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CONSULTATION AND CONSENT UNDER THE MPRDA AND THE IPILRA

A legal analysis of the decision-making practices of customary communities in South Africa

by

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Submitted to **The University of Cape Town**
in fulfilment of the requirements for the degree LLM in the Law of Mineral and Petroleum Extraction and Use
Faculty of Law, University of Cape Town

Date of submission: 26 January 2021

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Word Count: 28 488

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ACKNOWLEDGEMENTS

The writing of this dissertation has been a journey of constant learning and enlightenment. I am extremely grateful for all the support I have received from several people who have contributed in different ways to the completion of this dissertation.

I extend my wholehearted gratitude to my supervisor Professor Hanri Mostert and co-supervisor Doctor Richard Henry Cramer. Professor Hanri Mostert's early recognition of my passion and encouragement to pursue it has been instrumental to my development. I extend many thanks to Doctor Richard Henry Cramer for his exceptional guidance, steadfast support, and kindness throughout writing this dissertation; words cannot accurately express this gratitude.

I must also extend many thanks to the LLM Writing Circle members for their feedback and many moments of shared laughter. My sincere gratitude is also due to Doctor Aninka Claassens for her willingness to share her insights and for inspiring me in my pursuit of unlocking the challenges embedded in mining and land rights issues in the Republic of South Africa.

I also extend my sincere gratitude to my friends Hulisani Tseisi, Constance Sentongo, Mduduzi Ruwitah and Kennedy Chege for their loyal friendship, support, and prayers. To my uncle, Malume Hopi Mboweni, thank you for your constant support and always believing in me.

To my late grandparents Mr JWT "Totokho" Mboweni, Mrs RG "Toto" Mboweni, Professor HWE Ntsanwisi (Hosi Majeje I) and Mrs BN "Khululu" Ntsanwisi, I thank you for instilling a thirst for knowledge in me and leading by example. I know that this work will make you proud.

An exceptional acknowledgement goes to my parents, Hosi Mlungisi Ntsanwisi (Majeje II) and Mrs Khensani Ntsanwisi, and my elder sisters, Dr Ninakhulu Ntsanwisi and Ms Hlulani Ntsanwisi. This dissertation serves as a testament of your unconditional love and unwavering support in achieving my life's ambitions. I dedicate this work to you.

I thank God, the Almighty, for the gift of life, health, and the blessing of knowledge. It is only by God's grace, mercy, and unfailing love that I find myself where I am today, for I can do all things through Him who gives me strength.

ABSTRACT

Under the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), the State, as custodian of mineral resources, has the authority to grant rights to minerals and permits in favour of applicants that satisfy the requirements of the prescribed application procedures. Applicants for rights to minerals and permits must consult meaningfully with landowners and lawful occupiers, although the MPRDA itself does not require the latter's prior consent. The Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), by contrast, requires prior consent when persons are deprived of their informal rights to land. In South Africa, communities that occupy land under customary land tenure are recognised as lawful occupiers that have informal rights to land. The occupation of land by customary communities and the applicant's interest to exploit mineral resources creates competing rights and interests between these two parties, namely: a right to consultation and a right of access to land.

This minor dissertation aims to analyse the impact that the current statutory formulation of the requirements of consultation and consent has on the informal rights to land held by customary communities. This aim translates into two sub-inquiries: How do the statutorily required processes of consultation and consent embodied in the MPRDA and the IPILRA protect the informal rights to land held by customary communities? Furthermore, do the statutorily required processes of consultation and consent meaningfully engage with the existing decision-making practices of customary communities? These issues are considered in light of the elevated status that customary law enjoys under South African law and the Constitution's aspiration to reform racially discriminatory landholding systems. The dissertation argues that the statutorily required processes of consultation and consent inadequately engage with the existing decision-making practices of customary communities. It offers insight on how engagement with the existing decision-making practices, and with the Free, Prior and Informed Consent principle, can better accommodate and protect the rights and interests of customary communities that are affected by prospecting and mining operations.

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Chapter 1: Introduction

1. Introduction

The introduction of the Mineral and Petroleum Resources Development Act (MPRDA)[1] has birthed a new regulatory regime regarding the exploitation of mineral and petroleum resources in the Republic of South Africa (South Africa).[2] Amongst other objectives, the MPRDA aims to define the rights and obligations of the holders of mineral and petroleum rights and permits.[3] In terms of the MPRDA, the State, as custodian of mineral resources, has the authority to grant rights to minerals and permits to applicants that meet the requirements of the prescribed application procedures.[4] The State's authority to grant rights to minerals and permits is carried out by the Minister of Minerals and Energy (Minister) on behalf of the State.[5]

The focus of this dissertation will be limited to the provisions of the MPRDA that apply to the application procedures for the granting of prospecting rights, mining rights and mining permits. A holder of a prospecting right and mining right is entitled to enter the land to which the right relates to carry out any relevant activities for prospecting and mining.[6] A holder of a mining permit is entitled to enter the land related to the permit to erect infrastructure for mining.[7] The MPRDA confers on the holder of a mining or prospecting right a limited real right in respect of the mineral and the land to which the right relates.[8] However, the MPRDA is silent on the legal nature of mining permits.[9]

The holders of prospecting rights, mining rights and mining permits are entitled to carry out activities in a manner that is subject to the limitations imposed by the MPRDA.[10] Prospecting rights, mining rights and mining permits are often granted concerning land that is occupied by other parties such as landowners or lawful occupiers.[11] Landowners or lawful occupiers are entitled to continue to use and enjoy the relevant piece of land in a manner that is not in contravention of the law.[12] The landowner or lawful occupier is obliged to allow the holder of a prospecting right, mining right or a mining permit access to the land to exercise his or her rights effectively.[13] The

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[1] Act 28 of 2002.
[2] 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 128 (SCA)*"* (2019) 22 *PER/PELJ* 2 2.
[3] Van der Schyff (2019) *PER/PELJ* 2.
[4] Preamble and sections 2(b) and 3 of the MPRDA.
[5] Section 2(a).
[6] Section 5(3).
[7] Section 27(7)(a).
[8] Section 5(1).
[9] H Mostert & A Pope *The Principles of The Law of Property in South Africa* (2010) 276.
[10] PJ Badenhorst "Conflict resolution between owners of land and holders of rights to minerals: a lopsided triangle?" (2011) *TSAR* 326 326.
[11] Van der Schyff (2019) *PER/PELJ* 2.
[12] Badenhorst (2011) *TSAR* 326.
[13] *Maledu v Itlereleng Bakgatla Mineral Resources (Pty) Ltd* 2019 (2) SA 1 (CC) para 57.

holder of the mining right or permit is in turn required to exercise his or her right reasonably to cause the least inconvenience to the rights of the landowner or lawful occupiers.[14]

This dissertation's focus is limited to the rights and interests of the holders of prospecting rights, mining rights and mining permits, as well as those of customary communities that are affected by prospecting and mining activities. The relationship between the holders of the rights or permits and the customary communities creates a right of access to land that co-exists simultaneously with a duty to consult.[15] The right of access to land is in favour of the right or permit holder.[16] Members of customary communities that occupy land are owed a duty to consult by applicants.[17] The right or permit that allows for the right of access to land to be exercised will not be granted before the customary community is notified and consulted about the applicant's intention to commence mining or prospecting activities.[18] This consultation requirement embodied in the application procedures of the MPRDA must be read together with the requirement to obtain consent prescribed under the Interim Protection of Informal Land Rights Act (IPILRA),[19] as per the decision in *Baleni v Minister of Mineral Resource* (*Baleni*).[20]

The statutory requirements of consultation and consent have come to light in South Africa following the recent judgments of the High Court and the Constitutional Court.[21] From these judgments, it is apparent that the law on consultation and consent lacks clarity as well as certainty. These shortcomings bear tangible consequences on the rights and interests of members of customary communities that hold informal rights to land. Moreover, there is tension between the statutory requirements and the existing decision-making practices of customary communities, on the one hand, and between the competing right of access to land of the applicant and the duty to consult owed to the customary communities, on the other hand.

The property clause of the Constitution of the Republic of South Africa, 1996 (Constitution),[22] the MPRDA as well as the IPILRA collectively recognise and seek to redress the injustices of past racially discriminatory laws that have birthed the vulnerable position of the holders of informal rights to land.[23] A noteworthy tension that exists between the MPRDA and the IPILRA is that the former does not require a right or permit holder to obtain community consent before engaging in mining activities, while the latter does.[24] This tension aggravates the already vulnerable position of the customary communities that the property clause of the Constitution seeks to

[14] *Maledu v Itlereleng Bakgatla Mineral Resources (Pty) Ltd* 2019 (2) SA 1 (CC) para 58.
[15] Badenhorst (2011) *TSAR* 328.
[16] Badenhorst (2011) *TSAR* 328.
[17] Badenhorst (2011) *TSAR* 328.
[18] PJ Badenhorst "Conflict resolution between holders of prospecting or mining rights and owners (or occupiers) of land or traditional communities: What is not good for the goose is good for the gander" (2019) 136 *SALJ* 303 308.
[19] Act 31 of 1996.
[20] 2019 (2) SA 453 (GP) para 83.
[21] See *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP); *Maledu v Itlereleng Bakgatla Mineral Resources (Pty) Ltd* 2019 (2) SA 1 (CC); *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC).
[22] Constitution of the Republic of South Africa, 1996.
[23] MT Tlale "Conflicting Levels of Engagement under the Interim Protection of Informal Land Rights Act and the Minerals and Petroleum Development Act: A Closer Look at the Xolobeni Community Dispute" (2020) 23 *PER/PELJ* 2 18.
[24] Tlale (2020) *PER/PELJ* 18.

redress.[25] This dissertation intends to analyse the tensions that exist between the MPRDA and the IPILRA through comparing and contrasting the statutory processes of consultation and consent against the existing decision-making practices of customary communities.

2. Contextual Background

South African history is characterised by centuries of colonial dispossession and racial discrimination, the latter being more recently expressed through the laws of the apartheid regime.[26] This racial discrimination was coupled with the prioritisation of mining activity as the cornerstone industry of the nation.[27] As a direct consequence of the apartheid regime, vast masses of land in South Africa were held under legally insecure customary land tenure. [28] Customary land tenure refers to a land tenure system that is governed by unwritten customary law rules that are administered in accordance with the customary practices of the said community.[29]

Today, customary land tenure is prevalent in areas within South Africa that were previously designated as homelands during the apartheid era.[30] The phrase "communal land tenure" is commonly used interchangeably with the phrase "customary land tenure". However, communal land tenure is commonly understood to imply collective ownership of land as well as natural resources on a particular piece of land and access thereto based on the allocation patterns of the community.[31] The use of the phrase "communal land tenure" has been criticised by various researchers as being problematic and confusing.[32] These criticisms are addressed in Chapter Three of the dissertation.[33]

The South African apartheid government regulated the customary land rights of communities.[34] Customary land tenure as a land tenure system was undeniably insecure as a direct consequence of the racially discriminatory laws and practices imposed by the apartheid government.[35] Today, the Constitution recognises the injustices caused by the apartheid regime and seeks to honour and protect persons that suffered as a result thereof.[36]

In response to this racially discriminatory past, the Constitution includes a property clause, namely section 25. The property clause seeks to strike a balance between the protection of existing property rights and the need to

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[25] See section 25 of the Constitution.
[26] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 SA 113 (CC) para 28.
[27] See CH Feinstein *An Economic History of South Africa: Conquest, Discrimination, and Development* (2005).
[28] Mostert & Pope *Principles* 107.
[29] United Nations Economic Commission for Africa "Land Tenure Systems and Sustainable Development in Southern Africa" (12-2003) < https://sarpn.org/documents/d0000664/P672-ECA_Report.pdf > 2 (accessed 01-11-2021).
[30] 107.
[31] A Claassens & B Cousins *Land, Power & Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) 5.
[32] D Mailula "Customary (Communal) Land Tenure in South Africa: Did Tongoane overlook or avoid the core issue?" (2011) 4 *Constitutional Court Review* 73 137. See also Section 3.1.2 of Chapter Three.
[33] See Section 3.1.2 of Chapter Three.
[34] Badenhorst (2019) *SALJ* 304.
[35] Badenhorst (2019) *SALJ* 304.
[36] Tlale (2020) *PER/PELJ* 2.

reform racially discriminatory land holding systems.[37] The latter interest is addressed in section 25(6) which provides that a person or community whose land tenure is legally insecure as a consequence of past racially discriminatory laws or practices is entitled to legally secure tenure or a comparable remedy. In response to this constitutional mandate, the IPILRA was passed by the legislature in 1996 as a protection for the holders of informal rights to land.[38] This piece of legislation was intended to be a temporary law awaiting the promulgation of a permanent law that would strengthen these land rights.[39] A quarter of a century later, however, this permanent law has not yet been passed. Instead, the IPILRA has been renewed by Parliament every year.[40]

In terms of the MPRDA, interested and affected parties must be consulted before a right or permit is granted to an applicant.[41] The phrase 'interested and affected parties' is inclusive of 'communities' as defined under the MPRDA.[42] The Court in *Bengwenyama v Genorah* (*Bengwenyama*)[43] captured the purpose of consultation. The Court stated that the purpose of consultation is to determine whether any accommodation is possible between the interests of the right or permit applicant and the landowner or lawful occupier.[44] Despite the requirement of consultation, the MPRDA does not require any agreement regarding accommodation.[45] However, the consultation must be conducted in good faith to reach the desired accommodation.[46] Chapter Two of the dissertation discusses the consultation requirement in greater detail.[47]

In terms of the IPILRA, a person may not be deprived of their informal right to land without their prior consent.[48] The IPILRA further provides that this deprivation of an informal right to land must be in accordance with the customs and usages of the community, provided that the land is held on a communal basis.[49] The phrase

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[37] See section 25 of the Constitution.
[38] Centre for Law and Society, Faculty of Law, University of Cape Town (2- 2015) "Communal Land Tenure Policy and IPILRA – The Constitution's Promise" 4
<*http://www.cls.uct.ac.za/usr/lrg/downloads/Factsheet_CommunalTenure_IPILRA_Final_Feb2015.pdf*> (accessed 17-1-2021).
[39] Centre for Law and Society, Faculty of Law, University of Cape Town (2- 2015) "Communal Land Tenure Policy and IPILRA – The Constitution's Promise" 4
<*http://www.cls.uct.ac.za/usr/lrg/downloads/Factsheet_CommunalTenure_IPILRA_Final_Feb2015.pdf*> (accessed 17-1-2021).
[40] Centre for Law and Society, Faculty of Law, University of Cape Town (2- 2015) "Communal Land Tenure Policy and IPILRA – The Constitution's Promise" 5
<*http://www.cls.uct.ac.za/usr/lrg/downloads/Factsheet_CommunalTenure_IPILRA_Final_Feb2015.pdf*> (accessed 17-1-2021). The Communal Land Rights Act 11 of 2004 was intended, by the legislature, to be a permanent law that offered redress for insecure land tenure caused by past racially discriminatory laws. This Act has now been declared unconstitutional by the Constitutional Court therefore the IPILRA remains in force as a temporary law.
[41] South African Human Rights Commission *National Hearing on the Underlying Socio-economic Challenges of Mining-*affected Communities in South Africa (2016) 61. See sections 16(4)(b), 22(b) and 27(5)(a) of the MPRDA.
[42] Section 1 of the MPRDA defines 'communities' as 'a group of historically disadvantaged persons with interest or rights in a particular area of land on which members have or exercise communal rights in terms of agreement, custom or law…'.
[43] 2011 (4) SA 113 (CC).
[44] Para 65.
[45] Para 65.
[46] Para 65.
[47] See Section 3 of Chapter 2.
[48] Section 2(1) of the IPILRA.
[49] Section 2(2).

'custom and usages of the community' requires one to define the meaning of customary law. Under South African law, customary law consists of two forms, namely: living customary law and official customary law.[50] Living customary law is defined as the collection of unwritten customs and traditions that regulate different relationships between the members of a community.[51] Therefore, these practices that regulate the day-to-day life of people are uncodified.[52] In contrast, official customary law refers to customary law that is applied by the courts and other institutions of the State.[53]

The IPILRA affords customary communities legal protection to have control and autonomy over their land following the communities' customary law.[54] Despite the requirement of consent being contained in the IPILRA, the MPRDA does not require applicants to obtain consent from local communities.[55] Therefore, the absence of a consent requirement under MPRDA implies that a right or permit holder is entitled to mine for minerals on the community's land without obtaining prior consent.[56] As a result of this absence the communities are left with little or no bargaining power.[57] The limited real right of access conferred on the holder of a right or permit is undeniably invasive.[58] Consequently, the informal rights to land of customary communities, to which the rights and permits relate, are heavily encroached.[59]

The MPRDA does not define 'consent', and no regulations have been enacted to give effect to the statutorily required processes of consultation and consent.[60] The South African Human Rights Commission (SAHRC) is of the view that there appears to be no form of assessment of the adequacy of these processes.[61] An inquiry into the adequacy of the processes ought to consider whether there is a 'rational balance between the interests of holders of [prospective rights and permits] and the landowners [or lawful occupiers]'.[62] This dissertation is of the view that the achievement of this desired balance has the potential to provide for the accommodation and protection of the communities that hold informal rights to land.

Informal rights to land cannot be discussed without the acknowledgement of the need for reform and security of customary land tenure. The issue of tenure security has been a critical concern of land reform for the democratic government of South Africa since 1994.[63] In particular, security of land tenure has been an issue more so for

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[50] C Himonga & T Nhlapo *African Customary Law in South Africa: Post-apartheid and Living Law Perspectives* (2015) 25.
[51] 44.
[52] 44.
[53] 33.
[54] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC) para 95.
[55] South African Human Rights Commission *Challenges of Mining-affected Communities* 66.
[56] Tlale (2020) *PER/PELJ* 18.
[57] South African Human Rights Commission *Challenges of Mining-affected Communities* 65.
[58] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC) para 102.
[59] Para 102.
[60] South African Human Rights Commission *Challenges of Mining-affected Communities* 65.
[61] 65.
[62] *Meepo v Kotze* 2008 (1) SA 104 (NC) 111C; Mostert & Pope *Principles* 278.
[63] MT Tlale *A critical evaluation of the South African land tenure policy: a comparison with selected aspects of the Kenyan and Tanzanian law* PhD thesis North-West University (2018) 1.

people living under customary land tenure in the rural areas of South Africa.[64] The democratic government has promulgated numerous pieces of land legislation in an attempt to alleviate the consequences of past injustices.[65] Despite these efforts, tenure reform continues to be a complicated and difficult issue to resolve in South Africa.[66] The urgency of addressing these concerns within the mining context has now become evident in recent judgments such as *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* (*Maledu*),[67] *Baleni*, and *Bengwenyama* that deal with the requirements of consultation and consent. These judgments emphasise the elevated status that customary law enjoys under the constitutional dispensation. As such, meaningful engagement with the decision-making practices of customary communities is crucial for the fulfilment of the statutorily required processes of consultation and consent.

3. Research Question

The above account briefly illustrates the context in which the statutory requirements of consultation and consent apply. Furthermore, the account describes the obligations that the right and permit applicants and the customary communities have towards each other for the realisation of their respective rights and interests. These obligations create a set of competing interests between the applicants and the customary communities respectively, being a right of access to the land and a duty to consult with the lawful occupiers of the land.

This research aims to analyse the content of the statutorily required processes of consultation and consent, respectively embodied in the MPRDA and the IPILRA. The primary objective of the research is to analyse how the requirements of consultation and consent accommodate and protect customary communities that hold informal rights to land. The secondary objective of the research is to analyse the extent to which these statutory processes engage with the existing decision-making practices of customary communities that are affected by mining activities. The research aims to answer the following questions:

1) How do the statutorily required processes of consultation and consent embodied in the MPRDA and the IPILRA protect the informal rights to land held by customary communities?

2) Do the statutorily required processes of consultation and consent meaningfully engage with the existing decision-making practices of customary communities?

In light of these questions, the research seeks to analyse whether the protection provided by the MPRDA and the IPILRA is adequate . Furthermore, the research seeks to provide insight on how the meaningful engagement with and incorporation of the decision-making practices of customary communities can enrich the statutory

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[64] MT Tlale *A critical evaluation of the South African land tenure policy: a comparison with selected aspects of the Kenyan and Tanzanian law* PhD thesis North-West University (2018) 1.
[65] 1.
[66] 97.
[67] 2019 (2) SA 1 (CC) para 95.

processes of consultation and consent to better protect and accommodate customary communities. This dissertation is restricted to the informal rights to land of persons living on the land subject to a right or permit and not to persons living in surrounding communities.

4. Research Methodology

The research follows a doctrinal research methodology that will focus on a literature review and content analysis of legislation to examine whether the MPRDA and the IPILRA provide adequate protection to holders of informal rights to land, as well as the extent to which these laws reflect the decision-making practices of customary communities. The literature review and content analysis focus on a scrutiny of both primary and secondary sources. These sources include the Constitution, Acts of Parliament, regulations, case law, committee reports, books, journal articles, commentaries, and internet sources.[68]

5. Research Outline

This dissertation is divided into five chapters. The current chapter introduces the study, provides contextual background, and explains the relevance of the study. The chapter also presents the research questions, provides the research methodology and outlines the structure of the chapters of the dissertation.

Chapter Two discusses the statutory provisions relevant to the application procedures for the granting of prospecting rights, mining rights and mining permits. The chapter focuses on identifying and describing the legal framework applicable to the requirements of consultation and consent.

Chapter Three elaborates on the processes that must be adhered to, to fulfil the statutory requirements of consultation and consent. The focus of the chapter is on describing the nature of the decision-making practices of customary communities regarding the right of access to land and the control thereof. The chapter also introduces the Free, Prior and Informed Consent (FPIC) principle,[69] prescribed under international law.

Chapter Four considers the successes and shortfalls that arise out of the statutory formulation of the requirements of consultation and consent. The chapter addresses the question of whether the current formulation of the statutory requirements adequately accommodates and protects the informal rights to land of customary communities. The extent to which the requirements engage with the decision-making practices of customary communities is discussed. The chapter explores the applicability of the FPIC principle and the issues regarding the implementation of the principle in the South African context.

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[68] Given the impact of the Novel Coronavirus/COVID-19, the diversity of and access to sources such as books was adversely affected by the restricted access to university libraries.

[69] See art 19 of the United Nations Declaration on the Rights of Indigenous Peoples, General Assembly Resolution 61/295, 2007.

Chapter Five summarises the findings of the dissertation and offers concluding remarks. The chapter provides recommendations for potential law reform in South Africa to address the concerns stated in the research question. . Finally, suggestions are made on how meaningful engagement with the decision-making practices of customary communities can enrich the processes of consultation and consent.

Chapter 2: Legal Framework for the Requirements of Consultation and Consent

1. Introduction

Under South African law, the State, as the custodian of mineral resources, has the authority to grant rights to minerals and permits by following the application procedures prescribed under the Minerals and Petroleum Resources and Development Act (MPRDA).[1] The approval for the rights and permits contained in the MPRDA must be obtained from the Regional Manager.[2] This approval is required for prospecting rights, mining rights, mining permits, retention permits, reconnaissance permits and technical co-operation permits.[3] This dissertation is limited in scope to the application procedures for prospecting rights, mining rights and mining permits.

This chapter provides a brief overview of the application procedures for the granting of prospecting rights, mining rights and mining permits. The chapter also identifies and describes the applicant's duty to consult with interested and affected parties. Lastly, the chapter identifies and describes the consent requirement under the Interim Protection of Informal Land Rights Act (IPILRA).[4] This requirement to obtain consent from customary communities is discussed in light of the property clause of the Constitution of the Republic of South Africa,1996 (Constitution). The purpose of this chapter is to describe and provide the context for the legal framework for the requirements of consultation and consent.

2. Overview of Application Procedures

The MPRDA mandates the procedure to be followed when applying for a prospecting right,[5] mining right,[6] or mining permit.[7] The application procedures for the respective rights and permits are relatively similar in their requirements. This overview will provide the common features of application procedures that apply to prospecting rights, mining rights and mining permits. The overview will thereafter highlight the differences between the application procedures and state the practical implications of these differences. In this overview, the word 'right(s)' refers to prospecting rights and mining rights, and the word 'permit' refers to a mining permit.

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[1] Preamble and sections 2(b) and 3 of the MPRDA.
[2] Sections 16, 22 and 27. See also definition of 'Regional Manager' under section 1 of the MPRDA.
[3] Section 1.
[4] Act 31 of 1996.
[5] Section 16 of the MPRDA.
[6] Section 22.
[7] Section 27.

2.1 Common features of the application procedures

The application process for the granting of a right or permit is commenced by the applicant lodging an application with the Minister of Minerals and Energy (Minister) at the office of the Regional Manager.[8] The applicant is required to apply at the office of the Regional Manager in whose jurisdiction the land, to which the application pertains, is located.[9] Furthermore, the applicant is required to apply for an environmental authorisation simultaneously with the lodgement of the application.[10] Additionally, the application must be lodged in the prescribed manner[11] coupled with the prescribed non-refundable application fee[12] stated in the Mineral and Petroleum Resources Development Regulations (MPRDA Regulations).[13] Although the MPRDA does not describe the 'prescribed manner' that is mentioned in the application procedures, the MPRDA Regulations provide for a list of supporting documents and details that must accompany the application.[14] The listing of required documents and specific details does not sufficiently describe the 'prescribed manner' as it does not provide a procedure for the lodgement of the application. The MPRDA Regulations fail to provide the applicant with the prescribed manner to assist with compliance with the requirements in the MPRDA.

According to the MPRDA, the Regional Manager must accept the application for a right or permit if three listed preconditions are satisfied.[15] First, the requirements contained in section 16(1), 22(1) and 27(2) must be satisfied.[16] These sections provide that an applicant must apply for a prospecting right, mining right or mining permit simultaneously with the requisite environmental authorisation. Furthermore, that the application must be lodged at the relevant Regional Manager's office in the prescribed manner with the prescribed non-refundable application fee. Secondly, the right or permit must not be held by another person for the same mineral and relevant piece of land.[17] Lastly, no prior application must have been accepted for the same mineral on the same land which remained to be granted or has previously been refused.[18]

If the application for the right or permit is not compliant with the requirements of the MPRDA, the Regional Manager is required to notify the applicant within fourteen days of receiving the application.[19] Upon acceptance

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[8] Sections 16(1)(a), 22(1) and 27(2)(a) of the MPRDA.
[9] Sections 16(1)(a), 22(1)(a) and 27(2)(a).
[10] Sections 16(4)(1), 22(1) and 27(2).
[11] Sections 16(1)(b), 22(1)(b) and 27(2)(b).
[12] Regulation 75(1)(b) of the MPRDA Regulations; see also sections 16(1)(c), 22(1)(c) and 27(2)(c) of the MPRDA.
[13] GN R527 in GG 26275 of 23-04-2004.
[14] Regulations 5, 10 and 14 of the MPRDA Regulations. See also Department of Mineral Resources Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA.
[15] Sections 16(2), 22(2) and 27(3) of the MPRDA.
[16] Sections 16(2)(a), 22(2)(a) and 27(3)(a).
[17] Sections 16(2)(b), 22(2)(b) and 27(3)(b).
[18] Sections 16(2(c), 22(c) and 27(3)(c).
[19] Sections 16(3), 22(3) and 27(4).

of the application, the Regional Manager must notify the applicant in writing.[20] The applicant for a right or permit will then be informed to submit the relevant environmental report and to consult with interested and affected parties.[21]

The results of the consultation with the interested and affected parties must be included in the environmental report.[22] After the applicant has consulted with the relevant parties and submitted the relevant environmental report, the Regional Manager is required to forward the application to the Minister for consideration.[23] In the case of a mining right, the Regional Manager will decide within fourteen days of receipt of the environmental report including the results of consultation whether the application is accepted for consideration by the Minister.[24]

The Minister must grant a prospecting right within 30 days of receipt of the application from the Regional Manager if the requirements under section 17(1) are satisfied.[25] In the case of a mining permit, the Minister must issue the permit within 60 days of receipt from the Regional Manager for consideration.[26] Unlike the provisions for prospecting rights and mining permits, the MPRDA does not provide a time period for the granting of and notification to the mining right applicant of such a decision.[27] The MPRDA does, however, provide that the Minister must grant a mining right upon the satisfaction of the section 23(1) requirements.[28] Acceptance of the application for consideration by the Minister is a factual inquiry that depends on the fulfilment of requirements of the MPRDA and the MPRDA Regulations. [29]

The refusal for granting a prospecting right is a result of a lack of compliance with the requirements under section 17(1).[30] The refusal is also based on whether the granting of the right will result in 'the possible limitation of equitable access to mineral resources.'[31] The latter reason for refusal is consistent with the objective of the MPRDA to 'promote equitable access to the nation's mineral and petroleum resources to all people of South Africa.'[32] This refusal is communicated by the Minister, in writing, within 30 days to the applicant with reasons for the decision made by the Minister.[33] Unlike the prospecting right, the Minister must within 60 days of receipt of

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[20] Sections 16(4)(a), 22(4) and 27(5) of the MPRDA.
[21] Sections 16(4)(b), 22(4)(b), and 27(5)(a). See discussion below in Section 3.2 on the definition of interested and affected parties.
[22] Sections 16(4)(a), 22(4)(a) and 27(5)(a) of the MPRDA.
[23] Sections 16 (5) and 22(5).
[24] CL van Schalkwyk *A Legal Perspective on the Role of Municipalities in Navigating the Relationship between Land Use Planning and Mining* PhD thesis University of Cape Town (2018) 53.
[25] See the section 17(1)(a)-(f) of the MPRDA for the requirement that must be met before the Minister can grant a prospecting right.
[26] Section 27(6).
[27] Van Schalkwyk *Relationship between Land Use Planning and Mining* 54.
[28] See section 23(1)(a) – (h) of the MPRDA.
[29] Van Schalkwyk *Relationship between Land Use Planning and Mining* 54.
[30] See section 17(2) of the MPRDA.
[31] Section 17(2).
[32] Section 2(c).
[33] Section 17(3).

the application refuse to grant the mining right due to non-compliance with section 23(1).[34] Similarly, the decision to refuse the granting of a mining right must be communicated in writing within 30 days of the decision.[35] The MPRDA does not have any provisions regarding the refusal of the granting of a mining permit.

2.2 Differences in the application procedures

The application procedures for prospecting rights, mining rights and mining permits contain minor differences in the time periods for notification, the duration of validity and the renewal time period of the rights and the mining permit. Regarding the duration of validity, the rights and permits are valid for the period specified on the right or permit.[36] However, the validity of a prospecting right cannot exceed five years.[37] A mining right is valid for a period not exceeding 30 years,[38] and a mining permit is only valid for a period not exceeding two years.[39]

Concerning renewal, a prospecting right can only be renewed once for a period not exceeding three years.[40] The MPRDA does not stipulate a threshold for the number of renewals permitted for a mining right.[41] The wording 'may be renewed further' creates an impression that the right is renewable repeatedly provided that each time period does not exceed 30 years. The MPRDA is, however, clear concerning the mining permit and provides for renewal for three periods provided that each period does not exceed one year.[42]

Unlike the application procedure for a prospecting right and a mining permit, the MPRDA does not stipulate a time period in which the Minister should decide for the granting of a mining right.[43] Furthermore, the MPRDA does not provide a time period or a requirement for written notification to inform the applicant of the decision taken by the Minister to grant the mining right.[44] It is unclear why the legislature has omitted this time period and written notification requirement for mining rights. The lack of a time period and the written notification requirement creates uncertainty as to whether the absence of a decision by the Minister implies the granting of the application.[45]

The MPRDA provides for 30 days for both the granting and refusal of a prospecting right from the date of receipt of the application from the Regional Manager.[46] However, the MPRDA does not provide time periods for the granting and refusal of a mining permit. The MPRDA states that the Regional Manager has a period of fourteen

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[34] Section 23(3) of the MPRDA.
[35] Section 23(4).
[36] Sections 17(6), 23(6) and 27(8)(a).
[37] Section 17(6).
[38] Section 23(6).
[39] Section 27(8)(a).
[40] Section 18(4).
[41] Section 24(4).
[42] Section 27(8)(a).
[43] Van Schalkwyk *Relationship between Land Use Planning and Mining* 54.
[44] 54.
[45] 55.
[46] Section 17(1) and (2) of the MPRDA.

days, from receipt of the application, to either accept or reject the application.[47] If the application for a mining permit is not compliant with the requirements under section 27, the applicant will be notified in writing by the Regional Manager.[48] If the application meets the requirements under section 27, the Regional Manager will deliver written notification to the applicant to request the initiation of consultation with interested and affected parties.[49] This requirement is also present in the application procedures for prospecting rights and mining rights. However, it is unclear why the legislature has explicitly referred to applications that relate to 'land occupied by a community' in the case of prospecting rights[50] and mining rights[51] and omitted this statement in the case of mining permits. The MPRDA imposes additional conditions to promote the rights and interests of communities which include the participation of community members.[52] It is unclear whether the absence of this statement in the mining permit provisions implies that the applicant will not be required to fulfil these additional conditions. Arguably, the MPRDA's silence in this regard potentially deprives communities of a right of participation and the promotion of their rights and interests that are affected by mining permits.

There is a significant difference in the application procedure for the mining permit that requires two strict preconditions to be satisfied before lodging the application. The MPRDA provides that a mining permit can only be issued if the relevant mineral can be mined optimally within two years and if the mining area is within five hectares of land.[53] The applicant must apply at the relevant Regional Manager's office, in the prescribed manner accompanied by the prescribed non-refundable application fee.[54] Upon receipt of the application, the Regional Manager must accept the application if the requirements in section 27(2) are satisfied and if a person holds no other right or permit for the same mineral or piece of land that is concerned.[55] Additionally, the granting of the permit must not result in the applicant being granted more than one permit for the same area of land or an area adjacent to it.[56] This final requirement distinguishes the requirements of a mining permit from those of a prospecting and mining right considering that the granting of the latter rights have no restrictions relating to adjacent pieces of land.

Despite the minor differences, it is apparent from the provisions of the MPRDA and the above overview that the application procedures for prospecting rights and mining rights are relatively similar. The procedure for the mining permit is, however, distinguishable by the two preconditions that must exist before the lodgement of a permit application. The application procedures discussed above provide the context for the requirement of consultation with interested and affected parties for all rights and permits applied for in terms of the MPRDA.

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[47] Sections 27(4) and (5) of the MPRDA.
[48] Section 27(4).
[49] Section 27(5)(a).
[50] Section 17(4A).
[51] Section 23(2A).
[52] Section 17(4A).
[53] Section 27(1).
[54] Section 27(2).
[55] Sections 27(3)(a) and (b).
[56] Section 27(3)(c).

3. Consultation with Interested and Affected Parties

The consultation requirement under the MPRDA provides interested and affected parties with the necessary information regarding all the prospective mining activities.[57] This information ought to enable the interested and affected parties to make an informed decision in light of the representations made by the applicant.[58] The consultation requirement is therefore indicative of the serious concern expressed by the legislature for the rights of communities affected by mining activities.[59]

3.1 Purpose of the consultation requirement

In terms of the MPRDA, the granting of a prospecting right, mining right and mining permit must be preceded by a consultation initiated by the applicant with the interested and affected parties.[60] The Consultation Guideline of the Department of Mineral Resources (DMR Consultation Guideline)[61] provides a definition of what 'consultation' entails. In terms of the DMR Consultation Guidelines, consultation is a two-way communication process between the applicant for a right or permit and the interested and affected parties.[62] This communication process requires the applicant to listen to the relevant parties and consider their response to allow for 'openness in the decision-making process.'[63] Despite the inclusion of the requirement of consultation, the MPRDA does not provide the purpose of the consultation process.[64] Nevertheless, various court judgments and the DMR Consultation Guideline elaborate on the purpose of the consultation requirement.[65]

In *Meepo v Kotze*[66] the purpose of the consultation requirement was discussed in the context of prospecting rights.[67] The Court stated that the granting of prospecting rights results in a severe encroachment on the property rights of the landowner.[68] The Court further provides that the purpose of consultation under the MPRDA is to alleviate the consequences that prospecting activities have on the rights of the landowner.[69] The consultation process intends to resolve disputes or objections between the applicant or holder of a prospecting right and the landowner.[70] Therefore, the requirement is a balancing mechanism for the competing interests of the right or permit applicant and that of the landowner. However, the Court further stated that consultation is only required to

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[57] Tlale (2020) *PER/PELJ* 17.
[58] Tlale (2020) *PER/PELJ* 17.
[59] South African Human Rights Commission *Challenges of Mining-affected Communities* 60.
[60] Section 10 of the MPRDA.
[61] Department of Mineral Resources Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA.
[62] See definition of 'consultation' under section D of the DMR Consultation Guideline.
[63] See definition of 'consultation' under section D.
[64] Van Schalkwyk *Relationship between Land Use Planning and Mining* 55.
[65] See *Meepo v Kotze* 2008 (1) SA 104 (NC); *SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd* 2011 (4) All SA 168 (SCA); *Bengwenyama Minerals (Pty) Ltd v Genorah Resources* (Pty) Ltd 2011 (4) SA 113 (CC).
[66] 2008 (1) SA 104 (NC).
[67] Van Schalkwyk *Relationship between Land Use Planning and Mining* 55.
[68] *Meepo v Kotze* 2008 (1) SA 104 (NC) para 13.1.
[69] Para 13.1.
[70] Para 13.1.

the extent that the landowner is 'appraised of the impact prospecting activities may have on his land'.[71] The Court did not elaborate on the meaning of this statement, and neither did it explain how it would affect the statutory and constitutional rights of the landowner. The MPRDA requires consultation for all prospecting rights, mining rights and mining permits. The facts before the Court in *Meepo v Kotze* only dealt with prospecting rights and landowners. The Court did not mention any other types of rights and permits, and neither did the Court mention anything regarding lawful occupiers. Despite the Court's silence, the consultation process applies to all rights and permits under the MPRDA and all interested and affected parties, including lawful occupiers. Therefore, the purpose of the consultation process discussed *in Meepo v Kotze* is arguably applicable to all rights and permits, and all parties affected by the prospective mining activities, including lawful occupiers.

In *SA Soutwerke v Saamwerk Soutwerke* (*SA Soutwerke v Saamwerk)*[72] the Court stated the purpose of notifying the applicant to conduct a consultation is to trigger the assessment of the impact that the future mining activities will have on the parties.[73] The consultation also assists the applicant in its preparation of the required environmental management plan that factors in the concerns of interested and affected parties.[74] In *Bengwenyama Minerals v Genorah Resources* (*Bengwenyama)*[75] the Court elaborated on the purpose of notification and consultation. According to the Court, the notification and consultation requirement is concerned with the impact that granting a prospecting right will have on the landowner or lawful occupier.[76] Additionally, the Court stated that the purpose of the consultation is to determine whether accommodation is possible between the applicant and the landowner about the latter's right to use the land.[77] The landowner and the applicant are not obliged to reach an agreement.[78] However, the consultation must be done in good faith to attempt an accommodation.[79]

The DMR Consultation Guideline states that the purpose of the consultation is to provide the landowner, affected parties and communities with the necessary information about the proposed prospecting or mining project.[80] This consultation intends to assist the landowner, affected parties and communities to make an informed decision.[81] Furthermore, the consultation process intends to create an opportunity to assess whether accommodation is possible concerning the interference with the existing rights to the use of land. [82] It is apparent from the DMR Consultation Guideline and the abovementioned judgments that consultation creates an opportunity for interested and affected parties to influence decisions that are made by applicants that have a direct impact on

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[71] *Meepo v Kotze* 2008 (1) SA 104 (NC) para 13.1.
[72] 2011 (4) All SA 168 (SCA).
[73] Para 29.
[74] Para 29.
[75] 2011 (4) SA 113 (CC).
[76] Para 64.
[77] Para 65.
[78] Para 65.
[79] Para 65.
[80] Section E of the DMR Consultation Guideline.
[81] Section E.
[82] Section E.

their livelihood. A crucial assessment before consultation commences involves the determination of who qualifies as an 'interested and affected party'.

3.2 Definition of 'interested and affected parties'

The MPRDA does not define the phrase 'interested and affected parties'. However, a definition of an 'interested and affected person' is contained in the MPRDA Regulations. The MPRDA Regulations define an 'interested and affected person' as a natural or juristic person that has a direct interest in a prospective or existing operation.[83] This definition also includes persons that may be affected by an existing or prospective operation.[84] The Amendment Regulations to the Mineral and Petroleum Resources Development Regulations, 2020 (Amendment Regulations)[85] expressly include holders of informal rights to land, as defined by the IPILRA, in the definition of 'interested and affected persons'.[86] This amendment is noteworthy in that it formally recognises that the holders of informal rights to land must be consulted before their rights are deprived. Nevertheless, it is unclear whether the legislature intended for the word 'party' in the MPRDA to be used interchangeably with the word 'person' in the MPRDA Regulations. The inconsistent use of words creates a vagueness in determining who qualifies for consultation under the MPRDA.[87] The particular use of the phrase 'direct interest' creates an impression of a limited scope of persons to which consultation in the MPRDA applies.[88] This impression is contrary to the definition of interested and affected parties stipulated in the DMR Consultation Guideline that provides a list of interested and affected parties.[89] The DMR Consultation Guideline particularly mentions that the list of interested parties provided is not exhaustive.[90] In its current form, the use of the phrase 'direct interest' in the MPRDA Regulations changes the meaning of the phrase 'any interested and affected party' used in the MPRDA.[91]

In *SA Soutwerke v Saamwerk* the Court interpreted an 'interested party' as a party that has a lawful interest in the land to which the mining right pertains.[92] Interested parties include a landowner or a lawful occupier.[93] The Court distinguished an 'affected' party from an 'interested' party by stating that the former refers to individuals whose socio-economic conditions could be directly affected by the mining activities.[94] Considering that the MPRDA requires the submission of the outcome of the consultation to be in a National Environmental Management Act (NEMA)[95] compliant environmental report,[96] the definition of 'interested and affected party' in

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[83] Regulation 1 of the MPRDA Regulations.
[84] Regulation 1.
[85] GN R 420 in GG 43127 of 27-03-2020.
[86] See amendment of regulation 1 of the Amendment Regulations.
[87] Van Schalkwyk *Relationship between Land Use Planning and Mining* 57.
[88] 58.
[89] See definition of 'interested and affected parties' under section D of the DMR Consultation Guideline.
[90] See definition of 'interested and affected parties' under section D.
[91] Van Schalkwyk *Relationship between Land Use Planning and Mining* 57.
[92] *SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd* 2011 (4) All SA 168 (SCA) para 30.
[93] See definition of 'interested and affected parties' under section D of the DMR Consultation Guideline.
[94] SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd 2011 (4) All SA 168 (SCA) para 31.
[95] Act 107 of 1998.

the NEMA potentially provides clarity. The NEMA states that an 'interested and affected party' is 'any person, group of persons or organisation interested in or affected by such operation of activity.'[97] Although this is vague, this definition read with the list of parties in the DMR Consultation Guideline clarifies the group of persons that qualify for a consultation.[98] The definition of 'interested and affected parties' is crucial for the determination of which persons or group of persons qualify for an opportunity to be consulted. It is, therefore, imperative for the legislature to provide a uniform definition to allow for legal certainty and the consideration of the rights and interests of such persons through consultation.

For this dissertation, interested and affected parties refer to traditional or customary communities that are affected by mining activities. The phrase 'traditional community' will be used interchangeably with the phrase 'customary community'. The IPILRA defines a 'community' as a group of persons, or a portion thereof, whose rights to land originate from shared rules that determine access to such land that is held by the group.[99] The Traditional and Khoi-San Leadership Act (TKLA)[100] provides for the recognition of traditional communities.[101] A community is recognised as a traditional community if it: 1) is recognised by other traditional communities and observes a system of traditional leadership at a senior traditional leadership level;[102] 2) 'observes a system of customary law';[103] 3) 'recognises itself as a distinct traditional community with a proven history of existence, from a particular point in time up to the present, distinct and separate from other traditional communities';[104] 4) 'occupies a specific geographical area';[105] 5) 'has an existence of distinctive cultural heritage manifestations';[106] and 6) where it is relevant, the community 'has a number of headmanship or headwomenship'.[107] It is the consent of these customary communities that hold informal rights to land that the IPILRA requires before the deprivation of their informal rights to land.

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[96] Section 16(4)(a) of the MPRDA.
[97] See definition of 'interested and affected party' under section 1(a) of the NEMA.
[98] Section D of the DMR Consultation Guideline.
[99] Section 1 of the IPILRA.
[100] Act 3 of 2019. The Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) has now been repealed and replaced by the Traditional and Khoi-San Leadership Act 3 of 2019 which came into force on 1 April 2021. The TKLA has significantly expanded on the TLGFA definition which provided in sections 2(a) and (b) that a community is recognised as a traditional community if it 'is subject to a system of traditional leadership in terms of that community's customs' and if it 'observes a system of customary law'.
[101] Section 3(4) of the TKLA.
[102] Section 3(4)(a).
[103] Section 3(4)(b).
[104] Section 3(4)(c).
[105] Section 3(4)(d)
[106] Section 3(4)(e).
[107] Section 3(4)(f).

4. Consent from Customary Communities

The invasive nature of prospecting rights, mining rights and mining permits inherently results in the intrusion into the rights of customary community members that have informal rights to land.[108] The requirement of consent therefore becomes an essential mechanism for the protection of informal rights to land. The consent of a customary community implies that the decision taken by the community must be made without any form of manipulation, pressure or coercion before the mining activities commence.[109] Additionally, the customary community must be provided with comprehensive and accurate information regarding the scope and nature of the proposed mining activities.[110] The provision of comprehensive and accurate information has been prescribed in the recent judgment of *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources* (*Baleni v Regional Manager Eastern Cape)*.[111] This requirement is addressed in Chapter Four below.

4.1 Regulation of communal land and communal tenure landholding

As explained in Chapter One, the system of communal land tenure in South Africa is, to no small extent, reflective of the racially discriminatory landholding system implemented by the government of the apartheid regime.[112] During the apartheid era, black people were prohibited from owning or occupying land in particular areas in South Africa.[113] Despite South Africa not having any permanent legislation that regulates communal land or customary land tenure systems,[114] the property clause of the Constitution recognises and seeks to remedy the injustices of the past to honour those who have suffered as a result thereof.[115]

In terms of section 25(9) of the Constitution, the legislature must enact legislation that gives effect to section 25(6) of the Constitution. Section 25(6) provides that any person or community whose land tenure is legally insecure as a result of apartheid laws and practices is entitled to either legally secure tenure or comparable redress. In response to this constitutional mandate directed at the legislature, the IPILRA serves as a temporary measure to protect informal rights to land.[116]

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[108] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC) para 102.
[109] South African Human Rights Commission *Challenges of Mining-affected Communities* 64.
[110] 64.
[111] 2021 (1) SA 110 (GP).
[112] Tlale (2020) *PER/PELJ* 1.
[113] Tlale (2020) *PER/PELJ* 1.
[114] Legal Resources Centre *Free, Prior and Informed Consent in the Extractive Industries in Southern Africa – An Analysis of the legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia* (2018) 12.
[115] See section 25 of the Constitution.
[116] Tlale (2020) *PER/PELJ* 2.

4.2 Consent requirement under the IPILRA

In terms of the IPILRA, a person may not be deprived of their informal right to land without their prior consent.[117] An 'informal right to land' is defined as 'the use, occupation or access to land in terms of any tribal, customary or indigenous law or practice of a tribe.'[118] The deprivation of an informal right to land pertaining to land held on a communal basis must be in accordance with the customs and usages of the community.[119] This provision is subject to section 2(4) of the IPILRA, the Expropriation Act,[120] and any other laws that deal with the expropriation of land or rights.[121] Section 2(4) provides that the custom and usages of a community to dispose of their rights include the principle that the decision must be made by the majority of the right holders or their representative. The right holders are entitled to sufficient notice and a reasonable opportunity to participate in the decision-making processes.[122] The phrase 'custom and usages of the community' requires the definition of 'customary law' to be discussed. Chapter Three of the dissertation elaborates on this definition. The IPILRA does not define what constitutes a deprivation.[123] Nonetheless, the definition of deprivation is discussed in various court judgments.

The Court in *First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services; First National Bank of South Africa t/a Westbank v Minister of Finance* (*FNB* case)[124] stated that a deprivation occurs when there has been an interference with the use, enjoyment or exploitation of private property of a person that has a right or title over the property in question.[125] Therefore, the interference must have a legally relevant impact on the rights of the persons affected by the deprivation.[126] *Mkontwana v Nelson Mandela Metropolitan Municipality* (*Mkontwana*)[127] qualifies this definition further. The Court stated that 'whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation [of a right or interest to property].'[128] A minimum threshold is proposed by the Court that provides that there ought to be at least a 'substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment [in a democratic society].'[129] This threshold implies that the existence of deprivation is a matter of degree that is dependent on the extent of the interference concerned.[130] Arguably, the requirement of

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[117] Section 2(1) of the IPILRA.
[118] See definition of 'informal right to land' under section 1.
[119] Section 2(2).
[120] Act 63 of 1975.
[121] Tlale (2020) *PER/PELJ* 9.
[122] Tlale (2020) *PER/PELJ* 9.
[123] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC) para 98.
[124] 2002 4 SA 768 (CC).
[125] Para 57.
[126] Para 100; see also Tlale (2020) *PER/PELJ* 10.
[127] 2005 (1) SA 530 (CC).
[128] Para 32.
[129] Para 32.
[130] Tlale (2020) *PER/PELJ* 23.

a 'substantial interference' is a stricter criterion than that of *FNB* case.[131] The courts in *Baleni v Minister of Mineral Resources* (*Baleni*)[132] and *Maledu v Itereleng Bakgatla Mineral Resources* (*Maledu*)[133] accepted both definitions in the *FNB* case and *Mkontwana*.

Additionally, the Court in *Maledu* proposed that the dictionary definition of 'deprivation' should be adopted for section 2 of the IPILRA.[134] Deprivation, under the IPILRA, includes 'the damaging lack of basic material benefits; lack or denial of something considered essential'.[135] The Court in *Baleni* went further to state that the granting of a mining right constitutes a deprivation for both section 25 of the Constitution and the IPILRA.[136] The definitions provided in the above judgments appear to imply that the determination of whether there was a deprivation is a factual enquiry.

4.3 The exclusion of the consent requirement under the MPRDA

The provisions of the MPRDA do not require right and permit applicants to obtain consent from landowners or lawful occupiers who are potentially affected by mining.[137] Although the Constitution explicitly provides for the protection of property rights, including informal rights to land, the MPRDA enables applicants to be granted rights and permits without obtaining prior consent.[138] Practically, this results in the MPRDA granting the applicant a right of access to land that could be against the will of the landowner or lawful occupier.[139] Consequently, the members of communities that hold informal rights to land are at risk of losing their rights of use and enjoyment of the land that they lawfully occupy.[140] The MPRDA's silence regarding a consent requirement is inconsistent with both section 25 of the Constitution and the IPILRA. This inconsistency is concerning considering that the underlying purpose of the IPILRA is to provide security of tenure to vulnerable and historically disadvantaged persons.[141] The inconsistency is furthermore at cross-purposes with the Constitution, the MPRDA and the IPILRA's collective recognition of a need to redress the injustices of South Africa's past racially discriminatory laws.[142]

Nevertheless, the requirement of consultation under the MPRDA and the consent requirement under the IPILRA are not divorced from or in conflict with one another. These requirements are not mutually exclusive because a

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[131] AJ van der Walt & RM Shay "Constitutional Analysis of Intellectual Property" (2014) 17 *PER/ PELJ* 52 55.
[132] 2019 (2) SA 453 (GP).
[133] 2019 (2) SA 1 (CC).
[134] Para 98.
[135] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC) para 98. The 'lack or denial of something considered essential' refers to the informal right to land held by customary communities.
[136] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) para 59.
[137] Tlale (2020) *PER/PELJ* 14.
[138] Centre for Environmental Rights and Lawyers for Human Rights *Mining and your Community: Know Your Environmental Rights* (2014) 6.
[139] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC) para 100.
[140] Centre for Environmental Rights and Lawyers for Human Rights *Mining and your Community* 6.
[141] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC) para 105.
[142] Tlale (2020) *PER/PELJ* 18.

community cannot consent to mining activity before being consulted by the right or permit applicant.[143] The Court in *Bengwenyama* highlighted that a more general-purpose for consultation is to provide the landowner and lawful occupiers with the necessary information to make an informed decision.[144] The informed decision would essentially imply that the landowner or lawful occupier is either giving consent or refusing consent. Despite this reality, the MPRDA does not require an applicant to obtain consent from the landowner or lawful occupier.[145] The absence of a consent requirement creates a lack of clarity as to whether the legislature intended for the MPRDA to have precedence over the IPILRA or not. This lack of clarity has, however, been resolved in *Maccsand v City of Cape Town*[146] which held that 'the exercise of a mining right [is] subject to any other laws bearing on such a right'.[147]

In the *Maledu* the respondents were holders of a mining right for platinum-group metals and associated minerals in respect of a farm in the North West Province.[148] The applicants in the case contended that the farm was occupied and owned by the Lesetlheng Village Community.[149] Furthermore, the applicants contended that the respondents had never consulted them as the owners of the farm.[150] In the High Court, it was held that the applicants were not the owners of the farm and were therefore not owed a duty to be consulted by the respondents.[151] In response to this decision, the applicant sought leave to appeal the decision.[152] Amongst other issues, the Constitutional Court had to answer whether the applicants had consented to the deprivation of their informal rights to land or interests in the farm.[153] The Court held that the respondents were required to comply with the consent requirement of the IPILRA.[154] Additionally, the Court emphasised that the MPRDA must be read in agreement with the IPILRA.[155] Consequently, the award of a right or permit does not extinguish the operation of the IPILRA.[156]

According to Tlale, the *Baleni* judgment provides a noteworthy exhibition of the 'conflicting levels of engagement in terms of the IPILRA and the MPRDA'.[157] In *Baleni* the central issue before the Court was whether consent in terms of section 2 of the IPILRA was required before the Minister could grant a mineral right application.[158] In summary, the facts before the Court involved the Xolobeni community located in the Umgungundlovu area on the

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[143] Tlale (2020) *PER/PELJ* 24.
[144] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) para 66.
[145] South African Human Rights Commission *Challenges of Mining-affected Communities* 61.
[146] 2012 (4) SA 181 (CC).
[147] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC) para 106.
[148] Para 11.
[149] Para 10.
[150] Para 16.
[151] Para 17.
[152] Para 26.
[153] Para 42.
[154] Para 105
[155] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC) para 106.
[156] Para 106.
[157] Tlale (2020) *PER/PELJ* 7.
[158] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) para 32.

Wild Coast of the Eastern Cape Province in South Africa.[159] The Xolobeni community had resisted mining activities from being carried out by an Australian company, the fifth respondent, for over ten years.[160] Despite this, the community was notified that the Australian company was awarded a mineral licence to commence mining activity.[161] The company argued that the MPRDA trumps the IPILRA and that the Xolobeni community did not have a right to refuse consent to a mining right nor a right to consent before the granting of a mining right.[162] The Court held that the MPRDA must be read together with the IPILRA and that the holders of informal rights to land cannot be deprived of their rights and interests without their prior consent.[163] The *Baleni* decision has therefore set the standard of consent to be obtained before the granting of rights or permits.[164] The above judgments illustrate that there is no conflict between the IPILRA and the MPRDA and that the statutes must be interpreted in a manner that allows both their purposes to be satisfied.[165]

5. Conclusion

The purpose of this chapter was to explain the requirements of the application procedures for prospecting rights, mining rights and mining permits that give context for the requirements of consultation and consent. The above discussion highlights a lack of accuracy and comprehensiveness of the MPRDA concerning the application procedures.[166] The absence of specific provisions and statements in the respective application procedures creates uncertainty regarding the legislature's intention behind these omissions. Despite this, the minor differences in the application procedures indicate that the procedures are relatively similar.

The MPRDA does not define consultation, and neither does it state the purpose of the consultation requirement. This concern is, however, cured by the DMR Consultation Guideline and the judicial interpretations provided by the available case law. The lack of consistency in the use of the phrase 'interested and affected party' leaves a vagueness in the interpretation of who qualifies as an interested and affected party. This lack of clarity gives the applicant of the rights or permits the responsibility to determine who is an interested and affected party.[167] The lack of clarity may have the potential of adversely excluding parties who qualify as interested and affected parties. As such, the consequence is that the parties are deprived of their right to consultation due to a lack of consistency in the MPRDA.

The importance of obtaining community consent as a means of protecting informal rights to land cannot be undermined, particularly in the context of the granting of rights and permits for prospecting and mining projects.

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[159] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) para 2.
[160] Tlale (2020) *PER/PELJ* 7.
[161] Tlale (2020) *PER/PELJ* 7.
[162] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) para 26.
[163] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) para 83.
[164] Tlale (2020) *PER/PELJ* 12.
[165] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC) para 106.
[166] Van Schalkwyk *Relationship between Land Use Planning and Mining* 72.
[167] Van Schalkwyk *Relationship between Land Use Planning and Mining* 73.

The IPILRA affords customary communities legal protection to have control and autonomy over their land following their community's customary law and usages.[168] There is an undeniable urgency required on the part of the legislature to pass permanent legislation to recognise and strengthen the position of communities with informal rights to land. In the interim, the Free, Prior and Informed Consent (FPIC) principle under international law could serve as additional protection. The legal framework for the FPIC principle, the nature of customary land rights and their associated decision-making practices are discussed in Chapter Three below.

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

Chapter 3: Customary Land Rights, Decision-making Practices of Customary Communities and the FPIC Principle

1. Introduction

Chapter Two provided an overview of the application procedures for the granting of prospecting rights, mining rights and mining permits. The chapter also provided the context for the legal framework for the requirements of consultation and consent respectively contained in the Mineral and Petroleum Resources Development Act (MPRDA)[1] and the Interim Protection of Informal Land Rights Act (IPILRA).[2] This chapter discusses the processes that must be adhered to, to meet the requirements of consultation and consent. Chapter Four compares the processes and the decision-making practices observed by customary communities.

To understand the context in which the decision-making practices for consultation and consent apply, this chapter examines the nature of customary or indigenous land rights in South Africa. This chapter describes the nature of customary land rights in light of the existing academic interpretations and the statutory definition of 'customary law' as well as the criticisms of the phrase 'communal land tenure'. The chapter also introduces the meaning of and legal framework for the Free, Prior and Informed Consent (FPIC) principle prescribed under international law.[3] The purpose of this chapter is to identify and provide the context for the nature of the decision-making practices observed under customary law that should be engaged with for the fulfilment of the requirements of consultation and consent.

2. Processes for Consultation and Consent

This section briefly outlines the specific processes that must be followed by the applicant for the fulfilment of the statutory requirements of consultation and consent respectively prescribed under the MPRDA and the IPILRA. While Chapter Two has identified and discussed the provisions that contain the statutory requirements, this section goes further by discussing the processes that the applicant must follow.

2.1 Consultation process

As discussed in Chapter Two, the MPRDA requires the applicants of rights to minerals and mining permits to consult with the interested and affected parties in the 'prescribed manner'. Despite this requirement, neither the

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[1] Act 28 of 2002.
[2] Act 31 of 1996.
[3] See art 19 of the United Nations Declaration on the Rights of Indigenous Peoples, General Assembly Resolution 61/295, 2007.

MPRDA nor the Mineral and Petroleum Resources Development Regulations (MPRDA Regulations)[4] expand on what the 'prescribed manner' entails. As a result, the process and enforceability of the consultation requirement are questionable.[5] Courts have thus held that the consultation requirement under the MPRDA is unenforceable.[6] According to the courts, the consultation provisions in the MPRDA are unenforceable due to the lack of regulations.[7]

Although not binding, the Consultation Guideline of the Department of Mineral Resources (DMR Consultation Guideline)[8] guides the fulfilment of the consultation requirement.[9] The DMR Consultation Guideline provides three steps for the fulfilment of the applicant's duty to consult, namely: identification, notification and consultation.[10] First, the applicant is required to identify the landowner or lawful occupier of the land in question and all interested and affected parties.[11] The applicant is required to keep a record of the names and roles of the parties identified.[12] The identification step includes: 1) the identification of any communities that are affected; 2) the identification of interested parties; 3) a statement of whether the community is a landowner; and 4) a statement of whether or not a land claim is involved.[13] Secondly, the applicant is required to notify the landowner or lawful occupier and any interested and affected parties of its application and to keep proof of the notification.[14] The guideline mentions that traditional leaders of communities should be notified according to the values and traditions of the area.[15] Thirdly, the applicant is required to consult with the parties.[16] This consultation must include a meeting with all the parties mentioned above and must inform the parties in sufficient detail of what the prospecting or mining operations will entail.[17] According to the guideline, the consultation must result in an agreement that satisfies both parties regarding the communities 'existing cultural, socio-economic or biophysical environment'.[18] The consultation must also address the potential impact of the proposed prospecting or mining operations.[19] Lastly, the applicant is required to record minutes of the meeting to compile a report for submission to the Regional Manager.[20] It is unclear why the Minister of Minerals and Energy (Minister) has delayed in

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[4] GN R 527 in GG 26275 of 23-04-2004.
[5] Van Schalkwyk *Relationship between Land Use Planning and Mining* 66.
[6] 66. For case law see *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC); *Manqele v Durban Transitional Metropolitan Council* 2002 6 SA 423 (D) and *Minister for Environmental Affairs v Aquarius Platinum (SA) (Pty) Ltd* 2016 5 BCLR 673 (CC).
[7] Van Schalkwyk *Relationship between Land Use Planning and Mining* 66.
[8] Department of Mineral Resources Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA.
[9] South African Human Rights Commission *Challenges of Mining-affected Communities* 61.
[10] Section G 'Obligations of the Applicant' of the DMR Consultation Guideline.
[11] 6.
[12] 6.
[13] 6.
[14] 6.
[15] 6.
[16] 6.
[17] 7.
[18] 7.
[19] 7.
[20] 7.

promulgating regulations for the prescribed manner of consultation. It is a matter of urgency that the Minister enact binding regulations to ensure the enforceability of the requirements on applicants of rights to minerals and mining permits.

Considering that prospecting and mining operations are inevitably disruptive to customary communities, the consultation process must not merely be a formality.[21] The consultation process must be a genuine and effective meeting of the minds of both the applicants and the interested and affected parties.[22] It is therefore commendable that the Minister has amended the MPRDA Regulations to include the definition of 'meaningful consultation'.[23] The recent judgment of *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources* (*Baleni v Regional Manager Eastern Cape*)[24] considers the meaning of 'meaningful consultation'. The analysis in Chapter Four discusses the recent amendment and the meaning of 'meaningful consultation' as described in the *Baleni v Regional Manager Eastern Cape.*

2.2 Consent process

As discussed in Chapter Two, the express consent of the holders of informal rights to land is required before the deprivation of their land rights.[25] Regarding communal land, the deprivation of the informal rights to land must be in accordance with the customs and usages of the community.[26] Furthermore, the decision to dispose of the community's informal rights to land must be made by the majority of the right holders or their representative.[27] Despite this clear consent requirement contained in the IPILRA, the Minister of Land Affairs has not promulgated any regulations regarding how consent must be obtained.

The South Africa Human Right Commission (SAHRC) has recommended specific requirements regarding the decision to dispose of informal rights to land.[28] According to the SAHRC, first, a meeting must be held for the consideration of the disposal of the land rights; second, the community members must be afforded sufficient notice of the proposed disposal; third, the majority of the community members must be present or represented in the meeting; fourth, the community member must be afforded a reasonable opportunity to participate; fifth, the majority of the right holders must decide on the disposal; and sixth, compensation must be provided to those whose land rights have been disposed of.[29] Additionally, the SAHRC is of the view that the Department of Rural Development and Land Reform (DRDLR) policy document entitled the Interim Procedures Governing Land

[21] A Mitchel, L Moalusi, M van der Want, S Bryson, C Picas & J Verwey "The Avatar syndrome: mining and communities" (2012) 112 *The Journal of the Southern African Institute of Mining and Metallurgy* 151 153.
[22] Mitchel et al (2012) *The Journal of the Southern African Institute of Mining and Metallurgy* 153.
[23] See amendment of regulation 1 for the definition of 'meaningful consultation' in the Amendment Regulations.
[24] 2021 (1) SA 110 (GP).
[25] See Section 4.2 of Chapter Two.
[26] Section 2(2) of the IPILRA.
[27] Section 2(4) of the IPILRA.
[28] South African Human Rights Commission *Challenges of Mining-affected Communities* 64.
[29] 64-65.

Development Decisions which require the Consent of the Minister of Land Affairs as Nominal Owner of Land (DRDLR Policy Document)[30] could be of guidance.[31]

The DRDLR Policy Document requires the DRDLR to take the necessary steps to ensure that the process of consultation and the requirement of consent are both fair and inclusive.[32] This requirement, however, does not speak to the actual process that must be followed by the applicant to obtain consent. Nevertheless, the DRDLR Policy Document could serve as guidance for the assessment of the adequacy of both the consultation process and the consent requirement.[33] Chapter Four of the dissertation discusses this possibility further.

The above SAHRC requirements and the DRDLR Policy Document serve merely as recommendations due to their non-binding legal status. As a result, thereof, the content of the manner of obtaining consent is still unclear. Considering the vulnerable position of the holders of informal rights to land and the issue of tenure insecurity, the Minister should promulgate legally binding regulations stipulating a prescribed manner for obtaining consent.

3. Customary Land Rights under South African Law

The patterns of land ownership and interests held therein in South Africa are reflective of the remnants of a racially discriminatory past that characterised South Africa's history of colonial dispossession and apartheid.[34] Under the apartheid regime, black people were prohibited from owning or occupying land in certain parts of South Africa.[35] Furthermore, as a result of the apartheid regime, vast areas of land occupied by customary communities are still nominally owned by the State.[36]

The interpretation and nature of customary land tenure and customary land rights remain distorted and misunderstood.[37] Researchers have affirmed the view that customary land rights confer both real and substantive rights over land to individuals and communities that are governed by customary law.[38] In this dissertation, the phrase 'customary land rights' will be used interchangeably with the phrase 'indigenous land rights'. Despite the constitutional protection afforded to customary law, customary land rights remain misunderstood and undermined in South Africa.[39] Furthermore, the legislature has failed to produce a permanent

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[30] Department of Rural Development and Land Reform "Interim Procedures Governing Land Development Decisions which require the Consent of the Minister of Land Affairs as Nominal Owner of Land,1997" (11-2015) <http://www.incrementalsettlement.org.za/wiki/images/2/27/A_07_-_Interim_procedures_as_amended_to_1999.08.17_-_final_%282016%29.pdf > (accessed 25-01-2021).
[31] South African Human Rights Commission *Challenges of Mining-affected Communities* 65.
[32] 65.
[33] 65.
[34] Tlale (2020) *PER/ PELJ* 1.
[35] Tlale (2020) *PER/PELJ* 2.
[36] Para 1.1 of the DRDLR Policy Document.
[37] A Pope "Indigenous-Law Land Rights: Constitutional Imperatives and Proprietary Paradoxes" (2011) *Acta Juridica* 308 328.
[38] Claassens & Cousins *Land, Power & Custom* 125.
[39] Pope (2011) *Acta Juridica* 308.

piece of legislation in respect of customary land rights, as mandated by the Constitution of the Republic of South Africa,1996 (Constitution) to affirm this protection.[40] The IPILRA, to date, remains a temporary measure enacted to protect customary land rights and other informal rights to land.[41]

The nature of indigenous land rights is markedly different from the recognised common law property rights.[42] These differences have raised various complexities that have an inevitable consequence of insecure land tenure of customary communities. To understand the nature of indigenous land rights, an interpretation for the concepts of 'customary law' and 'communal tenure' is provided below.

3.1 Interpretation of 'customary law' and criticisms of the phrase 'communal land tenure'

As defined in Chapter Two, the IPILRA provides that a 'community' is a group of persons, or portion thereof, whose rights to land originate from shared rules that determine access to the land that is held by the group.[43] This definition highlights the communal nature of customary communities and the observance of a system of customary law.[44] For clarification, the interpretation of 'customary law' and the criticisms of the phrase 'communal land tenure' are addressed below.

3.1.1 Customary law

Historically, customary law is known as an oral tradition; however, the modern tradition of documentation has resulted in many customary laws being reduced to writing.[45] In South African law, customary law consists of two forms, namely: living customary law and official customary law.[46] Living customary law 'consists of the actual practices or customs of the indigenous community whose customary law is under consideration'.[47] These practices and customs are unwritten and serve the purpose of regulating the day-to-day life of people.[48] The indigenous communities that observe customary law consider their practices and customs to have binding authority.[49] According to Hamnett, living customary law 'emerges from what people do, or - more accurately - from what they believe they ought to do'.[50] The Court in *Pilane v Pilane*[51] confirmed that living customary law, in

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[40] Pope (2011) *Acta Juridica* 312.
[41] Tlale (2020) *PER/PELJ* 2.
[42] Pope (2011) *Acta Juridica* 310.
[43] See Section 3.2 of Chapter Two; see also section 1 of the IPILRA.
[44] See section 1 of the TGLFA for the definition of 'traditional community'.
[45] C Rautenbach "Case Law as an Authoritative Source of Customary Law: Piecemeal Recording of (Living) Customary Law?" (2019) 22 *PER/PELJ* 2 5.
[46] Himonga & Nhlapo *African Customary Law* 25.
[47] 27.
[48] 27.
[49] 27.
[50] C Himonga & C Bosch "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning." (2000) 117 *SALJ* 306 319.
[51] 2013 (4) BCLR 431 (CC).

its nature, is an active and dynamic law that evolves simultaneously with the changes in the lives of the people it governs.[52] The evolving nature of living customary law means that the new customary norms are unregulated by legislation, and the older norms immediately cease to be observed.[53]

Official customary law refers to customary law that is created by the state and the legal profession.[54] This form of customary law is found in legislation, case law, textbooks and academic writing.[55] Official customary law is a written law that is often described as an ossification of living customary law.[56] It is, therefore, a fixed body of law that is indistinguishable from legislation and case law.[57] Unlike living customary law, official customary law rarely reflects the extant customary law of the people whose customs and practices it represents.[58]

The South African legal system is a dual system that consists of the common law and customary law.[59] The common law and customary law enjoy equal protection and recognition under the Constitution.[60] Therefore under South African law, customary law is 'law in its own right'.[61] Customary law enjoys recognition under the Constitution through section 211(3) that serves as a recognition instrument.[62] In terms of section 211(3), the courts are obliged to apply customary law when it is applicable. This application is subject to the Constitution and any legislation that specifically deals with customary law.[63] Customary law in South Africa is further recognised through section 39(2) that provides that customary law must be developed in a manner that promotes the rights in the Bill of Rights. The Constitution acknowledges that customary law is a distinct and independent source of norms within the South African legal order.[64] However, the Constitutional Court in *Alexkor Ltd v The Richtersveld Community*[65] emphasised that the constitutional recognition of customary law is only applicable to living customary law and not official customary law.[66] With the above in mind, the statutory requirements for consultation and consent ought to ensure that they respect customary law in light of the elevated status customary law enjoys under the Constitution.

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[52] *Pilane v Pilane* 2013 (4) BCLR 431 (CC) para 55.
[53] Himonga & Nhlapo *African Customary Law* 31.
[54] W Wicomb & H Smith "Customary communities 'peoples' and their customary tenure as 'culture': What we can do with the Endorois decision?" (2011) 11 *African Human Rights Law Journal* 422 430.
[55] C Rautenbach (2019) *PER/PELJ* 5.
[56] Himonga & Nhlapo *African Customary Law* 34.
[57] P de Vos & W Freedman *South African Constitutional Law in Context* (2014) 208.
[58] Himonga & Nhlapo *African Customary Law* 33.
[59] C Rautenbach (2019) *PER/PELJ* 8.
[60] Y Meyer "*Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP): Paving the Way for Formal Protection of Informal Land Rights" (2020) 23 *PER/PELJ* 2 10.
[61] R Ozoemena "Living Customary Law: A Truly Transformative Tool?" (2017) VI *Constitutional Court Review* 147 151.
[62] Himonga & Nhlapo *African Customary Law* 59.
[63] Section 211(3) of the Constitution.
[64] *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) para 51.
[65] 2004 (5) SA 460 (CC).
[66] Wicomb & Smith (2011) *African Human Rights Law Journal* 430.

3.1.2 Criticisms of the phrase "communal land tenure"

The contemporary interpretations of communal land tenure in South Africa are understood in the centuries-old context of land dispossession and the state's regulation of land.[67] This history involves the significant alteration and adaptation of indigenous land regimes in favour of the dominant classes.[68] Consequently, the form of communal land tenure regulated by the pre-constitutional era has little resemblance to that of pre-colonial land tenure.[69] According to Cousins, pre-colonial land tenure was both 'communal' and 'individual', and therefore it comprised 'a system of complementary interests held simultaneously'.[70] Practically, this translates into different interests in the same property being held by different persons.[71]

Today, the indigenous system of land tenure is generally referred to as 'customary tenure', 'customary land tenure' or 'communal land tenure'.[72] Freudenberger defines 'customary tenure' as a 'set of rules and norms that govern community allocation, use, access, and transfer of land and other natural resources.'[73] The use of the term 'customary tenure' relates directly to the traditional rights that indigenous communities have in land and associated natural resources.[74] These rights are administered by following the customs and usages of the community in question.[75] Despite the tendency to use these phrases interchangeably, Cousins emphasises that the terms 'communal' and 'customary' do not necessarily have the same meaning or scope.[76]

Academics have argued that the use of the legal concept 'communal' is problematic and confusing.[77] Bennett argues that the term 'communal' creates an impression that the community shares the land for subsistence purposes, as opposed to the community having an equal claim to the land.[78] The confusion arises out of two interpretations; on the one hand, communal implies that the group of persons jointly holds the right to land.[79] On the other hand, communal implies that a group of persons in common holds the right.[80] Du Plessis is of the view that the latter interpretation does not apply to African indigenous tenure.[81] Despite the existing confusions and historical distortions, contemporary communal land tenure in South Africa is still characterised as being 'socially

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[67] B Cousins "More Than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and its Implications for Land Policy" (2007) 7 *Journal of* Agrarian *Change* 281 283.
[68] Cousins (2007) *Journal of Agrarian Change* 283.
[69] Claassens & Cousins *Land, Power & Custom* 138.
[70] Mailula (2011) *Constitutional Court Review* 79.
[71] Mailula (2011) *Constitutional Court Review* 79.
[72] Mailula (2011) *Constitutional Court Review* 79.
[73] Mailula (2011) *Constitutional Court Review* 79. See also in MS Freudenberger "The future of customary tenure" United States Agency International Development (USAID) Issue Paper (2011).
[74] Mailula (2011) *Constitutional Court Review* 79.
[75] Mailula (2011) *Constitutional Court Review* 80.
[76] Claassens & Cousins *Land, Power & Custom* 138.
[77] WJ du Plessis "African Indigenous Land Rights in a Private Ownership Paradigm" (2011) 14 *PER/ PELJ* 45 52.
[78] Du Plessis (2011) *PER/PELJ* 52.
[79] Du Plessis (2011) *PER/PELJ* 52.
[80] Du Plessis (2011) *PER/PELJ* 52.
[81] Du Plessis (2011) *PER/PELJ* 52.

embedded' and involving a set of complementary interests that are held simultaneously by different persons.[82] This social embeddedness is also reflected in customary land rights, as explained below.

3.2 Customary land rights and the decision-making practices of customary communities

South African law recognises customary land rights as informal rights to land.[83] As explained in Chapter Two, a land right is informal if 'the use, occupation or access to land in terms of any tribal, customary or indigenous law of practice of a tribe.'[84] Despite the informal status of customary land rights, the Constitution aims to protect all property rights, including customary land rights.[85] The Constitution expressly mandates the legislature to protect informal rights to land through legally secure tenure or comparable redress.[86] There is currently no permanent legislation that provides a remedy or structure to activate this protection adequately.[87] Therefore, it remains unclear how customary land rights will be protected and by what sort of remedies.[88] This dissertation proposes that requiring right and permit applicants to engage meaningfully with the nature of customary land rights and the associated decision-making practices will provide an additional mechanism for the protection of customary land rights. This additional mechanism potentially allows for customary communities to make an informed decision, after consultation with the relevant parties, regarding mining activities that inherently encroach on the land rights of the mining-affected communities.

3.2.1 The nature of customary land rights

The nature of customary or indigenous land rights is not easily explainable.[89] Customary land rights are markedly different from common law land rights.[90] Therefore reference cannot be made to the common law to ascertain the nature of customary land rights with any clarity.[91] According to Okoth-Ogendo, indigenous land rights systems cannot be adequately explained by only investigating whether African social systems recognise the notion of ownership or whether ownership is corporate or absolute.[92] He suggests that a more appropriate way of understanding indigenous land rights is to 'clarify what it is that constitutes property in land in the African social order'.[93] Practically, this requires an enquiry into how individuals, or individuals within a community, relate to the

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[82] Claassens & Cousins *Land, Power & Custom* 141.
[83] Tlale (2020) *PER/PELJ* 2.
[84] See definition of 'informal right to land' under section 1 of the IPILRA. See also Section 4.2 of Chapter Two.
[85] Pope (2011) *Acta Juridica* 312. The Constitution's conception of property goes beyond what is classified as property in private law.
[86] Section 25(6) of the Constitution.
[87] Pope (2011) *Acta Juridica* 312.
[88] Pope (2011) *Acta Juridica* 313.
[89] Mailula (2011) *Constitutional Court Review* 79; Claassens and Cousins *Land, Power & Custom* 126.
[90] Pope (2011) *Acta Juridica* 310.
[91] Pope (2011) *Acta Juridica* 327.
[92] Claassens and Cousins *Land, Power & Custom* 126.
[93] 126.

land and each other in respect of the land and its resources.[94] The enquiry ought to be cognisant of the set of 'reciprocal rights and obligations that bind together and vest power in community members over land.'[95] Okoth-Ogendo asserts that the continuous performance of these rights and obligations assists in determining who has access to and control over the land that communities reside on, including the associated resources.[96] Unlike in civil-law land rights, access to land is not the same as control of land under indigenous law.[97] Access to land is based on membership to a social unit, whereas control of land is exercised through political authority and structures of administration.[98] Pope is of the view that the determination of the content of indigenous land rights 'remains elusive',[99] mainly because the content is difficult to express in language.[100] Despite this difficulty, a crucial element of understanding indigenous land rights is acknowledging that these land rights are not embodied in written word.[101] The land rights are proven through the testimonies and accounts of communities that occupy and use the indigenous land.[102]

Okoth-Ogendo holds the view that it is a misconception to claim that indigenous land rights systems are 'communal' in nature.[103] According to Okoth-Ogendo, this claim would imply that the ownership of land is collective and as a result communities as 'corporate' entities make a collective decision relating to access to the use and control of the land.[104] Additionally, this would incorrectly imply that all members within a community share equivalent rights.[105] The proponents of Okoth-Ogendo's view allege that calling indigenous land rights systems communal implies that individuals have no recognised land rights.[106] On the contrary, land and resource rights include individual and family rights to residential and arable land as well as access to common property for uses such as grazing and water.[107] As such, indigenous land rights are simultaneously communal and individual.[108] The inherently dual capacity of indigenous land rights plays a significant role in explaining the nature and content of decision-making practices followed by customary communities when granting access to land that they occupy.

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[94] Claassens and Cousins *Land, Power & Custom* 125.
[95] Du Plessis (2011) *PER/PELJ* 54.
[96] Du Plessis (2011) *PER/PELJ* 54.
[97] Pope (2011) *Acta Juridica* 316.
[98] Cousins (2007) *Journal of Agrarian Change* 292.
[99] Pope (2011) *Acta Juridica* 319.
[100] Pope (2011) *Acta Juridica* 327.
[101] AK Barume *Land Rights of Indigenous Peoples in Africa: With Special Focus on Central, Eastern and Southern Africa* 2ed (2014) 50.
[102] Barume *Land Rights of Indigenous Peoples in Africa* 50.
[103] Claassens and Cousins *Land, Power & Custom* 125.
[104] Du Plessis (2011) *PER/PELJ* 54.
[105] Pope (2011) *Acta Juridica* 327.
[106] Claassens and Cousins *Land, Power & Custom* 125.
[107] Cousins (2007) *Journal of Agrarian Change* 293.
[108] Cousins (2007) *Journal of Agrarian Change* 293.

3.2.2 The nature of decision-making practices in customary communities

This dissertation proposes that the decision-making practices of customary communities should be meaningfully engaged with by the applicants of rights to minerals and mining permits in the fulfilment of the requirements of consultation and consent. The right of access to land conferred on the holder of a prospecting right, mining right or mining permit is undeniably invasive.[109] Consequently, the rights of customary communities, as landowners or lawful occupiers, are heavily encroached on.[110] A customary community cannot give informed consent to access to the land that it occupies without having first been consulted.[111] Therefore the decision-making practices followed by the affected communities, following their customary laws and usages, should not be disregarded.

The existences of the reciprocal rights and obligations that community members have towards each other under indigenous land rights systems require an inquiry into the layered nature of decision-making practices that exist in customary communities. According to Cousins, land and resource rights are embedded in a range of social relationships and units.[112] These social relationships or units are layered in nature and take various forms such as 'individual rights within households, households within kinship networks, [and] kinship networks within wider communities.'[113] As such, the rights and obligations are derived from the membership to a social unit and acquired through various ways such as birth or the affiliation to a group.[114] A consideration of the reciprocal rights and obligations is necessary to determine who has access to or control over land. [115] According to Okoth-Ogendo, two questions arise: first, who can have a right of access to land; and second, who has control and can manage the land resources on behalf of the people that have access to it.[116] Therefore a distinction exists between the manner in which access to land is obtained, and the mechanisms used to control and manage the land.[117] Access to land is based on membership to a social unit, whereas control of land is exercised through political authority and structures of administration.[118] This distinction demonstrates the idea that decision-making in customary communities, regarding access to and control of land, is not centralised but rather layered in its nature.

Okoth-Ogendo describes the structure of indigenous land rights system as an 'inverted pyramid' consisting of three layers, namely: the family; the clan lineage; and the community.[119] The family, clan lineage and the

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[109] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC) para 102.
[110] Para 102.
[111] Tlale (2020) *PER/PELJ* 24.
[112] Cousins (2007) *Journal of Agrarian Change* 293.
[113] Cousins (2007) *Journal of Agrarian Change* 293.
[114] Cousins (2007) *Journal of Agrarian Change* 293.
[115] Du Plessis (2011) *PER/PELJ* 54.
[116] Claassens and Cousins *Land, Power & Custom* 126.
[117] 126.
[118] Pope (2011) *Acta Juridica* 317.
[119] HWO Okoth-Ogendo "The Tragic African Commons: A century of expropriation, suppression and subversion" (2002) *Land reform and agrarian change in southern Africa: Occasional paper series No. 24, Programme for Land and Agrarian Studies,* *UWC Research Repository* 1 1 <

community represent the tip, middle and base of the pyramid respectively.[120] In this structure, access to land is dependent on a person's standing in the group and their social relations.[121] Essentially, access to land is dependent on membership to either of the three mentioned layers of the inverted pyramid.[122] This access to land is available to any individual based on their membership.[123] The decision regarding access to land on each layer of the pyramid is not made collectively. [124] Instead, the individual members of the layer of the pyramid affected decide who has access to land. [125] Decisions that are related to residential and arable land are made at a family or household level.[126] Decisions related to areas of land used for grazing, hunting and the redistribution of the resources are made at the clan level.[127]

On a community level, decision-making involves the protection of the land on behalf of the group in its entirety.[128] Therefore, the function of the land concerned is directly related to the layer of the pyramid that makes the decisions that affect the land concerned. Okoth-Ogendo further provides that the quantum of access rights is dependent on two factors, namely: 1) the category of membership that is held by the individual or the collective; and 2) the specific function that the access of the resources is needed for.[129] Unlike access to land, the control and management of the land lie in the hands of the community's sovereign power.[130] Consequently, the functions of control and management of the land are vested and exercised by the authority of the community, such as traditional leaders or elected committees.[131] Okoth-Ogendo reiterates that the control and management of land is not a function that is exercised by a single authority that is akin to a state.[132] He emphasises that this authority is not monolithic.[133] For example, a traditional leader or elected committee will enforce the rights that are subject to defined community rules. [134]

The dissertation proposes that the applicant of a prospecting right, mining right or a mining permit ought to consult and get consent directly from the parties that fall within the affected layer of the 'inverted pyramid'. The importance of engaging with the decision-making practices of customary communities in fulfilment of the

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http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/4372/op_24_tragic_african_commons_century_expropriation_suppression_subversion_2002.pdf?sequence=1&isAllowed=y> (accessed 8-9-2021). See also Du Plessis (2011) *PER/PELJ* 55.

[120] Du Plessis (2011) *PER/PELJ* 55.

[121] Du Plessis (2011) *PER/PELJ* 55.

[122] Claassens and Cousins *Land, Power & Custom* 126.

[123] Cousins (2007) *Journal of Agrarian Change* 292.

[124] HWO Okoth-Ogendo "The Tragic African Commons: A century of expropriation, suppression and subversion" UWC Research Repository 1. See also Du Plessis (2011) PER/PELJ 62.

[125] Du Plessis (2011) PER/PELJ 62.

[126] Cousins (2007) *Journal of Agrarian Change* 290.

[127] Cousins (2007) *Journal of Agrarian Change* 290.

[128] HWO Okoth-Ogendo "The Tragic African Commons: A century of expropriation, suppression and subversion" UWC Research Repository 2. See also Du Plessis (2011) PER/PELJ 62.

[129] HWO Okoth-Ogendo "The Tragic African Commons: A century of expropriation, suppression and subversion" UWC Research Repository 3.

[130] Claassens and Cousins *Land, Power & Custom* 127.

[131] 127.

[132] 127.

[133] 127.

[134] Cousins (2007) *Journal of Agrarian Change* 304.

statutorily required consultation and consent processes should not be underplayed. The nature and content of land rights and the decision-making practices attached to these rights continue to be misunderstood and distorted in academic writing and public policy.[135] This reality continues to aggravate the already vulnerable position of communities and perpetuates land tenure insecurity of holders of indigenous property rights.[136] Tenure insecurity is not an inherent characteristic of indigenous land systems.[137] This existing insecurity is instead a reflection of the dislocation of the land system from the social and institutional context in which it operates.[138] The recognition of and the adequate engagement with the decision-making practices would be better aligned with the Constitution's desire to protect the holders of informal rights to land. Additionally, engagement with the decision-making practices would also be a clear recognition of the elevated status that customary law enjoys under the Constitution.[139] The dissertation further proposes that application of the FPIC principle strengthens the protection of informal land rights of customary communities.

4. The Free, Prior and Informed Consent (FPIC) Principle

In a development context, such as mining, the FPIC principle plays a vital role in protecting and ensuring the right of access to information, self-determination, and public participation of local communities.[140] A crucial element of the FPIC principle, in the mining context, is the 'genuine inclusion, disclosure, and respect for peoples' decision-making processes'.[141] The right to FPIC is protected by a collection of international and regional instruments.[142] Collectively, these instruments obligate signatory states to recognise and protect the rights of indigenous peoples 'to own, develop, control and use their communal lands.'[143] Where deprivation of these rights or interests is concerned, no decisions that directly affect the indigenous peoples can be taken without their informed consent.[144]

4.1 The meaning of FPIC and 'indigenous peoples'

The main objective of the FPIC principle is to ensure: that local communities are not coerced or intimidated; that their consent is requested and freely given before the commencement of the proposed activities; and that the local communities have comprehensive and reliable information regarding the scope and impact of the

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135 Claassens and Cousins *Land, Power & Custom* 127.
136 124.
137 124.
138 124.
139 See section 211 of the Constitution.
140 JCN Ashukem "Included or Excluded: An Analysis of the Free, Prior and Informed Consent Principle in Land Grabbing Cases in Cameroon" (2016) 19 *PER/PELJ* 2 2.
141 Tlale (2020) *PER/PELJ* 17.
142 Ashukem (2016) *PER/PELJ* 2.
143 See para 5 of Committee on the Elimination of Racial Discrimination General Recommendation 23: Rights of Indigenous Peoples UN Doc A/52/18, 1997.
144 Para 4(d).

development activities.[145] Furthermore, the FPIC principle seeks to ensure that local communities have a choice to either give or refuse their consent.[146]

Although the phrase 'free, prior and informed consent' appears to be self-explanatory, the individual words 'free', 'prior' and 'informed' and 'consent' require interpretation to give meaning to the principle in its entirety.[147] 'Free' implies that the consent must be obtained without coercion, intimidation, manipulation or by the use of force by a government or non-governmental parties.[148] Therefore, the consent must be given voluntarily and through a process that is self-directed by the relevant local community.[149] 'Prior' implies that the consent is obtained before the commencement of the prospective activities.[150] Practically, this implies that the consent is sought well in advance of any authorisations or the commencement of the activities,[151] and that the indigenous peoples must be engaged in the early stages of the development and planning of the activities.[152] The peoples must be afforded adequate time to consider the proposed activities and to conduct their decision-making processes.[153] Therefore, the local communities cannot be approached only when approval is required from them.[154] 'Informed' implies that the indigenous peoples must be provided comprehensive information to ensure that they sufficiently understand the potential issues and impacts of decisions made that affect them.[155] Finally, 'consent' refers to the decisions made, collectively or individually, by the indigenous peoples through engaging in their communities' decision-making processes.[156] Consent is at the core of the communities' right to 'engage, negotiate, and choose whether to give or deny consent.'[157]

Despite indigenous peoples being the primary focus of the FPIC principle, there is no universally recognised definition of the term 'indigenous peoples'.[158] The African Commission on Human and People's Rights' (African Commission or the Commission) has argued that the establishment of a formal and universal definition of 'indigenous peoples' is neither necessary, desirable nor useful.[159] The argument emerges from the idea that no single definition can accurately capture the true characteristics of indigenous populations.[160] Although there is no agreement on the need for a universal definition, various definitions are accepted as guidelines for the

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[145] Ashukem (2016) *PER/PELJ* 3.
[146] Ashukem (2016) *PER/PELJ* 3.
[147] S Boutilier "Free, Prior and Informed Consent and Reconciliation in Canada." (2017) 7 *Western Journal of Legal Studies* 1 3.
[148] Boutilier (2017) *Western Journal of Legal Studies* 3.
[149] J Laughlin *UN-REDD Programme: Guidelines on Free, Prior and Informed Consent (*Working Final Version) (2013) 18.
[150] Ashukem (2016) *PER/PELJ* 3.
[151] Laughlin *Guidelines on Free, Prior and Informed Consent* 19.
[152] Boutilier (2017) *Western Journal of Legal Studies* 3.
[153] Laughlin *Guidelines on Free, Prior and Informed Consent* 19.
[154] 19.
[155] Boutilier (2017) *Western Journal of Legal Studies* 3.
[156] Laughlin *Guidelines on Free, Prior and Informed Consent* 18.
[157] Ashukem (2016) *PER/PELJ* 4.
[158] A Cook & J Sarkin "Who is Indigenous: Indigenous Rights Globally, in Africa and among the San in Botswana" (2009) 18 *Tulane Journal of International and Comparative Law* 93 105.
[159] Cook & Sarkin (2009) *Tulane Journal of International and Comparative Law* 99.
[160] Cook & Sarkin (2009) *Tulane Journal of International and Comparative Law* 99.

identification of 'indigenous peoples'.[161] The International Labour Organization Convention 169 (ILO Convention 169)[162] definition is one of such accepted definitions.[163] According to the ILO Convention 169, indigenous peoples are peoples in independent countries that are considered indigenous by virtue of their descent from populations that occupied the country 'at the time of conquest or colonisation or the establishment of present state boundaries'.[164] Additionally, these peoples retain, either in whole or part, their 'own social, economic, cultural and political institutions'.[165] Olanya is of the view that the focus should instead be on the identification of major characteristics of indigenous peoples as opposed to the reliance on a single definition.[166] According to the World Bank, these characteristics include: an attachment to ancestral territories and natural resources; self-identification and an identification by others of the peoples being a distinct group; an indigenous language; and the existence of customary, social and political institutions.[167] Despite the existing avoidance of a universal definition, the guideline definitions and identified characteristics play a crucial role in the determination of which people the FPIC principle protects.

4.2 International and regional legal framework for the FPIC principle

The FPIC principle is recognised by a number of international and regional bodies and organisations as well as conventions and documents.[168] This dissertation only discusses the provisions in the ILO Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[169] and the African Charter on Human and Peoples' Rights (African Charter).[170] The ILO Convention 169 is an international instrument that has binding force on all member states to the convention.[171] This convention sets the standards for the mandatory respect and protection of indigenous peoples' human rights in the context of development activities, such as mining.[172] The non-binding legal status of the UNDRIP is debated extensively in the international community.[173] Notwithstanding that the UNDRIP is non-binding in character, on a practical level, it holds significant legal

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[161] JB Hendricks *Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169* (2008) 5.
[162] International Labour Organization Convention No. 169, 1989.
[163] Hendricks *Research on Best Practices* 5.
[164] See art 1(1)(b) of the International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.
[165] Art 1(1)(b) of the ILO Convention 169.
[166] DR Olanya "Indigenous Peoples and Customary Land Rights: Public Policy Discourse of Large-Scale Land Acquisitions in East Africa." (2013) 10 *US-China Law Review* 620 624.
[167] Olanya (2013) *US-China Law Review* 625.
[168] P Tamang "An overview of the principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices" (2005) 9 *Australian Indigenous Law Reporter* 111 111.
[169] See United Nations Declaration on the Rights of Indigenous Peoples, General Assembly Resolution 61/295, 2007.
[170] African Charter on Human and People's Rights, 1981.
[171] Ashukem (2016) *PER/PELJ* 6.
[172] Ashukem (2016) *PER/PELJ* 6.
[173] CF Fredericks "Operationalizing Free, Prior and Informed Consent" (2016) 80 *Albany Law Review* 429 434.

authority.[174] According to Boutilier, the FPIC standards contained in the UNDRIP strengthen the earlier standards set by the ILO Convention 169.[175]

4.2.1 International law

The right to FPIC enjoyed by indigenous peoples derives from the international law principle of self-determination.[176] The principle of self-determination states that all persons have a right to 'freely determine their political status and freely pursue their economic, social and cultural development.'[177] Therefore, this implies that indigenous peoples have the right to participate freely in the decision-making processes that have an impact on their rights.[178]

In terms of Article 6 of the ILO Convention 169, states are required to consult with indigenous peoples 'through appropriate procedures and in particular through their representative institutions.'[179] Additionally, states are required to establish and make institutions available for indigenous peoples to freely participate at all levels of the decision-making processes of elective institutions and administrative bodies that are concerned with policy-making and programmes.[180] Finally, states are required to develop mechanisms that promote the full development of indigenous peoples' institutions and initiatives.[181] An essential requirement regarding consultation in the ILO Convention 169 is the obligation of states to consult with indigenous peoples in good faith and in a form that is appropriate to the circumstances.[182] According to Ashukem, this form ought to allow indigenous peoples to express their opinions easily.[183] Additionally, indigenous peoples ought to be able to exercise effective control through the participation in all decision-making processes that relate to their institutions, their way of life and their economic development.[184] Indigenous peoples have a right to their land, which is inclusive of the right of use, management and conservation of the land and its resources.[185] As such, states must ensure that indigenous peoples have the right to decide on their development priorities and to exercise control over the land that they occupy.[186] It is evident from the ILO Convention 169 that the FPIC

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[174] Fredericks (2016) *Albany Law Review* 434.
[175] Boutilier (2017) *Western Journal of Legal Studies* 2.
[176] Ashukem (2016) *PER/PELJ* 9.
[177] International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966.
[178] Ashukem (2016) *PER/PELJ* 9.
[179] Art 6(1)(a) of the ILO Convention 169.
[180] Art 6(1)(b).
[181] Art 6(1)(c).
[182] Art 6(2).
[183] Ashukem (2016) *PER/PELJ* 7.
[184] Ashukem (2016) *PER/PELJ* 7.
[185] Art 15(1) of the ILO Convention 169.
[186] Art 7(1).

principle plays a crucial role in the participation of indigenous peoples in decision-making processes and consultations for the protection of the community's rights relating to their land.[187]

The UNDRIP contains the FPIC principle in six articles, namely articles 10, 11, 19, 28, 29 and 32. This dissertation discusses articles 10, 19 and 32. In terms of article 10, indigenous peoples cannot be forcibly removed from their land nor relocated without the free, prior, and informed consent of the indigenous peoples. Additionally, relocation is only permissible after there has been an agreement on 'just and fair compensation' coupled with the option to return the land or territories.[188] Article 19 contains a mandatory obligation on states 'to consult and cooperate in good faith with indigenous peoples'.[189] This consultation ought to be carried out by the elected representative institutions of the indigenous peoples to obtain FPIC before the adoption and implementation of any legislative or administrative measure that impacts the peoples.[190] Article 32 obligates states to obtain free, prior and informed consent from indigenous peoples before the approval of any projects that affect their peoples' lands, territories and resources.[191] This consent must be obtained for development activities and the exploitation of mineral and other resources.[192] Although the UNDRIP is not a legally binding document, the existence of the document illustrates the acceptance that participating states have for the FPIC principle.[193] The document has an essential function of embodying the international principles of 'self-determination and cultural integrity'.[194] Collectively, these principles 'uphold the right of indigenous peoples to maintain and develop their customary law system of self-governance.'[195]

4.2.2 Regional law

Despite not explicitly referring to the FPIC principle, the African Charter on Human and Peoples' Rights (African Charter)[196] recognises and provides for the right to self-determination and the right to development.[197] The rights to self-determination and development collectively have a crucial role in fostering respect for the FPIC principle in Africa.[198] The right to self-determination guarantees all people the right to pursue their economic and social development freely.[199]

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[187] Ashukem (2016) *PER/PELJ* 8.
[188] Art 10 of the UNDRIP.
[189] Art 19.
[190] Art 19.
[191] Art 32(2).
[192] Art 32(2).
[193] Fredericks (2016) *Albany Law Review* 441.
[194] Fredericks (2016) *Albany Law Review* 434.
[195] Fredericks (2016) *Albany Law Review* 434.
[196] African Charter on Human and People's Rights, 1981.
[197] Ashukem (2016) *PER/PELJ* 10. These rights to self-determination and development are respectively embodied in arts 20 and 22 of the African Charter.
[198] Ashukem (2016) *PER/PELJ* 10.
[199] Art 20(1) of the African Charter.

Scholars argue that the right of self-determination provides a foundation for the protection of the peoples' rights and ensures their participation in decision-making that involves the development of their land.[200] The right to development grants all people the 'right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.'[201]

Based on these rights, the African Charter guarantees the right of people to participate in the cultural life of their community.[202] The African Charter further places a duty on states to promote and protect the morals and traditions of their communities.[203] This duty is carried out through adherence to the FPIC principle during the planning and implementation of development activities.[204]

The African Commission in *Centre for Minority Rights Development v Kenya* (*Endorois* case)[205] reiterates the duty on states to consult.[206] In the *Endorois* case, the Commission held that the state has to consult and obtain FPIC from the Endorois community following their customs and traditions when carrying out development projects.[207] Chapter Four discusses the facts and the applicability of the *Endorois* case to the South African context.[208]

The decisions of the African Commission are non-binding on member states; however, the decisions can become binding if they are adopted by the African Union.[209] In addition to the existing cases heard by the African Commission, the Commission has issued a resolution that calls upon all states to take all necessary measures to guarantee the participation of communities.[210] The participation must be inclusive of the FPIC of these communities in the decision-making processes related to natural resource governance.[211] Although not explicitly stated in the resolution, the reference to natural resource governance may be understood to be inclusive of participation in the decision-making processes regarding the exploitation of mineral resources on the land occupied by these communities.

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[200] Ashukem (2016) *PER/PELJ* 11.
[201] Art 22(1) of the African Charter.
[202] Art 17(2).
[203] Art 17(3).
[204] Ashukem (2016) *PER/PELJ* 11.
[205] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v* Kenya 2009 AHRLR 75 (ACHPR 2009).
[206] Ashukem (2016) PER/PELJ 11.
[207] Centre for Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya 2009 AHRLR 75 (ACHPR 2009) para 291.
[208] See Section 4 of Chapter 4.
[209] E Greenspan "Free, Prior, and Informed Consent in Africa: An emerging standard for extractive industry projects" (2014) 11 <https://s3.amazonaws.com/oxfam-us/www/static/media/files/community-consent-in-africa-jan-2014-oxfam-americaAA.PDF > (accessed 20-01-2021).
[210] African Commission on Human and Peoples' Rights, 224: Resolution on a Human Rights-Based Approach to Natural Resources Governance, 2012.
[211] African Commission on Human and Peoples' Rights, 224: Resolution on a Human Rights-Based Approach to Natural Resources Governance, 2012.

5. Conclusion

The chapter has discussed the processes that must be adhered to, to meet the requirements of consultation and consent under the MPRDA and the IPILRA. The lack of regulations that provide for the prescribed manner in which consultation and consent must be carried out raises serious concern regarding the enforceability of both requirements. The absence of guidance in the form of regulations arguably affects the effectiveness of the consultation and consent provisions in protecting informal rights to the land of customary communities affected by mining activities. It is unclear why the Minister is reluctant to promulgate binding regulations for consultation considering the non-binding nature of the DMR Consultation Guideline. The temporary character of the IPILRA combined with the lack of regulations for the consent process resemble a failure on the part of the legislature to meet its constitutional mandate to remedy the issue of insecure land tenure. Therefore, it is a matter of urgency that the legislature promulgates a permanent law that will protect the land rights of customary communities that are interfered with by prospecting and mining activities.

The chapter has addressed the nature of customary land rights and the associated decision-making practices of customary communities. The customary land rights and the associated decision-making practices of communities are markedly different from what is understood under the property system recognised under the common law. Considering this difference, a unique approach is required when applying the statutory requirements of consultation and consent to customary communities in order to satisfy these requirements without disregarding the customary law practices of the communities. The FPIC principle offers protection as well as an alternative mechanism for respecting the rights of indigenous peoples when carrying out development projects such as mining.

The FPIC principle is a combination of both consent and consultation aimed at the protection of the rights of indigenous peoples. The incorporation of the principle into South African law will serve to enrich both the consultation and consent processes for the protection of the informal rights to the land of customary communities. Chapter Four analyses the successes and challenges that emerge from the statutory formulation of consultation and consent requirement. Additionally, the applicability of and the benefits and issues regarding the implementation of the FPIC principle in South Africa are discussed.

Chapter 4: Successes and Shortfalls of the Consultation and Consent Requirements

1. Introduction

The dissertation has thus far focused on the legal framework for the requirements of consultation and consent, the nature of customary land rights and the associated decision-making practices, as well as the Free, Prior and Informed Consent (FPIC) principle. The focus of the dissertation now turns to an analysis of the impact that the statutory formulation of these requirements has on the informal rights to land held by customary communities. This analysis will be conducted in light of the aspirations of the Constitution of the Republic of South Africa, 1996 (Constitution) to redress insecure land tenure, the constitutional recognition of customary law and the value of land to customary communities.

This chapter focuses on identifying and discussing the successes and shortfalls that emerge from the current statutory formulation of the consultation and consent requirements and processes. In doing this, the chapter addresses the question of whether the current statutory formulation accommodates and protects the rights and interest of customary communities affected by prospecting and mining operations. Furthermore, the chapter addresses whether these requirements meaningfully engage with the decision-making practices discussed in Chapter Three. Finally, the chapter explores the applicability of the FPIC principle and discusses the issues regarding the implementation of the principle in the South African context. The purpose of this chapter is to provide context for the recommendations for potential law reform provided in the concluding chapter of the dissertation.

2. The Constitution's Aspirations and Mandates

According to the White Paper on South African Land Policy (Land White Paper)[1] South Africa's history of conquest and dispossession, forced removals and the racially-skewed distribution of land has resulted in a complicated legacy.[2] Racially-based land policies have resulted not only in landlessness of black people but also in insecure land tenure.[3] Since 1997 South Africa's Land Policy has, amongst other issues, aimed at addressing the injustices caused by racially-based land dispossession and achieving secure land tenure for all.[4] Additionally, the Constitution places a duty on the State to take steps to enable citizens to gain equitable access to land and to promote the security of land tenure.[5] In doing this, the Constitution aspires to remedy tenure insecurity to

[1] White Paper on South African Land Policy,1997.
[2] 4.
[3] 6.
[4] 6.
[5] 8.

eradicate the second-class landholding system that applied to black people during apartheid.[6] The aspirations for land reform contained in the Land White Paper and existing legislation seek to 'preserve the possibility of indigenous property management structures where these are appropriate.'[7]

The constitutional duties on the State regarding the promotion of tenure security flow from the land reform mandate expressed in section 25,[8] and section 39(3) of the Constitution.[9] Section 25(6) promotes tenure security through entitling communities or persons whose tenure is legally insecure as a result of the apartheid regime to either secure tenure or comparable redress. Mitchel et al. are of the view that section 25 acknowledges the past and present effect of mining activities on customary communities and consequently mandates the Minister of Minerals and Energy (Minister) 'to play a corrective role in this regard.'[10] According to section 39(3), the Bill of Rights recognises rights and freedoms conferred by customary law and legislation provided that they are consistent with the Bill of Rights. In the context of mining, the courts in *Baleni v Minister of Mineral Resources* (*Baleni*)[11] and *Maledu v Itereleng Bakgatla Mineral Resources* (*Maledu*)[12] both emphasised the importance of land tenure and ensuring land tenure security for customary communities.

As defined in Chapter Two, an informal right to land refers to the right to use, occupy or access to land in accordance with any tribal, customary, or indigenous laws or practice.[13] The focus of this dissertation has and continues to be on the informal rights to land held by customary communities that are affected by prospecting and mining operations. The recognition of customary rights is indicative of the respect that the Constitution has for customary law and customary land rights. It is against this background that this dissertation seeks to analyse the successes and shortfalls of the consultation and consent requirements.

3. Successes and Shortfalls of the Consultation and Consent Requirements

This section provides an analysis of the successes and shortfalls identified from the requirements and processes for consultation and consent discussed in Chapter Three above. The section does not provide an exhaustive set of successes and shortfalls. However, the issues identified for both consultation and consent are addressed below.

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[6] Du Plessis (2011) *PER/PELJ* 46.
[7] Pope (2011) *Acta Juridica* 309.
[8] See Section 4.1 of Chapter Two for the section 25 mandates.
[9] Pope (2011) *Acta Juridica* 309.
[10] Mitchel et al (2012) *The Journal of the Southern African Institute of Mining and Metallurgy* 152.
[11] 2019 (2) SA 453 (GP).
[12] 2019 (2) SA 1 (CC).
[13] See Section 4.2 of Chapter Two. See also definition of 'informal right to land' under the IPILRA.

3.1 Successes and shortfalls of the MPRDA regarding the consultation requirement

Although not stated in the Mineral and Petroleum Resources Development Act (MPRDA),[14] the Court in *Bengwenyama Minerals v Genorah Resources* (*Bengwenyama*)[15] emphasised that the consultation requirement is 'indicative of a serious concern for the rights and interests of landowners and lawful occupiers in the process of granting prospecting rights.'[16] The granting of prospecting rights, mining rights and mining permits is an undeniably 'grave and considerable invasion of the use and enjoyment of the land on which the prospecting [and mining operations are] to happen.'[17] With this in mind, these impacts must be considered and addressed by both the legislature and the judiciary. The successes and shortfalls of the MPRDA's consultation requirement are considered below.

3.1.1 The formal inclusion of a consultation requirement and 'meaningful consultation'

Considering the duration[18] of the rights and permits granted to applicants and the invasive nature of prospecting and mining operations, the formal inclusion of a consultation requirement by the legislature is a noteworthy success of the MPRDA. This inclusion of a consultation requirement in the application procedures is indicative of the legislature's sensitivity towards the informal rights to land held by customary communities. The Court in *Bengwenyama* and the Consultation Guideline of the Department of Mineral Resources (DMR Consultation Guideline)[19] both provide that consultation is a mechanism that assesses whether an accommodation is reachable between the parties concerning the interference with the informal rights to land of the lawful occupiers.[20] Consultation is accommodative of the informal rights to land of customary communities by facilitating a two-way communication between the parties.[21] However, whether this is the case on the ground is an issue worth addressing. The success mentioned above of the MPRDA is reinforced by the recent amendment to the

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[14] Act 28 of 2002.
[15] 2011 (4) SA 113 (CC).
[16] Para 63.
[17] Para 63.
[18] According to the MPRDA, the maximum years for the validity of prospecting rights, mining rights and mining permits are respectively five years, 30 years and two years. See sections 17(6), 23(6) and 27(8)(a) of the MPRDA.
[19] Department of Mineral Resources Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA (date unknown).
[20] See *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2011 (4) SA 113 (CC) para 65; DMR Consultation Guideline at section E.
[21] See definition of 'consultation' under the section D of the DMR Consultation Guideline.

Mineral and Petroleum Resources Development Regulations (MPRDA Regulations)[22] that include an interpretation of 'meaningful consultation' and extend the scope of 'interested and affected parties'.[23]

The Amendment Regulations to the Mineral and Petroleum Resources Development Regulations, 2020 (Amendment Regulations) provide a detailed interpretation of 'meaningful consultation'. According to the Amendment Regulations, the applicant would have meaningfully consulted with the interested and affected parties when: 1) the applicant has facilitated the parties' participation in good faith; 2) in a manner that gives the parties a sufficient opportunity to provide their comments regarding the land and the impact of the prospecting or mining activities; and 3) when all the relevant information regarding the activities is provided to enable the parties to make an informed decision.[24]

The amendment is commendable considering that neither the MPRDA nor the MPRDA Regulations contained a definition for consultation. Additionally, the amendment serves as an expansion of the existing definition of consultation contained in the DMR Consultation Guideline. The DMR Consultation Guideline defines consultation as a two-way communication process that allows for openness in the decision-making process.[25]

The Amendment Regulations have provided for an enforceable and more nuanced definition of consultation that aligns with the existing international law obligation to engage in meaningful consultation when dealing with development projects.[26] Despite the absence of regulations setting out the prescribed manner for consultation, the addition of an interpretation of 'meaningful consultation' in the regulations is a positive step towards addressing the issue of enforceability of the consultation requirement discussed in Chapter Two.

In addition to the Amendment Regulations, the Court in *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources* (*Baleni v Regional Manager Eastern Cape*)[27] commented on the meaning of 'meaningful consultation' as well as the issue of providing sufficient information to allow lawful occupiers to make an informed decision.[28] According to the Court, meaningful consultation entails a discussion of ideas between the interested and affected parties and the mining right applicant on an equal footing.[29] Therefore, the advantages and disadvantages ought to be discussed, and concessions must be made where necessary.[30]

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[22] GN R 527 in GG 26275 of 23-04-2004.
[23] See amendment of regulation 1 of the Amendment Regulations for the definition of 'meaningful consultation' and 'interested and affected parties'.
[24] See amendment of regulation 1 of the Amendment Regulations for the definition of 'meaningful consultation'.
[25] See definition of 'consultation' under section D of the DMR Consultation Guideline.
[26] See South African Human Rights *Commission Challenges of Mining-affected* 60 for the United Nations recognition of participation as a core element of the right-based approach to development.
[27] 2021 (1) SA 110 (GP).
[28] *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources* 2021 (1) SA 110 (GP) para 16.
[29] Para 89.
[30] Para 89.

The facts in *Baleni v Regional Manager Eastern Cape* involved the lawful occupiers of the Xolobeni community[31] and an Australian mining company (TEM).[32] The application brought before the Court concerned the lawful occupiers' right to access the mining right application of TEM.[33] The primary issue before the Court was whether interested and affected parties were entitled to a copy of the mining right application documents of mining companies.[34] TEM had applied for a mining right in 2015,[35] the applicants in the case had requested a copy of this application.[36] It was only after the application was issued and served that TEM provided the lawful occupiers with a redacted copy of the mining right application.[37] TEM argued that the MPRDA does not entitle interested and affected parties to access information.[38] The mining company further argued that a right to access to information is given effect to by the Promotion of Access to Information Act (PAIA)[39] and that the applicants should follow the procedures of PAIA to obtain a copy of the mining right application.[40]

The Court found that the existing limitations of the PAIA as a means to enforce the right to access to information was not a viable option.[41] The Court held that interested and affected parties are entitled to a copy of the mining right application.[42] The access to the mining right application being subject to the redaction of the mining company and the Department of Mineral Resources' (DMR) sensitive financial information.[43] The Court further held that the mining right application must be requested from the Regional Manager by the interested and affected parties.[44] The right to access to information coupled with the inclusion of holders of informal rights to land in the definition of interested and affected parties[45] places customary communities in a less vulnerable legal position when compared to their position before the Amendment Regulations. The decision of the Court is a positive step towards ensuring that customary communities are put in a position to make informed decisions

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[31] The Xolobeni community is a customary community located in the Umgungundlovu area on the Wild Coast of the Eastern Cape Province of South Africa.
[32] *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources* 2021 (1) SA 110 (GP) para 1.
[33] Para 3.
[34] *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources* 2021 (1) SA 110 (GP) para 16. The interested and affected parties are lawful occupiers of the Xolobeni community that is located in the Umgungundlovu area on the Wild Coast of the Eastern Cape Province in South Africa. These lawful occupiers were represented by the first applicant, Duduzile Baleni, who is the *iNkosana* and head of the community council. The applicants in the case live and work on the land on which the minerals were discovered by TEM.
[35] Para 15.1 and 15.2.
[36] Para 15.1 and 15.2.
[37] Para 8.
[38] Para 72.
[39] Act 2 of 2000.
[40] *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources* 2021 (1) SA 110 (GP) para 72.
[41] Para113.
[42] Para 117.1. See also Department of Mineral Resources (DMR) Manual, 2020 issued in terms of section 14 of the Promotion of Access to Information Act 2 of 2000 (DMR PAIA Manual) at section 5.1.3 which provides that the access to records is limited to the extent that confidential information is made available with the prior consent of the right applicant or the holder or the right.
[43] *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources* 2021 (1) SA 110 (GP) para 117.1. See also section 5.1.3 of the DMR PAIA Manual which provides that the access to records is limited to the extent that confidential information is made available with the prior consent of the right applicant or the holder or the right.
[44] *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources* 2021 (1) SA 110 (GP) para 117.1.
[45] See amendment of regulation 1(d)(v) of the Amendment Regulations for the inclusion of holders of informal rights to land as defined in terms of section 1 of the IPILRA.

regarding the deprivation of their land rights. The Court's decision aligns well with the Amendment Regulation's interpretation of meaningful consultation that requires interested and affected parties to be provided with all relevant information relating to the proposed activities.[46] Furthermore, the Court's decision is a proactive effort to protect the rights and interests of the holders of informal rights to land that are interfered with by prospecting and mining activities.

3.1.2 The lack of regulations and a means to assess compliance with the consultation requirement

As discussed in Chapter Three, the lack of regulations regarding the consultation process has resulted in the questionable enforceability of the consultation requirement.[47] The lack of binding regulations is a significant shortfall of the MPRDA in its attempt to protect the informal rights to land of customary communities. At the essence of the consultation requirement, is the process of public participation that ensures the consideration of the potential impact of a prospecting right, mining right and mining permits.[48] This lack of a prescribed manner in the MPRDA Regulations and the Amendment Regulations for the consultation process further exacerbates the effectiveness of the requirement of consultation.

While the inclusion of an interpretation of 'meaningful consultation' in the Amendment Regulations is laudable, the South African Human Rights Commission (SAHRC) has observed a misalignment between what is statutorily required and what is practised.[49] It is uncertain whether the addition of the definition 'meaningful consultation' will naturally translate into strict compliance with the consultation requirements by mining companies in the absence of enforceable regulations. This observation by the SAHRC emphasises the need for the promulgation of regulations prescribing a process for consultation.

Additionally, the SAHRC's observation also highlights the need for a mechanism through which the compliance with and adequacy of the consultation process can be assessed. According to Mitchel et al., flawed consultation usually involves a failure on the part of the applicant 'to make use of the appropriate channels within the traditional leadership structure of a community.'[50] Adding to this, flawed consultation is also attributable to the applicants not fully adhering to the layered nature of decision-making practices of the community.

As discussed in Chapter Three, the decision-making practices of customary communities are embedded in a range of social relationships.[51] Okoth-Ogendo succinctly describes the structure of the indigenous land rights system as an 'inverted pyramid' consisting of three layers, namely: the family; the clan lineage; and the

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[46] See at amendment of regulation 1(e) of the Amendment Regulations for the addition of the definition of 'meaningful consultation.'
[47] See Section 2.1 of Chapter Three; see also Van Schalkwyk *Relationship between Land Use Planning and Mining* 66.
[48] Legal Resource Centre *A Practical Guide for Mining-Affected Communities* (2016) 15.
[49] South African Human Rights Commission *Challenges of Mining-affected Communities* 61.
[50] Mitchel et al (2012) *The Journal of the Southern African Institute of Mining and Metallurgy* 153.
[51] Cousins (2007) *Journal of Agrarian Change* 293.

community.[52] With this structure, decisions made regarding access to land that is associated with the individual layers of the pyramid are not made collectively, but rather by the members of the layer that is affected.[53] Okoth-Ogendo emphasises that the decisions regarding control of the land are not made by a single authority such as a traditional leader.[54] It appears that the consultation process in the DMR Consultation Guideline does not align with the non-monolithic nature of decision-making observed by customary communities.

The DMR Consultation Guideline provides that the applicant is required to notify the landowner or lawful occupier, including the community, of its application.[55] The wording of the DMR Consultation Guideline specifically states notification to the traditional leader.[56] This wording suggests that notification of the application must be made directly to the traditional leader. When contrasted against the decision-making practices regarding access to land, this requirement in the guideline appears to disregard the practices. Therefore, there is a lack of acknowledgement of the appropriate level that should be consulted to make specific decisions about the land concerned.

Okoth-Ogendo clearly states that a traditional leader is to enforce his or her rights subject to defined community rules.[57] The SAHRC has reported that community members are not all consulted and that mining companies tend to consult small portions of the communities or just the traditional councils.[58] The concern is that the mining companies consult with these parties on the assumption that they represent the broader interest of the community as a whole.[59] The traditional councils have also been consulted by virtue of them presenting themselves as the 'custodians of communities'.[60] This representation has further resulted in the belief that consent must be obtained from traditional councils and not from the State or the customary communities.[61] However, this is incorrect because the land under the jurisdiction of traditional authorities is not owned by the authorities, but rather by the State or the communities.[62] This misrepresentation could be avoided if the DMR Consultation Guidelines included a mechanism through which the compliance with and adequacy of the consultation process can be assessed. In this regard, the Department of Rural Development and Land Reform (DRDLR) policy document (DRDLR Policy Document), which applies to both consultation and consent, could provide guidance for the assessment of the adequacy of and compliance with both the decision-making practices

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[52] Du Plessis (2011) *PER/PELJ* 55.
[53] Du Plessis (2011) *PER/PELJ* 62.
[54] Claassens and Cousins *Land, Power & Custom* 127.
[55] See para 2 of section G of the DMR Consultation Guideline.
[56] Para 2.1 of section G.
[57] Cousins (2007) *Journal of Agrarian Change* 304.
[58] South African Human Rights Commission *Challenges of Mining-affected Communities* 62.
[59] 62.
[60] 62.
[61] 62.
[62] 62.

and the existing recommended consultation processes.[63] The prospects of applying the DRDLR Policy Document are addressed in the successes and shortfalls of the consent requirement below.

3.2 Success and shortfalls of the IPILRA regarding the consent requirement

Regarding the granting of rights to minerals and permits, the Court in *Bengwenyama* emphasised that consent cannot be equated with consultation.[64] Consent refers to an agreement, whereas consultation is a process of seeking consensus or accommodation that might not result in an agreement.[65] The distinction between these requirements means that the conflation of the requirements may result in the undermining of the rights of customary communities. Therefore, the inclusion of a consent requirement is crucial for the protection of the informal rights to land of customary communities. This section addresses the successes and shortfalls of the consent requirement contained in the Interim Protection of Informal Land Rights Act (IPILRA).[66]

3.2.1 The pre-existence of a consent requirement in the IPILRA

Although the IPILRA predates the MPRDA, the pre-existing consent requirement in the IPILRA plays a crucial role in protecting holders of informal rights to land in the absence of the requirement in the MPRDA. According to Cousins, the MPRDA applies subject to the IPILRA, which implies that consent is a prerequisite for all applications for rights to minerals and permits.[67] The interaction between the MPRDA and the IPILRA discussed in the *Baleni* case is indicative of the importance of obtaining community consent in the mining context.[68] According to the Court, the MPRDA aims to foster equitable access to South Africa's mineral resources, whereas the IPILRA aims to protect the victims of historical racial discrimination.[69] It is clear that the MPRDA and the IPILRA do not operate at cross-purposes. The Court in *Maledu* confirmed that the MPRDA and the IPILRA must be read together to determine the consent required for granting of rights and permits over the land of communities that hold informal rights to land.[70] The applicability of the IPILRA consent requirement in the mining context is attributable to the fact that the granting of a right or permit is a deprivation of the community's land rights.[71] Therefore, although the IPILRA is not a piece of mining legislation, the pre-existing consent requirement in the IPILRA is a success of this Act in protecting the interests of holders of informal rights to land that are affected by prospecting and mining operations.

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[63] See Section 2.2 of Chapter Three.
[64] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) para 72.
[65] Para 72.
[66] Act 31 of 1996.
[67] Tlale (2020) *PER/PELJ* 19.
[68] Meyer (2020) *PER/PELJ* 10.
[69] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) para 64; see also section 4(2) of the MPRDA.
[70] Meyer (2020) *PER/PELJ* 13.
[71] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) para 59.

3.2.2 The lack of a substantive and permanent law and regulations for the consultation requirement

Although the pre-existence of a consent requirement in the IPILRA is praiseworthy, the lack of substantive and permanent legislation to protect informal rights to land and customary land tenure is of grave concern.[72] This reality has been confirmed by the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (High Level Panel) which highlights the temporary protection afforded by the IPILRA.[73] The High Level Panel emphasised that the annual renewal of the IPILRA since 1996 is indicative of the legislature's failure to introduce comprehensive legislation for the protection of informal rights to land.[74] This lack of a permanent law is also of concern considering that the IPILRA has no accompanying regulations that prescribe a process for obtaining consent. Despite this failure, there is comfort in the judiciary ensuring that informal rights to land are adequately protected and not sacrificed for the realisation of economic activities such as mining.[75]

Though the SAHRC has made useful recommendations to guide the process of consent,[76] the non-binding status of these recommendations does not provide customary communities with any legal protection. In summary, the SAHRC consent process consists of calling the community members for a meeting regarding the disposal of their land rights and allowing the majority of the members or their representative to decide on disposal.[77] The community members must have been given sufficient notice of the proposed disposal and also a reasonable opportunity to participate.[78]

A fundamental characteristic of the decision-making practices of customary communities is the reciprocal rights and obligations that community members have towards each other concerning the granting of access to or control of the land.[79] This access is granted through membership to a clan lineage, family, or the community.[80] If the calling of a meeting for community members as recommended by the SAHRC is reflective of this principle, then the recommendation lacks offence. At face value, the recommended process of the SAHRC is arguably not contradictory to the underlying principles of the decision-making practices of customary communities.[81] However, if consent is obtained from the community in its entirety and not from the specific members that occupy the land that is affected by the proposed mining activity, then the SAHRC consent process violates the customary

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[72] Meyer (2020) *PER/PELJ* 14.
[73] Meyer (2020) *PER/PELJ* 14.
[74] Meyer (2020) *PER/PELJ* 14. The IPILRA has been renewed annually in terms of section 5(2) of the IPILRA that permits the Minister to do so by notice through a Government Gazette. Section 5(2) only permits renewal for a period of 12 months.
[75] Meyer (2020) *PER/PELJ* 14.
[76] See discussion of the South African Human Rights Commission recommendations for the consent process under Section 2.2 of Chapter Three.
[77] South African Human Rights Commission *Challenges of Mining-affected Communities* 64-65.
[78] 64-65.
[79] See Section 3.2.2 of Chapter Three.
[80] See Section 3.2.2 of Chapter Three.
[81] See Section 3.2.2 of Chapter Three.

practices. This violation exists as a result of the fact that decisions regarding access to land are not made collectively but rather by the members of the affected layer of Okoth-Ogendo's 'inverted pyramid'.[82]

A shortfall of the IPILRA related to the lack of regulations, is the absence of a mechanism to assess the adequacy of and compliance with the decision-making practices of the community. However, the DRDLR Policy Document that accompanied the IPILRA from its inception[83] could guide the assessment of the adequacy of both the consent and consultation processes.

As a result of the racially discriminatory laws of the apartheid regime, the State is still a nominal owner of certain areas of land occupied by black people.[84] The Minister of Rural Development, as nominee or trustee, has a fiduciary duty to ensure that the community processes run smoothly.[85] The decisions related to ownership rights of land that is communally owned are made by the majority of the community members.[86] In this case, the Minister of Rural Development is not involved in the decision-making process but instead has the role of ratifying decisions made by the community.[87] According to Pope, a central issue regarding tenure security of customary land rights is how different levels of authority and decision-making processes are carried out concerning the land.[88] Therefore, the fiduciary duty of the Minister of Rural Development includes the responsibility to 'ensure that the decision-making happens at the level of the affected community.'[89]

The DRDLR could assess the adequacy of the consent or consultation processes through conducting an investigation into the social dynamics of the community and ensuring that a conducive environment is created for consultation and negotiation.[90] The DRDLR must ensure that all interested and affected parties are heard and that the consent and consultation process is fair and inclusive.[91] Furthermore, the DRDLR must confirm that the decisions taken by the community representatives are a true reflection of the community's will.[92]

The DRDLR Policy Document requires an official of the DRDLR to either preside over or witness the community meeting called for to obtain consent.[93] This assessment mechanism would serve as a means to protect the communities from right or permit applicants that disregard the customary practices of communities. The main concern regarding the adoption of the DRDLR assessment measures is that no regulations exist to give effect to

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[82] Du Plessis (2011) *PER/PELJ* 62. The 'inverted pyramid' referred to by Okoth-Ogendo refers to the three layers in the structure of the indigenous land rights system namely: the family, the clan lineage and the community.
[83] Legal Resources Centre *Free, Prior and Informed Consent in the Extractive Industries in Southern Africa – An Analysis of the legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia* (2018) 55.
[84] Para 1.1 of the DRDLR Policy Document.
[85] Legal Resource Centre *Free, Prior and Informed Consent* 55.
[86] Para 1.5 of the DRDLR Policy Document.
[87] Para 1.5.
[88] Pope (2011) *Acta Juridica* 320.
[89] Legal Resource Centre *Free, Prior and Informed Consent* 56.
[90] South African Human Rights Commission *Challenges of Mining-affected Communities* 65.
[91] 65.
[92] 65.
[93] 65.

the content of the DRDLR Policy Document.[94] Therefore the lack of regulations affects the enforceability of both the consent process and the suggested mechanism to assess the adequacy of and compliance with the processes of consent.

4. Applicability and Formal Incorporation of the FPIC Principle into South African Law

Following the discussion of the international and regional legal framework for the FPIC principle in Chapter Three, this section goes further by discussing the applicability of the FPIC principle and the issues regarding the realisation of the principle in South Africa. The section comments on the benefits of the FPIC principle by discussing the right of access to information and the compulsory duty to consult dealt with in *Centre for Minority Rights Development v Kenya* (*Endorois* case).[95] Finally, the section addresses the systematic issues that affect the implementation of the FPIC principle in the South African context.

4.1 Applicability of the international and regional instruments in South Africa

As discussed in Chapter Three, at an international level, the FPIC principle is embodied in the International Labour Organization Convention 169 (ILO Convention 169)[96] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[97] At a regional level, the FPIC principle, although not expressly stated, is reinforced through the right to self-determination and the right to development contained in the African Charter on Human and Peoples' Rights[98] (African Charter).[99] South Africa is a signatory to the UNDRIP [100] and a state party to the African Charter.[101] However, the South African government has not ratified the ILO Convention 169.[102] Therefore, South Africa only has an international obligation to honour the UNDRIP and a regional obligation to honour the African Charter. These obligations owed by South Africa arise out of the binding rights

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[94] South African Human Rights Commission *Challenges of Mining-affected Communities* 65.
[95] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya* 2009 AHRLR 75 (ACHPR 2009).
[96] International Labour Organization Convention No. 169, 1989.
[97] United Nations Declaration on the Rights of Indigenous Peoples, General Assembly Resolution 61/295, 2007. See Section 4.2.1 of Chapter Three for the discussion of the provisions containing the FPIC principle in the ILO Convention 169 and UNDRIP.
[98] African Charter on Human and People's Rights, 1981. See Section 4.2.2 of Chapter Three for discussion on the African Charter's provision containing the FPIC principle.
[99] See Section 4.2.2 of Chapter Three.
[100] C Traynor, YA Kisuule, G de Wet, R Le Fleur, T Schonwetter, L Foster & A Williamson *Protecting and Promoting Indigenous Peoples' Rights in Academic Research Processes: A Guide for Communities in South Africa* (2018) 8.
[101] De Vos & Freedman *South African Constitutional law in Context* 674.
[102] International Labour Organisation "Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169)" (05-09-1991) *ILO* <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312314:NO> (accessed 22-01-2021).

and obligations created by the UNDRIP as a General Assembly Resolution and the African Charter by it being a treaty.[103] These instruments, therefore, call on South Africa to ensure that indigenous peoples have equal rights to effectively participate in public life and decisions regarding their rights and interests with their prior and informed consent.[104] This obligation exists alongside the Constitution's protection of all institutions that are unique to customary law.[105] Additionally, the Constitution requires all courts, tribunals or forums to consider international law.[106] Therefore, when adjudicating cases concerning the rights of customary communities within the mining context, the South African courts are obligated to consider the FPIC principle for the protection of the rights and interests of customary communities.

Despite the clear obligations that South Africa has to honour regarding the FPIC principle, the applicability of the principle to members of customary communities in South Africa is questioned.[107] The applicability of the principle in the South African context has been questioned due to the origin of the principle being in the international indigenous movement.[108] Nevertheless, the Court in *Baleni* confirms the applicability of the FPIC principle in the South African context. The Court stated that the granting of special protection to communities by way of requiring consent complies with international law.[109] The Court further confirmed that international instruments require that communities have 'a right to grant or refuse their free, prior and informed consent to any mining development that will significantly affect them.'[110] This statement made by the Court is an explicit acknowledgement of the FPIC principle's applicability in South Africa.

Considering that indigenous peoples are the primary concern of the FPIC principle, it is crucial to determine whether customary communities in South Africa fall within the scope of indigenous peoples. Chapter Three has provided the working definition of the ILO Convention 169 for indigenous peoples and the characteristics of indigenous peoples as defined by the World Bank.[111] Although the IPILRA provides for the consent requirement for the protection of informal rights to land held by customary communities, the IPILRA does not define 'indigenous peoples'. Nevertheless, it is commonly understood in South Africa that indigenous peoples are the San and Khoekhoe people, collectively known as the Khoisan.[112]

According to Huizenga, a significant struggle for the Xolobeni community in the *Baleni* case was that the people did not qualify as 'indigenous' because they are not Khoisan.[113] Huizenga highlights that the members of the

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[103] TW Bennett & J Strug *Introduction to International Law* (2013) 12.
[104] Tlale (2020) *PER/PELJ* 18.
[105] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) para 41, see also section 211 of the Constitution.
[106] See section 39(1)(b) of the Constitution.
[107] D Huizenga *Customary Law and Indigenous Rights in South Africa: From Transformative Constitutionalism to Living Law in struggles for Rural Land Rights* PhD thesis York University (2019) 172.
[108] 172.
[109] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) para 78.
[110] Para 78.
[111] See Section 4.1 of Chapter Three.
[112] Huizenga *Customary Law and Indigenous Rights* 173.
[113] 173.

Xolobeni community have a 'history of continued marginalisation by the state' and 'a long historical and cultural connection with their land'. [114] He argues that both factors are essential for establishing the indigenous nature of the Xolobeni community.[115] Arguably, these factors are similar to the World Bank's characteristics of indigenous peoples, notably the characteristic of a close attachment to ancestral territories and natural resources.[116]

In *Baleni,* counsel for the applicants in the case stated that 'there is no question that the applicants are an indigenous people'[117] in his justification for the reliance on international law and the right to FPIC. The decision of the Court in requiring mining companies to obtain full and informed consent from the communities is an indication of the Court's support of the arguments made in favour of the Xolobeni community members being indigenous peoples.[118] This illustrates that the FPIC principle applies to customary communities in South Africa that are affected by prospecting and mining operations.

4.2 Benefits and issues regarding the implementations of the FPIC principle in South Africa

According to the Legal Resources Centre (LRC),[119] the FPIC principle is both a substantive principle and a process designed to ensure that development activities yield satisfactory outcomes.[120] Chapter Three addresses the substantive aspects of the principle. The LRC describes the FPIC principle as a process because the right of refusal places the community in a position to negotiate.[121] This dissertation reiterates the absence of permanent legislation that regulates communal land and its administration in South Africa.[122] Although the IPILRA serves as an interim piece of legislation, the dissertation proposes that the formal incorporation of the FPIC principle into South African law will provide additional protection to the holders of informal rights to land. The benefits of the FPIC principle addressed below are the right of access to information and the compulsory duty on the state to consult. Additionally, the issues regarding the implementation of the FPIC principle in the South African context are discussed below.

4.2.1 Benefits of the FPIC principle

Under the African Charter and the United Nations (UN) instruments, the right of access to information associated with the FPIC principle is broader than the right of access to information contained in the MPRDA and the

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[114] Huizenga *Customary Law and Indigenous Rights* 173; see statement of Tembeka Ngcukaitobi SC in Huizenga *Customary Law and Indigenous Rights*.
[115] 173.
[116] See Section 4.1 of Chapter Three for the World Bank's characteristics of indigenous peoples.
[117] Huizenga *Customary Law and Indigenous Rights* 173.
[118] See decision of the Court in *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) para 84.
[119] The Legal Resources Centre is a public interest and human rights organisation established in South Africa since 1979.
[120] Legal Resource Centre *Free, Prior and Informed Consent* 19.
[121] 19.
[122] See Section 4.1 of Chapter Two.

PAIA.[123] The right to access to information contained in regional and international instruments is not just a right to access to information. [124] Instead, it is also a right to participation, self-determination and development.[125] Under the UN instruments, the right of access to information is a component of the broader right of freedom of expression.[126] This right of access to information 'imposes a duty on the state to facilitate access of everyone to information that is held by public bodies.'[127] The African Charter provides that freedom of expression is a fundamental right, and it guarantees the right to receive information.[128] However, Salau argues that this right does not guarantee a right to have access to information that the state is not willing to release.[129] Nevertheless, in the context of mining operations, it is commendable that the African Charter promotes the FPIC principle, which is inclusive of the right of all people to receive information.[130] In doing this, the African Charter places an obligation on all its member states to provide information to local communities regarding development projects such as mining.[131]

In terms of the MPRDA, all South Africans are beneficial owners of mineral resources and thus have a right to access to information.[132] The PAIA gives effect to section 32 of the Constitution that provides for the right to access any information that is held by the State and by any other person that is needed for the exercise or protection of his or her rights.[133] In the specific context of mineral resources, the Department of Mineral Resources PAIA Manual (DMR PAIA Manual)[134] assists persons on how to gain access to records held by the DMR.[135]

The decision of the Court in *Baleni v Regional Manager Eastern Cape* regarding access to mining right applications is indicative of South Africa's inclination towards the values of the FPIC principle. The access to mining right applications during the consultation process serves as a mechanism through which customary communities can make informed decisions before giving their consent. The MPRDA and the PAIA formulation of the right to access to information is narrower than that of the UN instruments and the African Charter. The

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[123] See *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources* 2021 (1) SA 110 (GP) para 68. The right to access to information is contained in the following United Nations instruments: Art 19(1) of the UNDRIP, UN General Assembly Resolution 217 A (III), 10 December 1948; art 19(1) International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200 A (XXI) adopted 16 December 1966, entered into force 23 March 1976.
[124] *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources* 2021 (1) SA 110 (GP) para 68.
[125] Para 68.
[126] AO Salau "The right of access to information and national security in the African regional human rights system" (2017) 17 *African Human Rights Law Journal* 367 368.
[127] Salau (2017) *African Human Rights Law Journal* 368.
[128] See art 9(1) and (2) of the African Charter.
[129] Salau (2017) *African Human Rights Law Journal* 373.
[130] See art 9(1) of the African Charter.
[131] Ashukem (2016) *PER/PELJ* at 12.
[132] *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources* 2021 (1) SA 110 (GP) para 84.
[133] See section 32 of the Constitution.
[134] Department of Mineral Resources (DMR) Manual, 2020 issued in terms of section 14 of the Promotion of Access to Information Act 2 of 2000.
[135] Section 1.

broader right to access information has the potential to add significant value to the decision-making process of customary communities when deciding to either grant or refuse consent for mining operations.

Concerning the duty to consult, the African Commission on Human and Peoples' Rights (African Commission or the Commission) in the *Endorois* case raised the threshold for the right to development of communities.[136] In the *Endorois* case the Commission dealt with the violation of, amongst other rights, the right to development.[137] The complainants brought the communication before the Commission on behalf of the Endorois community.[138] The complainants claimed that the community was forcefully evicted from their ancestral and traditional lands at Lake Bogoria in central Kenya.[139] According to the complainants, the displacement of the Endorois community from their ancestral and traditional lands amounted to a violation of the right to development.[140] The Commission found that the lack of meaningful participation by the Endorois people was a violation of their rights.[141] According to the Commission, the State ought to have conducted a consultation in a manner that allowed the Endorois people to be 'fully informed of the agreement, and participate in developing parts crucial to the life of the community.'[142] Therefore, the failure to do so was a violation of Endorois peoples' ability to make choices and to exercise their capabilities.[143]

The Commission further emphasised that the right to development is closely linked to the issue of participation.[144] According to the Commission, in order to ensure effective participation, the State has 'a duty to actively consult with the said community according to their customs and traditions.'[145] This duty to consult requires the State to accept and give information, as well as maintaining constant communication between the parties.[146] Furthermore, the consultation must follow the 'culturally appropriate procedures of the community to reach an agreement.' [147] Additionally, the consultation must be conducted in good faith.[148]

It is clear from the *Endorois* case that the duty to consult in terms of the FPIC principle is much more extensive than what is prescribed by the MPRDA. Under the MPRDA, the landowner or lawful occupier and the right or permit applicant are not obliged to reach an agreement.[149] The consultation must only be conducted in good faith

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[136] Wicomb & Smith (2011) *African Human Rights Law Journal* 444.
[137] Wicomb & Smith (2011) *African Human Rights Law Journal* 444.
[138] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya* 2009 AHRLR 75 (ACHPR 2009) para 1-2.
[139] Para 1-2.
[140] Para 17.
[141] Para 283.
[142] Para 282.
[143] SAD Kamga "The right to development in the African human rights system: the Endorois case" (2011) *De Jure* 381 382.
[144] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya* 2009 AHRLR 75 (ACHPR 2009) para 289.
[145] Para 289.
[146] Para 289.
[147] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya* 2009 AHRLR 75 (ACHPR 2009) para 289.
[148] Para 289.
[149] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) para 65.

to attempt reaching an accommodation.[150] The compulsory duty to consult following customary practices and to reach an agreement as stated in the *Endorois* case undeniably places communities in a stronger position to negotiate and to protect their rights and interests. Not only is the State required to obtain FPIC,[151] but the State is also required to reach an agreement as well as accept and provide information.

This formulation of the duty to consult appears to be an amalgamation of the right of access to information, the requirement of consultation and the FPIC principle. This combination would be beneficial to customary communities in the South African context that are affected by prospecting and mining operations. The customary communities would potentially have an opportunity to engage and to negotiate before deciding whether they choose to grant or refuse consent during the application procedures.

4.2.2 Issues regarding the implementation of the FPIC principle

The LRC reported in 2009 that a group of affected communities, community organisations and non-government organisations in South Africa met with the SAHRC to discuss the applicability of the FPIC principle in South Africa.[152] Despite the group having met for issues related to massive relocation resulting from the apartheid regime, it was agreed that the FPIC principle should be a fundamental principle enjoyed by all.[153] There is, therefore, a general concern amongst the public regarding the rights and interests of affected communities as well as consensus that the FPIC principle could bring about protection of these rights and interests. However, according to the LRC, the implementation of the FPIC principle in South Africa is not without challenges. It is, however, beyond the scope of this dissertation to elaborate on these challenges as it warrants further research.

As aforementioned, in South Africa, customary law is given equal status as the common law.[154] This equal status implies that customary practices must be respected and also applied in a court of law provided that they are not in contravention with the Constitution.[155] The LRC is of the view that customary law has 'problematic and discriminatory values inherent to it',[156] that affect the implementation of the FPIC principle. The challenges to implementing the FPIC principle in South Africa identified by the LRC include executive power overriding community decisions and the unchecked powers of traditional leaders.[157]

Interviews conducted by the LRC with various stakeholders revealed that South Africa's most significant challenge with the implementation of the FPIC principles is the creation of greater transparency and

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[150] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) para 65.
[151] Legal Resource Centre *Free, Prior and Informed Consent* 24. The Commission in Endorois stated that the right to development is inclusive of the requirement of Free, Prior and Informed Consent.
[152] 29.
[153] 29.
[154] Himonga & Nhlapo *African Customary Law* 47.
[155] See section 211(3) of the Constitution.
[156] Legal Resource Centre *Free, Prior and Informed Consent* 34.
[157] 60.

participation.[158] Additionally, the accountability around the process of decision-making that impacts tenure security is also a concern.[159] The LRC found further that despite the strong protections provided by the IPILRA, the performance of the DRDLR has been unsatisfactory as an implementing authority.[160] The DRDLR has indicated that it is not always notified when applications are received for rights on the land it holds in trust.[161] The SAHRC has raised concern that it appears not to be standard practice to inform and subsequently consult with the DRDLR during mining right applications.[162] The concern of the LRC regarding the unchecked powers of traditional leaders is related to the conclusion of surface lease and other agreements without the DRDLR being a party thereto as the nominal owner of the land.[163] The SAHRC observed that some traditional authorities present themselves as custodians of communities who have thus been consulted and have granted consent in the absence of relevant parties such as the DRDLR.[164] However, in other instances, traditional authorities were not consulted at all, and this has had an impact of undermining the institution of traditional leadership and the existing structures under customary law.[165] A well-functioning relationship between the Minister, the DRDLR and traditional authorities is crucial in ensuring that communities are protected. Furthermore, this relationship is crucial in the successful implementation of the FPIC principle into the existing regulatory regime of the South African mining sector.

The above systematic challenges to implementing the FPIC principles in South Africa law are coupled with the non-binding character of decisions of the African Commission. The decisions of the African Commission, such as *Endorois* case, have the potential to add much-needed protection to the rights and interests of customary communities. The compulsory and high threshold of the duty to consult declared in *Endorois* case is a good example of how the non-binding status of the Commission's decisions affects the application of the duty to consult by member states.[166] The compulsory duty to consult will only become binding on South Africa if the African Union adopts the decision.[167] Alternatively, the FPIC principle and the higher threshold of the duty to consult can be incorporated into South African law through the domestication of these requirements by the promulgation of national legislation.

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[158] Legal Resource Centre *Free, Prior and Informed Consent* 60.
[159] 60.
[160] 60.
[161] South African Human Rights Commission *Challenges of Mining-affected Communities* 65.
[162] 65.
[163] Legal Resource Centre *Free, Prior and Informed Consent* 60.
[164] South African Human Rights Commission *Challenges of Mining-affected Communities* 62.
[165] 62.
[166] E Greenspan "Free, Prior, and Informed Consent in Africa: An emerging standard for extractive industry projects" (2014) 11 <*https://s3.amazonaws.com/oxfam-us/www/static/media/files/community-consent-in-africa-jan-2014-oxfam-americaAA.PDF* > (accessed 20-01-2021**).**
[167] E Greenspan "Free, Prior, and Informed Consent in Africa: An emerging standard for extractive industry projects" (2014) 11 <*https://s3.amazonaws.com/oxfam-us/www/static/media/files/community-consent-in-africa-jan-2014-oxfam-americaAA.PDF* > (accessed 20-01-2021).

5. Conclusion

This chapter has analysed the successes and shortfalls of the consultation and consent requirements and processes. The chapter has observed that the requirement of consultation serves as an essential weapon with which customary communities can safeguard their rights and interests.[168] The invasive and disruptive nature of prospecting and mining activities require meaningful consultation to take place before the commencement of the operations. This meaningful consultation ought to allow customary communities to mitigate the inevitable impact of disruptions by voicing their concerns and negotiating fair and reasonable measures.[169]

The chapter has highlighted that the absence of regulations and a mechanism to assess compliance with and adequacy of the requirements is a severe shortfall of the MPRDA regarding consultation. The misalignment between what is statutorily prescribed and what the decision-making practices of customary communities dictate emphasise the need for regulations and an assessment mechanism. Concerning the consent requirement, the chapter has noted the shortfalls that emerge out of the lack of permanent legislation and the lack of regulations. The chapter has also discussed the role that the DRDLR Policy Document could play in mitigating the impact that the lack of compliance with the requirements has on the land rights of the customary communities.

The current statutory formulation of consultation and consent has not yet comprehensively struck a balance between the competing interests of the stakeholders. The right or permit applicant's future right of access to land brings about an inevitable interference to the informal rights to land of the communities. There appears to be a delay or reluctance on the part of the Minister to promulgate regulations that will clarify the process that must be followed during the consultation. The judiciary is commended for its attempt to clarify the purpose of consultation, the importance of consent and the introduction of the right to access to information. Despite the existing systemic challenges to implementing the FPIC principle, the benefits discussed will most likely provide much-needed protection to the rights of communities affected by mining. The following and concluding chapter provides the recommendations for potential law reform to address the concerns stated in the research questions.

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[168] Mitchel et al (2012) *The Journal of the Southern African Institute of Mining and Metallurgy* 153.
[169] Mitchel et al (2012) *The Journal of the Southern African Institute of Mining and Metallurgy* 153.

Chapter 5: Conclusion and Recommendations

1. Introduction

In South Africa, the Mineral and Petroleum Resource Development Act (MPRDA)[1] is the primary legislation that regulates the exploitation of mineral resources. The State, acting through the Department of Mineral Resources (DMR), has the authority to grant prospecting rights, mining rights and mining permits after the fulfilment of the requirements under the prescribed application procedures.[2] The holder of a prospecting right, mining right or permit is entitled to enter the land to which the right or permit relates.[3] Consequently, the granting of the right or permit constitutes a deprivation of the informal rights to land of community members in terms of both the Constitution of the Republic of South Africa, 1996 (Constitution) and the Interim Protection of Informal Land Rights Act (IPILRA).[4] The operation of the IPILRA is triggered from the moment that an application for a right or permit granted in terms of the MPRDA is lodged to the Regional Manager.[5] Furthermore, the application for a right or permit triggers the requirements of consultation and consent respectively embodied in the MPRDA and the IPILRA. This chapter summarises the findings of the dissertation and offers recommendations for potential law reform in South Africa to address the concerns raised in the research questions.

2. General Background

This dissertation aimed to determine how meaningful engagement with the decision-making practices of customary communities and with the Free, Prior and Informed Consent (FPIC) principle can better accommodate and protect customary communities that hold informal rights to land that are affected by mining operations. This aim was achieved by following a doctrinal research methodology that focused on primary and secondary sources. Two sub-inquiries emerged from this aim: How do the statutorily required processes of consultation and consent embodied in the MPRDA and the IPILRA protect the informal rights to land held by customary communities? Furthermore, do the statutorily required processes of consultation and consent meaningfully engage with the existing decision-making practices of customary communities? A summary of the findings of the dissertation is discussed below.

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[1] Act 28 of 2002.
[2] See the preamble and sections 2(b) and 3 of the MPRDA.
[3] Sections 5(3) and 27(7)(a).
[4] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) para 59.
[5] Section 2(1) of the IPILRA provides that the holder of an informal right to land must provide prior consent to the deprivation of their right.

3. Findings of the Dissertation

Chapter Two discusses the application procedures prescribed by the MPRDA for the granting of prospecting rights, mining rights and mining permits to provide context for the consultation requirement. The consent requirement prescribed under the IPILRA is also discussed. The chapter exposes the aspects of the application procedures that lack clarity and questions the legislature's intention behind leaving these issues unresolved. Chapter Two highlights the absence of a consent requirement under the MPRDA and the implications thereof. The chapter finds that the Constitution explicitly protects customary communities that hold informal rights to land as a result of a racially discriminatory past. In finding this, the chapter confirms that despite the absence of a consent requirement under the MPRDA, the MPRDA and the IPILRA must be read in agreement.[6]

Chapter Three discusses the processes that must be followed by applicants in fulfilment of the consultation and consent requirements. The chapter reveals that the absence of regulations has far-reaching consequences on the enforceability of the requirements and more so on the protection of the land rights of customary communities. The chapter focuses on unpacking the nature of customary land rights and on explaining the underlying principles of the decision-making practices of customary communities. In doing this, the chapter finds that customary land rights and their associated decision-making practices are markedly different from what is understood under the common law.[7] The chapter argues that the protection of these unique customary practices is enhanced by the adherence to the FPIC principle, which affords more extensive protection than both the IPILRA and the MPRDA.

Chapter Four identifies and discusses the successes and shortfalls that emerge from the current statutory formulation of the consultation and consent requirements. In analysing these successes and shortfalls, the chapter addresses the extent to which the requirements engage with the decision-making practices of customary communities. The chapter finds that the statutes, in their formal inclusion of the requirements, protect and somewhat accommodate the informal rights to land of the customary communities. The efforts of the judiciary are commended in this regard, with particular praise being given to adopting the right to access of information as well as the application of FPIC principle. However, this success is hindered by an underwhelming engagement with the actual practices of the communities. This reality is evident in the lack of acknowledgement of both the non-monolithic and the layered nature of decision-making practices of communities that are not reflected in the recommended processes. The chapter finds that FPIC principle is highly beneficial to communities and also applicable in South African law despite the existence of systemic challenges to the implementation of the principle.

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[6] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC) para 106.
[7] Pope (2011) *Acta Juridica* 310.

4. Recommendations

In light of the above findings, the dissertation proposes the following recommendations for law reform. These recommendations are by no means entirely novel in their nature, and neither are they intended to be overnight solutions to the concerns highlighted throughout the dissertation. However, they intend to stress the awareness of the urgency with which members of customary communities affected by prospecting and mining operations must be accommodated and protected.

4.1 Enactment of a permanent law that protects informal rights to land

The lack of substantive and permanent legislation to protect informal rights to land and to provide secure customary land tenure is a serious concern that requires urgent attention.[8] The lack of permanent legislation is indicative of the legislature's failure to adhere to its constitutional mandate under section 25(9) to enact legislation to give effect to section 25(6) of the Constitution.[9] The reluctance or delay of the legislature to enact permanent legislation after the Communal Land Rights Act[10] was declared unconstitutional by the Constitutional Court in 2010 is unknown. However, it is recommended that the legislature either formally adopts the IPILRA as a binding piece of legislation or promulgates an equivalent alternative legislation.[11] In doing this, the legislature will be affording customary land rights the same respect and legitimacy under South African law as is the case for common law property rights. This recommendation has the potential of also providing community members with securer land tenure, in general, and in particular in the context of development projects such as mining.

4.2 Promulgation of regulations for the consultation and consent processes

In terms of the MPRDA and the IPILRA, the respective ministers have the powers to make regulations that are 'necessary or expedient to be prescribed to achieve the objects of the [Acts]'.[12] Given that the ministers have these powers, it is recommended that clear departmental guidelines and regulations are drafted to provide for a prescribed manner in which the processes of consultation and consent should be conducted. This recommendation is made in light of the declaration by the courts of the requirements not being enforceable due to a lack of regulations.[13] Furthermore, these regulations and guidelines should incorporate the underlying principles of the decision-making practices of customary communities. This incorporation intends to reflect the

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[8] Meyer (2020) *PER/PELJ* 14.
[9] See discussion of sections 25(6) and 25(9) of the Constitution under Section 4.1 of Chapter Two.
[10] Act 11 of 2004.
[11] Meyer (2020) *PER/PELJ* 14.
[12] See section 107(1)(l) of the MPRDA for the powers of the Minister of Minerals and Energy; see also section 4 of the IPILRA for the powers of the Minister of Land Affairs.
[13] See Section 2.1 of Chapter Three.

non-monolithic and layered nature of decision-making that exists in customary communities. This recommendation bears great potential to strengthen the existing protections of informal rights to land, to mitigate tenure insecurity and to respect the elevated status that customary law enjoys in South African law.

4.3 Formal incorporation of the FPIC principle through national legislation

In view of section 39(1) of the Constitution and the extensive protections afforded to indigenous peoples by the FPIC principle, the formal incorporation of the FPIC principle into South African law is recommended. Furthermore, it is suggested that the formal incorporation be carried out through the domestication of the FPIC principle by the promulgation of national legislation. South African courts have already applied the FPIC principle in the context of mining.[14] This application is indicative of the judiciary's inclination towards applying the FPIC principle and the judiciary's acknowledgement of section 39(1).[15] Given the lack of clarity in the consultation and consent processes as well as the requirements thereof, the established FPIC principles bear the potential for additional protection to the rights of customary communities affected by mining.

The scope of this dissertation is limited to whether the MPRDA's application procedures meaningfully engage with the decision-making practices of customary communities. Further research may be necessary to explore the actual nature and content of the living customary law practices of communities relating to consultation and consent to enrich the application procedures contained in the MPRDA. Through the above recommendations, it is hoped, however, that the collective recognition of the Constitution, the IPILRA and the MPRDA to rectify the injustices of racial laws, within the mining context, can be achieved.[16]

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[14] See *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP) for a South African case that has applied the FPIC principle in the mining context.

[15] Section 39(1) of the Constitution requires the court to consider international law when interpreting the Bill of Rights.

[16] Tlale (2020) *PER/PELJ* 18.

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