Liebenberg (2016) 17, discussing *Hoërskool Ermelo v Head, Department of Education, Mpumalanga* 2009 3 SA 422 (SCA); *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 8 BCLR 761 (CC) paras 74-78 and *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC) paras 72-82.

certainly endure the same inconveniences, hardships and painful experience. It has already been explained how and the extent to which mining-induced displacements and evictions are negatively impacting on socio-economic rights.[654] From the preceding discussions about meaningful engagement and its potential,[655] there can be no question that this remedy has great potential to assist the mine communities, mining companies and other stakeholders to reach a settlement agreement concerning their issues and conflicting interests. The engagement process can facilitate a participatory, contextualised solution to the impasse which often develop between mine communities and mineral right holders.

It will be demonstrated, not here but in chapter five,[656] how meaningful engagement remedy is continuously making its way to becoming an established adjudicative strategy in the context of mining-induced displacements. This will be shown through an analysis of three significant judgments where, although it was not ordered, meaningful engagement featured prominently in the courts' decisions respectively. These judgments are *Bengwenyama Minerals v Genorah Resources*[657] (the first indication of the need to engage in mining sector displacements); *Maledu and Others v Itereleng Bakgatla Mineral Resources and Another*[658] (the integration and/or adoption of meaningful engagement the mining sector context); and then *Baleni & Others v Minister of Mineral Resources and Others*[659] (a further endorsement of meaningful engagement in the mining sector context).

3.6. Conclusion

This chapter has addressed the following sub-research question: what is meaningful engagement; how has it evolved as a constitutional mechanism and remedy to enforce rights over the years; how and to what extent have the South African courts interpreted and given it content; and what could its specific role be in addressing mining-induced displacement? This sub-research questions was addressed through a discussion of the following issues:

i. the need and legal basis for the crafting of meaningful engagement;

ii. the South African jurisprudence on meaningful engagement;

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654 See certain aspects of chapter one and two respectively.

655 Parts 3.3 and 3.4.

656 Part 5.4.

657 *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2011] 4 SA 113 (CC).

658 *Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2019] 1 BCLR 53 (CC); 2019 (2) SA 1 (CC).

659 *Baleni & Others v Minister of Mineral Resources & Others* (73768/2016) [2018] ZAGPPHC 829.

iii. the scholarly perceptions on meaningful engagement;

iv. the extension of meaningful engagement into the mining sector;

As a general point of departure, the chapter found that meaningful engagement remedy is a by-product of the South African courts' innovation in enforcing socio-economic rights.[660] The chapter also found that the power of the courts to grant appropriate remedies for infringements of constitutional rights stems directly from the Constitution, sections 38 and 172(1) in particular. The former constitutional provision empowers a court to grant an "appropriate relief, including a declaration of rights." As for the latter provision, it requires a court to "declare that any law or conduct that is inconsistent with the Constitution, is invalid to the extent of its inconsistency" and empowers a court to grant "any order that is just and equitable." The weighty consideration for the courts in crafting remedies for socio-economic rights violations is to ensure the effective vindication and protection of the infringed right. The chapter went on to discover that there is great utility in meaningful engagement. This remedy was found to be less polycentric because it restrains and/or prevents the courts from being actively and directly involved in policy formulation that fall within the prerogatives and power remits of the political branches. Instead, the court's role was found to be the one of prodding and encouraging communities, public, private institutions and other stakeholders to develop context-sensitive programmes of realising the rights as informed by constitutionally-grounded reasons.[661] It was for this reason that the chapter observed that meaningful engagement as an adjudicative strategy is one of the enablers of separation of powers principle that shapes and sits at the heart of governance structure.[662]

The chapter then progressed to consider how the courts have developed, interpreted and given substantive content to meaningful engagement over the years in various cases. In doing so, the chapter analysed some cases wherein meaningful engagement featured prominently in the courts' decisions, namely: the *Grootboom, Port Elizabeth, Olivia Road* and *Joe Slovo* cases. The chapter lauded the adoption of a concrete adjudicative strategy in the form of meaningful engagement by the Constitutional Court in the first three judgments. This remedy was found to be having a great potential to prod communities, government authorities and private entities to find contextualised and localised solutions to the varying complex issues which arise in eviction disputes through deliberative engagement process. However, the chapter found that in

660 Part 3.3.

661 Liebenberg (2012) 26.

662 De Vos & Freedman (2021) 788.

Joe Slovo, the Constitutional Court digressed from the precedence it had set in the earlier cases and reversed all the gains that were achieved insofar as the development of content for meaningful engagement is concerned. It appeared from the discussions that meaningful engagement was set by the Constitutional Court as a critical consideration and review standard against which the granting of an eviction order is to be determined. The *Joe Slovo* decision represented a diametric opposition to this proposition.

With a view of adding the critical analytical element to jurisprudence, the chapter turned to consider the scholarly perceptions on meaningful engagement. The chapter found that meaningful engagement is a two-way process that can be applied not only on eviction cases in the context of housing, but to other similar contexts where displacements are rampant, such as in mining sector. The chapter found that meaningful engagement occurs where communities, State authorities, private entities and other stakeholders talk to each other and understand each other's interests with a view to achieve a common goal and objective. To express differently, meaningful engagement is a neutral safe space where parties can have a discussion about the suitable options and solutions to difficult issues. While majority voice appear to be supporting the significance, value and utility of meaningful engagement (and this study does support too), there are commentators who are of the view that meaningful engagement is not that much of an achievement. For instance, it was observed earlier that Landau is of a view that meaningful engagement as applied by the South African Constitutional Court has not achieved much on the ground.[663] This study rebutted and dismissed this contention. From the survey of the relevant literature, the timing, nature, good and bad about meaningful engagement are now known with precision.

In the last part, the chapter considered how this innovative remedy can be of application in the mining sector context. The discussion in this part was intentionally made to be very brief, for it is a placeholder of a more thorough discussion that will occur later in chapter five. But, in short, the idea is that meaningful engagement remedy is indeed relevant and applicable in a mining context. This will be demonstrated with reference to three famous case law where displacement occurred in the context of mining.

[663] Part 3.4.4

PART C: INTERNATIONAL AND REGIONAL LAW PERSPECTIVE

CHAPTER FOUR

INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK ON THE PROTECTION AGAINST MINING-INDUCED DISPLACEMENTS

4.1. Introduction

Displacements and arbitrary relocations of people is a serious and pressing human rights issue across the world.[664] South Africa and Ghana are no exceptions. As such, various international and regional law instruments contain a host of norms that provide some legal protection for specific categories of people or communities against certain types of displacement.[665] A survey of existing legal protection norms and standards reveals that such norms and standards are each tailored to address a specific category of displacements.[666]

The focus of this study is limited to legal protection norms and standards against development-induced displacements under which mining-induced displacement is a sub-category.[667] The focus is further narrowed to explore the legal protection for indigenous communities against displacement, for it is these communities that often suffer the dire consequences of mining-induced displacements. Considering that the South African legal framework is "international law-friendly",[668] this chapter identifies and explores the norms and standards[669] of legal protection against displacements in international law.

Human rights imperatives inform the need for robust legal safeguards against the displacement of communities on account of mining developments at a country level.[670] Human rights are "rights and freedoms to which every human being is equally and inalienably entitled".[671] One

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664 R Adeola "The right not to be arbitrarily displaced under the United Nations Guiding Principles on Internal Displacements" (2016) 16 *African Human Rights Law Journal* 84; P Banerjee et al. "Resisting erasure: Women IDPs in South Asia" in P Banerjee et al. (eds) *Internal displacement in South Asia: The relevance of the UN's Guiding Principles* (2005) 287-288.

665 M Morel *The Right not to be Displaced in International Law* (2014) 69-70.

666 Morel (2014) 49-232.

667 Parts 2.2 and 2.3.

668 N Botha "Justice Sachs and the interpretation of international law by the Constitutional Court: Equity or expediency?" (2010) 25 *SA Public Law* 235 and N Botha & M Olivier "Ten years of international law in the South African courts: Reviewing the past and assessing the future" (2004) 29 *South African Yearbook of International Law* 42.

669 These include conventions and treaties, as well as soft law instruments.

670 AA Agbor "70 years after the UDHR: a provocative reflection shaped by African experiences" (2020) 23 *PELJ* 3.

671 UDHR Information Booklet at https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (16 March 2021). See also Agbor (2020) 3; J Griffin *On Human Rights* (2008) 2; RN Fasel "'Simply in virtue of being

of those entitlements is for one not to be arbitrarily displaced from their places of abode where they enjoy their peace, being, privacy and other liberties. Considering the legal protection standards against displacements in international law is critical to establishing how instructive they could be to examined jurisdictions[672] on how they could improve. This study's benchmarking exercise is forward-looking. It motivates for law reform and the development of a more resilient national framework for the right of protection against displacements due to mining developments in the examined jurisdictions.[673] The Constitution of the Republic of South Africa, 1996 imposes an obligation (and not a choice) on the courts, tribunals or any forum to consider international law when interpreting the Bill of Rights.[674] The Constitution further entrusts the courts, tribunals and forums the discretionary power to consider foreign law.[675] The need for having regard to international and foreign law when dealing with an underexplored issue such as the one under discussion is even more significant since the primary national legislation in both examined jurisdictions fails to provide adequate regulation of mining-induced displacements.[676]

Against this background, this chapter seeks to explore the status of the international legal protection against mining-induced displacements and the right not to be displaced in international law. The chapter is guided by a sub-question: are there norms and standards of legal protection against mining-induced displacements in regional and international legal instruments and, if so, what are these norms and standards and how instructive are they in improving the regulation of mining-induced displacements in South Africa and Ghana? The extent to which the examined jurisdictions conform to those international norms and standards in their respective domestic frameworks will be considered later as part of chapter seven.

As a guiding framework for this discussion, the chapter considers the following two inter-related issues:

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human'? A critical appraisal of a human rights commonplace" (2018) 9(3) *International Journal of Legal and Political Thought* 461 & D Feldman *Civil Liberties & Human Rights in England and Wales* (2002) 5.

672 *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19 para 26.

673 Section 231, Constitution provides that a treaty binds South Africa once it has been approved by the National Assembly and the National Council of Provinces, unless it is self-executing, or of a technical, administrative or executive nature.

674 Section 39(1)(b), Constitution; *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

675 Section 39(1)(c), Constitution.

676 Chapter seven.

i. the explicit recognition of the right not to be displaced generally (and for mining developments purposes in particular) in international and regional instruments;

ii. considering that mining-induced displacement often targets poor and vulnerable indigenous communities, the specifically tailored legal protection for this category

4.2. The legal protection against displacement in regional and international law

The displacement of people is a pressing human rights issue,[677] hence several international instruments guarantee the protection of people against manifestations of displacements[678] and forced evictions.[679] This study focuses on displacements undertaken to make way for mining developments. This part of the chapter explores the content of international and regional law instruments that provide explicit recognition of the right not to be displaced generally and for mining development purposes in particular. Considering that international law principles and laws often influence regional legal frameworks, this discussion commences with selected international efforts and instruments on displacements generally and mining-induced displacements in particular.

4.2.1. The international law framework on the right not to be displaced

The right to be protected against arbitrary displacement has enjoyed great coverage in international law.[680] Morel observes that the common thread running through various international law instruments echoes that displacement is prohibited by all means.[681] Further, several international law instruments contain explicit recognition of the right not to be

677 Adeola (2016) 84 & Banerjee et al. (2005) 287-288.

678 Article 1(k), Kampala Convention and section 2 UN Commission on Human Rights, Addendum "Guiding Principles on Internal Displacement" *Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to the UN Commission on Human Rights Resolution* 1997/39, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998).

679 CESCR, General Comment No. 4: The right to adequate housing (Art. 11(1)), 13 December 1991 (CESCR, General Comment No. 4), section 18; CESCR, General Comment No. 7, section 3; UN Commission on Human Rights Res. 1993/77, Forced evictions, 10 March 1993, section 1 provides that "the practice of forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing"; UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1998/9, Forced evictions, 20 August 1998, section 1 states that "the practice of forced eviction constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing, the right to remain, the right to freedom of movement, the right to privacy, the right to property, the right to an adequate standard of living, the right to security of the home, the right to security of the person, the right to security of tenure and the right to equality of treatment".

680 Morel (2014); M Stavropoulou "The right not to be displaced" (1994) 9(3) *The American University Journal of International Law and Policy* 747.

681 Morel (2014) 82.

displaced. This section explores the content of those instruments to identify the regulatory norms and standards that could be instructive to South Africa and Ghana's regulatory framework on mining-induced displacements. These legal instruments are discussed regardless of their status in the examined jurisdiction (i.e. whether ratified or not). If ratified, then a case may be argued that compliance should be enforced, but if not ratified, then it will be recommended and argued that the examined jurisdictions should consider the ratification of a particular instrument and facilitate its implementation.

4.2.1.1. The Universal Declaration of Human Rights (UDHR), 1948

Upon its adoption on 10 December 1948 by the UN General Assembly,[682] the UDHR was widely celebrated "as a common standard of achievement for all peoples of all nations".[683] The UDHR contains several provisions that are relevant in averting arbitrary displacement due to mining operations. The first is Article 12, which prohibits arbitrary interference with a person's privacy, family, home or correspondence and guarantees legal protection against such interference. Mining-induced displacements, among others, constitute a direct violation of this Article through its cross-cutting impact on the socio-economic interests of the affected persons.[684] Also relevant, Article 13 guarantees freedom of residence within the borders of each state for everyone. This provision, in real terms, implies that no one should be forced to change their places of habitual residence in an unlawful or arbitrary manner. As demonstrated in chapter one, displacements caused by mining operations often result into the violation of this right in that it result in people being permanently relocated from their places, the violation that extends to interference with the affected people's right or liberty to free of movement.[685]

Another closely related provision is Article 17, which guarantees the right of everyone to own property alone (individually) and in association with others (collectively).[686] The displacement of communities without fair and adequate compensation for their loss of land, as shown below,[687] constitute a violation of the prohibition of arbitrary deprivation of property ownership provided under Article 17.[688] Further, there is Article 23 which provides for protection against

682 UN General Assembly Resolution 217 A (III).

683 Preamble, UDHR. ED Re "The Universal Declaration of Human Rights: effective remedies and the domestic courts" (2003) 33(2) *California Western International Law Journal* 138.

684 See the discussion on the impacts of mining-induced displacements in chapter two.

685 Article 13(2), UDHR.

686 Article 17(1), UDHR.

687 Parts 5.4 & 6.5.

688 Article 17(2), UDHR.

unemployment, among others. However, this provision is also triggered when there is no support for displaced persons to restore their livelihoods.[689] The other social human right that is often violated by displacements is the right to adequate housing guaranteed under Article 25. Failure to provide displaced persons with alternative suitable housing units is arguably a direct infringement of this right. These are a few analogies of human rights violations that all flow from an act of mining-induced displacements. It calls for great concern where a country's legal framework in certain aspects fails to complement the UDHR, which sets the global tone for the protection and enforcement of human rights. It is equally concerning where a country may be complementing the UDHR in content but failing to implement and enforce those legal protection provisions.

4.2.1.2. The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

In January 2015,[690] South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR).[691] Thus, South Africa is bound by the legal obligations imposed by this instrument. The ICESCR forms part of the International Bill of Human Rights[692] and is an international instrument that, among others,[693] provides for a right to housing and not to be forcibly displaced or evicted. Although the UDHR[694] sets an overarching framework and standard for human rights protection,[695] the ICESCR gives substance to economic, social and cultural rights as a segment or category of human rights. In this regard, Article 11(1) of the ICESCR is pertinent. It enjoins the member states to "recognise the right of everyone to an adequate standard of living for himself and his family, including adequate access to food,

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689 Article 23, UDHR.

690 Dullah Omar Institute "International Covenant on Economic, Social and Cultural Rights (ICESCR)" at https://dullahomarinstitute.org.za/socio-economic-rights/international-covenant-on-economic-social-and-cultural-rights-icescr (accessed 20 March 2021).

691 ICESCR 993 UNTS 3, concluded on 16 December 1966 and entered into force on 3 January 1976. As at 1 September 2020 the Covenant has 171 States Parties.

692 Read "Fact Sheet No.2 (Rev.1) - The International Bill of Human Rights", Office of the United Nations High Commissioner for Human Rights, at https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf (accessed 17 November 2020).

693 Although the ICCPR is mainly focused on civil and political rights, it fittingly provides in Article 17 that no "… one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."

694 The UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at https://www.refworld.org/docid/3ae6b3712c.html (accessed 21 March 2021).

695 Muller G *The impact of section 26 of the Constitution on the eviction of squatters in South African law* (Unpublished LLD dissertation, University of Stellenbosch, 2011) 161.

clothing and housing, and to the continuous improvement of living conditions." The provision goes further to enjoin the member states to take appropriate measures in realising these rights, especially the right of access to adequate housing and its corollary protection against forceful evictions or displacements.[696] The specific obligations of member states are made clear in two general comment documents developed by the UN Committee on Economic, Social and Cultural Rights (CESCR).[697] Although considered to be international soft law, with limited binding authority,[698] the general comments are important clarifying documents on what states obligations are in relation to the prevention of forced evictions or displacements and the promotion of the right to adequate housing which is one other right affected by mining-induced displacements. The following paragraphs turn to discuss these two main general comments of the ICESCR and the content and meaning of the right to housing and its corollary protection against forceful eviction.

4.2.1.2.1. *CESCR General Comment No. 4 (GC 4)*

The General Comment unpacks the right to housing framework and its protection against unlawful eviction and displacement.[699] The General Comment is informed by Article 11(1) of the ICESCR where it is acknowledged as the most comprehensive guarantee provision on the right to adequate housing, which is equally the most important right in international human rights instruments by being of "central importance for the enjoyment of all economic, social and cultural rights".[700] The motivation for this General Comment emanated from the fact that the CESCR lacked sufficient information on the right to adequate housing by member states on the standards of living that prevailed in respective countries.[701] Therefore, the aim was to close up the information gap and identify the key issues in relation to the right to housing and the enablers of its realisation.[702] It further provides that the right to adequate housing applies to everyone without any form of discrimination, and it should not be interpreted in any way that seeks to exclude anyone from enjoying its protection.[703] The General Comment goes

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696 Article 11(1), ICESCR.

697 Muller (2011) 161. See also J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 3 and G Muller & S Viljoen *Property in Housing* (2021).

698 S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 102.

699 OHCHR *CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)* (1991), hereafter GC 4, available at https://www.refworld.org/docid/47a7079a1.html (accessed 20 March 2021).

700 Paras 1 & 3, GC 4.

701 Para 5, GC 4.

702 Para 4, GC 4.

703 Para 6, GC 4.

further to provide that the right to adequate housing should not be interpreted in a narrow sense but as having "the right to live somewhere in security, peace and dignity".[704] The otherwise broader interpretation of the right to adequate housing, encouraged in the General Comment,[705] would appreciate the interconnectedness of all human rights and would specifically impede any substantive evaluation of the adequacy of housing structure for human occupation.[706] Thus, the housing would be considered adequate if it provides legal security of tenure,[707] is affordable,[708] habitable,[709] accessible,[710] and is located in close proximity to essential services and social facilities,[711] is culturally adequate[712] and there is availability of services, materials, facilities and infrastructure.[713]

Given these adequacy criteria, the member states, regardless of their level of development, are required to take effective and appropriate steps,[714] on their own and through international cooperation,[715] in ensuring the full realisation and protection of the right to adequate housing for every individual within the available state resources.[716] Provision is also made of the legal remedies for the violation of the right to adequate housing *vis-a-vis* forced evictions.[717] The General Comment concludes by prohibiting forced evictions, indicating that they are *prima facie* incompatible with the objectives of the ICESCR and they "can only be justified in the most exceptional circumstances", with strict compliance with the relevant international law.[718]

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704 Para 7, GC 4.
705 Para 7, GC 4.
706 Paras 7 & 9, GC 4. See P Kenna "Adequate housing in international and European human rights law: A panoramic view" (2012) 7 *International Journal of Land Law and Agricultural Science* 4.
707 Para 8(a), GC 4.
708 Para 8(c), GC 4.
709 Para 8(d), GC 4.
710 Para 8(e), GC 4.
711 Para 8(f), GC 4.
712 Para 8(g), GC 4.
713 Para 8(b), GC 4.
714 Paras 10-13, GC 4.
715 Article 23, ICESCR.
716 Para 14, GC 4.
717 Para 17, GC 4.
718 Para 18, GC 4.

4.2.1.2.2. *CESCR General Comment No. 7 (GC 7)*

On 20 May 1997, this General Comment[719] was developed by the CESCR to clarify the implications of forced evictions in terms of the state party obligations contained in the ICESCR.[720] The CESCR defines forced evictions as "the permanent or temporary removal against the will of individuals, families and communities from the homes and land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection".[721] The CESCR observes that the term "forced evictions" captures a strong sense of arbitrariness and illegality,[722] a widespread phenomenon that ravages developed and developing countries alike.[723] The CESCR goes further to emphasise that the occurrence of forced evictions is not only limited to overpopulated urban areas, but it also occur when people are forcefully displaced in the context of armed conflicts,[724] "mass exoduses", as a counter measure against refugee movements[725] and, quite often, "in the name of development[s]"[726] such as urban renewal and mining.

The other key observation of the CESCR under this General Comment is the acknowledgment and identification of certain vulnerable groups that often suffer disproportionately from the impacts of forced evictions and are subjected to some forms of discrimination.[727] These groups include children, ethnic minorities and other minorities, indigenous people, the elderly, women and other vulnerable groups. The need for the protection of these groups is emphasised strongly in this General Comment.

Hence the CESCR instructs member states to "refrain from forced evictions and ensure that the law is enforced against its agents or third parties which carry out forced evictions".[728] Further, the CESCR observes that effective means of ensuring a resilient system for adequate protection against displacement is to enact legislation that provides strong security of tenure to land

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719 CESCR *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions* (1997) E/1998/22, hereafter GC 7, at https://www.refworld.org/docid/47a70799d.html (accessed 21 March 2021).

720 Para 1, GC 7.

721 Para 3, GC 7.

722 Para 3, GC 7.

723 Para 4, GC 7.

724 Para 6, GC 7.

725 Para 5, GC 7.

726 Para 7, GC 7.

727 Para 10, GC 7.

728 Para 8, GC 7.

occupiers and have control over the circumstances under which evictions can occur.[729] Further, the member states must ensure that they exhaust feasible alternatives to eviction to avoid or minimise the need for force.[730] Where eviction is unavoidable, an entity seeking to evict people must consult with those persons.[731] The CESCR obligates member states to ensure that appropriate procedural protection is availed to those that stand to be affected by the process of forced evictions.[732] It also calls for the development of legal remedies in the form of adequate compensation for suffered damages to those who are affected by eviction orders.[733]

4.2.1.2.3. *The content of the right to adequate housing*

In deliberating what the right to adequate housing entails, the United Nation's Office of the High Commissioner for Human Rights (OHCHR) states that the right contains two elements, namely; freedoms and entitlements.[734] The "freedoms" element include the protection against forced evictions or displacements, individually or collectively.[735] About the state's obligations in respect of the right to housing, the OHCHR, like the South African Constitution, classifies these into three categories, namely; the obligations to respect, protect and fulfil.[736] States are obliged to respect the right of housing and refrain from carrying out unlawful evictions, and to protect the right and prevent private actors from carrying out forced evictions.[737]

The ICESCR provision for adequate housing is important in the domestic context for two main reasons. First, courts are required to consider it in constitutional interpretation. Second, South Africa is bound by the ICESCR through its ratification. By ratifying the ICESCR, South Africa agreed to be bound by its provisions and perform its obligations in good faith,[738] and to act in a way that does not infringe upon the fundamental principles of the ICESCR.[739] Accordingly,

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729 Paras 9 & 14, GC 7.
730 Para 14, GC 7.
731 Para 13, GC 7.
732 Para 8, GC 7.
733 Para 13, GC 7.
734 OHCHR *Fact Sheet No. 21, The Human Right to Adequate Housing*, Fact Sheet 21/Rev.1 (2009) 3, available online at https://www.refworld.org/docid/479477400.html (accessed 20 August 2020).
735 OHCHR (2009) 3.
736 OHCHR (2009) 33.
737 OHCHR (2009) 33. See J Hohmann "The right to housing" in M Moos (ed.) *A Research Agenda for Housing* (2019) 15.
738 Liebenberg S "South Africa and the International Covenant on Economic, Social and Cultural Rights: Deepening the Synergies" (2020) *SAJEI Journal* (forthcoming) at 9.
739 D Petherbridge "South Africa's Pending Ratification of the International Covenant on Economic, Social and Cultural Rights: What are the implications?" SERAJ Research Group available at

Liebenberg makes an interesting point that international law can "enter into, and influence, the development of South African domestic law via a number of constitutional conduits."[740] Thus, it becomes insubstantial and unconvincing for the South African government to rely on the shortcomings in domestic law on mining-induced displacements[741] in justifying its failure to fulfil its treaty obligations under ICESCR. If the national efforts towards the realisation of the rights contained in ICESCR are found insufficient, then such country must take necessary steps and seek international assistance and cooperation.[742]

4.2.1.3. The United Nations Guiding Principles on Internal Displacement (Guiding Principles), 1998

A set of Guiding Principles on Internal Displacement was adopted in 1998 by the United Nations in response to the global problem of internal displacement.[743] The Guiding Principles' objective is to provide a normative set of international standards on how individual states can ensure adequate legal protection for persons forcibly uprooted from their usual residence.[744] The Guiding Principles sought to build on existing international practice to identify specific safeguards in response to the gap between the protection of persons displaced within their own countries.

The Guiding Principles set forth the rights of persons displaced within the borders of their countries and outline the obligations of governments and the international community towards these populations.[745] Internal displacement includes forceful and involuntary resettlement or relocation of persons or a group of people.[746] Then internally displaced persons are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places

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http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf (accessed 12 March 2021).

740 Liebenberg S "South Africa and the International Covenant on Economic, Social and Cultural Rights: Deepening the Synergies" (2020) *SAJEI Journal* (forthcoming) at 9.

741 The DMRE had admitted the shortcomings of the legal framework on mining-induced resettlements and displacements in South Africa. Resettlement Guidelines (2022) 3-4.

742 Article 2(1) ICESCR and OHCHR *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1)* (1990) at https://www.refworld.org/pdfid/4538838e10.pdf (accessed 21 March 2021).

743 UN Commission on Human Rights "Guiding Principles on Internal Displacement" Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted in pursuit of the Commission's Resolution 1997/39, UN Doc E/CN.4/1998/53/Add.2 11 February 1998 (UN Guiding Principles); R Cohen & FM Deng Masses in flight: The global crisis of internal displacement (1998).

744 Morel (2014) 69-70.

745 Morel (2014) 70.

746 Part 2.3.1.

of habitual residence, in particular as a result of or in order to avoid the effects of … human-made disasters, and who have not crossed an internationally recognized State border."[747]

The Guiding Principles require all the national authorities and international actors to respect their international law obligations, including human rights and humanitarian law, under all circumstances, to prevent and avoid causes of displacement of persons.[748] In doing so, the Guiding Principles state that "[e]very human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence".[749] Accordingly, displacement in cases of large-scale development projects such as the construction of mines which are not justified by compelling and overriding public interests, constitutes a prohibited (because arbitrary)[750] form of displacement.[751] Development-induced displacements are only permissible under strict circumstances where they are absolutely necessary and are in line with public interests.

Another key observation from the Guiding Principles is that displacement of people should be avoided altogether if possible and always be treated as a measure of last resort.[752] Where there are no alternatives, and displacement is inevitable, then the relevant authorities must explore all possible measures to minimise displacement and its adverse effects.[753] In the latter case, the relevant authorities undertaking such displacement must ensure that adequate support is availed to the displaced persons, including proper accommodation, safe conditions, nutrition, health and hygiene and avoid separating family members.[754] This obligation is not confined to State actors only, but extends to cases where an entity seeking the displacement of people is private.

The last part of Principle 7 formulates the "non-negotiable guarantees" that must characterise any displacement project.[755] The first guarantee is that a decision to displace people must only be taken by a State authority empowered by law to order such measure.[756] In the context of mining practice, where displacement is often sought by mining companies, the responsible

747 Section 2, Guiding Principles.
748 Principle 5, Guiding Principles.
749 Principle 6(1), Guiding Principles.
750 Arbitrariness "… refers to the classical requirements for lawful restriction of human rights, relating to the issues of legality, legitimacy, necessity and proportionality". Morel (2014) 85.
751 Principles 6(2)(c), Guiding Principles.
752 Principle 7(1), Guiding Principles.
753 Principles 7(1), Guiding Principles.
754 Principles 7(2), Guiding Principles.
755 Despite in armed conflicts and disasters, given the emergency nature of these kind of events that may render impossible some of the guarantees.
756 Principle 7(1)(a), Guiding Principles

authority i.e. the DMRE must be empowered by law to regulate such. The second guarantee is that adequate measures must be taken to ensure that those affected by displacement have access to full and accurate information about the reasons and procedures for their displacement.[757] The displaced persons must also be informed adequately about compensation and relocation where applicable.[758] The third guarantee affirms that free and informed consent of those to be displaced shall be sought.[759] This guarantee means that the relocation must consensual. The guarantee further presupposes that the seeking of consent may be unsuccessful, where the displacees refuse to consent to their relocation and such decision must be respected by whoever is seeking their relocation, whether public or private entity.

The fourth guarantee demands that those affected by displacement should be actively involved in the process leading to their displacement.[760] The guarantee makes special call for the involvement of vulnerable groups, especially women in the planning and management of their relocation.[761] The Guiding Principles affirms the point argued earlier that women are more risk-averse in mining-induced displacements, hence they should be involved in all stages of the relocation project.[762] The fifth guarantee demands that non-compliance with these principles be dealt with accordingly and deterrently by competent legal authorities.[763] Then the last guarantee ascertain "[t]he right to an effective remedy, including the review of such decisions by appropriate judicial authorities."[764] This principle presupposes that an aggrieved displaced person who is of the view that any of these guarantees have been compromised can approach a competent court to vindicate their right not to be displaced arbitrarily and seek the appropriate relief.[765]

In short, the national legislation must specifically authorise an organ of State ordering the displacement of individuals or communities. The affected people must have access to full information about their displacement, so that their decision to grant or refuse their consent is informed adequately. The critical aspects of the information that the affected people must access include the reasons and procedures for their sought relocation, as well as compensation

[757] Principle 7(1)(b), Guiding Principles
[758] Principle 7(1)(b), Guiding Principles
[759] Principle 7(1)(c), Guiding Principles
[760] Principle 7(1)(d), Guiding Principles
[761] Principle 7(1)(d), Guiding Principles
[762] See the discussion around women marginalisation in chapter two.
[763] Principle 7(1)(e), Guiding Principles
[764] Principle 7(1)(f), Guiding Principles.
[765] Part 3.2.

for any damage that they may incur as a result. The Guiding Principle once again emphasises the importance of stakeholder participation and consultation by requiring the involvement of affected persons, especially women,[766] from as early as the planning phase of the displacement process. Lastly, the Guiding Principles reflect on the need for appropriate grievance mechanism in the process, that the affected persons' right to effective remedy (including judicial review of displacement decisions) be respected and upheld whenever invoked.

Thus, the above-mentioned provisions mark a real breakthrough in the resolve to address the problem of displacement caused by development projects generally and mining developments in particular.[767] Although the Guiding Principles are laid down in a non-legally binding (i.e. soft law)[768] instrument, they remain a remarkable international instrument with the potential to address the issue of development-induced displacement and frame it as an equally significant issue as other human rights concerns. Therefore, the Guiding Principles can be persuasive to and provide valuable insights and practical guidance to the South African and Ghanaian government and non-government organizations in their approach to dealing with displacements of people. Therefore, as I will argue later,[769] it is my hope that they will be widely circulated and given the necessary practical application in the examined jurisdictions.

4.2.1.4. The Basic Principles and Guidelines on Development-Based Evictions and Displacements (Displacement Principles), 2007

The 2007 report of the UN Special Rapporteur on adequate housing to the Human Rights Council formulated the Basic Principles and Guidelines on Development-Based Evictions and Displacement (Displacement Principles).[770] The immediate objective of the Displacement Principles is to address the human rights implications of development-induced evictions and related displacements.[771] It is a comprehensive instrument outlining both substantive and procedural issues concerning development-based evictions and displacements.[772] The most

[766] Who are often affected severely by the impacts of displacements.

[767] Principles 8 & 9, Guiding Principles.

[768] They constitute 'soft law' in the sense that they have not been formally adopted by South African government by means of a treaty or convention.

[769] In chapter seven, the part dealing with the overall conformity to international law norms and standards by the regulatory frameworks of the examined jurisdictions.

[770] UNCHR, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living (2007) UN doc. A/HRC/4/18 at https://www.ohchr.org/documents/issues/housing/guidelines_en.pdf (accessed 21 March 2021).

[771] Para 3, Displacement Principles.

[772] It actually represents a further development of the comprehensive human rights guidelines on development-based displacement. Displacement Principles (2007) para 3.

critical aspects contained in this instrument include the general obligations,[773] considerations prior to,[774] during,[775] and after a development-based displacement.[776] The instrument also avails legal remedies to those who are forcefully evicted or displaced,[777] monitoring and evaluation mechanisms,[778] as well as the potential role of the international community in protecting the human right to housing, land and property against the infringement in the form of development-related forced displacements.[779]

The Displacement Principles describe "forced evictions"[780] as constituting gross violations of several internationally recognised fundamental rights, such as the rights to housing, health, food, education, water, work, security of the home, security of the person, freedom from cruel, inhuman and degrading treatment and freedom of movement.[781] The instrument defines "development-based evictions" as evictions "often planned or conducted under the pretext of serving the 'public good', such as those linked to development and infrastructure projects including … mining".[782] The development-based evictions and forced evictions alike deepen inequalities, social conflict and they often affect the poorest invariably, especially the socially and economically vulnerable categories of society, including women, children, minorities and indigenous peoples.[783]

Further, Displacement Principles provide useful guidance in situations where displacement is unforeseen, such as the cases of public emergency.[784] Procedurally, the Displacement Principles require that evictions and displacements should not be carried out in a manner that violates human dignity, right to life and security of those affected.[785] The instrument further prohibits the execution of large-scale evictions under certain circumstances and specified times, such as in mining context where the displacees have not been informed and their consent

[773] Chapter II, Displacement Principles.
[774] Chapter III, Displacement Principles.
[775] Chapter IV, Displacement Principles.
[776] Chapter V, Displacement Principles.
[777] Chapter VI, Displacement Principles.
[778] Chapter VII, Displacement Principles.
[779] Chapter VIII, Displacement Principles.
[780] Para 4, Displacement Principles.
[781] Para 6, Displacement Principles.
[782] Para 8, Displacement Principles.
[783] Para 7, Displacement Principles.
[784] Para 9, Displacement Principles.
[785] Para 47, Displacement Principles.

sought.[786] This instrument sets an important normative framework for the better understanding of the right against forced evictions on account, or rather "pretext", of developments including the mining operations.

Before any planned displacement could occur, the Displacement Principles demand the involvement of all those likely to be affected.[787] This involvement should feature certain elements, such as prior notice of the planned action to all those who stand to be affected, as well as a public consultation with them.[788] The other elements include effective dissemination of all the relevant information in advance, such as the proposed resettlement plans covering efforts to protect vulnerable groups;[789] reasonable time period for public review of and comment on or objection to the proposed plan.[790] The affected persons must be provided with legal, technical and other advice about their rights and options;[791] as well as the holding of a public hearing where affected persons and their representatives get an opportunity to meaningfully engage and challenge the displacement or eviction decision where necessary.[792]

The states are under an obligation to explore all possible alternatives to eviction fully. If unavoidable, all potentially affected persons, including women, indigenous peoples and persons with disabilities and their representatives, have the right to accurate information, full consultation and participation throughout the entire process.[793] Governments must also ensure that eviction action does not result in homelessness (which would otherwise require adequate alternative housing) and violation of other human rights.[794]

4.2.1.4.1. *The implementation of resettlement projects*

The Displacement Principles provide for few considerations to be maintained during the actual implementation of the displacement process. Relevant government officials (or their representatives) are e.g. required to be present on the site and identify themselves to the persons being evicted.[795] The purpose for the presence of government officials is to ensure compliance

[786] For example: no evictions prior to elections, or during or just prior to school examinations. Para 49, Basic Principles.
[787] Para 37, Displacement Principles.
[788] Para 37(a), Displacement Principles.
[789] Para 37(b), Displacement Principles.
[790] Para 37(c), Displacement Principles.
[791] Para 37(d), Displacement Principles.
[792] Para 37(e), Displacement Principles.
[793] Para 38-42, Displacement Principles.
[794] Para 43, Displacement Principles.
[795] Para 45, Displacement Principles.

with and respect for human rights standards, and to present authorisation for the eviction. Independent observers, regional or international, should also be allowed access to observe transparency and compliance with international principles and standards during the carrying out of eviction,[796] i.e. that the rights to dignity and life and security of those affected are not grossly violated.[797] Lastly, use of force is intolerable and, if legal, it must comply with the principles of necessity and proportionality, consistent with international law enforcement and human rights standards.[798]

After the displacement action, the government and any other parties responsible for providing a just compensation and adequate alternative accommodation must do so immediately.[799] The government must, without discrimination, ensure that displaced persons or groups, especially those who are unable to provide for themselves, "have safe and secure access to food; potable water and sanitation; basic shelter and housing; appropriate clothing; essential medical services; livelihood sources; fodder for livestock and access to common property resources previously depended upon; and education for children and childcare facilities."[800] To deal with the psychosocial impact that the eviction might have on the affected persons, access to psychological and social services must be made available.[801] The government must also take special efforts to ensure equal participation of women in all planning processes and in the distribution of basic services and supplies at the new place of residence.[802]

The identified site for resettlement must meet the basic standards of adequacy for human occupation and habitability. The criteria for this include security of tenure, where the affected persons or displacees are assured that their tenure will be secured and will not live in fear of another displacement or eviction action.[803] The resettlement site must also have basic services such as infrastructure for potable water, sanitation, washing facilities and energy for cooking, heating and lighting.[804] The resettlement site must also have proper drainage system and

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796 Para 46, Displacement Principles.

797 Para 47, Displacement Principles, the "States must also take steps to ensure that women are not subject to gender-based violence and discrimination in the course of evictions, and that the human rights of children are protected". See P Kenna et al (eds.) *Loss of Homes and Evictions Across Europe: A Comparative Legal and Policy Examination* (2018) 2.

798 Para 48, Displacement Principles.

799 Here exception is made for cases of force majeure. Para 52, Displacement Principles.

800 Para 52, Displacement Principles.

801 Para 54, Displacement Principles.

802 Para 53, Displacement Principles.

803 Para 55, Displacement Principles.

804 Para 55, Displacement Principles.

emergency services, and access to natural and common resources, where appropriate.[805] There is also an element of affordability i.e. that the new site must provide for affordable and habitable housing, meaning that units must have adequate space and adequate protection from harsh weather conditions.[806] Lastly, the site must provide physical safety and be equally accessible to disadvantaged groups, such as women and persons with disability.[807] Where appropriate, access to employment options, health-care services, schools, childcare centres and other social amenities must not be compromised in the process.[808]

The Displacement Principles further outline the universal criteria against which the compatibility of any mass resettlement can be weighed. Among others, the instrument requires the member states to ensure that there is no act of resettlement take shall take place unless such member state had developed a comprehensive resettlement policy that is consistent with the principles and guidelines contained in the instrument and other internationally recognized human rights norms and standards is in place.[809] Like the Guiding Principles, the Displacement Principles demand that the practice and policy of resettlement in member states must provide protection for the rights of women, children, indigenous communities and other vulnerable groups, especially their right to property which often gets violated in displacements actions.[810] As it should be, the entity seeking the resettlement of people from their usual residences (i.e. mining company seeking the resettlement of mine communities), must incur all the associated costs for the resettlement.[811] The Displacement Principles further provide that the communities affected by resettlement and forced eviction should not have their right to the continuous improvement of living conditions be subject to infringement in the course of such eviction.[812] Using force in resettlement would be in breach of the very objective of this instrument. It requires resettlement to be carried out only after a full and informed consent of those affected has been lawfully obtained.[813] The Displacement Principles further demand that the alternative

[805] Para 55, Displacement Principles.
[806] Para 55, Displacement Principles.
[807] Para 55, Displacement Principles.
[808] Para 55, Displacement Principles
[809] Para 56(a), Displacement Principles.
[810] Para 56(b), Displacement Principles.
[811] Para 56(c), Displacement Principles.
[812] Para 56(d), Displacement Principles.
[813] Para 56(e), Displacement Principles.

site for settlement should be environmentally sustainable,[814] and be accessible in a sense that it does not place excessive demands on the budgets of low-income households.[815]

Sparing another thought for the vulnerable, the Displacement Principles require that the affected indigenous communities be afforded access to accurate information about their resettlement where they have consented to the process.[816] Further, women, minorities, the landless and children must be adequately represented and included at every step of the process.[817] The resettlement, if consented to, must be carried out on prior notice of at least 90 days to the scheduled date and,[818] for oversight and monitoring purposes, the local authority and neutral observers acceptable to both parties must be present during the resettlement to ensure that the process is free from force, violence and intimidation.[819] Where there is poor monitoring, the unwanted use of force is likely. It will be shown in the subsequent case study chapters that this may prove correct in the displacement cases in examined jurisdictions where mining companies, taking advantage of their financial wealth, would force and intimidate the often vulnerable and poor mine indigenous communities to relocate from their usual residence to make way for mining operations. Lastly, the Displacement Principles are clear in that the whole process of resettlement should only occur with full participation by and with affected people, groups and communities and the views proposed by those affected must always be taken into account to an extent possible.[820]

4.2.1.4.2. *The remedies for forced evictions and displacements*

The Displacement Principles provide for three main remedies for displacements and forced evictions, namely compensation, restitution and return, as well as resettlement and rehabilitation.[821] In respect of compensation, the government is under an obligation to provide and ensure that fair and just compensation for any suffered losses of personal, real or other property and goods, including rights or interests in property.[822] In the context of this study, this implies that the government can "ensure" that the mining company compensates the affected community for the losses suffered. Further, compensation must be provided for any assessable

814 Para 56(g), Displacement Principles.
815 Para 56(h), Displacement Principles.
816 Para 56(h), Displacement Principles.
817 Para 56(h), Displacement Principles.
818 Para 56(j), Displacement Principles.
819 Para 56(k), Displacement Principles.
820 Para 56(i), Displacement Principles.
821 Part VI, Displacement Principles.
822 Para 60, Displacement Principles.

damage in economic terms, to an extent that is appropriate and proportional to the severity of the concerned violation.[823] The instrument prohibits the replacement of "real compensation" in the form of land and common property facilities with cash compensation and requires that where land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better.[824]

Furthermore, everyone affected by eviction is entitled to compensation "irrespective of whether they hold title to their property" or not and regardless of the nature of the thing owned i.e. formal or informal, real or corporeal.[825] The instrument also addresses the question of gender discrimination in respect of compensation eligibility by providing that, in a case of a married couple, spouses must be co-beneficiaries of all compensation packages, while single women and widows are entitled to their own compensation.[826]

In respect of restitution and return remedy, the Displacement Principles observe that instances of forced evictions due to development projects, such as mining, rarely allow for the return of people to their places of origin.[827] It further provides that even if the displaced persons have the option to return, they should not be forced against their will to do so.[828] For this remedy to be feasible in the context of mining sector, the government will have to ensure that mining companies fulfil their mine site rehabilitation process after exhausting their operations and ensure that it holds mining companies accountable for failing to adequately rehabilitate the land after their operations.[829] The instrument requires the State to adopt special measures ensuring women's equal participation in restitutionary processes.[830] The idea is to address the existing household, community, administrative and structural gender disparities that add to systemic marginalisation of women.[831] Those who might choose to return to their location of origin, the government has the responsibility to assist them in recovering, to the maximum extent possible, their properties and possessions that they had left behind unintentionally or were dispossessed of during their eviction.[832]

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823 Para 60, Displacement Principles.

824 Para 60, Displacement Principles.

825 Para 61, Displacement Principles.

826 Para 62, Displacement Principles.

827 Para 64, Displacement Principles.

828 Para 64, Displacement Principles.

829 This is a major and topical issue in South Africa, where the DMRE is failing to hold mining companies accountable where they fail to rehabilitate their abandoned mine sites.

830 Para 65, Displacement Principles.

831 Para 65, Displacement Principles.

832 Paras 65 & 67, Displacement Principles.

The last remedy is that of resettlement and rehabilitation. This remedy is relevant in instances where certain considerations such as the promotion of general welfare, or where the health, safety, livelihoods or enjoyment of rights necessitate the permanent resettlement of persons or communities.[833] However, such resettlement is still required to be carried out in a just and equitable manner, as well as in full accordance with the international human rights law norms and standards.[834]

The last part of the Displacement Principles deal with the monitoring, evaluation and follow-up as well as the role of the international community in ensuring that people and communities are adequately protected against displacements and forced evictions. In terms of monitoring and evaluation, the instrument mandates the government to monitor and carry out evaluations of displacement actions with a view of determining the numbers involved, the type and long-term consequences of the displacement.[835] The governments in examined jurisdictions may play this role in ensuring that the mining companies act accordingly and without impunity. It is also required that the monitoring reports and findings be made accessible to the public and concerned international entities.[836] There must also be an independent national body to monitor and investigate forced evictions and State compliance with international standards and human rights.[837] Lastly, the international community is also under an obligation to promote, protect and fulfil the human right to housing, land and property.[838]

In sum, due process must be followed for any resettlement action. This requires an observance to adequate consultation with and participation of the affected individuals and communities, and that relevant legal protections be put in place. It is also required that an impact assessment for eviction be carried out to establish the likely results of the eviction. In similar way, there must also be a monitoring and evaluation process for transparency purposes. Adequate grievance mechanisms and remedies must be availed and evictions must not be carried out in a forceful and discriminatory manner, and must significantly considerate to people who are vulnerable.

833 Para 68, Displacement Principles.
834 Part V, Displacement Principles.
835 Para 69, Displacement Principles.
836 Para 69, Displacement Principles.
837 Para 70, Displacement Principles.
838 Para 71, Displacement Principles.

4.2.1.5. The London Declaration of International Law Principles on Internally Displaced Persons (London Declaration), 2007

The London Declaration was adopted on 29 July 2000 by the International Law Association.[839] In its preamble, the London Declaration acknowledges the growing global crisis of internal displacements of millions of persons from their homes and places of habitual residence for various reasons.[840] According to the Declaration, internally displaced persons are "persons or groups of persons who have been forced to flee or leave their homes or places of habitual residence as a result of armed conflicts, internal strife or systematic violations of human rights, and who have not crossed an internationally recognized State border".[841] Informed by purposive reading, this definition arguably extends to persons affected by development- and mining-induced displacements.[842] The London Declaration requires that the people's freedom of movement, including the right not to be displaced or evicted arbitrarily, be respected at all times by both the state and private entities, including mining companies.[843] In instances where communities have consented to their resettlement, their new place of residence should not expose them to any danger and their restitutionary right to return to their place of origin, once such is feasible, should be respected and fulfilled should it be invoked.[844]

The London Declaration further provides for restitution or fair and adequate compensation for property losses and damages, as well as for the physical and mental suffering resulting from an act of displacement.[845] The member states are under an obligation to protect and assist all the individuals and communities affected by displacement within their jurisdictions.[846] In doing so, they have an option of seeking assistance from the international community and institutions such as the United Nations.[847]

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839 M Morel, M Stavropoulou, JF Durieux "The history and status of the right not to be displaced" (2012) 41 *Forced Migration Review* 5-7.

840 Preamble, London Declaration.

841 Article 1.1, London Declaration.

842 Article 1.2, London Declaration.

843 Article 4.1, London Declaration.

844 Article 5, London Declaration.

845 Article 9, London Declaration.

846 Article 10.1, London Declaration.

847 Article 11.2, London Declaration.

4.2.2. The regional and sub-regional instruments offering legal protection against mining-induced displacements

The African continent has demonstrated some efforts to address the broader concern of development related displacements much earlier than when the problem started to gain recognition at international level.[848] This early commitment can be seen on a number of continental instruments and mechanisms that set guarantees for the legal protection against arbitrary forms of displacement in various contexts, mining included. The African Union (AU) is acclaimed for its long historical commitment to dealing with "the general problem of displacement in Africa",[849] which is considered seriously across the region for the system is "woefully lacking" to tackle it adequately.[850] Subsequently, there has been significant legal developments in the region to improve the regional legal response to the problem. In the light of these developments, the focus of this section is to consider the standard measures developed (and efforts taken) by the AU in its various legal instruments (and institutions) for protecting persons and communities against arbitrary relocations and displacements for various (but mainly mining) reasons. Like with the adopted position on international law discussion, the instruments discussed below are considered regardless of their status in the examined jurisdiction (i.e. whether ratified or not). If ratified, then good, but if not, then it will be recommended and argued on persuasive basis that the examined jurisdictions should perhaps consider the ratification of a particular instrument for its good regulatory practices and facilitate its implementation thereof.

4.2.2.1. The African Charter on Human and Peoples Rights (African Charter), 1986

The African Charter on Human and Peoples' Rights establishes a system or framework for the promotion and protection of human rights across the African continent.[851] The African Charter came into force on 21 October 1986 and it contains a number of human rights such as civil and

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848 Fawole (2018) 102.

849 C Beyani "Recent developments: the elaboration of legal frameworks for the protection of a legal framework for the protection of internally displaced persons in Africa" (2006) 50 *Journal of African Law* 189; KM DeJesus "Forced migration and displacement in Africa: contexts, causes and consequences" (2018) 37 *African Geographical Review* 79-82; J Crisp "Forced displacement in Africa: Dimensions, difficulties and policy directions" (2010) 29 *Refugee Survey Quarterly* 1.

850 Fawole (2018) 121; AM Abebe "Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa" (2009) 22 *Journal of Refugee Studies* 164-165.

851 Maru "The Kampala Convention and its contribution in filling the protection gap in international law" (2011) 1(1) *Journal of Internal Displacement* 109.

political, socio-economic and cultural, individual and collective rights. This Charter is hailed for being the first regional instrument to incorporate the different classes of human rights in a single document. The African Charter was adopted following an outcry and external pressure on the African states to develop a regional human rights framework to address the rampant gross human rights violations that engulfed the continent.[852] In the context of this thesis, the African Charter is relevant to an extent that it protects the host of rights that are often infringed by mining-induced displacements.[853] In certain aspects where it falls short, like with the failure to have an explicit legal protection against displacement, the Charter allows the African Commission on Human and Peoples' Rights to consider and draw insights from international human rights law.[854] In doing exactly this, the African Union has drawn significant reference from the international 'soft' law in the form of Guiding Principles to develop the Kampala Convention that presents a binding regional instrument offering legal protection against displacements and arbitrary evictions and, similarly, Protocol on internally displaced persons by the Great Lakes region.

4.2.2.2. The Great Lakes Pact and the Protocol on Internally Displaced Persons (IDP Protocol), 2006

The Great Lakes sub-region assembled the International Conference on the Great Lakes Region (ICGLR) in 2006 which sought to craft a coordinated response guidelines informed by the UN Guiding Principles to internal displacements.[855] Out of the ICGLR, the Pact on Security, Stability and Development in the Great Lakes Region (the Great Lakes Pact) was produced.[856] Although it does not explicitly provide for the right not to be displaced, the Pact indirectly recognises the right and encourage its members states to adopt and enforce the UN Guiding Principles on internal displacements.[857] Part of the Great Lakes Pact is two protocols both dealing with internal displacements of people and communities, namely: the Protocol on the Protection and Assistance to Internally Displaced Persons (IDP Protocol). The main objective

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852 DM Chirwa "African regional human rights system" in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 323-338.

853 Such as the right to economic, social and cultural development.

854 Article 60, African Charter.

855 ICCLR *Pact on Security, Stability and Development in the Great Lakes Region* (2006) available at https://peacemaker.un.org/sites/peacemaker.un.org/files/061215_PactonSecurityStabilityDevelopmentGreatLakes.pdf (accessed 23 May 2021).

856 Pact, Article 2(c); C Beyani "Recent developments: The elaboration of a legal framework for the Protection of Internally Displaced Persons in Africa" (2006) 50 *Journal of African Law* 192.

857 Beyani (2006) 192.

of the IDP Protocol is to facilitate the incorporation of the Guiding Principles into the domestic legal framework and to establish protection mechanisms for the "physical safety and material needs of the displaced and creating obligations to prevent the root causes of displacement."[858] The immediate relevance of this Protocol to this study mainly located in that the displacement need not arise from the action of the state authorities for the protection to be invoked, the protection may well be invoked if the displacement results from a private action.[859] This formulation should (since there is no reason not to) extend to cover an act of displacement occasioned by a mining company that seeks to make way for mining operations.

The other notable strength of the IDP Protocol is the responsibilities it imposes on the member states to, among others, ensure that an entity seeking the displacement of people provide them with full information relating to the displacement and allow for their effective participation in the planning and management of their relocation.[860] Further, the Protocol demands that to an extent possible, displacement be completely avoided and consider feasible alternatives instead.[861] Where displacement is unavoidable, then its adverse consequences on the displacees must be kept at minimum levels[862] by provide support for adequate and habitable sites with ample accommodation and satisfactory conditions on safety, nutrition, health and hygiene.[863] The IDP Protocol also requires its member states to pass legislation that "prescribe procedures for undertaking development induced displacement"[864] and ensure "effective participation of [the displacees] in the preparation and design" of such legislation.[865]

It should be evident that the lawmakers should develop the law that is consistent with international norms and standards, especially those set by the Guiding Principles that informs the Protocol. For these specific provisions and others not mentioned, it is indeed with basis to conclude that the IDP Protocol is innovative and even more comprehensive than the Guiding Principles.[866] Lastly, the other good about this instrument is that it is binding to member states, as opposed to being persuasive.

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858 L Juma "An overview of normative frameworks for the protection of development-induced IDPs in Kenya" (2013) 6 *African Journal of Legal Studies* 26.

859 Juma (2013) 28.

860 Article 5(6), IDP Protocol.

861 Article 5(2), IDP Protocol.

862 Article 5(4), IDP Protocol.

863 Article 5(5), IDP Protocol.

864 Article 6(4)(b), IDP Protocol.

865 Article 6(5), IDP Protocol.

866 Juma (2013) 28.

4.2.2.3. The AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (The Kampala Convention), 2009

The AU adopted the Convention for the Protection and Assistance of Internally Displaced Persons in Africa on 23 October 2009.[867] This instrument is usually referred to as the Kampala Convention.[868] The adoption of the Kampala Convention was triggered by, among others, an observed need for the mitigation, prohibition, elimination and protection against a plight of arbitrary displacement of persons and communities within the internal state borders of their countries.[869] While a regional instrument dealing with the protection of persons arbitrarily displaced outside state borders existed, the normative gap in legal protection of persons displaced internally within state borders resonated significantly and presented as an impetus for the adoption of the Kampala Convention.[870] The obvious strength of the Kampala Convention is its binding nature on the countries that have ratified it.[871] Unfortunately, none of the examined jurisdictions has ratified this Convention and therefore, its consideration in this study is to motivate for law reform and potentially its adoption by the examined jurisdictions.

The Kampala Convention is the only legally binding regional instrument and hard law that recognises the right not to be displaced.[872] This Convention imposes on its member states the obligation to protect and assist the internally displaced persons.[873] In particular, article 4(4) of the Convention provides that "[a]ll persons have a right to be protected against arbitrary displacement." The prohibited categories of displacements include displacement that are caused by developments, generalised violence and violations of human rights.[874] The content of the Kampala Convention is heavily influenced[875] by that of the Guiding Principles.[876] This can be seen in its founding preamble, where the Kampala Convention makes an explicit

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867 The Kampala Convention was adopted at the Special Summit of the Union Kampala, Uganda on 23 October 2009 and entered into force on 6 December 2012, available at https://au.int/sites/default/files/treaties/36846-treaty-kampala_convention.pdf (accessed 27 February 2021).

868 Because it was adopted in Kampala, Uganda.

869 Article 2(a), Kampala Convention.

870 Article 2(k), Kampala Convention.

871 L Groth "Engendering protection: an analysis of the 2009 Kampala Convention and its provisions for internally displaced women" (2011) 23(2) *International Journal of Refugee Law* 222.

872 Morel (2014) 90-91.

873 Maru (2011) 91.

874 Articles 4(4)(d) & 10, Kampala Convention.

875 The definition of internally displaced persons in the Kampala Convention is a direct adaptation from the introduction in the Guiding Principles.

876 In particular, Principle 6; M Stavropoulou "The Kampala Convention and protection from arbitrary displacement" (2010) 36 *Forced Migration Review* 62.

reference to the Guiding Principles describing them as an "important international framework for the protection of internally displaced persons."[877] The Convention is logically structured and follows a three-phase approach in presentation of its content, namely the protection from displacement or forced eviction; the protection and assistance in the course of displacement; and the protection and assistance following the displacement. The Convention is explicit in stating that its provisions are applicable to all situations of internal displacement regardless of the precise causes.[878]

On the specific right not to be displaced, the Kampala Convention is more focused (compared to Guiding Principles) on issues of accountability. It enjoins its member states to ensure that there is "individual responsibility for acts of arbitrary displacement …, [and] the accountability of non-State actors concerned, including multinational [mining] companies and private military or security companies, for acts of arbitrary displacement …"[879] Being more relevant to this study, the Convention goes further to demand the accountability for acts of displacement caused by "non-State actors involved in the exploration and exploitation of economic and natural resources leading to displacement."[880] These provisions impose on the member states both negative and positive obligations to prevent displacements and protect the people and communities against them.[881]

As indicated, mine-affected communities often become spiritually and culturally detached from their ancestral lands at the point of mining-induced displacements.[882] For this reason and others, the Kampala Convention places state members under an obligation to "protect communities with special attachment to, and dependency, on land due to their particular culture and spiritual values from being displaced from such lands, except for compelling and overriding public interests."[883] In cases where displacement is unavoidable given the overriding public interests, the affected persons and communities must be fairly and adequately compensated for their losses.[884]

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877 Preamble, Kampala Convention.
878 Article 15(1), Kampala Convention.
879 Article 3(1)(g) to (i), Kampala Convention.
880 Article 3(1)(g) to (i), Kampala Convention.
881 Article 3(1)(a), Kampala Convention & Principle 5, Guiding Principles.
882 See the discussion on the impacts of mining-induced displacements in chapter two.
883 Article 4(5), Kampala Convention.
884 Article 12(1) & (2), Kampala Convention.

Therefore, the Kampala Convention is an important development in the African continent so far leading in impact among the legally binding instruments across the region and it remains the only instrument with explicit recognition of the right not to be displaced. The Kampala Convention has integrated the major part of the of the 'soft' Guiding Principles into binding and 'hard' regional norms and standards on displacements more broadly. As per Morel's observation, the Kampala Convention has filled the legal protection gap at the regional level that existed before its adoption.[885] However, this Convention is only beneficial to those member states that have ratified and integrated it into their domestic legal protection frameworks.[886] As it turns out, none of the examined jurisdictions have ratified the Kampala Convention and it will be recommended later that perhaps adopting this regional instrument might provide some insights to South Africa and Ghana on how best they can regulate mining-induced displacements.

4.2.2.4. Non-legislative efforts to address displacements and arbitrary evictions

The African continent has also taken notable non-legislative efforts in dealing with the problem of forced evictions and displacements of people and communities from their places of habitual residence. Since it was established, the African Commission on Human and Peoples' Rights[887] has heard several matters regarding forced evictions and arbitrary displacements of people resulting in several violations of human rights guaranteed in the African Charter.[888] Furthering of its mandate, the African Commission has also appointed a Special Rapporteur on Refugees, Asylum Seekers, Migrant and Internally Displaced Persons to attend to and provide regional legal protection measure and guidelines against displacements.

In addition to the initiatives of the AU, there have been other responses to the issue of internal displacement in Africa. The individual African states have been encouraged by the AU to

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885 Morel (2014) 94.

886 Morel (2014) for further discussion on the enforcement of the provisions of this instrument by member states.

887 Also called 'African Commission' (ACHPR), is the monitoring body for the implementation of the African Charter discussed above. Article 45 of the African Charter vests this Commission with relatively broad powers to promote and ensure the protection of human and peoples' rights across the region. OHCHR "Pamphlet No. 6: minority rights under the African Charter on Human and Peoples' Rights" available online at https://www.ohchr.org/Documents/Publications/GuideMinorities6en.pdf (accessed 27 February 2021). F Viljoen "The African Commission on Human and Peoples' Rights" in C Heyns (Ed) *Human Rights Law in Africa* (2004) 385.

888 Amnesty International "The African Commission: Amnesty International's oral statement on forced evictions"; M Zard, C Beyani & CA Odinkalu "Refugees and the African Commission on Human and Peoples' Rights" (2003) 16 *Forced Migration Review* 33-35; AM Abebe "Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa" (2009) 22 *Journal of Refugee Studies* 161.

develop domestic laws providing the legal protection and assistance of internally displaced persons. However, perhaps the notable shortcoming with these initiatives is that some were ad hoc since there was no established coordination or systematic action plan on their implementation.

There is also the ECOWAS Mining Directive of 2009.[889] The Directive guarantees the FPIC principle in the context of mining developments and petroleum extraction operations. In accordance with international best practices, the Directive requires that fair and adequate compensation be payable to the owners or lawful occupiers of land in instances where the developments result in the resettlement.[890] The Directive further recommends that the states should designate some lands as "no go zones" in instances where mining operations constitute risk to the preservation of, among others, security, environmental, social and cultural conservation. It is argued that mine-affected communities' lands can be protected through this kind of provision. In particular, Article 15 of the Directive deals with human rights obligations arising from mining activities. Among others, the provision requires that mineral right holders should respect the existing rights of local communities to own, use, occupy, develop, protect and control their lands in a manner they deem fit.[891] In this way, the commencement of any mining activity in the local community is subject to the FPIC of that concerned community. The Directive states explicitly that mining companies shall "obtain free, prior and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post- mining operations" and "maintain consultations and negotiations on important decisions affecting local communities throughout the mining cycle."[892] The timing of obtaining the FPIC is clearer i.e. before exploration begins and the nature of the FPIC process is equally clear i.e. that it should be continuous throughout the full project life cycle.

4.3. The legal protection against the displacement of indigenous communities

The indigenous communities are often affected by mining-induced displacements. It has to be for this reason, among others, that international community consider indigenous people as a category of people in critical need of special legal protection.[893] These legal protections are found in various instruments where they are guaranteed explicitly or implicitly. This part of

889 ECOWAS *Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector* Directive C/Dir./3/05/09 62nd Ordinary Session of the Council of Ministers, Abuja 26-27 May 2009.

890 See the compensation provision, ECOWAS Mining Directive.

891 Article 5, ECOWAS Mining Directive.

892 Article 5, ECOWAS Mining Directive.

893 Morel (2014) 68.

the chapter seeks to explore the international instruments that provides specific protection for indigenous people and communities against displacement.

4.3.1. The Indigenous and Tribal Peoples Convention (ITP Convention), 1989

The Indigenous and Tribal Peoples Convention[894] is among the early set of international law instruments containing specific and detailed provisions concerning the threatened rights and privileges of people in indigenous and tribal communities.[895] Among its seminal provisions, the ILO Convention recognises the indigenous communities'[896] right of self-determination.[897] The right of self-determination encompasses the empowerment of indigenous communities to determine their preferred way of development and the use of their ancestral lands on which they live and the natural resources on which they depend.[898] The other ITP Convention provision affords indigenous communities an opportunity to "decide their own priorities for the process of development, as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control over their economic, social and cultural development".[899]

The ITP Convention addresses a number of issues concerning indigenous people and rural communities. These issues include, among others, rural economy and related affairs,[900] culture and education,[901] as well as social security and health care.[902] For this thesis, focus is only on specific provisions regarding the recognition and protection of indigenous communities' rights and privileges in relation to their ancestral territories. In particular, more emphasis is on the requirement for participation and meaningful consultation with these indigenous communities in cases of planned developments over their territories and that affect their social, cultural, religious and spiritual ties with their ancestral lands. In this regard, Article 2 is pertinent in

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894 ITP Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries was adopted in Geneva, Session of the Conference: 76 on 27 June 1989. It later came into force on 5 September 1991.

895 Article 16, ITP Convention.

896 Article 7, ITP Convention. T Joona *ILO Convention No. 169 in a Nordic Context with Comparative Analysis: An Interdisciplinary Approach* (dissertation, University of Lapland, 2021) 28-29. Similarly, in SJ Anaya *Indigenous peoples in international law* (1996) 3.

897 LM Graham "Resolving indigenous claims to self-determination" (2004) 10 *ILSA Journal of International & Comparative Law* 385.

898 ED Titanji "The right of indigenous peoples to self-determination versus secession: One coin, two faces?" (2009) 9 *African Human Rights Law Journal* 56-57 & F Viljoen *International human rights in Africa* (2007) 279.

899 Article 7, ITP Convention.

900 Part IV, ITP Convention.

901 Part IV, ITP Convention.

902 Part V, ITP Convention.

compelling governments to take responsibility of developing, "with the participation of the peoples concerned", a well-structured and co-ordinated systematic approach to protect the rights of indigenous communities and to guarantee respect for their integrity.[903] The implementation of the envisaged systematic action should be free from discrimination on the basis of gender.[904] This is a key provision addressing the entrenched masculinity and patriarchal tendencies in most cultural practices that disenfranchise majority of women from land ownership and equal benefit sharing from inherited resources.[905] In the context of this study, a new mining project is arguably 'development' in the wording of this instrument, and thus the protection shall extend to those affected by the implementation of the project.

Article 3(2) is also relevant in prohibiting any form of force or coercion in violation of the human rights and fundamental freedoms of the concerned individuals and communities. Mining-induced displacements and arbitrary evictions fall within the scope of this provision since they are forceful in nature and often coerced.[906] The Convention further demands that the social, cultural, religious and spiritual values and practices of the concerned indigenous persons and communities be recognised and protected.[907] The same is required with their values, practices and cultural institutions to be given the necessary respect and integrity.[908] Where consensus has been reached freely and, for instance, the development agreed upon culminate in the relocation of the community, the government must ensure that adequate policy is in place to mitigate the challenges experienced by the affected communities in their new settlement.[909]

Further, Article 6 reflects on the need for consultation and participation of communities in the planning stage of any developments that may affect them directly. In effect, the notion of "free, prior and informed consent," (FPIC) as a precursory requirement, first appeared in the ITP Convention. The Convention requires that indigenous communities be consulted whenever an administrative, legislative or developmental action which may affect their protected interests is considered.[910] In doing so, appropriate procedures through communities' representative institutions should be observed. For that consultation to be meaningful, appropriate measures should be adopted to ensure that the indigenous people participate freely, and without coercion,

[903] Article 2, ITP Convention.
[904] Article 3(1), ITP Convention.
[905] Chapters five and six.
[906] Chapters five and six respectively.
[907] Article 5(a), ITP Convention.
[908] Article 5(b), ITP Convention.
[909] Article 5(c), ITP Convention.
[910] Article 6(1)(a), ITP Convention.

to at least the same extent as other stakeholders involved in the process.[911] These measures should be maintained at all levels of decision-making. In the mining context, this would mean that community participation is needed from the mining right application stage to the displacement pre-planning phase and up until the post-displacement stage, encompassing livelihood restoration and rehabilitation.[912]

The Convention also emphasises that the involved stakeholders must at all times act in good faith; in a form appropriate to the prevailing circumstances;[913] and have regard to their customs and customary law.[914] Article 14 requires the member states to "recognise the *ownership and possession* of the peoples concerned over the lands which they traditionally occupy."[915] The provision imposes an obligation on the state to develop appropriate measures at the national level to ensure that affected persons are not denied access and use over the lands that are not exclusively occupied by them, but to those lands which they have traditionally accessed for their living and traditional activities as well.[916]

Article 15[917] provides that the right of the affected indigenous communities in respect to the natural resources in their lands shall be protected.[918] This provision simply implies that the affected communities must be thoroughly consulted on any project that seeks to exploit the mineral beneath its indigenous land. However, this is not compatible with the South African regime for mineral resource ownership where the concept of private mineral rights is no longer acknowledged and, instead, the state enjoys exclusive sovereignty over natural resources.[919]

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911 Article 6(1)(b), ITP Convention.

912 Loosely, 'rehabilitation' in this context refers to restoring the incomes, livelihoods, and social systems of the displaced persons to at least the level of their pre-project status.

913 Article 6(2), ITP Convention.

914 Article 8(1), ITP Convention.

915 Article 14(1), ITP Convention.

916 Article 14(1), ITP Convention.

917 Few observations from this Article. First, the provision requires the state to establish and maintain procedures for a mandatory consultation with the people and communities that stand to be affected in the process of extracting minerals which may include, among other, mass displacements. Secondly, the provision specifies the purpose for having the consultation, namely to ascertain the extent to which the concerned communities are to be affected by the developments. This exercise is to be undertaken before the implementation of the suggested development. Thirdly, once the impact has been ascertained or quantified, commensurate and fair compensation must be paid to those affected as a result of the development. Lastly, the provision acknowledges the important notion of benefit sharing for indigenous and local communities due to industrial resource extraction.

918 Article 15(1), ITP Convention.

919 H Mostert *Mineral Law: Principles and policies in perspective* (2012) 78; H Mostert "The 'Thing' called 'Mineral Right': Re-examining the nature, content and scope of a rather confounding concept in South African law" (2014) 17 *Recht in Afrika – Law in Africa* 28-51 & PJ Badenhorst, E Van der Vyfer & C Van Heerden

The provision goes on to state that in cases where the ownership of mineral resources vests on the state, then the government must craft procedures that guides consultation with those affected.[920] The purpose of this consultation shall be to ascertain "whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources [in] their lands."[921] The Convention requires further that the people and communities affected "shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities."[922]

4.3.2. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[923] is arguably the most comprehensive international instrument addressing a wide range of issues concerning indigenous people and communities. It is said to have been drafted in consultation with the indigenous peoples worldwide.[924] In fact, some scholars have observed that the substantive rights of indigenous people and communities never enjoyed sufficient coverage in international law to any significant scale until the adoption of the UNDRIP.[925] In the context of this thesis, the most relevant provisions of the UNDRIP are those affirming that governments should obtain "free, prior and informed consent" from indigenous communities about any proposed development projects that could potentially affect their livelihoods.[926] The same obligation, it is argued, should and must extend to private entities including mining companies that are responsible for and bringing the proposed developments bearing on the communal land rights of communities. The notable strength of this instrument is found in that it has retrospective

"Proposed nationalisation of mineral rights in South Africa" (1994) 12 *Journal of Energy and Natural Resources Law* (1994) 502.

920 Article 15(2), ITP Convention.

921 Article 15(2), ITP Convention.

922 Article 15, ITP Convention.

923 UNDRIP was adopted by the UN General Assembly Resolution 61/295 on 13 September 2007, available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (accessed 16 March 2021).

924 S Wiessner "Indigenous sovereignty: A reassessment in light of the UN Declaration on the Rights of Indigenous Peoples" (2008) 41 *Vanderbilt Journal of Transnational Law* 1141-1142, & SJ Rombouts *Having a say: Indigenous peoples, international law and free, prior and informed consent* (2014) 16.

925 EIA Daes "Some considerations on the Right of Indigenous Peoples to Self-Determination" (1993) *Transnational Law and Contemporary Problems* 1.

926 Articles 10, 19, 29 & 32, UNDRIP.

effect and provides that "indigenous peoples have a right to redress for lands that have been taken or used in the past without their consent."[927]

While the preamble to the UNDRIP does not define the term "indigenous community" in explicit terms, it makes reference to several elements that are attributable to indigenous peoples or communities.[928] Moreover, despite not providing any new rights for indigenous peoples that are not already contained in other international legal instruments,[929] and being classified as a 'soft law',[930] the UNDRIP synthesizes how these rights should be applied in practical terms.[931] Thus, the practicality attribute makes this instrument one of its own kind. Further, the UNDRIP lays down in broad generic terms the "effective mechanisms for prevention of, and redress for [... a]ny action which has the aim or effect of dispossessing [indigenous communities] of their lands, territories or resources."[932] The following discussions reflect on how the instrument achieves these.

4.3.2.1. The principle of free, prior and informed consent (FPIC)

As indicated above, the most notable provision in the UNDRIP is in relation to FPIC concept. The FPIC concept is developing rapidly into being one of the most critical legal safeguards that the indigenous communities have at their disposal. Considering that this concept is still in a phase of dynamic development, much about it is yet to be discovered and there has not yet been full consensus on its accurate interpretation of what it entails and does not. The concept of FPIC requires that indigenous communities facing development projects that are likely to affect them, such as mining operations, should be given an opportunity to have a say about whether and how such project should proceed. The concept is meant to complement two other principal rights of indigenous communities, namely; the right to self-determination and the right to participation. The FPIC concept "requires processes that allow and support meaningful choices

927 Article 28, UNDRIP.

928 These include their distinctiveness, dispossession of lands, territories and natural resources, historical and precolonial presence in certain territories, cultural and linguistic characteristics, and political and legal marginalization.

929 As discussed above.

930 Joona (2012) 88 & S Wiessner "The cultural rights of Indigenous peoples: achievements and continuing challenges" (2011) 22(1) *European Journal of International Law* 121-140.

931 R Stavenhagen "Making the Declaration work" in C Chartres & R Stavenhagen (eds) *Making the Declaration work: The United Nations Declaration on the rights of Indigenous Peoples* (2009) 352-371, cited in P Hanna & F Vanclay "Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent" (2013) 31(2) *Impact Assessment and Project Appraisal* 149.

932 Article 8(2), UNDRIP.

by indigenous peoples about their development path."[933] In this way, the FPIC is not just a single moment of decision-making, "but an iterative process that is meant to help create a climate of trust and respect between indigenous peoples and states."[934]

There is some degree of consensus among commentators that the FPIC is not a 'right' *per se*, but a procedural mechanism to aid the indigenous people's struggle for what they term the "right to have rights", self-determination being central.[935] Article 10, about FPIC, is most pertinent. Among other purposes, the Article prohibits the forceful removal of indigenous people from their lands or territories. It further provides that "[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."[936] This provision contains two remedies in it, namely fair compensation and a possible return of indigenous communities to their places of origin.[937] In the South African mining context, the second remedy i.e. return to original place, is dependent on whether the mining company has fulfilled its statutory and license obligation to rehabilitate the mining site at the closure of operations or, if failed to do so, whether the DMRE has done so.

In the subsequent paragraphs, the discussion turns to briefly explore the different aspects of FPIC concept. The first letter in FPIC represents the requirement 'free' and one may ask: when can it be said that an indigenous community has made a free decision? Or, in extension, when can it be said that a process of consultation with indigenous persons is carried out in a manner that is 'free' in the context of FPIC? This requirement demands that the indigenous people's and community's consent be obtained freely without undue pressure, coercion or any form of intimidation from anyone, including government and any private entity such as mining companies. The 'free element implies that should a community decide to withhold their consent, as they have that choice, such decision must be respected and there must be no

933 UN Sub-Commission on the Promotion and Protection of Human Rights *Report of the Working Group on Indigenous Populations on its 22nd Session* E/CN.4/Sub.2/2004/28 (2004) 5, at https://digitallibrary.un.org/record/527396?ln=en (accessed 21 March 2021).

934 Rombouts (2014) 115.

935 Hanna & Vanclay (2013) 146 and J Anaya "The right of Indigenous peoples to self-determination in the post-declaration era" in C Chartres & R Stavenhagen (eds) *Making the declaration work: The United Nations Declaration on the Rights of Indigenous peoples* (2009) 184–199.

936 Article 10, UNDRIP.

937 See earlier discussion on these remedies.

retaliation on the side of either government or private entity seeking their displacement.[938] An indigenous community that is free is one that is able to freely determine their own political path and freely determine and pursue their own way of economic and cultural pursuits.[939] Others have argued that consultations should have full discursive control for the indigenous people and communities involved.[940]

The second requirement is that consent of the indigenous people should be sought and obtained 'prior' to or before any development on indigenous land can take place, and that sufficient time is provided for adequate consideration by an affected indigenous community.[941] The affected communities' consent should be sought and freely given before the implementation of any development projects that has direct effects on them. The prior seeking of consent is also necessary so that the indigenous peoples and communities have enough time for internal deliberations to run their course, decision-making process to unfold and the formulation and finalisation of their standpoints.[942]

The other essential requirement for successful FPIC process is that the indigenous people involved should be adequately informed about the implications their decision may entail. This is where the element of 'informed' feature in the FPIC concept. The imperative for indigenous people to be 'informed' is such that the affected communities be given access to all the necessary information about the project for them to arrive at an informed decision.[943] In practical terms, this would compel the project developers to make full disclosure of their planned activities in the manner and language acceptable to the affected communities. It would also require that each affected community have access to sufficient information to have a reasonable understanding of what those planned activities would likely mean to them, including the socio-economic impacts they will encounter.[944] Informing the indigenous peoples and communities about the impacts and consequences of a proposed project will be considered fulfilled if critical information - such as the nature, size, pace and scope of the project; reasons or purposes for the project; the duration of the project; the locality of affected areas; an outcome

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938 F Vanclay & AM Esteves "Current issues and trends in social impact assessment" in F Vanclay & AM Esteves AM (eds) *New directions in social impact assessment: conceptual and methodological advances* (2011) 6 cited in Hanna & Vanclay (2013) 150.

939 Rombouts (2014) 117.

940 Rombouts (2014) 125.

941 Vanclay & Esteves (2011) 6 and Hanna & Vanclay (2013) 150.

942 Rombouts (2014) 140.

943 Rombouts (2014) 141.

944 Hanna & Vanclay (2013) 150.

of the preliminary assessment of the likely economic, social, cultural and environmental impact and risks; and procedures that the project may entail - is made available to them.

Lastly in the FPIC concept is consent. By 'consent' it is mainly implied that the potentially affected communities have a real choice over whether and how their development path proceed.[945] Certain aspects that would ordinarily encourage communities to give their consent is if, among others, there is a clear description of benefits and development opportunities that the project would bring to them as well as proper rehabilitation and fair compensation agreements. Reverse is true, the affected communities can withhold their consent if they are not satisfied with the deal.

4.3.2.2. *Good faith consultation and cooperation*

Cooperating well and consulting in good faith are crucial components of the consent process.[946] Accordingly, Article 6 of the UNDRIP requires that indigenous peoples and communities are consulted in good faith in line with appropriate procedures and, in particular, through their representative legitimate institutions. The other provision is Article 19 that requires the governments to consult thoroughly and cooperate in good faith with the indigenous people and communities affected through their own representatives in order to obtain their free, prior and informed consent before implementing any project that may affect them. Article 28 guarantees indigenous people's right to redress through restitution or just, fair and equitable compensation, for their lands, territories and resources which they have traditionally owned, used or occupied.[947] In achieving the objectives of UNDRIP, the member states, in cooperation with indigenous communities, are under an obligation to take the appropriate steps including legislative measures to fulfil the aspiration of the instrument.[948]

4.4. Conclusion

This chapter has addressed the following sub-research question: are there norms and standards of legal protection against mining-induced displacements at regional and international level and, if so, what are these norms and standards and how instructive they could be in improving the regulation of mining-induced displacements in South Africa and Ghana? This sub-question was addressed through a discussion of the following points:

945 Rombouts (2014) 145.
946 Rombouts (2014) 115.
947 Article 28(1), UNDRIP.
948 Article 38, UNDRIP.

i. The explicit recognition of the right not to be displaced generally (and for mining developments purposes in particular) in international and regional instruments;

ii. Considering that mining-induced displacement often targets poor and vulnerable indigenous communities, the specifically tailored legal protection for these category

As a point of departure, the chapter found that the right not to be displaced in international law has not yet developed like other human rights - but has the potential for such growth. The legal protection against displacement features in some instruments as an incidental issue and the instruments where it appears are mostly 'soft law', as in the form of guidelines with limited binding authority. Although the protection against displacement may be inferred as a corollary to other guaranteed rights, it was found that the UDHR which sets the universal tone for the recognition and protection of human rights does not have explicit recognition of the right not to be displaced. Instead, the chapter found that the ICESCR goes a long way in trying to give substance to economic, social and cultural rights as a category of human rights. The ICESCR has two general comment documents developed by the CESCR and these documents outline the state obligations in relation to the prevention of forced evictions and displacements.

Further, there is also the Guiding Principles that provide a normative set of standards on how individual states can ensure adequate legal protection for persons forcibly uprooted from their usual residence. This is the most comprehensive instrument on the protection against displacement in international law. This instrument set forth the rights of persons displaced within the borders of their countries and outline the obligations of governments and the international community towards these populations. The Guiding Principles have influenced and shaped several regional and sub-regional instruments that tackle displacements occasioned by developments such as mining. These are the Kampala Convention and the IDP Protocol of the Great Lakes Pact.

The chapter discovered that there has been notable efforts at the regional level to regulate the displacement phenomenon adequately. The chapter found that being a legally binding instrument, the Kampala Convention is an important development in the African continent with explicit recognition of the right not to be displaced. This Convention integrates the major part of the of the 'soft' Guiding Principles into binding and 'hard' regional norms and standards on displacements. It was also found that none of the examined jurisdictions has unfortunately ratified the Kampala Convention.

Lastly, it was discovered that the legal protection of indigenous people against displacements is present and extensive.[949] The primary instrument in this regard is the UNDRIP which, among others, provide for a FPIC consent. The FPIC consent is arguably an important tool to realise, recognise and protect indigenous rights against violation by the state and powerful private entities. The aim of FPIC is to ensure that the indigenous communities get a stronger voice in the decision-making processes about projects that affect them. The FPIC concept is rapidly becoming one of the most crucial concepts in contemporary international law concerning indigenous peoples and their right to self-determination. The indigenous peoples were found to be protected by several provisions in the Guiding Principles and the Kampala Convention respectively.

[949] Both parts 4.2 & 4.3.

PART D: A COMPARATIVE ANALYSIS OF LAW AND PRACTICE

CHAPTER FIVE
THE REGULATION OF MINING-INDUCED DISPLACEMENTS IN SOUTH AFRICA

5.1. Introduction

Laws and policies fail to succeed on their own merits, but, rather, their progress and prospects are dependent on adequate implementation.[950] This thesis has demonstrated already how it is practically challenging for mining companies, which demand large tracts of land to operate, to co-exist with mining communities who depend on the same land to sustain their livelihoods.[951] The challenge persists despite having laws and best practices to manage the conflicting interests between mining companies and communities. Given the need to address this challenge, the main question guiding this thesis is: how consultative and robust is the regulatory framework in addressing mining-induced displacements in South Africa and Ghana, and to what extent are these frameworks implemented in practice?

The manifold impacts of mining-induced displacement in South Africa have already been explored.[952] This chapter addresses the question: how, in law and practice, is the mining-induced displacement phenomenon regulated in South Africa? The chapter has two main objectives. The first is to assess how and to what extent the constitutional and legal framework is consultative and robust in regulating mining-induced displacements. This assessment features an exploratory discussion on the institutional and structural mechanisms that exist to monitor compliance in this regard. The second objective is to determine the extent to which the legislative framework on mining-induced displacement is implemented and complied with in practice. The second objective will be realised by considering how the courts have adjudicated selected case law wherein mining-induced displacement was either a central or an incidental issue and to ascertain the judicial treatment of the issue over the years.

The chapter is presented in three parts. The first part provides a brief context overview of the historical and political developments in general and those specific to the mining sector in South Africa. This part will also explore how South African laws have treated mining-induced displacements. The second part explores the relevant legislative framework that regulates the

950 B Hudson, D Hunter & S Peckham "Policy failure and the policy-implementation gap: Can policy support programs help?" (2019) 2(1) *Journal of Policy Design & Practice* 1.

951 See problem statement in chapter one.

952 See explanation of the research title and the problem statement in chapter one.

phenomenon in South Africa and also looks at the government structures and institutions that exists to control and monitor compliance with the framework. The last part explores and analyses selected case law wherein the mining-induced displacement was either a primary or incidental issue before the court. This analysis is to establish the extent to which the legislative framework is complied with in practice.

In pursuing this inquiry, the chapter ventilates the following issues:

i. the general historical developments of South Africa's mining practice and policy to underscore successive reforms in policy developments and their varied implications for mining-induced displacements over time;[953]
ii. the country's relevant constitutional and legislative framework to establish how appropriately it regulates the phenomenon;[954]
iii. the extent to which the legal framework is complied with in practice by looking at how the South African courts have adjudicated matters involving the mining-induced displacement.[955]

5.2. Background and Context

South Africa was established as a unified and self-governing State in 1910 through the South Africa Act of 1909. The Union of South Africa had four erstwhile British colonies of the Cape of Good Hope, Natal, Transvaal and the Orange River.[956] Since then, and beyond, the country experienced social and political developments, racial segregations, land dispossessions and evictions. This part is presented in two sections. The first section reflects on the historical forced removals of black communities from their communal lands to foreign places under the

953 Part 5.2.

954 Part 5.3.

955 Part 5.4.

956 GE Devenish "The South African Act revisited: Some constitutional and political reelections on lessons learnt from the centenary of the Union of South Africa in 1910" (2011) 32(1) *Obiter* 108-125; AJ Christopher "Roots of urban segregation: South Africa at Union, 1910" (1988) 14(2) *Journal of Historical Geography* 151-169; and J Zollmann "Negotiated Partition of South Africa: An Idea and its History (1920s–1980s)" (2021) 73(2) *South African Historical Journal* 406-434. Each territory had its restrictions through enacted laws, i.e. the Natal Ordinance 2 of 1865, the Orange Free State Ordinance 4 of 1895 and the Transvaal Ordinance 21 of 1895. Then, the Vagrancy Act 23 of 1879 (and its Amendment Act 27 of 1889), the Native Locations Amendment Act 33 of 1892, the Native Locations Amendment Act 30 of 1899 and Private Locations Act 32 of 1909.

apartheid and colonial regimes.[957] The second section surveys past events of mining-induced displacements in the country against the general plight of forced removals and evictions of black communities.[958]

5.2.1. The general history of forced evictions and resettlements in South Africa

The history of forced evictions and removals of black communities in South Africa is a long and disconcerting one.[959] It is the history associated with skewed patterns of land use and ownership to the exclusion of black people.[960] The apartheid regime that South Africa's Afrikaner-led National Party facilitated in 1948 had two main objectives to advance,[961] namely to sustain political supremacy and promote economic prosperity for the white minority.[962] Ownership during the apartheid entailed that an owner had a qualified right to exclude all lawful occupiers from their land upon proving that any right, permission or licence they have granted previously no longer exists or that the right had terminated in case of real or personal right.[963]

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957 S Rugege "Land Reform in South Africa: An overview" (2004) 32(2) *International Journal of Legal Information* 283-312; S Kgatla "Forced removals and migration: A theology of resistance and liberation in South Africa" (2013) 41(2) *Missionalia: Southern African Journal of Missiology* 120; G Mathiba "Corruption in land administration and governance: A hurdle to transitional justice in post-apartheid South Africa" (2021) 42(3) *Obiter* 561-579.

958 H Mostert & G Mathiba "Mine community displacement and resettlement in South Africa" in N Graham, M Davies & L Godden (eds) *The Routledge Handbook of Property, Law and Society* 1st ed (2022) 61.

959 G Mathiba "Evictions and tenure security in South Africa: A review of *Baron and Others v Claytile (Pty) Ltd and Another* (2017)" (2018) 19(2) *ESR Review: Economic and Social Rights in South Africa* 13; C Murray "Struggle from the margins: Rural slums in the Orange Free State" in F Cooper (ed) *Struggle for the City: Migrant Labour, Capital and the State in Urban Africa* (1983) 287-311; I Niehaus "Relocation into Phuthaditjhaba and Tseki: A comparative ethnography of planned and unplanned removals" (1989) 48(2) *African Studies* 164; J Sharp "Relocation and the problem of survival in QwaQwa: A report from the field" (1982) 8(2) *Social Dynamics* 14; J Sharp "A World turned upside down: Households and differentiation in a South African Bantustan in the 1980s" (1994) 53(1) *African Studies* 76.

960 JM Pienaar *Land Reform* (2014) 82-83 and entire chapter 3; H Mostert, JM Pienaar & AMA van Wyk "Land" in WA Joubert & JA Faris (eds) *The Law of South Africa* 3rd ed (2010) 1-21; H Kloppers & GJ Pienaar "The historical context of land reform in South Africa and early policies" (2014) 17(2) *PELJ* 681; MT Hoffman "Changing patterns of rural land use and land cover in South Africa and their implications for land reform" (2014) 40(4) *Journal of Southern African Studies* 707.

961 M Abel "Long-Run Effects of Forced Resettlement: Evidence from Apartheid South Africa" (2019) 79(4) *The Journal of Economic History* 1-39; M Abel "Long-run Effects of Forced Removal under *Apartheid* on Social Capital" (2015) Working Paper at *https://scholar.harvard.edu/abel/publications/long-run-effects-forced-removal-under-apartheid-social-capital* (accessed on 17 March 2022).

962 Abel (2015) 5; F Wilson & M Ramphele *Uprooting Poverty in South Africa* (1989) 208; D Posel "The Apartheid Project, 1948-1970" in R Ross, A Kelk-Mager & B Nasson (eds.) *Cambridge History of South Africa* (2011) 319-368.

963 G Muller *The impact of section 26 of the Constitution on the Eviction of Squatters in South African law* (unpublished LLD thesis, Stellenbosch University, 2011) 33.

As for unlawful occupiers, the owner could evict them through a vindicatory action which, during the apartheid, was understood to be conferring on the owner an absolute right to evict with no regard for their personal circumstances.[964] The State could do same through police power,[965] with a political motive of maintaining a skewed, unequal and unjust land-use system founded on racial grounds.[966] Between mid-17th and the late 20th century, the colonial administration facilitated the impoverishment of indigenous people while pursuing the enrichment of white farmers by creating political and economic power structures that maintained white privilege.[967] The enacted laws ensured that black farmers were dispossessed of their lands, disqualified from owning lands[968] and forced to resettle to the overcrowded reserves known as the homelands or Bantustans.[969]

In 1913,[970] the segregationist Natives Land Act was passed as a legislative means of maintaining the status quo of skewed and unequal land use, occupation and ownership along racial lines.[971] Among others, the Act established a commission to enquire and report on land areas that were to be set aside or 'scheduled' for black people.[972] All black people who happened to unlawfully occupy any land other than those 'scheduled' for them, would be served with a written notice that requesting them to show cause why they should not be evicted,[973] failing which forced removal followed.[974] The government through the Department of Native Affairs had a statutory obligation to accommodate the evicted black people in a

964 Muller (2011) 33.

965 Vindicatory action could also be exercised by the state through police power, to forcefully evict people from the occupied property/land for various reasons, such as health considerations, safety and public interest in terms of the Trespass Act 6 of 1959, Slums Act 53 of 1934, Physical Planning Act 88 of 1967 and Health Act 63 of 1977.

966 Van der Walt AJ *Constitutional Property Law* (2005) 414.

967 S Terreblanche *A History of Inequality in South Africa 1652-2002* (2002) 6 and Muller (2011) 35.

968 For instance, the Group Areas Act was promulgated to establish designated areas for different race groups as defined in the Act and to control their use, occupation and acquisition of ownership of land in those areas.

969 D Posel *The Making of Apartheid, 1948- 1961: Conflict and compromise* (1997) 227-255; M West "From Pass Courts to Deportation: Changing patterns of influx control in Cape Town" (1982) 81(325) *African Affairs* 463- 477; B Freund "Forced Resettlement and the Political Economy of South Africa" (1984) 29 *Review of African Political Economy* 49-63; C Murray "Displaced urbanization: South Africa's rural slums" (1987) 86(344) *African Affairs* 311-329; E Unterhalter *Forced Removal: The Division, Segregation and control of the people of South Africa* (1987) and C Desmond *The Discarded People: An account of African resettlement in South Africa* (1971).

970 W Beinart & P Delius "The Historical Context and Legacy of the Natives Land Act of 1913" (2014) 40(4) *Journal of Southern African Studies* 669.

971 Beinart & Delius (2014) 668. See also Muller (2011) 36.

972 Beinart & Delius (2014) 668 and Muller (2011) 36.

973 Section 37(1), Development Trust and Land Act 18 of 1936 (DTLA).

974 Section 37(3), DTLA.

traditional and scheduled area following their often forced eviction.[975] Notably, though, some attempts were made to restore the rights of the affected indigenous communities through the creation of tribal lands in terms of the Native Trust and Land Act 18 of 1936.[976]

In 1951, three years after the National Party had assumed power, the Prevention of Illegal Squatting Act[977] was passed. The passing of this Act demonstrated the National Party's clear resolve to ensure and prioritise the safety and tranquillity of white people against blacks.[978] As for purpose, this Act was aimed at preventing and controlling illegal squatting in both private and public lands.[979] Among drastic provisions of the PISA is the one affording stage and private person as landowners the powers to summarily demolish buildings and/or structures[980] erected on the designated pieced of land without the consent or permission by the owner.[981] A victim of building or structure demolition had no form of relief or remedy at law since section 3B(4)(a) of PISA abrogated the court's jurisdiction to entertain and grant any relief in civil proceedings[982] that is sought to stop an intended or actual eviction or demolition or to recover possession of materials used to build the structure,[983] unless the applicant could prove *mala fide* on the side of the respondent.[984]

With the foregoing summation of historical events around forced removals in South Africa, the country never had it easy insofar as the protection of human rights is concerned between 1910 - when its first constitution was adopted - and the 1990s that marked the last decade within

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975 Section 38, DTLA.

976 AA Schoch et al. "South Africa" (1938) 20(2) *Journal of Comparative Legislation and International Law* 120-140 and J van Wyk "The legacy of the 1913 Black Land Act for spatial planning" (2013) 28(1) *Southern African Public Law* 91-105.

977 Prevention of Illegal Squatting Act 52 of 1951 (PISA).

978 National Party *Election Manifesto* (1948).

979 Long Title to the PISA.

980 Building or structure includes "any shack, hut, tent or similar structure" as per the Act. The courts have had an opportunity to consider the meaning of the term "building or structure" for purposes of section 3B(1)(b) of PISA in *Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C).

981 Section 3B, PISA.

982 A *mandament van spolie* to be specific.

983 In *Rikhotso v Northcliff Ceramics (Pty) Ltd & Others* 1997 (1) SA 526 (W) at para 532, the court held that a *mandament van spolie* cannot be invoked - in a case of building or structure demolition - to recover possession of materials that were used to build the structure where such material has been irreparably destroyed. This is because "[t]here is nothing upon which the order can operate, and no possessory entitlement [is/would be] left to adjudicate upon".

984 Muller (2011) 63; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5ed (2006) 304; CG Van der Merwe *Sakereg* 2de (1989) 134.

which a way towards the current final Constitution was paved.[985] The country's system of parliamentary sovereignty, apartheid, absence of the rule of law, severe human rights abuses[986] were all factors that meant that rendered the observance of human rights and the protection of black communities against forced removals difficult.[987] Notable, though, is that in 1994, the country experienced a wave of change and reform through the adoption of the Constitution of the Republic of South Africa 200 of 1994,[988] which was later finalised in 1996.[989] The 1996 Constitution is opposed to the apartheid regime laws in every respect, particularly its structure and the Bill of Rights, it has been touted as one of the most progressive worldwide.[990] Among others, the 1996 Constitution outlines the fundamental values that underpin democracy and governance vision of the country. It shares the ideals of human dignity, equality, human rights, non-racialism and non-sexism and the rule of law.[991] Having replaced the system of parliamentary sovereignty under the apartheid regime,[992] the 1996 Constitution sets itself as the supreme law of the country against which any "… law or conduct inconsistent with it is invalid".[993] The

5.2.2. Tracing the history of policy and practice of mining-induced displacements in South Africa

The preceding discussion explored the general history of forced removals in South Africa. This section aims to place, in particular, the mining-induced displacement in its legal-historical context by tracing how the mining policy evolved over the years insofar as mineral exploration and ownership is concerned. The section further seeks to explore how the mineral owner related with the third party and the State. Having done so, the section also enquires on how the related sector practice has been concerning displacements of mining-affected communities.

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985 I Currie & J de Waal *The Bill of Rights Handbook* (2009) 3; H Corder "Constitutional Reform in South African History" in H Corder, V Federico & R Orru (eds) *The Quest for Constitutionalism: South Africa since 1994* (2014) 182-184.

986 Currie & de Waal (2009) 2; J Dugard & A Alcaro "Let's work together: Environmental and socio-economic rights in the courts" (2013) 16 *South African Journal on Human Rights* 15 and LJ Kotzé "Critical survey of domestic constitutional provisions relating to environmental protection in South Africa" (2008) 14 *Tilburg Law Review* 299.

987 Kotzé (2008) 301.

988 Currie & de Waal (2009) 5 & Corder (2014) 185.

989 The Constitution of the Republic of South Africa, 1996.

990 K Klare "Legal subsidiarity and constitutional rights: A reply to AJ van der Walt" (2008) 9 *Constitutional Court Review* 129.

991 Section 1, Constitution.

992 Section 2, Constitution.

993 Section 2, Constitution.

5.2.2.1. Historical antecedents of mining policy in South Africa

Historically, the mining rights in South Africa were intrinsically bound to the ownership of the land in which those minerals were embedded in and under.[994] This legal position gained more credence during the Dutch era,[995] when the Cape became the Dutch colony in 1652.[996] From this era, what the country benefitted policy-wise was the principle rule of property law from Roman common law known as *cuius est solum eius est usque ad coelum et usqne ad inferos*, meaning that the owner of the land was deemed to be the owner of not only the surface but also of the 'fruits of the land'[997] extending to the space above[998] and below it.[999] This would simply mean that there was a solid recognition of private property rights (over minerals) as long back as during the Dutch era in the Cape. This principle was retained during the British era in 1806 when the Cape became the British colony.[1000] However, the position started to shift from private ownership to State ownership of minerals in 1813 through the enactment of the Cradock Proclamation that made an exclusive reservation of the 'right to mine' precious stones, silver and gold to the then government of the Cape Colony.[1001] As colonisation intensified, the independent provincial states were established around 1836 and each of these governments had its own laws which reserved certain minerals to the State.[1002] However, most part of the provincial states followed the position adopted by the Cape Colony.[1003]

During the Union era, where the former four independent states were unified into the Union of South Africa in 1910, there was a move to consolidate the various provincial rules governing

994 E van der Schyff "South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals" (2012) 64 *New Contree* 132; FT Cawood & RCA Minnitt "A historical perspective on the economics of the ownership of mineral rights" (1998) *The Journal of South African Institute of Mining and Metallurgy* 369.

995 The Dutch legal system did not yield much influence on the South African mining law as such for the reason that mining was not among the most significant economic activities in Holland at the time.

996 Cawood & Minnitt (1998) 370.

997 MO Dale *A historical and comparative study on the concept and acquisition of mineral rights* (unpublished PhD thesis, University of South Africa, 1979) 1-12; 175-240.

998 Up to the heavens.

999 Down to the center of the earth.

1000 Cawood & Minnitt (1998) 370.

1001 Section 4 of Sir John Cradock's Proclamation on Conversion of Loan Place to Quitrent Tenure, 6 August 1813. See *Benade v Minister van Mineraal en Energiesake* 2002 JDR 0769 (NC) 8 & G Levin & JRF Handley "Mineral rights evolution in Southern Africa: A comprehensive historical review" (research paper) (1993) 37.

1002 Cawood & Minnitt (1998) 370.

1003 Cawood & Minnitt (1998) 370.

mineral rights through the Land Settlement Act of 1912.[1004] The statute sought to vest all the mineral rights (not just the right to mine but also ownership) in the State.[1005] In 1917, these gains were reversed and the ownership of mineral rights reversed to the landowner,[1006] but this was short-lived.[1007] In 1942, the Base Minerals Development Act was passed with the effect of empowering the State to intervene if a landowner was not exercising their right to mine or prospect for minerals and to grant prospecting right to a third party if this was deemed to be in the national interest.[1008] The policy direction towards State control continued in 1948.[1009] During the Republican era, all the statutes that regulated various aspects of the mining sector were consolidated into one single piece of legislation, namely the Mining Rights Act 20 of 1967.[1010] Subsequent to this point, there was a whole host of other statutes that were passed at difference intervals to further regulate the sector with various implications at each point in time.[1011]

In the late 1990s and the early 2000s, the debates started to revolve around the need for reform of the mining sector policy and the desirable future of the mining regime in the country,[1012] and this culminated into the passing of the Mineral and Petroleum Resources Development Act in 2004, the MPRDA.[1013] From the preceding discussion, it is concluded that the regulation of displacements caused by mining is among issues that did not enjoy much coverage, if at all, in the policy history of the sector. Instead, the sector policy started to entertain the displacement

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1004 Bernard & Audre Rapoport Center for Human Rights & Justice *Property Rights from Above and Below: Mining and Distributive Struggles in South Africa* (University of Texas, 2019) 15, hereafter 'Bernard & Audre Report'.

1005 Cawood & Minnitt (1998) 371; Bernard & Audre Report (2019) 15.

1006 This position existed even though the state continued to own the mineral rights associated with the public land it owned, and continued to do so even if it disposed of the said land.

1007 Notably, if a mine were established on a privately owned land, the state was entitled to royalty payments in terms of the Reserved Minerals Development Act of 1925.

1008 Cawood & Minnitt (1998) 371 & Bernard & Audre Report (2019) 15.

1009 Through the Atomic Energy Act 35 of 1948 which vested the right to prospect and mine for prescribed minerals on the government.

1010 This was to the exception of precious stones, which were governed by the Precious Stones Act 73 of 1964.

1011 Including the Mining Titles Registration Act 16 of 1967; Mining Rights Act 20 of 1967; Mineral Laws Supplementary Act 10 of 1975 and Minerals Act 50 of 1991.

1012 PJ Badenhorst, E van der Vyver & CN van Heerden "Proposed nationalisation of mineral rights in South Africa" (1994) 12(3) *Journal of Energy and Natural Resources Law* 287.

1013 This was obviously preceded by the *Broad Based Socio-Economic Empowerment Charter*, known as the Mining Charter, of which its first draft version was released in July 2002.

issue only after the enactment of the MPRDA,[1014] which is the current central and enabling statute for the broader mining sector.

5.2.2.2. The history of mining practice and communities on the issue of displacement

The picture that emerges from the preceding discussion is that the issue of mining-induced displacement enjoyed little to no coverage in mining policy over the years until recently with the introduction of MPRDA. Even so, the critical point to begin with is that mining-induced displacements is not a new occurrence in South Africa. If anything, it has become a some perpetuation of the humiliating experiences of forced removals of black communities from their communal lands by the apartheid administration.[1015] The country's mineral-driven industrialisation in the first half of the 20th century did not only increase demand for cheap labour in urban cities that hosted mining developments,[1016] but has also resulted in forced displacements of black people to make way for the construction and expansion of those mining developments.[1017] The preceding discussion demonstrated how and the extent to which the apartheid regime used the law and police power as machinery to facilitate land dispossessions and forced removals of black communities for social reconstruction, economic marginalisation and political oppression.[1018] Between 1960 and 1982, about 3.5 million black people were forcibly removed from their homes and arable lands to desolate and uninhabitable places by the apartheid government to schedule those lands for developments to the benefit of white minority.[1019] This has had pervasive and lasting negative impacts in black communities and, among others, it caused many communities to lose their long-established social unity and ties.[1020]

1014 The MPRDA has been described as a 'paradigm shift in mineral policy' in the country, FT Carwood "The Mineral and Petroleum Resources Development Act of 2002: A paradigm shift in mineral policy in South Africa" (2004) 104(1) *The Journal of The South African Institute of Mining and Metallurgy* 53-64.

1015 Mostert & Mathiba (2022); Rugege (2004) & Kgatla (2013) 120.

1016 JA Muntingh *Community perceptions of mining: The rural South African experience* (unpublished MBA mini-dissertation, North-West University, 2011) 28.

1017 Abel (2015) 5.

1018 L Platzky & C Walker *The surplus people: Forced removals in South Africa* (1984) 1.

1019 Platzky & Walker (1984) 1.

1020 F Demissie "In the shadow of the gold mines: Migrancy and mine housing in South Africa" (1998) 13(4) *Housing Studies* 445-469; H Tutu, TS McCarthy & E Cukrowska "The chemical characteristics of acid mine drainage with particular reference to sources, distribution and remediation: The Witwatersrand Basin, South Africa as a case study" (2008) 23 *Applied Geochemistry* 3666-3684; Y Von Schirnding et al. "A study of paediatric blood levels in a lead mining area in South Africa" (2003) 93 *Environmental Research* 259-263. S Pegg "Mining and poverty reduction: Transforming rhetoric into reality" (2006) 14 *Journal of Cleaner Production* 376-387; EA Aubynn *Community perceptions of mining in Ghana* (Unpublished Master's thesis,

It is not by coincidence that the communities that are often negatively affected by mining developments are those that have historically endured a disproportionate dire socio-economic impact from the development of mining,[1021] and it continues to exert serious environmental, human rights, cultural and health impacts for mining-affected communities.[1022] The mining companies would often decide to forcefully remove communities from their land without any prior arrangements or consultation with a view to prospect for minerals.[1023] What is striking about these removals and displacements is that everywhere where they have been executed, they have been abrupt, violent, sudden and mostly minimally compensated, or not compensated at all.[1024] There are both old and contemporary incident examples of black communities being removed from their communal and ancestral lands to make way for mining developments.

As an older example, the Bakgaga Bakopa community's experience of forced removals by the Berlin Missionaries constitute a good case in point. This community occupied the farm called Maleoskop (Thabantsho), that was originally known to be Rietkloof, in the then Eastern Transvaal.[1025] In 1953, the Maleoskop community's land was declared to be a 'black spot' in terms of the Group Area's Act of 1950.[1026] Following the declaration, the community was given an ultimatum that for the sake of their survival, they will have to accept to be removed from the area.[1027] The community objected and refused to abide by this intimidation,[1028] arguing that they had been born and bred in Maleoskop and that they have strong spiritual ties with the area since their forefathers were buried there.[1029] The community remained firm on its refusal to be resettled. This did not end well and, between the period 26 June and 16 July 1962, their refusal was met with excessive and unreasonable use of force by the armed police officers and the state's bulldozers.[1030] In the process of forced removals, building structures, churches and

University of Alberta, 2003) 7; AGN Kitula "The environmental and socio-economic impacts of mining on local livelihoods in Tanzania: a case study of Geita District" (2006) 14 *Journal of Cleaner Production* 405.

1021 DMR *Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry* (Mining Charter) May 2015, 30.

1022 Muntingh (2011) 28.

1023 R Chauhan "Social justice for miners and mining affected communities: The present and the future" (2018) 39(2) *Obiter* 346.

1024 Chauhan (2018) 346.

1025 NR Nkadimeng *The Bakgaga Bakopa Community's Experience of Forced Removal from the Ancestral Settlement at Maleoskop* (unpublished Master's thesis, University of Johannesburg, 1999) 2.

1026 Nkadimeng (1999) 2.

1027 Nkadimeng (1999) 2.

1028 Nkadimeng (1999) 2.

1029 Nkadimeng (1999) 2.

1030 Nkadimeng (1999) 3.

kraals were demolished, some of their livestock died while others went missing and, as a result, they were left feeling spiritually disconnected from their ancestors because they were removed from the land where their forefathers were buried.[1031] The community was eventually displaced to another area called Tafelkop which was about 40 kilometres from Maleoskop.[1032] Upon later discovery, it became clear that the then government, acting in concert with the missionaries, removed the Maleoskop community from their land because they were attracted by "a concentration of heavily mineralised magnetite on the surface" of Maleoskop land among other things.[1033]

As for a recent case, the lived experiences of the Dingleton community in the Northern Cape province is pertinent. The displacement of this community clearly demonstrates that mining-induced displacement remains unabated in South Africa at the sight of a democratically elected government that fails to hold infringing mining companies accountable.[1034] The Dingleton community was resettled to the nearby town of Kathu by the Anglo-American's iron ore mining company to make way for the expansions of its operations at the Sishen Iron Ore mine between 2014 and 2017.[1035] Empirical studies on this resettlement project have found that it failed in many aspects including, among others, the mining company having failed to conduct prior meaningful engagement and consultation with the community before it could carry out the project.[1036] Some community members are reported to have been aggrieved and dissatisfied with the compensation awarded to them, indicating that the mining company had abused its economic power to coerce them into agreeing to inadequate compensation.[1037]

1031 Selected translated remarks include: "*The government instructed us to leave. We had to leave*"; "*The whites wanted our land because our land was fertile*"; "*Our livestock was stolen by other people from the nearby villages, and the Boers who found them wandering in their farms kept them for themselves*"; "*We had also left our ancestor's graves*", Nkadimeng (1999).

1032 Nkadimeng (1999) 3.

1033 W Boshoff "The Bakopa of Boleu and the Missionaries from Berlin (1860-1864): The brief existence of Gerlachshoop, first mission station of the Berlin Missionary Society in the ZAR" (2004) 32(3) *Missionalia* 451.

1034 DP Mouton "The power of stories from within: The Dingleton community relocation" (2016) 2(1) *Stellenbosch Theological Journal* 306.

1035 Mouton (2016) 301. See also C de Wet "Assessing country safeguards as a protection/benefit for those who are displaced by development projects: The case of democratic South Africa" in S Price & J Singer (eds) *Country Framework for Development Displacement and Resettlement: Reducing Risk, Building Resilience* (2019) 133-152.

1036 B Luka *Communication between the mine and the community in a mining resettlement project: A case study on Kumba Iron Ore's Dingleton project* (unpublished Master's thesis, North-West University, 2019) 100.

1037 Mouton (2016) 314.

Another contemporary case worth noting is the Mapela and Kekana communities in Mokopane in Limpopo province. As in the Dingleton case, these two rural communities had to be resettled permanently by the Anglo-American platinum mining company that wanted to extend its open-cast mining operations towards the northern part[1038] of its concession at the Mogalakwena Platinum Mine.[1039] This resettlement involved over thousand households[1040] and it also had issues. The members of the affected communities were dissatisfied and aggrieved by several problems such as the lack of necessary support by the mining company to ensure that their livelihoods, economic, agricultural and cultural activities were successfully restored.[1041] The communities also decried the fact that the graves of their forefathers were exhumed and, as a result, they felt culturally, spiritually and socially disarticulated.[1042] The mining company and the relevant State authorities never held prior consultation and engagement with the two rural communities.[1043] As a result of not being consulted, some community members attempted to resist their removal from their communal land that the company targeted for mine expansions.[1044] It was at the point of their resistance when they were then forcibly removed with extreme use of force by the police and private security officers of the company.[1045] In the process of their forced removals, their properties and homes were destroyed and they were inadequately compensated, while others were not compensated at all.[1046]

Had history just repeated itself? It indeed did, because similar *modus operandi* was unleashed on the Bakgaga Bakopa community of Maleoskop in the former Eastern Transvaal in 1962.[1047] Even more striking about the abrupt and forceful displacements of the Mapela community is that the traditional authority is said to have "colluded" with the mining company and some

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1038 Anglo American "Motlhotlho village relocation Mogalakwena mine" (2014) Symposium Presentation at https://conferences.iaia.org/resettlement/proceedings/9%20-%20Govt%20and%20Private%20Sector/1%20-%20Governance%20Structures%20-%20Motlhtlo%20(Espag).pdf (accessed 14 May 2021).

1039 Apparently, this mine is considered 'the largest open-pit platinum mine in the world'. See Anglo American "About" (2015) available at https://www.angloamerican.com/about-us/our-stories/mine-profile-mogalakwena (accessed 12 May 2021).

1040 S Mnwana, F Mtero & M Hay *Dispossessing the dispossessed: Mining and rural struggles in Mokopane, Limpopo* (2016) 17.

1041 DMS Manamela *The impact of mining on indigenous African communities in Limpopo* (unpublished PhD thesis, University of Johannesburg, 2019) and Mnwana, Mtero & Hay (2016).

1042 Manamela (2019) & Mnwana, Mtero & Hay (2016).

1043 Manamela (2019).

1044 Manamela (2019) 142.

1045 Manamela (2019) 142.

1046 Manamela (2019) 141-42.

1047 Nkadimeng (1999) 3.

government officials to sell the communal land to the mining company without having informed and consulted the community.[1048] For reasons such as these, I have argued elsewhere that, with the advent of colonialism, most (if not all) traditional leaders became the agents of apartheid and were strictly accountable to its administration and no longer to the communities they lead.[1049] That said, it begs the question: has the traditional leadership in contemporary South Africa improved for the better? That remains to be seen, but there is at least some indication that the mine communities are becoming more aware of and defensive against abuse and infringement of their rights. In a recent judgment in *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*,[1050] the High Court held that "the top-down approach whereby kings or monarchs were consulted on the basis that they spoke for all their subjects is a thing of the past which finds no space in a constitutional democracy."[1051] The court further stated that "the community is a separate entity from the Chief and [that] 'Chief' does not denote the community."[1052]

Lastly, many similar case studies exist; some have been covered in other studies, so the foregoing instances are not exhaustive.[1053] For present inquiry, the few case studies discussed above demonstrate the point on how prevalent large-scale community displacements for reasons of mining has been and continues to be in South Africa. It is against the preceding background that even to date, the rural communities living in areas with rich mineral deposits

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[1048] One of the community members who was interviewed by Manamela (2019) 141-142 during field work summarised what exactly transpired by remarking that "[t]he chief did not consult us regarding mining activities in our land. We were just informed that mining is going to bring 'tsholopele' [meaning development] in our area. We were promised that there will be jobs ... However, he [the chief] did not disclose to us that he had already sold communal land to the mine. Neither did he disclose what will be paid to the community and how? Since there were no financial reports about community funds and how they are used. The only thing we know is when he will slaughter a cow and call the people to eat and said the cow comes from the mine. Deals between the mine and the chief are never disclosed to the community. It was only when the youth and other community structures confronted him; he was able to disclose that the land (some farms) was sold to the mine. Details of the transaction were also not divulged".

[1049] G Mathiba "Traditional leaders as 'colonial agents' and the land question" 28 June 2018 *News24* at available online at https://www.news24.com/news24/Analysis/traditional-leaders-as-colonial-agents-and-the-land-question-20180628 (accessed 19 May 2022); L Ntsebeza "Land reform, traditional authorities and rural local government in post-Apartheid South Africa: Case studies from the Eastern Cape" Research Report No.2 PLAAS-UWC (1999) and S Rugege "Traditional leadership and its future role in local governance" (2003) 7(2) *Law, Democracy & Development* 171-200.

[1050] *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* Case No.: 3491/2021, judgment delivered 01 September 2022 (hereafter the '*Wild Coast*').

[1051] *Wild Coast* (2022) para 92.

[1052] *Wild Coast* (2022) para 93.

[1053] The study by Zamchiya (2019) covers other rural communities that suffered land dispossessions and forced removals to make way for mining operations in Limpopo. P Zamchiya "Mining, capital and displacement in Limpopo, South Africa" Working Paper 56 PLAAS-UWC (2019).

continue to live in fear, for there is no indication that this trend of forcibly removing communities from their communal lands will end in the near future.[1054]

5.3. Exploration of law and policy on mining-induced displacements in South Africa

As a starting point, I have argued elsewhere that South Africa's problem of mining-induced displacement is growing rapidly, hence a need to reflect on the country's policy on the subject to identify key areas for improvement in protecting those directly affected by displacements.[1055] The preceding discussion has demonstrated that prior to 1994, the legal protection of vulnerable black mine communities against mining-induced displacements was weak because the preoccupation of the then anti-black administration was mainly on growing the economy for the benefit of minority without bounds.[1056] At this point, focus then turns to explore and consider how and what the country's constitutional and legislative framework provides in an attempt to regulate the phenomenon in contemporary South Africa.

5.3.1. The constitutional framework

The treatment of mining-induced displacement under the Constitution of the Republic of South Africa, 1996 can be inferred from several constitutional provisions.[1057] The Constitution is the supreme law of the country, the law against which anything incompatible with should be deemed invalid.[1058] Among others, this Constitution is premised upon the need to achieve social justice[1059] and uplift socio-economic rights.[1060] In *Hoffmann v SAA*,[1061] though in a completely different context, the Constitutional Court described the Constitution as "protect[ing] the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping."[1062] It guarantees to everyone, including members of the mine communities, the protection of

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1054 Part 5.4 will reflect on recent case law on the matter to demonstrate the point that this problem is persistent.

1055 Mostert & Mathiba (2022) 61.

1056 Part 5.2.2.

1057 Inferred because the Constitution makes no express mention of 'mining-induced displacements'.

1058 Section 2, Constitution.

1059 With several provisions commanding for a corrective action to address the past and present inequalities through affirmative action.

1060 M Pieterse "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *South African Journal on Human Rights* 475; M Pieterse "Beyond the welfare state: Globalisation of neo-liberal culture and the Constitutional protection of social and economic rights in South Africa" (2002) 14 *Stellenbosch Law Review* 3; DM Davies "The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles" (1992) 8 *South African Journal on Human Rights* 475; N Haysom "Constitutionalism, majoritarian. Democracy and socio-economic rights" (1992) 8 *South African Journal on Human Rights* 451 & E Mureinik "Beyond a charter of luxuries: Economic rights in the Constitution" (1992) 8 *South African Journal on Human Rights* 464.

1061 *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17 paras 34.

1062 *Hoffmann* (2000) paras 34 & 37.

fundamental human rights and freedoms, including the right to human dignity,[1063] equality and freedom,[1064] civil liberties and a host of other socio-economic rights.[1065] However, for present inquiry, focus should be limited to only two most pertinent constitutional provisions.

The first is section 25(6), which provides that "[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress." From the formulation of this right, one can observe that this provision is more reformist in nature.[1066] It has an effect of rectifying the wrongs of the past through redress and reversing of the racially biased patterns of land ownership and balancing the minority privilege in property rights.[1067] Further observation is that the Constitution is, for the benefit of previously disadvantaged black majority, authorising the State to facilitate tenure security and access to land by recognising and protecting land occupation and use rights of these persons even if these rights clash with ownership rights.[1068]

The second is section 26(3) which provides that no "one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances [and n]o legislation may permit arbitrary evictions." Considering certain formulations of the right, few notable observations can be drawn. On a general level, the current formulation anticipates that eviction of people from their homes for whatever reason may happen at any point in time and, at certain instances, it may be coupled with the demolition of their home structures. The right also demonstrates that there will always be a need for court involvement in determining whether eviction is warranted or not and that, in the event that it is warranted, the personal and other circumstances of the victim should have been considered.

1063 Human dignity is one of the fundamental values of the Constitution and it is at the heart of individual rights in a free and democratic society. In *NM & Others v Smith & Others* 2007 (5) SA 250 (CC), the Constitutional Court stated in paras 49-50 and the *dictum* in *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000(8) BLCR 837 (CC) para 35; S Liebenberg "The value of human dignity in interpreting socio-economic rights" (2005) 21 *South African Journal on Human Rights* 1.

1064 *S v Solberg* 1997 (4) SA 1176 (CC) para 141.

1065 Chapter 2, Constitution.

1066 J Pienaar *Land Reform* (2014) 167, where she correctly alludes that section 25 generally is a "clearly more reform-centred and expansive land reform approach", compared to its framing section 28 of the Interim Constitution, 1993; J Dugard "Unpacking section 25: What, if any, are the legal barriers to transformative land reform" (2019) 9 *Constitutional Court Review* 144.

1067 E du Plessis "Property in transitional times: The glaring absence of property at the TRC" in M Swart & K van Marle (eds) *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years on* (2017) 107 & R Hall "Reconciling the past, present and future" in C Walker, A Bohlin, R Hall & T Kepe (eds) *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa* (2010) 17.

1068 Dugard (2019) 151.

Further, the right imposes a negative duty,[1069] discernible from phrases such as "no one may" and "no legislation may".[1070] There is equally a positive duty, enjoining the State to take reasonable legislative and other measures to guard against evictions to an extent that they may result in homelessness.[1071] The right also has both horizontal and vertical effect and/or application, with a landowner or lawful occupier being afforded the right to challenge both the State and private parties for the violation of the right.

Therefore, the Constitution demands that the vulnerable mine communities be protected against mining-induced displacements, whether carried out by private mining companies of public authorities. In the spirit of sections 7(2) and 8(1) of the Constitution, the State is enjoined to adopt legislation and take executive actions and decisions as reasonable measures to protect its citizens against arbitrary evictions and displacements. Considering that the obligations imposed by the Constitution *must* be fulfilled,[1072] the State must be compelled to act if they are reluctant to take the reasonable executive and legislative measures as enjoined.

5.3.2. The relevant legislative framework

In 2002, South Africa promulgated the Mineral and Petroleum Resources Development Act[1073] to regulate the mining industry and mineral resource exploitation through national and regional offices of the Department of Mineral Resources and Energy (DMRE).[1074] In 2004, when the MPRDA came into effect, it was hailed for being a turning point that heralded a new era for the governance of extractive sector in the country.[1075] It has changed how rights to minerals are acquired and exercised.[1076] True to its nature as a framework law, the MPRDA purports to make provision for equitable access to and sustainable development of the nation's mineral and

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1069 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC) para 34.

1070 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* 2009 (9) BCLR 847 (CC) para 148 and *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) at para 28.

1071 Section 26(2), Constitution.

1072 Section 2, Constitution.

1073 Mineral and Petroleum Resources Management Act 28 of 2002 (MPRDA).

1074 Apart from the MPRDA, there are other relevant sectoral legislation such as: the National Environmental Management Act 107 of 1998; National Water Act 36 of 1998; National Environmental Management: Air Quality Act 39 of 2004; and National Environmental Management: Waste Act 59 of 2008.

1075 AJ van der Walt *Constitutional Property Law* 3rd ed (2011) 396; M Hermanus et al "Impact of the South African Minerals and Petroleum Resources Development Act on levels of mining, land utility and people" (2015) 48(1) *LABOUR: Capital and Society* 12.

1076 Previously, these "rights vested in the owner of the land on or under which minerals were found. The owner of the land, or a party authorised to do so by the owner, could exploit the minerals, subject to the person exploiting the minerals possessing a mining authorisation in terms of the Minerals Act"; *Xstrata South Africa (Pty) Ltd & Others v SFF Association* [2012] 2 All SA 617 SCA para 1; *Minister of Mineral Resources v Sishen Iron Ore Co (Pty) Ltd* 2014 (2) SA 603 (CC) paras 10 & 11.

petroleum resources.[1077] It achieves this objective by forming a policy regime that would facilitate, among others, land and wealth redistribution for the benefit of all South Africans.[1078] Among its key inventions is the introduction of State custodianship[1079] of all minerals, as well as making mineral resources the common heritage of the people of South Africa,[1080] and the creation of conditions for meaningful participation of the previously disadvantaged persons in the sector.

The prospecting and mining rights are acquired through an application[1081] submitted at the office of the regional manager of DMRE in the prescribed manner and with a fee.[1082] Upon satisfying the formal requirements, the application may succeed.[1083] Upon the granting of the right,[1084] it must be registered with the Mineral and Petroleum Titles Registration Office[1085] within 60 days after it has become effective.[1086] Once a right has been registered with MPTRO, a limited real right,[1087] binding against third parties, is deemed to have been created[1088] in respect of the mineral and the land to which it relates.[1089] After the granting of a mineral right and before the commencement of operations on the land subject to the mineral right, the landowner or lawful occupier must be given a proper notice of the intention to enter the land.[1090]

1077 Long Title, MPRDA.

1078 *De Beers Consolidated Mines v Regional Manager, Mineral Regulation Free State Region: DME* 2008 ZAFSHC 40 (15 May 2008) para 6; FT Cawood "The Mineral and Petroleum Resources Development Act of 2002: A paradigm shift in mineral policy in South Africa" (2004) *The Journal of the South African Institute of Mining and Metallurgy* 54 & Hermanus et al (2015) 13.

1079 As a fundamental principle, section 3, MPRDA.

1080 H Mostert & A Pope (eds) *The Principles of the Law of Property in South Africa* (2010) 271 & E van der Schyff "Stewardship Doctrines of Public Trust: Has the Eagle of Public Trust Landed on South African Soil?" (2013) 130(2) *South African Law Journal* 369-389

1081 The notice pertaining this application must be communicated within 14 days after receipt of the application by the Regional Manager - section 10(1), and the decision is administrative in nature. Badenhorst (2017) 368.

1082 Sections 16(1) & 22(1), MPRDA.

1083 Sections 16(2) & 22(2), MPRDA.

1084 See the specific discussion around the delegation of powers by the Minister to other officials within the DMRE in PJ Badenhorst & H Mostert *Mineral and Petroleum Law of South Africa* (2004) & PJ Badenhorst "The nature of new order prospecting rights and mining rights: A can of worms?" (2017) 134 *The South African Law Journal* 365.

1085 PJ Badenhorst "Lapsed prospecting rights: The custodian giveth and the custodian taketh away? *Palala Resources v Minister of Mineral Resources & Energy*" (2016) 133 *The South African Law Journal* 38.

1086 Sections 19(2)(a) & 25(2)(a), MPRDA.

1087 This is a real right held by a non-owner in respect of the property owned by someone else, and is thus limited in that sense (*ius in re aliena*).

1088 Section 5(1), MPRDA; *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* 2016 (1) SA 306 (SCA) para 19, and Badenhorst (2017) 367.

1089 Section 5(1), MPRDA.

1090 Section, 5A(c), MPRDA.

The MPRDA also entitles the mineral right holder to enter the land to which the right relates with his or her workforce and machinery equipment, and construct any surface or do whatever for the purposes of exercising the mineral right.[1091] This entitlement is problematic, considering that mineral rights are often granted or acquired in relation to the land owned (or lawfully occupied) by someone else whom, for all intents and purposes, their permission to grant access would be inescapable. I shall revert to this point later, when dealing with section 54 on compensation.

For now, the critical point to note on the legal effect of mineral rights, though, is that they do not supersede or extinguish the rights of the landowner or any other lawful occupier, be it a community or an individual, of the land to which the right relates.[1092] Further, a prospective or mining right only terminates upon expiration of period for which it was granted,[1093] abandonment,[1094] cancellation by the Minister for specified reasons and by operation of law,[1095] the death of a holder of a right (prospector or minor), who is a natural person and there is no successor in title,[1096] and other grounds stipulated in the MPRDA.[1097]

Concerning meaningful engagement with landowners and/or lawful occupiers, the MPRDA, in peremptory terms,[1098] requires that interested and affected parties be consulted about any proposed mining developments on their land.[1099] While it calls for consultation, the MPRDA itself refrains from detailing what exactly 'consultation' entails and how it should be conducted. However, it attempts to rectify this omission in its supplementary guidelines, as will be shown later.[1100]

1091 Section 5(3)(a), MPRDA.

1092 In *Mfolozi Community Environmental Justice Organisation and Others v Minister of Minerals and Energy and Others* (82865/2018) [2022] ZAGPPHC 305 para 54.

1093 Section 56(a), MPRDA.

1094 Section 56(f), MPRDA.

1095 Section 47 & 56(e), MPRDA.

1096 Section 56(b), MPRDA.

1097 Section 56(c) & (d), MPRDA.

1098 Meaning it is binding. See *Normandien Farms (Pty) Limited v The South African Agency for Promotion of Petroleum Exploration and Exploitation S.O.C Limited* Case No. CCT 195/2019 para 2.1.

1099 Sections 10, 16(4)(b), 22(4)(b), MPRDA. See *Aquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd* 2014 ZAGPPHC 218 para 9; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC); L Gumbi "Prospecting and mining rights" (2012) December *Advocate* 47-50; PJ Badenhorst & NJJ Olivier "Host communities and competing applications for prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002" (2011) *De Jure* 126-148.

1100 Part 5.3.3.

The courts have also, on many occasions, interpreted and given content to what consultation should entail in this context and this, too, will be shown later.[1101] Within 14 days after receiving the prospecting or mining right application, the Regional Manager must in the prescribed manner publish a notice calling upon interested and affected persons to submit their comments on the application in question.[1102] The opportunity to comment on the application lasts for 30 days from the date of the notice that invited the comments.[1103] If any of the comments raise an objection, the Regional Manager is enjoined to refer such objection to the Regional Mining Development and Environmental Committee[1104] to consider such objection and advise the Minister thereon.[1105] What then follows is for the Minister to make determination on the application, and such determination would constitute an administrative decision.[1106]

Insofar as the appropriate redress is concerned, the MPRDA makes an elaborate provision on the compensation payable under certain circumstances to the landowner or lawful occupier by the mineral right holder.[1107] I now revert to the problematic mineral right holder's entitlement to 'enter'.[1108] Section 54(1) of the MPRDA refers to two terms: 'enter'[1109] and 'access'[1110] which are not to be construed as being synonymous.[1111] The right holder must notify the Regional Manager if they cannot commence or conduct operations as per the right due to the landowner or the lawful occupier refusing entry to the land,[1112] making unreasonable demands in turn of access,[1113] and being unavailable to receive application for and grant access to the land.[1114] Looking at this formulation, the correct interpretation of section 54(1), I argue, presupposes that the right holder must first obtain access from the landowner or lawful occupier before they can enter. Therefore, the right holder's entitlement of entry is not immediately

1101 Part 5.4.2.
1102 Section 10(1)(b), MPRDA.
1103 Section 10(1)(b), MPRDA.
1104 The RMDEC.
1105 Section 10(2), MPRDA.
1106 Badenhorst (2017) 368.
1107 Section 54, MPRDA.
1108 Section 5(3)(a), MPRDA.
1109 Section 54(1)(a), MPRDA.
1110 Section 54(1)(c), MPRDA.
1111 E van der Schyff "The right to be granted access over the property of others in order to enter prospecting or mining areas: Revisiting *Joubert v Maranda Mining Company (Pty) Ltd* 2009 4 All SA 127 (SCA)" (2019) 22 *PELJ* 4.
1112 Section 54(1)(a), MPRDA.
1113 Section 54(1)(b), MPRDA.
1114 Section 54(1)(c), MPRDA.

enjoyable or realisable as its framing and presentation in the Act suggest, but it depends on the landowner or lawful occupier's access requirement as a precursor. The two are interrelated.[1115]

Once the preliminaries i.e. entry and access issues have been sorted, and it has been established that the landowner or lawful occupier has suffered or would likely suffer loss or damage as a result of prospecting or mining operations, the Regional Manager must request the parties to endeavour to reach an agreement for the payment of a just compensation for such loss or damage.[1116] The landowner or lawful occupier is responsible for making known their loss or damages to the Regional Manager.[1117] Should the parties fail in their endeavour to reach an agreement on the payable compensation on their own, then a competent court may be approached, or an arbitration process utilised,[1118] to arrive at such determination.[1119] If the failure to reach an agreement results from the mineral right holder's fault, then the Regional Manager may prohibit the holder from commencing or continuing with the operations until the dispute has been resolved by court or arbitration.[1120]

Apart from the MPRDA, the other relevant legislation is the Interim Protection of Informal Land Rights Act,[1121] which governs the tenure security of people who occupy and use land under communal and/or customary land law. However, this piece of legislation was introduced as a "holding measure or safety net"[1122] for vulnerable land use and occupation right holders while a comprehensive law was to be developed.[1123] Despite having had to endure for only a year from the date of its coming into force, the IPILRA is still a temporary measure over two and half decades later, with its existence and application being subject to annual extensions by the Minister of Agriculture, Land Reform and Rural Development.[1124] The country is still without a comprehensive law and the communal land tenure rights of over 17 million South

[1115] See van der Schyff (2019) 9.
[1116] Section 54(3), MPRDA.
[1117] Section 54(7), MPRDA.
[1118] In terms of the Arbitration Act 42 of 1965.
[1119] Section 54(4), MPRDA.
[1120] Section 54(6), MPRDA.
[1121] The Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA).
[1122] The High-Level Review Panel *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 258, hereafter the *High-Level Panel Report* (2017).
[1123] The Act makes it clear in its Long Title that it is a temporary intervention. It provides that the Act purports "[t]o provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law …".
[1124] The last extension was in terms of GN R1635 *GG* 45687 of 20 December 2021 in terms of which it will now remain in operation until 31 December 2022.

Africans who live in the former homelands remain with minimal protection in the form of a 'safety net' extendable annually.[1125]

The courts made sufficient efforts to protect customary land rights of vulnerable customary communities whenever approached for that determination.[1126] However, the Parliament must still be called out for betraying the constitutional imperative to secure and protect the tenure of people in communal areas through legislative means.[1127] This betrayal is also lamented by the High-Level Review Panel, established by the President, that has recommended that, at the least, IPILRA be made a permanent legislation.[1128]

Key among the provisions of IPILRA is that no person entitled to certain informal right to and interest in land may be deprived of such rights and interests without first obtaining their consent.[1129] The formulation of this right presupposes two propositions. First, that consent is to be treated as a precondition to prospecting or mining operations. Secondly, that if there is to be any act of deprivation of the right to and interest in communal land, such deprivation must have been consented to by the right holder. Thus, the corollary of the second proposition is that a community that consents or agrees to dispose of its rights in land must have a full appreciation of its choice about their development path. This corollary validates the point made in chapter four earlier, that the community's consent, which must be free, informed and obtained prior to deprivation, is critical. Absent such consent, the traditional communities are at serious risk of losing not only their rights in land, but their very way of being.[1130] However, the consent provision in IPILRA is subject to certain qualifications, and may be overridden by the application of Expropriation Act,[1131] and/or by the accepted custom and usage that is endorsed by a majority of the community members present at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice and reasonable opportunity to participate.[1132]

Lastly, there are other statutes that find application in matter concerning mining-induced displacements. Key among those is the Prevention of Illegal Eviction from and Unlawful

[1125] *High-Level Panel Report* (2017) 258 & 260.
[1126] Parts 5.4.1 & 5.4.2.
[1127] Section 25(6) & (9), Constitution.
[1128] *High-Level Panel Report* (2017) 270.
[1129] Section 2(1), IPILRA.
[1130] See the discussion on FPIC concept in chapter four.
[1131] Expropriation Act 63 of 1975.
[1132] Section 2(4), IPILRA.

Occupation of Land Act,[1133] which purports to protect unlawful occupiers anywhere in the country from being evicted in a manner that is not just and procedurally compliant and, as per eviction jurisprudence, in unlikely to result into homelessness.[1134] The other laws include the Extension of Security of Tenure Act[1135] which aims to enhance the legal protection against the eviction of people who occupy non-formally proclaimed township areas with the consent of the owner; and the Labour Tenants Act which permits and/or enables the labour tenants to own or occupy the land in which they have worked and lived over the years.[1136]

In addition to the above explored legislative framework, mining-induced displacements is also comprehensively covered by the guidelines supplementing the MPRDA. The discussion turns to analyse these guidelines in the subsequent paragraphs.

5.3.3. The DMRE guidelines on mining-induced displacements

On 28 March 2022, the Minister of the DMRE assented to and gazetted the Mine Community Resettlement Guidelines, 2022.[1137] These guidelines are said to have been developed to guide the mineral right holders or applicants on consultation and compensation imperatives where the exercising of such prospecting or mineral right is likely to result in the resettlement of owners, lawful occupiers, informal land rights holders, mine and host communities.[1138] It should be stated upfront that reference to these guidelines in this study is drawn reluctantly for two main reason. First, it is not entirely clear as to which provision(s) of the MPRDA the Minister of DMRE relied on in developing these guidelines.[1139] Thus, the status of these guidelines is wandering. The only conceivable description of these guidelines, though, is if they can be categorised as an internal document or memorandum of the DMRE. That being the case, we are ascertained in *Duduzile Baleni and Others v Regional Manager and Others*[1140] that "… an internal document of the DMR can change at any time, and, in fact, … [an] internal documents cannot be used to interpret the Act."[1141]

1133 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

1134 G Mathiba "The constitutionality of the Covid-19 eviction moratorium on evictions in South Africa" in ZT Boggenpoel et al (eds) *Property and Pandemics: Property Law Responses to Covid-19* (2021) 208-225.

1135 Extension of Security of Tenure Act 62 of 1997 (ESTA).

1136 Labour Tenants (Land Reform) Act 3 of 1996 (LTA).

1137 GN R1939 *GG* 46125 of 30 March 2022.

1138 Resettlement Guidelines (2022) pg 7.

1139 The provision mandating the Minister to develop guidelines remains to be seen in the DMRE.

1140 *Duduzile Baleni and Others v Regional Manager: Eastern Cape and Others (CALS intervening)* Case No.: 96628/2015 (2015).

1141 *Baleni* (2015) para 52.

Secondly, these guidelines are not tantamount to regulations, and thus they do not constitute a binding legal instrument that can be enforced against the defaulting mineral right holders and applicants. Thus, whatever these guidelines envisage is not enforceable, despite their use of peremptory wording. Given the intrusive nature of mining (and its corollary displacements) on the constitutional rights[1142] of the affected mine communities, one would expect a process regulating that to be outlined in a binding legal instrument that is able to provide speedy and enforceable recourse to the affected communities. It is a serious threat to legal certainty to have substantive rights, obligations and processes on resettlement relegated and contained in the mere guidelines that do not have the same binding force as legislation or even regulations.[1143]

By inference, these guidelines recognise and attract the application of IPILRA in the granting of mineral rights by their reference to informal land rights, which are the subject of IPILRA.[1144] The guidelines provide for, among others, the specific procedures to be followed by a mineral right applicant or holder on resettlement,[1145] and the principles which should guide the determination of a fair compensation to the landowners and lawful occupiers.[1146] In what seems to be the context statement for the guidelines, the DMRE acknowledges that the mining industry, despite being the cornerstone of the country's economy,[1147] has several negative socio-economic and environmental impacts on the owners, lawful occupiers, holders of informal and communal land rights and mine communities.[1148] The DMRE acknowledges further that the mining developments often inflict trauma and great inconvenience on the affected communities through, for example, physical displacement, exhumation of the graves of their forebears and sometimes destruction of their properties.[1149]

The guidelines make reference to 'meaningful consultation'.[1150] This is defined as a process where an applicant or holder of a mineral right consult with the landowners, lawful occupiers, interested and affected parties, holders of informal and communal land rights, mine and host

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1142 Such as environmental rights (section 24), property rights (section 25), housing rights (section 26) socio-economic rights (section 27).

1143 If anything, guidelines are appropriate for granular details and not issues bearing this great significance.

1144 Resettlement Guidelines (2022) pgs 3-4.

1145 Resettlement Guidelines (2022) pg 4.

1146 Resettlement Guidelines (2022) pg 7.

1147 By contributing towards the country's Gross Domestic Product (GDP), creating employment opportunities and alleviating poverty and inequality with the society. Resettlement Guidelines (2022) pg 3.

1148 Resettlement Guidelines (2022) pgs 3-4.

1149 Resettlement Guidelines (2022) pgs 3-4.

1150 "Acronyms and Definitions", Resettlement Guidelines (2022) pg 5.

communities to achieve five objectives.[1151] The first objective is to afford the affected mine communities an opportunity to comment, be heard and access the detailed information about the proposed mining activities and the implications of resettlement on them.[1152] The second objective entails determining whether some sort of accommodation between the mineral right holder or applicant and affected mine communities can be achieved insofar as the interference with the latter's occupation and land use rights are concerned.[1153] The third objective is phrased loosely as aiming for "clearing up of misunderstandings about technical issues, resolving disputes and reconciling conflicting interests."[1154] The fourth imperative is to "encourage transparency and accountability in decision-making."[1155] The last objective gives effect to procedural fairness of administrative action as required by the PAJA.[1156] The guidelines provides more clarity on what consultation should entail than their founding legislation, namely the MPRDA.

Guideline four sets out the policy and legal framework that is applicable in issues of mining-induced resettlements and displacements. In this list of associated laws,[1157] the guidelines omit the IPILRA which is a primary legislation for the protection of informal rights to land. It is contended that this serious omission is indicative of the DMREs reluctance to acknowledge the IPILRA and its application in the process of awarding a mineral right, especially the consent requirement.[1158] The guidelines further provide for "fundamental principles of resettlement" that should always be observed by the mineral right applicants or holders.[1159] The first principle demands that the affected mine communities be consulted meaningfully by the mineral right holder or applicant.[1160] The second principle demands equality in the process of resettlement, that the vulnerable groups of the affected communities, such as women, children and people living with disabilities be given equal treatment.[1161] The protection of existing rights on land is

[1151] Moving forward, I will simply refer to these categories of people as "affected mine communities" to avoid repetition of these long list.

[1152] Point 1, Resettlement Guidelines.

[1153] Point 2, Resettlement Guidelines.

[1154] Point 3, Resettlement Guidelines.

[1155] Point 4, Resettlement Guidelines.

[1156] Point 5, Resettlement Guidelines.

[1157] MPRDA; NEMA; NEMWA; PIE Act; Local Government Municipal Systems Act 32 of 2000; Development Facilitation Act 67 of 1995 and the Expropriation Act 73 of 1975.

[1158] See case law discussion below (especially Xolobeni), where DMRE is firm that the MPRDA should always trump the IPILRA in effect, suggesting that the latter is of lesser significance.

[1159] Guideline 5, Resettlement Guidelines.

[1160] Guideline 5.1(a), Resettlement Guidelines.

[1161] Guideline 5.1(b), Resettlement Guidelines.

another principle, where the affected mine communities may not be unlawfully deprived of their use and enjoyment of their rights in land without fair and adequate compensation.[1162] The fourth principle requires that meetings and/or engagements be had at frequent intervals where the mine affected communities are provided with accurate detailed information to make informed decisions.[1163] There is also "avoid and minimise" principle, which demands that mining-induced resettlements and displacements be avoid to an extent possible and that where resettlement is unavoidable, the necessary assistance be availed by the mineral right holder or application to ensure smooth transition and restoration of livelihoods post-resettlement.[1164] The last principle demands professional service, that the resettlement process be carried out in as much professional manner as possible.[1165]

Guideline seven deals with meaningful consultation.[1166] The guideline[1167] imposes a duty on the mineral right holder or applicant to consult with the affected communities as required by the primary legislation in the form of MPRDA.[1168] In the process of consultation, the affected mine communities must be afforded an opportunity to make representations and comment on and be given adequate information about the proposed mining developments;[1169] establish whether the community can accommodate the mineral right holder somehow insofar as the interference with their land use rights is concerned;[1170] to clarify any misunderstandings[1171] and to ensure accountability and transparency.[1172] The guidelines further specify the stakeholders that must be meaningfully consulted.[1173] They demand that the mineral right holder or applicant identify and profile those relevant stakeholders that must be part of the consultation process.[1174] These stakeholders are all interested and affected parties including mine affected communities;[1175] a representative from the relevant non-governmental

[1162] Guideline 5.1(c), Resettlement Guidelines.
[1163] Guideline 5.1(d), Resettlement Guidelines.
[1164] Guideline 5.1(e), Resettlement Guidelines.
[1165] Guideline 5.1(f), Resettlement Guidelines.
[1166] Guideline 7, Resettlement Guidelines.
[1167] Guideline 7.1, Resettlement Guidelines.
[1168] Sections 10(1)(b), 16(4)(b), 22(4)(b) & 27(5)(b), MPRDA.
[1169] Guideline 7.1(1.1.1), Resettlement Guidelines.
[1170] Guideline 7.1(1.1.2), Resettlement Guidelines.
[1171] Guideline 7.1(1.1.3), Resettlement Guidelines.
[1172] Guideline 7.1(1.1.4), Resettlement Guidelines.
[1173] Guideline 7.2, Resettlement Guidelines.
[1174] Guideline 7.2, Resettlement Guidelines.
[1175] Guidelines 7.2(7.2.1-6), Resettlement Guidelines.

organisation;[1176] the traditional authority;[1177] the local municipality;[1178] community-based organisation[1179] as well as the relevant agencies, institutions and government departments.[1180] This list of stakeholders is not exhaustive and this is observable from the all-inclusive wording of the guidelines that "any other person whose socio-economic conditions may be directly affected by the proposed mining operations" may also be consulted meaningfully.[1181]

The guidelines also provide detailed clarity on how consultation should be conducted for it to be meaningful.[1182] The mineral right holder is expected to adopt and utilise appropriate tools and platforms when engaging with the above listed stakeholders and affected mine communities.[1183] There has to be regular meetings and workshops[1184] organised by the mineral right holder. These meetings have to be announced on time using various platforms accessible to the locality of the intended operations including local newspaper, television, radio stations and other media platforms.[1185] During these meetings and workshops, the affected parties and stakeholders with low levels of literacy must be accommodated and the used language must be one they can fully understand and express themselves with, so that they can participate actively.[1186] The mineral right holder may also utilise programmes such as surveys and roadshows[1187] to ensure that the interested and affected parties are well versed with the proposed operations. In the scheme of all these things, the mineral right holder has to finance the entire resettlement process[1188] and ensure that the affected mine communities are consulted meaningfully;[1189] are informed about their available options and rights pertaining resettlement by giving them adequate information;[1190] are provided with residential housing and agricultural land at the alternative location;[1191] are supported adequately in ensuring their livelihoods

[1176] Guideline 7.2(7.2.9), Resettlement Guidelines.
[1177] Guideline 7.2(7.2.7), Resettlement Guidelines.
[1178] Guideline 7.2(7.2.13), Resettlement Guidelines.
[1179] Guideline 7.2(7.2.10), Resettlement Guidelines.
[1180] Such as the Department of Agriculture Land Reform & Rural Development. See Guideline 7.2(7.2.11) & (7.2.14), Resettlement Guidelines.
[1181] Guideline 7.2(7.2.12), Resettlement Guidelines.
[1182] Guideline 7.3, Resettlement Guidelines.
[1183] Guideline 7.3, Resettlement.
[1184] Guideline 7.3(7.3.1), Resettlement Guidelines.
[1185] Guideline 7.3(7.3.3), Resettlement Guidelines.
[1186] Guideline 7.3(7.3.4), Resettlement Guidelines.
[1187] Guideline 7.3(7.3.2), Resettlement Guidelines.
[1188] Guideline 8.1(8.1.5), Resettlement Guidelines.
[1189] Guideline 8.1(8.1.1), Resettlement Guidelines.
[1190] Guideline 8.1(8.1.2), Resettlement Guidelines.
[1191] Guideline 8.1(8.1.6), Resettlement Guidelines.

restoration and improved living conditions;[1192] their comments and views are heard and considered;[1193] are fairly compensated for their losses of property and livelihoods.[1194] The guidelines do not provide for a standard formula for calculating compensation for mining-induced resettlements.[1195] Instead, they provide that the payable compensation "should be determined based on the local context and current full replacement values".[1196] The methods for valuation are to be clearly documented and disseminated to all the involved stakeholders following a more transparent and participatory approach.[1197]

According to Guideline 9, the mineral right holder or applicant is expected to ensure that the livelihoods of the affected mine communities will be improved or at least fully restored at their new settlement area.[1198] The improvements make take the form of construction of better housing units, schools, health and recreational centres and any other public facility.[1199] These issues must be ventilated and agreed upon in the resettlement agreement.[1200] This agreement is deemed to be of such a nature that no mining activity should commence until it has been reached.[1201] The agreement should be considered in line with the local context,[1202] paying regard to cultural considerations,[1203] maintaining existing social networks[1204] and reflecting "the way people live in their current location and meet their key requirements in terms of living space, functionality and access to resources …".[1205] It is further expected that this agreement have clear terms on security of tenure for the affected communities through registration of property rights in relation to the new settlement housing units.[1206]

Once all the particularities have been agreed upon in the resettlement agreement,[1207] then a resettlement plan must be developed by the mineral right holder or applicant since it would have been ascertained at that point that the mining operations will result in the physical

[1192] Guideline 8.1(8.1.7), Resettlement Guidelines.
[1193] Guideline 8.1(8.1.3), Resettlement Guidelines.
[1194] Guideline 8.1(8.1.4), Resettlement Guidelines.
[1195] Guideline 9.4(9.4.1), Resettlement Guidelines.
[1196] Guideline 9.4(9.4.1), Resettlement Guidelines.
[1197] Guideline 9.4(9.4.1), Resettlement Guidelines.
[1198] Guideline 9.1, Resettlement Guidelines.
[1199] Guideline 9.1, Resettlement Guidelines.
[1200] Guideline 9.2, Resettlement Guidelines.
[1201] Guideline 9.2, Resettlement Guidelines.
[1202] Guideline 9.3(c), Resettlement Guidelines.
[1203] Guideline 9.3(b), Resettlement Guidelines.
[1204] Guideline 9.3(d), Resettlement Guidelines.
[1205] Guideline 9.3(b), Resettlement Guidelines.
[1206] Guideline 9.3(j), Resettlement Guidelines.
[1207] Guideline 10(10.1), Resettlement Guidelines.

resettlement of people.[1208] The mineral right holder or applicant is again required to consult meaningfully with the affected communities in developing the resettlement plan.[1209] The plan must detail the support arrangements and assistance available to the communities during and after the process of resettlement.[1210] The resettlement packages may include cash compensation for the lost assets and/or properties;[1211] new housing structures at the resettlement area;[1212] alternative resettlement plots of land;[1213] counselling services;[1214] relocation allowance[1215] and livelihoods restoration programmes.[1216] The plan must also provide for the project description and its nature,[1217] the impact analysis of socio-economic conditions of the affected communities and mitigation measures adopted,[1218] outline the information about the manner and extent of meaningful consultation that was conducted prior to resettlement,[1219] the implementation schedule,[1220] the costs and budgetary arrangements and who is responsible for that,[1221] the confirmation of government institutions or bodies that must be involved[1222] and be approved by the involved parties i.e. the authorised representative of the community and the mineral right holder.[1223]

Upon the approval of the resettlement plan by the involved parties, the resettlement action plan must then be developed.[1224] The resettlement action plan, as the name suggests, is a document outlining the step-by-step actions to be taken in order to achieve and fulfil the goals set out in the resettlement agreement and plan.[1225] It must also outline the timeframes within which certain actions and responsibilities must be fulfilled.[1226] It is meant to be a more practical

[1208] Guideline 9.4(9.4.1), Resettlement Guidelines.
[1209] Guideline 10(10.2), Resettlement Guidelines.
[1210] Guideline 10(10.3), Resettlement Guidelines.
[1211] Guideline 10.4(10.4.1), Resettlement Guidelines.
[1212] Guideline 10.4(10.4.2), Resettlement Guidelines.
[1213] Guideline 10.4(10.4.3), Resettlement Guidelines.
[1214] Guideline 10.4(10.4.5), Resettlement Guidelines.
[1215] Guideline 10.4(10.4.6), Resettlement Guidelines.
[1216] Guideline 10.4(10.4.7), Resettlement Guidelines.
[1217] Guideline 10.5(10.5.1), Resettlement Guidelines.
[1218] Guideline 10.5(10.5.2), Resettlement Guidelines.
[1219] Guideline 10.5(10.5.3), Resettlement Guidelines.
[1220] Guideline 10.5(10.5.4), Resettlement Guidelines.
[1221] Guideline 10.5(10.5.5), Resettlement Guidelines.
[1222] Guideline 10.5(10.5.6), Resettlement Guidelines.
[1223] Guideline 10.5(10.5.7), Resettlement Guidelines.
[1224] Guideline 11, Resettlement Guidelines.
[1225] Guideline 11(11.1), Resettlement Guidelines.
[1226] Guideline 11(11.1), Resettlement Guidelines.

document on what must happened and how.[1227] The mine affected communities must also be consulted meaningfully in sketching out the action plan.[1228] Once completed, the resettlement action plan is to be submitted to the office of the relevant Regional Manager where the application for the mineral right has been submitted or otherwise issued.[1229]

In the event of a dispute arising at any point in developing either a resettlement agreement, plan or action plan, the guidelines make provision for several dispute resolution mechanisms that the parties may explore for their indifference to be determined.[1230] The mineral right holder or applicant may opt to resolve the issue(s) amicably through meaningful engagement and mutual agreement with the mine affected community.[1231] This is referred to as the party-to-party process.[1232] If the parties are unable to resolve the issues amicably, the other available mechanism at their disposal is provided in terms of section 54(3) of the MPRDA.[1233] Here the dispute should be referred to the relevant Regional Manager who must constitute a negotiation team comprising of all the affected and involved parties;[1234] develop the terms of reference for such a team pertaining to its role, scope of work, meeting dates and times;[1235] require from parties the relevant information ahead of the meetings;[1236] and chair those meetings.[1237] This is referred to as the Regional Manager-led process[1238] and if it also fails to resolve the dispute between the parties, the Regional Manager must then refer the dispute to the DG or Deputy DG or even to the Minister of DMRE is circumstances warrant ministerial intervention and determination.[1239] The other available mechanism if the Regional Manager-led process has failed is the referral of the dispute to the formal mediation, arbitration and conciliation process.[1240] The last mechanism that is equally the last resort, is for an aggrieved party to

[1227] Guideline 11(11.2), Resettlement Guidelines.
[1228] Guideline 11(11.3), Resettlement Guidelines.
[1229] Guideline 11(11.4), Resettlement Guidelines.
[1230] Guideline 13, Resettlement Guidelines.
[1231] For this to happen, the mineral right holder or applicant must establish a grievance management mechanism and formal procedures to be able to track and resolve lodged grievance mindful of the locally appropriate grievance mechanism (e.g., strictly through traditional leadership in some communities); update the community about the progress made in resolving their grievances and communicate the outcome timeously. Guideline 13.2, Resettlement Guidelines.
[1232] Guideline 13.2, Resettlement Guidelines.
[1233] Guideline 13.3, Resettlement Guidelines.
[1234] Guideline 13.3(a), Resettlement Guidelines.
[1235] Guideline 13.3(b), Resettlement Guidelines.
[1236] Guideline 13.3(c), Resettlement Guidelines.
[1237] Guideline 13.3(d), Resettlement Guidelines.
[1238] Guideline 13.3, Resettlement Guidelines.
[1239] Guideline 13.3(f), Resettlement Guidelines.
[1240] In terms of the Arbitration Act & Conciliation Act. Guideline 13.4, Resettlement Guidelines.

approach a competent court with a reasonable time to seek the determination of whatever the dispute entails.[1241] The costs of soliciting legal representation for the affected mine communities must be borne by the mineral right holder or applicant.[1242] The wording of these guidelines suggest that court process is not immediately available to an aggrieved party, but becomes only available after having exhausted the party-to-party, Regional Manager-led and arbitration, mediation and conciliation processes, as outlined in *Maledu*. This proposition might prove to be problematic and difficult to sustain in a long run.[1243]

The guidelines further establish a committee to monitor and facilitate the approved resettlement agreement, resettlement plan and resettlement action plan.[1244] This committee is known as the Resettlement Monitoring and Evaluation Committee (RMEC).[1245] The key functions of RMEC include developing and implementing the monitoring and evaluation plan as part of its oversight role[1246] and ensuring that the affected mine communities are meaningfully engaged and regularly updated about the progress made in implementing the resettlement plan.[1247] Once the resettlement project has been completed, the RMEC must then conduct completion audits[1248] and evaluate the extent of achievement against the objectives envisaged in the resettlement plan and the challenges (if any) arising from implementation.[1249] The evaluation must also reflect on the impacts of the resettlement project on the affected communities, both before and after fact.[1250]

The operations of RMEC are funded by the mineral right holder or applicant.[1251] This include the provision of resources this structure needs to function properly, such as laptops, cell phones, transportation, office space, meeting facilities and other necessities.[1252] While it can only be

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1241 Guideline 13.5, Resettlement Guidelines.

1242 Guideline 13.1, Resettlement Guidelines.

1243 My view is that this proposition limits the court's jurisdiction. Whether this limitation is justified is yet to be tested. However, I will argue (as part of my future research agenda) that this limitation, on constitutional grounds, might be unjustified as it limits the mineral right holder or applicant's access to courts. Their access to mining can be throttled by years of waiting in an endeavour to fulfil this suspensive condition.

1244 Guidelines 8.1(8.1.10), (8.1.11) & (8.1.12), Resettlement Guidelines.

1245 Guidelines 14.5, Resettlement Guidelines.

1246 Guideline 14.6 (14.6.1)(a) & (b), Resettlement Guidelines.

1247 Guideline 14.6 (14.6.1)(c), Resettlement Guidelines.

1248 Guideline 14.6 (14.6.1)(d), Resettlement Guidelines.

1249 Guideline 14.6 (14.6.1)(e), Resettlement Guidelines.

1250 Guideline 14.6 (14.6.1)(f), Resettlement Guidelines.

1251 Guideline 14.7 (14.7.1), Resettlement Guidelines.

1252 Guideline 14.7 (14.7.2), Resettlement Guidelines.

the mining companies[1253] to incur these costs,[1254] it is equally problematic that an oversight structure in the form of RMEC that is required to act against any integrity violations by the mining companies be financially dependent on the same companies to these extreme levels. It begs a question: can the RMEC bite the mining company's hand that feeds it?[1255] Circumstances would suggest that it may not always do, if at all. This was noted earlier in the historical account[1256] and it will be shown again later in case law analysis where some traditional leaders were reported to have received some kickbacks from the mining company to give consent on behalf of the community without having consulted with them.[1257] This arrangement tends to perpetuate an imbalanced power dynamics where the one party i.e. mining company unleashes its strong financial muscle over the vulnerable other i.e. mine affected community.

Insofar as its reporting obligations are concerned, the RMEC reports quarterly on the progress made on the implementation of the resettlement agreement to the DMRE through the mineral right holder or applicant.[1258] Then the DMRE, through the relevant Regional Manager, is expected to monitor and evaluate the implementation of the plan by the mineral right holder or applicant for the duration of the mineral right in question.[1259] The other notable point in the guidelines is that they acknowledge and recognise that the impacts of resettlement are disproportionately felt by women and other vulnerable groups and that resettlements be mindful of the imperative to achieve gender equality.[1260] However, the guidelines fail to identify the concrete manner and form in which the rights of the women and vulnerable groups are usually infringed in the resettlement process (e.g., the failure to recognise women's right of access to land by some traditional authorities) and to prohibit such mannerism. There is also no effort nor concrete intervention to address issues pertaining women marginalisation in land allocation including through mandatory representation of women, youth and vulnerable groups

1253 Used interchangeably with mineral right holder or applicant.

1254 If not them, then who?

1255 "Don't bite the hands that feeds you" is a line from a 1971 song by a Canadian folk group, Humphrey and the Dumptrucks, and it resonates well with the sentiment held by the candidate on this particular aspect i.e. of mining companies financing RMEC that is supposed to call them into order where they default.

1256 Part 5.2.2.2, with focus on the Bakgaga Bakopa community's experience of forced removals by the Berlin Missionaries and be sold out by their *Kgoshi*.

1257 Part 5.4.

1258 Guideline 14.8 (14.8.1), Resettlement Guidelines.

1259 Guideline 14.8 (14.8.2), Resettlement Guidelines.

1260 Guideline 5.1(b), Resettlement Guidelines.

in the forums provided for in the Guidelines. Thus, the guidelines are far from being pro gender equality as they purport to be.

Based on the above discussion of constitutional and legislative framework, the next section of the chapter ventures into the judicial treatment and pronouncements on cases of mining-induced displacements and evictions. This is for the purposes of determining if and how the courts have advanced the protection of vulnerable mine affected communities against giants mining companies in the country.

5.4. The courts and mining-induced displacements in South Africa

This part takes the discussion forward by investigating the extent to which the discussed framework is being complied with in practice. In undertaking this exercise, the section considers how the South African courts have adjudicated matters involving and around mining-induced displacements. Put differently, the section inquires into how judicial treatment of mining-induced displacements has been over the years. As noted in chapter two, mining-induced displacement phenomenon is a bigger universal problem that features various themes, and these themes have been discussed.[1261] It is in terms of these key themes that the following discussions are structured. The cases discussed under certain theme should imply that such theme was either a central or incidental issue in that case. But in all case discussions, a factual background information will be provided to contextualise the problem that arose in the case in question.

5.4.1. The standard and level of engagement with affected communities

In many occasions, the courts in South Africa have had the opportunity to adjudicate and pronounce the appropriate position on the level of engagement, with the affected and interested parties, that is required in the process of granting a mineral right. The level of engagement (in terms of IPILRA and MPRDA) with the affected parties in the process of granting mineral right remains a topical issue and the courts have arguably done enough to ascertain the position and create a consistent precedent on the matter. As noted in chapter three, South Africa has a rich jurisprudence on the meaningful engagement approach to cases of evictions as they relate to housing rights generally. However, this approach has proven to have found its way into the mining sector context, and it will be shown how the courts have done so in cases concerning the consultation and consent requirements in mining-induced displacements.

[1261] Part 2.5.

5.4.1.1. *Doe Run*: consultation as a mandatory requirement

In *Doe Run Exploration v Minister of Minerals and Energy*,[1262] the High Court professed the critical role that consultation plays prior to awarding prospecting right. The issue was whether the prospecting right applicant had failed to notify and consult the landowner or occupier about their application in terms of section 16(4) of the MPRDA.[1263] The first applicant, Doe Run, a registered South African mining company, applied for prospecting rights from the DMRE to explore several minerals including copper, lead and zinc in respect of 16 farms.[1264] The application was refused in September 2005.[1265] Three months later, Doe Run reapplied to prospect for the same minerals in respect of the same farms.[1266] In October 2006, the applicant was informed that their application to prospect has been granted in respect of nine farms, and not sixteen as applied for.[1267] Then Doe Run attempted to get reasons for this outcome from the DMRE, to no avail.[1268] It later became apparent that among the six farms that the DMRE denied Doe Run,[1269] some of those were approved in respect of the application submitted by the fourth respondent, Samber Trading.[1270] This implies that Doe Run and Samber Trading had both applied for prospecting right in respect of the same farms, named Glencard and Bushy Park,[1271] and obviously two separate rights cannot be granted in respect of one defined area.

Doe Run then resolved to review the decision by DMRE to grant a prospecting right in relation to Glencard and Bushy Park farms to Samber. The review ground was that, in terms of section 16(4) of MPRDA, Samber had failed to notify and consult with the second applicant, Hendrick Brits as the landowner and occupier of Glencard farm about its application for prospecting right.[1272] Doe Run advanced the same review ground in respect of Bushy Park farm, that Samber had failed to notify and consult with the fourth and fifth applicants as the owner and Hendrick Brits as the lawful occupier of the farm.[1273]

1262 *Doe Run Exploration SA (Pty) Ltd and Others v Minister of Minerals and Energy and Others* (499/07) [2008] ZANCHC 3.
1263 *Doe Run* (2008) para 9.
1264 *Doe Run* (2008) para 8, 'background facts'.
1265 *Doe Run* (2008) para 8.
1266 *Doe Run* (2008) para 8.
1267 *Doe Run* (2008) para 8.
1268 *Doe Run* (2008) para 8.
1269 Since it granted only 9 out 16.
1270 *Doe Run* (2008) para 9.
1271 *Doe Run* (2008) para 10.
1272 *Doe Run* (2008) para 13.
1273 *Doe Run* (2008) para 13.

Section 16(4) of the MPRDA enjoins the Regional Manager (RM), a second respondent, to notify the successful applicant to submit an environmental management plan and consult with the landowner or any other interested or affected party upon accepting the application for prospecting right. The court accepted that Doe Run, having submitted an application in respect of Glencard and Bushy Park farms, was an affected party in terms of section 16(4) and that it therefore had to be notified and consulted by Samber.[1274] The court noted that such notice and consultation by Samber was strictly imperative and inescapable[1275] since the notification and consultation seeks to protect the land occupiers' rights.[1276] While respondents tried to argue that consultation requirement was fulfilled, the court was not persuaded and it described this as "a bald statement" since Samber failed to furnish sufficient evidence of consultation before it.[1277] The court then found that Samber failed to comply with consultation requirements outlined in the MPRDA.[1278] The court upbraided the DMRE for having overlooked other statutory procedures in issuing mineral rights and held that it "hope[s] that this Court has seen the last of this disturbing trend in the present matter".[1279]

5.4.1.2. *Bengwenyama*: consent and consultation

In *Bengwenyama Minerals v Genorah Resources*,[1280] the Constitutional Court provided much-needed clarity on several issues ranging from the existence and effect of the internal appeal mechanism within the MPRDA, the nature and content of consultation requirement, the procedural obligations of the DMRE on the community's preferent right and the awarding of prospecting rights. The applicants were Bengwenyama Minerals, an entity that exists for investment purposes to the benefit of the Bengwenyama-ye-Maswazi community, also cited as the applicant.[1281] The first respondent was Genorah Resources and others were DMRE officials, the Minister, the RM, the DG and Deputy DG.[1282] The subject of this suit was two properties, Eerstegeluk and Nooitverwacht farms in Sekhukhuneland district in Limpopo.[1283]

1274 *Doe Run* (2008) para 9.

1275 The court held that "the use of the word '*must*' is significant". *Doe Run* (2008) para 9.

1276 *Doe Run* (2008) para 9 & 39.

1277 The court held that "[t]his is clearly inadequate as regards proof of compliance with the provisions of s16(4) read with s16(5) of the Act [PAJA]". *Doe Run* (2008) para 10.

1278 *Doe Run* (2008) para 11.

1279 *Doe Run* (2008) para 50.

1280 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (CCT 39/10) [2010] ZACC 26; 2011 (3) BCLR 229 (CC).

1281 *Bengwenyama* (2011) para 6.

1282 *Bengwenyama* (2011) para 6.

1283 *Bengwenyama* (2011) para 7.

The court had to determine few issues.[1284] For this study, only three are pertinent, namely: whether the MPRDA provides for an internal appeal; whether there was proper consultation by Genorah in terms of the MPRDA and whether DMRE had an obligation to afford applicants a hearing before awarding a prospecting right.[1285] The facts leading up to this judgment can be summarised as follows.

For centuries, the Bengwenyama community had enjoyed an uninterrupted use and occupation of the Nooitverwacht farm.[1286] As for Eerstegeluk farm, the community suffered its dispossession in 1945,[1287] but a land claim for its formal restoration has since been successfully lodged.[1288] Thus, it was acceptable by both parties that the community was the owner of the two farms.[1289] In 2004, the community communicated its intention to acquire prospecting rights in respect of its two farms for investment to the DMRE through a letter.[1290] The community was also objecting against the granting of prospecting rights over the farms where they will not be meaningfully accommodated in the projects.[1291] However, the DMRE never entertained the community's interest and no prospecting right was secured by the community.[1292]

In February 2006, the interaction between Genorah and the community began when a Genorah representative visited Kgoshi Nkosi[1293] to engage with him about Genorah's prospecting applications in respect of the two farms.[1294] The community had already communicated with the DMRE about prospecting applications on its two farms fourteen months prior to this meeting,[1295] except to mention that a Genorah representative had left a prescribed consultation form.[1296] However, none of the community members signed this perfunctory form.[1297] In March

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1284 PJ Badenhorst & NJJ Olivier "Host communities and competing applications for prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002" (2011) 44(1) *De Jure* 126-148; PJ Badenhorst, NJJ Olivier & CC Williams "The final judgment" (2012) *TSAR* 106-129; PJ Badenhorst, NJJ Olivier & C Williams "The Final Judgment" (2012) *TSAR* 106-129; T Humby "The Bengwenyama Trilogy: Constitutional rights and the fight for prospecting on community land" (2012) 15 (4) *PELJ* 166-231.

1285 *Bengwenyama* (2011) para 26.

1286 *Bengwenyama* (2011) para 7.

1287 *Bengwenyama* (2011) para 7.

1288 *Bengwenyama* (2011) para 7.

1289 As per section 1, MPRDA. *Bengwenyama* (2011) para 7.

1290 Through two letters dated 2 December 2004 & 19 January 2005 respectively. *Bengwenyama* (2011) para 8.

1291 *Bengwenyama* (2011) para 8.

1292 *Bengwenyama* (2011) para 9.

1293 *Kgoshi* means a chief and/or traditional leader.

1294 *Bengwenyama* (2011) para 9.

1295 *Bengwenyama* (2011) para 9.

1296 *Bengwenyama* (2011) para 9.

1297 *Bengwenyama* (2011) para 9.

2006, Kgoshi Nkosi sent a reply letter to Genorah indicating that he would have signed the form but he could not do so because Genorah was not yet known well by the community or the chief himself, and further that the community had applied for prospecting rights over the same farms.[1298] The Kgoshi and community never heard from Genorah following this letter and no further attempt were made to engage and consult with the community.[1299]

Unknown to the Kgoshi and his community, Genorah had already submitted its application for prospecting right in respect of Nooitverwacht five days before its meeting and communication with the Kgoshi.[1300] As for Eerstegeluk, consultation with the community or the Kgoshi did not take place at all.[1301] On 17 February 2006, Genorah augmented its application information by indicating that they had introduced themselves to the Kgoshi and they were yet to receive a response from him on whether the community objects against the application as it related to Nooitverwacht or not.[1302] On 20 February 2006, the DMRE informed Genorah that its application will be processed further provided they consult with the landowners, lawful occupiers, other interested and affected persons,[1303] and thereafter report the outcome of such consultation to the RM.[1304] Genorah never consulted as instructed by DMRE.[1305]

On 10 May 2006, the community pursued its own application for prospecting rights on its farms through Bengwenyama Minerals by a letter to the DMRE.[1306] The application was unsuccessful due to technical deficiencies relating to the production of a title deed and for the fact that a prospecting right in the land had already been granted to someone else.[1307] However, the application was later accepted by the DMRE as being compliant after Bengwenyama Minerals resubmitted.[1308] In reply, the DMRE informed Bengwenyama Minerals that the application had to comply with provisions on consultation with affected parties and the filing of environmental authorisations.[1309] Bengwenyama Minerals was also informed that other entities, including Genorah, had already applied for prospecting rights on the farms.[1310] The communication

1298 *Bengwenyama* (2011) para 10.
1299 *Bengwenyama* (2011) para 10.
1300 *Bengwenyama* (2011) para 12.
1301 *Bengwenyama* (2011) para 11.
1302 *Bengwenyama* (2011) para 12.
1303 *Bengwenyama* (2011) para 13.
1304 *Bengwenyama* (2011) para 13.
1305 *Bengwenyama* (2011) para 13.
1306 *Bengwenyama* (2011) para 14.
1307 *Bengwenyama* (2011) para 14.
1308 On 14 July 2006.
1309 *Bengwenyama* (2011) para 15.
1310 *Bengwenyama* (2011) para 15.

exchange between the community, Bengwenyama and DMRE continued until November 2006.[1311] For whatever reasons, the DMRE failed to inform the community and Bengwenyama Minerals that during these continuing exchanges, the prospecting rights on the two farms had already been awarded to Genorah on 8 September 2006.[1312] The community was never informed of this, that the prospecting rights were granted over the community's farms without any notice to them.[1313]

Only in December 2006 the DMRE notified Bengwenyama Minerals and the community that its prospecting right applications on the farms have been unsuccessful for the right has been awarded to Genorah that applied earlier.[1314] Aggrieved by this, the community and Bengwenyama Minerals requested DMRE to furnish them with a record of Genorah's application,[1315] which was furnished on January 2007. Then the community lodged an appeal against the granting of the rights to Genorah on February 2007,[1316] objecting that Genorah's application failed to comply with certain provisions[1317] of MPRDA on consultations with owners and lawful occupiers[1318] and the disregard for the community's preferent claim to the right.[1319] On March 2007, before the DMRE could respond to the community's objection, the applicants had successfully launched interdict proceedings to prevent Genorah from executing its prospecting rights on the farms pending the final determination of its objection.[1320] The review application was then brought on August 2007 in the High Court by the applicants,[1321] seeking to set aside the decision of the DMRE of awarding prospecting rights to Genorah.[1322] The court delivered its judgment in November 2008 dismissing the review application reasoning that no internal appeal was available and that the review was thus brought out of

1311 *Bengwenyama* (2011) paras 16 & 17.
1312 *Bengwenyama* (2011) para 18.
1313 *Bengwenyama* (2011) para 18.
1314 *Bengwenyama* (2011) para 18.
1315 *Bengwenyama* (2011) para 20.
1316 *Bengwenyama* (2011) para 20.
1317 Including section 392)(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).
1318 Sections 16(4) & 17(1)(a), MPRDA.
1319 Section 104, MPRDA. *Bengwenyama* (2011) para 20.
1320 *Bengwenyama* (2011) paras 21 & 23.
1321 *Bengwenyama* (2011) paras 22 & 23.
1322 *Bengwenyama* (2011) para 23.

time[1323] with no review grounds.[1324] The matter proceeded to the Supreme Court of Appeal, where it was also dismissed.[1325]

The applicants then approached the Constitutional Court seeking to set aside the DMRE's decision.[1326] The matter involved the dispute between an owner or lawful occupier of land and the entity which has been awarded a rights to prospect over that land. The former was never consulted nor notified in the process leading to the awarding of a right to the latter. The owner or lawful occupier was not just an ordinary owner or occupier, but a customary community that was previously deprived of formal title to their land by the apartheid administration. Further, it is a community that qualifies to enjoy a preferent claim or right on their land.

The Constitutional Court ruled in favour of the applicants. This judgment have set a key precedent on issues pertaining consultation with landowners, occupiers and preferent right for communities.[1327] The court held that a more rigorous good faith standard is applicable in consultations for the purposes of granting a mineral right. The court affirmed that the MPRDA imposes notice and consultation requirements at different stages of mineral right acquisition of any nature, and that this is all availed to signify a serious concern for the rights and interests of owners and lawful occupiers of land in the process of granting those rights.[1328] The court also indicated that the purpose of the notification and consultation ought to be related to the impact that the granting and executing of such a right will normally bear on the owner or lawful occupier.[1329] The court framed and grounded its view on the nature of prospecting right as representing "a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen".[1330]

It has to be for this reason that the court accordingly held that the required consultation in the MPRDA seeks to serve at least two interrelated purposes. First, to establish if some accommodation is possible between the applicant of prospecting right and the owner or lawful occupier of land insofar as the invasion or interreference with the latter's rights on land is

[1323] This was supposed to have been brought within 180 days of learning in December 2006 that prospecting rights had been granted to Genorah.
[1324] *Bengwenyama* (2011) para 23.
[1325] *Bengwenyama* (2011) para 24.
[1326] *Bengwenyama* (2011) para 25.
[1327] I shall limit the focus to only these two grounds of review.
[1328] *Bengwenyama* (2011) para 63.
[1329] *Bengwenyama* (2011) para 63.
[1330] *Bengwenyama* (2011) para 63.

concerned.[1331] The court noted that while the MPRDA does not intend to impose agreement on these issues on parties, that should not be understood to imply that consultation is just another tick-box exercise that does not require engaging meaningfully in good faith and spirit to reach accommodation.[1332] Where agreement is not reached, though, a need for negotiation around the payment of compensation by the mineral right holder to the landowner or occupier is immediately triggered.[1333]

The second purpose of consultation entails facilitating access to information, where the landowner or lawful occupier must be furnished with the necessary information outlining everything that is to be done during the prospecting operations.[1334] Being in possession of the relevant information, the landowner or occupier is then enabled to make an informed decision on the mater.[1335] This emphasises the point made in chapter four, that access to information about the operations is critical for it is only when the information is available that the owner or occupier is better placed to participate actively in the process.[1336] The court concluded that Genorah failed to meet these consultation imperatives.[1337]

The court further held that Genorah had statutory obligation in respect of four imperatives.[1338] First, that it had to inform the community in writing that its application for prospecting rights over their land has been accepted for further consideration by the DMRE.[1339] Secondly, it had to inform the community about the nature of prospecting operations and what they entail on the land for the community to assess what impact the prospecting operations would mean for their use of the land.[1340] Thirdly, that it had to consult with the community to reach an agreement to the satisfaction of both parties regarding the impact of the proposed prospecting operations on the land.[1341] Lastly, that it had to submit to the RM the outcome of the consultation process within 30 days after receiving the notification to consult.[1342]

1331 *Bengwenyama* (2011) para 65.
1332 *Bengwenyama* (2011) para 65.
1333 *Bengwenyama* (2011) para 65.
1334 *Bengwenyama* (2011) para 66.
1335 For example, on whether to object to the application or to subject that decision to the appeal or review process before a competent forum.
1336 *Bengwenyama* (2011) para 67.
1337 *Bengwenyama* (2011) para 68.
1338 *Bengwenyama* (2011) para 67.
1339 *Bengwenyama* (2011) para 67.
1340 *Bengwenyama* (2011) para 67.
1341 *Bengwenyama* (2011) para 67.
1342 *Bengwenyama* (2011) para 67.

On the preferent right of the community, the court emphasised the fact that the DMRE has been aware of the community's interests and intention to acquire prospecting rights on its own farms, and that the same was communicated on many occasions.[1343] The court's view was that the DMRE ought to have been aware that it was dealing with a 'community' based on the nature and content of the exchanges that took place between early 2006 and even before that.[1344] The court found that there is a special category of rights spared for these 'communities' in the MPRDA which take the form of a preferent right to prospect on their own land.[1345] The nature of a preferent right is such that it cannot be awarded where a prospecting right over the communal land has already been granted to another entity.[1346] The court further held that the DMRE had other obligations not only in terms of MPRDA, but PAJA as well, to inform the community and Bengwenyama Minerals of Genorah's application and the implications it had on theirs.[1347] This, the DMRE failed to do.[1348] In principle, Genorah's application had a legal effect of disentitling a community of its statutory entitlement to apply for a preferent prospecting right.[1349]

5.4.1.3. *Maledu*: consent and consultation

In *Maledu v Itereleng Bakgatla Mineral Resources*,[1350] the applicants were members of Lesetlheng community whom claimed to be the rightful owners, occupiers[1351] and holders of informal land rights[1352] in respect of the Wigelspruit farm in Rustenburg district in the North West.[1353] There were two respondents, namely the Itereleng Bakgatla Mineral Resources and the Pilanesberg Platinum Mines.[1354] The respondents had mineral rights[1355] over the platinum in the farm.[1356] The applicants approached the Constitutional Court with an application for

[1343] *Bengwenyama* (2011) para 74.
[1344] *Bengwenyama* (2011) para 74.
[1345] *Bengwenyama* (2011) para 74.
[1346] *Bengwenyama* (2011) para 74.
[1347] *Bengwenyama* (2011) para 74.
[1348] *Bengwenyama* (2011) para 74.
[1349] In terms of section 104, MPRDA.
[1350] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* (CCT265/17) [2018] ZACC 41; 2019 (1) BCLR 53 (CC).
[1351] *Maledu* (2018) para 10.
[1352] Section 2(1), IPILRA.
[1353] *Maledu* (2018) paras 3 & 6.
[1354] The second respondent was contracted by the first respondent in terms of section 101, MPRDA. *Maledu* (2018) para 11.
[1355] In terms of section 23, MPRDA.
[1356] *Maledu* (2018) para 11.

leave to overturn a judgment of the High Court[1357] which ordered an eviction against the community from the farm and granted an interdict to the respondents, restraining the applicants from entering the farm, grazing their livestock or erecting any structures on the farm.[1358]

The applicants argued that their forebears, who lived in Lesetlheng, had bought the farm in 1919.[1359] However, due to the past racially discriminatory laws on landholding, the forebears were unable to get the farm transferred and registered on their names as joint owners.[1360] For that, the farm was then transferred to the Minister of Rural Development and Land Reform who holds the farm in trust for the Bakgatla-ba-Kgafela community,[1361] and not Lesetlheng because it was not recognised as an autonomous entity.[1362] This was never an issue.[1363] The applicants had erected building structures on the farm, for their own occupation and those of their labourers.[1364] Crop and stock farming was their source of livelihood.[1365] In 2004, the first respondent was awarded a prospecting right and later a mining right over the farm in 2008.[1366] In 2014, the respondents commenced with the preparations for the full-scale mining operations on the farm and[1367] the operations had already started to interfere with the peaceful and undisturbed occupation and enjoyment of the farm by the community.[1368]

In response to this intolerable situation, the applicants obtained a spoliation order[1369] against the respondents.[1370] Shortly after this success, the respondents approached the High Court seeking an eviction and restraint order against the applicants,[1371] the two orders that are subject

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1357 Held in Mahikeng, delivered on 16 February 2017.

1358 *Maledu* (2018) para 3.

1359 *Maledu* (2018) para 12.

1360 *Maledu* (2018) para 12.

1361 *Maledu* (2018) para 12.

1362 *Maledu* (2018) para 12.

1363 Because there was a common understanding that only "members of the Lesetlheng Community who had contributed to the purchase price had a legal interest in the farm and not all of the members of the Bakgatla-Ba-Kgafela Community". *Maledu* (2018) para 12.

1364 *Maledu* (2018) para 13.

1365 *Maledu* (2018) para 14.

1366 *Maledu* (2018) para 14.

1367 *Maledu* (2018) para 14.

1368 *Maledu* (2018) para 14.

1369 This is a remedy at the disposal of the owner to restore lost possession of a movable, immovable, corporeal or incorporeal property, in instances where possession has been unlawfully deprived. A spoliation application is often brought on an urgent basis where the owner would need to aver, on a preponderance of probabilities, that a) they were in peaceful and undisturbed possession of the property; and b) the respondent unlawfully deprived them of possession. *Blendrite (Pty) Ltd and Another v Moonisami and Another* (227/2020) 2021 (5) SA 61 (SCA).

1370 *Maledu* (2018) para 14.

1371 *Maledu* (2018) para 15.

to the appeal in this case.[1372] The respondents were adamant that their operations should proceed since they had fulfilled the requirement to consult with affected and interested parties at the time when they were applying for their mineral right over the farm.[1373]

The applicants' case was simply that they are the rightful owners of the farm and were neither consulted as such in terms of the MPRDA nor consented to being deprived of their farm in terms of IPILRA.[1374] As such, their rights in the farm were being attacked and invalidly extinguished by the respondents.[1375] The applicants also argued that the mining right of the respondents was invalid because they did not comply with the zoning laws of the local authority and they failed to meet the consultation and consent requirements in terms of MPRDA and IPILRA.[1376] The High Court rejected all these arguments, reasoning that the applicants are not the owners of the farm and thus the respondent had no obligation to consult them, and that a challenge to the respondents' mining right, if at all, should be brought as a review application.[1377]

The Constitutional Court ruled in favour of the applicants and overturned the eviction and restraint order of the High Court.[1378] On the issue of who the rightful owner of the farm was, the Constitutional Court was of the view that it would have been premature for it to make a definitive finding on the issue because the same determination was pending before another forum in terms of the Land Titles Adjustment Act.[1379] This implies that the issue of ownership of the farm should wait for finality on the claim by that forum. On whether the respondents were duty bound to exhaust section 54(1) internal process before approaching the High Court, the Constitutional Court ruled that they indeed were duty bound.[1380] The court ruled further that section 54(1) is invocable when occupation is lawful and the court was convinced that the occupation of the applicants was lawful on the basis of their informal customary land rights on

1372 *Maledu* (2018) para 3.
1373 *Maledu* (2018) para 15.
1374 *Maledu* (2018) para 16.
1375 *Maledu* (2018) para 16.
1376 *Maledu* (2018) para 16.
1377 *Maledu* (2018) para 17.
1378 *Maledu* (2018) para 111.
1379 Land Titles Adjustment Act 111 of 1993.
1380 *Maledu* (2018) para 91.

the farm.[1381] In strong terms, the court held that "[t]he existence of a mineral right does not itself extinguish the rights of a landowner or any other occupier of the land in question."[1382]

The court also found that the granting of a mineral right constituted a deprivation of informal rights to land in terms of IPILRA.[1383] For this reason, the consent requirement was triggered.[1384] The court also shared light on how to interpret IPILRA and MPRDA in cases of a conflict, and it held that "the MPRDA must be read, insofar as possible, in consonance with IPILRA … There is no conflict between these two statutes; each statute must be read in a manner that permits each to serve their underlying purpose."[1385] In supporting this point, the court followed the approach adopted in *Maccsand*,[1386] where the MPRDA was read in the manner that did not subordinate other applicable statutory provisions.[1387] The essence of this interpretive approach is mainly aimed at protecting the informal land rights of a customary community through their right to provide (or refuse) their free, prior informed consent.[1388] In this way, the judgment presupposes that the requirements imposed by both the MPRDA and IPILRA had to be fulfilled before the respondents could claim the right to can evict the Lesetlheng people from their supposed farm. The judgment further presupposes that the consent requirement, as per the IPILRA, still had to be obtained over and above the consultation requirement as per the MPRDA.[1389]

5.4.1.4. *Baleni*: consultation coupled with prior informed consent

In *Baleni v Minister of Mineral Resources*,[1390] meaningful engagement approach was endorsed. The High Court had to determine whether it is prior consent of the customary community, in terms of IPILRA,[1391] or a mere consultation with the community, in terms of MPRDA,[1392] that is required before the granting of a mining right. The court had to make a ruling on "who gets to decide whether mining activities can take place on [an] area - the community … or the

1381 *Maledu* (2018) para 97.
1382 *Maledu* (2018) para 103.
1383 *Maledu* (2018) para 102.
1384 Section 2(1), IPILRA.
1385 *Maledu* (2018) para 106.
1386 *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC).
1387 *Maledu* (2018) para 106.
1388 *Maledu* (2018) para 105.
1389 *Maledu* (2018) para 108.
1390 *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829, 2019 (2) SA 453 (GP).
1391 Section 2(1), IPILRA.
1392 Sections 10, 16(4)(b), 22(4)(b), MPRDA.

[mining company?]".[1393] The court also had to consider and rule on the interaction between the IPILRA and MPRDA, as to which trumps over the other, if at all. The applicants held informal rights in terms of IPILRA, in the land to which the mining right related and that the applicants have been occupying this land in line with their law and customs.[1394] Thus, their consent in terms of section 2(1) of IPILRA was triggered.[1395] The applicants were members of the Xolobeni community in Umgungundlovu area on the Wild Coast of Eastern Cape and were represented by Duduzile Baleni in her capacity as the headwoman of the Umgungundlovu area. The community owned, occupied and used this land over the centuries and it is strongly attached to it.[1396] Central to the life of this community is its customary law that is passed on from one generation to the other, in terms of which land applications by non-members of the community (including mining companies) is subject to robust assessment process to protect the interests of the community.[1397] Based on this setup, the community objected to mining activities on its ancestral land for over ten years since 2008 when a mineral right for titanium ores and other heavy minerals was awarded to the respondent mining company.[1398]

The main argument of the applicants was that not only were they not consulted, but also that their prior consent was not obtained before the awarding of the mining right and, on that basis, no mining activity could commence on their land. Their view is that their consent should have been treated as a precondition for granting a mineral right over their land.[1399] The applicants attempted to resolve the impasse by lodging several internal appeals with the DMRE.[1400] These attempts were all in vain.[1401] In their last internal appeal, the applicants lamented that the mining company failed to obtain the environmental and labour authorisations.[1402] The absence of these authorisations supported the fact that the mining company did not consult in the manner prescribed in the MPRDA since such information is gathered through consultations.[1403] The applicants further argued that the DMRE acted unlawfully in granting a mining right to

1393 *Baleni* (2018) para 24.
1394 *Baleni* (2018) para 3.
1395 *Baleni* (2018) para 61.
1396 *Baleni* (2018) paras 8 & 9.
1397 *Baleni* (2018) paras 9 & 10.
1398 *Baleni* (2018) para 11.
1399 *Baleni* (2018) para 28.
1400 Section 96, MPRDA.
1401 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 *PELJ* 7.
1402 Tlale (2020) 7.
1403 Tlale (2020) 8.

the respondent company without having complied with the consent requirement in terms of the IPILRA.[1404]

In contrast, the mining company advanced two main contentions. First, it argued that the applicants did not have the right to consent to the granting of a mining right.[1405] This argument was supported by the DMRE. The company was of the view that the only statutory obligation they had was merely to consult with the community in terms of MPRDA, the obligation they claimed to have fulfilled having consulted only the local traditional leader and a few others around him.[1406] As such, according to the company, it had fulfilled consultation requirement necessary for the awarding of a mining right.[1407] The second contention was that the MPRDA should trump over the IPILRA in application and as such, in terms of MPRDA, no owner or any other person can have a right to refuse consent to mining.[1408]

The court ruled overwhelmingly in favour of the applicants with all the declaratory orders being granted as sought. It noted with caution that not only Xolobeni, but majority other traditional communities across South Africa continue to be at loggerheads with mining companies and the DMRE.[1409] It was important for the court to affirm three specific points, namely that: First, Xolobeni was a 'community' as defined by IPILRA.[1410] Secondly, being a community, it was the lawful landowner or occupier with the rights and interests protectable under IPILRA against; thirdly, the imminent deprivation that was to result from the activities of the respondent company which constituted deprivation as defined under IPILRA.[1411] The court found that indeed the DMRE lacked the authority to award the mining right to the company without having fulfilled the relevant provisions of IPILRA, with more emphasis on the prior consent provision.[1412] The court confirmed that in terms of IPILRA, the DMRE had an obligation to obtain full and informed consent from the community before it could grant a mining right to the respondent company. Thus, it is the community that gets to decide whether mining activities can take place on an area,[1413] and not the mining company, let alone the DMRE.

1404 *Baleni* (2018) para 28.
1405 *Baleni* (2018) para 26.
1406 Tlale (2020) 8.
1407 *Baleni* (2018) para 26.
1408 *Baleni* (2018) para 26.
1409 *Baleni* (2018) para 50 & 51; *Meepo* (2008) para 13.
1410 Section 1, IPILRA.
1411 *Baleni* (2018) para 59.
1412 *Baleni* (2018) para 84, order 1.
1413 "[T]he applicants … [have] the right to decide what happens with their land". *Baleni* (2018) para 79.

On the other dispute of how IPILRA and MPRDA should interact, or which one trumps in effect, the court found that none trumps over the other and, if anything, "[t]he MPRDA and IPILRA must be read together".[1414] The logic behind this reasoning implies that both statutes are applicable despite serving different purposes. Therefore, both of them must find expression and have an effect, with the effect of MPRDA being merely consultation and the effect of the IPILRA being consent which goes little deeper in depth, implication and effect than consultation. In differentiating these two effects or levels of engagement, the held that "[consultation] contemplates an agreement whilst [consent] envisages a process of consensus seeking that may not necessarily result in an agreement".[1415] Thus, parties may fail to agree insofar as obtaining consent is concerned and that should be the end of inquiry, unless such time that consent holders change their mind for whatever reason.

The granting of a mineral right constitutes a 'deprivation' in the context of both IPILRA[1416] and the Constitution.[1417] The level or standard of engagement with the affected and interested parties in the process of granting mineral right is also ascertained to be that of consent in terms of IPILRA and not merely consultation in terms of MPRDA. The DMRE must have also learnt a lesson or two in terms of how it should exercise its authority to award mineral rights. Otherwise, the courts will never cease to hold it accountable, whenever approached to do so, for its decisions to award mineral rights without paying due regard to the prescribed legislative procedures, be it in the MPRDA, IPILRA or elsewhere. In 2019 at the Mining Indaba held in Cape Town, the Minister of DMRE is reported to have indicated an intention to appeal this judgment.[1418] On the grounds of such an anticipated appeal, the Minister hinted two issues: that the judgment usurped the authority of the DMRE to award mineral rights and gave it to communities; and that the status of the MPRDA has been downplayed by subordinating it to other legislation.[1419] At the time of writing, this appeal was neither launched nor heard by the appeal court. However, should the appeal proceed as envisaged by the Minister, the appeal judgment will form part of the future research agenda of the candidate on the topic.

1414 *Baleni* (2018) para 79. The *Maledu* obiter dictum was confirmed. *Maledu* (2018) para 106.

1415 *Baleni* (2018) para 71.

1416 Section 2(1), IPILRA.

1417 Section 25(1), Constitution.

1418 Tlale (2020) 13.

1419 R Campbell "Xolobeni judgment to be appealed" 12 December 2018 *Mining Weekly* available online at https://www.miningweekly.com/article/xolobeni-judgment-to-be-appealed-2018-12-12 (accessed 11 October 2021).

Relying on the above precedence, the High Court in *Duduzile Baleni and Others v Regional Manager: Eastern Cape and Others*[1420] described "[m]eaningful consultation entails discussion of ideas on an equal footing, considering the advantages and disadvantages of each course and making concessions where necessary."[1421]

To this end, the South African courts, particularly the Constitutional Court, have made significant strides in demonstrating the critical role that consent and consultation with affected and interested parties and their consent play prior to granting mineral rights. Insofar as the level of engagement is concerned, the courts have also made it clear that both consultation in terms of MPRDA and consent in terms of IPILRA should apply. Therefore, a mineral right applicant bears the responsibility to comply with the statutory procedures imposed by both statutes alongside other legislation such as the PAJA and NEMA.

5.4.2. Recognition and protection of surface land rights and related compensation

The protection of mining communities against displacements can also be gauged based on the extent to which the law and courts recognise the communities' surface land rights and avails redress mechanisms such as fair and adequate compensation where there has been interference with those rights. In one of the recent Land Claims Court cases i.e. *Glencore Operations South Africa v Mnguni and Others*,[1422] the court had to balance the land surface rights and interests of the community against the economic interests of the mining company. The applicant in this case was Glencore, a mining company that was a registered holder of a coal mining right over an area which includes the Goedgevonden farm in the district of Witbank, Mpumalanga.[1423] The respondents were a small community[1424] residing at and occupying, with the permission of Glencore, the houses within the Goedgevonden farm.[1425] Glencore sought an order evicting the respondents from these houses to make way for its mining operations expansions.[1426] The relevant facts can be summarised as follows.

1420 *Duduzile Baleni and Others v Regional Manager: Eastern Cape and Others (CALS intervening)* Case No.: 96628/2015.

1421 *Baleni* (2015) para 89.

1422 *Glencore Operations South Africa (Pty) Ltd v Mnguni and Others* (LCC105/2017) [2018] ZALCC 2 (23 January 2018).

1423 *Glencore* (2018) para 5.

1424 *Glencore* (2018) para 7.

1425 *Glencore* (2018) para 6.

1426 *Glencore* (2018) paras 1, 6 & 20.1.

In July 2004, the community development group of Glencore identified some communities within and around Goedgevonden farm and others in the greater Ogies for a mass resettlement project as they were located in an area earmarked for open cast coal mining operations.[1427] The communities that were to be resettled included that of the applicants.[1428] Having identified these communities, Glencore then conducted the process of consultation with all those that were to be affected by resettlement.[1429] On 27 July 2004, Glencore representatives went to Goedgevonden for first engagement with the respondents and other occupiers from different segments of the farm.[1430] At this meeting, the communities were introduced to a company whose services Glencore had solicited to undertake a baseline socio-economic survey of each household.[1431] From this point, a protracted process unfolded where communities demanded an assurance from Glencore in the form of an agreement that the alternative resettlement site will be a suitable one for their livelihoods.[1432]

This process dragged until 2013 when five households from Goedgevonden farm agreed to be resettled to Rietspruit township located 20 kilometres away.[1433] Between 2015 and 2017,[1434] a further ten households agreed to be resettled, this time to Phola township.[1435] Six households, comprising the respondents, remained in the farm and Glencore contends that their refusal was unreasonable.[1436] In supporting this contention, Glencore explained the efforts it took to ensure that Phola township, as an alternative, is suitable for the respondents.[1437] These efforts included the construction of a school,[1438] provision of over 150 houses[1439] for these households,[1440] launched various skills development programmes in the township,[1441] and offering at least one member of each household employment at its mining operation.[1442] Glencore also argued that the respondents' relocation would have been to their own benefit because if they continue to

1427 *Glencore* (2018) para 8.
1428 *Glencore* (2018) para 8.
1429 *Glencore* (2018) para 9.
1430 *Glencore* (2018) para 9.
1431 *Glencore* (2018) para 9.
1432 *Glencore* (2018) para 10.
1433 *Glencore* (2018) para 10.
1434 Seven during 2015, two during 2016 and one in 2017. *Glencore* (2018) para 10.
1435 *Glencore* (2018) para 10.
1436 *Glencore* (2018) para 10.
1437 *Glencore* (2018) para 11.
1438 That has allegedly cost Glencore over R71 million. *Glencore* (2018) para 11.1.3.
1439 Compared to the ones the respondents are currently occupying at Goedgevonden farm.
1440 *Glencore* (2018) para 11.1.2.
1441 *Glencore* (2018) para 11.1.4.
1442 *Glencore* (2018) para 11.2.

reside at Goedgevonden farm, they will be continually exposed to grave health risks, physical harm to themselves and their children and damage to their dwellings.[1443] For these reasons, Glencore could not proceed with its operations.[1444] As a result, the company risked being shut down due to the respondents' refusal to vacate the area planned for mining extensions.[1445] To this end, Glencore submitted that it had "exhausted meaningful engagement with the respondents" to no avail.[1446]

The respondents' argument was that the houses that Glencore had built for them in Phola were "too small, both to live in and to graze and crop."[1447] They further argued that they were not going to receive titles to those houses, and so ownership of those houses was another concern.[1448] The respondents further contended that Glencore had an option to dump the mine waste at an alternative pit that was seven kilometres away, and they could be left undisturbed in the farm.[1449] Glencore countered this submission stating that opting for such an alternative pit had an effect of rendering its operations uneconomical due to the associated transportation costs.[1450] However, the respondents were of the view that Glencore could, "given its financial muscle, bear those costs" with ease,[1451] while the community could not have borne the dignity cost that would have resulted from "the prejudice and trauma [of] uprooting [them] from an area where they had lived for generations".[1452]

The Land Claims Court ruled in favour of the community by dismissing Glencore's application for their urgent removal.[1453] The court reasoned that Glencore had an alternative remedy apart from eviction and opted not to exhaust it.[1454] This alternative remedy entailed Glencore applying for a deviation of its license conditions from the DMRE, something it could still do even at the time of the hearing.[1455] The application could have conceivably been for the approval to continue dumping the mine waste on the partially rehabilitated land.[1456] On the

1443 *Glencore* (2018) paras 21 & 22.
1444 *Glencore* (2018) para 23.
1445 *Glencore* (2018) para 23.
1446 *Glencore* (2018) para 23.2.
1447 *Glencore* (2018) para 13.
1448 *Glencore* (2018) para 13.
1449 *Glencore* (2018) para 24.
1450 *Glencore* (2018) para 25.
1451 *Glencore* (2018) para 24.
1452 *Glencore* (2018) para 24.
1453 *Glencore* (2018) para 35, order 1.
1454 *Glencore* (2018) paras 26 & 27.
1455 *Glencore* (2018) paras 26 & 27.
1456 *Glencore* (2018) para 27.

question of whether the harm likely to have been suffered by Glencore was greater than the harm the respondents would suffer if the order for their removal was denied, the court answered in favour of the respondents. The court was mindful of the negative economic impact that the refusal to grant an order would have on Glencore.[1457] However, the respondents also stood to be greatly impacted by their relocation to Phola township in many ways, including increased transportation costs to and from work and other social factors, such as that the relocation from a farm to a township might expose the respondents' young children to alien influences.[1458] The court also found that the relocation will affect the respondents as they will now have increased grocery bill because at the township they will not be able "to keep chicken and crop on a limited scale".[1459] For all these, the court found that if the respondents would be financially overburdened and emotionally strained, causing them a serious prejudice and harm that outweighs the one Glencore would suffer.[1460] The court stated that Glencore was a part of an international resources company and might well be able to endure a temporary slow-down on its operations while the respondents were persons of limited means.[1461]

In *Maledu*, the case involved primarily two competing rights in the context of evictions, namely the rights of the customary community to use and occupy the land surface of the farm which they and their forebears had occupied for over a century against the right of the mining companies to mine on the farm occupied by the applicants.[1462] In essence, the case concerned a dispute between lawful occupiers of land[1463] on the one hand and the companies that were granted mineral rights to mine platinum on the same land on the other.[1464] The High Court upheld the case of the mining companies that a mining right does not extinguish and thus override other rights on the land to which the right relates.[1465] This proposition was further articulated that an owner or lawful occupier in whom surface rights on land vest is at liberty to enjoy those rights subject to the limited real right of the mining holder.[1466] The Constitutional Court denounced this proposition and held that the mining company is under an obligation to exercise its mineral rights *civiliter modo* i.e. in a reasonable manner so as to cause the least

1457 *Glencore* (2018) para 30.
1458 *Glencore* (2018) para 30.
1459 *Glencore* (2018) para 30.
1460 *Glencore* (2018) para 31.
1461 *Glencore* (2018) para 32.
1462 *Maledu* (2018) paras 12-25.
1463 In terms of IPILRA.
1464 In terms of MPRDA.
1465 *Maledu* (2018) para 19.
1466 *Maledu* (2018) para 19.

possible inconvenience to the surface land rights of the owner or lawful occupier.[1467] The Constitutional Court referred to the common law requirement that both the landowner or lawful occupier and the mineral right holder should exercise their respective rights alongside each other to the extent reasonably possible.[1468] Thus, the judgment presupposes the co-existence of the right of the landowner or lawful occupier on the surface land and that of the mining right holder, as provided for in terms of section 53(2) of the MPRDA.[1469]

5.4.3. The statutory obligation(s) of State bodies and administrative authorities

The South African courts have previously had an opportunity to adjudicate and pronounce on the government's statutory obligations to monitor and control the mine-community relations in general terms with a view of ensuring that the operations of mining companies in those communities are carried out without contravening their statutory and license obligations. These judgments emphasise mostly two main duties, among others, on the DMRE. First, to ensure that affected mine communities and other interested parties have adequate access to information and; secondly, that the DMRE as a State entity participate actively in the court proceedings where joined and justify its decisions when called upon to do so for the courts to arrive at an appropriate determination. In *Doe Run*,[1470] though the obligations of the administrative authority was not the central point in issue, the court held that the DMRE, through its Regional Managers, has a duty to make the relevant information and documents readily available to the affected mine communities and any other interested and affected parties.[1471] The court reasoned that the Regional Manager is under a statutory obligation to communicate the administrative outcomes of applications for various mineral and prospecting rights to those affected and to do so within a reasonable period without requiring extensive follow-ups.[1472]

This position was crystallised seven years later in *Duduzile Baleni and Others v Regional Manager: Eastern Cape and Others*,[1473] where the High Court had to decide whether interested and affected parties in an application for a mineral right are entitled to receive a copy of the

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1467 *Maledu* (2018) para 58.
1468 *Maledu* (2018) para 58, citing *Hudson v Mann* 1950 (4) SA 485 (T) at 488B-H.
1469 *Maledu* (2018) para 58.
1470 *Doe Run* (2008) para 13.
1471 *Doe Run* (2008) para 13.
1472 *Doe Run* (2008) para 13.
1473 *Duduzile Baleni and Others v Regional Manager: Eastern Cape and Others (CALS intervening)* Case No.: 96628/2015.

mineral right application documents.[1474] On the one hand, the applicants were members of the Umgungundlovu community led by Duduzile Baleni who is the *iNkosana*[1475] of the legitimate community council established in terms of the living customary law.[1476] On the other, the respondents were officials of the DMRE[1477] and Transworld Energy, a mineral right applicant and/or holder.[1478] The applicants sought a declaratory order to the effect that they were entitled in terms of the MPRDA,[1479] and on request to the relevant Regional Manager, to be furnished with a copy of an application for a mining right as contemplated by section 22 of the MPRDA.[1480] They also sought an order compelling the DMRE functionaries[1481] to furnish them with a copy of Transworld Energy's application for a mining right submitted to the DMRE on 3 March 2015.[1482] With a view to exert some pressure, the applicants further prayed that the DMRE be interdicted from awarding the mining right to Transworld Energy for so long as they were not in possession of the copy of the application.[1483]

The joined DMRE officials did not oppose the application and, instead, they filed a 'Notice to Abide' by the decision of the court on 26 May 2016.[1484] As for Transworld Energy, it furnished the applicants with a copy of its mining right application to the exclusion of confidential details, and this happened only after the court application was issued and served.[1485] However, Transworld Energy contended that the process by which the applicants must be given information is not provided for in the MRPDA,[1486] and that the matter has become moot since it provided a copy to the applicants on its own volition.[1487] In making its decision, the court ruled in favour of the applicants that the correct interpretation of the MPDRA provisions presupposes that interested and affected parties should not be subjected to the time-consuming and often unsatisfactory Protection of Access to Information Act (PAIA)[1488] process to access

1474 Sections 10 and 22(4), MPRDA.
1475 A junior chief.
1476 *Baleni* (2015) para 1.
1477 The Eastern Cape Regional Manager; Deputy Director-General and the Director-General.
1478 *Baleni* (2015) para 2.
1479 Sections 10(1) & 22(4), MPRDA.
1480 "… subject to the right of the applicant and/or the Department to redact financially sensitive aspects of the application." See *Baleni* (2015) para 6.
1481 The Eastern Cape Regional Manager; Deputy Director-General and the Director-General.
1482 *Baleni* (2015) para 6.
1483 *Baleni* (2015) para 6.
1484 *Baleni* (2015) para 7.
1485 *Baleni* (2015) para 8.
1486 *Baleni* (2015) para 71.
1487 *Baleni* (2015) para 93.
1488 Protection of Access to Information Act 2 of 2000 (PAIA).

the information contained in a mining right application.[1489] The court further held that the relevant Regional Manager is under an obligation to provide the mining right application documents to any interested and affected parties upon request.[1490]

In *Masuku and Others v Minister of Mineral Resources and Others*,[1491] the High Court had to determine whether the interested and affected parties are entitled to have access to the contents of the mining right application in their endeavour to launch an internal appeal in terms of the MPRDA.[1492] The applicants were members of the Madimatle community[1493] and other interested entities.[1494] The respondents were the DMRE officials;[1495] provincial government officials;[1496] Motjoli Resources, the mining company and other two of its subsidiary entities,[1497] and Aquila Steel.[1498] The applicants submitted that they had on numerous occasions requested from the DMRE, Aquila Steel and Motjoli mining companies the information pertaining to the mining right and its subsequent transfer from one company to the other.[1499] However, these requests were in vain as the DMRE and these entities withheld the critical information that would have enabled the applicants to launch an internal appeal[1500] against the proposed mining.[1501] To counter these averments, the respondents argued that the internal appeal procedure "does not require an applicant … to have a copy of the mining right or to have the full facts."[1502] The only requirement instead, the respondents argued, was for the applicants to be aware that an administrative decision has been taken and to launch their internal appeal based on that awareness.[1503] The respondents further argued that the applicants had their remedy under the PAIA and not the MPRDA.[1504] Though the court dismissed the application,[1505] it found that the DMRE has a positive obligation to ensure that the relevant

1489 *Baleni* (2015) para 117.
1490 *Baleni* (2015) para 117.
1491 *Masuku and Others v Minister of Mineral Resources and Others* (25764/2019) [2022] ZAGPPHC 145.
1492 *Masuku* (2022) para 38.
1493 A 'community' in terms of section 1 of the *Restitution of Land Rights Act* 22 of 1994.
1494 *Masuku* (2022) paras 5-8.
1495 The Minister, DG and the Regional Mining Development and Environmental Committee Limpopo Region.
1496 MEC and the HoD of the Department of Economic Development Environmental and Tourism, Limpopo Provincial Government
1497 Namely, Motjoli Real Estate (Pty) Ltd and Motjoli Iron Ore Company (Pty) Ltd.
1498 *Masuku* (2022) paras 14 & 15.
1499 *Masuku* (2022) para 38.
1500 In terms of the MPRDA.
1501 *Masuku* (2022) para 38.
1502 *Masuku* (2022) para 39.
1503 *Masuku* (2022) para 39.
1504 *Masuku* (2022) para 39.
1505 *Masuku* (2022) para 144.

information is made available to the interested and affected parties.[1506] Generally, some of the civil society and public interest litigation organisations[1507] have lamented the DMRE's tendency of unaccounted delays that continue to hinder access to information and described this information bottleneck as having far more serious implications for the affected communities whose rights and interests are ignored and suppressed.[1508]

In some previous cases where the DMRE was joined to the proceedings, it tended not to participate actively in the proceedings by entering appearance and filing court papers justifying its decisions and explaining its position on the matter to assist the courts.[1509] In some instances, such as in *Baleni*,[1510] the DMRE would simply file a notice to abide with the court decision. The Supreme Court of Appeal in *Samancor Chrome v VDH Holdings and Others*[1511] became aware of this tendency and warned the Minister of the DMRE strongly against it.[1512] The court ruled that the DMRE has a positive obligation to participate in court proceedings where it is enjoined to assist the courts in finalising the disputes.[1513] In strong terms, Mbha JA held that:

> "… although the [DMRE] Minister's decision to grant Samancor a mining right is at the heart of this litigation, the Minister elected not to file any papers in either the court below or on appeal to justify his decision. That election was extraordinary. Considering that the Minister represents the State in its role as the custodian of the nation's mineral and petroleum resources, he had a *constitutional duty* to assist the court by explaining the reasoning behind his decision to overturn the DG's decision to refuse Samancor's application for a mining right. [As a result,] this court, of its own accord, therefore invited submissions from the Minister, to assist the court. The court is thankful for the subsequent submissions … made on the Minister's behalf, which were of great assistance and benefit in deciding this matter."[1514]

Thus, the Minister, or any other DMRE functionary for that matter, is not under just any obligation but a constitutionally entrenched obligation to assist the courts by explaining their

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1506 *Masuku* (2022) para 129.

1507 Such as The Centre for Applied Legal Studies, which intervened in *Baleni* (2015).

1508 The Centre for Applied Legal Studies (CALS) *Unearthing the truth: How the mines failed communities in the Sekhukhune Region of South Africa* Field Research Report (2022) 33 available online at https://www.groundup.org.za/media/uploads/documents/mining_report_16_february_2022.pdf (accessed 13 July 2022).

1509 Such as in *Samancor Chrome Ltd v VDH Holdings (Pty) Ltd and Others* (344/19) [2020] ZASCA 96 and *Masuku and Others v Minister of Mineral Resources and Others* (25764/2019) [2022] ZAGPPHC 145

1510 *Baleni* (2015) para 7.

1511 *Samancor Chrome Ltd v VDH Holdings (Pty) Ltd and Others* (344/19) [2020] ZASCA 96.

1512 *Samancor* (2020) para 10.

1513 *Samancor* (2020) para 10.

1514 *Samancor* (2020) para 10.

administrative decisions whenever joined to the proceedings where such decisions are at dispute. That the constitutional obligation is binding on and compellable against whoever who bears it and fails to fulfil is undisputable and should go without saying.[1515] That is, "the obligations imposed by [the Constitution] must be fulfilled."[1516] Therefore, the effect of *Samancor* judgment is such that the DMRE functionaries can be compelled to file papers explaining their decisions where they are joined to the proceedings.

5.4.4. Gender equality imperative: The inclusion of women

While South African courts have developed a rich jurisprudence on gender equality in broad terms,[1517] this has not yet been canvassed to any meaningful degree in cases pertaining to mining-induced displacements. The limited jurisprudence on gender equality[1518] as it relates to resettlement processes in mining sector exists despite the fact that women's rights on land are usually ignored and suppressed in many ways during resettlement processes where, in some instances, traditional authorities would not recognise women's right of access to land.[1519] It is a well-documented problem in gender empowerment studies that there is a general systemic tendency to deny and fail to recognise and protect the rights of women in land including to register for land titles independently.[1520] However, as far as could be established and despite the imperative for women inclusion being well advocated for in various platforms,[1521] there is little to nothing in the form of case law that has dealt with the subject in the context of mining law and its sector.

1515 Section 2, Constitution.

1516 Section 2, Constitution.

1517 *Harksen v Lane NO* 1998 (1) SA 300 (CC) & *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC).

1518 A Goetz "Gender justice, citizenship and entitlements: Core concepts, central debates and new directions for research" in M Mukhopadhyay & N Singh (eds) *Gender Justice, Citizenship and Development* (2007) 15; A Gouws & H Galgut "Twenty years of the Constitution: reflecting on citizenship and gender justice" (2016) 30(1) *Agenda* 3 & C Rustin "What gender legislative reforms have meant for women in South Africa" (2021) 25 *Law, Democracy & Development* 47-66.

1519 *Sithole and Another v Sithole and Another* (CCT 23/20) [2021] ZACC 7; 2021 (6) BCLR 597 (CC).

1520 T Weinberg "Contesting customary law in the Eastern Cape: Gender, place and land tenure" (2013) *Acta Juridica* 100-117; A Classens & S Mnisi "Rural women redefining land rights in the context of customary law" (2009) *South African Journal on Human Rights* 491-516 & F Banda "Women, law and human rights in Southern Africa" (2006) 32(1) *Journal of Southern African Studies* 13-27.

1521 MA Akinola *Women rights and land reform in South Africa: A case study of KwaZulu-Natal Province* (Master of Social Sciences mini-dissertation, University of KwaZulu Natal, 2020); M Mann "Women's access to land in the former Bantustans: Constitutional conflict, customary law, democratisation and the role of the State" Occasional Paper, PLAAS, UWC (2000) 21.

5.4.5. Deterrence measures and consequence management

Yet another critical theme of keen interest on the topic is deterrence measures that the courts and laws have been trying to impose with a view of preventing or minimising the recurrence of instances of mining-induced displacements. From the foregoing case discussions, what seem to be the preferred deterrence measure, or the often ordered injunction on the matter, is the awarding of cost orders, sometimes punitive, to mining companies and the DMRE and other State agencies alike. In the *Doe Run* case, the court ruled overwhelmingly in favour of the applicant who was aggrieved by the failure to have been notified and consulted by the mining company, and for the DMRE to have granted a prospecting right despite such failure by the company.[1522] In making its determination, the High Court declared invalid the awarded prospecting right and set aside the decision of the DMRE to have awarded such right without due regard to the relevant statutory obligations on both itself as a regulating authority and the mineral applicants.[1523] The DMRE officials, the Minister, the DG and the Regional Manager, were ordered to pay the costs of litigation jointly and severally.[1524] While the awarding of costs in this case, and some of those discussed below, might have been as per the *Biowatch* rule that "the state should bear the costs of litigants who have been successful against it,"[1525] it is arguably not effective because the government officials would simply pay same with public funds gained from taxpayers, and thus the effort, resolve and personal inclination by officials to prevent same from happening again would arguably be lesser. Instead, it is argued, holding government officials including those of DMRE personally liable for the costs of suit through *de bonis propriis*[1526] orders will be more deterrent, this being done obviously on a case-by-case basis and where circumstances warrant. Similarly, in the *Wild Coast* case, the High Court ruled that the exploration rights for oil and gas along the Wild Coast in the Eastern Cape granted by the Minister of DMRE to two energy companies[1527] was unlawful and subsequently set it aside.[1528] Among others, the court located the basis of unlawfulness on the fact that the critical

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[1522] Part 5.4.1.

[1523] *Doe Run* (2008) para 50, orders 1, 4 & 5.

[1524] *Doe Run* (2008) para 50, orders 3, 7, 9 & 11.

[1525] "…ordinarily there should be no costs orders against any private litigants who have become involved.". In the *Doe Run* case, the private litigant who was involved, though did not enter appearance, is the fourth respondent, and indeed no cost order was made against Samber and this has to be a clear indication of this rule. *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC) para 56.

[1526] *Black Sash Trust (Freedom Under Law Intervening) v Minister of Social Development and Others* [2018] ZACC 36 where the then Minister of Social Development Bathabile Dlamini was, in her personal capacity, ordered to pay 20% of the costs.

[1527] Impact Africa Limited and Shell Exploration and Production South Africa BV.

[1528] *Wild Coast* (2022), para 141 order 1.

requirement for energy companies to consult meaningfully with the affected communities was not fulfilled as part of the exploration right application process.[1529] The DMRE Minister and the two energy companies were ordered to pay the costs of litigation jointly and severally.[1530]

5.5. Conclusion

This chapter sought to achieve two main objectives. The first was to assess how and to what extent the South African constitutional and statutory framework is consultative and robust in regulating the occurrences of mining-induced displacement. The second objective was to determine the extent to which the statutory framework on the matter is complied with and/or implemented in practice through a thematic analysis of related case law. The central question for the chapter was: how, in law and practice, is the mining-induced displacement phenomenon regulated in South Africa? In addressing this question, the chapter canvassed the following issues:

i. the general historical developments of South Africa's mining practice and policy to underscore successive reforms in policy developments and their varied implications for mining-induced displacements over time;[1531]
ii. the country's constitutional and legislative framework to establish how robust and appropriate it regulates mining-induced displacements;[1532]
iii. the extent to which the legal framework is complied with in practice by looking at how the South African courts have adjudicated matters involving acts of mining-induced displacement.[1533]

The general background found that South Africa had a rough history that was engulfed in many forms of human rights violations executed by the apartheid[1534] and colonial administration.[1535] It was also revealed that land dispossessions and forced removals were the most perpetuated

[1529] *Wild Coast* (2022), para 141.
[1530] *Wild Coast* (2022), para 141 order 1.
[1531] Part 5.2.
[1532] Part 5.3.
[1533] Part 5.4.
[1534] Currie & de Waal (2009) 2; Dugard & Alcaro (2013) 15 & Kotzé (2008) 301.
[1535] Part 5.2.1; J Dugard *Human Rights and the South African Legal Order* (1978) 84, H Bhorat "The South African social safety net: past, present and future" (1995) 12(4) *Development Southern Africa* 598, N Bohler-Muller "Against forgetting: Reconciliation and reparations after the Truth and Reconciliation Commission" (2008) 19(3) *Stellenbosch Law Review* 466-482, N Bohler-Muller "Reparations for apartheid human rights abuses: The case of Khulumani" (2008) *AfricaGrowth Agenda* 20-22 & N Bohler-Muller "Apartheid victim group scores symbolic victory against multinationals" (2012) 10(3) *HSRC Review*.

crimes and violations among others.[1536] It was for this reason and the desire to achieve the aspirations of transitional justice[1537] that provided served as an impetus for the negotiation of new constitution.[1538] In 1994, the country experienced the first wave of change and reform through the adoption of the Constitution of the Republic of South Africa Act 200 of 1994 (the Interim Constitution),[1539] which was later finalised in 1996.[1540]

The 1996 Constitution has been considered world leading as provides for an elaborate Bill of Rights which must be respected, protected, promoted and fulfilled by the State and, in some instances, due to horizontal effect, by private parties.[1541] The Constitution is the supreme law of the country, meaning that it sets the benchmark for all laws and conduct in South Africa. It further outlines the fundamental values that underpin democracy and the governance vision of the country. It shares the ideals of human dignity, equality, human rights, non-racialism and non-sexism and the rule of law.[1542] Having replaced the system of parliamentary sovereignty under the apartheid regime,[1543] the 1996 Constitution sets itself as the supreme law of the country against which any "… law or conduct inconsistent with it is invalid".[1544]

The historical account has also revealed that mining-induced displacement is not a new trend or occurrence in South Africa. It was traced to have occurred as back as 1953 and possibly beyond, where the Bakgaga Bakopa community was forcefully removed from their land in Maleoskop by the Berlin Missionaries.[1545] In the process of their forced removal, the Bakgaga Bakopa had their properties, kraals, graveyards, building and church structures demolished by the armed police force and the state's bulldozers.[1546] The same fate was suffered by the Dingleton, Mapela and Kekana mine communities in the subsequent years.[1547] Apart from the foregoing case studies, historical archives have revealed that during the period between 1960 and 1982, about 3.5 million black people were forcibly removed from their

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1536 Part 5.2.

1537 KH Raligilia "Beyond foot-dragging: a reflection on the reluctance of South Africa's National Prosecution Authority to prosecute apartheid crimes in post-transitional justice" (2020) 41(1) *Obiter* 63-77.

1538 Currie & de Waal (2009) 3, also Corder (2014) 182-184.

1539 Currie & de Waal (2009) 5 & Corder (2014) 185.

1540 The Constitution of the Republic of South Africa, 1996 (Constitution).

1541 Klare (2008) 129.

1542 Section 1, Constitution.

1543 With that of constitutional supremacy, section 2, Constitution.

1544 Section 2, Constitution.

1545 The land occupied by the Maleoskop community was declared to be a 'black spot' in terms of the Group Areas Act of 1950.

1546 Nkadimeng (1999) 3.

1547 Part 5.2.2.2.

homes and arable lands to uninhabitable places by the apartheid administration with a view of scheduling those lands for developments[1548] to the benefit of white minority.[1549] These acts have had pervasive and lasting negative impacts in black communities and some are still grappling with the remniscents of these acts to date,[1550] hence there are some rural communities in rich mineral deposits places that continue to live in fear forceful removal even under the current dispensation.[1551]

In terms of the constitutional and statutory framework, the chapter found that despite several deficiencies, there is appreciable efforts in law to protect mine communities against mining-induced displacements in the country.[1552] South Africa has the Constitution that is intentional about "protect[ing] the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping."[1553] It guarantees the protection of the fundamental human rights and freedoms,[1554] such as the right to human dignity,[1555] equality and freedom,[1556] civil liberties and a host of other socio-economic rights.[1557] The Constitution also makes provision for tenure security and protects the informal property and/or land rights of the customary communities that were deprived as a result of past racially discriminatory laws and practices.[1558] It also proscribes any act of forced removal, property deprivation and evictions that are unlawful and unsupervised by the courts.[1559] It would therefore appear that the Constitution demands that the vulnerable mine communities be protected against displacements, whether carried out by private mining companies of public authorities. The enabling legal framework also provides for elaborate provisions on both State and mining companies obligations and duties insofar as mining-induced displacement is concerned. All these have been explored, in terms of the MPRDA, IPILRA and other statutes.[1560]

1548 I am inclined to hold that these developments included mining developments/operations.

1549 Platzky & Walker (1984) 1.

1550 Demissie (1998) 445-469; Tutu, McCarthy & Cukrowska (2008) 3666-3684; Von Schirnding et al (2003) 259-263; Pegg (2006) 376-387; Aubynn (2003) 7; Kitula (2006) 405.

1551 The discussion in part 5.4 will reflect on recent case law on the matter to demonstrate the point that this problem is persistent.

1552 Part 5.3.

1553 *Hoffmann* (2000) paras 34 & 37.

1554 Chapter 2, Constitution.

1555 Sections 1(a) & 10, Constitution. *NM & Others v Smith & Others* 2007 (5) SA 250 (CC); *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000(8) BLCR 837 (CC) para 35.

1556 Section 9, Constitution. See generally *S v Solberg* 1997 (4) SA 1176 (CC).

1557 Chapter 2 (sections 7-39), Constitution.

1558 Section 25(6), Constitution.

1559 Section 25 & 26, Constitution.

1560 Part 5.3.2.

Emanating from these statutes, there is a clear indication that interested and affected parties must be consulted about the proposed mining developments scheduled to take place in their areas, and their consent must be sought before the mining operations can commence.[1561] Although they are not binding, there are guidelines on consultation and compensation for resettlements undertaken with a view of making way for mining operations.[1562] This attribute signifies the extent to which the legal framework value surface land rights protection and access to property for vulnerable communities. The aspect of fair and adequate compensation for the mine communities where resettlement is inevitable enjoys great coverage in the country's mining legislative framework.[1563] Among others, the principles for the determination of the payable compensation for the disturbance of the surface land rights are also clearly spelt out;[1564] the obligations of various stakeholders in a resettlement process and other peculiar aspects of the process such as the issues to be canvassed in the resettlement plan are appreciably clarified.[1565]

Concerning case law, the South African courts, particularly the Constitutional Court, have made significant strides in demonstrating the critical role that consultation with affected and interested parties and their consent play prior to granting mineral rights.[1566] Insofar as the level of engagement is concerned i.e. whether consultation or consent, the courts have made it clear that both consultation in terms of MPRDA and consent in terms of IPILRA should apply.[1567]

Therefore, a mineral right applicant bear the responsibility to comply with the statutory procedures imposed by both statutes and any other legislation, such as the PAJA and NEMA. Thus, it can be answered in the affirmative that the South African courts have interpreted and given content to the consultation requirement, this integrating meaningful engagement in mining law. Moreover, the courts have also shown their inclination to recognise surface land rights and the recourse that can take the form of far compensation or resettlement for any interference.[1568] Overall, one can observed from the surveyed cases that in most instances, the courts have always been a demonstrable effort on the part of the courts to uphold the rights of

[1561] Part 5.3.2.
[1562] Part 5.3.3.
[1563] See the relevant provisions of MPRDA and related regulations and guidelines.
[1564] See the relevant provisions of MPRDA.
[1565] Part 5.3.2.
[1566] Part 5.4.1.
[1567] Part 5.4.1.
[1568] Part 5.4.2.

vulnerable mining communities. For instance, in cases such as *Baleni*, *Bengwenyama*, *Glencore* and *Maledu*, the courts have ruled overwhelmingly in favour of the vulnerable communities by ordering fair and reasonable compensation to be paid to them for the suffered disturbance of their surface land rights and, in some instances, demolition of their housing structures.

The courts have also ascertained some of the statutory obligations of the government bodies, the DMRE in particular. In *Doe Run*, *Baleni* and *Masuku* respectively, the courts have emphasised two main obligations, among others, namely to ensure that affected communities and other interested parties have adequate access to information and; secondly, that the DMRE as a State entity participate actively in the court proceedings where joined and justify its decisions when called upon to assist the courts in ascertaining some issues to arrive at an appropriate determination.[1569] What is concerning, though, is that insofar as gender inclusivity and beneficiation in mining-induced resettlement recourse packages is concerned, the South African courts have not added their voice to this issue, despite having prevalence in practice.[1570] Lastly, the courts have also held the DMRE accountable and at times sanctioned appropriate remedies such as injunctions and cost orders against it and private mining companies in cases like *Doe Run*. Although awarding of costs orders is a good deterrence mechanism against the default party, it has been argued that it would be more efficient if it is more punitive in the form of *de bonis propriis*,[1571] bearing in mind of course the unique merits of each case. Ordering *de bonis propriis* against the DMRE functionaries including the Minister where they are found to have erred on their statutory and constitutional obligations will not be an unprecedented occurrence, it has been ordered before against the former Minister of Social Development in *Black Sash*.[1572] I have argued elsewhere, analysing the same case of *Black Sash*, that there is

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1569 Part 5.4.3.

1570 Part 5.4.4.

1571 The *de bonis propriis* order is punitive in nature and is ordered by the court to be paid by a party or their legal representative from their own pocket for acting in an improper, dishonest, and seriously negligent manner. See *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited & Another v Blue Label Telecoms Limited & Others* [2013] 4 All SA 346 (GNP) para 34 and *Kekana v Society of Advocates of South Africa* [1998] ZASCA 54, 1998 (4) SA 649 (SCA) and *Naphtronics (Pty) Limited v Ngaka Modiri Molema District Municipality* [2019] NWPD Case No.: CAF 5/19 para 11.

1572 *Black Sash Trust (Freedom Under Law Intervening) v Minister of Social Development and Others* [2018] ZACC 36 where the then Minister of Social Development Bathabile Dlamini was personally ordered to pay 20% of costs.

no basis under which the Ministers can escape personal liability of the litigation costs where they are found to have transgressed their constitutional duties.[1573]

That the Minister of DMRE has a constitutional duty to comply with consultation and consent provisions in granting mining rights was confirmed by Mbha JA in *Samancor Chrome*.[1574] Therefore, the DMRE Minister, like that of Social Development, should be punished with *de bonis propriis* order in future cases where he is found to have failed to monitor and control mining companies on and around issues of mining-induced displacements.

[1573] GL Mathiba "The deconstruction of the SASSA debacle and aftermaths of non-compliance with the constitutional duties by the Minister of Social Development" (2017) 73 *The Thinker* 53.

[1574] *Samancor* (2020) para 10.

CHAPTER SIX
THE REGULATION OF MINING-INDUCED DISPLACEMENTS IN GHANA

6.1. Introduction

Mining legislation must be constantly and actively revised to address in detail the ever-growing complexities associated with natural resource extraction and its accompanying socio-economic and other concerns. The previous chapter demonstrated how, in law and practice, the mining-induced displacement phenomenon is regulated in South Africa. This chapter follows a similar analytical approach in its inquiry into how the phenomenon is being regulated in Ghana. Three objectives underpin the chapter. The first involves traversing the manifold impacts of mining-induced displacement in Ghana. The second objective explores how the relevant legislative framework of the country provides the necessary provisions for the adequate regulation of the phenomenon or, in reverse, how it neglects to do so. This assessment also features an exploratory discussion on the institutional mechanisms to monitor compliance in this regard. The last objective to determine the extent to which the legislative framework relevant to the phenomenon is implemented and complied with in practice. This part relies on the analysis of selected case law wherein mining-induced displacement was either a central or an incidental issue for determination before the court.

To achieve the goal of this chapter, it is presented in four parts. For context, the first part gives a general background overview of the historical evolution of political developments and those specific to the mining sector in Ghana. This part will also explore how at different times in modern history the Ghanaian laws have treated the mining-induced displacement phenomenon. The second part explores the impacts of the phenomenon on vulnerable communities. This is done to highlight the need for devising efficient safeguards and means of regulating the phenomenon appropriately. The third part deals with the legislative framework that regulates the phenomenon in Ghana and looks at the relevant institutions responsible for monitoring compliance with the same framework. Finally, in part four, the discussion turns to explore and analyse selected case law wherein the phenomenon was either a primary or incidental issue before the court. This analysis is to establish the extent to which the legislative framework is (or is not) complied with in practice. As far as could be established, not much scholarly analysis has previously been conducted on the cases forming a significant part of this section. For this reason, the discussion and analysis in this part is mainly informed by own interpretation.

In pursuit of this analysis, the following issues are canvassed:

iv. the history of Ghana's mining practice and policy, to underscore reforms in policy developments and their implications for mining-induced displacements over time;
v. the impacts of mining-induced displacements on the affected communities, to demonstrate the existence of the problem and the need to address it;[1575]
vi. the country's legal framework, to establish how appropriately it regulates mining-induced displacements;[1576]
vii. the extent to which the legal framework is complied with in practice by looking at how the courts have adjudicated matters involving the mining-induced displacement.[1577]

6.2. Background and Context

In general, the history of Africa is a great case study of numerous critical hardships that most emerging post-colonial African countries are still grappling with in the process of self-discovery and renewal. Ghana, in particular, was the first country in the sub-Saharan region to gain independence from Great Britain and has since then been playing an instrumental role in the political transformation, democratisation, and regional integration across the African continent.[1578] It is a country with a relatively long and eventful history. This part surveys the key events associated with different eras of such history and that survey is presented in two sections. The first section provides a more generalised overview of the political history of the country, while the second one appraises the historical evolution specific and relevant to mining policy and practice.

6.2.1. General overview of political history in Ghana

Ghana is a former British colony, from 1900 to 1957.[1579] Given its mineral endowment, Ghana was named the Gold Coast during colonial times.[1580] The British colonisers acquired the Northern Ghana by declaring a Protectorate over it, having colluded with the traditional

[1575] Part 6.3.
[1576] Part 6.4.
[1577] Part 6.5.
[1578] M Addaney & MG Nyarko "Governance and Human Rights in Twenty-First Century Africa: An introductory appraisal" in M Addaney & MG Nyarko (eds) *Ghana @ 60: Governance and human rights in twenty-first century Africa* (2017) 2.
[1579] K Konadu & CC Campbell (eds) *The Ghana Reader: History, Culture, Politics* (2016) 207. See CA Anabila "Recollections of past events of British colonial rule in Northern Ghana, 1900-1956" in SS el-Malik & IA Kamola (eds) *Politics of African Anticolonial Archive* (2017) 123 and FM Bourret *Ghana: The Road to Independence, 1919-1957* (1960).
[1580] B Murillo '"The devil we know": Gold Coast consumers, local employees, and the United Africa Company' (2011) 12 (2) *Enterprise & Society* 317; H Fuller *Building the Ghanaian Nation-State* (2014).

authorities to sign for the indirect rule policy mandate.[1581] This was after the area had been devastated by the slave prowling activities of Samori and Babatu,[1582] along the perennial civil wars that had weakened the pre-colonial chieftaincy.[1583] Viewed from this perspective, Ghana could not start its existence as an independent republic with peace and composure. However, being the second leading producer of gold in the African continent, after South Africa, Ghana has remained the most stable country in terms of economic prosperity and social well-being in the West Africa sub-region.[1584] The contemporary history of the post-independent Ghana can be presented in four eras of democratic rule, interspersed with military *coups d'état* in-between[1585]

The period between 1957 and 1966 marked the first era of democratic rule for the Gold Coast, as Ghana was known then,[1586] after gaining sovereign independence from Great Britain on 6 March 1957.[1587] Ghana did not fare well in upholding the rule of law and the democratic tenets during this era.[1588] This is demonstrable from, among others, the enactment of the Preventive Detention Act which sought to detain persons whose future actions were deemed likely to be a threat to the state's security; and the Deportation Act which sought to strip Ghanaians of their citizenship status so that they can be deported from Ghana.[1589] Instead of being a line of defence for the citizens, the judiciary exercised unnecessary restraint and failed to take a decisive position against the suppression of the fundamental rights to freedom of movement and citizenry.[1590] Frimpong and Agyeman-Budu discuss four seminal cases that represent the major

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1581 R Rathbone "Gold Coast Chiefs: Minutes by EGG Hanrott on parliamentary question about the number of chiefs destooled since CPP took office" in R Rathbone (ed) *British Documents on the End of the Empire* (1992) 336-337.

1582 S Benson "They came from the North': historical truth and the duties of memory along Ghana's Slave Route" (2007) 27(2) *The Cambridge Journal of Anthropology* 91.

1583 P Ferguson & I Wilks "Chiefs, constitutions and the British in the Northern Ghana" in M Crowder & I Obaro (eds) *West African Chiefs: Their changing status under Colonial rule and independence* (1970) 327-369.

1584 T Akabzaa "Mining in Ghana: Implications for national economic development and poverty reduction" in B Campbell (ed) *Mining in Africa: Regulation and development* (2009) 25; FXD Tuokuu *Environmental Policy Assessment in the Ghanaian Gold Mining Industry: Insights from Stakeholders* (unpublished PhD thesis, Antioch University New England, 2019) 1.

1585 The post-independence history of Ghana witnessed five military coups.

1586 K Frimpong & K Agyeman-Budu "The rule of law and democracy in Ghana since independence: Uneasy bedfellows?" (2018) 18 *African Human Rights Law Journal* 246; ELR Meyerowitz "A Note on the Origins of Ghana" (1952) 51(205) *African Affairs* 319 and J Goody "Ethnohistory and the Akan of Ghana" (1959) 29 (1) *Africa: Journal of the International African Institute* 67-81.

1587 SA de Smith "The Independence of Ghana" (1957) 20 *Mod. L. Rev*. 347. For this reason, section 5(2) of the Ghana Independence Act of 1957.

1588 SP Huntington *The third wave: Democratization in the late Twentieth Century* (1991).

1589 Frimpong & Agyeman-Budu (2018) 246.

1590 Frimpong & Agyeman-Budu (2018) 246.

instances where the Ghanaian courts were called upon in the immediate post-independence era to uphold the human rights of Ghanaians but were reluctant and acquiescent in doing so.[1591]

The period between 1969 and 1971 marked the Second Republican era which presented renewed aspirations for a democratic government that respects the rule of law and upholds constitutional democracy. However, the transition of political power was characterised by fierce conflict,[1592] causing the Second Republican era to be preceded by a military *coup d'état* on February 1966. The cumulative effect of this development was the removal of Nkrumah from the Presidency and the repeal of the 1960 Constitution.[1593] The coup was a welcome occurrence to most Ghanaians as Nkrumah was known for repressive rule and human rights violations.[1594] From the time of the coup, the National Liberation Council (NLC) took over the administration of the affairs of the State until 1969.[1595] This transition culminated in the adoption of the 1969 Second Republican Constitution and the ascension to political power by a democratically-elected and constituted government led by Prime Minister Kofi Abrefa Busia.[1596] Among its notable democratic gestures, the 1969 Constitution proscribed a one-party State and endorsed official opposition parties, thus placing more emphasis on a multi-party system.[1597] It also introduced fervent limitations on executive powers and promoted a range of civil rights and liberties.[1598] To this end, the primary objective of the 1969 Constitution was to prevent the dictatorial tendencies and excesses of the Nkrumah regime from recurring, while promoting active citizen participation which is central to the practice of constitutional democracy. It was also during this era that the judiciary made significant strides to redeem its

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1591 Read e.g. the case of *Lardan v Attorney-General* (No 2) [1957] 3 WALR 114 which was about a deportation order made pursuant to the Deportation Act of 1957; and also the case of *In Re Dumoga & 12 Others* [1961] GLR 44 which revolved around the implementation of the Preventive Detention Act of 1958.

1592 Part 6.2.1.

1593 National Liberation Council (Establishment) Proclamation, 1966. See also P Stacey "Rethinking the Making and Breaking of Traditional and Statutory Institutions in Post-Nkrumah Ghana" (2016) 59(2) *African Studies Review* 209-230; AW Harvey "Post-Nkrumah Ghana: The Legal Profile of a Coup" (1966) *Wisconsin Law Review* 1096 and A Small "An unintended legacy: Kwame Nkrumah and the domestication of national self-determination in Africa' (2017) 17 *African Human Rights Law Journal* 68-88.

1594 Harvey (1966) 1097-1098.

1595 O Agyeman "Setbacks to Political Institutionalisation by Praetorianism in Africa" (1988) 26(3) *The Journal of Modern African Studies* 403-435; R Pinkney *Democracy and Dictatorship in Ghana and Tanzania* (1997) 158-175.

1596 AB Yakohene *Overview of Ghana and regional integration: Past, present and future. Ghana in Search of Regional Integration Agenda* (2009) 1-22; KS Agomor "Understanding the Origins of Political Duopoly in Ghana's Fourth Republic Democracy" (2019) 10(1) *African Social Science Review* 59-84.

1597 E Gyimah-Boadi & E Debrah "Political Parties and Party Politics" in B Agyeman-Dua (Ed.) *Ghana, Governance in the Fourth Republic* (2008) 132 and Agomor (2019) 68-69.

1598 Agomor (2019) 68.

institutional image after being hopelessly tainted during the immediate post-independence era. To demonstrate this, the *Sallah v Attorney-General*[1599] is an excellent case in point. While many other judgments that would similarly advance the rule of law were still expected from the judiciary, the Second Republican era was cut short by another military coup in 1972.

The Third Republican era emerged between 1979 and 1981,[1600] headed by President Hilla Limann.[1601] This era has also seen the judiciary attracting attention through its attempts to assert its authority in maintaining the rule of law and democratic governance in the country. The famous judgment in this regard is that of *Tuffour v Attorney-General*,[1602] which involved the interpretation of a transitional provision of the Constitution on certain categories of persons, including justices of the superior courts.[1603] This judgment deterred the executive and Parliament from jettisoning such an important constitutional provision relating to the appointment of the Chief Justice. The judgment has also, according to Frimpong and Agyeman-Budu, recognised the right of the people to approach the courts in their personal capacities to adjudicate matters of public interest such as the appointment of Chief Justice.[1604]

Finally, the current Fourth Republican era was ushered in by the military rule which occurred under the Provisional National Defence Council (PNDC) led by Flight Lieutenant Jerry John Rawlings between 31 December 1981 and 7 January 1993.[1605] Following this period, the current 1992 Constitution of Ghana was promulgated and ushered in the Fourth Republic in January 1993. The current Constitution assures the Ghanaians of economic and social prosperity, while making a firm commitment towards advancing the rule of law, democratic governance and respect for fundamental human rights. For instance, the Constitution emphasises judicial independence and the institutional integrity of the courts. However, some have criticised this Constitution for having certain provisions that indemnify the acts and omissions committed by the PNDC officials and other officials of all the previous military

1599 *Sallah v Attorney-General* 2 G & G 739 (2d) 1319, [1970] GLR 55.

1600 Y Manu "The party system and democracy in Ghana" in KA Ninsin & FK Drah (eds) *Political Parties and Democracy in Ghana's Fourth Republic* (1993).

1601 JL Adedeji "The Legacy of J.J. Rawlings in Ghanaian Politics, 1979-2000" (2001) 5(2) *African Studies Quarterly* 3.

1602 *Tuffour v Attorney-General* [1980] GLR 637.

1603 See the factual background of the case, *Tuffour* [1980].

1604 Frimpong & Agyeman-Budu (2018) 257.

1605 Frimpong & Agyeman-Budu (2018) 258-259.

regimes in the country.[1606] Despite all of its shortcomings, the Fourth Republic has fared much better in sustaining the rule of law and respect for human rights compared to the previous eras. Though there is still a need for further improvement as demonstrated by several judgments,[1607] the judiciary under the current era has proven to be relatively strong and resilient in asserting its authority.

6.2.2. The history of mining practice and policy in Ghana

Mining in Ghana, especially of gold, is said to have been carried out in the area since times immemorial,[1608] dating back to the fourth Century A.D.[1609] Historical accounts affirm that gold mining has been one of the most important economic activities in the country over the years.[1610] It is also commonplace that until the emergence of the Atlantic slave trade, gold was the commodity that attracted the colonisers to the Gold Coast.[1611] Around the fifth and sixth Centuries B.C, the Phoenicians[1612] are reported to have sailed towards the direction of the Gold Coast where they discovered gold trading and have found the gold that "was so fine that it fetched a premium price in Europe".[1613] Further accounts detail that before the arrival of the Europeans from Portugal and Great Britain between 1453 and 1622, the natives had already been actively engaged in gold mining for thousands of years.[1614] Given its mineral endowment, an idea was conceived of the Gold Coast being the biblical Ophir, known to be a source of proverbially fine gold for King Solomon.[1615] The Ophir is that place biblically described as "the land where there is gold, and the gold of that land is good".[1616]

1606 Frimpong & Agyeman-Budu (2018) 259 and CEK Kumado "Forgive us our trespasses: An examination of the indemnity clause in the 1992 Constitution of Ghana" (1993) 19 *University of Ghana Law Journal* 83.

1607 Frimpong & Agyeman-Budu (2018) *AHRLJ* 259-263.

1608 R Jackson "New mines for old gold: Ghana's changing mining industry" (1992) 77(2) *Geography Association* 175-178.

1609 W Peters *History of Gold Mining in Ghana* (2013) 6; NR Junner *Annual Reports of the Gold Coast Geological Survey* (1934) 9; W Rodney "Gold and Slave on the Gold Coast" *Transactions of the Historical Society of Ghana* (1969) and R Addo-Fening "The Gold Mining Industry in Akyem Abuakwa C. 1850–1910" (1976) 2 *Sankofa: Legon Journal of Archaeology and Historical Studies* 33-37.

1610 AE Ofosu-Mensah "Traditional Gold Mining in Adanse" (2010) 19(2) *Nordic Journal of African Studies* 124; GO Kesse "An Overview of Gold Resources of Ghana" in K Barning (ed) *Symposium on Gold Exploration in Tropical Rainforest Belts of Southern Ghana* (1991).

1611 Ofosu-Mensah (2010) 124 and Addo-Fening (1976) 33.

1612 Originating from the Tarshish, which was then the southern part of Spain.

1613 Peters (2013) 6.

1614 Peters (2013) 6.

1615 Peters (2013) 6.

1616 Genesis chapter 2 verse 12 (KJV).

Coming closer to modern history, the Gold Coast started to experience large-scale mining with the advent of British rule around the 1880s.[1617] As the sector evolved, a significant shift from the locally-focused artisanal mining to a more formal and industrialised large-scale mining was noted during the 19th century.[1618] This shift resulted in the chieftainship starting to gradually lose control over the mineralised lands due to commercialisation of those lands by the British colonisers.[1619] The sector continued to thrive as Ghana's main economic activity throughout the 20th century right into the 1980s, and the interest in the country's mining sector has been growing consistently since then.[1620]

To this point, mining has always been a major economic activity in the country. However, a more complex aspect is that mining has over the years exhibited the full gamut of negative impacts in Ghana including environmental degradation, destruction of livelihoods and most disconcertingly, the displacement of communities for mining projects.[1621] In an endeavour to address the issues associated with the mining-induced phenomenon, there is a trace of response mechanisms encompassing regulations, institutional frameworks and administrative measures in the history of mining in Ghana.[1622] Nevertheless, the efficiency of these formal measures has been questioned in several studies.[1623] This then necessitates a reflection on the historical policy development and its varying implications on the mining-induced displacement over time. The sequential development exploring this is discussed in the following paragraphs.[1624]

1617 Jackson (1992) 175-178; G Hilson "Harvesting mineral riches: 1000 years of gold mining in Ghana" (2002) 28(1) *Resources Policy* 13-26 and FS Tsikata "The vicissitudes of mineral policy in Ghana" (1997) 23(1) *Resources Policy* 9-14.

1618 AB Adam *Conceptualizing household livelihood needs in mining-induced displacement and resettlement: A case study from Ghana* PhD thesis, University of Queensland (2019) 70.

1619 A Bebbington et al. *Governing Extractive Industries: politics, histories and ideas* (2018) 163.

1620 Hilson (2002) 13-26.

1621 J Taabazuing et al. "Mining, conflicts and livelihood struggles in a dysfunctional policy environment: the case of Wassa West District, Ghana" (2012) 31(1) *African Geographical Review* 33-49; B Terminski *Mining-Induced Displacement and Resettlement: Social Problem and Human Rights Issue (A Global Perspective)* (2012) and TE Downing *Avoiding new poverty: mining-induced displacement and resettlement* (2002).

1622 Adam (2019) 74.

1623 E Lawson & G Bentil "Shifting sands: changes in community perceptions of mining in Ghana" (2014) 16(1) *Environment, Development and Sustainability* 217-238; PWK Yankson "Gold mining and corporate social responsibility in the Wassa West district, Ghana" (2010) 20(3) *Development in Practice* 354-366 and D Owusu-Koranteng "Mining Investment & Community Struggles" (2008) 35(117) *Review of African Political Economy* 467-473.

1624 Jackson (1992) 175-178; Tsikata (1997) 9-14 and Hilson (2002) 13-26.

6.2.2.1. The Gold Coast Pre-Independence era (1900-1957)

The progression of mining sector policy in Ghana is as old as the British colonial rule in the country, having begun in the early 1900s.[1625] The development and subsequent implementation of the sector policy was to a great extent influenced by the British interest in the country's mineral endowment.[1626] The sector policy was biased towards preserving the British interests, while also claiming apparent commitment to addressing issues around the community and mining companies' relations and security of tenure for mineral right holders.[1627] Informed by the growing foreign interest in the Gold Coast's mineral reserves, the British administration ratified the Concession Ordinance, 1900 which was the first official mining law in Ghana.[1628]

Among other subjects, the ordinance outlined the rules relating to compensation negotiation between the local chiefs and the mining investors,[1629] related fiscal systems, regularised land acquisition for mining purposes and assured security of tenure to those holding concessions.[1630] While the mining operations were underground, they still negatively impacted the undisturbed use of surface land by the communities and it also contaminated surface waters, disturbing agricultural activity alongside.[1631] These impacts did not receive significant attention as they deserve in the ordinance, except to mention that the communities had the liberty to move to other lands where they felt that their peaceful settlement and livelihoods were affected by mining operations.[1632]

6.2.2.2. The Ghana Post-Independence period (1957-1983)

After gaining the sovereign independence in March 1957,[1633] the democratic government of Nkrumah embarked on a broad mining sector policy reform. Among the major reforms, the administration focused on was ownership of mineral rights and control over mineral revenue. Thus, the mineral rights, their related operations and the revenue that accrued therefrom were

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1625 Hilson (2002) 13-26.

1626 Ofosu-Mensah (2010) 124; Addo-Fening (1976) *Sankofa: Legon Journal of Archaeology and Historical Studies* 33 and Tsikata (1997) *Resources Policy* 9-14.

1627 Adam (2019) 75.

1628 Adam (2019) 75.

1629 Historically, it was the full responsibility of the chiefs to promote community development and well-being, and they relied mainly on the mineral royalties and other investment benefits for that.

1630 Tsikata (1997) 9-14 and Hilson (2002) 13-26.

1631 Hilson (2002) 13-26.

1632 Adam (2019) 75.

1633 De Smith (1957) 347 and section 5(2), Ghana Independence Act.

nationalised.[1634] This nationalisation drive was necessitated by a great quest for revenue and claims relating to sovereign wealth aimed at achieving intergenerational equity.[1635] While intergenerational equity may have been a good motive, there are claims that such movement tended to advance the interest of the centre and deserted those of the marginalised local communities that are directly impacted by mining activities.[1636]

In 1962, the Nkrumah administration enacted the Minerals Act 123 of 1962 which vested all the mineral resources in the country in the President. The Minerals Act further demanded the State equity of 55 percent in the mining operations by private ownership. At the same time, the Administration of Stool Lands Act was also enacted and it brought to an end the direct company-community royalty agreements and introduced the state-community royalty sharing agreement in turn. This shift empowered the government to collect and distribute rents from stool lands by using a standardised formula determined by the State.[1637] So, these rules destabilised the negotiation power of mining-affected communities with the companies as mining royalties were now centralised and collected by the government.[1638] However, not much of an activity was recorded insofar as the mining-induced displacements were concerned because the type of mining remained underground and there were no significant expansions to cause further destruction on the land surface.

6.2.2.3. The Economic Reform era (1983-2000)

During this period, the economy of Ghana underperformed and experienced a significant decline due to, among others, the nationalisation of mineral resources.[1639] In an effort to resuscitate the economy, the government adopted the Economic Recovery Programme (ERP) in 1983 and this was shortly followed by the Structural Adjustment Program from 1986 to 1991.[1640] The two programmes were funded by the World Bank and the International Monetary Fund (IMF).[1641] With the expansion of large-scale mining operations between 1986 and 2000,

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1634 Tsikata (1997) *Resources Policy* 9-14.

1635 H Etemad & KS Salmasi "The Evolution of Mining Policy in Developing Countries" *The Socio-Economic Impacts of Artisanal and Small-Scale Mining in Developing Countries* (2003) 569-582.

1636 ML Williams "The extent and significance of the nationalization of foreign-owned assets in developing countries, 1956-1972" (1975) 27(2) *Oxford Journals* 260-273 and A Gedicks "The Nationalization of Copper in Chile: Antecedents and Consequences" (1973) 5(3) *Review of Radical Political Economics* 1-25.

1637 Articles 17, 19 & 20 of the Act.

1638 W Tsuma *Gold Mining in Ghana: Actors, Alliances, and Power* (2010).

1639 E Aryeetey et al *Economic Reforms in Ghana: The Miracle and the Mirage* (2010).

1640 Bebbington et al. *Governing Extractive Industries: politics, histories and ideas* (2018) 163.

1641 MK Ayisi "The Review of Mining Laws and the Renegotiation of Mining Agreements in Africa: Recent Developments from Ghana" (2015) *The Journal of World Investment & Trade* 467-505.

the displacement incidents of local communities and their loss of livelihoods hiked.[1642] Accounting for this is that during the same period, most of active projects were open-cast mines which required large tracts of land to operate.[1643] This trend has been going unabated. Since the aim of such reforms was to advance economic growth, it would seem, then, that protecting the communities against displacements was less of the reforms' concern and definitely not the gravamen it might have been conceived to be. As of 1994, the companies operating in Ghana are required to undertake an environmental impact assessment (EIA) aimed at detecting the impacts that could potentially ensue from mining projects and to outline a preventive plan of action for addressing those potential issues. In the context of Ghana, the EIA process seeks to comprehensively assess the social impacts of the operations, including on land access or ownership, environment and livelihoods.[1644]

On the subject matter of this study, the EIA regulations enjoin the mining companies to consult communities that are likely to be displaced to make way for the intended project. However, there has been uncertainty on whether these regulations are adequately comprehensive in detailing what is required of such mining-affected community consultations. For instance, Bawole, although focused on oil and gas sector, finds that the EIA consultation process is mostly rhetoric and not much useful in soliciting genuine community concerns, views and consent.[1645] In March 2008, the Ghana's Commission on Human Rights and Administrative Justice (CHRAJ) released a damning report on the State of human rights in mining communities across the country.[1646] Among others, the CHRAJ findings included the issues around forced displacements, inadequate compensation and alternative livelihood restoration arrangements, poor communication and consultation channels between mining companies and communities, unfulfilled promises of employment of locals and other concerns.[1647] Thus, the general sense is that the mining community-company consultation practice is not adequate and fit for purpose to fulfil the objectives it is intended for.

1642 Adam (2019) 78.

1643 V Schueler et al. "Impacts of Surface Gold Mining on Land Use Systems in Western Ghana" (2011) 40(5) *AMBIO* 528-539.

1644 Despite this, the preferred practice, especially on the World Bank funded projects, is where the developers conduct a separate social impact assessment (SIA) or environmental and social impact assessment (ESIA).

1645 JN Bawole "Public hearing or 'hearing public'? An evaluation of the participation of local stakeholders in environmental impact assessment of Ghana's Jubilee oil fields" (2013) 52(2) *Environ Manage* 385-397.

1646 Ghana's Commission on Human Rights and Administrative Justice (CHRAJ) *The State of Human Rights in Mining Communities in Ghana* (2008).

1647 CHRAJ *The State of Human Rights in Mining Communities in Ghana* 18-20.

Once it is settled that mining-induced displacement is ill-regulated, one then has to ponder on how such ill-regulation affects those at the receiving end, namely the mine-communities. The next part engages this aspect.

6.3. The impacts of mining-induced displacements on vulnerable communities

Despite being regarded as an intrinsic economic activity worldwide, mining has a wide range of severe negative impacts on human life, environment and the entire biodiversity. Among those impacts, the displacement of vulnerable communities in making way for mining operations stands out for this research. The inevitable need for large tracts of land to carry out mining projects signifies that the displacement phenomenon will remain a common reality in the sector for as long as mining activities occur. In view of this inevitability, it is necessary to identify some specific impacts of displacement phenomenon to highlight the need for developing practice and legal measures that could foster a peaceful co-existence of mining and the resulting displacement phenomenon.

6.3.1. Loss of productive land and exacerbation of food insecurity

Land is an inevitable need for any mining activity to take place. According to Cernea, the expropriation of land for mining purposes from affected communities removes from them the main foundation upon which their productive systems, economic activities and livelihoods are derived and sustained.[1648] Thus displacement is the worst form of de-capitalization and pauperization of the displaced mine communities, as they lose both physical and man-made capital.

A 2021 empirical study[1649] finds that majority of households in Kenyasi, Asutifi North District in Ghana, have lost large tracts of arable agricultural land as those lands are increasingly being sold out and converted into mining concessions.[1650] The community members in this area plant various agricultural crops, the main being cocoa beans and others, including maize, cashews,

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[1648] MM Cernea "Understanding and preventing impoverishment from displacement: Reflections on the state of knowledge" (1995) 8(5) *Journal of Refugee Studies* 245-264.

[1649] F Agariga et al "Mining Impact on Livelihoods of Farmers of Asutifi North District, Ghana" (2021) 10(4) *Environmental Management and Sustainable Development* 29-45.

[1650] Agariga et al (2021) 30; SA Wilson "Mining-induced Displacement and Resettlement: The case of Rutile mining communities in Sierra Leone" 18(2) *Journal of Sustainable Mining* 67-76; G Hilson & SM Banchirigah "Are alternative livelihood projects alleviating poverty in mining communities? Experiences from Ghana" 45(2) *Journal of Development Studies* 172-196; A Ayensu-Ntim "Effects of loss of agricultural land due to large-scale gold mining on agriculture in Ghana: the case of the Western Region" (2015) 2(6) *Br J Res* 196-221 and PM Prajna "Coal mining and rural livelihoods: Case of the lb Valley Coalfield" (2009) 44(44) *Orissa* 117-123.

oil palm, rice, oranges and cassava.[1651] The community members complained that their annual production has significantly declined in recent times due to mining concessions that destroyed large part of their farming lands.[1652] Moreover, the deposit of chemical substances by the mining processes into the soil makes it less cultivable and destroys crops.[1653]

As a result, the affected communities tend to suffer from a net food deficit.[1654] A study focused on Kyebi in the Eastern Region of Ghana describes the mining operations around that area as an act of "mining [themselves] out of existence" since their most basic human needs for survival such as food are being destroyed by the mining operations.[1655] This persistent estrangement from local food production has increased food prices significantly,[1656] a serious threat that can lead to increased starvation, malnutrition and sometimes even deaths emanating from the latter effects.[1657]

6.3.2. Disenfranchisement of women

Consensus exists among scholars with knowledge about gendered issues in the mining sector that women tend to be more risk-averse[1658] and are often severely affected by the consequences of mining-induced displacements than their male counterparts.[1659] There have also been some scholarly observations that there is a general reluctance by the legal framework of the country to confront the male domination in terms of livelihood reconstruction and beneficiation after the mining displacement.[1660] This problem comes at a cost of women whom their "issues of

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1651 Agariga et al (2021) 34.

1652 V Schueler, T Kuemmerle, & H Schroder "Impacts of surface gold mining on land use systems in Western Ghana" (2011) 40(5) *Ambio* 528-539; Agariga et al (2021) 39.

1653 IT Ocansey *Mining impacts on agricultural lands and food security – Case study of towns in and around Kyebi in the Eastern Region of Ghana* Bachelor's thesis, Turku University of Applied Sciences (2013) 20.

1654 Food security is "when all people at all times have access to sufficient, safe, nutritious food to maintain a healthy and active life"; World Food Summit *Rome Declaration on World food Security* (1996).

1655 Ocansey *Mining impacts on agricultural lands and food security – Case study of towns in and around Kyebi in the Eastern Region of Ghana* (2013) 7.

1656 VK Pun *Mining displacement and learning in struggle in Ghana* (unpublished Master's thesis, McGill University, 2007) 49.

1657 Ocansey (2013) 18.

1658 J Nelson *Are women really more risk-averse than men?* (2012) INET Research Note 012 and L Borghans et al. *Gender Differences in Risk Aversion and Ambiguity Aversion* (2009) NBER Working Paper 14713.

1659 B Terminski *Mining-Induced Displacement and Resettlement: Social Problem and Human Rights Issue- A Global Perspective* (2013) 14; R Mandishekwa & E Mutenheri "Mining-induced displacement and resettlement: An analytical review" (2020) 17(1) *Ghana Journal of Development Studies* 127 and R Mandishekwa & E Mutenheri "Quantification and modelling life satisfaction among internal displacees in Arda Transau, Zimbabwe" (2019) 5(4) *Int. J. Happiness and Development* 298-327.

1660 Mandishekwa & Mutenheri (2020) 127 & DL Madsen *Feminist Theory and Literary Practice* (2000) Pluto Press.

concern … are frequently overlooked or seen as unimportant",[1661] resulting in their economic empowerment prospects being unduly stifled.[1662] For instance, the success prospects of a women aspiring to be involved in an economic mainstream after the displacement phenomenon would ordinarily be far less compared to their male contestants.[1663]

An empirical study was conducted to find out how the phenomenon affects women in Ghana.[1664] In that study, women raised serious concerns about the loss of land, the problem they have firmly decried and described as being inimical to their normal functioning and livelihoods sustenance as they rely on the same land for crop production necessary for maintaining their families.[1665] This is in line with Cernea's resettlers' income curve, which demonstrates that if women are affected by the mining-induced displacement more than men, their recovery is bound to take longer to catch up with that of their male counterparts and non-displaced households.[1666] Furthermore, women get to be more impacted by the phenomenon due to the responsibilities they assume during the displacement process, which includes taking care of the children and the sick, elderly and disabled.[1667]

6.3.3. Cultural and social destruction

Given its destructive nature, the displacement phenomenon has over the years severed social ties and diminished the cultural identities of affected communities. This destruction has led to a significant loss of connection to historical, religious and symbolic locations which are often crucial for survival in those indigenous communities.[1668] The affected communities in and around the district capital of Tarkwa have continuously complained about being separated from their families and close relatives, and the reckless exhumation of their ancestors' graves in making way for AngloGold's open cast mining expansions.[1669] These issues demonstrate the extent to which the phenomenon disrupts the collective identity which is integrally linked to

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1661 P Abbott, C Wallace & M Tyler *An Introduction to Sociology: Feminist Perspectives 3*rd Ed (2005) 5.

1662 Mandishekwa & Mutenheri (2020) 127.

1663 Mandishekwa & Mutenheri (2020) 128.

1664 Cernea (1995) 245-264.

1665 Cernea (1995) 245-264.

1666 Cernea (1995) 254-255.

1667 A Antwi-Boasiako *Proliferation of surface mining in Ghana: A threat or a blessing to the poor in the mining areas? A case study of Tarkwa Mining Area* (M.Sc. thesis, University of Lund, 2003) 18.

1668 M Cernea "Public policy responses to development-induced displacements" (1996) 31(24) *Economic and Political Weekly* 1515-1523.

1669 Red Internacional Mujeres Mineria (RIMM) "Women from mining affected communities speak out - Defending Land, Life & Dignity" *International Women and Mining Network/RIMM International Secretariat-Samata, India* at https://landportal.org/sites/landportal.info/files/2010rimmwomenspeakout.pdf (accessed 03 April 2022).

the geographical place where the affected communities have historically resided, conducted their traditional rituals and buried their ancestors. Additionally, when a community is displaced, especially in a forceful manner, the very social cohesion and interdependence of such community life is broken, leading to alienation, emotional distress and tribulation.[1670]
In the next section, the study turns to explore the various laws and policies that are in place to regulate how instances of mining-induced displacement are managed in Ghana.

6.4. An overview of law and policies on mining-induced displacements in Ghana

To maintain peace and stability, every sector and establishment needs the laws to regulate the conduct and activities of both individuals and institutions. Individuals and institutions often have only their self-interests in mind, and they will seek to prioritise those interests even if they trump the interests of others. Similarly, the mining sector in Ghana also has the laws and policies that define acceptable or otherwise unacceptable conduct of individuals and organisations operating within the sector. This framework law is discussed in the following paragraphs.

6.4.1. The constitutional framework

The Ghanaian legal system consists of the 1992 Constitution, the common law, the parliamentary enacted statutes, secondary laws (orders, rules and regulations) and customary law.[1671] As a general rule, the Ghanaian mining sector legal framework is based on the 1992 Constitution which reigns supreme and sets the standard against which any other law must be consistent to be valid.[1672] The 1992 Constitution guarantees the protection of the fundamental human rights and freedoms,[1673] including the right to human dignity,[1674] equality,[1675] not to be deprived of property,[1676] civil liberties,[1677] women's and children's rights,[1678] as well as cultural rights and practices.[1679] The same Constitution also established, among others, the CHRAJ, a

[1670] A Escobar, D Rocheleau & S Kothari "Environmental social movements and the politics of place" (2002) 45(1) *Development* 35.
[1671] Article 11, Constitution, 1992.
[1672] Article 1(2), Constitution, 1992.
[1673] Article 12, Constitution, 1992.
[1674] Article 15, Constitution, 1992.
[1675] Article 17, Constitution, 1992.
[1676] Article 20, Constitution, 1992.
[1677] Article 21, Constitution, 1992.
[1678] Articles 27 & 28, Constitution, 1992.
[1679] Article 26, Constitution, 1992.

quasi-judicial body mandated to promote and protect fundamental human rights and enhance accountability and transparency in governance, while combating corruption.[1680]

Insofar as land and natural resources (*vis-à-vis* mining) are concerned, chapter 12 of the 1992 Constitution is a key point of reference. On land, the country has three different forms of land ownership, namely public, private and stool or skin lands.[1681] All public lands within the country are vested in the President on behalf of and in the trust for all the people of Ghana.[1682] The Constitution also vests on the President the authority to acquire private land and stool or skin land, or to authorise the acquisition of any land or property upon being established that such acquisition is necessary to uphold and promote some public benefit.[1683] On natural resources, all minerals in their natural state beneath and upon any land in the country, is considered the property of the Republic of Ghana and shall vest in the President on behalf of and in trust for all the people of Ghana.[1684] The country has two regime scales of mining for which the Ministry of Lands and Natural Resources, alongside the Minerals Commission, regulates, co-ordinates and grants mining concessions in respect of.[1685] These two are the large-scale mining which is usually accessible to both international and local applicants, and the small-scale artisanal mining which is restricted to Ghanaian applicants only.[1686] The displacement issue is mainly attributed to the large-scale mining concessions given the often occupied large tracts of land they need to operate. This issue, among others, has led to continued community resistance against mining developments throughout Ghana. However, since 2000, the government has brought about several sector policy reforms to address the negative impacts of mining.

6.4.2. The relevant legislative framework

Flowing from the 1992 Constitution, the enabling national legislation for the mining sector in Ghana is the Minerals and Mining Act 703 of 2006.[1687] The Act seeks to "revise and consolidate

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1680 Chapter 18, Constitution, 1992.

1681 Lands under the control of traditional authority.

1682 Article 257(1), Constitution, 1992.

1683 Article 20(1)(a), Constitution, 1992.

1684 Article 257(6), Constitution, 1992.

1685 However, there is a third category, which is an illegal form of artisanal mining that is also being practised across Ghana i.e. *galamsey*.

1686 PWK Yankson & KV Gough "Gold in Ghana: The effects of changes in large-scale mining on artisanal and small-scale mining (ASM)" (2019) 6(1) *The Extractive Industries and Society* 120-12; A Aubynn "Sustainable solution or a marriage of inconvenience? The co-existence of large-scale mining and artisanal and small-scale mining in the Abosso Goldfields Concession in Western Ghana" (2009) 34(1/2) *Resource Policy* 64-70.

1687 As amended by Minerals and Mining Act 900 of 2015 and Minerals and Mining Act 995 of 2019.

the law relating to minerals and mining and to provide for connected purposes"[1688] by, among others, explaining where the ownership of minerals lies, outlining the procedure for acquiring a mining right, dispute resolution and other related matters. However, for the purpose of this study, the key area of focus in this Act relates to the recourse it avails to the owner or lawful occupier (or the community for that matter) that inhabits the land subject to a mining concession. In this regard, the Act is helpful on three fronts which constitute some of the various themes that encompass debates around mining induced displacements, namely, the protection of surface land rights; the compensation for any disturbance with such rights; the obligations of the relevant Minister in case of resettlement of communities and other themes further elucidated in secondary legislation and/or regulations, as discussed later in this section.

Firstly, the rights awarded to a mineral right holder to explore and exploit the minerals on the concession are all subject to a limitation that takes the form of statutory protection of the surface rights of the owner, lawful occupier or the community that occupies the land in question and any other limitation that may be determined and imposed by the Minister.[1689] In exercising the rights bestowed on them by the mining right in respect of minerals on the land, the mining right holder may face certain limitations relating to the usage of surface rights and others that may be imposed by the relevant Ministry for various reasons.[1690] These surface rights extend to the owner or lawful occupiers of land retaining the right to graze their livestock on the concerned land or even to cultivate the surface of that land, provided that none of these activities interfere with the actual mining operations in the area.[1691] However, the latter rights of the owner or lawful occupiers of the land are only enjoyable or rather enforceable when the surface of the land itself is not affected by the mining operations. Notably, the tone of this provision is peremptory, meaning that the regulation drafters' intended to leave a mining right holder or the owner of a mining lease with no option other than to respect and give effect to the owner's and lawful occupier's rights when executing his mining operations.

However - and the second front comes in - in a case where the interference with or disturbance of the owner's and lawful occupiers' surface rights is imminent due to, for instance, expansion of operations, a fair and adequate compensation becomes payable.[1692] This fair and adequate

[1688] Long Title of the Act.
[1689] Section 72(1), Minerals and Mining Act.
[1690] Part 6.4.
[1691] Section 72(3), Minerals and Mining Act.
[1692] Article 20(2)(a), Constitution, 1992 & sections 73 & 74(1), Minerals and Mining Act.

compensation is claimable from the holder of a mineral right.[1693] The amount of claimable compensation is to be determined by agreement between the holder of the mineral right and the owner or lawful occupiers of the affected surface of the land.[1694] When the parties disagree on the amount of compensation payable by the holder of the mineral right, either party can refer the matter to the Minister for determination.[1695] In making such a determination, the Minister is enjoined to consult with the government agency responsible for land valuation.[1696] The Minerals and Mining Act spells out the principles upon which the determination of the compensation amount to be paid for the disturbance of the surface land rights should be based.[1697] This is a notable reform since the Minerals and Mining Law of 1986 (PNDCL153), which governed the sector before the enactment of Act 703, did not provide for the guidelines necessary for the determination of compensation.

Thirdly, the Minerals and Mining Act imposes certain obligations on the Minister in a case where the envisaged mining operations result in the resettlement of the owner or lawful occupiers of the concerned land.[1698] In this regard, the Minister is enjoined to ensure that the resettled persons or communities are settled on a suitable alternative land that is compatible with their economic well-being and socio-cultural values and practices.[1699] The Minister should also ensure that the resettlement is carried out in accordance with the relevant town planning laws.[1700]

6.4.3. The regulations on mining-induced displacements

In giving effect to and facilitating the implementation of the Minerals and Mining Act, the Compensation and Resettlement Regulations of 2012 were gazetted.[1701] These regulations go a long way in detailing the regulation of mining-induced displacement phenomenon in Ghana. On compensation, the regulations outline the procedure that the claimants should follow when claiming, and goes on to specify the involved timeframes within that process.[1702]

1693 Section 73(1), Minerals and Mining Act.
1694 Section 73(3), Minerals and Mining Act.
1695 Section 73(3), Minerals and Mining Act.
1696 Section 73(3), Minerals and Mining Act.
1697 Section 74(1) of the Minerals and Mining Act.
1698 Section 73(4), Minerals and Mining Act.
1699 Section 73(4), Minerals and Mining Act.
1700 Section 73(4), Minerals and Mining Act.
1701 Minerals and Mining (Compensation And Resettlement) Regulations, 2012 (L.I. 2175), hereafter 'ComRes Regulations'.
1702 Regulation 1, ComRes Regulations.

The regulations become even more useful when they provide comprehensive guidance on how the payable amount of compensation is to be assessed and quantified.[1703] Appreciating the complexity around the assessment of payable compensation, the regulations make a provision for the claimants to solicit and engage the services of a qualified person to undertake such exercise on their behalf.[1704] While the mineral right holder may elect to negotiate the settlement of the amount of compensation,[1705] the claimants are not bound to be amenable to propositions advanced by the mining right holder during the negotiations. If warranted, the mineral right holder and the claimants may appoint an ad-hoc committee to negotiate the amount of payable compensation.[1706] The composition of this committee should include, among others, the traditional authority of the land in which the mining is to take place; the qualified persons representing the parties; a representative of the government agency responsible for valuation; three representatives of the affected communities and others.[1707] The mineral right holder should pre-finance the costs incurred by the committee in executing its mandate, including the costs for the services of a qualified person engaged by the claimants.[1708] The regulations proceed to provide an outline of the compensation principles to guide in assessing the amount payable.[1709]

The issue of resettlement enjoys greater coverage in the regulations as well. It is required that the resettled or displaced communities and their chiefs be actively engaged or consulted by the mineral right holder in the process of their resettlement.[1710] The mineral right holder is further enjoined to collect, analyse and document all the necessary information pertaining the socio-economic and environmental conditions of the population to be displaced.[1711] With a view of streamlining the issues pertaining the resettlement, the regulations demand a strategic action plan to be developed to outline certain projects and programmes with their specific action plans, guidelines and institutional arrangements for their execution.[1712] Regulation 8 enlists further issues that the resettlement plan must address, such as the demographic and socio-economic survey of the displaced population; the carrying out of a housing inventory and a survey of

[1703] Regulation 2, ComRes Regulations.
[1704] Regulation 2(1), ComRes Regulations.
[1705] Regulation 2(2), ComRes Regulations.
[1706] Regulation 2(3), ComRes Regulations.
[1707] Regulation 2(4), ComRes Regulations.
[1708] Regulation 2(5), ComRes Regulations.
[1709] Regulation 3, ComRes Regulations.
[1710] Regulation 7(a), ComRes Regulations.
[1711] Regulations 7(b) & (c), ComRes Regulations.
[1712] Regulations 7(d), ComRes Regulations.

conditions of buildings in the existing settlement to determine planning factors such as plot size, house types, occupancy rates, materials and housing construction preferences and facilities; and many other pertinent issues as this is not a closed list of considerations.[1713] Once the resettlement plan has been developed and all the involved stakeholders are in agreement with its contents, then the plan must be approved by the district planning authority within whose jurisdiction the resettlement is to be carried out.[1714] The district planning authority may elect not to approve the plan if, among others, he is not satisfied with the evidence of consultation and participation of the chiefs and communities to be resettled or if the alternative resettlement place is not appropriate and safe for human settlement.[1715] Once the plan has been approved, it has to be submitted to the Minister.[1716]

As far as the implementation is concerned, the Minister or his representative has to take the necessary action to give effect to the plan.[1717] It is not readily clear as to what the taking of "the necessary action" is intended to mean. However, the phrase is read and understood in the context of this study to mean that the Minister or his representative should then assume the responsibility, whatever that means, of ensuring that the plan is fully implemented. The regulations make it clear that it is the mineral right holder who should bear the costs of implementing the plan,[1718] and that no operations should proceed before the affected communities have been successfully resettled.[1719]

Moreover, to aid the Minister in monitoring the implementation of the resettlement plan, the regulations establish the Resettlement Monitoring Committee (RMC),[1720] of which its operating costs must be borne by the mineral right holder.[1721] The RMC composition is widely diverse and consists of the District Chief Executive or his representative who shall chair the committee; the District Engineer; the District Town and Country Planning Officer; the Assembly member of the area of the mining lease; the most senior chief of the area of the

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[1713] These include the identification of physical and environmental conditions, the analysis of the environmental opportunities and challenges through a study of settlement pattern, drainage, physical geography and barriers of the resettlement area, the identification of an existing land tenure and management system and thorough preparation of cadastral maps covering the alternative resettlement area.

[1714] The district planning authority must revert within 60 days after receipt of the plan. Regulations 10(1) & (2), ComRes Regulations.

[1715] Regulations 10(3)(a) & (b), ComRes Regulations.

[1716] Regulations 11(1), ComRes Regulations.

[1717] Regulations 11(2), ComRes Regulations.

[1718] Regulations 11(3), ComRes Regulations.

[1719] Regulations 11(4), ComRes Regulations.

[1720] Regulations 12(3), ComRes Regulations.

[1721] Regulations 12(4), ComRes Regulations.

mining lease; two persons nominated by the community to be resettled, one of whom should be a woman; the Regional Lands Officer or his representative; a representative of the mining lease holder; a representative of the Minister and any other three more people the committee may co-opt for the Minister to appoint.[1722]

Having provided an overview of the relevant legal framework on the mining-induced displacement phenomenon in Ghana, the focus shifts in the next section to explore how this legal framework is upheld in practice. This exploration is not empirical in nature and, instead, is undertaken by considering how the courts in Ghana have treated cases concerning the displacements of mining communities.

6.5. The courts and mining-induced displacements in Ghana

The cases involving mining-induced displacements in Ghana are scant. Where they are concerned, these cases are found in five areas or themes, namely: the protection of surface land rights and compensation for disturbances; prior consultation with affected communities; government's statutory obligation to monitor and control mine-community relations in displacement matters; the inclusion of women; and the appropriate injunction sanctionable against defaulting mining companies. The cases are explored in the subsequent paragraphs. However, an important caveat is that little to no academic commentaries exist on the court's jurisprudence on cases involving this phenomenon in Ghana. Thus, the greater part of the discussion in this section is based on an original analysis of the selected cases.

6.5.1. Protection of surface land rights and compensation for related disturbances

As far as could be established, most of the adjudicated cases on mining-induced displacements in Ghana have revolved around the protection of surface land rights and compensation for related disturbance. In this regards, three issues prove to be contentious. First, the lawfulness of an eviction of communities by mining companies. Secondly, the determination of fair and reasonable compensation for the disturbance and interference with surface land rights. Lastly, access to the courts for relief where a community is dissatisfied with the compensation package by a mining right holder or as determined by the Minister. Put differently, the jurisdiction of courts in cases concerning the appropriate determination of compensation for disturbance of surface land rights. The following discussions of case law will be guided by these three issues.

[1722] Regulations 12(1) & (2), ComRes Regulations.

In *Nana Kofi Karikari & Others v Ghanaian Australian Goldfields*,[1723] the High Court dealt with what one could classify as 'cynical eviction', an act of unlawfully evicting people from their places of abode where, during the course of eviction, their homes and composite building materials are destroyed.[1724] In *Nana Kofi*, the agents of the defendant company evicted the plaintiffs forcefully and demolished their buildings seeking to make way for the defendant's mining operations on the land that was occupied by the plaintiffs at Nkwantakrom village.[1725] The defendant had acquired a mining concession over the area covering the Nkwantakrom around 1991 or 1992.[1726] The plaintiffs' case was three-fold. First, they argued and submitted a shred of compelling evidence to the effect that Nkwantakrom has been their lawful place of abode for decades since 1968.[1727] Logically, the existence of Nkwantakrom village preceded the acquisition of the mining concession by the defendant.[1728] Secondly, the plaintiffs were of the view that the demolition of their building structures by the defendant's agents was unlawful and as such, thirdly, they were entitled to compensation for the disturbance of their surface land rights resulting from eviction and demolition.[1729]

The defendant company argued two points. First, it contended that the eviction of plaintiffs was lawful and that the demolition of their homes without compensation was justified since those homes were illegally erected in its concession. The company submitted that it defined the blasting zone in its concession and accordingly compensated owners of all properties that were within the defined zone in August 1996.[1730] The company further submitted that it later extended its concession to an area referred to as Block five, an area within which its radius of five landowners had planted crops that were compensated in October 1996.[1731] Thus, according

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1723 *Nana Kofi Karikari & Others v Ghanaian Australian Goldfields Defendant (GAG) Ltd* Suit No. LS.34/97 High Court – Tarkwa Region (2007), hereafter '*Nana Kofi'*.

1724 AJ Van der Walt "Developing the law on unlawful squatting and spoliation" (2008) 125(1) *South African Law Journal* 24.

1725 One witness in the case described the incident as follows: "[o]n 27th June 1997, I was in the classroom teaching when Ghanaian Australian Goldfields (GAG) led by two of their officials, Col. Dan Asiamah, Chief Security Officer, Mr. Daniel Addo, the Environmental Officer and armed policemen led by ASP Kweitu, came to the village and told me to bring the children out of the class room. I asked of the reason but they did not give me any reason. They started pulling the structures down so I had to bring the children out. From the school they went on to demolish all the structures in the village. They did not allow us to remove our properties in the houses".

1726 *Nana Kofi* (2007) pg 7.

1727 *Nana Kofi* (2007) pg 3.

1728 This was undisputed.

1729 *Nana Kofi* (2007) pgs 9-10.

1730 *Nana Kofi* (2007) pg 4.

1731 *Nana Kofi* (2007) pg 4.

to the defendant, there were no building structures within that radius at the time and the structures that were demolished in June 1997 were those that were ostensibly, hurriedly and opportunistically erected by the plaintiffs to attract undue compensation from the company.[1732] Secondly, the company denied having deployed its agents to invade and demolish the homes of the plaintiffs.

Instead, the company argued that it approached the District Security Council (DISEC)[1733] following a sudden structural erection at its concession.[1734] DISEC, responsible for security, took it upon itself to demolish those structures.[1735] It was DISEC that ordered and carried out the demolition of the alleged illegal structures on the defendant's concession. It is for this reason that the defendant was of the view that it should not be held responsible for paying compensation for the demolition of the plaintiffs' structures as it did not use any of its equipment or agent to carry out the demolition.[1736]

The court ruled in favour of the plaintiffs. First, it ruled that the demolished structures and materials have been in existence before the defendant company could acquire a concession, let alone occupy a site to commence with operations.[1737] It described the company as a "late comer" at Nkwantakrom,[1738] having found the plaintiffs there. The court criticised the company for not adducing sufficient evidence to corroborate its alleged non-existence of Nkwantakrom at the time of commencing with its operations and stated that "the defendant was economical with the truth on this issue."[1739] Secondly, the court ruled that the General Manager of the defendant was at all times present and actively involved in the events leading to the invasion and demolition of the plaintiffs' homes. As such, the defendant's argument that it did not use its equipment or agents to evict plaintiffs and demolish their structures were "legally and

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1732 *Nana Kofi* (2007) pg 4.

1733 Section 9, Security and Intelligence Agencies Act 526 of 1996.

1734 Without a court order. The acquiring of a court order before the demolition was emphasised in *Randolph v Accra City Council* (1975) 2 GLR 198, where a house was demolished by the defendant, local authority without an order of the court. In making a judgment, Aboagye J stated at pg 200 that "[i]t is clear the provisions of Section 44 of the Local Government Act, 1971, were not complied with in as much as no complaint was made to a District Magistrate and no magisterial order requiring the plaintiff to pull down her property was obtained. The act of the defendants in demolishing the plaintiff's house was outside their jurisdiction and therefore wrongful for which the plaintiff is entitled to recover damages".

1735 *Nana Kofi* (2007) pg 4.

1736 *Nana Kofi* (2007) pg 4.

1737 *Nana Kofi* (2007) pg 6.

1738 *Nana Kofi* (2007) pg 7.

1739 *Nana Kofi* (2007) pg 7.

factually untenable"[1740] since those that carried out the demolition acted "wrongful, unlawful, unconstitutional and without justification"[1741] under control and on behalf of the company.[1742] The court stated that the defendant's actions were not different from the compulsory acquisition of their property without the payment of prompt, fair and adequate compensation as per Article 20(2) of the Constitution, 1992.[1743] The court ruled that the plaintiffs were entitled to compensation.

The quantification of loss that the plaintiffs had suffered was a difficult exercise for the court since their homes were demolished before they could be surveyed. However, the court could not be deterred in making a reasonable award. It held that the plaintiffs should be restored to their former position as far as money can do so.[1744] The plaintiffs should be restored to the position they would have been if the disturbance of their surface land rights had not occurred. Thus, the court ordered that the plaintiffs should be awarded a package of cash compensation of ¢130,000,000 or GH¢13,000.00 to each plaintiff and ¢20million or GH¢2,000 as a relocation allowance to each household.[1745] A further compensatory award was made for the reconstruction of the church, the mosque and the school.[1746]

In *Ammisah Anthony & Others v Goldfields Ghana Ltd*,[1747] the High Court determined whether a community dissatisfied with the compensation package determined by the Minister can approach the High Court for relief by seeking its original jurisdiction to determine the appropriate compensation the community may be entitled to.[1748] The plaintiffs were members of a community occupying a concession land, and they could not agree with Goldfields on the compensation package that was proposed by the latter. The plaintiffs then referred a disagreement for ministerial determination.[1749] The Minister reverted with the compensation package he deemed fair and reasonable. The plaintiffs remained dissatisfied with the package

[1740] *Nana Kofi* (2007) pg 7.
[1741] *Nana Kofi* (2007) pg 14.
[1742] *Nana Kofi* (2007) pg 7.
[1743] *Nana Kofi* (2007) pg 14.
[1744] *Nana Kofi* (2007) pg 19.
[1745] *Nana Kofi* (2007) pg 19.
[1746] The award for the reconstruction of the school was to be paid to the first plaintiff, the Chief, who had to facilitate the reconstruction of the school on behalf of the community.
[1747] *Amissah Anthony & Others v Goldfields Ghana Limited*, Suit No CS 47/97 High Court Tarkwa , Ghana, July 21, 2000.
[1748] *Amissah Anthony* (2000), issues for determination by the court.
[1749] Section 73(3), Minerals and Mining Act.

and, as a result, issued a writ in the High Court seeking the original jurisdiction of the court to determine the appropriate compensation for them.

The court dismissed the writ reasoning that it lacked the original jurisdiction to enforce individual rights for that matter.[1750] The court aligned itself with the provision that the only instance where a person entitled to compensation or the mineral right holder may approach the High Court is after the ministerial determination,[1751] where their application seeks a review of such determination and the case in which the court should be exercising its supervisory[1752] (and not original) jurisdiction.[1753] The High Court made this ruling despite the constitutional guarantee that anyone may approach it for redress if such person alleges that their fundamental right has been or is likely to be violated.[1754] The court ruled further that this provision does not confer on it the original jurisdiction to enforce the right to be adequately compensated as pursued by plaintiffs.[1755] The judgment effectively meant that mine-affected communities have restricted access to the High Court in vindicating their right pertaining to compensation for interference with their surface land rights since they are mandatorily required to exhaust the administrative procedure set out in mining law.[1756] This proposition is problematic for the following reason. In *Ernest Adofo & Another v The Attorney General & Another*,[1757] the Supreme Court of Appeal (SCA) held that "… the unimpeded access … to the courts is a fundamental prerequisite to the full enjoyment of fundamental human rights … and this access [ought to be preserved] in the interest of good governance and constitutionalism … which the 1992 Constitution is clearly committed."[1758] That said, it goes without saying that the court in *Amissah Anthony* has drastically digressed and omitted the latter constitutional commitment.

1750 The Justice stated that the "[w]rit of Summons of the Plaintiffs' is wrong, in so far as it was worded to seek the original jurisdiction, and not the appellate jurisdiction of the High Court. After all, the Plaintiffs had resorted to the original jurisdiction of the Administrative Court. How could they seek the same original jurisdiction in the same reliefs in the High Court too?" *Amissah Anthony* (2000), an order of the court.

1751 Section 75(2), Minerals and Mining Act.

1752 When exercising its supervisory jurisdiction, the High Court may not get to a point where it ponders on the production of evidence by parties (often victims) in determining the appropriate compensation as a new inquiry altogether.

1753 Section 75(3), Minerals and Mining Act.

1754 Article 17, Constitution, 1992.

1755 The court stated that this means that "… if any other cause of action is open to an individual as a result of the violation of his right, he shall not be foreclosed by his initial action to vindicate his right from pressing that other action". A Niber *The Mining Industry and Human Rights in Ghana* (unpublished LLM dissertation, Indiana University, 2007/8) 64-65.

1756 Section 57(1), Minerals and Mining Act.

1757 *Ernest Adofo & Another v The Attorney General & Another*, 2 G.M.L.R. 148, 173 (Supreme Court of Ghana, February 6, 2006).

1758 *Ernest Adofo* (2006), 173.

While this omission in *Amissah Anthony* may be excused since it was determined before the precedent-setting *Ernest Adofo* SCA judgment, the same omission is persistent in similar cases that were adjudicated and determined after *Ernest Adofo* judgment. One of those cases is the *Alex Gyan & Others v Newmont*.[1759]

In *Alex Gyan*, the defendant company extended its mining operations in 2014 towards Kantika village, where the plaintiffs were residing.[1760] While the company resettled other residents by building structures for them at an alternative site, the plaintiffs were monetarily compensated and denied a choice to be resettled in the same manner, where structures are being built for them. The disagreement then resulted between the parties over the preferred method of compensation. The plaintiffs then approached the High Court which had to determine whether it has the original jurisdiction to adjudicate the disagreement between the parties over compensation. For their part, the plaintiffs argued that they are at liberty to approach the court to adjudicate on the disagreement between them and the defendant company. In turn, the defendant argued that the plaintiffs had to exhaust the requisite statutory step of referring the disagreement for ministerial determination first,[1761] and only approach the court if they are dissatisfied with the ministerial determination. The court ruled in favour of the defendant and referred the plaintiffs back to fulfil the statutory requirement. It justified its ruling that:

> "It appears rather plausible and reasonable that, instead of a bare *disagreement* between two private persons being the basis for invoking the supervisory jurisdiction of the High Court, it is rather the administrative or quasi-judicial *determination* of the Minister that can properly be the legal basis for invoking the supervisory jurisdiction of the High Court."[1762]

With the above words, the High Court essentially held that the ministerial determination on the parties' disagreement over compensation is a statutory standard requirement that is inescapable even if the determination of such disagreement is urgent. It is also observable that the High Court can exercise its discretion to determine a fair and reasonable compensation in instances where the properties were destroyed by the agents of the mining company before they could be surveyed, as was the case in *Nana Kofi*. The case analysis reveals that mining companies tend to allege the non-existence of human settlement in the lands covered by their concessions. This

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1759 *Alex Gyan & Others v Newmont (GH) Gold Ltd*, Suit No HR/0007/2017 High Court [Human Rights Division] Accra, Ghana, 10 July 2017).

1760 The relevant documentation to this effect is with the candidate and such can be recovered upon request.

1761 Sections 73 & 75, Minerals and Mining Act.

1762 *Alex Gyan* (2017), 8 & 9.

allegation seems to be made with a view to creating an impression that the victims of evictions erect their building structures opportunistically to attract compensation from the companies.

6.5.2. The standard and level of engagement with affected communities

The courts in Ghana have pronounced the legal position on whether prior consultation with affected and to-be-affected mining communities must be had before they could be displaced or resettled. There is a demonstrable effort on the part of the courts to buttress and create a consistent precedent on the need for consultation and well-rounded negotiations as a preliminary requirement in all matters concerning mining-induced displacements. In *Bulsa Kakraba v Goldfields Ghana Limited*,[1763] the High Court had to decide, among other issues, whether the mining company was, by operation of law, required to consult and negotiate with the affected community before it could resort to the displacement action.[1764]

In this case, the farming community of Kobedda in Tarkwa were forcefully evicted from their homes and their buildings were demolished by the Goldfields mining company.[1765] In justifying its action, Goldfields argued that the portion of land that the community had occupied fell within its concession area, and thus had the right to evict them to gain possession of the surface land.[1766] Goldfields argued further that some of the structures were those that were hurriedly erected by some community members after it had acquired the concession.[1767] However, the community managed to adduce evidence establishing that the demolished building structures have been in existence long before Goldfields could acquire the concession in respect of the area covering their community.[1768] The court found that Goldfields was indeed required to first consult and negotiate with the affected community instead of resorting to displacement characterised by force and demolition of structures.[1769] The court had a compelling basis on which to pronounce prior consultation as a preliminary requirement preceding displacement given the need to assess and survey the homes and crops of the plaintiffs. For this reason, the court ruled in favour of the plaintiffs.

[1763] *Bulsa Kakraba v Goldfields Ghana Limited*, Suit No CS 15/1999 (Tarkwa High Court, Ghana), hereafter referred to as *Bulsa Kakraba* (1999).

[1764] Issues for determination in *Bulsa Kakraba* (1999).

[1765] Plaintiffs' case in *Bulsa Kakraba* (1999).

[1766] Defendant's case in *Bulsa Kakraba* (1999).

[1767] Defense statement in *Bulsa Kakraba* (1999). A similar argument was advanced in *Nana Kofi* (2007).

[1768] *Bulsa Kakraba* (1999).

[1769] Court order in *Bulsa Kakraba* (1999).

In *Nana Kofi*,[1770] the court had to determine the appropriate relief for the plaintiffs whom were forcefully evicted from their homes without having been consulted nor served with adequate notice by Goldfields.[1771] The court upheld its earlier stance in *Bulsa Kakraba*,[1772] that as a matter of inescapable imperative, Goldfields had to consult with the community to negotiate regardless of whatever the situation might have been.[1773] There is no better way to capture the thrust of this imperative than the court's direct wording that:

> "The correct legal position is [that] where a statute prescribes a prior condition or requirement to be fulfilled before another act can be performed then unless that prior condition or requirement has been fulfilled, that act … cannot be valid."[1774]

In that light, it follows that any process or action by a mining company, including the displacement of mining community, that it is not preceded by consultation and negotiations, should be deemed unlawful. The court explained that the failure to consult and engage with the affected mining communities deprived them an opportunity to make an offer for compensation payable by the company, a deprivation which could not be cured with certainty since the structures were destroyed before they could be surveyed for value ascertainment.[1775] The court also indicated that among key role players that the company had to consult include the chiefs, opinion leaders and a fair representative fraction of inhabitants in the area.[1776]

To summarise, the cases on prior consultation in relation to the mining-induced displacements demonstrate the extent to which Ghanaian courts consider meaningful engagement as an integral part to surface land rights protection. In *Bulsa Kakraba* and *Nana Kofi*, the courts found that in all circumstances, the commencement of mining activities that are likely to result in displacement of people should be preceded by thorough consultation with the communities that stand to be affected.[1777]

1770 *Nana Kofi* (2007).
1771 *Nana Kofi* (2007) pg 13.
1772 Although not cited in the judgment.
1773 *Nana Kofi* (2007) pg 17.
1774 *Nana Kofi* (2007) pg 13.
1775 *Nana Kofi* (2007) pg 13 & 14.
1776 *Nana Kofi* (2007) pg 13.
1777 This buttresses the relevant provisions of PNDCL 153, namely section 70 (1), (2) and (4) (1).

6.5.3. The statutory obligation(s) of state bodies and administrative authorities

The courts in Ghana have also had the opportunity to adjudicate the government's statutory obligations to monitor and control the mine-community relations in general terms with a view of ensuring that the operations of mining companies are carried out without contravening their statutory and license obligations. In *Centre for Public Interest Law v Environmental Protection Agency and Others*,[1778] the High Court had to adjudicate the exact role of the government in monitoring mining activities. While this case was canvassed more from an environmental law and justice context,[1779] the ruling would arguably be relevant and applicable in a case involving the displacement of communities in the context of mining. The plaintiffs were two non-governmental organisations advocating for environmental justice and the protection of the rights of vulnerable mining communities.[1780] The defendants were two government bodies,[1781] the Environmental Protection Agency[1782] and the Minerals Commission,[1783] and the mining company[1784] of which its activities had resulted in environmental degradation which was the cause of the suit. The mining company had contravened its statutory obligations.[1785]

The relevant facts are that the activities of the company had caused numerous uncovered ponds and degradation of land in the Bonteso area during and after its operations.[1786] The then Minister of Environment and Science was aware of this contravention as he was asked to detail the Ministry's plan of remedying the situation during a parliamentary session.[1787] However, the situation persisted. Aggrieved by the inaction on the part of defendants, the plaintiffs then brought an application seeking three determinations. First, that the company and its agents be

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1778 *Centre for Public Interest Law (CEPIL) & Another v Environmental Protection Agency and Others* Suit No. A (EN) 1/2005 – High Court, hereafter referred to as *CEPIL* case.

1779 In that the plaintiffs were suing the defendants (regulatory body) to compel them to perform their statutory obligations in respect of damage to the environment i.e. land degradation caused by the mining activities of the third defendant.

1780 CEPIL and the Centre for Environmental Law.

1781 This "includes any authority or body authorized by the executive to perform functions of the government in accordance with the tenets of the Constitution", *CEPIL* (2005) pg 4.

1782 EPA is a statutory body in terms of the *Environmental Protection Act* 490 of 1994, under the Ministry of Environment and Science, to *co-ordinate activities* for the protection of the environment (emphasis italicised). Part 1, EPA Act and section 2, EPA Act.

1783 This Commission is a statutory body charged with the responsibility to regulate and manage mineral resources in Ghana. Section 2, Minerals Commission Act 450 of 1993.

1784 Trading as Bonte Gold Mines. *CEPIL* (2005) pg 2.

1785 *CEPIL* (2005) pgs 6 & 12.

1786 *CEPIL* (2005) pg 2.

1787 *CEPIL* (2005) pg 2.

ordered and compelled to remedy the degradation caused by its operations at Bonteso.[1788] Secondly, that a mandatory injunction be ordered against EPA and the Commission compelling them to enforce compliance with statutory obligations resting on the company to remedy the environmental harm emanating from its operations. Lastly, that an injunction be ordered against EPA and the Commission, compelling them to take all necessary steps for the rehabilitation of the damaged environment.[1789] The second and third relief sought would have been rendered moot if the mining company had remedied its degradation.[1790]

The plaintiffs contended that the land degradation caused by the mining company, and condoned by EPA and the Commission, infringed on their constitutional right to clean and safe environment.[1791] EPA accepted that it indeed had statutory obligation to enforce compliance with the environmental assessment procedures by the mining company,[1792] and that it fulfilled such responsibility.[1793] The Commission argued that it had no obligation to coordinate the environmental policies in respect of mining activities of the company.[1794] The company blamed all its contraventions on its' insolvency and resultant liquidation as being the cause for its inability to implement rehabilitation on the abandoned sites.[1795]

In its ruling, the court started by alluding to the fact that public interest litigation plays an integral role in the advancement and protection of the rights of vulnerable communities against infringement by mining companies.[1796] The court found that EPA and the Commission were "under a mandatory statutory obligation to monitor and control the activities of the [company] to ensure that their mineral operations … are carried on without breaching their statutory obligations",[1797] and they failed to that effect. However, the court rejected the relief sought by plaintiffs for a mandatory injunction order against EPA and the Commission, reasoning that such relief is unavailable "if the court is required to see to supervision of its orders", of which was the case in this suit.[1798] Resultantly, the court ruled that the defendants were jointly and

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1788 If the mining company could simply comply and remedy the degradation it caused, then the second and third relief would not be necessary.

1789 *CEPIL* (2005) pgs 2 & 3.

1790 Because then the issues underlying the dispute would have been resolved, thus no longer affecting the protected interests of the plaintiffs.

1791 Plaintiffs' case, *CEPIL* (2005) pg 3.

1792 *CEPIL* (2005) pg 3.

1793 *CEPIL* (2005) pg 3.

1794 *CEPIL* (2005) pg 3.

1795 *CEPIL* (2005) pg 3.

1796 *CEPIL* (2005) pg 4.

1797 *CEPIL* (2005) pg 12, ruling c.

1798 *CEPIL* (2005) pg 12.

severally liable to those adversely affected by the damage to environment and their properties as a result of the defendants' inaction and default.[1799] A costs order was made against the defendants jointly and severally.[1800]

This judgment is significant in two fronts: First, it has clarified the role of the relevant government bodies i.e. EPA and the Commission in relation to mining company-community relations and disputes. Secondly, it has set the standard and reaffirmed the need for more liberal public interest litigation in mining company-community disputes, and that capacity or legal standing in such cases must be granted as a matter of principle with the courts "rarely assist[ing] in attempts to exclude such cases on the basis of lack of capacity".[1801]

6.5.4. Gender equality imperative: The inclusion of women

While provision is made in law for the inclusion of women in deliberating matters concerning resettlement,[1802] empirical studies have proven that women disenfranchisement on the ground remains prevalent.[1803] In Ghana, land ownership pattern is generally characterised by gender imbalances and it features varying degrees of partial, conditional and secondary control over land which is dependable on the status of women.[1804] This imbalance is perpetuated by the general urge to preserve customary system of land ownership that is biased against women.[1805] The problem manifest in various contexts, including mining-induced displacements. However, as far as could be established, there is little in the form of case law that has dealt with the provision against women exclusion in any meaningful detail.

6.5.5. Deterrence measures and consequence management

The appropriate deterrence and injunction sanctionable against the mining companies in default has also been an aspect of great interest in the surveyed cases. Among issues that the court had to determine in *CEPIL*, was whether the defendants should be held jointly and severally liable for all the costs incurred by the plaintiffs in pursuing the suit. The relevant facts of the case

1799 *CEPIL* (2005) pg 12, ruling d.
1800 *CEPIL* (2005) pg 12, ruling f.
1801 *CEPIL* (2005) pg 4, citing *Pennie & Another v Egala & Another* [1980] GLR 234-257 and *Ward Brew v Ghana Bar Association* (No.1) [1993-94] 2 GRL 439-453.
1802 Regulations 12(1) & (2), ComRes Regulations.
1803 Part 6.3.2.
1804 MA Akinola *Women rights and land reform in South Africa: A case study of KwaZulu-Natal Province* (Master of Social Sciences mini-dissertation, University of KwaZulu Natal, 2020) 10.
1805 Akinola (2020) 10.

were discussed earlier,[1806] and would not be repeated here. What is relevant for present purpose is the court's ruling in respect of the issue of costs. The court found that the mining company had an obligation - of which it failed - to rehabilitate the damaged environment due to its operations and, as a result, there would be no reason not to order costs against it.[1807] The court found that the EPA and the Commission had the obligation - of which they failed - to regulate the activities of the mining company. In this instance i.e. where the State is found to be in default, as a general rule, the State should be ordered to pay the costs. It was for these reasons, among others, that the court ruled in favour of the plaintiffs and ordered that the defendants be held jointly liable for all cost incurred by the plaintiffs in pursuing the action.[1808]

In *Nana Kofi*, the court had to decide on two issues carrying deterrence and consequence management effect: First, whether the granting of a cost order against the defendant mining company would be justified and, secondly, whether the granting of a perpetual injunction restraining the defendant company or their agents from carrying on any demolitions of plaintiffs' buildings in the concession land without a court order, or at least an adequate opportunity to show cause, would be justified.[1809] Again, the relevant facts of the case were discussed earlier.[1810] What is relevant for present purpose is the court's ruling in respect of the two issues namely, the cost order and the perpetual injunction against the defendant mining company.

The court ruled in favour of the plaintiffs' in respect of the costs. I ordered punitive costs against the defendant mining company and their agents jointly and severally.[1811] Punitive costs order is mainly considered as a punishment to a litigant who is in the wrong due to the manner in which they approached the suit and to also "deter such inflexible and unreasonable litigants from engaging in such inappropriate conduct in the future."[1812] In respect of ordering a perpetual injunction against the defendant, the court refused. It reasoned that the defendant mining company is permitted by law to operate in the concession and would therefore be unjustifiable if not unlawful to make an order halting their lawful activities.[1813]

1806 Part 6.5.3.
1807 *CEPIL* (2005) pg 12, rulings d & f.
1808 *CEPIL* (2005) pg 12, ruling f.
1809 *Nana Kofi* (2007) pg 1.
1810 Part 6.5.1.
1811 *Nana Kofi* (2007) pg 20.
1812 *Andile Maribatsi v Minister of Police & Others* Case No.: 3490/2019 para 12.
1813 *Nana Kofi* (2007) pg 20.

In *Esther Osei and Others v Kibi Goldfields Ltd of Osino*,[1814] the plaintiffs were farmers with various land plots in Saaman and they were suing the defendant mining company for failing to pay them a fair and adequate compensation for the destruction of their farms and properties.[1815] The defendant did not dispute the lawfulness of the farming activities and occupation of the plaintiffs in the concerned plots of land.[1816] The court ruled in favour of the plaintiffs through an order directing the defendant mining company to pay the plaintiffs a fair and adequate compensation for the destruction of their farms and the use of surface land.[1817] The court further ordered costs against the defendant company.[1818]

6.6. Conclusion

This chapter sought to explore how the mining-induced displacement is regulated in Ghana. In addressing this question, the chapter discussed the following issues: the historical evolution of Ghana's mining practice and policy to underscore successive reforms in policy developments and their varied implications for mining-induced displacements over time;[1819] the impacts and exigencies of mining-induced displacements on the affected communities;[1820] the country's legal framework with a view of establishing how appropriate and robust it is in dealing with the phenomenon;[1821] and the extent to which the legal framework is complied with in practice by looking at how the Ghanaian courts have adjudicated matters involving the mining-induced displacement.[1822]

As a general background, the chapter found that Ghana has managed to overcome decades of political instability and military dictatorship by ushering in a constitutional democracy that is underpinned by a Bill of Rights.[1823] It is also apparent that, unlike the previous constitutions, the 1992 Constitution of Ghana reiterates the supremacy of the Constitution as a fundamental value of the State.[1824] The Constitution further guarantees quite a comprehensive list of various

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1814 *Esther Osei and Others v Kibi Goldfields Ltd of Osino* Suit No.: C12/116/2015.
1815 *Esther Osei* (2015) pg 1.
1816 *Esther Osei* (2015) pg 6.
1817 *Esther Osei* (2015) pg 6.
1818 *Esther Osei* (2015) pg 6.
1819 Part 6.2.
1820 Part 6.3.
1821 Part 6.4.
1822 Part 6.5.
1823 Part 6.2.1.
1824 M Nyarko "Study on the implementation of the African Charter on the Rights and Welfare of the Child in Ghana" in E Fokola, N Murungi & M Aman (eds) *The Status of the Implementation of the African Children's Charter: A ten-country Study* (2022) 208; K Quashigah "The 1992 Constitution of Ghana" (2013) and MG

fundamental rights including civil, political and socio-economic rights,[1825] which are also supplemented in the directive principles of State policy.[1826]

These rights are enforceable and justiciable not only on the basis that they are constitutionalised rights, but also for the reason that they are further supplemented in directive principles of State policy that are similarly enforceable on their own or at least when read in conjunction with justiciable provisions of the Constitution,[1827] as per the judicial pronouncements on the matter in various cases.[1828] Like South Africa, the legal system of Ghana is modelled on the common-law tradition inherited from the British colonial administration.[1829] The chapter has also discovered that mining has been a major economic activity in Ghana for as far back as 1900s and, over the years, it continued to negatively affect the use of surface land by the communities and had other environmental issues such as surface water contamination and destruction of agricultural activity.[1830] This upheaval remained unabated for an extended period of time to date, still bearing multiple impacts on vulnerable mining communities.[1831]

The next part of the chapter demonstrated that there is a considerable degree of legal protection of communities against mining-induced displacements in Ghana. The Constitution guarantees the protection of the fundamental human rights and freedoms,[1832] such as the right to human dignity[1833] and not to be deprived of property.[1834] The rights of women and children are also constitutionalised[1835] and are the rights to be respected and upheld at all times including during instances of displacement. The enabling legal framework provides for elaborate provisions on

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Nyarko "The impact of the African Charter and Maputo Protocol in Ghana" in VO Ayeni (ed) *The impact of the African Charter and Maputo Protocol in selected African states* (2016) 95.

1825 Chapter 5, Constitution, 1992.

1826 Nyarko (2022) 209.

1827 MO Mhango "Separation of Powers in Ghana: The Evolution of the Political Question Doctrine" (2014) 17 (6) *PELJ* 2731.

1828 Although the text of the 1992 Constitution fails to expressly indicate whether the directive principles are enforceable (justiciable) or not, the courts have clarified the matter in various cases such as *New Patriotic Party v Attorney-General* (31st December Case) 1993-94 2 GLR 35 SC; *New Patriotic Party v Attorney General* (CIBA) 1997 SCGLR 729 and *Ghana Lotto Operators Association v National Lottery Authority* 2007-2008 SCGLR 1088. There is an interesting academic commentary on the enforceability (or lack thereof) of directive principles, such as Mhango (2014) 2731; Nyarko (2022) 208 and A Atupare "Reconciling Socio-economic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria" (2014) 27 *Harvard Human Rights Journal* 71.

1829 Part 6.2.1.

1830 Hilson (2002) 13-26.

1831 Part 6.3.

1832 Article 12, Constitution, 1992.

1833 Article 15, Constitution, 1992.

1834 Article 20, Constitution, 1992.

1835 Articles 27 & 28, Constitution, 1992.

State obligations and duties insofar as mining-induced displacement is concerned, some of which include monitoring and controlling of mining community-community relations. This attribute signifies the extent to which the law-makers and people of Ghana value surface land rights protection and access to property for vulnerable communities.

The aspect of fair and adequate compensation for the mine communities where resettlement is inevitable enjoys great coverage in the mining legislative framework of Ghana. Among others, the principles for the determination of the payable compensation for the disturbance of the surface land rights are clearly spelt out;[1836] the obligations of various stakeholders in a resettlement process and other peculiar aspects of the process such as the issues to be canvassed in the resettlement plan are appreciably clarified.[1837] Lastly, while the legislative framework, i.e. the Minerals and Mining Act and its accompanying regulation on compensation and resettlement are generally not in a poor and hopeless form, they are "not as elaborate as [they] should be on some key elements",[1838] and this will be demonstrated in the next chapter.

Concerning case law, there is not much in the form of scholarly analysis that has previously been conducted on the cases dealing with mining-induced displacements in Ghana. Despite the longstanding provision for the surface land and property rights of mine communities, as well as their protection against displacements by mining companies, the courts in Ghana have not dealt and ventilated the subject in greater scale like the South African courts.[1839] Having surveyed the cases on the matter adjudicated before the Ghanaian courts, is there any indication that the legal framework on/against mining-induced displacement is being complied with to any meaningful measure in practice? Perhaps not, because, insofar as could be established, the courts have in many instances ruled against mining companies,[1840] finding them to be in default of their obligations insofar as displacement, resettlement and compensation is concerned.[1841] Also repugnant is the barring of access to the courts that the mining communities are faced with whenever trying to vindicate their right pertaining to the payment of fair and reasonable compensation for disturbance of their surface land rights.[1842] The Minerals and Mining Act

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1836 Section 74(1) of the Minerals and Mining Act.

1837 Part 6.4.

1838 AB Adam *Conceptualizing household livelihood needs in mining-induced displacement and resettlement: A case study from Ghana* (unpublished PhD thesis, University of Queensland, 2019) 117.

1839 See a comparative analysis in the next chapter.

1840 Where the courts have ruled in favour of mining companies, on this subject, was on procedural basis and not in substance and/or merit. See *Ammisah Anthony* and *Alex Gyan*.

1841 *Nana Kofi*, *CEPIL* and *Bulsa Kakraba*.

1842 Since they are mandatorily required to exhaust the administrative procedure set out in mining law. See the court's decision in *Ammisah Anthony* and *Alex Gyan* cases.

denies an outright access to the courts by an aggrieved community without first having obtained ministerial determination on whatever the grievance holds.[1843] It has been argued that this provision is inconsistent with the letter and spirit of the Constitution which holds that, as ruled in *Ernst Adofo*, "[t]he unimpeded access of individuals to the courts is a fundamental prerequisite to the full enjoyment of fundamental human rights."[1844]

On balance, though, what is striking about the surveyed cases is that in most of them, there has always been a demonstrable effort on the part of the courts to uphold the rights of vulnerable mining communities. For instance, in cases such as *Nana Kofi* and *CEPIL*, the courts have ruled overwhelmingly in favour of the vulnerable communities by ordering fair and reasonable compensation to be paid to them for the suffered disturbance of their surface land rights and, in some instances, demolition of their housing structures. The courts have also come across as firm on maintaining that well-rounded negotiation with affected communities be had as precursor to any intended resettlement. The courts have also held government and its agencies accountable and at times sanctioned appropriate remedies such as injunctions and orders against the government and private mining companies in cases like *CEPIL* and *Esther Osei*. Collectively, these cases indicate that for the most part, courts in Ghana lean more on the side of surface land and property rights protection when dealing with issues that concerns or might result in mining-induced displacement.

[1843] Section 73(3), Minerals and Mining Act.

[1844] *Ernest Adofo* (2006), 173, read with Article 1(2) of the 1992 Constitution. *Kwakye v Attorney-General* [1981] GLR 9; *Mensima v Attorney-General* [1996-97] SCGLR 676; *Labone Weavers Enterprises Ltd v Bank of Ghana* [1977] 2 GLR 156 at 157.

CHAPTER SEVEN

COMPARATIVE ANALYSIS OF SIMILARITIES AND DIFFERENCES

7.1. Introduction

The previous two chapters demonstrated how and to what extent the regulatory framework is comprehensive in addressing mining-induced displacements in the examined jurisdictions, South Africa[1845] and Ghana.[1846] The chapters established the extent to which these frameworks are being complied with in practice and how the courts have determined them.[1847] This chapter provides an analysis of similarities and differences on how the examined jurisdictions answer the key comparative question.[1848]

The comparative exercise reflects on several themes that have equally guided the case law analysis. These themes include the standard and level of engagement that is applicable to the granting of mineral rights where the displacement of the owner or lawful occupiers is likely to result; the basis of these standards as understood and prescribed in law and interpreted by the courts; the statutory obligations of the relevant State bodies in enforcing compliance and the procedures these State authorities must follow; the degree of recognition and legal protection that had been afforded to the customary communities' surface land rights and the deterrence measures to address or minimise the recurring effect of mining-induced displacements.

The main objective of this comparative exercise is to establish in which aspects or respects an examined jurisdiction protects the customary communities, with informal rights to land, against instances of mining-induced displacements. The chapter concludes with a comparative overview on how each jurisdiction protects the mining communities' informal land rights. The chapter canvasses two inter-related points:

i. the thematic similarities and differences between South Africa and Ghana on the consultative nature of their legal framework against mining-induced displacements of communities. The protection of communities informal land rights against mining;

[1845] Chapter five.
[1846] Chapter six.
[1847] Part 5.4 and 6.4.
[1848] See the main research question in chapter one.

ii. the degree of conformity (by each jurisdiction) to the international good practices on the regulation and management of mining-induced displacements; and the relevant recommendations for each jurisdiction.

7.2. Thematic analysis of similarities and differences

It is known that mining-induced displacements are rampant not only in the examined jurisdictions, but worldwide.[1849] It is also known that there are several themes and indicators through which one can tell whether mining-induced displacements is robustly or poorly regulated in any given jurisdiction. These selected themes were explored in chapter two.[1850] It is these themes that guide the discussion of case law concerning mining-induced displacements and how the courts approach them in examined jurisdictions.[1851] As such, the analysis in this part provides a comparison on which of the examined jurisdictions has a better and robust regulation of mining-induced displacements. Further, the analysis establishes in which respects a jurisdiction protects mine communities against displacement than the other examined jurisdiction.

7.2.1. The standard and level of engagement (consultation or consent or both?)

Despite the lack of explicit reference and recognition of the need to facilitate engagement in the context of mining-induced displacements, the legislative frameworks in both examined jurisdictions contain provisions from which this imperative may be inferred, albeit in varying degrees. For instance, while the South African Constitution is explicit in providing redress and protection for the indigenous mine community with unsecure land tenure and another layer of legal protection against evictions and demolitions of their homes,[1852] the Ghanaian Constitution is found wanting in these respects. Under the legislative frameworks of both jurisdictions, compulsory undertaking of consultation with affected and to-be-affected mine communities is a common similarity.[1853] With Ghana, from the Constitution through Minerals and Mining Act to the regulations, the requirement for engagement ends at the level of consultation where a mining company is merely required to first consult and negotiate with the affected community before resorting to eviction or displacement.[1854] It is not readily clear if this consultation

[1849] Chapter two.
[1850] Part 2.5.
[1851] Parts 5.4 and 6.5.
[1852] Sections 25(6) & 26(3), South African Constitution.
[1853] Parts 5.3.2; 5.3.3; 6.4.2 & 6.4.3.
[1854] Court order in *Bulsa Kakraba* (1999).

requirement extends to incorporate consent of those affected. But it does not seem so, at least from the Ghanaian courts judgments in *Bulsa Kakraba* and *Nana Kofi* respectively.[1855] In these two cases, the courts found that in all circumstances, the commencement of mining activities that are likely to result in displacement should be preceded by thorough consultation and negotiation with the mine communities that stand to be affected those activities.[1856]

However, a closer look at the South African context shows that more - in the form of consent - is required than just consultation and negotiation with the affected mine communities.[1857] So both consultation and consent are required, the position that is hotly contested.[1858] On the one hand, the MPRDA, in peremptory terms,[1859] requires that interested and affected parties be consulted about any proposed mining developments on their land that has a potential to get them displaced.[1860] It says nothing about consent. There are also DMRE guidelines and, despite them not binding, they make reference to 'meaningful consultation',[1861] defined as a process where an applicant or holder of a mineral right consult with the landowners, lawful occupiers, interested and affected parties, holders of informal and communal land rights, mine and host communities to achieve five objectives.[1862] These guidelines, too, say nothing about consent requirement. On the other hand, there is an IPILRA which governs the tenure security of people who occupy land under communal or customary land law. The IPILRA provides that no person entitled to certain informal right to and interest in land may be deprived of such rights and interests without first obtaining their consent.[1863] The consent is viewed as a precondition to prospecting or mining operations. Despite controversy around the consent issue, the position

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1855 Part 6.5.2.

1856 This buttresses the relevant provisions of PNDCL 153, namely section 70 (1), (2) and (4) (1).

1857 Part 5.3.2.

1858 The Minister of DMRE, remarking on the *Xolobeni* case, remarked that it is only consultation in terms of the MPRDA that is required for the granting of a mineral right, and not consent in terms of the other legislation i.e. IPILRA. R Campbell "Xolobeni judgment to be appealed" 12 December 2018 *Mining Weekly* at https://www.miningweekly.com/article/xolobeni-judgment-to-be-appealed-2018-12-12 (accessed 11 October 2021).

1859 *Normandien Farms (Pty) Limited v The South African Agency for Promotion of Petroleum Exploration and Exploitation S.O.C Limited* Case No. CCT 195/2019 para 2.1.

1860 Sections 10, 16(4)(b), 22(4)(b), MPRDA. *Aquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd* 2014 ZAGPPHC 218 para 9; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC); L Gumbi "Prospecting and mining rights" (2012) December *Advocate* 47-50; PJ Badenhorst & NJJ Olivier "Host communities and competing applications for prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002" (2011) *De Jure* 126-148.

1861 'Acronyms and Definitions', Resettlement Guidelines.

1862 Moving forward, I will simply refer to these categories of people as "affected mine communities".

1863 Section 2(1), IPILRA.

as it stands, at least as per the judgment in *Baleni*,[1864] is that not only consultation should be held with mine-affected communities, but their consent too must be obtained.

All in all, it seems that the South African law and courts provide a better judicial protection for mine-affected communities in terms of engagement and having a say in every developmental project that may negatively affect them. The law and courts require that both consultation, in terms of MPRDA, and consent, in terms of IPILRA, be fulfilled before the commencement of such development. As for Ghana, the only legal requirement in terms of the Mineral and Mining Act is consultation alone. South Africa provides for better protection than Ghana in this specific aspect of inquiry.

7.2.2. The statutory obligations of the relevant State bodies or authorities

To varying degrees, the courts in the examined jurisdictions have ascertained the roles of and held government and its agencies accountable for failing to fulfil their statutory roles. In Ghana, the court in *CEPIL* found that the Environmental Protection Agency (EPA)[1865] and the Minerals Commission[1866] were both "under a mandatory statutory obligation to monitor and control the activities of the [company] to ensure that their mineral operations … are carried on without breaching their statutory obligations,"[1867] and they failed this obligation. This judgment is significant in two fronts: First, it has clarified the role of the relevant government bodies i.e. EPA and the Commission in relation to mining company-community relations and/or disputes. As for South Africa, the courts have not emphasised the general roles of government administrative bodies like the Ghanaian courts did in *CEPIL*. In South Africa, the obligation that is often emphasised by the courts against the government authorities is that the Minister, or any other DMRE official, is not under just any obligation but a constitutionally entrenched obligation to assist the courts by explaining their administrative decisions whenever joined to the proceedings where such decisions are partially or wholly in dispute. This proposition was emphasised in *Samancor* judgment, presupposing that the DMRE functionaries can be compelled to file papers explaining their decisions where they are joined to the proceedings so as to assist the courts in arriving at an appropriate determination. To this end, the courts in each jurisdiction have defined and clarified the State administrative, regulatory and monitoring obligations within the unique context of each jurisdiction.

1864 Part 5.4.

1865 EPA is a statutory body established in terms of the *Environmental Protection Act* 490 of 1994.

1866 Section 2, Minerals Commission Act 450 of 1993.

1867 *CEPIL* (2005) pg 12, ruling c.

7.2.3. The recognition and protection of surface land rights

In both examined jurisdictions, it appears that there is some degree of legal protection of mine communities against displacements by mining companies. The legislative framework and the courts appear to recognise the communities' surface land rights and avails redress mechanisms such as fair and adequate compensation where there has been interference with those rights. In South Africa, the Constitutional Court has adopted a neutral stance on the balance between mining rights and occupier's or owner's surface land rights. For instance, in *Maledu*, the Constitutional Court held that a mineral right holder is under an obligation to exercise its mineral rights *civiliter modo* i.e. in a reasonable manner possible so as to cause the least possible inconvenience to the surface land rights of the owner or lawful occupier.[1868] The court referred to the common law requirement that both the landowner or lawful occupier and the mineral right holder should exercise their respective rights alongside each other to the extent reasonably possible under the circumstances.[1869] In this way, the judgment presupposes the co-existence of the right of the landowner or lawful occupier on the surface land and that of the mining right holder, as provided for in terms of section 53(2) of the MPRDA.[1870] Where there is material interference with the surface land rights, a fair and adequate compensation must be paid to those affected.

As for Ghana, the courts' jurisprudence on this aspect seems to be leaning more towards the side of protecting the landowner's or lawful occupier's surface land rights than those of a mineral right holder. In this regard, namely section 70 (1), (2) and (4) (1) of the Minerals and Mining Act provides that "[t]he holder of a mineral right shall exercise the rights of the holder under this Act subject to the prescribed limitations relating to a surface right." It is clear from the wording of this provision that the surface land rights enjoy some degree of prominence and superiority over the mineral rights. The courts have affirmed this position in several cases such as *Nana Kofi* and *Ammisah Anthony* where the High Court ordered a mining company to pay an appropriate compensation package to a community that had suffered interference with their surface land rights in the form of displacements and demolitions of their homes. The court ordered compensation basing its reasoning on Article 20(2) of the Ghanaian Constitution.[1871] The court ordered in strict terms that the plaintiffs should be restored to the position they would

[1868] *Maledu* (2018) para 58.
[1869] *Maledu* (2018) para 58, citing *Hudson v Mann* 1950 (4) SA 485 (T) at 488B-H.
[1870] *Maledu* (2018) para 58.
[1871] *Nana Kofi* (2007) pg 14.

have been if the disturbance of their surface land rights had not occurred as a result of the actions of a mining company.[1872]

To this end, the Ghanaian courts and laws are more robust and clearer in protecting the surface land rights of the mine-affected communities. These rights enjoy a great deal of dominance over the mineral rights in Ghana. Contrastingly, the South African courts appear to be treading a bit careful in balancing these competing rights by their inclination to follow a *civiliter modo* i.e. a less invasive approach, that the two competing rights must find a way to co-exist. However, the feasibility of this co-existence has proven to be naturally difficult in practice and this is well-evident from the *Maledu*, *Baleni* and *Glencore* cases.[1873] A more decisive stance must be adopted in law and by courts to deal with this stalemate. To this end, one may conclude that the recognition and legal protection of the mine-affected communities' surface land rights is better and clear in Ghana than in South Africa.

7.2.4. The gender equality imperative

In both examined jurisdictions, there are documented manifestations of gender inequality and women marginalisation as an effect of mining-induced displacements.[1874] Oftentimes, women are found to be more risk-averse to this phenomenon than the male counterparts.[1875] This exists despite the constitutionalisation of the right to gender equality in both jurisdictions.[1876] To a varying degree, both jurisdictions have some legislative measures in place to foster gender-equitable outcomes in land acquisition and holding, economic empowerment, livelihoods restoration opportunities and compensation eligibility. In Ghana, there is a provision that makes it compulsory for women to be part of an ad-hoc committee to negotiate the amount of payable compensation and who is eligible for such compensation.[1877] Not only that, but women are also negotiators of the planning, implementation and monitoring of the resettlement plan through a regulatory requirement that one of the nominees among the displaced community to be part of the Resettlement Monitoring Committee (RMC) should be a woman.[1878] While this may be lauded as providing a much-needed platform for women to voice out their plight, the lived

[1872] *Nana Kofi* (2007) pg 19.
[1873] Part 5.4.
[1874] Parts 2.4.3; 2.5.4; 5.4.4, 6.3.2 & 6.5.4.
[1875] Parts 2.5.4.
[1876] Parts 5.3.1 & 6.4.1.
[1877] Regulation 2(3), ComRes Regulations.
[1878] Regulations 12(3), ComRes Regulations.

experiences of the majority of rural women in Ghana seem to be suggesting that these are simply paper-based quota entitlements that do not translate to reality.[1879]

In South Africa, the structure equivalent to the Ghanaian RMC is the Resettlement Monitoring and Evaluation Committee (RMEC).[1880] The RMEC's role is that of oversight in nature as it monitors and facilitates the resettlement agreement, resettlement plan and resettlement action plan.[1881] Similar to Ghana, a provision is made for a fair compensation package for the losses of property and livelihoods that is not biased and unfairly discriminatory against women.[1882] Another similarity is that women are entitled to be part of the RMEC that deliberates on key issues around resettlement support and compensation packages.[1883] However, the most striking difference is that while these entitlements for women are enumerated in an enforceable instrument, 'hard law' in the form of regulations in Ghana, the same women entitlements are relegated into mere guidelines that constitute 'soft law' that is non-binding in South Africa.

Lastly, the notable concern is that the enforcement of these gender equity provisions and/or entitlements is less adjudicated in courts and, as far as could be established, none of the examined jurisdictions has had these provisions and entitlements vindicated and adjudicated in courts as a primary issue for determination, let alone as an incidental issue. For South Africa, the non-binding nature of the guidelines providing for these entitlements might be the reason why there is less court involvement in women marginalisation concerns in the context of mining-induced displacements. As for Ghana, however, the factors accounting for this lack of enforcement of binding regulations through courts is not readily ascertainable.

7.2.5. The deterrence measures against mining-induced displacements

In both examined jurisdictions, there is a strong indication of the weaknesses in the deterrence effect or measures against the acts of mining-induced displacement. In most instances, the courts would be reluctant to order injunctions that are more deterrent, such as the perpetual injunction against the mining operations where there is strong evidence of blatant disregard for human rights and interests of the local populations. One point of reference for this is *Nana Kofi* case where the mine-affected community sought an order of perpetual injunction against the defendant mining company due to the socio-economic hardship the mining operations had

[1879] Part 6.3.2.
[1880] Guidelines 14.5, Resettlement Guidelines.
[1881] Guidelines 8.1(8.1.10), (8.1.11) & (8.1.12), Resettlement Guidelines.
[1882] Guideline 8.1(8.1.4), Resettlement Guidelines.
[1883] Guideline 5.1(b), Resettlement Guidelines.

caused them. The court refused to order such injunction, reasoning, in principle and quite correct, that the defendant mining company is permitted by law to operate in the concession and would therefore be unjustifiable if not unlawful to make an order halting their lawful activities.[1884] In turn, the court awarded costs against the defendant mining company, the costs which were arguably not calculated on the basis of the gains that the default party may derive from the violations the community sought to get rectified and remedied. In this way, the costs order awards may, therefore, be less than what would lead to deterrence. In the same line, when government infringes rights, for instance, it may not view the benefits of such infringement in monetary terms.

In South Africa, although the courts often find it more apposite to order costs against the defendant mining companies, they sometimes take the companies to task in complying with the sector laws by crafting more deterrent orders such as, although not expressed as such, perpetual injunction orders. For instance, in the *Doe Run* case, the High Court declared invalid the awarded prospecting right and set aside the decision of the DMRE to have awarded such right without due regard to the relevant statutory obligations on both itself as a regulating authority and the mineral applicants.[1885]

7.2.6. General observation

As it turns out, the regulation of mining-induced displacements is generally better in South Africa (not with all aspects though) when compared to Ghana. Both consultation and consent are the prerequisites for the mining operations to commence in South Africa. This is a noticeable strong safeguard that ensures protection for mine-affected communities from painful acts of displacement. In Ghana, the only prerequisite pertaining to engagement for mining to commence is consultation, and this has proven to be a weak form of protection for mine communities at the wake of displacements. The court in both jurisdictions have, and will continue to do so whenever approached, tried to clarify scope and content of statutory obligations that vests with the State authorities and administrative bodies in relation to mining-induced displacements. The South African courts are somewhat apologetic to advance and reinforce the mine communities surface land rights. They do this by reason of *civiliter modo* principle[1886] which demands that the competing rights of the mine communities and the mineral

[1884] *Nana Kofi* (2007) pg 20.

[1885] *Doe Run* (2008) para 50, orders 1, 4 & 5.

[1886] In the context of this study, this would mean that the mineral right holder will have to exercise the mineral right in a manner that is reasonable and civil so as to cause minimum of inconvenience or harm to the owner of

right holder be forced to co-existent under any given circumstance. Contrastingly, the Ghanaian courts seem to have developed a consistent unapologetic approach favouring the mine-affected communities' surface land rights over the mineral rights. Further, the problem of women marginalisation is a reality in both examined jurisdictions. Ghana has binding provisions which, upon effective enforcement through the courts, this problem may be addressed or at least reduced to minimal proportions. As for South Africa, the position does not inspire confidence, gender equality imperative has been relegated to non-binding guidelines and thus one cannot approach the court to enforce a non-binding instrument. Lastly, both examined jurisdictions are faced with weak deterrence against mining-induced displacements.

Against the international framework of norms and standards on displacement expounded in chapter two, the next section turns to consider whether the domestic regulatory frameworks in the examined jurisdictions compare favourably or unfavourably with those international norms and standards.

7.3. The legal framework's conformity to international good practices on selected themes

Chapter four of this study demonstrated that there are several international and regional 'soft' and 'hard' law instruments that provide for good norms and standards of regulating the mining-induced displacements. As such, it is the primary purpose of this section to establish how these international law norms and standards compare to the current regulatory framework on the matter in the examined jurisdictions. The aim is to identify which aspects or themes the examined jurisdiction lag behind in terms of conformity with international law best practices.

7.3.1. The FPIC requirement

A number of international instruments recommend that the states integrate the concept of free, prior and informed consent (FPIC) in their domestic frameworks as a precursory requirement to granting of mineral rights that tend to affect the communities if exercised. The FPIC recommendation first appears in Article 6 of the ITP Convention.[1887] The instrument recommends that indigenous communities be consulted whenever an administrative, legislative or developmental action which may affect their protected interests is considered.[1888] In doing so, appropriate procedures through communities' representative institutions should be

surface land. G Muller "*Civiliter* exercise of a statutory servitude: Reflections on *Link Africa* and *Telkom*" (2021) 11(1) *Constitutional Court Review* 152.

[1887] Part 4.3.1.

[1888] Article 6(1)(a), ITP Convention.

observed. For that consultation to be meaningful, appropriate measures should be adopted to ensure that the indigenous people participate freely, and without coercion, to at least the same extent as other stakeholders involved in the process.[1889] The UNDRIP has a closely similar recommendation, that the State authorities should obtain "free, prior and informed consent" from indigenous communities about any proposed development projects that could potentially affect their landholding and livelihoods.[1890] The same obligation, it is has been argued,[1891] should and must extend to private entities including mining companies that are responsible for and bringing the proposed developments bearing negative impacts on the communal land rights of communities.

At a regional level, it was also discovered that there are some comprehensive instruments on the protection of mine-affected communities against displacement.[1892] These are the Kampala Convention; the IDP Protocol of the Great Lakes Pact and the ECOWAS Mining Directive.[1893] These two regional instruments are heavily influenced by the UN Guiding Principles[1894] and they also provide for an FPIC framework as a safeguard for the mine communities against displacements. It is therefore recommended that both South Africa and Ghana should fully recognise and integrate the FPIC requirement in their domestic regulatory frameworks. For South Africa in particular, it is strongly recommended that the legislation providing for the consent requirement i.e. IPILRA,[1895] although not comprehensive if compared to the above-mentioned international instruments, must be made elevated from being an interim measure to being a final statute. As for Ghana, the study found that there is no elaborate provision of the consent requirement (let alone FPIC) anywhere in the laws of Ghana.[1896] It is therefore recommended that Ghana should consider taking immediate law reform steps to recognise and integrate the FPIC principle in its domestic mining law to empower the mine-affected communities. In doing so, both countries may need to assemble an impartial and independent team of experts to carefully consider the implications these instruments in their unique contexts so as to avoid the unsuitable and ineffective transplantation of regulatory systems.

1889 Article 6(1)(b), ITP Convention.

1890 Articles 10, 19, 29 & 32, UNDRIP.

1891 Chapter four above under the discussion on UNDRIP.

1892 Part 4.2.2.

1893 Part 4.2.2.

1894 Part 4.2.1.3.

1895 Section 2, IPILRA.

1896 CEPIL & WACAM *The right to decide: Free prior informed consent in Ghana* (2015) 5 available online at https://s3.amazonaws.com/oxfam-us/www/static/media/files/FPIC_in_Ghana_FINAL.pdf (accessed 23 April 2022).

7.3.2. The recognition and protection of surface land rights

The UN Guiding Principles recommend a less invasive approach in an attempt to balance the competing rights between that of the land surface owner or occupier and the mineral right holder. The instrument provides that "[e]very human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence."[1897] It further demands that resettlement of people be considered as a last resort and to an extent possible be avoided altogether.[1898] Where there are no alternatives, then measures must be taken to minimise the severity of the resulting effects.[1899] Similarly, the Kampala Convention recommends adequate protection for surface land rights in the context of mining activities.[1900] Article 4(4) of the Convention provides that "[a]ll persons have a right to be protected against arbitrary displacement." The Kampala Convention is significantly influenced by that of the Guiding Principles.[1901] In both countries, the provision of compensation for the interference with the enjoyment of surface land rights by the owner or lawful occupier is available in the constitutions.[1902] This shows the recognition of surface land rights. For South Africa, the courts are seemingly taking a neutral position that both rights should find equal expression. For instance, in *Maledu*,[1903] the Constitutional Court found that the mining company is under an obligation to exercise its mineral rights *civiliter modo* i.e. in a reasonable manner so as to cause the least possible inconvenience to the surface land rights of the owner or lawful occupier.[1904] This proposition implies that both the landowner or lawful occupier and the mineral right holder should exercise their respective rights alongside each other to the extent reasonably possible.[1905] Thus, instead of one right being considered in superiority to the other, they should co-exist to an extent possible.[1906] However, the Land Claims court has ruled in favour of the landowner and occupiers rights on surface land over the economic interests of the mining

[1897] Principle 6(1), Guiding Principles.

[1898] Principle 7(1), Guiding Principles.

[1899] Principles 7(1), Guiding Principles.

[1900] M Maru "The Kampala Convention and its contribution in filling the protection gap in international law" (2011) 1(1) *Journal of Internal Displacement* 91.

[1901] In particular, Principle 6. See also M Stavropoulou "The Kampala Convention and protection from arbitrary displacement" (2010) 36 *Forced Migration Review* 62.

[1902] Parts 5.3.1 & 6.4.1 respectively.

[1903] *Maledu* (2018) para 19.

[1904] *Maledu* (2018) para 58.

[1905] *Maledu* (2018) para 58, where the court drew precedence from *Hudson v Mann* 1950 (4) SA 485 (T) at 488B-H.

[1906] Section 53(2), MPRDA. *Maledu* (2018) para 58.

company in the *Glencore* case,[1907] thus showing some resonance with Principle 7(1) of the UN Guiding Principles. In this case, the court dismissed Glencore's application seeking urgent eviction of the Goedgevonden community[1908] reasoning that Glencore had an alternative remedy apart from eviction and opted not to exhaust it.[1909] This alternative remedy entailed Glencore applying for a deviation of its license conditions from the DMRE, and it could still do so even at the time of the hearing.[1910] As it stands now, the jurisprudence on the balancing exercise between landowner or occupiers' rights on surface land and those of the mineral right holder is not consistent in South Africa.

As for Ghana, the position is somewhat settled, at least as per the courts' ruling on the analysed case law, that the surface land rights of the landowner or occupier enjoy some protection compared to those of the mineral right holder. In *Nana Kofi* case,[1911] the court affirmed this position and ruled that the actions of the defendant mining company to forcefully remove the community from their customary land were "wrongful, unlawful, unconstitutional and without justification."[1912] The court further ruled that the defendant's actions were tantamount to the compulsory acquisition of the plaintiffs' properties without the payment of prompt, fair and adequate compensation.[1913] Collectively, cases such as *CEPIL* and *Esther Osei* demonstrate that to some considerable extent, the courts in Ghana tend to lean more on the side of surface land and property rights protection whenever approached to determine the conflict between these rights and those of the mineral right holders. The Ghanaian position seem a bit more consistent as compared to South Africa.

7.3.3. The available remedies for mining-induced displacements

The UN Guiding Principles makes a provision for the payment of a fair and adequate compensation to those that are being resettled for reasons of making way for developments such as mining.[1914] Similarly, the Displacement Principles provide remedies for displacements and evictions, including compensation and rehabilitation.[1915] In respect of compensation, the

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1907 *Glencore Operations South Africa (Pty) Ltd v Mnguni and Others* (LCC105/2017) [2018] ZALCC 2 (23 January 2018). The facts of this case were summarised earlier in part 5.4.2.

1908 *Glencore* (2018) para 35, order 1.

1909 *Glencore* (2018) paras 26 & 27.

1910 *Glencore* (2018) paras 26 & 27.

1911 The facts of this case were summarised earlier in part 6.5.1.

1912 *Nana Kofi* (2007) pg 14.

1913 Article 20(2), Constitution, 1992. *Nana Kofi* (2007) pg 14.

1914 Principle 7(1)(b), Guiding Principles

1915 Part VI, Displacement Principles.

government or a private entity seeking displacement of people is under an obligation to provide and ensure that fair and just compensation for any suffered losses of personal, real or other property and goods, including rights or interests in property.[1916] This compensation is payable to everyone affected "irrespective of whether they hold title to their property" or not and regardless of the nature of the thing owned i.e. formal or informal, real or corporeal.[1917] The other remedy is that of resettlement and rehabilitation. This remedy is relevant in instances where certain considerations such as the promotion of general welfare, or where the safety, health or enjoyment of human rights demands necessitate the permanent resettlement of persons or communities.[1918] However, such resettlement is still required to be carried out in a just and equitable manner and in full accordance with international human rights law norms and standards.[1919] At a regional level, the Kampala Convention, which has few commonalities with the Guiding Principles, is available. This instrument requires its member states to ensure that there is "individual responsibility for acts of arbitrary displacement …, [and] the accountability of non-State actors concerned, including multinational [mining] companies and private military or security companies, for acts of arbitrary displacement …"[1920] The instrument demands that were possible, displacement of people from their lands be avoided.[1921] Where displacement is unavoidable given the overriding public interests, the affected persons and communities must be fairly and adequately compensated for their losses.[1922]

Both examined jurisdictions already follow the recommendation that fair and adequate compensation be payable to the persons and communities affected by displacement. This has been constitutionalised in both jurisdictions.[1923] Considering that none of the examined jurisdictions has ratified this Kampala Convention, it is recommended that the ratification and integration of this instrument in domestic frameworks may presents as an opportunity for law reform and strengthening of existing local provisions. The instrument provides a three-phase approach in the regulation of displacements, namely the protection from displacement or eviction; the protection and assistance during the course of displacement; and the protection and assistance after the displacement has occurred. Both South Africa and Ghana need this

[1916] Para 60, Displacement Principles.
[1917] Para 61, Displacement Principles.
[1918] Para 68, Displacement Principles.
[1919] Part V, Displacement Principles.
[1920] Article 3(1)(g) to (i), Kampala Convention.
[1921] Article 3(1)(a), Kampala Convention & Principle 5, Guiding Principles.
[1922] Article 12(1) & (2), Kampala Convention.
[1923] Parts 5.3.1 & 6.4.1.

kind of comprehensive framework on dealing with displacements. For South Africa in particular, it is hoped that the courts may start to develop a consistent jurisdiction on how to determine a fair and adequate amount of compensation. The same applies to Ghana where, for instance, the court in *Nana Kofi* had some difficulty in determining and quantifying the loss that the plaintiffs had suffered since their homes were demolished before their valuation could happen. The court thus held that the plaintiffs should be restored to their former position as far as money can do so.[1924] To this end, it is recommended that both jurisdictions should introduce an explicit compensation calculation formula or criteria for determining a fair and just compensation generally and, if needs be, in the context of mining-induced displacements in particular.[1925]

7.3.4. Gender equality

The Displacement Principles have seminal provisions on gender equality imperative. The instrument prohibits gender discrimination in respect of compensation eligibility and provides that, in a case of a married couple, spouses must be co-beneficiaries of all compensation packages, while single women and widows are entitled to their own compensation.[1926] The instrument recommends further that adequate consultation with and participation of the affected vulnerable groups and individuals such as women and people living with disabilities. The similar provisions and guarantees are also found in some of the regional instruments such as the Kampala Convention and the Mining Directive.[1927] In both examined jurisdictions, it was found that the right to equality and protection against discrimination of any sort in any context is constitutionalised.[1928] In the context of this study, the right is further echoed in regulations and guidelines that govern mining-induced displacements in both countries.[1929] Despite having these in place, the study found that the equality right, mainly on the basis of

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1924 *Nana Kofi* (2007) pg 19.

1925 For South Africa generally, the calculation of fair and just compensation has been and remains to be a topical issue of great interest and political controversy. The significant amount of research work by Elmien du Plessis grapples with this issue and she has written a doctoral thesis on this issue, among others. WJE du Plessis *Compensation for Expropriation under the Constitution* (unpublished LLD thesis, Stellenbosch University, 2009).

1926 Paras 62 & 63, Displacement Principles.

1927 See the discussion on regional regulatory framework in chapter four.

1928 Parts 5.3.1 and 6.4.1. For South Africa, see A Smith "Constitutionalising equality: The South African Experience" (2010) 9(4) *International Journal of Discrimination and the Law* 201 and for Ghana; DT Ayentimi et al "Gender equity and inclusion in Ghana: Good intentions, uneven progress" (2020) 30(1) *Labour & Industry: A Journal of the Social & Economic Relations of Work* 66-84.

1929 Parts 5.3.3 and 6.4.3.

gender and marital status, oftentimes gets violated during mining-induced displacements in both examined countries.[1930] However, the adjudication and enforcement of the equality rights in the context of mining-induced displacements through the courts is seemingly poor (if not absent) in both jurisdictions. It is therefore recommended that civil society organisations and public interest litigation entities (such as CALS and MACUA in South Africa; CEPIL and WACAU in Ghana) should start to consider equality issue quite strictly and view it from a serious light when advocating for the rights and interests of the displaced communities. Once this effort materialises, there is hope that the rights of vulnerable groups especially women will be fairly recognised and respected.

7.4. Conclusion

On a comparative basis, this chapter sought to establish in which fronts and aspects an examined jurisdiction protects (than the other) the mine-affected communities with informal rights to land against acts of mining-induced displacements.[1931] The chapter also sought to find out the degree of conformity by each jurisdiction to the international good practices on the regulation and management of mining-induced displacements.[1932] At a broader level, the chapter found that the examined jurisdictions ensure different degrees of legal protection for mine communities against displacements and their far-reaching negative effects. However, a room for policy improvement exists in both jurisdictions. In relation to the required standard and level of engagement with mine-affected communities in the process of granting a mineral right, it appears that the examined jurisdictions prescribe different requirements.[1933] South Africa is arguably offering more legal protection for the mine-affected communities by ensuring that their right to have a say in every developmental project that affect them negatively is strongly provided for in mandatory terms.[1934] The South African law requires that both requirements to consult, in terms of MPRDA, and to obtain consent, in terms of IPILRA, be fulfilled before the granting of any mineral or exploration right,[1935] let alone the commencement of such development. As for Ghana, there is generally very little legal protection for the mine-affected communities' right to have a say. The position in Ghanaian

[1930] Chapters five and six respectively.
[1931] Part 7.2.
[1932] Part 7.3.
[1933] Part 7.2.1.
[1934] Section 2, IPILRA.
[1935] *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* Case No.: 3491/2021 paras 90-94 (hereafter *Wild Coast*).

law is that only consultation (and not consent necessarily)[1936] is required in the process of obtaining a mineral right.

Insofar as statutory obligations of the relevant State bodies or authorities is concerned, the courts in both jurisdiction have defined and clarified the State administrative, regulatory and monitoring obligations within the unique context of each jurisdiction. In South Africa, for instance, the courts are often called upon to scrutinise the actions and decisions of the DMRE and to take it into task where there is a backslide on its regulatory, oversight and administrative obligations.[1937] Further, the courts have ruled in several cases such as *Samancor* that the DMRE is under a constitutional obligation to assist the courts by explaining their administrative decisions whenever joined to the proceedings where such decisions are partially or wholly in dispute.[1938] This proposition means that a DMRE functionary can even be compelled to file papers explaining their decisions where they are joined to the proceedings so as to assist the courts in arriving at an appropriate determination. Ghanaian courts have had a similar opportunity in the case of *CEPIL* found that the Environmental Protection Agency (EPA) and the Minerals Commission were both "under a mandatory statutory obligation to monitor and control the activities of the [company] to ensure that their mineral operations … are carried on without breaching their statutory obligations,"[1939] and they had failed this obligation.

In terms of the gender imperative, both examined jurisdictions have seminal provisions on the promotion of gender equity and protection against discrimination on the basis of gender. The right is constitutionalised in both countries.[1940] For instance, the legislative frameworks in both jurisdictions provide that women affected by mining-induced displacements should be entitled to fair and adequate compensation regardless of their marital status, among others.[1941] However, the striking difference is that while these entitlements for women are enumerated in an enforceable instrument, 'hard law' in the form of regulations in Ghana, they are relegated into mere guidelines that constitute a non-binding 'soft law' in South Africa. Another notable concern is that the enforcement of these gender equity provisions is less adjudicated in courts

1936 There is even no provision in the Mineral and Mining Act or its regulations from which consent requirement can be implied.

1937 For example, in the recent Shell seismic survey judgment, the Eastern Cape Division of the High Court set aside the DMRE's decision for having granted a mineral right to a petroleum exploration company when the company did not conduct consultation with the affected communities. *Wild Coast* (2022) case.

1938 Part 7.2.2.

1939 *CEPIL* (2005) pg 12, ruling c.

1940 Part 7.2.4.

1941 Part 7.2.4.

and, as far as could be established, none of the examined jurisdictions has had these provisions and entitlements vindicated and adjudicated in courts as a primary issue for determination, let alone as an incidental issue.[1942] Lastly, both examined jurisdictions are faced with weak deterrence measures against mining-induced displacement given the recurring effect of this problem in both jurisdictions.

With regard to the state of conformity by examined jurisdictions to the international framework of norms and standards on displacement,[1943] there is varying degrees to which the examined jurisdictions conform to the international best practice standards. The chapter found that in some aspects, a jurisdiction would compare favourably with the international standards and compare unfavourable when it comes to other aspects. For instance, it was found that while both South Africa and Ghana should fully recognise and integrate the FPIC requirement in their domestic regulatory frameworks, South Africa has already recorded some progress in that regard as it already has a consent requirement in terms of IPILRA.[1944] A similar observation on varying degrees of conformity was also observed in respect of the recognition of surface land right; the available remedies for the mining-induced displacement and the gender equality imperative (where there is some sense of commonality between examined jurisdictions).

All in all, South Africa seem to be offering a better legal protection to the mine-affected communities against the related displacements when compared to Ghana. However, there are some aspects where South African framework needs to improve as indicated earlier.[1945] Both jurisdictions should also consider integrating the international best practice standards (as recommended earlier) in their respective domestic legal frameworks. Among others, both jurisdictions should consider the following recommendations more broadly: introducing and recognising the FPIC concept to give the affected communities more power to have a say in the determination of developments that affect them; fully recognise the surface land rights of the owner and lawful occupiers; craft the deterrence measures against displacements; avail and clarify the remedies for the mine-affected communities and individuals; encourage the civil society organisations and public interest litigation groups to consider advancing women rights in the context of mining-induced displacements through litigation and/or advocacy; compel the mining companies to put in place the preventive measures and compliance with those measures be fully enforced; introduce the communities' right to return to their initial place of residence

[1942] Part 7.2.4.
[1943] Chapter two.
[1944] Section 2, part 7.3.1.
[1945] Chapter five and parts 7.2 & 7.4.

where there is non-implementation of the mineral right or where the mining land has been fully rehabilitated after the mine cycle has ended.

PART E: SUMMARY, CONCLUSION AND RECOMMENDATIONS

CHAPTER EIGHT
SUMMARY, CONCLUSION AND RECOMMENDATIONS

8.1. Introduction

The purpose of this final chapter is to provide a summary of analysis undertaken in the previous chapters and to reflect on the key findings of the study. The recommendations on how mining-induced displacement phenomenon can be regulated better and appropriately in South Africa and Ghana have already been proffered in the preceding chapter.[1946] The present chapter concludes the study with remarks on the future implications and challenges surrounding the regulation of mining-induced displacements.

8.2. Ground covered (summary of analysis)

This study comparatively examined the regulation of mining-induced displacements in South Africa and Ghana, two among the most mineral resource rich countries in the African continent.[1947] The mining-induced displacement refers to a phenomenon where individuals and local communities are displaced from their places of abode mainly by private multinational mining companies with a view to make way for mining developments and expansions. As a general observation, especially in South Africa, most communities are owning and occupying communal lands that have great mineral deposits underneath, hence those communities tend to be the targets of bulldozing and intimidation by the mining companies.[1948] The investigation carried out in this study sought to determine the extent to which the mine communities in South Africa and Ghana are given an opportunity - let alone a right - to have a say on the mining developments that occur in their communal lands, especially when these developments result in them being displaced.

The inquiry also considered how and to what extent the meaningful engagement concept, as an adjudicative strategy of enforcing rights by the courts, could result in an efficient management of the problem and the regulatory framework that offers sufficient protection to the mine-affected communities. As such, this study is an attempt at finding a potential nexus between

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1946 Part 7.3.

1947 AD Awolusi, J Mbonigaba & CK Tipoy "Mineral resources endowment and economic growth in Southern African countries" (2018) 4(1) *International Journal of Diplomacy and Economy* 59-79 & The World Bank *Digging beneath the surface: An exploration of the net benefits of mining in Southern Africa* (2019) available at https://openknowledge.worldbank.org/bitstream/handle/10986/32107/Digging-Beneath-the-Surface-An-Exploration-of-the-Net-Benefits-of-Mining-in-Southern-Africa.pdf?sequence=1 (accessed 10 August 2022).

1948 Part 5.4.

meaningful engagement and mining-induced displacement within the broader context of mining law in South Africa and Ghana. South African courts have developed a rich jurisprudence on meaningful engagement in the context of evictions and housing rights.[1949] The study tapped into this jurisprudence as a frame of reference to demonstrate the manner in which similar cases of evictions and displacements in the mining context could be developed through this remedy in both jurisdictions. Based on this, the study advances the proposition that one way of looking at the problem of mining-induced displacement is by considering how the application of meaningful engagement concept may be extrapolated into mining law for the specific purpose of addressing this unabated problem. Beyond the fact that mining-induced displacements are rife in both South Africa and Ghana, the study reveals that little scholarship exists on how the law could be developed further to offer effective response to the problem and how the courts could tap into new strategies of adjudicating cases emanating from this problem, looking particularly at the meaningful engagement concept. It is unclear how the courts have advanced the mine communities' right not to be displaced for whatever purpose,[1950] how courts have protected the mine-affected communities through this right, how the courts have taken both the State and private entities to task in protecting, respecting and fulfilling this right. As far as could be established, part of the reason why such knowledge is lacking can be attributed to a lack of research and scholarship around these issues.

Against this brief background, the following overarching research question guided the inquiry and train of thought in this study: *How robust and consultative is the regulatory framework in addressing mining-induced displacements in South Africa and Ghana, and to what extent are these frameworks complied with in practice?* Individual chapters of the study contributed bits in answering this research question. A brief version of the analysis carried out in each chapter is presented in the following paragraphs.

8.2.1. A descriptive theory of and around mining-induced displacement

Chapter two of this study sought to provide a theoretical overview on, and perhaps the state of scholarly knowledge about, mining-induced displacement phenomenon. With this exercise, the aim was to ascertain the state of research around mining-induced displacements to gain a better understanding of sector terminologies, dynamics and other imperatives that may be instructive to the conceptualisation of the phenomenon in this study. In particular, the chapter sought to

[1949] Chapter three.

[1950] Parts 4.2 & 4.3.

answer the question: *what does the mining-induced displacement generally entail; what it does not necessarily entail; and to what extent does it affect the often vulnerable mine communities?*

At the outset, the chapter found that mining-induced displacements is a phenomenon that has existed over the years not only in the examined jurisdictions, but across the world.[1951] The chapter also discovered that for South Africa, the history of mining-induced displacements stretch over a period of more than a century,[1952] with its earliest manifestations being traceable to as far back as the first half of the 20th century with the booming of the country's mineral-driven industrialisation.[1953] This industrialisation culminated in many acts of forced relocations targeting black rural communities from their communal lands to make way for developments such as mining.[1954] The chapter argued that these occurrences were reminiscent and further perpetuations of forced removals of the black majority from their communal lands by the apartheid regime.[1955] As for Ghana, the chapter found that literature on the history of mining-induced displacements in the country is extremely minimal.[1956] However, in some limited literature, it is acknowledged that mining in Ghana has had negative impacts including the destruction of livelihoods and most disconcertingly, the displacement of communities for mining projects.[1957]

The chapter then turned to consider the definitive meaning and nuances of displacement at a broader spectrum and other related concepts. Displacement is characterised by three elements, namely the use of force i.e. against the free will of the displacees; the loss of land and places of abode and; as a result, the unsecured tenancy and occupation by displaced persons.[1958] Essentially, there can be no displacement if people had decided to move and relocate voluntarily by themselves.[1959] It was also found that with displacement, there is no room for the critical role of free, prior and informed consent and/or consensus between those that stand to be displaced or transferred and the entity seeking their displacement or transfer, be it private

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1951 Part 2.2.2.

1952 Chapters five and six.

1953 JA Muntingh *Community perceptions of mining: The rural South African experience* (unpublished MBA mini-thesis, North-West University, 2011) 28.

1954 Part 2.2.

1955 S Rugege "Land reform in South Africa: An overview" (2004) 32(2) *International Journal of Legal Information* 283-312 & G Mathiba "Corruption in land administration and governance: A hurdle to transitional justice in post-apartheid South Africa" (2021) 42(3) *Obiter* 561-579.

1956 Part 2.2.1.2.

1957 J Taabazuing et al "Mining, conflicts and livelihood struggles in a dysfunctional policy environment: The case of Wassa West District, Ghana" (2012) 31(1) *African Geographical Review* 33-49.

1958 Part 2.3.1.

1959 M Morel *The Right Not to be Displaced in International Law* (2014) 17.

or the State.[1960] Thus, displacement is a forceful, arbitrary and perhaps aggressive act of relocating people. The chapter also argued that while resettlement is often treated as being synonymous to displacement, the two have different connotations. Resettlement was found to be a process that is properly planned, monitored and occurring only with the consent of those affected,[1961] as opposed to the abrupt connotation associated with displacement.[1962] Thus, resettlement is a voluntary, organised, pre-planned and monitored process that is often followed by the restoration of livelihoods.[1963]

There are diverse socio-economic impacts of mining-induced displacements and the different forms through which they negatively affect the displaced persons.[1964] A survey of literature reveals that displacements pose enormous risks including livelihood instability, loss of access to basic resources for their normal survival.[1965] Displacements also have an effect of causing them "the trauma of the forced separation from one's homeland and the consequent dislocation of one's identity and traditions, entailing the destruction of historical and emotional links to the native earth, ancestral landscapes, cultural heritage, churches and cemeteries."[1966] The chapter discovered further that the most striking effect of displacement is in affecting those who are already impoverished and disadvantaged, including women, indigenous groups and people with tenure insecurity.[1967] It is disruptive, painful and always resulting in a high risks of destitution for those affected.[1968] Its effects include homelessness;[1969] landlessness;[1970] and

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1960 Part 2.3.2.

1961 R Chambers *Settlement Schemes in Tropical Africa: A Study of Organizations and Development* (1969) & B Terminski *Mining-Induced Displacement and Resettlement: Social Problem and Human Rights Issue - A Global Perspective* (2013) 14.

1962 Part 2.3.1.

1963 H Mostert & G Mathiba "Mine community displacement and resettlement in South Africa" in N Graham, M Davies & L Godden (eds) *The Routledge Handbook of Property, Law and Society* 1st ed (2022) 63 & 64.

1964 Parts 1.2; 1.3 & 1.4.

1965 SA Wilson "Mining-induced displacement and resettlement: The case of rutile mining communities in Sierra Leone" (2019) 18(2) *Journal of Sustainable Mining* 67; D Kemp, JR Owen & N Collins "Global perspectives on the state of resettlement practice in mining" (2017) 35(1) *Impact Assessment and Project Appraisal* 22 & JR Owen & D Kemp "Mining-induced displacement and resettlement: A critical appraisal" (2015) 87(1) *Journal of Cleaner Production* 478.

1966 A de Zayas "Forced population transfer" Max Planck Encyclopedia of Public International Law, online (2009) available at www.mpepil.com/ViewPdf/epil/entries/law-9780199231690-e802.pdf?stylesheet=EPIL-display-full.xsl (accessed 12 April 2021) & Morel (2014) 20.

1967 Morel (2014) 21.

1968 M Cernea "Why economic analysis is essential to resettlement: A sociologist's view" in M Cernea (ed) *The economics of involuntary resettlement: Questions and challenges* (1999).

1969 Part 2.4.1.

1970 Part 2.4.2.

marginalisation.[1971] These socio-economic impacts are by no means not the "necessary evils" or "acceptable collateral damages" and should be confronted and be dealt with.[1972]

Lastly, the chapter found that there are certain issues, rights and aspects through which the mine-affected communities can vindicate their rights and seek legal protection. The chapter also identified few themes that could be indicative of a failing or thriving regulation of mining-induced displacements. These themes included: the protection of surface land rights and compensation for related disturbances; the required standard and level of engagement with mine-affected communities; the statutory obligations of State entities and administrative authorities in relation to mining-induced displacements; the gender equality imperative *vis-à-vis* women inclusion; and the deterrence measures.

8.2.2. The value and utility of meaningful engagement concept

Chapter three of the study sought to answer the question: What is meaningful engagement in the South African context; how has it evolved as a remedy and a constitutional mechanism of enforcing rights over the years; how and to what extent have the South African courts interpreted and given it content; and what could its specific role be in addressing mining-induced displacements?

At a broader level, the chapter found that meaningful engagement concept and remedy is a by-product of the South African courts' innovation in enforcing socio-economic rights.[1973] The chapter discovered that the power of the courts to grant appropriate remedies for infringements of constitutional rights stems directly from the Constitution, sections 38 and 172(1) in particular. These constitutional provisions empower the courts to grant "appropriate relief, including a declaration of rights" and to "declare that any law or conduct that is inconsistent with the Constitution, is invalid to the extent of its inconsistency." A court may also grant "any order that is just and equitable." It was found that the weighty consideration for the courts in crafting remedies for socio-economic rights violations is to ensure the effective vindication and protection of the infringed right. The chapter went on to discover that there is great utility in meaningful engagement remedy. This remedy was found to be less polycentric because it restrains the courts from being actively and directly involved in policy formulation that fall

[1971] Part 2.4.3.

[1972] F Vanclay "Project-induced displacement and resettlement: from impoverishment risks to an opportunity for development?" (2017) 35(1) *Impact Assessment and Project Appraisal* 4.

[1973] Part 3.3.

within the prerogatives and power remits of the political branches. If anything, the court's role was found to be the one of prodding and encouraging communities, public, private institutions and other stakeholders to develop context-sensitive programmes of realising the rights as informed by constitutionally-grounded reasons.[1974]

The chapter moved on to consider how the courts have developed, interpreted and given substantive content to meaningful engagement over the years in various cases. To demonstrate in practical terms how the courts did these, the cases of *Grootboom*, *Port Elizabeth*, *Olivia Road* and *Joe Slovo* were used as examples. The chapter lauded the adoption of a concrete adjudicative strategy in the form of meaningful engagement by the Constitutional Court in judgments in these cases. The chapter found that meaningful engagement remedy has a great potential to prod communities, government authorities, private entities and other stakeholders to find contextualised and localised solutions to the varying complex issues which arise in eviction disputes through engagement process. However, the chapter found that in *Joe Slovo*, the Constitutional Court digressed from the precedence it had set in the earlier cases and reversed all the gains that were achieved insofar as the development of content for meaningful engagement is concerned. It appeared from the discussions that meaningful engagement was set by the Constitutional Court as a critical consideration and review standard against which the legality of eviction and displacement of communities is to be determined. The *Joe Slovo* decision represented a diametric opposition to this proposition.

With a view of adding the critical analytical element to jurisprudence, the chapter turned to consider the scholarly perceptions on meaningful engagement. The chapter found that meaningful engagement is a two-way process the Constitutional Court refers to does not only apply to the particular people involved in the *Olivia Road* case, but can be applied to similar contexts where evictions or displacements are rampant. So, more broadly, meaningful engagement occurs where communities, State authorities, private entities and other stakeholders talk and listen to each other to understand each other's interests so that they can achieve a common goal and objective. Put differently, meaningful engagement is a neutral space where people and the State can discuss and shape options and solutions to difficult issues. The chapter also found that there are scholars and commentators who are of the view that meaningful engagement is not that much of an achievement as projected to be. For instance, Landau is of a view that meaningful engagement as applied by the South African Constitutional

[1974] S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *African Human Rights Law Journal* 26.

Court has not achieved much on the ground.[1975] This study rebutted and dismissed this contention.[1976] In the last part of the chapter, a case was made that meaningful engagement remedy can and should be introduced in the mining sector context.

8.2.3. The international best practice standards of regulating mining-induced displacements

Chapter four of the study addressed the question: are there norms and standards of legal protection against mining-induced displacements at regional and international level and, if so, what are these norms and standards and how instructive they could be in improving the regulation of mining-induced displacements in South Africa and Ghana? The chapter found that the right not to be displaced in international law has not yet, but has the potential to develop and mature like other human rights.[1977] The legal protection against displacement features in some instruments as an incidental issue and the instruments where it appears are mostly 'soft law', as in the form of guidelines that are simply persuasive with no binding authority. Although the protection against displacement may be inferred as a corollary to other guaranteed rights, such as the right to housing, human dignity and self-determination, it was found that the Universal Declaration of Human Rights which sets the universal tone for the recognition and protection of human rights does not have explicit recognition of the right not to be displaced. Instead, the chapter found that the International Covenant on Economic, Social and Cultural Rights (ICESCR) goes a long way in trying to give substance to economic, social and cultural rights as a category of human rights.

The ICESCR has two general comment documents developed by the UN Committee on Economic, Social and Cultural Rights (CESCR) and these documents outline the State obligations in relation to the prevention of forced evictions and displacements.[1978] The chapter made a further discovery that the Guiding Principles offer a normative set of standards on how individual states can ensure adequate legal protection for persons forcibly uprooted from their usual residences to poorly habitable elsewhere and sometimes to nowhere, thus left in destitute. The Guiding Principles is arguably the most comprehensive instrument on the protection against displacement at an international level. This instrument set forth the rights of persons displaced within the borders of their countries and outline the obligations of governments and

[1975] Part 3.4.4.
[1976] Part 3.4.
[1977] Part 4.2.
[1978] Part 4.2.1.2.

the international community towards these populations. The Guiding Principles have influenced and shaped several regional and sub-regional instruments that tackle displacements occasioned by developments such as mining. These are the Kampala Convention and the Internally Displaced Persons Protocol of the Great Lakes Pact.

The chapter has also discovered that there has been notable efforts at the regional level to regulate the displacement phenomenon adequately. The chapter found that being a legally binding instrument, the Kampala Convention is an important development in the African continent with explicit recognition of the right not to be displaced. This Convention integrates the major part of the of the 'soft' Guiding Principles into binding and 'hard' regional norms and standards on displacements. It was also found that none of the examined jurisdictions has unfortunately ratified the Kampala Convention. There is also some legal protection against displacements specifically tailored for the indigenous people against displacements. The primary instrument in this regard is the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which, among others, provide for a free, prior and informed (FPIC) consent. The FPIC consent is arguably an important tool to realise, recognise and protect indigenous rights against violation by the State and private entities. The aim of FPIC is to ensure that the indigenous communities get a stronger voice in the decision-making processes about projects that affect them. The FPIC concept is rapidly becoming one of the most crucial concepts in contemporary international law concerning indigenous peoples and their right to self-determination. The indigenous peoples were found to be protected by several provisions in the Guiding Principles and the Kampala Convention respectively.

8.2.4. An assessment of the regulation of mining-induced displacements in South Africa and Ghana

Relying on the analysis in chapters five and six respectively, chapter seven was aimed at providing an analysis of similarities and differences in how the examined jurisdictions respond to the mining-induced displacement phenomenon and the appropriateness of the regulatory framework in doing so. The chapter sought to establish in which fronts and aspects an examined jurisdiction protects - than the other - the mine-affected communities with informal rights to land against acts of mining-induced displacements.[1979] The chapter also sought to find out the degree of conformity by each jurisdiction to the international good practices on the regulation

[1979] Part 7.2.

and management of mining-induced displacements.[1980] On the basis of the comparative analysis, the chapter found that South Africa and Ghana ensure different degrees of legal protection for mine communities against displacements. It was argued that there is a room for policy improvement and law reform in both jurisdictions.

In relation to the required standard and level of engagement with mine-affected communities in the process of granting a mineral right, it appears that the examined jurisdictions prescribe different requirements.[1981] South Africa is arguably offering more legal protection for the mine-affected communities by ensuring that their right to have a say in every developmental project that affect them negatively is strongly provided for in mandatory terms.[1982] The South African law requires that both requirements to consult, in terms of MPRDA, and to obtain consent, in terms of IPILRA, be fulfilled before the granting of any mineral or exploration right,[1983] let alone the commencement of such development. As for Ghana, there is generally very little legal protection for the mine-affected communities' right to have a say. The position in Ghanaian law is that only consultation (and not consent)[1984] is required in the process of obtaining a mineral right.

Insofar as statutory obligations of the relevant State bodies or authorities is concerned, the courts in both jurisdiction have defined and clarified the State administrative, regulatory and monitoring obligations within the unique context of each jurisdiction. In South Africa, for instance, the courts are often called upon to scrutinise the actions and decisions of the DMRE and to take it into task where there is a backslide on its regulatory, oversight and administrative obligations.[1985] Further, the courts have ruled in several cases such as *Samancor* that the DMRE is under a constitutional obligation to assist the courts by explaining their administrative decisions whenever joined to the proceedings where such decisions are partially or wholly in dispute.[1986] This proposition means that a DMRE functionary can even be compelled to file papers explaining their decisions where they are joined to the proceedings so as to assist the courts in arriving at an appropriate determination. Ghanaian courts have had a similar

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1980 Part 7.3.

1981 Part 7.2.1.

1982 Section 2, IPILRA.

1983 *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* Case No.: 3491/2021 paras 90-94 (hereafter *Wild Coast*).

1984 There is no provision in the Mineral and Mining Act from which consent requirement can be implied.

1985 For example, in the Shell seismic survey judgment, the High Court set aside the DMRE's decision for having granted a mineral right to a petroleum exploration company when the company failed to consult with the affected communities. *Wild Coast* (2022) case.

1986 Part 7.2.2.

opportunity in the case of *CEPIL* found that the Environmental Protection Agency (EPA) and the Minerals Commission were both "under a mandatory statutory obligation to monitor and control the activities of the [company] to ensure that their mineral operations … are carried on without breaching their statutory obligations,"[1987] and they had failed this obligation.

In terms of the gender imperative, it was observed that both examined jurisdictions have seminal provisions on the promotion of gender equity and protection against discrimination on the basis of gender. The right is constitutionalised in both countries.[1988] For instance, the legislative frameworks in both jurisdictions provide that women affected by mining-induced displacements should be entitled to fair and adequate compensation regardless of their marital status, among others.[1989] However, the striking difference is that while these entitlements for women are enumerated in an enforceable instrument, 'hard law' in the form of regulations in Ghana, they are relegated into mere guidelines that constitute a non-binding 'soft law' in South Africa. Another notable concern is that the enforcement of these gender equity provisions is less adjudicated in courts and, as far as could be established, none of the examined jurisdictions has had these provisions and entitlements vindicated and adjudicated in courts as a primary issue for determination, let alone as an incidental issue.[1990] Lastly, both examined jurisdictions are faced with weak deterrence measures against mining-induced displacement given the recurring effect of this problem in both jurisdictions.

With regard to the state of conformity by examined jurisdictions to the international framework of norms and standards on displacement,[1991] the chapter found that there is varying degrees to which the examined jurisdictions conform to the international best practice standards. The chapter found that in some aspects, a jurisdiction would compare favourably with the international standards and compare unfavourable when it comes to other aspects. For instance, it was found that while both South Africa and Ghana should fully recognise and integrate the FPIC requirement in their domestic regulatory frameworks, South Africa has already recorded some progress in that regard as it already has a consent requirement in terms of IPILRA.[1992] A similar observation on varying degrees of conformity was also observed in respect of the recognition of surface land right; the available remedies for the mining-induced displacement

[1987] *CEPIL* (2005) pg 12, ruling c.
[1988] Part 7.2.4.
[1989] Part 7.2.4.
[1990] Part 7.2.4.
[1991] Chapter two.
[1992] Section 2, part 7.3.1.

and the gender equality imperative (where there is some sense of commonality between examined jurisdictions).

All in all, it was found that South Africa offers a better legal protection to the mine-affected communities against the related displacements when compared to Ghana. However, there are some aspects where South African framework needs to improve as indicated earlier.[1993] Both jurisdictions should also consider integrating the international best practice standards (as recommended earlier) in their respective domestic legal frameworks. Among others, both jurisdictions should consider the following recommendations more broadly: introducing and recognising the FPIC concept to give the affected communities more power to have a say in the determination of developments that affect them; fully recognise the surface land rights of the owner and lawful occupiers; craft the deterrence measures against displacements; avail and clarify the remedies for the mine-affected communities and individuals; encourage the civil society organisations and public interest litigation groups to consider advancing women rights in the context of mining-induced displacements through litigation and/or advocacy; compel the mining companies to put in place the preventive measures and compliance with those measures be fully enforced; introduce the communities' right to return to their initial place of residence where there is non-implementation of the mineral right or where the mining land has been fully rehabilitated after the mine cycle has ended.

8.2.5. Recommendations

The study has made several recommendations for law reform to examined jurisdictions in the previous chapters, particularly chapter seven. Based on the comparative analysis and the application of international good governance standards, the study highlights the following recommendations, among others, on how to improve the protection of communities against mining-induced displacements in the examined jurisdictions with the meaningful engagement and in line with international good governance standards.

8.2.5.1. Introducing and recognising the FPIC concept

If an FPIC concept can be fully recognised and introduced into mining law in both jurisdictions, extracted from the international good governance standards, in which affected communities are given more power to have a say in the determination of developments that affect them and their lands, but without discarding the importance of the mineral rights and mining activities for the

[1993] Chapter five and parts 7.2 & 7.4.

countries' economic development, then many of the problems could be addressed. For South Africa in particular, it is strongly recommended that the legislation providing for the consent requirement i.e. IPILRA,[1994] be elevated from being an interim measure to being a final statute and more content be added to the consent requirement so that it meets all the elements of FPIC. The critical need for the adoption of FPIC in Ghana, where there is no elaborate provision of the consent requirement,[1995] cannot be over emphasised than already is. As such, Ghana should consider taking immediate law reform steps to recognise and integrate the FPIC principle in its domestic mining law to empower the mine-affected communities. In doing so, both countries may need to assemble an impartial and independent team of experts to carefully consider the implications these instruments in their unique contexts so as to avoid the unsuitable and ineffective transplantation of regulatory systems.

8.2.5.2. Adopting meaningful engagement in mining-induced displacements

In chapter three, it was argued that when courts craft remedies, they are constitutionally mandated to do so and they render finality to a pending case by coming up with an order they deem appropriate to address the harrowing displacement that is being complained of. It is strongly recommended that the courts in both countries should consider adapting the meaningful engagement remedy for its potential of having the advantages of efficiency, time and money saving, avoiding of litigation delays and cost, and many other issues that may present in the process of doing so. It is also recommended that the Ghanaian courts may also wish to consider adopting the meaningful engagement as an adjudicative strategy whenever approached for mining-induced displacements, but would obviously have to be context-sensitive to the realities of the country.

8.2.5.3. The integration of avoid and minimise rule (on/of displacements)

The avoid and minimise rule, as provided for in various international instruments discussed above,[1996] should be integrated into the examined jurisdictions' domestic policy response to the problem. Once integrated, the countries should then give effect to these rules and apply them strictly in letter and spirit. In practical terms, the avoid and minimise rule would mean that to an extent possible, the mineral right holders will adopt a less invasive approach and

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1994 Section 2, IPILRA.

1995 CEPIL & WACAM *The right to decide: Free prior informed consent in Ghana* (2015) 5 available online at https://s3.amazonaws.com/oxfam-us/www/static/media/files/FPIC_in_Ghana_FINAL.pdf (accessed 23 April 2022).

1996 Chapter four.

avoid displacements of people and communities. If the mineral right holder fails to fulfil this, then the relevant administrative authority i.e. DMRE should then take appropriate steps to enforce compliance.

8.2.5.4. Encouraging active involvement of civil society organisations in taking up women marginalisation issues

The study found that despite documented records of women marginalisation on compensation packages during resettlement projects in both jurisdictions, these instances never get to be challenged and adjudicated in courts.[1997] It is believed that one way of addressing this trend could be by encouraging human rights civil society organisations to assist vulnerable women against marginalisation. These organisations are "private associations which devote significant resources to the promotion and protection of human rights, which is independent of both government and political groups that seek direct political power."[1998] It is therefore strongly recommended that the governments in both the examined jurisdictions should create a space and conducive environment where the legitimate operation and participation of the civil society organisations and human rights defenders.

8.2.5.5. Strict enforcement of land rehabilitation after mine closures

One of the international best practice standards in the instruments analysed earlier is the displaced persons and communities' right to return to their places of origin.[1999] For this standard to be compatible and feasible in examined jurisdictions, especially South Africa, the State through the DMRE should strictly enforce compliance with and ensure that mining companies fulfil land rehabilitation[2000] process after completing their mining operations.[2001] This is a statutory obligation.[2002] Where mining companies are failing to fulfil this obligation, the State must take those companies into task and hold them accountable.[2003]

8.3. Where to from here? The future projections of the study

The research carried out in this study demonstrates that the examined jurisdictions - South Africa and Ghana - have varying degrees of appropriateness and robustness insofar as the

1997 Parts 5.4.4 & 6.5.4.

1998 L Wiseberg "Protecting human rights activists and NGO's" (1991) 13 *Human Rights Quarterly* 529.

1999 Para 64, Displacement Principles.

2000 *Grand Mines (Pty) Ltd v Giddey NO* 1999 (1) SA 960 SLA.

2001 The closure of a mine refers to cessation of mining activities at that site.

2002 Sections 41 & 89, MPRDA.

2003 Paras 66 & 67, Displacement Principles.

regulation of mining-induced displacements is concerned. It is clear that there is a room for improvement in both jurisdictions. However, based on comparative analysis, it is seemingly fair to conclude that South Africa has a better regulatory framework on the issue when compared to Ghana. This is evident from, among others, the fact that there is consent requirement - and not only consultation - for granting of mineral rights in South Africa. The position is different when it comes to Ghanaian law that simply requires mere consultation. Further, South Africa also has an advanced jurisprudence on the meaningful engagement remedy, which will possibly make it much easier for this remedy to be utilised in other contexts such as mining-induced displacements.

Since the role of the courts in adjudicating the protection of mine-affected communities against displacements could be limited by the fact that the courts cannot invent facts and that they naturally deal only with the issues argued before them, there is a need for litigants, especially the human rights defenders and civil society organisations, to entertain key issues central to this problem, especially those issues that have not received much attention in the form of case law, such as the marginalisation of women on compensation beneficiation. It is contended that if the regulation of mining-induced displacements is to be comprehensively, innovatively and effectively translated into practice, then such a critical task cannot be left to the courts alone. If anything, a more concerted effort including different segments of government, private stakeholders and civil society will definitely be a necessity. To this end, in the future, especially for South Africa, the State (through DMRE) is likely to challenge the consent requirement on the basis that the communities' consent provision usurps or has the potential to usurp the powers of the State to grant mineral rights. In such event, it is hoped that this study will provide a useful reference in making a case for the upholding of consent, as in the FPIC concept.

8.4. Future research agenda

Due to some inherent limitations,[2004] this study does not and cannot proffer solutions to all the problems in an encyclopaedic manner about and around mining-induced displacements in the examined jurisdictions or even elsewhere. However, it became evident throughout the course of inquiry that there are some issues which could benefit from further research in the future as separate and stand-alone projects. These issues are briefly presented below, coined and posed

[2004] Part 1.9.

as questions and it is envisaged that they will together inform the candidate's future research agenda:

i. To what extent do the courts actively engage with regional and international law, in their domestic jurisprudence, pertaining the right not to be displaced for reasons of developments such as mining?

ii. If any, what more insights about this topic could be drawn from an empirical or field work study, looking specifically on the various socio-economic issues and dilemmas of mining induced displaced people?

iii. On the basis of what considerations and under what circumstances can the court arrive at the conclusion that the right not to be displaced is outweighed by a mineral right?

iv. How much of the mining-induced displacement problem, if at all, should be attributed to political and other factors such as systemic corruption?

8.5. Concluding thought

Theoretically, South Africa has good prospects of addressing mining-induced displacements through meaningful engagement and other procedural mechanisms such as the FPIC. However, the thesis reveals that the country's legal framework is marred with notable shortcomings that stand to defeat all these good prospects. If the legal framework is improved, for instance, by integrating the relevant international law and best standards, then the problem of mining-induced displacements can be brought under control - if not completely eradicated. Therefore, more streamlined policy initiatives and legal reforms are needed to achieve better regulation of this problem in the country. The elements and recommendations proffered above may serve as a proper starting point towards such endeavour.

Furthermore, an improved legal framework cannot on its own deal with the problem. It requires implementation as a complimentary factor. The thesis contends that a lack of political will and effort on the part of the State negates the implementation of the legal framework and renders it difficult. If the government's reluctance is addressed, that would lead to increased legitimacy of the state's commitment to addressing the problem. It would also lead to mine-communities, mining companies, government entities and other stakeholders becoming more aware of their respective rights, interests and obligations. In this way, the parties are then able to engage with one another meaningfully and in good faith with a view to reach an agreement and consent,

thus respecting and recognising communal property and resource rights of affected mine-communities.

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Postscript

This thesis is over the prescribed 80 000 word limit. However, the candidate was granted the permission to exceed this limit to the stipulated maximum of 103 000 words in terms of Student Rule GP6.8 in the General Rules and Policies, Handbook 3.

[END]