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Best Practice Guideline on Community Consultation in the South African Extractives Industry

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in alliance with > Linklaters

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Definitions

In this Guideline, the following words and expressions shall have the following meanings:

"African Charter"	means the African Charter on Human and Peoples' Rights, unanimously adopted by the States of the African Union (then, Organisation of African Unity) on 27 June 1981;
"CBD"	means the Convention on Biological Diversity, 1992;
"CPA Act"	means the Communal Property Associations Act, 28 of 1996;
"DLRRD"	means the Department of Land Reform and Rural Development;
"DFFE"	means the Department of Forestry, Fisheries and the Environment;
"DFFE Public Participation Guidelines"	means the Public Participation Guideline, 2017 published in terms of NEMA and the EIA Regulations;
"DMPR"	means the Department of Minerals and Petroleum Resources, previously the Department of Mineral Resources and Energy;
"DMPR Consultation Guidelines"	means the Guideline for Consultation with Communities and Interested and Affected Parties, 2021 published in terms of the MPRDA;
"DMPR Resettlement Guidelines"	means the Mine Community Resettlement Guidelines, 2019, published in terms of the MPRDA;
"EIA Regulations"	means the Environmental Impact Assessment Regulations published under NEMA;
"Expropriation Act"	means the Expropriation Act, 63 of 1975;
"FPIC"	means free, prior and informed consent;
"IAPs"	means interested and affected parties, as defined in the applicable legislation;
"ICCPR"	means the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966;
"ICERD"	means the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the United Nations General Assembly on 21 December
"ICESCR"	means the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966;
"ICMM"	means the International Council on Mining and Metals;
"IFC Performance Standards"	means the International Finance Corporation's Performance Standards on Environmental and Social Sustainability, 2012;
"Interpretation Act"	means the Interpretation Act, 33 of 1957;
"IPILRA"	means the Interim Protection of Informal Land Rights Act, 31 of 1996;
"ILO"	means the International Labour Organisation;
"ILO Convention 169"	means the Indigenous and Tribal Peoples Convention, or ILO Convention No. 169, adopted by the General Conference of the ILO on 27 June 1989 and entered into force on 5 September 1991;
"IRMA"	means the Initiative for Responsible Mining Assurance;
"MEC"	means the Member of Executive Council;
"MINCOSA"	means the Minerals Council of South Africa;
"MPRDA"	means the Mineral and Petroleum Resources Development Act, 28 of 2002;
"MPRDA Regulations"	means the Mineral and Petroleum Resources Development Regulations published under the MPRDA;
"NEMA"	means the National Environmental Management Act, 107 of 1998;
"NEMBA"	means the National Environmental Management: Biodiversity Act, 10 of 2004;
"NHRA"	means the National Heritage Resources Act, 25 of 1999;
"OECD"	means the Organisation for Economic Co-operation and Development;
"OECD Guidelines"	means the OECD's Guidelines for Multinational Enterprises on Responsible Business Conduct, 2023;
"PAJA"	means the Promotion of Administrative Justice Act, 3 of 2000;
"Regional Manager"	means the officer designated by the DMPR Director-General as regional manager for a specified region of the DMPR;
"Restitution Act"	means the Restitution of Land Rights Act, 22 of 1994;
"SAHRA"	means the South African Heritage Resources Authority;
"SEMA"	means a specific environmental management Act, as defined in section 1 of NEMA;
"SLP"	means a social and labour plan envisaged in regulation 46 of the MPRDA Regulations;
"TKLA"	means the Traditional and Khoi-San Leadership Act, 3 of 2019;
"Trust Act"	means the KwaZulu-Natal Ingonyama Trust Act, 3 of 1994;
"UDHR"	means the United Nations Declaration on Human Rights;
"UNDRIP"	means the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly on 13 September 2007;
"UNGPs"	means the United Nations' Guiding Principles on Business and Human Rights, 2011; and
"UPRD Bill"	means the Upstream Petroleum Resources Development Bill [B13B-2021], passed by the National Assembly on 26 October 2023, with concurrence from the National Council of Provinces issued on 25 April 2024, and awaiting Presidential assent.

References in this Guideline to any legislation or applicable law are to the legislation or applicable law in force as at the date of this Guideline, alternatively, such earlier date as the context of the Guideline may require.

1. Executive Summary

1.1. Contextual background and purpose of the Guideline

1.1.1. Notwithstanding the positive contributions of mining to the country's economy, many communities in South Africa have been historically disadvantaged and marginalised and remain so today because of South Africa's history of colonialism and apartheid which led to systematic land dispossession, inequality, and racial discrimination, and which established insecure customary land tenure for customary right holders.

1.1.2. The Constitution of the Republic of South Africa, 1996 recognises the injustices of South Africa's racially discriminatory past and seeks to honour and protect persons that suffered as a result thereof through legislative efforts and the entrenchment of fundamental human rights in its Bill of Rights.

1.1.3. Post-apartheid, the advent of the MPRDA signalled a new era in respect of mineral regulation, with the State becoming the custodian of the nation's mineral resources for the benefit of the population as a whole. One of the objects of the MPRDA is to promote equitable access to the nation's mineral resources to all the people of South Africa. Legislation has also been introduced by Parliament which seeks to address insecure land tenure, recognise customary land tenure, and promote land reform. IPILRA was enacted to provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law. It was intended to be an interim measure pending the introduction of more comprehensive legislation. These two pieces of legislation form part of a complex field of law and regulation which govern the consultation and engagement process to be facilitated by mining companies within and across the dedicated community structures recognised and existing in South Africa. But an aspect which is unclear in the South African mining industry is the interplay between the MPRDA – which requires that meaningful consultation take place with mining-affected communities, prior to rights being granted under the MPRDA; and IPILRA – which provides that, subject to certain provisions, the holders of informal rights to land cannot be deprived of such rights without their consent.

1.1.4. Consultations between mining companies and mining-affected communities are essential for establishing meaningful outcomes for mining-affected communities, securing the mining company's social licence to operate, and ensuring that appropriate safeguards are put in place to conduct mining activities in a responsible manner.

1.1.5. In the context of development projects, the term 'consent' is often said to be synonymous with FPIC. FPIC is a concept recognised under international human rights law which recognises and gives expression to indigenous peoples and their right to self-determination and the rights to own, develop, control, and use their communal lands, territories, and resources. FPIC is linked to the broader discussion regarding ensuring a fair distribution of the costs, benefits, risks, and responsibilities associated with mining activities, as well as the ethical principle that those who could be exposed to harm or risk of harm should be properly informed about these risks and have an opportunity to express a willingness to accept such risks or not.

1.1.6. There is debate internationally as to whether FPIC amounts to an elevated form of consultation, in an attempt to reach consensus, or includes a right to veto (i.e. the right to 'say no' to mining projects). In the African context, recognising the unique histories of colonialism and post-colonialism across the continent, the applicability of this international law right of indigenous communities to many local, affected communities in Africa remains contested and has not gained much traction on the continent.

1.1.7. According to international laws, read with international best practice frameworks, FPIC is rather a process of consulting with indigenous peoples with the objective of reaching agreement or consensus on proposed measures to address the impacts of the proposed mining project, and working to obtain the consent of significantly and adversely impacted indigenous communities regarding the basis on which the project will go ahead (and where consensus cannot be reached, considering the role of the State as ultimate decision-maker and the availability of legal remedies); and is applied in limited instances, namely (i) if there will be impacts on lands and natural resources subject to traditional ownership or under customary use; (ii) if there will be relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use; and (iii) if there will be significant impacts on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of indigenous peoples' lives.

1.1.8. In light of the context set out above, the purpose of the Guideline is to provide an analysis of the South African legal regimes applicable to mining-affected community consultation and consent; how these are to be read and applied together in the context of mining projects; and how these are to apply to the nuanced community structures existing in South Africa.

1.2. Community structures and indigenous peoples

1.2.1. Communities are often comprised of a diverse group of individuals, and may have varying needs or even conflicting demands. Membership and leadership of communities may also be a complex issue. Mining companies are often uncertain of applicable customs and community governance structures, and they often face challenges in determining the appropriate structures for engagement and consultation. Given these challenges, community consultation should be approached with flexibility by mining companies to accommodate the nuances of community structures existing in South Africa.

1.2.2. The definitions of "Community" in the MPRDA and IPILRA are the starting point to identify mining-affected communities and this is explored in the Guideline.

1.2.3. While there is no generally accepted legal definition of 'indigenous peoples', their designation has come to be recognised as a particular demographic category under international law through international instruments. The term 'indigenous peoples' has principally been applied to those who are considered to be the descendants of pre-colonial peoples, or marginalised minority ethnic groups (often described as "tribal populations"), with a culture distinct from the majority of the population and who have historically occupied certain regions. The impacts of mining projects on indigenous peoples may be different to those on communities, as envisioned in applicable legislation, or more severe, considering the strong link that indigenous peoples have to specific territories and cultural heritage.

1.2.4. Therefore, in determining who should be consulted in the context of a mining project, both communities, as defined in applicable legislation, and indigenous peoples groupings should be taken into consideration.

1.2.5. Community structures should also be considered alongside the type of tenure in which any specific land is held. Tenure may be individually-held or communally-held, with different types of communal tenure recognised in South African law. There may be also formal tenure, where land is owned by or on behalf of a community, in which case certain formal leadership structures and legal frameworks may be applicable, or there may be informal tenure (recognised under IPILRA, through land claims and through recognition of indigenous peoples), which needs to be separately considered. The Guideline explores each of these.

1.2.6. All of these possible different layers in the community structure need to be understood so that it can be determined who will be directly affected by the proposed operations, and therefore, who needs to be consulted at which level. It is important for mining companies to note that the people directly affected by the operations may be smaller units of people within the broader community or traditional structure, in which case engagement at each level would be required.

1.3. Legal frameworks governing community consultation and consent in South Africa

1.3.1. The mineral regulatory regime under the MPRDA provides for responsible environmental and social practices by mining companies. It provides for consultation requirements with IAPs, including communities, in accordance with the process set out in NEMA's EIA Regulations.

1.3.2. Meaningful consultation is required, which means that the applicant must in good faith facilitate participation in such a manner that reasonable opportunity is given to provide comment about the impact the prospecting or mining activities would have on rights of use of the land, by availing all relevant information pertaining to the proposed activities, enabling these parties to make an informed decision regarding the impact of the proposed activities. The DMPR Consultation Guidelines state that the purpose of consultation with IAPs and communities is to provide them with the necessary information so that they can make informed decisions, and to see whether some accommodation with them is possible insofar as the interference with their rights to use the affected properties is concerned. Consultation under the MPRDA's provisions requires engaging in good faith to attempt to reach such accommodation.

1.3.3. When applying for a prospecting right, mining right, or mining permit, the results of the consultation process are to be submitted to the DMPR and should be taken into account in making the decision to grant such right. In addition, if an application for a mining right relates to land occupied by a community, the DMPR Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.

1.3.4. Continuous consultation with communities throughout the life of the mine is also provided for in the MPRDA and MPRDA Regulations, as well as NEMA and the EIA Regulations.

1.3.5. NEMA gives effect to the section 24 constitutional right to a healthy environment and codifies the requirement for sustainable development. It details key environmental and sustainable development principles that expressly recognise the importance of public participation (with all IAPs and especially women, youth, vulnerable, and disadvantaged persons), knowledge and information sharing, and common heritage.

1.3.6. NEMA's EIA Regulations prescribe the application processes in respect of developments which require environmental authorisation. Generally, if the applicant for an environmental authorisation is a person who is not the owner or person in control of the land on which an activity is to be undertaken, that person must obtain the prior written consent of the landowner or person in control of the land to undertake such activity on that land. An exception to this, however, is activities constituting or directly related to prospecting or exploration of a mineral and petroleum resource, or extraction and primary processing of a mineral or petroleum resource.

1.3.7. The NHRA regulates those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations as part of the national estate. It gives effect to the constitutional rights afforded to cultural, religious, and linguistic communities to (i) enjoy their culture, practise their religion, and use their language; and (ii) form, join, and maintain cultural, religious, and linguistic associations and other organs of civil society. Strict consultation and engagement procedures are prescribed where dedicated NHRA permits are required to obstruct, destroy, remove, etc. any identified heritage resources. In addition, the NHRA provides that the consent of the owner of a heritage resource must be given for SAHRA, or a provincial heritage resources authority, to negotiate and agree with a provincial authority, local authority, conservation body, person, or community for the execution of a heritage agreement to provide for the conservation, improvement, or presentation of a clearly defined heritage resource.

1.3.8. Guidelines have also been published by the DMPR and DFFE to deal with specific circumstances where human rights risks are heightened, for example with respect to resettlement and relocation.[1]

1.3.9. IPILRA was enacted to provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law. It was intended to be an interim measure pending the introduction of more comprehensive legislation. There have been some shifts in approach to legislation and proposed legislation relating to informal tenure, communal land, and traditional leadership over the years, and this is still in a state of flux. At this stage, IPILRA is extended annually.

1.3.10. IPILRA provides that no one may be deprived of their informal right to land without their consent, and that if the land in question is communal land, a person may be deprived of their right in accordance with custom, where the custom of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal, and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.

1.3.11. It must, however, be noted that IPILRA does recognise that holders of informal rights may be deprived of their rights pursuant to the Expropriation Act or any other law which provides for the expropriation of land or rights in land. The Expropriation Act accords the State expropriation powers for a public purpose.

1.3.12. For the purposes of the MPRDA, section 1(2)(b) of IPILRA deems holders of informal rights to be owners of land for the purposes of section 42 of the Minerals Act, 50 of 1991. The Minerals Act has since been repealed, but the scheme of section 42, which dealt with payment of compensation, has been etched out in section 54 of the MPRDA. The Interpretation Act makes provision for a re-enacted provision to replace a repealed provision that is of the same substance. Therefore, holders of informal rights are deemed to be owners of land for the purposes of the MPRDA's section 54 process.

1.3.13. Section 54 of the MPRDA provides for a dispute resolution mechanism in instances where, among others, the landowner or lawful occupier refuses to allow such holder of a mining right to enter the land or places unreasonable demands in return for access to the land.

The mineral regulatory regime under the MPRDA provides for responsible environmental and social practices by mining companies.

1. Mine Community Resettlement Guidelines, 2019.

The process is aimed at providing a remedy to mining-affected communities, through the reaching of an agreement for the payment of compensation for any loss or damage they may suffer as a result of the operations. If the parties fail to reach an agreement, compensation must be determined by arbitration or by a competent court. If the DMPR Regional Manager, having considered the issues raised by the parties, concludes that any further negotiation may detrimentally affect certain objects of the MPRDA, he may recommend to the DMPR Minister that such land be expropriated in terms of section 55. In terms of section 55 of the MPRDA, if it is necessary to achieve certain objects of the MPRDA, the Minister may, in accordance with the relevant sections of the Constitution and applicable law, expropriate any land or any right therein and pay compensation in respect thereof.

1.4. Case law regarding consultation, participation, and consent

1.4.1. As mentioned above, the interplay between the MPRDA and land reform legislation is not well understood and has been the subject of two recent court judgments, *Maledu*[2] and *Baleni*[3].

1.4.2. In the case of *Maledu*, the Constitutional Court emphasised the requirement to consult in terms of the MPRDA but ultimately based its decision on IPILRA and found that there was no evidence to substantiate the assertions that the deprivation of informal land rights was in conformity with IPILRA or that consent was obtained in compliance with IPILRA. The Constitutional Court held that the MPRDA and IPILRA should be read in a manner that allows each to fulfil its purpose. The court recognised the process envisioned in section 54 of the MPRDA as a process to be followed in the context of informal rights in land.

1.4.3. In the *Baleni* judgment, the High Court found that the State may not grant mining rights before consent of informal land rights holders has been obtained, effectively holding that 'consent' for purposes of IPILRA includes a right to veto. The *Baleni* judgment raises interpretational challenges which we discuss further below, and is notably the subject of an appeal which has been submitted by the DMPR.

1.4.4. With regards to section 54 of the MPRDA, other recent case law demonstrates that there are some differing views and therefore uncertainty as to how section 54 of the MPRDA should be applied.

1.5. The difference between consultation and consent in South Africa

1.5.1. In South Africa, the State is the custodian of the nation's mineral resources for the benefit of the population as a whole and one of the objects of the MPRDA is to promote equitable access to the nation's mineral resources to all the people of South Africa.

1.5.2. The MPRDA clearly requires meaningful consultation with mining-affected communities in accordance with the applicable legal framework before a right under the MPRDA can be granted. The purpose of the consultation is to provide mining-affected communities with the necessary information about the project and its likely impacts so that the community can make informed representations and, where significant adverse impacts to their rights in and to the land are concerned, to see whether some accommodation is possible insofar as the interference with rights/interests in the land or the management of adverse impacts is concerned. This envisages a good faith, two-way engagement process, aimed at reaching consensus, where required. The consultation processes conducted, as well as their outcomes (where relevant) must be considered by the decision-maker when awarding a prospecting right, mining right, or mining permit.

1.5.3. International best practice supports these views, in recognising that effective consultation must be a two-way process and can be conducted through varying levels of engagement.

1.5.4. In instances where a landowner or lawful occupier of the relevant land refuses to allow the holder of a mining right to enter the land or places unreasonable demands in return for such access, section 54 of the MPRDA provides for access to remedies.

2. *Maledu* and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another [2018] ZACC 41.

3. Baleni v Minister of Mineral Resources 2019 2 SA 453 (GP).

1.5.5. Clearly, in terms of the MPRDA, the ultimate decision on whether prospecting or mining should proceed is in the hands of the State as the custodian of the nation's mineral resources and is subject to clear legislative provisions governing access to remedy.

1.5.6. Both the MPRDA and IPILRA are post-apartheid and transformative pieces of legislation. While IPILRA envisages that no person may be deprived of any informal right to land without his or her consent, it recognises that holders of informal rights may be deprived of their rights pursuant to the Expropriation Act or any other law which provides for the expropriation of land or rights in land. Despite IPILRA's recognition of informal land right holders, the MPRDA only recognises formal landowners (as persons in whose name the land is registered; or if land is owned by the State, as the State together with the occupant thereof). To address this, section 1(2)(b) of IPILRA specifically provides for the holders of informal rights to be deemed to be landowners for purposes of section 54 of the MPRDA (applying the Interpretation Act). It essentially grants informal rights holders the same protections enjoyed by formal rights holders of land, considering the history and circumstances under which such informal rights came to be held, for purposes of determining appropriate compensation and addressing disputes with the holder of the right under the MPRDA. Therefore, in instances where the consent of informal rights holders is not given, the process in section 54 of the MPRDA should apply.

1.5.7. In interpreting the MPRDA and IPILRA, the fact that the State is the custodian of mineral resources in South Africa (and that in its decision-making it must further the objects of the MPRDA) should be borne in mind.

1.5.8. We note that in the *Baleni* judgment, the High Court did not specifically take the provisions of section 1(2)(b) of IPILRA into account. As mentioned above, this section acknowledges the section 54 process and deems the holders of informal land rights landowners for purposes thereof. The alternative argument is therefore that while consent from informal land rights holders must be sought, if it is not obtained, then the informal rights holders are elevated to the position of landowners and the remedy would be for the process in section 54 of the MPRDA to be followed, as it would for any farmer or other landowner. This is because IPILRA specifically cross-refers to section 54 of the MPRDA (applying the Interpretation Act).

1.5.9. Having considered the applicable legal frameworks in South Africa, the international instruments and best practice, and the difference between consultation and consent, the ultimate position on FPIC or 'consent' in the South African extractives industry should thus seek an outcome where mining companies

Concerned resident from Matshansundu village. **Screenshot from *Eshowe Video*, produced by Corruption Watch.**

Both the MPRDA and IPILRA are post-apartheid and transformative pieces of legislation. While IPILRA envisages that no person may be deprived of any informal right to land without his or her consent...

Relocated villagers at their new place of residence, Phumulong Community. **Screenshot from *Limpopo Video*, produced by Corruption Watch**

use all reasonable measures and meaningful engagement to reach consensus or agreement with mining-affected communities recognised as having formal and informal land rights, and indigenous peoples, in respect of a mining project's impacts on their rights and interests in and to the land and the terms on which the project should proceed. Such a process should strive to be consistent with their traditional decision-making processes and national laws and policies, while respecting internationally recognised human rights laws and standards. Where consensus is not possible, despite the best efforts of all parties, in balancing the rights and interests of indigenous peoples and communities recognised as having informal land rights with the wider population, the processes and remedies set out in the MPRDA which are applicable to all landowners will apply and the State will ultimately determine whether a project should proceed and specify the conditions that should apply.

1.6. Adequacy of current legal framework

1.6.1. The legal framework regulating consultation with communities in the mining context, although complex, is comprehensive and requires meaningful engagement of varying levels at various stages throughout the project lifecycle. IPILRA, which deals with consent in the case of informal rights holders, cross-refers to the remedy in the MPRDA available to landowners where a dispute between a landowner and a right holder arises, and deems holders of informal rights to be landowners for this purpose when consensus cannot be reached.

1.6.2. Moreover, the legislation relating to informal tenure, communal land, and traditional leadership is in a state of flux. IPILRA was enacted as an interim measure and more comprehensive legislation has not been promulgated. It remains to be seen whether Parliament will re-enact the TKLA in a constitutionally compliant manner, or whether it will be abandoned entirely. In addition, the UPRD Bill is awaiting presidential assent and the DMPR has indicated that an amendment to the MPRDA is imminent. Law- and policy-makers are therefore already in the process of considering law reform.

1.6.3. Given the complexities of the legal framework and the challenges discussed in this Guideline, while law- and policy-makers are applying their minds to the various laws and revisiting certain legislative aspects, consideration could be given to the possibility of a policy document being drafted by the State, which clarifies how the various pieces of legislation should be read and applied together in the mining context, and how mining companies should meaningfully consult with communities and indigenous peoples with a view to reaching consensus.

1.7. Basic norms and standards framework on consultation

1.7.1. It is recommended that until such time as the relevant regulators consider the merits of legislative reform or introducing additional policy, a voluntary Basic Norms and Standards Framework be used as supplemental practical guidance to ensuring adequate and meaningful engagement with communities and indigenous peoples in respect of development activities in the extractives sector.

1.7.2. In Annexure A to the Guideline, the text of the Basic Norms and Standards Framework is proposed, as informed by international instruments and best practice, and as contextualised to the South African legal, policy, and practical landscape.

2. Introduction

2.1. Purpose of the Guideline

2.1.1. In light of the context and challenges underpinning consultation practices in the South African extractives sector, this Guideline seeks to give guidance on community consultation requirements which must and should apply to mining projects, with reference to laws, policies, and international best practice.

2.1.2. The purpose of the Guideline is, accordingly, to provide an analysis of the South African legal regimes applicable to community consultation and consent; how these are to be read and applied together in the context of mining projects; and how these are to apply to the nuanced community structures existing in South Africa. Where practical challenges are and have been faced, or where gaps in the legal regimes exist, in attaining meaningful engagement, this Guideline further provides for recommendations to bolster or supplement the existing regimes in order to support meaningful engagement with mining-affected communities.

2.2. Target audience of the Guideline

2.2.1. The Guideline is intended for use by mining companies operating in the extractives industry in South Africa, as well as the DMPR and South African law- and policy-makers.

2.2.2. The Guideline is also for the benefit of, and therefore can be used by, mining-affected communities as IAP groupings, as well as industry bodies and civil society, in providing practical guidance on consultation and consent in mining projects.

2.3. Stakeholder consultations

2.3.1. In preparing this Guideline, consultations were scheduled with representatives of stakeholder groups from mining-affected communities, civil society organisations, and the DMPR. Nothing contained in this Guideline purports to represent the views of any of these stakeholders, unless expressly referenced in discussion.

...this Guideline seeks to give guidance on community consultation requirements which must and should apply to mining projects, with reference to laws, policies, and international best practice.

3. Contextual Background

The Constitution of the Republic of South Africa, 1996, recognises the injustices of South Africa's racially discriminatory past and seeks to honour and protect persons that suffered as a result thereof.

3.1. The mining industry in South Africa has made a significant contribution to the country's economic development, creating employment opportunities and contributing to gross domestic product. The historic socio-political context, however, was colonialism and apartheid which led to systematic land dispossession, inequality, and racial discrimination, where apartheid laws and policies established insecure customary land tenure for customary right holders. The Constitution of the Republic of South Africa, 1996, recognises the injustices of South Africa's racially discriminatory past and seeks to honour and protect persons that suffered as a result thereof. Legislation has been introduced by Parliament which seeks to address insecure land tenure, recognise customary land tenure, and promote land reform, as discussed in this Guideline.

3.2. Mineral deposits are often located in rural areas which are inhabited by people holding different titles and rights in respect of land, with distinct customs and ties to the land. Mining-affected communities are also not homogonous, and the human rights of mining-affected communities that may be adversely impacted or violated by mining projects are varied.[4] Some of the adverse impacts raised by mining-affected communities who live close to mines include exposure to the environmental impacts of mining (such as air, water, and land pollution); livelihood impacts; social changes and conflicts brought by industrialisation to rural communities; altering the landscape and way of life of such communities; high unemployment rates; and a lack of prioritisation of the interests of women and children.[5] A critical human rights risk for the extractives industry is therefore how it engages with and impacts mining-affected communities.

3.3. Although the mining industry's relative contribution to GDP has been declining, it remains a critical industry to the achievement of South Africa's sustainable development objectives. Yet many mining-affected communities in South Africa remain historically disadvantaged and marginalised and continue to face socio-economic challenges. It is in this context that the need for adequate consultation with mining-affected communities must be understood. The advent of the MPRDA signalled a new era in respect of mineral regulation, with the State becoming the custodian of the nation's mineral resources for the benefit of the population as a whole. One of the objects of the MPRDA is to promote equitable access to the nation's mineral resources to all the people of South Africa.

4. These include the rights to life, liberty, and security of the person; to a clean, healthy, and sustainable environment; to participate in cultural life; to hold opinions, freedom of information and expression; not to be arbitrarily deprived of property; to equal recognition and protection under the law; to non-discrimination; and to effective remedy.

5. Summit hosted by Mining project-affected communities United in Action in February 2024: Communities demand more benefits from mines in their towns | GroundUp.

3.4. The mineral regulatory regime under the MPRDA provides for responsible environmental and social practices by mining companies. It provides for consultation requirements with IAPs, including mining-affected communities. Guidelines have also been published to deal with specific circumstances where human rights risks are heightened, for example with respect to resettlement and relocation. Challenges remain, however, in light of the inconsistent application or enforcement of these requirements, as well as the opacity of meaningful consultation requirements in the context of differing community structures and legal regimes recognising alternative tenure formats.

3.5. To ensure that benefits from mining activities are derived for mining-affected communities, certain obligations are placed on mining companies to substantially and meaningfully expand the opportunities for historically disadvantaged persons to enter the mining industry and to benefit from the exploitation of the nation's minerals. For example, mines are obligated to have an SLP in place which promotes local development for mining-affected communities. Consultations between mining companies and mining-affected communities are essential for establishing meaningful outcomes with mining-affected communities, securing the company's social licence to operate, and ensuring that appropriate safeguards are put in place to conduct mining activities in a responsible manner. Failure to consult and engage from the outset may result in disputes being levelled against mining companies in a number of ways (including community unrest, grievances, and litigation).

3.6. Consultation processes in South Africa are inconsistent. According to a community survey conducted in March 2024 in respect of mining across South Africa, 54% of respondents indicated that they were not aware of meetings being held with mining companies, while 38% indicated that they had never communicated with mining companies. In addition, 38% indicated that their grievances never get resolved, while 31% said that their grievances are sometimes resolved or attended to. Another issue highlighted by the survey is the different avenues for consultation: 32% of respondents said they raise concerns through the royal family or headmen/women and 20% indicated that they raise concerns through community organisations.

...many mining-affected communities in South Africa remain historically disadvantaged and marginalised and continue to face socio-economic challenges

3.7. The community and civil society representatives consulted during the stakeholder workshop conducted in preparing this guideline spoke to challenges regarding divide-and-conquer tactics sometimes used by mining companies to divide communities; legal representation being required by community members but being inaccessible or unaffordable; mines not complying with their SLPs; grievances not being addressed; non-compliances with environmental obligations; and confusing or conflicting legislation, with different rights contained in different legislation. Furthermore, the women and individual community members are frequently excluded from consultation processes, and mining companies' engagements have focused on traditional leaders.

The Matsewu family relocated to Phomolong by Anglo American. **Screenshot from *Limpopo Video*, produced by Corruption Watch.**

Residents discussing the mining project at Gqokubukhosi High School. **Screenshot from *Eshowe* Video, produced by Corruption Watch.**

Consultation processes in South Africa are inconsistent.

3.8. Mining companies often face a myriad of challenges in relation to engaging with mining-affected communities, which include:

3.8.1. uncertainty regarding applicable customs, community governance structures, and who in a community should be consulted;

3.8.2. managing community expectations, especially in the early stages of the investment into and development of a project;

3.8.3. having to redirect capital to assist local municipalities in providing for the basic human needs of communities rather than being able to focus on long- term socio-economic development and sustainability initiatives;

3.8.4. instability among communities, which disrupts mining operations and can result in intentional damage to mine property and infrastructure;

3.8.5. opportunistic individuals who are not part of mining-affected communities, but claim to be, and use mining-affected communities to pursue their own economic interests, extorting mining companies; and

3.8.6. disagreements or factions within a community affecting the engagement between the community and the mining company, and resulting in ongoing legal challenges which detract from socio-economic development initiatives.

3.9. The interplay between the MPRDA and land reform legislation is not well understood and has been the subject of two recent court judgments, *Maledu*[6] and *Baleni*.[7] The legislation is also in a state of flux and legislative reforms are currently anticipated to both the mineral regulatory regime and the land reform regulatory regime. Notwithstanding this state of flux, this Guideline seeks to provide practical guidance to mining companies on how to undertake meaningful consultation. To achieve this, we consider the local regulatory frameworks, international legal frameworks, and international best practice;[8] and have compiled a Norms and Standards Framework on Consultation (contained in Annexure A).

6. *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41.

7. *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018).

8. It must be appreciated that potential limitations arise with respect to applying the internationally recognised notion of 'indigenous peoples' to the South African context, which many international best practice frameworks expressly pronounce on and which we discuss in more detail herein.

4. Defining Community Structures and Indigenous Peoples in South Africa

4.1. Defining the relevant "community" for purposes of consultation is the first challenge, as mining-affected communities are not homogonous. Communities often comprise diverse groups of individuals. Each community may have varying needs, and within communities there may be various groups with differing demands, at times competing or conflicting. Membership and leadership of communities may also be a complex issue, and mining companies often face challenges in determining the appropriate structures for engagement.

4.2. What will become clear from the below is that defining "community" is not straightforward and the types of tenure and rights of communities and people forming part of communities may be layered and complex. This needs to be taken into account when seeking to engage in meaningful consultation.

4.2.1. Defining a "community"

4.2.1.1. "**Community**" attracts various legal definitions.

4.2.1.2. The MPRDA defines community to mean a group of historically disadvantaged persons with interests or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom, or law: provided that, where as a consequence of the provisions of the MPRDA, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affected by mining on land occupied by such members or part of the community.

4.2.1.3. IPILRA defines a community to mean any group or portion of a group of people whose rights to land are derived from shared rules determining access to land, held in common by such group. This definition is similar to that found in the Restitution Act.

4.2.1.4. The NHRA does not define a community. The term used to be defined in NEMA (which was aligned to the above MPRDA definition). This definition was, however, deleted in 2014 and never replaced. The Land Claims Court in the *Elambini* case[9] provides some guidance relating to the interpretation of "community" by providing that "*[t]he legislation has set a low threshold as to what constitutes a 'community' or any 'part of a community'.*

... defining "community" is not straightforward and the types of tenure and rights of communities and people forming part of communities may be layered and complex. This needs to be taken into account when seeking to engage in meaningful consultation.

9. *Elambini Community and Others v Minister of Rural Development on Land Reform and Others* (LCC88/2012) [2018] ZALCC 11 (30 May 2018), para 139.

It does not set any pre-ordained qualities of the group of persons or any part of the group in order to qualify as a community"'. In the NHRA, "community" is used as a genus of groupings that also includes "cultural group" and "body of persons" which would, in the context of the NHRA, have shared cultural interests and conscious practice or articulation of such interests/customs.

4.2.1.5. The TKLA only defines what a traditional community is and prescribes the criteria for the determination thereof. According to the TKLA, a traditional community (a) must have a system of traditional leadership; (b) observes a system of customary law; (c) recognises itself as a distinct traditional community with a proven history; (d) occupies a specific geographical area; (e) must have a distinct heritage; and (f) where applicable, has a number of headmen or headwomen.

4.2.2. Indigenous peoples

4.2.2.1. There is no generally accepted legal definition of 'indigenous peoples', but the designation of 'indigenous peoples' has come to be recognised over the last few decades as a particular demographic category under international law through instruments such as the UNDRIP and ILO Convention 169, as discussed in paragraph 8 below. The term 'indigenous peoples' has principally been applied to those who are considered to be the descendants of pre-colonial peoples, or marginalised minority ethnic groups (often described as "tribal populations"), with a culture distinct from the majority of the population and who have historically occupied certain regions.[10]

4.2.2.2. The following general characteristics have been established as partly and/or fully indicative of indigenous peoples:

4.2.2.2.1. self-identification as indigenous;

4.2.2.2.2. historical continuity with pre-colonial and/or pre-settler societies;

4.2.2.2.3. a common experience of colonialism and oppression;

4.2.2.2.4. occupation of or a strong link to specific territories;

4.2.2.2.5. distinct social, economic, and political systems;

4.2.2.2.6. distinct language, culture, and beliefs from dominant sectors of society; and

4.2.2.2.7. resolved to maintain and reproduce their ancestral environments and distinctive identities.

4.2.2.3. South Africa's total population is around 59-million, of which indigenous groups are estimated to comprise approximately 1%. Collectively, the various African Indigenous communities in South Africa are known as Khoe-San (also spelled Khoi-San, Khoesan, Khoisan), comprising the San and the Khoikhoi.[11] In contemporary South Africa, Khoikhoi and San communities exhibit a range of socio-economic and cultural lifestyles and practices. The socio-political changes brought about by the current South African regime have created the space for a deconstruction of the racially-determined apartheid social categories such as "Coloureds". Many previously "Coloured" people are now exercising their right to self-identification and are identifying as San and Khoikhoi.[12]

4.2.2.4. While African Indigenous San and Khoikhoi peoples are not formally recognised in terms of national legislation, legislative efforts have been made to protect their rights:[13]

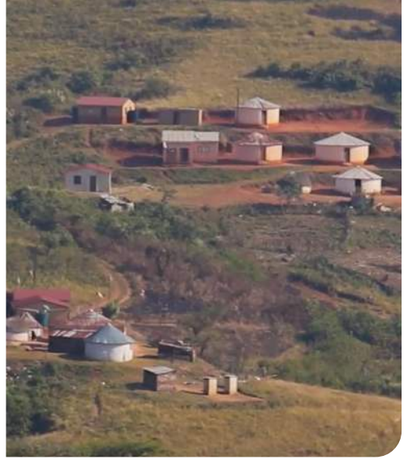
4.2.2.4.1. in 2013, Parliament introduced an amendment to the Restitution Act in order to re-open land claims and enable claims for land taken before 1913.

10. ICMM, 'Good Practice Guide: Indigenous Peoples and Mining', 2015.

11. The main San groups include the ǂKhomani San, who reside mainly in the Kalahari region, and the Khwe and!Xun who reside primarily in Platfontein, Kimberley. The Khoikhoi include the Nama who reside mainly in the Northern Cape Province; the Koranna mainly in Kimberley and the Free State province; the Griqua in the Western Cape, Eastern Cape, Northern Cape, Free State and KwaZulu-Natal provinces; and the Cape Khoekhoe in the Western Cape and Eastern Cape, with growing pockets in Gauteng and Free State provinces.

12. The International Work Group for Indigenous Affairs, 'The Indigenous World 2024'.

13. Ibid.



Matshansundu village in Melmoth, KwaZulu-Natal. **Screenshot from *Eshowe* Video, produced by Corruption Watch.**

This removed what had been a barrier to lodging land claims for the Khoikhoi and San, many of whom were dispossessed of their ancestral lands during the first waves of European colonisation. However, this amendment was overturned in 2019 as the Constitutional Court ruled that applicants could only claim under the amended Restitution Act once the first batch of restitution claimants' cases has been resolved. As a result, the Khoikhoi's and San's many historical land claims and needs remain unaddressed and structurally neglected; and

4.2.2.4.2. the TKLA gave statutory recognition to the Khoikhoi and San leadership and its communities. However, it was also found to be unconstitutional in 2023, with the State having been found to have failed to facilitate meaningful public participation when passing this legislation. While the TKLA recognised Khoikhoi and San leadership communities, it also received criticism during the public hearings from traditional (non Khoi-San) and Khoi-San communities alike. The overwhelming majority of Khoikhoi and San communities did nonetheless support the enactment as recognition was a key first step to accessing justice and the beginning of South African institutional dispensations documenting and including their communities into post-apartheid developmental aspirations.

4.3. Where indigenous peoples are involved, the impacts of mining projects on indigenous peoples may be more nuanced or severe, considering the strong link of indigenous peoples to specific territories and cultural heritage. Therefore, in determining who should be consulted in the context of a mining project, a mine should identify whether indigenous peoples groupings form part of the mining-affected community in question.

4.4. Community structures should also be considered alongside the type of tenure in which any specific land is held. There may be formal tenure, where land is owned by or on behalf of a community, in which case certain formal leadership structures and legal frameworks may be applicable, or there may be informal tenure, which needs to be separately considered. This is expanded upon below.

4.4.1. Formal Tenure

4.4.1.1. If tenure is formal, the land could be owned by a community (i.e. registered in undivided shares in the name of certain community members), registered in the name of the State on behalf of a community, or owned by a trust or communal property association ("CPA") on behalf of a community. In KwaZulu-Natal, the Ingonyama Trust owns a substantial portion of communal land regulated by the Trust Act.

4.4.1.2. In such instances, it will be important to consider the formal tenure arrangement and the legal framework which applies thereto to determine (a) appropriate formal leadership structures that should be consulted, for example, an executive committee or a board of trustees; and (b) whether any other requirements need to be met beyond consultation, for example, requirements to conclude lease agreements or land use agreements for mining purposes.

4.4.1.3. CPAs

4.4.1.3.1. CPAs are established under the CPA Act. The CPA Act applies to communities who have been awarded land by the Land Claims Court or by settlement with the State, or communities who are to receive some form of property or assistance from the State. A CPA must be governed by a constitution and must be registered with the State.

4.4.1.3.2. The constitution governing a CPA must ensure inclusive and fair decision-making; equality of membership; provide for democratic processes; allow for fair access and use of the property in question; and provide for accountability and transparency in respect of the CPA's management.

4.4.1.3.3. The CPA leadership is accountable to the CPA members for whom the land is held. It is a democratic structure, and while externally facing, the decisions taken and communicated externally are decided upon democratically by the CPA's members (i.e. the community beneficiaries).

4.4.1.3.4. The CPA Act, under section 12, places limitations on how a CPA may deal with the property under its custodianship, including that:

4.4.1.3.4.1. CPAs may not dispose of or encumber or conclude prescribed transactions in respect of the property without the consent of the majority of its members; and

4.4.1.3.4.2. The Director-General may intervene when requested by CPA members, should transactions be concluded in contravention of the CPA Act.

4.4.1.4. Ingonyama Trust

4.4.1.4.1. The Ingonyama Trust was established under the Trust Act. The Trust Act mainly vests all that land which, prior to its enactment vested in the erstwhile Government of KwaZulu[14], in the Ingomyama Trust. The Trust Act also appoints the King of AmaZulu as the sole trustee of the Trust who is thereby tasked with administering the Trust for the benefit of the tribes and communities living on the land in question.

4.4.1.4.2. The King and the Trust are also limited from alienating and transacting in respect of the land without the prior consent of the traditional authority or community authority concerned.

4.4.1.4.3. In respect of consultation, viewed alongside the recent case law, it is advisable to consult community members and individual households in addition to the traditional authorities or community authority, and the King, presiding over the communities. The case of Council for the Advancement of the South African Constitution[15] related to the Ingonyama Trust leasing land for rental to the holders of informal rights in land as envisaged in IPILRA. The court held that the lease programme undermined informal land rights and declared it to be unlawful. This emphasises that informal rights can exist separately to formal tenure and need to be taken into consideration.

4.4.2. Informal Tenure

4.4.2.1. Therefore, in addition to considering formal land ownership when seeking to engage with and meaningfully consult communities, informal rights in land, as envisaged in IPILRA, also need to be considered.

4.4.2.2. IPILRA

4.4.2.2.1. It should be borne in mind that people may have informal rights in land as envisaged in IPILRA, even if there is no claim to restitution, and that indigenous peoples may also have informal rights in land.

4.4.2.2.2. IPILRA was enacted as a temporary measure to recognise and protect holders of informal land rights, until a permanent law is published. However, IPILRA has been renewed by Parliament every year, as a permanent law has not been passed. An informal land right is defined as:

4.4.2.2.2.1. the use of, occupation of, or access to land in terms of (a) any tribal, customary, or indigenous law or practice of a tribe; (b) the custom, usage, or administrative practice in a particular area or community, where the land in question at any time vested in the South African Development Trust, or authority established pursuant to the Self-Governing Territories Constitution Act, 21 of 1971 or land which vested in the governments of the Republics of Transkei, Bophuthatswana, Venda, and Ciskei;

4.4.2.2.2.2. the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed pursuant to an act of Parliament, or the holder of a public office;

4.4.2.2.2.3. the beneficial occupation of land which has been continuous for a period of not less than five years prior to 31 December 1997; or

4.4.2.2.2.4. the use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in schedules 1 and 2 to the Upgrading of Land Tenure Rights Act, 112 of 1991, although he or she is not formally recorded in a register of land rights as the holder of the right in question.

4.4.2.2.3. Excluded from the definition of an informal right are:

4.4.2.2.3.1. any right or interest of a tenant, labour tenant, sharecropper, or employee if such right of interest is purely of a contractual nature; and

4.4.2.2.3.2. any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier.

4.4.2.2.4. IPILRA accords a number of rights to informal land right holders. In the context of mining projects, these are explained in further detail in paragraph 5.5 below.

4.4.2.2.5. When considering informal rights, it is also important to note that informal rights may be based on individual tenure or communal tenure.

4.4.2.3. Individual tenure

4.4.2.3.1. The rights held in land, whether full or limited, may be shared with no other, or may potentially be exercised with others, such as is the case in households or family units. For communities, individual tenure does not always mean that the right holder exercises all rights in property to the exclusion of others. Therefore, depending on the setting, consultations should be held with the holder of the right and those with whom the rights are exercised.

4.4.2.3.2. The Socio-Economic Rights Institute of South Africa ("SERI") has documented the prevalence of so-called "Family Homes" in South Africa.[16] These kinds of set-ups are prevalent in South Africa's urban settings among black people.[17]

4.4.2.3.3. The concept of a "Family Home" is undefined and has no legal recognition. "Family Homes," as documented by SERI, possess the following features:

4.4.2.3.3.1. the set-up has a preference for extension over nuclear family. This expands the scope of people who may claim rights over such property;

4.4.2.3.3.2. a hybrid system of tenure. "Family Homes" tend to have characteristics of individual, free-hold tenure, and incorporate a system of customary tenure;

4.4.2.3.3.3. "Family Homes" have a preference for inclusion over exclusion;

4.4.2.3.3.4. they serve as a place of refuge for those family members in need;

4.4.2.3.3.5. they have a custodian, who may or may not be

14. This is a reference to the former self-governing bantustan of KwaZulu, which was abolished in 1994.

15. *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others* 2021 (8) BCLR 866.

16. Socio-Economic Rights Institute of South Africa, '*A Gendered Analysis of Family Homes in South Africa*', 2024.

17. *Shomang v Motsose N.O. and Others 2022* (5) SA 602 (GP).

Gogo Khulu from Allen Farm, affected by mining operations.
Screenshot from *New Castle Video*, produced by Corruption Watch.

the actual title holder. The idea is that the custodian sees to the proper upkeep of the "Family Home;"

4.4.2.3.3.6. there is a limitation on the alienation of the "Family Home." The custodian or the title holder may not alienate the "Family Home" without the general consent of the family, especially those residing therein; and

4.4.2.3.3.7. the customs governing access and usage to "Family Homes" are adaptable.

4.4.2.4. Communal tenure

4.4.2.4.1. In the case of communal tenure, the rights held in land are shared and exercised communally with others. There exist different types of communal tenure.

4.4.2.4.2. Communal tenure systems under traditional authorities differ depending on the community in question. Some communities exercise a democratic system of collective decision-making, while others may give deference to the traditional authority leadership, depending on the custom in place. In certain instances, for example, the traditional authority leadership is regarded as the custodian of the land on which the community resides. It is important to note that the legislation which sought to place communal land entirely under the control of traditional authorities (i.e. the Communal Land Rights Act, 11 of 2004) was declared unconstitutional.[18] As such, there is no legislation that grants traditional authorities the sole authority over communal land, with the exception of the Ingonyama Trust which is dealt with above.

4.4.2.5. Land Claims

4.4.2.5.1. If there is a claim for restitution of a right in land on behalf of a community in terms of the Restitution Act in relation to particular land, then the claimant community would likely have informal rights to such land as envisaged in IPILRA.

4.4.2.5.2. It is also important to consider the requirements in the Restitution Act that apply once a notice of a land claim has been published in terms of the Restitution Act, including that:

4.4.2.5.2.1. certain notices are required to be given to the relevant Regional Land Claims Commissioner for certain actions relating to the land, including sales and leases;

4.4.2.5.2.2. no claimant who occupied the land in question at the date of commencement of the Restitution Act may be evicted from the said land without the written authority of the Chief Land Claims Commissioner; and

4.4.2.5.2.3. no claimant or other person may enter upon and occupy the land without the permission of the owner or lawful occupier.

18. *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC).

5. The Current Legal Frameworks Governing Community Consultation In South Africa

5.1. The current legal frameworks which govern or prescribe community participation, consultation, and/or consent requirements for mining development projects are discussed below. The purpose of this section is to showcase that the applicable legal provisions are complex and layered, and in the context of community consultation in the mining sector must be read and applied together.

5.2. The legal frameworks should be applied considering the Bill of Rights contained in Chapter 2 of the Constitution of the Republic of South Africa, 1996, which enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

5.3. MPRDA

5.3.1. The MPRDA provides that applicants for prospecting rights and mining rights must consult in the prescribed manner with the landowner, lawful occupier, and any IAP, and include the result of the consultation in the relevant environmental reports.[19] Prescribed means prescribed by regulation.[20]

5.3.2. The MPRDA Regulations contain the following definition for meaningful consultation: *"means that the applicant, has in good faith facilitated participation in such a manner that reasonable opportunity was given to provide comment by the landowner, lawful occupier or interested and affected party in respect of the land subject to the application about the impact the prospecting or mining activities would have to his or her right of use of the land by availing [all] relevant information pertaining to the proposed activities enabling these parties to make an informed decision regarding the impact of the proposed activities."*

5.3.3. MPRDA Regulation 3A(1) provides that "*[t]he meaningful consultation with landowners, lawful occupiers and interested and affected persons contemplated in sections 16 (4) (b) 22 (4) (b) 27 (5) (a) of the Act shall be conducted in terms of the public participation process prescribed in the Environmental* Impact Assessment *Regulations promulgated in terms of section 24 (5) of the National Environmental Management Act, 1998.*"

...the applicable legal provisions are complex and layered, and in the context of community consultation in the mining sector must be read and applied together.

19. Sections 16(4)(b) and 22(4)(b) of the MPRDA.

20. Section 1 of the MPRDA.

The definition of "interested and affected persons" contained in the MPRDA Regulations is broad and is not a closed list. It essentially includes any person who can demonstrate that they have an interest in the proposed operations or may be affected by the operations, and includes mine communities

Helen Matsewu and her mother recount their decade-long fight for fair compensation.
Screenshot from *Limpopo Video*, produced by Corruption Watch.

5.3.4. MPRDA Regulation 3A(2) contemplates participation in the meaningful consultation process by the Regional Manager of the relevant area, as an observer, "*to ensure that the consultation by the applicant is meaningful and in accordance with these regulations*". The use of the word "*may*" in this MPRDA Regulation seems to suggest that such participation by the Regional Manager is, however, optional and not obligatory.

5.3.5. MPRDA Regulation 3 provides that the relevant Regional Manager, who has accepted the application for a prospecting right, mining right, or mining permit, must give notice of such decision by placing the notice:

5.3.5.1. on a notice board at the office of the Regional Manager;

5.3.5.2. at the Magistrate's Court in the applicable magisterial district; and

5.3.5.3. at local schools, public libraries, municipal offices, and Traditional Council offices.

5.3.6. This notice is required to be in English as well as one other language dominantly used in the area and must include an invitation to the public to submit written comments within 30 days of the notice, with the details of the person to whom the comments must be sent.

5.3.7. Consequently, it is clear that the DMPR has a responsibility to ensure that sufficient notice is given to potential IAPs and, similarly, communities should be encouraged to check whether any notices have been posted that relate to the areas which they own or occupy. The responsibility then appears to shift to the applicant for a prospecting right, mining right, or mining permit. Applicants are required to provide the IAPs with sufficient information in respect of the proposed activities and the impact that the operations will have on their rights to use the surface of the land, to allow these parties to make an "*informed decision regarding the impact of the proposed activities*".

5.3.8. The definition of "*interested and affected persons*" contained in the MPRDA Regulations is broad and is not a closed list. It essentially includes any person who can demonstrate that they have an interest in the proposed operations or may be affected by the operations, and includes mine communities;[21] land claimants who have lodged claims in terms of the Restitution Act, which have not been rejected or settled in terms thereof; lawful land occupiers; holders of informal rights to land as defined in IPILRA; and the DLRRD.

21. The MPRDA Regulations define 'Mine Community' as "…refers to communities where mining takes place, major labour sending areas, adjacent communities within a local municipality, metropolitan municipality or district municipality."

5.3.9. Further guidance on what is expected from an applicant for a prospecting right, mining right, or mining permit is set out in the DMPR Consultation Guidelines, as more fully dealt with in paragraph 7.1 below.

5.3.10. As part of the process set out in NEMA and the EIA Regulations, the results of the consultation process are to be submitted to the DMPR by the applicant for a prospecting right, mining right, or mining permit and should be taken into account in making the decision to grant such right. In addition, if an application for a mining right relates to land occupied by a community, the DMPR Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community[22].

5.3.11. Once a prospecting right, mining right, or mining permit is granted, the holder of such authorisation is obliged to give any landowner or lawful occupier at least 21 business days' notice before it can enter the land in question. At this stage, consultation is not envisioned and what is required is a notice informing the landowner or lawful occupier that the conduct of operations is imminent. This is confirmed by the contents of section 5 of the MPRDA, which sets out the rights of a prospecting right, mining right, or mining permit holder, which, among others, includes the right to enter the land and to conduct such operations as provided for in its prospecting right, mining right, or mining permit.

5.3.12. Every mining right holder is required to have an SLP in place focused on, among others, human resources development aspects, such as skills development, and a local economic development programme; and is required to provide financially for the implementation of the SLP and report annually to the DMPR regarding the extent of compliance with the approved SLP[23]. In terms of the MPRDA Regulations, the objectives of the SLP are to (i) promote employment and advance the social and economic welfare of all South Africans (ii) contribute to the transformation of the mining industry and (iii) ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating, as well as labour sending areas[24]. Mining right holders are required to consult meaningfully with mining-affected communities and a broad range of IAPs regarding the content of the SLP, and the consultation is to be conducted in terms of the public participation progress prescribed in the EIA Regulations[25].

5.3.13. The MPRDA Regulations envisage that mining companies can collaborate on SLP projects so that they may have a greater and lasting impact. Collaboration must be transparent, inclusive, and based on meaningful consultation with mining-affected communities and IAPs[26].

5.3.14. Continuous consultation with mining-affected communities throughout the life of the mine is also provided for in the MPRDA and MPRDA Regulations. In terms of the MPRDA Regulations, the holder of a mining right must convene a minimum of three meetings per annum with mining-affected communities and IAPs to update these stakeholders about the progress made with the implementation of the approved SLP[27]. In addition, mining companies are required to review their approved SLPs every five years, and such review process must be done "*in meaningful consultation with mine communities, and interested and affected persons*". Before a new SLP is approved, the DMPR Minister is also required to take into account the input received from, among others, mining-affected communities and IAPs, as well as the changing nature of the relevant needs of the mining-affected community as per municipal integrated development plans.

5.3.15. Engagement is again provided for in section 54 of the MPRDA, which provides for a dispute resolution mechanism in instances where, among others, the landowner or lawful occupier "*refuses to allow such holder to enter the land*" or "*places unreasonable demands in return for access to the land*".

5.3.16. If, upon consideration of the issues raised by the right holder and the representations of the landowner or lawful occupier, the DMPR Regional Manager concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the operations, the DMPR Regional Manager must request the parties concerned to reach an agreement for the payment of compensation for such loss or damages. The MPRDA therefore does not require parties to

22. Section 23(2A) of the MPRDA.
23. Regulations 45 and 46 of the MPRDA Regulations.
24. Regulation 41 of the MPRDA Regulations.
25. Regulation 42(3) of the MPRDA Regulations.
26. Regulation 46C of the MPRDA Regulations.
27. Regulation 45 of the MPRDA Regulations.

reach consensus following consultation, and a mining right can be awarded without the land right holder's consent.

5.3.17. The purpose of section 54 is to determine reasonable compensation to be paid to the landowner or the lawful occupier for their loss of the use of the surface of the area subject to the prospecting right, mining right. or mining permit.

5.3.18. Section 54 of the MPRDA is similarly available to landowners or lawful occupiers who are free to approach the DMPR if they have suffered or are likely to suffer loss or damage as a result of the prospecting or mining operation.

5.3.19. In terms of section 55 of the MPRDA, if it is necessary to achieve certain objects of the MPRDA, the Minister may, in accordance with the relevant sections of the Constitution and applicable law, expropriate any land or any right therein and pay compensation in respect thereof.

5.3.20. In terms of section 96 of the MPRDA, any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of the MPRDA may also appeal such decision in the prescribed manner.

5.4. NEMA and supporting environmental legislation

5.4.1. NEMA gives effect to the section 24 constitutional right to a healthy environment and codifies the requirement for sustainable development.[28] NEMA provides for the framework and underlying principles governing all other environmental laws in South Africa, and is therefore described as 'framework' or 'umbrella' legislation. Any SEMA is to be enforced in accordance with, and under the provisions of NEMA, and all other legislation impacting on the environment should be interpreted and applied in accordance with NEMA.

5.4.2. NEMA details key environmental and sustainable development principles that apply throughout South Africa, and which serve as guidelines by reference to which the regulators must exercise their decision-making functions. These NEMA principles expressly recognise the importance of public participation (with all IAPs and especially women, youth, vulnerable, and disadvantaged persons), knowledge and information sharing, and common heritage.

5.4.3. In order to give effect to these principles, NEMA prescribes other measures to ensure that there is adequate and appropriate opportunity for public participation in decisions that may affect the environment. NEMA caters for this participation by requiring that:

5.4.3.1. with respect to environmental authorisation applications, the investigation, assessment, and communication of potential environmental impacts must ensure that public information and participation procedures provide all IAPs with a reasonable opportunity to participate in those information and participation procedures;

5.4.3.2. any person applying for an environmental authorisation must comply with any regulated procedure related to public consultation and information gathering through the public participation process; and

5.4.3.3. the person conducting a public participation process must take into account any relevant guidelines applicable to public participation.

5.4.4. NEMA's EIA Regulations prescribe the application processes in respect of developments which require environmental authorisation. The EIA Regulations require, among others, that:

5.4.4.1. if the applicant is a person who is not the owner or person in control of the land on which an activity is to be undertaken, that person must obtain the prior written consent of the landowner or person in control of the land to undertake such activity on that land. Note, however, that there are limited exceptions to this requirement, one of which is activities constituting, or activities directly related to, prospecting or exploration of a mineral and petroleum resource or extraction and primary processing of a mineral or petroleum resource;

5.4.4.2. all application documents are subjected to a public participation process. This public participation process requires that all potential or registered IAPs must receive written notice of the availability of the document(s) for review and comment. The parties who must receive such written notice from an applicant include (among others) the owners and occupiers of the land which is the subject of an application, neighbouring landowners, and any other party directed by the competent authority to be consulted. The IAPs must then be given at least 30 days to submit comments on each of the prescribed documents. The public participation process must provide access to all information that reasonably has or may have the potential to influence any decision with regard to an application, unless access to that information is protected by law. The person conducting the public participation process must ensure that participation by potential or registered IAPs is facilitated in a way that they have a reasonable opportunity to comment on the application or proposed application. Strict requirements are imposed on applicants for the means and format of the public participation process (e.g. sizes and locations of notice boards, places of advertisement); and

5.4.4.3. any report prepared in respect of a basic assessment or scoping and environmental impact assessment reporting process is then required to include the details of the public participation process conducted, including the steps that were taken to notify potentially affected IAPs; proof that notice was given to IAPs; a list of registered IAPs; and a summary of the issues raised by IAPs, together with the environmental assessment practitioner's responses thereto.

5.4.5. In addition to the public participation prescribed in the context of environmental authorisation applications, NEMA provides that any person may appeal a decision made in terms of NEMA or any SEMA to the DFFE Minister or MEC responsible for environmental affairs. In this regard, the EIA Regulations specifically require that IAPs are notified of a decision regarding an application for environmental authorisation, and of their right to lodge an appeal in terms of section 43 of NEMA.

5.4.6. Beyond NEMA, certain SEMAs provide dedicated requirements for engagement and consultation with IAPs. These include the NHRA and NEMBA.

5.4.7. The NHRA regulates those heritage resources of South Africa which are of cultural significance[29] or other special value for the present community and for future generations as part of the national estate. The heritage resources regulated by the NHRA expressly include "living heritage" or intangible heritage.[30]

5.4.8. The NHRA also gives effect to the constitutional rights afforded to cultural, religious, and linguistic communities to (i) enjoy their culture, practise their religion, and use their language; and (ii) form, join and maintain cultural, religious, and linguistic associations and other organs of civil society.

5.4.9. In regulating development activity that may adversely impact on heritage resources, the NHRA contains a catch-all provision which provides for the general protection of heritage resources. This provision requires that any person who intends to undertake certain prescribed development activities must notify the responsible heritage resources authority, at the very earliest stage, of such development. If there is reason to believe that heritage resources will be affected by such development, the authority must notify the person who intends to undertake the development to compile and submit a heritage impact assessment report (through a qualified and experienced specialist approved by the authority). The authority will specify the contents of the report, but certain minimum contents are prescribed in the NHRA, and include the results of consultation with communities affected by the proposed development and other interested parties regarding the impact of the development on heritage resources. The report must then be considered by the authority which must, after consultation with the person proposing the development, decide (among others) whether or not the development may proceed; any limitations or conditions to be applied to the development; and whether compensatory action is required in respect of any heritage resources damaged or destroyed as a result of the development. There is a carve-out to this provision of the NHRA,[31] which provides that a separate heritage impact assessment is not required if this is to be assessed as part of an environmental impact assessment process for an environmental authorisation or other permit application.

5.4.10. Strict consultation and engagement procedures are further prescribed where dedicated NHRA permits are required to obstruct, destroy, remove, etc. any identified heritage resources. For example, for grave exhumation and relocation permits, the authority may not issue a permit

28. Everyone has the right—(a) to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—(i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

29. Which is described with reference to the aesthetic, architectural, historical, scientific, social, spiritual, linguistic, or technological value or significance that these resources should possess.

30. "Living heritage" is defined as the intangible aspects of inherited culture and may include: (a) cultural tradition; (b) oral history; (c) performance; (d) ritual; (e) popular memory; (f) skills and techniques; (g) indigenous knowledge systems; and (h) the holistic approach to nature, society, and social relationships.

31. Section 38(8) of the NHRA.

unless it is satisfied that the applicant has, in accordance with regulations: (i) made a concerted effort to contact and consult communities and individuals who, by tradition, have an interest in the grave or burial ground; and (ii) reached agreements with such communities and individuals regarding the future of such grave or burial ground.

5.4.11. The NHRA also provides that the consent of the owner of a heritage resource must be given for SAHRA, or a provincial heritage resources authority, to negotiate and agree with a provincial authority, local authority, conservation body, person, or community for the execution of a heritage agreement to provide for the conservation, improvement, or presentation of a clearly defined heritage resource.

5.4.12. NEMBA governs the management and conservation of South Africa's biodiversity within the framework of NEMA. As a SEMA, community participation in the context of biodiversity-impacting activities is informed by the NEMA principles and requirements. However, NEMBA does recognise the need for specific engagement with indigenous communities or individuals in the limited context of bioprospecting. "Bioprospecting" comprises research on, or the development or application of, indigenous biological resources for commercial or industrial exploitation. Though bioprospecting is not typically undertaken in the extractives sector, we briefly discuss these participatory mechanisms for the benefit of extrapolation.

5.4.13. Engagements and contracting with indigenous communities or individuals are only regulated in the context of bioprospecting, where these stakeholders' traditional uses of the relevant indigenous biological resources have initiated or will contribute to or form part of the proposed bioprospecting; or where their knowledge of or discoveries about the relevant indigenous biological resources are to be used for the proposed bioprospecting. NEMBA includes two categories of stakeholders whose prior informed consent to a bioprospecting project must be obtained, namely:

5.4.13.1. those who give access to the indigenous biological resources (e.g. a landowner); and

5.4.13.2. indigenous communities whose knowledge or traditional use of indigenous biological resources has contributed to, or may contribute to, the bioprospecting.

5.4.14. Benefit-sharing agreements must be entered into with both these categories of stakeholders and a material transfer agreement must be entered into with stakeholders who give access to the indigenous biological resources. NEMBA also establishes a Bioprospecting Trust Fund, into which all money arising from benefit-sharing agreements must be paid, and from which all payments to stakeholders will be made.

5.4.15. It is noted that in 2024, the National Environmental Management: Biodiversity Bill was published. In seeking to amend NEMBA, revisions are also proposed to the provisions governing access to indigenous biological resources and indigenous knowledge, and benefit sharing. It is proposed that the DFFE Minister will need to approve (i) the prior informed consultation and consent process, which process must meet prescribed criteria; and (ii) the contents of the access agreement, which agreement must also meet prescribed criteria, before a discovery-phase bioprospecting permit application or a commercial bioprospecting permit application can proceed.

5.5. IPILRA provisions relevant to mining projects

5.5.1. IPILRA provides that:

5.5.1.1. subject to paragraph 5.5.2, no one may be deprived of their informal right to land without their consent;[32] and

5.5.1.2. if the land in question is communal land, a person may be deprived of their right in accordance with custom, but where the deprivation of a right in land is caused by a disposal of the land or a right in land by the community, the community shall pay appropriate compensation to any person who is deprived on an informal right to land as a result of such disposal. In this regard, the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.[33]

5.5.2. It must, however, be noted that IPILRA does recognise that holders of informal rights may be deprived of their rights pursuant to the Expropriation Act or any other law which provides for the expropriation of land or rights in land.[34] The Expropriation Act accords the State expropriation powers for a public purpose. The leading case which deals with what entails a public purpose suggests that this is a case-by-case determination.[35] If the ultimate benefactor is a private entity, that does not in of itself mean that the expropriation is not for a public purpose.

5.5.3. For the purposes of the MPRDA, section 1(2)(b) of IPILRA deems holders of informal rights to be owners of land for the purposes of section 42 of the Minerals Act, 50 of 1991. The Minerals Act has since been repealed, but the scheme of section 42, which dealt with payment of compensation, has been etched out in section 54 of the MPRDA. In accordance with section 12(1) of the Interpretation Act, where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted. Therefore, holders of informal rights are deemed to be owners of land for the purposes of the MPRDA's section 54 process, the implications of which we discuss further below.

5.6. TKLA

5.6.1. The TKLA does not explicitly deal with land issues. It attempts to overhaul the system of traditional leadership and has a number of implications which have been widely criticised.

5.6.2. The TKLA has been declared unconstitutional, but the declaration has been suspended for 24 months (expiring on 30 May 2025) to allow the legislature to re-enact the TKLA in a constitutionally compliant manner, or to pass another statute.[36] Pursuant thereto, the TKLA remains an Act of Parliament.

IPILRA provides that: subject to paragraph 5.5.2, no one may be deprived of their informal right to land without their consent...

32. Section 2(1) of IPILRA.
33. Section 2(2) to 2(4) of IPILRA.
34. Section 2(1) of IPILRA.
35. *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA).
36. *Mogale and Others v the Speaker of the National Assembly and Others* (CCT 73/22) [2023] ZACC 14.

5.6.3. Some of the criticism of the TKLA includes that:

5.6.3.1. it subverts the Constitution's vision for all leadership to be grounded in democracy. The TKLA accords traditional councils all decision-making powers, with no need for community consent. It places a vague and loose standard pursuant to which traditional authorities must act, in that traditional authorities are only required to act in the best interests of their communities. The TKLA moves traditional authorities away from community scrutiny in respect of financial reporting obligations, and thereby undermines transparency;

5.6.3.2. it permits traditional authorities to contract on behalf of communities with no requirement that they obtain consent, a requirement provided for in statues such as IPILRA. As such, in addition to potentially being in conflict with IPILRA, it is also possible that traditional authorities may facilitate the dispossession of land under the guise of acting in the best interests of the community; and

5.6.3.3. it creates a fourth sphere of government and a quasi "House of Lords" occupied by unelected persons, who are expected to opine on democratic processes.

5.6.4. It is not clear whether Parliament will re-enact the TKLA in a constitutionally compliant manner, or whether it will be abandoned entirely given the recent massive reconfiguration of South Africa's politics.

5.7. UPRD Bill

5.7.1. The main objective of the UPRD Bill is to separate petroleum provisions and minerals provisions, which are currently both provided for in the MPRDA. This separation was necessitated by the need to provide for two standalone pieces of legislation addressing matters pertinent to each industry and to bring about stability and security to investors, especially in the upstream petroleum sector.

5.7.2. While the UPRD Bill contains some similar provisions to the MPRDA regarding consultation, it goes further than what is stipulated in the MPRDA.

5.7.3. In terms of section 19 of the UPRD Bill, it is the responsibility of the South African Agency for Promotion of Petroleum Exploration and Exploitation (SOC) Ltd ("**Petroleum Agency**") to make known that an application for a reconnaissance permit or petroleum right has been accepted and to then call on IAPs to submit any comments that they may have within 30 days. The Petroleum Agency is then entitled to, pursuant to the completion of a consultation process by the applicant and having regard to the consultation report submitted by the applicant, conduct further public hearings.

5.7.4. At the same time, the Petroleum Agency is required to notify the applicant in writing to consult with the landowners, lawful occupiers, and any other affected party and to submit a consultation report within 60 days of the acceptance of the application.

5.7.5. What is also noticeably different from the MPRDA is that the Petroleum Agency is obligated to attend the consultation processes held by the applicant to ensure that "*the process is transparent, fair and meaningful*". Where landowners or lawful occupiers cannot be found to consult with, the applicant has the responsibility to provide the Petroleum Agency with proof of the steps taken to trace down landowners or lawful occupiers and is expected to place advertisements in a local and national newspaper for at least 30 days.

5.7.6. It is noteworthy that the UPRD Bill does contain a provision similar to section 54 of the MPRDA. An important difference is, however, that section 92(8) of the UPRD Bill does contemplate that in circumstances where the landowner or lawful occupier "*suffered or is likely to suffer any loss or damage and such loss or damage may result in the relocation or resettlement of the owner or lawful occupier of land, such relocation or resettlement must be carried out in the prescribed manner*".

5.7.7. The UPRD Bill throughout makes reference to things being done "*in the prescribed manner*" and in terms of section 107 of the UPRD Bill it is explicitly provided that regulations can be gazetted to deal with consultation with landowners or lawful occupiers of land and other IAPs which will, in turn and in all likelihood, set out the prescribed manner in which certain steps will need to be taken.

6. Case Law Regarding Consultation, Participation, and Consent

6.1. The courts in South Africa have provided some useful guidance regarding consultations with communities, including that: (i) applicants for rights in terms of the MPRDA should consult with landowners with a view to reaching an agreement to the satisfaction of both parties in regard to the impact of the proposed operation;[37] (ii) an applicant for a right must show that it has taken reasonable steps to notify and consult with IAPs and if consultations fail to take place because IAPs do not attend them, this cannot preclude an applicant from being granted a right in terms of the MPRDA;[38] (iii) meaningful consultation is more than a tick box exercise but is rather a genuine, *bona fide*, substantive, two-way process aimed at possible consensus;[39] and (iv) the medium used to publish the consultation notices and the language used should be appropriate to the IAPs to be consulted.[40]

6.2. However, there have been some differing views in the courts interpreting how the MPRDA and IPILRA should be read and applied together with reference to section 54 of the MPRDA, which emphasises the need for clarifying policy.

6.3. The case of *Maledu* concerned an appeal of an order of the High Court evicting the appellants and all persons occupying through or under them from farm property in the North West Province. It also granted an interdict restraining the appellants from entering the farm, bringing their livestock onto the farm, and erecting any structures on the farm. The High Court had found that the consultation process was acceptable. The Constitutional Court did not appear to make any definitive finding in this regard, but rather emphasised the requirement to consult in terms of the MPRDA. The Constitutional Court ultimately based its decision on IPILRA and found that there was no evidence to substantiate the assertions that the deprivation of informal land rights was in conformity with IPILRA or that consent was obtained in compliance with IPILRA.

Blasting notification sign by Tharisa Mine near residential area in Mmaditlhokwa. **Screenshot from *North West Video*, produced by Corruption Watch.**

The courts in South Africa have provided some useful guidance regarding consultations with communities

37. *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC) (30 November 2010).

38. *Samancor Chrome Limited v VDH Holdings (Pty) Ltd and 10 Others* (344/19) [2020] ZASCA 96 (27 August 2020).

39. *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* (58/2023; 71/2023; 351/2023) [2024] ZASCA 84 (3 June 2024).

40. Ibid.

There have been some differing views in the courts interpreting how the MPRDA and IPILRA should be read and applied together with reference to section 54 of the MPRDA, which emphasises the need for clarifying policy.

The appeal was upheld and the order of the High Court set aside, with the Constitutional Court holding that the MPRDA and IPILRA should be read in a manner that allows each to fulfil its purpose. The court recognised the process envisioned in section 54 of the MPRDA as a process to be followed in the context of informal rights in land.

6.4. In the High Court case of *Baleni*, the applicants were a community who held informal rights in terms of IPILRA to the land over which mining rights were granted in terms of the MPRDA. The Court commented that "*this matter requires a consideration of the provisions of IPILRA and the MPRDA in respect of the level of engagement that must be achieved prior to the grant of a mineral right: 'Consent' as opposed to 'consultation'. It further requires a consideration of the potential conflict between the requirement of 'consent' under IPILRA vis a vis the requirement of 'consultation' under the MPRDA prior to the grant of a mineral right*". The Court declared that the grant of the mining right was unlawful as the full and informed consent of the community who held informal rights in terms of IPILRA was not obtained. The *Baleni* judgment is notably a High Court decision in respect of which an appeal has been submitted by the DMPR.

6.5. In the recent *Stuart Coal* case,[41] it was argued by the landowner that Stuart Coal may not have access to its land, to commence with the conduct of mining operations, until such time as the process envisaged in section 54 of the MPRDA to determine compensation for the loss the mining-affected community would be suffering as a result of the conduct of mining operation was finalised, relying on the *Maledu* judgment. Stuart Coal, however, relied on a later judgment handed down in the *Sydney on Vaal Property* case [42] (which also dealt with the *Maledu* judgment), to argue that nowhere in section 54 of the MPRDA does it state that compensation should first be determined before mining operations can commence. The court agreed with the argument of Stuart Coal and held that, when reading section 54 of the MPRDA, it was apparent that the Regional Manager could only prohibit the holder of a mining right from commencing with its operations until such time as compensation has been determined in circumstances where the failure to reach an agreement or to resolve the dispute was due to the fault of the mining company.

Community meeting at Gqokubukhosi High Schooly.
Screenshot from *Eshowe Video*, produced by Corruption Watch

41. *Stuart Coal Proprietary Limited v The Regional Manager: Mpumalanga Region Department of Mineral Resources and Energy and CJ Williams en Seuns Boerdery Proprietary Limited*, out of the High Court of South Africa, Mpumalanga Division (Middelburg Local Seat) under case number: 2585/2023 (16 July 2024).

42. *Sydney on Vaal Property Association v Theta Mining (Pty) Ltd & Others* (363/2019) [2020] ZANCHC 6 (28 February 2020)

7. Governmental Guidelines

7.1. DMPR Consultation Guidelines

7.1.1. The DMPR Consultation Guidelines were published to provide clarity on the provisions of the MPRDA that require notification and consultation with communities by the DMPR Regional Managers and applicants for rights in terms of the MPRDA.

7.1.2. Although the DMPR Consultation Guidelines deal with certain MPRDA provisions which have since been amended to require public participation that is consistent with NEMA, they still contain relevant guidance regarding (i) the manner in which the DMPR Regional Managers are to provide notice of an application in terms of the MPRDA; (ii) the obligations of an applicant as they relate to the consultation and participation process when applying for rights in terms of the MPRDA; and (iii) the methodology to be applied to consultations in terms of the MPRDA. Where the DMPR Consultation Guidelines do not contradict the MPRDA and the MPRDA Regulations, they should be viewed as a supplement to the legislation. In circumstances of a contradiction, the provisions of the MPRDA and the MPRDA Regulations, as amended, shall apply.

7.1.3. The DMPR Consultation Guidelines provide that the purpose of consultation with landowners, affected parties, and communities is to provide them with the necessary information about the proposed prospecting or mining project so that they can make informed decisions, and to see whether some accommodation with them is possible insofar as the interference with their rights to use the affected properties is concerned. Consultation under the MPRDA's provisions requires engaging in good faith to attempt to reach such accommodation.

7.1.4. "Consultation" is defined as a "*two way communication process between the applicant and the community or interested and affected party wherein the former is seeking, listening to, and considering the latter's response, which allows openness in the decision making process* ". (our emphasis)

7.1.5. The definition of an IAP includes, but is not limited to, host communities; landowners (whether by title deed or by tradition); a traditional authority; land claimants; lawful land occupiers; the DLRRD; any other person whose socio-economic conditions may be directly affected by the proposed operations; the local municipality; and the relevant government departments, agencies, and institutions responsible for the various aspects of the environment and for infrastructure which may be affected by the proposed project. This definition aligns with the definition of IAP contained in the MPRDA Regulations, although the definition contained in the MPRDA Regulations is slightly more expansive and includes "Civil society" and the Department of Water and Sanitation. Both are, in any event, not closed lists and should therefore be interpreted accordingly.

7.1.6. In relation to the notification by the DMPR Regional Manager, envisaged in section 10 of the MPRDA, in terms of which the DMPR has to notify IAPs that an application for a prospecting right or mining right has been accepted, the DMPR Consultation Guidelines similarly provide guidance on the methods and extent of the notification. Of importance is that the intention is to make the application known to afford mining-affected communities and IAPs an opportunity to raise comments and concerns before the application can be processed further. The prescribed notifications do not preclude the Regional Manager from placing notices at other venues or from causing the application to be brought to the attention of other directly affected parties identified in the consultation process.

7.1.7. In terms of the DMPR Consultation Guidelines, the applicant must, after being notified of the fact that its application has been accepted:

7.1.7.1. identify all persons who will be affected by its proposed operations, compile a list which includes their details, and submit such list to the Regional Manager;

7.1.7.2. notify such persons of the application and provide the Regional Manager with proof of such notification. Of importance is that such notice is expected to observe all protocols, values, and traditions applicable to the area in question;

7.1.7.3. consult with such identified parties, including communities and landowners, which consultations must –

7.1.7.3.1. observe any guidelines published by the DLRRD, where consultations are being conducted with communities;

7.1.7.3.2. inform such persons, in sufficient detail, of the proposed activities to allow them to understand whether such proposed activities will have an impact on their land and their use thereof;

7.1.7.3.3. be conducted with a view to –

7.1.7.3.3.1. reaching agreement to the satisfaction of both parties; and

7.1.7.3.3.2. ascertaining whether the land in question is subject to a land claim, alternatively, whether the community owns the land; and

7.1.7.3.4. be minuted to include, among others, the outcome of the meeting, and where applicable, a stamped tribal resolution in line with the guidelines provided by the DLRRD and a signed attendance register (with telephone numbers) of the attendees. Where possible, video (DVD) recordings can be used and submitted as further proof of consultation.

7.1.8. Regarding the legal nature of the DMPR Consultation Guidelines, the High Court of South Africa has ruled that the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018, constitutes policy as opposed to a binding legal instrument[43]. Given the similarities between the Mining Charter and the DMPR Consultation Guidelines, the DMPR Consultation Guidelines would also constitute policy. Although, as policy, the DMPR Consultation Guidelines are not binding, they need to be read together with the MPRDA Regulations which are binding. Policy has the added benefit of being a living document which can be updated by the regulator as and when needed, therefore providing flexibility.

7.2. DFFE Public Participation Guidelines

7.2.1. NEMA expressly requires that the person conducting the legally-mandated public participation process must take into account any relevant guidelines applicable to public participation which have been published by the DFFE.[44] The DFFE Public Participation Guidelines were developed to assist project proponents or applicants for environmental authorisation; registered IAPs; environmental assessment practitioners; and competent authorities to understand what is required of them and how to comprehensively undertake a public participation process. Given that the MPRDA requires public participation to be conducted in terms of the EIA Regulations, these guidelines apply to MPRDA applicants.

7.2.2. The DFFE Public Participation Guidelines provide, among others, that:

7.2.2.1. at a minimum, the public participation process undertaken must allow for the following:

7.2.2.1.1. provide an opportunity for all role players (including potential and registered IAPs, environmental assessment practitioners, State departments, organs of state, and the competent authority) to obtain clear, accurate, and understandable information about the environmental impacts of the proposed activity or implications of a decision;

7.2.2.1.2. provide for role players to voice their support, concerns, and questions regarding the project, application, or decision;

7.2.2.1.3. provide the opportunity for role players to suggest ways for reducing or mitigating any negative impacts of the project and for enhancing its positive impacts;

43. Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others ZAGPPHC 623 (21 September 2021).

44. Sections 24J and 24O of NEMA.

7.2.2.1.4. enable the person conducting public participation to incorporate the needs, preferences, and values of potential or registered IAPs into its proposed development that becomes the subject of an application for an environmental authorisation;

7.2.2.1.5. provide opportunities for clearing up misunderstandings about technical issues, resolving disputes, and reconciling conflicting interests;

7.2.2.1.6. encourage transparency and accountability in decision-making;

7.2.2.1.7. contribute toward maintaining a healthy, vibrant democracy; and

7.2.2.1.8. give effect to the requirement for procedural fairness of administrative action as contained in PAJA;

7.2.2.2. public participation must be undertaken at each stage of, and continuously throughout, the project lifecycle:

7.2.2.3. project notifications inform the right of all potential and registered IAPs to be informed early, and in an informative and proactive way, regarding proposals that may affect their lives or livelihoods. Early communication can aim to build trust among participants, allow more time for public participation, improve community analysis, and increase opportunities to modify the proposal with regard to the comments and information gathered during the public participation process;

7.2.2.4. the minimum requirements for public participation outlined in the EIA Regulations will not necessarily be sufficient for all applications. This is because the circumstances of each application are different, and it may be necessary in some situations to incorporate extra steps in the public participation process. The level of public participation must be at a minimum be informed by:

7.2.2.4.1. the scale of anticipated impacts of the proposed project;

7.2.2.4.2. the sensitivity of the affected environment and the degree of controversy of the project; and

7.2.2.4.3. the characteristics of the potentially affected parties;[45]

7.2.2.5. the type of method used for notifications must be an effective method of communication;[46]

7.2.2.6. since the circumstances of each project proposal are different, the nature and state of potential and registered IAPs or public sensitivity around the project should determine which public participation mechanisms are most appropriate to use.

45. The DFFE Public Participation Guidelines provides additional guidance on each of these considerations.

46. i.e. notice boards must be of appropriate size, and must be placed in areas that are considered to be visible; and advertisements must be placed in newspapers that will easily reach the intended audiences, considering jurisdictions and boundaries within which the proposal or application falls and/or will have an impact or interest.

For example:

7.2.2.6.1. where potential and registered IAPs include historically disadvantaged communities, or people with special needs (e.g. a lack of skills to read or write), public meetings should be considered; and

7.2.2.6.2. since the legislation does not stipulate what language must be used when placing an advertisement, the person conducting public participation must exercise insight and discretion and ensure that the language used allows for the facilitation of an inclusive public participation process. The language used by the IAPs must be taken into account when serving a notice and when selecting a newspaper; and where environmental reporting is done in one of the three regional languages, executive summaries in the other two languages should be made available, on request;

7.2.2.7. over and above the placement of general notices on site or in the media inviting IAPs to participate in the application process, certain stakeholders should be specifically approached (organs of state, the owner or person in control of the land, etc. are automatically regarded as IAPs). Additional means of identifying stakeholders should be used when appropriate;[47]

7.2.2.8. where registered IAPs include rural or historically disadvantaged communities or people with special needs (e.g. illiteracy, disability, or any other disadvantage), the following could, among others, be considered to facilitate their participation or overcome potential constraints:

7.2.2.8.1. announcing the public participation process on a local radio station in a local language, at an appropriate time (e.g. peak hours);

7.2.2.8.2. participatory rural appraisal and participatory learning and action approaches and techniques could be used to build the capacity of the IAPs to engage and participate more effectively;

7.2.2.8.3. specific approaches to existing community structures, committees, and leaders;

7.2.2.8.4. holding public meetings at times and venues suitable to the community;

7.2.2.8.5. holding separate meetings with vulnerable and marginalised groups;

7.2.2.8.6. appropriate access to information must be provided; and

7.2.2.8.7. the use of the following public participation mechanisms over and above these requirements should also be considered: public meetings and open days, conferences, press releases, questionnaires or opinion surveys, information desks and/or info lines (helpline), web-based platforms/social media, and meetings/workshops with constituencies (e.g. national standing committees, non-governmental organisations/ community based organisations); and

7.2.2.8.8. all organs of state which have jurisdiction in respect of the activity to which the application relates must comment on the reports within a period of 30 days (failing which they will be regarded as having no comment).[48]

7.3. DMPR Resettlement Guidelines

7.3.1. In March 2022, the DMPR published the DMPR Resettlement Guidelines which are intended "*to outline the process and requirements to be complied with by an applicant or a holder of a prospecting right, mining right or mining permit when such application or right will result in physical resettlement of landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities, from their land.*" They accordingly apply when the need for land arises and communities are required to be resettled, which could be during various stages of the life of the mine.

47. Such as social profiles or probes on the key characteristics of the people of a community or area, established lists and databases held by consultancies, authorities, or research institutions, and networks or chain referral systems to assist in identifying other stakeholders.

48. The competent authority or environmental assessment practitioner must consult with every organ of state that administers a law relating to a matter affecting the environment relevant to that application for an environmental authorisation when such competent authority considers the application and, unless agreement to the contrary has been reached, the environmental assessment practitioner will be responsible for such consultation.

7.3.2. The DMPR Resettlement Guidelines define "meaningful consultation" as consultation with landowners, lawful occupiers, IAPs, holders of informal and communal land rights, mine communities, and host communities (each as separately defined) by an applicant or a holder of a mining right, prospecting right, or mining permit with a view to provide an opportunity to comment, be heard, obtain clear, accurate, and understandable information about all impacts of the proposed mining activity or implications of a decision on resettlement, determine whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's rights to use the property is concerned, provide opportunities for clearing up misunderstandings about technical issues, resolving disputes, and reconciling conflicting interests, encouraging transparency and accountability in decision-making, and giving effect to the requirement for procedural fairness of administrative action as contained in PAJA.

7.3.3. The DMPR Resettlement Guidelines state that (i) stakeholders, which include communities, landowners, and lawful occupiers, are required to be consulted; and (ii) a stakeholder mapping exercise is to be undertaken to identify and profile the stakeholders that must form part of this process. The DMPR Resettlement Guidelines provide that they are to be read and applied with the DMPR Consultation Guidelines where consultation is required.

7.3.4. The DMPR Resettlement Guidelines do, however, provide additional contextual guidance, and provide that:

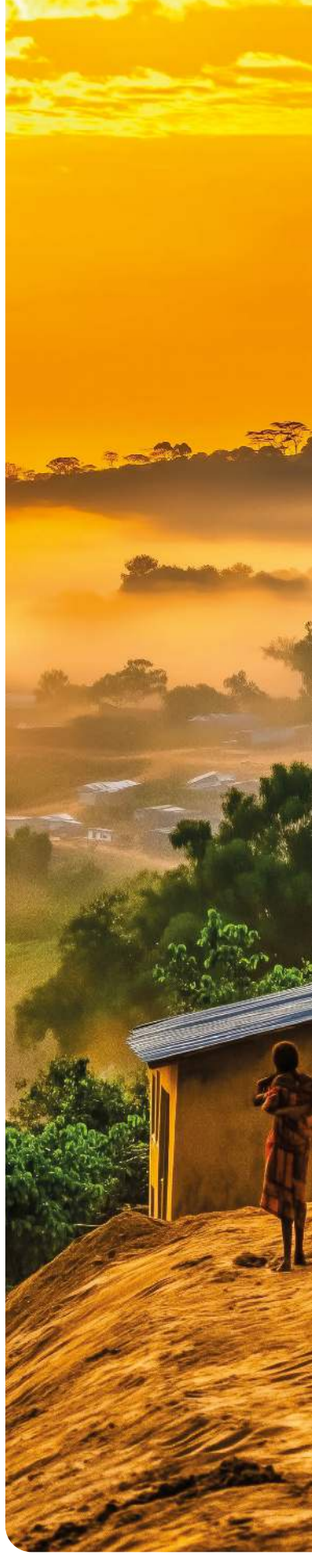
7.3.4.1. the methods of consultation with stakeholders may include regular meetings or workshops, surveys or roadshows, and announcements of the process on relevant media considering literacy levels and language requirements;

7.3.4.2. consultations in the context of planned relocation/resettlement must include compensation for loss of property and livelihood; financial and related support; residential housing or agricultural land; sustained development; and establishment of a monitoring and evaluation committee;

7.3.4.3. an applicant for or holder of a prospecting right, mining right, or mining permit shall develop a Resettlement Plan and Resettlement Action Plan, and conclude a Resettlement Agreement (each of which must be subject to meaningful consultation), whenever such application or the project will have the effect of physical resettlement of landowners, lawful occupiers, holders of informal and communal land rights, mine communities, and host communities.[49] The Resettlement Agreement must be lodged with the relevant DMPR Regional Manager; and the party undertaking the resettlement must provide progress reports to the DMPR on implementation of the Resettlement Action Plan; and

7.3.4.4. where a dispute arises, parties should first attempt to resolve these by engagements and agreement through an appropriate local mechanism, such as a traditional leader or local structure, and if unsuccessful, through a DMPR Regional Manager-led negotiation process as contemplated in section 54(3) of the MPRDA. Should this fail, a party may refer the matter to arbitration or conciliation and if unsuccessful, approach a Court within a reasonable timeframe.

7.3.5. The DMPR Resettlement Guidelines (like the DMPR Consultation Guidelines) are considered to be policy and should again be viewed as a supplement to the MPRDA and the MPRDA Regulations. They further recognise the different policies and legal frameworks currently in place that govern the resettlement of communities, including but not limited to the Constitution, the MPRDA, and NEMA, and should be considered within this context.



49. The Resettlement Plan details the broader project and the intended resettlement, the Resettlement Action Plan contains the steps that will be undertaken as part of the resettlement, and the Resettlement Agreement contains the terms of the resettlement as agreed by the parties thereto, including in respect of the appropriate amount of compensation as a result of resettlement.

8. International Instruments Governing Consultation and Consent

8.1. International instruments governing consultation and consent are also relevant to the interpretation of the South African legal regime.

8.2. Consent and FPIC

8.2.1. In the context of development projects, the term 'consent' is often said to be synonymous with FPIC. FPIC is a concept recognised under international human rights law which recognises and gives expression to indigenous peoples and their right to self-determination and the rights to own, develop, control, and use their communal lands, territories, and resources.

8.2.2. FPIC envisages that indigenous peoples must be informed about projects that may affect their land, resources, and other rights in a timely manner, free of coercion and manipulation, and be given the opportunity to approve or reject a project prior to the commencement of all activities.

8.2.3. There is debate internationally as to whether FPIC amounts to an elevated form of consultation, in an attempt to reach consensus, or includes a right to veto (i.e. the right to 'say no' to mining projects). This notwithstanding, it is widely accepted that FPIC comprises the following elements: (i) free (i.e. given voluntarily and absent of coercion, intimidation, or manipulation); (ii) prior (i.e. sought sufficiently in advance of any authorisation or commencement of activities); (iii) informed (i.e. information should be accessible, clear, consistent, accurate, constant, and transparent and delivered in appropriate language and culturally appropriate format); and (iv) consent (i.e. the collective decision made by the rights holders and reached through the customary decision-making processes of the communities).

8.2.4. The issue of FPIC is linked to the broader debate around ensuring a fair distribution of the costs, benefits, risks, and responsibilities associated with mining activities, as well as the ethical principle that those who could be exposed to harm or risk of harm should be properly informed about these risks and have an opportunity to express a willingness to accept such risks or not.[50] It builds upon customary practices of paying respect and asking permission for entering, or having an impact on their territory. FPIC is also regarded by indigenous peoples as a principle of negotiating in good faith on the basis of mutual respect and equality. Meaningful negotiations require consultations free from intimidation, coercion, bribery, or undue influence, and an acceptance of the outcome of those negotiations. For indigenous peoples, FPIC typically entails an internal process of consensus building among their people.

8.2.5. In the African context, recognising the unique histories of colonialism and post-colonialism across the continent, the applicability of this international law right of indigenous communities to many local, affected communities in Africa remains contested.[51] While the African Commission on Human and Peoples' Rights and the Indigenous Peoples of Africa Co-ordinating Committee have helped achieve recognition for indigenous peoples in Africa, FPIC has not gained much traction on the continent.

8.2.6. According to international best practice, FPIC (i.e. consulting with indigenous peoples with the objective of reaching agreement or consensus on proposed measures, and working to obtain the consent of significantly and adversely impacted indigenous communities regarding the basis on which the project will go ahead) applies only in limited instances, namely (i) if there will be impacts on lands and natural resources subject to traditional ownership or under customary use; (ii) if there will be relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use; and (iii) if there will be significant impacts on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of indigenous peoples' lives.

8.2.7. In addition, in certain countries, the State retains the ownership or is the custodian of mineral rights and therefore has the right to make decisions on the development of resources according to applicable national laws, including those laws implementing host country obligations under international law. Where States retain ownership or custodianship of sub-surface resources, national law requires governments to consult indigenous peoples before exploration or exploitation takes place and to ascertain whether and how their interests would be adversely affected, and requires indigenous peoples to participate in the benefits of such activities wherever possible, and receive fair compensation for any damages they may sustain as a result. Where consent is not forthcoming, these instruments provide that relocation shall take place only following appropriate procedures established by national laws and regulations.

8.3. Overview of key international instruments

8.3.1. South Africa ratified the ICCPR on 10 December 1998, and the ICESCR on 12 January 2015, making South Africa legally bound to implement the provisions of the conventions and adhere to their obligations under international law. The ICCPR affirms that all peoples have the right to self-determination and to the free pursuit of their economic, social, and cultural development.[52] The ICESCR similarly enshrines the right to self-determination. South Africa also ratified the African Charter on 9 July 1996, which enshrines the rights to self-determination,[53] the right to development,[54] and the right to information.[55] None of these instruments expressly provide for FPIC. However, the African Commission on Human and People's Rights and the African Court on Human and People's Rights held in *Centre for Minority Rights Development v Kenya*[56] (also known as the *Endorois* case) and *African Commission on Human and People's Rights v Republic of Kenya*,[57] respectively, that multiple rights in the African Charter require that no decisions be made about indigenous peoples' land without their FPIC.

International instruments governing consultation and consent are also relevant to the interpretation of the South African legal regime.

50. ICMM, '*Guidance: Indigenous Peoples and Mining*', 2015.

51. Oxfam, Legal Resources Centre 'Free, prior and informed consent in the extractives industries in Southern Africa – An analysis of legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia, 21.

52. ICCPR, Article 1.

53. Article 20 of the African Charter.

54. Article 22(1) of the African Charter.

55. Article 9 of the African Charter.

56. Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya ACHPR Communication 276/2003.

57. African Commission on Human and People's Rights v Republic of Kenya Application No. 006/2012.

8.3.2. FPIC is expressly provided for in the ILO Convention 169 and the UNDRIP, in specified circumstances. South Africa is yet to ratify the ILO Convention 169, but it supported the adoption of the UNDRIP. These instruments recognise the rights of indigenous and tribal peoples, in the following contexts:

8.3.2.1. No relocation shall take place without the FPIC of the peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations.

8.3.2.2. Where the State retains the ownership of mineral or sub-surface resources, or rights to other resources pertaining to lands, then governments must establish or maintain consultation procedures to ascertain whether and to what degree the interests of indigenous and tribal peoples to the natural resources in their land would be prejudiced (and how they can participate in the benefits of or be compensated for damages resulting from projects), before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.

8.3.2.3. States must therefore consult and co-operate in good faith with the indigenous peoples concerned, to obtain their FPIC prior to the approval of any project affecting their lands or territories and other resources; and provide effective mechanisms for impact mitigation and for just and fair redress for any such activities.

8.3.3. Finally, the CBD, which South Africa ratified on 2 November 1995, protects indigenous knowledge by allowing its use only with prior approval. It also explicitly affirms FPIC in the context of biodiversity conservation, in providing that States must, subject to their national legislation, respect, preserve, and maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity; promote their wider application with the approval and involvement of the holders of such knowledge, innovations, and practices; and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations, and practices. Implementation guidelines in respect of this provision state that access to traditional knowledge, innovations, and practices of indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations, and practices.

Displaced residents pointing at Tharisa Mine. **Screenshot from *North West Video*, produced by Corruption Watch.**

9. International Best Practice Standards Which South Africa Can Consider

9.1. Outside of the international law instruments discussed above, there exists a number of voluntary best practice frameworks and standards which have been developed by the United Nations and other international industry bodies to guide the conduct of business enterprises operating in the extractives sector. Each of these frameworks considers the critical role of local and indigenous communities as stakeholders and rights holders in mining development, and the need for effective and meaningful engagement with them. Below, we set out a brief discussion of these frameworks and their constructions of consultation, consent, and FPIC.

9.2. The best practice frameworks and standards differentiate between indigenous and non-indigenous communities, recognising that FPIC is limited to contexts where the rights of indigenous peoples may be impacted; whereas non-indigenous project-affected persons/communities have the right to consultation and negotiation in decision-making processes that affect them. This notwithstanding, the below standards and frameworks can be used to inform best practice in meaningful engagement and attempting to reach consensus with and among mining-affected communities.

9.3. UNGPs

9.3.1. In 2011, the United Nations Human Rights Council unanimously endorsed the UNGPs, which are the world's most authoritative, normative framework guiding responsible business conduct and addressing human rights abuses in business operations and global supply chains. FPIC is a human rights issue, as a manifestation of indigenous peoples' rights to self-determination and self-governance, and as earlier mentioned, a critical human rights risk for the extractives industry is how it engages with and impacts local communities more broadly and indigenous peoples specifically. Therefore, the UNGPs should be considered.

9.3.2. In short, States have duties to respect, protect, and fulfil the human rights of individuals within their territory and/or jurisdiction, and in doing so should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations, and adjudication; and have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application,

The standards and frameworks can be used to inform best practice in meaningful engagement and attempting to reach consensus with and among mining-affected communities.

and by providing for adequate accountability, legal certainty, and procedural and legal transparency. Corporates/business enterprises, on the other hand, have an independent duty to respect human rights, by avoiding infringing on the human rights of others and addressing adverse human rights impacts with which they are involved, with reference to internationally recognised human rights. A key pillar underpinning the duties of both States and corporates is the requirement to take appropriate steps to ensure access to effective remedy when human rights abuses occur (for the State, through judicial, administrative, legislative, or other appropriate means; and for corporates, through effective operational-level grievance mechanisms). Practically, these duties are met through corporates establishing human rights policy commitments and conducting effective human rights due diligence, and by States enacting appropriate laws and policies.[58]

9.4. ICMM

9.4.1. The ICMM notes that successful mining projects require the support of a range of IAPs – this includes both the formal legal and regulatory approvals granted by governments and the broad support of mining-affected communities.

9.4.2. In 2018, the ICMM became the first industry body to commit to upholding the UNGPs. The ICMM has since published a Sustainable Development Framework and its Mining Principles, which define the good practice environmental, social, and governance requirements of company members through a comprehensive set of 39 Performance Expectations and nine related position statements on a number of critical industry challenges.[59] Key principles and performance expectations should be applied to the meaningful consultation process engaged on with mining-affected communities, such as:

9.4.2.1. avoiding the involuntary physical or economic displacement of families and communities; and where this is not possible, applying the mitigation hierarchy and implementing actions or remedies that address residual adverse effects to restore or improve livelihoods and standards of living of displaced people;

9.4.2.2. working to obtain the FPIC of indigenous peoples where significant adverse impacts are likely to occur as a result of relocation or disturbance of lands and territories or critical cultural heritage, and capturing the outcomes of engagement and consent processes in agreements;

9.4.2.3. implementing inclusive approaches with local communities to identify their development priorities and support activities that contribute to their lasting social and economic wellbeing, in partnership with government, civil society, and development agencies, as appropriate;

9.4.2.4. conducting stakeholder engagement based on an analysis of the local context and providing local stakeholders with access to appropriate and effective mechanisms for seeking resolution of grievances related to the company and its activities; and

9.4.2.5. committing to proactively engage key stakeholders on sustainable development challenges and opportunities in an open and transparent manner, including effectively reporting and independently verifying progress and performance.

9.4.3. In addition to the Mining Principles, the Indigenous Peoples and Mining: Position Statement published by the ICMM in 2013 sets out ICMM members' approach to engaging with indigenous peoples and to FPIC. It articulates a vision of "*constructive relationships between the mining and metals industry and indigenous peoples which are based on respect, meaningful engagement and mutual benefit, and which have particular regard for the specific and historical situation of indigenous peoples*". In the ICMM's view, FPIC comprises a process and an outcome. Through this process, indigenous peoples are:

9.4.3.1. able to freely make decisions without coercion, intimidation, or manipulation;

9.4.3.2. given sufficient time to be involved in project decision-making before key decisions are made and impacts occur; and

9.4.3.3. fully informed about the project and its potential impacts and benefits.

9.4.4. The outcome is that indigenous peoples can give or withhold their consent to a project, through a process that strives to be consistent with their traditional decision-making processes while respecting internationally recognised human rights, and is based on good faith negotiation.

9.4.5. However, the ICMM position provides that:

9.4.5.1. It is States who have the ultimate right to make final decisions on the development of resources according to applicable national laws. While some countries have made an explicit consent provision under national or sub-national laws, in most countries 'neither indigenous peoples nor any other population group have the right to veto development projects that affect them', so FPIC should be regarded as a 'principle to be respected to the greatest degree possible in development planning and implementation'.[60]

9.4.5.2. Consent processes should focus on reaching agreement on the basis for which a project (or changes to existing projects) should proceed. These processes should neither confer veto rights to individuals or sub-groups nor require unanimous support from potentially impacted indigenous peoples (unless legally mandated). Consent processes should not require companies to agree to aspects not under their control. Where consent is not forthcoming despite the best efforts of all parties, in balancing the rights and interests of indigenous peoples with the wider population, government might determine that a project should proceed and specify the conditions that should apply. In such circumstances, the company will determine whether they ought to remain involved with a project.

9.4.6. The ICMM has also published the Indigenous Peoples and Mining: Good Practice Guide, 2015, to support the building of strong and mutually beneficial relationships with indigenous peoples. This Guide provides, among others, that:

9.4.6.1. Awareness of the unique characteristics of indigenous peoples, and an understanding of how they may affect the way companies engage with indigenous peoples, is important to ensuring mutually beneficial engagement and outcomes.

9.4.6.2. The term "engagement" covers a broad set of activities, ranging from the simple provision of information through to active dialogue and partnering. It is a core activity that needs to take place in a sustained manner across the project life cycle – from initial contact prior to exploration through to closure.

9.4.6.3. Governments have a critical role to play in the process of engaging with indigenous peoples, particularly since it is governments, not companies, who are party to instruments such as the UNDRIP and ILO Convention 169. Their role can include determining which communities are considered to be indigenous, shaping the processes to be followed for achieving FPIC, and negotiating agreements and/or obtaining community input into decision-making processes relating to resource projects. However, indigenous peoples and their rights exist irrespective of recognition by the State, which is not always forthcoming. One factor that defines people as being indigenous is their self-identification as such.

9.4.6.4. Negotiated agreements between companies and indigenous groups provide a means through which a community's consent for a project, and the terms and conditions of projects negotiated through the process of FPIC, can be formalised and documented.

58. Various EU member states have, for example, passed dedicated human rights-focused legislation in the recent past, such as the EU Corporate Sustainability Due Diligence Directive which makes environmental and human rights due diligence mandatory for in-scope companies. Other examples include the EU Deforestation Directive, the EU Forced Labour Ban, Modern Slavery Acts in Australia, the UK, and Canada, the French Duty of Vigilance Law, and the German Supply Chain Due Diligence Act.

59. In particular, Mining Principle 3 addresses human rights, and requires ICMM members to commit to respect human rights and the interests, cultures, customs, and values of workers and communities affected by their activities; Mining Principle 9 addresses social performance and requires ICMM members to commit to pursue continual improvement in social performance and contribute to the social, economic, and institutional development of host countries and communities; and Mining Principle 10 addresses stakeholder engagement and requires ICMM members to commit to proactively engage key stakeholders on sustainable development challenges and opportunities in an open and transparent manner, and effectively report and independently verify progress and performance.

60. As expressed in the Department of Economic and Social Affairs of the United Nations (UN) Secretariat, Resource kit on indigenous peoples' issues, 2008.

9.5. MINCOSA

9.5.1. Closer to home, MINCOSA's Human Rights Framework draws from the principles of international human rights standards (in particular, the UNGPs and ICMM Mining Principles), but prioritises industry issues which are specific to the South African mining context. The issues are informed by potential impacts in these areas, and the need to strengthen compliance mechanisms and provide equitable redress where impacts are unavoidable. The Framework is not intended to replace compliance with existing laws or limit any legal obligation. Rather, it encourages compliance with existing laws, taking adequate measures for prevention, mitigation, and provision of mediation where impacts are not avoidable.

9.5.2. MINOCSA's contextual view on FPIC is that it is a specific right that pertains to indigenous peoples and is recognised in the UNDRIP.[61] In discussing the characterisation of "indigenous peoples", however, MINCOSA refers to international discourse and does not appear to recognise or identify indigenous peoples in the South African context, as we have discussed earlier in this Guideline. MINCOSA nevertheless recognises the importance in distinguishing indigenous peoples from project-affected communities more broadly, because "it has become common among various NGO groupings and others (including the SAHRC) to demand recognition of the FPIC principle for a much broader range of people. Yet, it is important to adopt a position that is compatible with international norms."

9.5.3. MINCOSA's view is that FPIC should not apply to the South African mining industry and mining communities, given that: (i) the country's mineral wealth is administered by the State on behalf of the entire society and the exploitation of minerals is intended to benefit the entire society, and it therefore cannot be argued that any mining community should have the right to veto the exploitation of an orebody; and (ii) mining communities clearly cannot be described as indigenous peoples since they are almost invariably integrated parts of South African society (notwithstanding the issues of inequality, poverty, etc). That said, it is also the case that communities in areas that will be affected by mining are entitled to expect that their material well-being should not be negatively affected by the advent of mining. And the mining industry should, both because it is the right thing to do and to protect its reputation, be willing to advocate such a position.

9.6. IRMA's Standard for Responsible Mining, 2018

9.6.1. This framework provides that both States and corporations should respect the rights of indigenous peoples in relation to industrial-scale mining developments:[62]

9.6.1.1. Corporations may demonstrate such respect by obtaining the FPIC of indigenous peoples and providing culturally appropriate alternatives and adequate compensation and benefits for projects that affect indigenous peoples' rights.

9.6.1.2. The State always holds the primary duty to protect indigenous peoples' rights. Where a host government has established an existing legislative framework that requires or enables agreements between mining companies and indigenous communities, it may not be necessary for companies to run a parallel FPIC process. It would, however, be necessary for companies to demonstrate that the process whereby the agreement was reached conformed with or exceeded IRMA FPIC requirements.

9.6.2. FPIC, in the context of this standard, requires that engagement with indigenous peoples be free from external manipulation, coercion, and intimidation; that potentially affected indigenous peoples be notified that their consent will be sought, and that notification will occur sufficiently in advance of commencement of any mining-related activities; that there be full disclosure of information regarding all aspects of the proposed mining project in a manner that is accessible and understandable to the indigenous peoples; and that indigenous peoples can fully approve, partially or conditionally approve, or reject a project or activity.

9.6.3. Conversely, the participatory process with non-indigenous communities must result in the mining company obtaining "broad community support", which should be determined through local democratic processes or governance mechanisms, or by another process or method agreed to by the company and an affected community (e.g. a referendum). The company must consult with stakeholders to design engagement processes that are accessible, inclusive, and culturally appropriate, and must demonstrate that continuous efforts are taken to understand and remove barriers to engagement for affected stakeholders (especially women, and marginalised and vulnerable groups).[63]

9.7. Other frameworks and standards

9.7.1. The OECD Guidelines were published as recommendations addressed by governments to multinational enterprises to enhance the business contribution to sustainable development and address adverse impacts associated with business activities on people, planet, and society.[64]

9.7.2. In its commentary on human rights, the OECD Guidelines note that enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights, and in practice, some human rights may be at greater risk of adverse impacts than others in particular industries or contexts, and therefore will be the focus of heightened attention. Depending on circumstances, enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. Enterprises should pay special attention to any particular adverse impacts on individuals who may be at heightened risk due to marginalisation, vulnerability, or other circumstances, individually or as members of certain groups or populations, including indigenous peoples.

9.7.3. The OECD Guidelines are supported by a number of guidance documents, such as (for present purposes) the OECD Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector, which provides a practical framework for identifying and managing risks with regard to stakeholder engagement activities to ensure companies play a role in avoiding and addressing adverse impacts as defined in the OECD Guidelines. This guidance differentiates between, among others, different modes of engagement, namely information-sharing,[65] consultation/learning,[66] negotiation,[67] and consent processes.[68]

9.7.4. Insofar as consent and FPIC is concerned, this guidance:

9.7.4.1. advises to agree with affected indigenous peoples on a consultation process for working towards seeking indigenous peoples' FPIC. This should identify the specific current and future activities where consent should be sought. In some cases, it might be appropriate to commit to this process through a formal or legal agreement – it has been suggested that FPIC can be understood as a heightened and more formalised form of community engagement. As a result, in certain cases, companies may be motivated to enter into a more formal consultation process when developing an extractive process on or near indigenous territory that may have significant adverse impacts. The process should always be based on good faith negotiation free of coercion, intimidation, or manipulation;

9.7.4.2. advises to consult on, and agree on, what constitutes appropriate consent for affected indigenous peoples in accordance with their governance institutions and customary laws and practices, for example, whether this is a majority vote from the community or approval of the council of elders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions; and

9.7.4.3. recognises the process of seeking FPIC as iterative rather than a one-off discussion, where continuous dialogue with the local community will lead to a trust relationship and a balanced agreement that will benefit the enterprise across all phases of the project.

61. It allows them to give or withhold consent to a project that may affect them or their territories. It also enables them to negotiate the conditions under which the project will be designed, implemented, monitored, and evaluated.

62. Namely, the right to self-determination, by virtue of which indigenous peoples freely determine their political status and pursue their economic, social and cultural development; rights to property, culture, religion, and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; rights to set and pursue their own priorities for development; and the right to make authoritative decisions about external projects or investments.

63. Stakeholder engagement should further begin prior to or during mine planning, and be ongoing, throughout the life of the mine. The company must foster two-way dialogue and meaningful engagement with stakeholders by: providing relevant information to stakeholders in a timely manner; including participation by site management and subject-matter experts when addressing concerns of significance to stakeholders; engaging in a manner that is respectful and free from manipulation, interference, coercion, or intimidation; soliciting feedback from stakeholders on issues relevant to them; and providing stakeholders with feedback on how the company has taken their input into account.

64. The OECD Guidelines apply to multinational enterprises operating in or from OECD and adhering countries, across all sectors of the economy. South Africa is not a member/adhering country of the OECD, but is rather a "key partner" who participates in the OECD's daily work and policy discussions, bringing useful perspectives and increasing the relevance of policy debates.

65. Appropriate if there is a need to provide information to stakeholders about a project or activity and its expected impacts (positive and negative) and is relevant in all stages of a project.

66. Appropriate when needing to gather information in order to build an understanding of the project context and understand the concerns and expectations of stakeholders and is relevant in all stages of a project.

67. Appropriate when the objective is to obtain the agreement of stakeholders on the terms and conditions under which a project will proceed, including management of impacts and provision of benefits and is most relevant prior to feasibility studies and project development, prior to operations commencing or prior to major expansions.

68. Appropriate when the objective is to obtain consent of impacted communities on whether a project may proceed or regarding mitigation of specific aspects of the project or impacts on specific rights. Government regulatory and licensing processes represent a structured form of consent generally administered by higher levels of government. In addition to regulatory approval, consent of impacted communities may be a legal or operational requirement or an expectation in some operating contexts, particularly in the context of engagement with indigenous peoples. Consent processes are potentially relevant prior to feasibility studies, project exploration and project development, or prior to major expansions. Formal consent processes could include majority vote from the community, approval by a traditional decision-making body such as a council of elders, organised regional referendum or other forms determined by regulation or other mechanism defining the requirement for consent, or by agreement between the enterprise and the stakeholders themselves.

9.7.5. The IFC Performance Standards, which apply to IFC clients whose projects go through IFC's initial credit review process, differentiate between informed consultation and participation by project-affected communities on the one hand, and FPIC by indigenous peoples on the other:

9.7.5.1. When project-affected communities are subject to identified risks and adverse impacts from a project, an IFC client must undertake a process of consultation in a manner that provides the project-affected communities with opportunities to express their views on project risks, impacts, and mitigation measures, and allows the client to consider and respond to them. The extent and degree of engagement required by the consultation process should be commensurate with the project's risks and adverse impacts and with the concerns raised by the project-affected communities. Effective consultation is a two-way process.[69] The client must also tailor its consultation process to the language preferences of the project-affected communities, their decision-making process, and the needs of disadvantaged or vulnerable groups. If clients have already engaged in such a process, they must provide adequate documented evidence of such engagement.

9.7.5.2. For projects with potentially significant adverse impacts on project-affected communities, IFC clients must conduct an Informed Consultation and Participation ("ICP") process that will build upon the consultation steps outlined above and will result in the project-affected communities' informed participation. ICP involves a more in-depth exchange of views and information, and an organised and iterative consultation, leading to the client's incorporating into their decision-making process the views of the project-affected communities on matters that affect them directly, such as the proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues. The consultation process should (i) capture both men's and women's views, if necessary through separate forums or engagements, and (ii) reflect men's and women's different concerns and priorities about impacts, mitigation mechanisms, and benefits, where appropriate. The IFC client must document the process, in particular the measures taken to avoid or minimise risks to and adverse impacts on the project-affected communities, and will inform those affected about how their concerns have been considered.

9.7.5.3. For projects with adverse impacts to indigenous peoples, IFC clients are required to engage them in a process of ICP and, in certain circumstances, the client is required to obtain their FPIC. The requirements related to indigenous peoples and the definition of the special circumstances requiring FPIC are described in Performance Standard 7, which is dedicated to the recognition of indigenous peoples as a marginalised and vulnerable segment of the population. Performance Standard 7 provides that FPIC builds on and expands the process of ICP and will be established through good faith negotiation between the IFC client and the project-affected communities of indigenous peoples. The IFC client must document: (i) the mutually accepted process between the client and project-affected communities of indigenous peoples; and (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree. In addition, circumstances requiring FPIC are limited to: (i) impacts on lands and natural resources subject to traditional ownership or under customary use; (ii) relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use; (iii) significant impacts on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of indigenous peoples' lives; and (iv) use of cultural heritage, including knowledge, innovations, or practices of indigenous peoples for commercial purposes.

9.7.5.4. The Guidance Notes to the IFC Performance Standards advise that meaningful participation of indigenous peoples in decision-making should focus on achieving agreement while not conferring veto rights to individuals or sub-groups, or requiring the IFC client to agree to aspects not under their control. The FPIC process builds upon the requirements for ICP (which include requirements for free, prior, and informed consultation and participation) and additionally requires Good Faith Negotiation ("GFN") between the client and project-affected communities of indigenous peoples. GFN involves on the part of all parties: (i) willingness to engage in a process and availability to meet at reasonable times and frequency; (ii) provision of information necessary for informed negotiation; (iii) exploration of key issues of importance; (iv) use of mutually acceptable procedures for negotiation; (v) willingness to change initial position and modify offers where possible; and (vi) provision of sufficient time for decision-making. The outcome, where the GFN process is successful, is an agreement and evidence thereof.

69. This two-way process should: (i) begin early in the process of identification of environmental and social risks and impacts and continue on an ongoing basis as risks and impacts arise; (ii) be based on the prior disclosure and dissemination of relevant, transparent, objective, meaningful, and easily accessible information which is in a culturally appropriate local language(s) and format and is understandable to project-affected communities; (iii) focus inclusive engagement on those directly affected as opposed to those not directly affected; (iv) be free of external manipulation, interference, coercion, or intimidation; (v) enable meaningful participation, where applicable; and (vi) be documented.

9.7.6. The Equator Principles, which are based on the IFC Performance Standards, serve as a common baseline and risk management framework for financial institutions to identify, assess, and manage environmental and social risks when financing projects. The Equator Principles recognise that indigenous peoples may represent vulnerable segments of project-affected communities, and that all projects affecting indigenous peoples must be subject to a process of ICP and will need to comply with the rights and protections for indigenous peoples contained in relevant national law, including those laws implementing host country obligations under international law. The Equator Principles refer back to IFC Performance Standard 7 in detailing the special circumstances that require the FPIC of affected indigenous peoples, and provide that for projects that meet these special circumstances, a qualified independent consultant will be required to evaluate the consultation process with indigenous peoples, and the outcomes of that process, against the requirements of host country laws and IFC Performance Standard 7.

9.7.7. The World Bank's Environmental and Social Framework, 2019, similarly requires a borrower to obtain the FPIC of the affected indigenous peoples when the circumstances described in its ESS7 are present. ESS7 applies to affected "Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities".[70] FPIC of the affected Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities must be obtained in the same circumstances outlined in IFC Performance Standard 7.

9.7.8. The World Bank's standard provides, among others, that the scope and scale of consultation, as well as subsequent project planning and documentation processes, will be proportionate to the scope and scale of potential project risks and impacts as they may affect Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities. For its purposes, consent refers to the collective support of affected indigenous peoples' communities for the project activities that affect them, reached through a culturally appropriate process. It may exist even if some individuals or groups object to such project activities. When the World Bank is unable to ascertain that such consent is obtained from the affected indigenous peoples, the World Bank will not proceed further with the aspects of the project that are relevant to those indigenous peoples for which FPIC cannot be ascertained. In such cases, the World Bank will require the borrower to ensure that the project will not cause adverse impacts on such indigenous peoples.

70.This term is used in a generic sense to refer exclusively to a distinct social and cultural group possessing the following characteristics in varying degrees: (a) self-identification as members of a distinct indigenous social and cultural group and recognition of this identity by others; (b) collective attachment to geographically distinct habitats, ancestral territories, or areas of seasonal use or occupation, as well as to the natural resources in these areas; (c) customary cultural, economic, social, or political institutions that are distinct or separate from those of the mainstream society or culture; and (d) a distinct language or dialect, often different from the official language or languages of the country or region in which they reside. This ESS also applies to communities or groups of Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities who, during the lifetime of members of the community or group, have lost collective attachment to distinct habitats or ancestral territories in the project area, because of forced severance, conflict, government resettlement programs, dispossession of their land, natural disasters, or incorporation of such territories into an urban area; and to forest dwellers, hunter-gatherers, pastoralists, or other nomadic groups, subject to satisfaction of the criteria above.

10. The Difference Between Consultation and Consent – Legal Analysis in the South African Context

This requires more than the passive transfer of information (by informing people about what is inevitable), or simply meeting with mining-affected communities or indigenous peoples to discuss a proposed project in general terms to tick a box.

10.1. Consultation

10.1.1. As evidenced by the legislative review above, the term 'consultation' is understood to mean 'meaningful participation' or 'meaningful consultation', which must afford IAPs, including mining-affected communities and indigenous peoples, an opportunity to influence decision-making on projects that will affect their rights. This requires more than the passive transfer of information (by informing people about what is inevitable), or simply meeting with mining-affected communities or indigenous peoples to discuss a proposed project in general terms to tick a box.

10.1.2. South African legislation and policy have provided further guidance on consultation, particularly regarding the content, methods, and levels of engagement or participation, information sharing, transparency, and the acceptable standards of consultation. The courts have clarified that consultation is the only prescribed method by law for assessing the impact that [prospecting] activities may have on a landowner's land.[71] Understanding the disruptive nature of mining to a community or indigenous peoples and the potential benefits it may bring, such consultation must be to see whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's rights to use the property are concerned.[72] Consultation also equips landowners or lawful occupiers with the necessary information to make informed decisions.[73]

10.1.3. International best practice supports these views, in recognising that effective consultation must be a two-way process and can be conducted through varying levels of engagement.

10.2. Consent and FPIC

10.2.1. As explained above, section 2(1) of IPILRA provides that holders of informal rights in land may not be deprived of such rights without their consent.

71. *Meepo v Kotze and Others 2008* (1) SA 104 (NC).

72. *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC), paragraph 65.

73. *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC), paragraph 66.

However, it needs to be read together with the other provisions of IPILRA which cross-refer to mining-related legislation and which envisage that rights may be expropriated. This is explained in further detail below.

10.2.2. The term 'consent' in the development context is often said to be synonymous with FPIC. As set out above:

10.2.2.1. FPIC is a concept recognised under international human rights law which recognises and gives expression to indigenous peoples and their right to self-determination and the rights to own, develop, control, and use their communal lands, territories, and resources; and

10.2.2.2. the international laws read with international best practice frameworks provide that FPIC:

10.2.2.2.1. is a process of consulting with indigenous peoples with the objective of reaching agreement or consensus on proposed measures to address the impacts of the proposed mining project, and working to obtain the consent of significantly and adversely impacted indigenous communities regarding the basis on which the project will go ahead;

10.2.2.2.2. these processes should neither confer veto rights to individuals or sub-groups nor require unanimous support from potentially impacted indigenous peoples (unless legally mandated); and should not require companies to agree to aspects not under their control. Where the State retains the ownership or is the custodian of mineral rights, it has the right to make decisions on the development of resources according to applicable national laws. Where consensus is not forthcoming despite the best efforts of all parties, in balancing the rights and interests of indigenous peoples with the wider population, the State will determine whether the project should ultimately proceed and specify the conditions and/or additional legal requirements that should apply;

10.2.2.2.3. is applied in limited instances, namely (i) if there will be impacts on lands and natural resources subject to traditional ownership or under customary use; (ii) if there will be relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use; and (iii) if there will be significant impacts on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of indigenous peoples' lives.

10.3. Interaction between the applicable legislation in South Africa

10.3.1. In South Africa, the State is the custodian of the nation's mineral resources for the benefit of the population as a whole and one of the objects of the MPRDA is to promote equitable access to the nation's mineral resources to all the people of South Africa.

10.3.2. The MPRDA clearly requires meaningful consultation with mining-affected communities, who are recognised as IAPs, in accordance with the applicable legal framework before a prospecting right, mining right, or mining permit can be granted. The purpose of the consultation is to provide mining-affected communities with the necessary information about the project and its likely impacts so that the community can make informed representations and, where significant adverse impacts to their rights in and to the land are concerned, to see whether some accommodation is possible insofar as the interference with rights/interests in the land or the management of adverse impacts is concerned. This envisages a good faith, two-way engagement process, aimed at reaching consensus, where required. The consultation processes conducted, as well as their outcomes (where relevant), must be considered by the decision-maker when awarding a prospecting right, mining right, or mining permit.

10.3.3. In instances where a landowner or lawful occupier of the relevant land refuses to allow the holder of a right to enter the land or places unreasonable demands in return for such access, section 54 of the MPRDA provides for access to remedies, in setting out a process to be

followed for the landowner or lawful occupier and right holder to agree on the payment of compensation, to the extent that the landowner or lawful occupier has suffered or is likely to suffer loss or damage as a result of the prospecting or mining operations. If the parties fail to reach agreement, compensation must be determined by arbitration and ultimately, if the DPMR Regional Manager concludes that any further negotiation may detrimentally affect certain objects of the MPRDA[74], the Regional Manager may recommend to the DMPR Minister that such land be expropriated in terms of section 55 of the MPRDA.

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

10.3.5. Clearly, in terms of the MPRDA, the ultimate decision on whether prospecting or mining should proceed is in the hands of the State as the custodian of the nation's mineral resources, and is subject to clear legislative provisions governing access to remedy.

10.3.6. IPILRA was enacted to provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law. It was intended to be an interim measure pending the introduction of more comprehensive legislation. There have been some shifts in approach to legislation and proposed legislation relating to informal tenure, communal land and traditional leadership over the years, and this is still in a state of flux. At this stage, IPILRA is extended annually.

10.3.7. Both the MPRDA and IPILRA are post-apartheid and transformative pieces of legislation, and the South African courts have held that the laws should be read together. While IPILRA envisages that no person may be deprived of any informal right to land without his or her consent, it recognises that holders of informal rights may be deprived of their rights pursuant to the Expropriation Act or any other law which provides for the expropriation of land or rights in land. In addition, section 1(2)(b) of IPILRA deems holders of informal rights to be owners of land for the purposes of section 42 of the Minerals Act, 50 of 1991. The Minerals Act has since been repealed, but the scheme of section 42, which dealt with payment of compensation, has been etched out in section 54 of the MPRDA. In accordance with section 12(1) of the Interpretation Act, where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted. Therefore, holders of informal rights are deemed to be owners of land for the purposes of the MPRDA's section 54 process. It essentially elevates the informal right to the formal right of ownership for purposes of determining appropriate compensation and addressing disputes with the holder of the right under the MPRDA. Therefore, in instances where the consent of informal rights holders is not given, the process in section 54 of the MPRDA should apply.

10.3.8. If one were to interpret section 2 of IPILRA in a manner which affords the holders of informal rights in land the right to veto prospecting or mining operations entirely, or in a manner which would prevent prospecting rights, mining rights, or mining permits from being granted unless and until consent is obtained, this would have the effect of the custodianship of mineral resources in South Africa being taken out of the hands of the State, which could severely impede the objects of the MPRDA.

10.3.9. Although in *Maledu*[75] the Constitutional Court did not specifically analyse section 1(2)(b) of IPILRA, it acknowledges the process set out in section 54 of the MPRDA as applicable and appears to suggest that for section 54 to be triggered, it is sufficient to show that the community or person asserting their rights is a holder of informal rights, and that there has been a deprivation pursuant to the granting of a mineral right pursuant to the MPRDA. In *Maledu*, the Constitutional Court expressly stated that the issue of whether the mining right was invalid because the applicants did not consent to it being granted, 'must be left open for another day'.

74. Those in sections 2 (c), (d), (f), or (g) of the MPRDA.

75. *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41.

In the *Baleni*[76] judgment, the High Court found that the State may not grant mining rights before consent of informal land rights holders has been obtained, effectively holding that 'consent' for purposes of IPILRA includes a right to veto. The *Baleni* judgment is notably a High Court decision and if the same question is raised in a High Court in another jurisdiction, that court would need to consider *Baleni*, but could depart from it, if justified. We note that the court did not specifically take the provisions of section 1(2)(b) of IPILRA into account. As mentioned above, this section acknowledges the section 54 process and deems the holders of informal land rights landowners for purposes thereof. The alternative argument is therefore that while consent from informal land rights holders should be sought, if it is not obtained, then the informal rights holders are recognised as equal to or in the same position of landowners, and the remedy would be for the process in section 54 of the MPRDA to be followed, as it would for any farmer or other landowner. This is because IPILRA specifically cross-refers to section 54 of the MPRDA (applying the Interpretation Act). In relation to rights not being capable of being granted until such time as consent is obtained, we note that the section 54 process applies to the holders of prospecting rights, mining rights, and mining permits and if this is a remedy identified in IPILRA as being applicable in circumstances where consent is not obtained, then it suggests that rights may be capable of being granted prior to such consent being obtained.

10.3.10. Having considered the applicable legal frameworks in South Africa, the international instruments and best practice, and the difference between consultation and consent, the ultimate position on FPIC or 'consent' in the South African extractives industry should thus seek an outcome where mining companies use all reasonable measures and meaningful engagement to reach consensus or agreement with mining-affected communities recognised as having formal and informal land rights, and indigenous peoples in respect of a mining project's impacts on their rights and interests in and to the land and the terms on which the project should proceed. Such a process should strive to be consistent with their traditional decision-making processes and national laws and policies, while respecting internationally recognised human rights laws and standards. Where consensus is not possible, despite the best efforts of all parties, in balancing the rights and interests of indigenous peoples and communities recognised as having informal land rights with the wider population, the processes and remedies set out in the MPRDA which are applicable to all landowners will apply.

Damaged homes in Mmaditlhokwa and unsafe living conditions due to mining operations. **Screenshot from *North West Video*, produced by Corruption Watch.**

76. *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP).

11. Adequacy of the Current Legal Framework

The legal framework regulating consultation with mining-affected communities, although complex, is comprehensive and requires meaningful engagement of varying levels at various stages throughout the project lifecycle.

11.1. The legal framework regulating consultation with mining-affected communities, although complex, is comprehensive and requires meaningful engagement of varying levels at various stages throughout the project lifecycle. Though IPILRA generally and on its own does not prescribe what the requisite consultation and consent procures should entail, in the context of mining IPILRA expressly cross-refers to the mining legislation in deeming holders of informal rights to be landowners for purposes of the remedies which are accessible under the MPRDA. This, read with the case law, provides the foundation for reading and applying together the applicable legislative regimes discussed above, when informing the consultation and consent requirements which are applicable to mining projects.

11.2. Moreover, the legislation relating to informal tenure, communal land, and traditional leadership is in a state of flux, with the potential for the applicable regulators to consider whether legislative amendments focused on community consultation may be required. IPILRA was enacted as an interim measure and more comprehensive legislation has not been promulgated. It also remains to be seen whether Parliament will re-enact the TKLA in a constitutionally compliant manner, or whether it will be abandoned entirely. In addition, the UPRD Bill is awaiting presidential assent and the DMPR has indicated that an amendment to the MPRDA is imminent. Law- and policy-makers are therefore already in the process of considering law reform. To the extent that the regulators consider the promulgation of additional regulations, such as under IPILRA, then it would need to be ensured that such regulations are consistent with the existing primary and subordinate legislation and that they create more certainty rather than resulting in further fragmentation or complexity.

11.3. Given the complexities of the legal framework and the challenges discussed in this Guideline, while law- and policy-makers are applying their minds to the various laws and revisiting certain legislative aspects, consideration could be given to the possibility of a policy document being drafted by the State, which clarifies how the various pieces of legislation should be read and applied together in the mining context, and how mining companies should meaningfully consult with communities and indigenous peoples with a view to reaching consensus.

12. Establishment of a Basic Norms and Standards Framework on Consultation

12.1. In the context of the South African legislative framework reviewed herein, read with the accompanying governmental guidelines, it is recommended that until such time as the relevant regulators consider the merits of legislative reform or introducing additional policy, a voluntary Basic Norms and Standard Framework be used as supplemental practical guidance to ensuring adequate and meaningful participation by communities and indigenous peoples aimed at reaching consensus, in respect of development activities in the extractives sector.

12.2. In Annexure A hereto, the text of the Basic Norms and Standard Framework is proposed, as informed by international instruments and best practice, and as contextualised to the South African legal, policy, and practical landscape.

...it is recommended that... a voluntary Basic Norms and Standard Framework be used as supplemental practical guidance to ensuring adequate and meaningful participation by communities and indigenous peoples aimed at reaching consensus...

Damage to homes in New Castle as a result of coal mining activities. **Screenshot from *New Castle Video*, produced by Corruption Watch.**

ANNEXURE A

Basic Norms and Standards Framework for Consultation with Communities

1. Introduction

1.1. The framework described below is intended to act as a voluntary set of basic norms and standards which offer guidance on conducting Meaningful Consultation and Public Participation processes with Communities as a dedicated IAP group in the context of South African extractives development projects.

1.2. It has at its core a focus on meaningful, effective, appropriate, and continuous participation by Communities, which is free of coercion, intimidation, manipulation, bribery, or undue influence.

1.3. The basic norms and standards offer practical guidance to private companies, mining-affected Communities, and organs of state on how differing levels of consultation and participation may be required in different circumstances that typically apply to Communities, and how to practically and adequately achieve these.

1.4. The basic norms and standards do not replace, and are not intended to contradict, legal requirements and the specific legal obligation on mining companies to conduct Meaningful Consultation with Communities. They seek to complement existing legal requirements and governmental guidance, with reference to international best practice and the context of the South African extractives industry, to offer additional guidance on Community engagement requirements where the existing frameworks may not be clear, explicit or comprehensive.

1.5. The structure of the basic norms and standards is as follows:

1. Introduction
2. Key terms used in or applicable to the consultation and public participation process
3. The stages at which Communities should be engaged
4. The pre-consultation/early identification process
5. The application-stage process
6. The construction and operational stage process
7. The decommissioning and closure stage process

2. Key terms used in or applicable to the consultation and public participation process

2.1. "**Community**" bears the meaning ascribed thereto in the MPRDA and accordingly means a group of historically disadvantaged persons with interests or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom, or law: provided that the community shall include the members or part of the community directly affected by mining on land occupied by such members or part of the community. For the purposes of this guidance, it is important to note that there are various types and compositions of community structures in South Africa, and depending on these characteristics additional legal requirements may apply. For example, IPILRA defines "community" to mean any group or portion of a group of people whose rights to land are derived from shared rules determining access to land, held in common by such group. This definition is similar to that found in the Restitution Act. When dealing with informal and/or communal rights in land, therefore, these pieces of legislation must be read together in determining which community members to engage with and how;

2.2. "**COGTA**" means the Department of Cooperative Governance and Traditional Affairs;

2.3. "**DFFE**" means the Department of Forestry, Fisheries and the Environment;

2.4. "**DLRRD**" means the Department of Land Reform and Rural Development;

2.5. "**DMPR**" means the Department of Minerals and Petroleum Resources, previously the Department of Mineral Resources and Energy;

2.6. "**DWS**" means the Department of Water and Sanitation;

2.7. "**EIA Regulations**" means the Environmental Impact Assessment Regulations published under NEMA;

2.8. "**IAPs**" means interested and affected parties as defined in NEMA and the MPRDA Regulations and accordingly includes a natural or juristic person or an association or group of persons with a direct interest in the proposed or existing prospecting or mining operation or activities or who may be affected by the proposed or existing prospecting or mining operation or activities. These include, but are not limited to: (i) Communities; (ii) land claimants who have lodged claims in terms of the Restitution Act which have not been rejected or settled in terms thereof; (iii) lawful land occupiers; (iv) holders of informal rights to land as defined in section 1 of IPILRA; (v) the DLRRD; (vi) COGTA; (vii) the DWS; (viii) any other person (including on adjacent and non-adjacent properties) whose socio-economic conditions may be directly affected by the proposed or existing prospecting or mining operation; (ix) the relevant local municipality; (x) civil society; and (xii) the relevant government departments, agencies, and institutions responsible for and who have jurisdiction over the various aspects of the environment and for infrastructure which may be affected by the proposed project;

2.9. "**Indigenous Peoples**" do not carry a universally accepted definition but the designation of 'indigenous peoples' has come to be recognised over the last few decades as a particular demographic category under international law. The term 'indigenous peoples' has principally been applied to those who are considered to be the descendants of pre-colonial peoples, or marginalised minority ethnic groups (often described as "tribal populations"), with a culture distinct from the majority of the population and who have historically occupied certain regions. Collectively, the various African Indigenous communities in South Africa are known as Khoe-San (also spelled Khoi-San, Khoesan, Khoisan), comprising the San and the Khoikhoi (each containing further sub-groups in different regions, predominantly in the Kalahari and the Western Cape, Eastern Cape, Northern Cape, Free State, and KwaZulu-Natal provinces);

2.10. "**IPILRA**" means the Interim Protection of Informal Land Rights Act, 31 of 1996;

2.11. "**Meaningful Consultation**" refers to ongoing engagement with stakeholders that is two-way, conducted in good faith, responsive, and ongoing:

2.11.1. two-way engagement means that parties freely express opinions, share perspectives, and listen to alternative viewpoints to reach mutual understanding. Moving away from the company as a primary decision-maker to a more mutual process of aiming to reach consensus with Communities is important. It also means that stakeholders are actively involved in driving engagement activities themselves;

2.11.2. good faith engagement depends on the participants of both sides of engagement. It means that the parties engage with the genuine intention to understand how Community interests are affected by company activities. It means that the Company is prepared to prevent or address its adverse impacts, and that Communities honestly represent their interests, intentions, and concerns;

2.11.3. responsive engagement means that there is follow-through on outcomes of engagement activities through implementation of commitments agreed to by the parties, ensuring that adverse impacts to Communities are appropriately prevented or addressed, including through provision of remedies when companies have caused or contributed to adverse impacts, and that Communities' views are taken into account in project decisions; and

2.11.4. ongoing engagement means that Community engagement activities continue throughout the lifecycle of an operation and are not a once-off endeavour;

2.12. "**Modes of Engagement**" have specific connotations in the context of Community engagement, and can take the following forms:

2.12.1. notification/informing/reporting: one-way communication, generally from the company to Community members, focused on providing information;

2.12.2. information sharing: providing information to stakeholders about a project or activity and its expected impacts (positive and negative); relevant in all stages of a project;

2.12.3. consulting: communication focused on sharing information and collecting information, to adequately understand the project or activity's context and the preferences, concerns, and expectations of each party, and to ensure that all parties learn from one another's perspectives;

2.12.4. negotiating: two-way communication with the objective of reaching accommodation or consensus on the terms and conditions under which a project will proceed, including management of impacts and provision of benefits. Good faith negotiation involves on the part of all parties: (i) willingness to engage in a process and availability to meet at reasonable times and frequency; (ii) provision of information necessary for informed negotiation; (iii) exploration of key issues of importance; (iv) use of mutually acceptable procedures for negotiation; (v) willingness to change initial position and modify offers where possible; and (vi) provision of sufficient time for decision-making. The outcome, where the good faith negotiation process is successful, is an agreement and evidence thereof;

2.12.5. reaching accommodation or consensus: appropriate when the objective is to obtain consent of impacted Communities on whether a project may proceed or regarding mitigation of specific aspects of the project or impacts on specific rights. Reaching accommodation or consensus may be a legal or operational requirement depending on the proposed operating contexts; and

2.12.6. responding: taking action in response to an issue, concern, or certain information;

2.13. "**MPRDA**" means the Mineral and Petroleum Resources Development Act, 28 of 2002;

2.14. "**MPRDA Regulations**" means the Mineral and Petroleum Resources Development Regulations published under the MPRDA;

2.15. "**NEMA**" means the National Environmental Management Act, 107 of 1998;

2.16. "**Public Participation**" is a process in decision-making that incorporates the interests and concerns of all project-affected stakeholders and meets the needs of the decision-making body. In the South African extractives context, public participation is legally prescribed under the MPRDA, NEMA, and EIA Regulations. In principle, public participation is based on the following values: (i) it is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process; (ii) it includes the principle that the public's contribution will influence the decision; (iii) it promotes sustainable decisions by recognising and communicating the needs and interests of all participants, including decision-makers; (iv) it seeks out and facilitates the involvement of those potentially affected by or interested in a decision; (v) it seeks input from participants in designing how they participate; (vi) it provides participants with the information they need to participate in a meaningful way; and (vii) it communicates to participants how their input affected the decision;

2.17. "**Restitution Act**" means the Restitution of Land Rights Act, 22 of 1994;

2.18. "**Stakeholder mapping**" refers to the process of identifying, analysing, and prioritising stakeholders who are interested in or affected by a project, operation, or activity. The process is used to ascertain the stakeholders' influence, interest, and impact on the project, operation, or activity and *vice versa*, thereby allowing companies to develop tailored strategies to engage with them effectively; and

2.19. "**Vulnerable or marginalised persons or groups**" refers to women, children, persons with disabilities, migrant workers and their families, ethnic minorities, and Indigenous Peoples. These persons often require distinction within Communities because of the heightened risk of their potential exclusion from the engagement process and the increased severity of adverse impacts which they may suffer.

3. The stages at which Communities should be engaged

3.1. Mining is a dynamic activity, and information regarding mining can change during the project lifecycle. Consequently, regular and ongoing engagement with Communities is essential throughout a project's lifecycle, including where new issues or information may arise which may affect Communities and their interests. Consultation and Public Participation need to be undertaken throughout the project lifecycle, from preparatory stakeholder mapping and initial contact prior to project development, during permit application and operational phases, through to closure and post-closure.

3.2. Companies should appoint and retain appropriately skilled personnel to engage with Community members throughout the project lifecycle, who must be knowledgeable of and capacitated/experienced in the local operating context.

3.3. Community engagement should, at a minimum, take place at the following stages:

3.3.1. before the initiation of a new project development and the submission of applications for applicable permits;

3.3.2. when an application has been accepted by the competent authority/regulator;

3.3.3. during the permit application process, when various specialist impact assessments are conducted, which typically happens in iterations and/or when significant changes have been made or significant new information has been added to the application documents, plans, and reports;

3.3.4. when seeking to amend project permits to change or expand on their scope;

3.3.5. when seeking to materially amend project management plans, for example to address audit recommendations (such as insufficient mitigation of impacts or insufficient levels of compliance), or to amend project management outcomes and objectives;

3.3.6. throughout the project lifecycle, relating to, among others, social and labour plan development, implementation, and review;

3.3.7. ahead of decommissioning or bringing a project to closure; and

3.3.8. when decommissioning or bringing a project to closure.

4. The pre-consultation/early identification process

4.1. Scoping of potentially affected Communities

4.1.1. Communities are often comprised of a diverse group of individuals, and may have varying needs or even conflicting demands. Membership and leadership of Communities may also be a complex issue. Community consultation should be approached with flexibility by companies to accommodate the nuances of Community structures existing in South Africa. Similarly, Communities should accommodate bona fide efforts made by companies to consult and, where appropriate, communicate the appropriate structures for engagement. Robust and adaptable consultation processes are essential if companies are to mitigate challenges that may occur during the life of the mine, as well as facilitate meaningful and appropriate socio-economic development.

4.1.2. All potentially affected Communities should be identified early. Stakeholder mapping is typically conducted at the earliest stage of project inception, and should include the express identification, analysis, and prioritisation of potentially affected Communities.

4.1.3. Various means and resources exist that can be used to properly identify potentially affected Communities, such as social profiles or probes to provide a comprehensive summary of the key characteristics of the people of a Community or area; or established lists and databases, held by consultancies, authorities (such as the DLRRD, COGTA, DMPR, and provincial/regional authorities), or research institutions, which hold details of Communities.

4.1.4. A preliminary identification of Communities should encompass the establishment of a list of Communities and those Community members or households whose interests may be affected by the project or activity.

4.1.5. In determining the Communities which may be affected by the project and who should be consulted with, the different types of recognised Community structures should be considered (including membership and leadership of communities) alongside the type of tenure in which any specific land is held. For example:

4.1.5.1. a 'traditional community' may be present, which has its own system of traditional leadership, observes a system of customary law, occupies a specific geographical area, and has a distinct heritage;

4.1.5.2. Indigenous Peoples may be present, which occupy or have a strong link to specific territories, have distinct social, economic, and political systems, and have distinct language, culture, and beliefs from dominant sectors of society;

4.1.5.3. the land could be held under *individual* or *communal* tenure; and

4.1.5.4. tenure can also be *formal* (registered in the name of certain Community members, or in the name of the State on behalf of a Community, or in the name of a trust or a communal property association established in law); or *informal* (informal rights in land as envisaged in IPILRA, which may include claims for rights in land in terms of the Restitution Act).

4.1.6. The above Community scoping exercise is crucial to ascertaining which legal frameworks apply to the Community engagement process and what level of consultation may be required, as well as whether any other requirements need to be met in relation to specific arrangements (such as the notification and consensus requirements prescribed in IPILRA and the Restitution Act).

4.1.7. The focus should therefore not only be on identifying formal landowners, community councils, or senior traditional leaders. Rather, an analysis should be done to identity the holders of formal and informal rights in relation to the land in question, as well as individual and communal structures, to determine who will be directly affected by the proposed operations. This may be individuals or households with customary use and occupation rights, or user groups with shared customary rules governing access, for example, shared access to communal resources such as forests and grazing lands. The people directly affected may be smaller units of people within the broader community or traditional structure, in which case consultation at each level would be required. In the case of use and occupation rights, consensus should be sought at that level, whereas with communal access rights, consensus may be sought from the majority of the holders of such rights as envisaged in IPILRA.

4.1.8. It should always be borne in mind that some Communities may not be aware that they are "stakeholders", since they may be unaware that they would potentially be adversely affected by the project until the impact occurs. Using the appropriate Modes of Engagement to reach mining-affected Communities is crucial to overcoming this challenge.

4.2. Understanding the local context

4.2.1. Despite numerous commonalities, the specific local and Community context also needs to be ascertained at the earliest stage of a mining project. Baseline information is particularly important to gather and, among others, should focus on the following key characteristics of the local context:

4.2.1.1. demographic information about the nature of the Community in terms of tribal identities, clan relationships within the Community, and population growth data. This will be important to monitoring changes in these characteristics during engagement and project development;

4.2.1.2. land ownership and tenure from a legal and customary perspective as discussed above, as well as any contestations about tenure within clan families. Overlapping ownership claims should be documented through government channels, but also through independent inquiry from local experts;

4.2.1.3. the customary laws, practices, and traditions of the Community in question and what customary decision-making processes apply in the relevant Community;

4.2.1.4. cultural heritage significance and association with particular sacred sites should be ascertained, for example, from tribal elders who have the confidence of the Community;

4.2.1.5. livelihood and subsistence data on how the Community meets its basic food and shelter needs, as well as the level of connectivity (if any) that the Community has with the land; and

4.2.1.6. information about the ethnic composition and relations in the area, as well as the history of migration.

4.2.2. Ascertaining these characteristics will inform key engagement requirements to ensure Meaningful Consultation, such as social structures (roles and responsibilities); cultural protocols, including traditional ways of dealing with grievances and conflict; governance and decision-making structures; and environmental and natural resource management strategies within each local context.

4.2.3. While it is important to acknowledge the role of elders and other traditional Community leaders, it should not automatically be assumed that those who occupy formal leadership positions, whether they be traditional or government appointed, represent all interests in the Community. In particular, companies need to identify any holders of informal rights in land as envisaged in IPILRA and also be sensitive to those parts of the Community who may be excluded from the decision-making process, such as women and young people. During engagement with Communities, those facilitating the engagement process should make it clear that they are committed to acting in an inclusive and non-discriminatory way. Traditional decision-making structures should not exclude vulnerable or marginalised persons or groups, and input from these persons must also be obtained – for example, and where possible, via Community needs surveys and baseline studies, or through informal discussions with small groups, or holding consultations in a neutral venue such as community halls instead of traditional authority offices to ensure all members of the communities can attend. Also, those facilitating the engagement process should endeavour to explain to traditional decision-makers that, while they respect existing structures and will work through them wherever possible, it is important for the company to understand how its activities might affect all parts of the Community, including the holders of informal rights in land as envisaged in IPILRA.

4.2.4. Beyond Community characterisation, it is also key to identify and ascertain the following local aspects which may impact the project and which may affect Community engagement:

4.2.4.1. Historical events: Key historical events in the area or region may be relevant to the project, and may affect engagement with Communities. This may include legacy issues from prior development projects; cumulative impacts of past, on-going, or foreseeable activities; history of conflict in the area, including between Community groups; previous protests over land, resources, and infrastructure ownership, use, and/or access. Such information may assist in the identification of potential cumulative impacts on Communities, of opposition groups and vulnerable or marginalised persons or groups, and of challenges to engagement (for example, inherited issues, violence, and opposition).

4.2.4.2. Politics and governance: National, regional, and local political issues might influence engagement with Communities, such as the presence or the absence of strong civil society, trade unions, and democratic institutions; local perceptions; administrative structures and formal decision-making processes; and dynamics of competing political parties.

4.2.4.3. Government structure and roles: Different roles, powers, and underlying interests at the local, regional, and national levels of government, and between different departments and agencies responsible for the various aspects of regulating the extractives sector. Capacity and institutional presence of the government at different levels should also be considered.

4.2.4.4. Human rights: track record of industry and companies in addressing human rights issues in the past, including through access to remedy; as well as assessing the potential human rights impacts of the proposed project itself on the Community.

4.3. Verification of scoping information

4.3.1. Those facilitating the consultation and Public Participation process should seek to verify the initial scoping information they have gathered, to ensure the accuracy and credibility of the data which will inform their Meaningful Consultations.

4.3.2. Such verification can be done, for example, by enlisting the services of reputable advisers with good local knowledge (land tenure experts, lawyers, anthropologists, and specialist agencies); or requesting the assistance of regulators in the DMPR, COGTA, provincial government, and/or DLRRD.

4.3.3. When relying on information obtained from third parties (e.g. other extractive operators working in the region, national and local civil society organisations, academics, or government representatives), one should always consider the reputation, objectivity, capacity, relevance, and expertise of the source.

4.4. Consultation Planning

4.4.1. Following completion of the stakeholder mapping and Community scoping exercises, a comprehensive needs analysis should be undertaken in relation to the Communities which will be impacted by the proposed prospecting or mining operations, which should take into account the land associations and livelihood and subsistence data envisaged above, be based on credible research and information, and consider how the company may be able to bring benefits to Communities and contribute to creating sustainable livelihoods for Communities both during the operational phase and in the long term, post-operations; or negatively impact on Community needs and how such impacts should be prevented or mitigated/addressed, where it is not possible to prevent them.

4.4.2. In planning Meaningful Consultation, consideration should be given to:

4.4.2.1. appropriate priorities in relation to who should be consulted and in what order, taking into account the interplay between formal and informal Community structures and therefore the different layers at which consultation should take place;

4.4.2.2. long-term planned outcomes, and ways in which deficiencies can be addressed and companies can act as catalysts for broader socio-economic development in the area;

4.4.2.3. opportunities for the company to collaborate with other companies in the area on socio-economic initiatives in order to be more broadly impactful and have longer lasting results; and

4.4.2.4. questions and challenges likely to be raised by Community members and appropriate responses thereto.

4.5. Notification of the proposed project

4.5.1. Project notifications inform the right of all potential and registered IAPs to be informed early, and in an informative and proactive way, regarding proposals that may affect their lives or livelihoods.

The type of methods used to notify Communities of a mining project proposal must, in addition to meeting legal requirements, be effective, and culturally appropriate methods of communication should be used.

4.5.2. Proposed project notifications seek to, among others, invite Communities to register their interest in the project, whereafter they will be invited to participate in forthcoming consultations and Public Participation processes. Consideration should be given, in such notifications, to inviting Communities to propose or request specific forms and platforms of engagement, such as holding public meetings within the Community.

4.5.3. In addition to legally prescribed notification protocols, understanding the local context can further ensure that initial contact/notification of the proposed project development and permit application processes is appropriate and respectful, for example, by understanding and respecting local entry protocols as they relate to permission to enter a Community or homestead.

4.5.4. Appropriate participation measures must also deal with language requirements. The language used by the Communities in the project area must be taken into account when serving notices (whether by site notice, newspaper, Government Gazette, or radio). Communities must also be able to access such notices (for example, online/website notices should not be used where the Community has no access to internet or computers/equipment to access same).

4.5.5. Senior company representatives should be present at initial meetings, wherever possible, and meet with the Community representatives, as this demonstrates respect and sets the scene for building long-term trust and relationships with Communities.

4.6. Recording of registered interest from Communities

Mining companies should record the notification and early engagement processes, as well as feedback received from Communities, to provide a record for current or future stakeholders and to ensure transparency in the decision-making process.

4.7. Regulatory regime and relevant standards

4.7.1. Those initiating and facilitating the consultation and Public Participation process must at all times be cognisant of and informed by the regulatory regime governing the proposed operation and obligations or commitments around stakeholder engagement activities. Applicable legislation may include departmental policies and guidelines, and consideration must further be given to developing common law through the Courts.

4.7.2. Also to be considered are:

4.7.2.1. applicable international instruments, standards, and guidance documents; and

4.7.2.2. contracts, financing agreements, contractor agreements, and supplier agreements concluded or to be concluded in respect of the proposed development.

5. The application-stage process

5.1. Determining consultation requirements

5.1.1. Differing levels of engagement are envisaged for Communities when considering the scale of anticipated impacts of the proposed project, and the composition/scope of the mining-affected Communities.

5.1.2. The scale of anticipated impacts will inform the *extent of Meaningful Consultation* required. For example:

5.1.2.1. If the project is a greenfields development (a new development in a previously undisturbed area), extensive Meaningful Consultation with Communities should be undertaken.

5.1.2.2. If the project area already suffers from socio-economic problems or environmental problems, and the project is likely to exacerbate these, extensive Meaningful Consultation with Communities should be undertaken.

5.1.3. The results of the scoping exercise undertaken in terms of paragraph 4.1 will inform the level of consultation required, to ensure Meaningful Consultation. All applicable legal requirements will at this stage need to be considered and complied with.

5.1.4. There are scenarios in which consultation with mining-affected Communities or Community members will not be enough, and where 'elevated Meaningful Consultation' with a view to reaching some form of accommodation or consensus with Communities is required. These include:

5.1.4.1. Depriving landowners and lawful occupiers (both formal and informal) of their rights in and access to the land on which the project or mining operations will be developed (i.e. loss of land associated with livelihoods or subsistence). In such instances, companies must engage with the affected Communities to try to reach an outcome of accommodation or consensus relating to the (in)ability to continue using the surface of the land (such as through concluding lease agreements or land use agreements for mining purposes), in accordance with any additional requirements or arrangements prescribed in law.

5.1.4.1.1. Consultation in such instance thus entails a more extensive engagement and negotiation process, with a view to reaching some accommodation or consensus with the mining-affected Community. IPILRA, in the context of informally-held land rights, further requires the deprivation of communally-held land to be in accordance with the custom and usage of that Community and by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such deprivation. Land owned by a trust or Communal Property Association on behalf of a Community, on the other hand, will be subject to its own specific legal requirements in the event of planned land deprivation.

5.1.4.1.2. If such accommodation or consensus is not reached and the mining-affected Community refuses to permit the company access to the land over which it holds mineral rights, additional engagements are prescribed by virtue of the MPRDA dispute resolution and compensation process (if the landowner or lawful occupier has suffered or is likely to suffer loss or damage as a result of the operations, the parties concerned must endeavour to reach an agreement for the payment of compensation to the landowner or occupier for such loss or damage; and if the parties fail to reach an agreement, compensation must be determined by arbitration or by a competent court). IPILRA similarly grants the holders of informal land rights access to the MPRDA's section 54 remedies.

5.1.4.2. Physical displacement, relocation, or resettlement of Communities. Relocation and resettlement are subject to strict legal requirements, and consultations in the context of planned relocation/resettlement must include agreeing compensation for loss of property and livelihood; financial and related support to relocated Communities; and access to residential housing or agricultural land. Among others, a Resettlement Agreement should be concluded between the company and the affected Community or Community members, which contains the terms of the resettlement as agreed by the parties thereto, including in respect of the appropriate amount of compensation as a result of resettlement. The Resettlement Agreement should be lodged with the relevant DMPR Regional Manager and regularly monitored and reported on. Where feasible and if desirable, the relocated/resettled Community members should be given the option to return to the land, should the cause of their relocation/resettlement cease to exist (such as after mine closure).

5.1.4.3. Significant adverse impact on critical heritage resources that are essential to the identity and/or cultural, ceremonial, or spiritual aspects of Communities' lives (such as the exhumation and relocation of graves and burial sites). Again, strict legal requirements apply in such circumstances, including the requirement to reach agreements with affected Communities and individuals regarding the future of such grave or burial ground.

5.2. Nature of Consultation

5.2.1. The manner in which Communities make decisions should be taken into consideration in determining the Modes of Engagement that should be utilised for Meaningful Consultations.

5.2.2. Communities should be consulted well enough in advance, taking into account Community structures and the nature and extent of internal Community engagement based on customary laws and traditions, local democratic processes, or governance mechanisms.

5.2.3. Consultation should focus on inclusive engagement, and on those who will be directly affected by the proposed mining operations as opposed to those not directly affected. Inclusive approaches include adapting consultation practices to include vulnerable or marginalised persons or groups; and identifying development priorities to support activities that contribute to the lasting social and economic wellbeing of Communities, in partnership with government, civil society, and development agencies, as appropriate.

5.2.4. Consultation should focus on respecting the rights, interests, aspirations, culture, and natural resource-based livelihoods of Communities in project design, development, and operation; applying the mitigation hierarchy to address adverse impacts; and delivering meaningful outcomes for Communities.

5.2.5. Companies should recognise that the consultation process is iterative, rather than a once-off discussion. Continuous dialogue with Communities will lead to a relationship built on mutual trust that will benefit the parties across all phases of the project.

5.2.6. Where significant Community impacts may arise pursuant to the mine project development, informed consultation and participation should involve a more in-depth exchange of views and information, and an organised and iterative consultation, leading to incorporation into the company's decision-making process of the views of the mining-affected Communities on matters that affect them directly, such as the proposed mitigation measures.

5.2.7. Meaningful Consultation can and should also consider how meaningful outcomes may be achieved for Communities and include consultation on the company's proposed social and labour plan. Benefits to Communities can be monetary or non-monetary, as agreed between the company and the Community/ies through consultation or negotiation processes (for example, local job opportunities; opportunities for local procurement; the diversification of income-generating opportunities; capacity development; technology transfer; improvements in local infrastructure; better access to credit and markets, particularly for small and medium-sized businesses; or the creation of Community trusts).

5.2.8. Where consultations are to be aimed at reaching consensus, this means that:

5.2.8.1. the purpose of the consultation must be related to the impact that the granting of the prospecting right, mining right, or mining permit will have on the Community/ies (in other words, consulting with the Community/ies should be with a view to reaching an accommodation in regards to the impact of the proposed mining or prospecting operations, and all reasonable steps should be taken to reach consensus regarding the basis on which the project will go ahead);

5.2.8.2. the consultation should provide the Community/ies with the necessary information on everything that is to be done so that they can make an informed decision in relation to the representations being made;

5.2.8.3. the consultation process must inform the Community/ies in sufficient detail of what the mining or prospecting operations will entail on the land, and in a manner that is timely, objective, accurate, and understandable to them, so that they are fully informed about the scale and nature of the proposed project and its potential impacts and benefits;

5.2.8.4. the company should pursue an engagement strategy that meets the legitimate expectations of the Community/ies, to the extent possible, and should agree with the Community/ies a consultation process for working towards seeking to reach consensus. Companies should therefore also consult on, and agree on, what constitutes consensus for the Community/ies in accordance with their governance institutions, customary laws, and practices (for example, whether this is a majority vote from the Community or approval of the council of elders). Communities should be able to participate through their own freely chosen representatives and customary or other institutions;

5.2.8.5. Communities should be given sufficient time to consider project information before key decisions are made and impacts occur;

5.2.8.6. working to reach consensus should be done according to an agreed consultation process, and acting consistently with the principles of good faith negotiation. The process of reaching consensus should be initiated prior to the Community/ies being exposed to any significant adverse impacts from the project; and the Community/ies must not be subject to coercion, intimidation, manipulation, bribery, or undue time pressure over the course of this process; and

5.2.8.7. when aiming to reach consensus, a company's primary focus should not be on the giving of a simple "yes" or "no". Rather, companies should aim to reach agreement on the terms under which the project should proceed. It is important to remember that companies should not agree to aspects that they cannot control (such as matters requiring a change in government policy or law).

5.2.9. These consultation and Public Participation processes should be documented, including where consensus has been reached (such as in the form of an agreement or a commitments register). Where consensus or agreement cannot be reached, the parties should determine what remedial action(s) can be taken (such as the MPRDA section 54 compensation process).

5.3. Updating of information

Information on Communities and the local and operating environment should be updated on a regular basis, as more information becomes available, either through additional studies or through Community engagement activities and as the project's circumstances change.

6. The construction and operational stage process

6.1. Establish a regular forum or representative body to host discussions on monitoring, implementation, grievances, and follow-through

6.1.1. Establishing appropriate Community engagement forums through which engagement and ongoing Meaningful Consultation will take place during the construction and operational stage of a project is key. The forums should facilitate open and accountable engagement and collaboration to build relationships and mutual trust.

6.1.2. A Community engagement plan should be developed which sets out the approach to engagement and the manner in which it will be implemented, as well as the engagement principles which will inform the process.

6.1.3. The Community engagement forums should also cater for the ongoing meetings required in terms of the MPRDA Regulations to update Communities on the progress made in the implementation of social and labour plans and for the Meaningful Consultation required for the review of social and labour plans every five years.

6.2. Establish a feedback loop to integrate Community views into project decision-making

Companies should establish systems which provide for the integration of Community views into project or activity decision-making at a management level. The following approaches may be considered:

6.2.1. Establishing direct lines of communication between senior management and on-the-ground personnel involved with Community engagement, and a process for communicating potential changes or project decisions under consideration which could impact Communities or agreed commitments.

6.2.2. When relevant, having senior management sign off on additions to any commitments registers and report on the fulfilment of commitments or agreements.

6.2.3. When Community perspectives have not been incorporated or commitments and remedies have not been provided as previously agreed to, providing an explanation to impacted Communities or Community members/households as to why this is the case.

6.2.4. Using open and transparent means to effectively report and independently verify progress and performance on project plans.

6.3. Set up a Community-facing grievance mechanism

Having effective operational-level grievance mechanisms in place to systematically handle and resolve grievances that arise during the project lifecycle helps to diffuse potential problems and provides channels for resolving issues that might otherwise escalate into protests, conflicts, or legal disputes. They also provide an important tool to help companies assess the state of Community relations and indicate where problems may arise (prevention) or have arisen (mitigation and remediation). To be effective, a grievance mechanism should incorporate the following criteria:

6.3.1. Legitimacy:

6.3.1.1. involving Communities in the co-design of the grievance mechanism;
6.3.1.2. establishing an independent process for complex issues; and
6.3.1.3. ensuring formal accountability for the grievance mechanism.

6.3.2. Accessible:

6.3.2.1. promoting the grievance mechanism;
6.3.2.2. providing multiple channels for accessing the grievance mechanism;
6.3.2.3. adapting channels to local culture and language;
6.3.2.4. making the grievance mechanism easy to use;
6.3.2.5. ensuring there is no retaliation for using the mechanism; and
6.3.2.6. considering additional steps to ensure that vulnerable or marginalised persons or groups can access the mechanism.

6.3.3. Predictable:

6.3.3.1. defining a clear process;
6.3.3.2. communicating clearly the outcomes that are available; and
6.3.3.3. maintaining flexibility to adapt the process, where necessary, to respect rights.

6.3.4. Equitable:

6.3.4.1. providing access to information;
6.3.4.2. facilitating independent representation, where necessary; and
6.3.4.3. establishing an independent process if there is a perceived imbalance of power.

6.3.5. Transparent:

6.3.5.1. regularly updating complainants on the process;
6.3.5.2. being transparent with Communities about outcomes; and
6.3.5.3. balancing the need for transparency with respect for complainants' confidentiality.

6.3.6. Rights-compatible:

6.3.6.1. ensuring the process and outcomes respect human rights;
6.3.6.2. enlisting human rights expertise, where necessary; and
6.3.6.3. respecting affected stakeholders' rights not to use the grievance mechanism and to use other available channels.

6.3.7. A source of continuous learning:

6.3.7.1. soliciting feedback from grievance mechanism users;
6.3.7.2. acting upon lessons for improving the mechanism and preventing future harm;
6.3.7.3. regularly assessing trends about grievances, including how outcomes are implemented; and
6.3.7.4. establishing and continually refining the key performance indicators underpinning the grievance mechanism.

6.3.8. Based on engagement and dialogue:

6.3.8.1. resolving grievances through dialogue and joint problem-solving;
6.3.8.2. deepening Community involvement in the grievance process;
6.3.8.3. engaging meaningfully with vulnerable or marginalised persons or groups about the grievance process and outcomes; and
6.3.8.4. conducting a participatory evaluation of the grievance mechanism.

6.3.9. Strengthen organisational structure and culture to support effective grievance management by:

6.3.9.1. promoting the understanding within the organisation that grievance management is normal and beneficial;
6.3.9.2. securing senior-level management support for effective grievance management, where necessary;
6.3.9.3. promoting cross-functional co-ordination and collaboration, where grievances may need the involvement of departments or personnel outside of those at the company designated with the responsibility of Community/stakeholder relations;
6.3.9.4. focusing on developing the right skills and competencies within the company to deal with grievances; and
6.3.9.5. maintaining robust management systems.

6.4. Ensure follow-through to track agreements, commitments, and remedies

A system or process for tracking performance on or against agreements, commitments, and remedies should be established. Regular reports back to Communities on the company's performance on or against agreements, commitments, and remedies will foster accountability.

7. The decommissioning and closure stage process

7.1. Mine closure is inevitable and although it is often scheduled, unscheduled and temporary mine closures can occur. Closure planning must recognise that the closure of mines has historically resulted, among others, in irreversible environmental degradation, economic hardship in mining-dependent and mining-affected Communities, and health, safety, and security risks for remaining mining-affected Communities.

7.2. Integrated mine closure is a dynamic and iterative process that takes into account environmental, social, and economic considerations at an early stage of mine development. Planning for closure (scheduled and unscheduled) throughout the life of the mine and conducting concurrent rehabilitation are essential to ensuring that Communities do not ultimately bear the brunt of environmental and socio-economic closure at the end of the life of a mine.

7.3. It is important to manage Communities' expectations and grievances prior to and during decommissioning, mine closure, and post-closure. Engagement with Communities should take place throughout the closure planning process, with insight from that engagement used to shape key elements of the closure plan. Closure plans and objectives should feature as a recurring item on the Community engagement forum's agenda.

7.4. The objective of mine closure is to reach a sustainable end use, which should be informed by the Communities' needs in addition to other factors, such as available technology, post-mining economic alternatives, and the nature and extent of economic dependence on a mine by mining-affected Communities and remote Communities in labour-sending areas. This is to ensure that the positive environmental and social legacies of mining are not reversed on mine closure, and that any negative legacy impacts are mitigated. Closure plans should thus consider the ways in which socio-economic development can be achieved in a sustainable way post-closure.

7.5. Consideration would also need to be given to whether it is feasible for Communities to return to the land, post-closure, to the extent that they were resettled.

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