30 OCTOBER 2018

MINING & MINERALS ALERT

IN THIS **ISSUE**

MINING COMMUNITY CONSULTATION: WHO IS THE COMMUNITY?

How does the Constitutional Court's Judgment in *Grace Masele (Mpane) Maledu and Others v Itereleng Bakgatla Mineral Resources (Proprietary) Limited and Another* [2018] ZACC 41 affect mining companies?

CDH
CLIFFE DEKKER HOFMEYR

MINING COMMUNITY CONSULTATION: WHO IS THE COMMUNITY?

The Applicants claimed to be the true owners of the Farm due to the fact that their forebears, as members of the Lesetlheng Community, had purchased the Farm.

How does the Constitutional Court's Judgment in *Grace Masele (Mpane) Maledu and Others v Itereleng Bakgatla Mineral Resources (Proprietary) Limited and Another* [2018] ZACC 41 affect mining companies?

On 25 October 2018, the Constitutional Court of the Republic of South Africa (CC) handed down its judgment in Grace Masele (Mpane) Maledu and Others v Itereleng Bakgatla Mineral Resources (Proprietary) Limited and Another [2018] ZACC 41 (Maledu Judgment). What follows is a brief discussion of the background of the matter, the legal issues that arose and the affect that the Maledu Judgment will have on mining companies going forward.

Background

During 2004, Itereleng Bakgatla Mineral Resources (Proprietary) Limited (IBMR) was granted a prospecting right over the farm Wilgespruit 2 JQ, located in the North-West Province (Farm). On 19 May 2008, IBMR was granted a mining right over the Farm, and IBMR's environmental management programme was approved on 20 June 2008. On 28 June 2008, IBMR concluded a surface lease agreement with the Bakgatla-Ba-Kgafela Tribal Authority (Bakgatla Community) and the Minister of Mineral Resources (Minister), in terms of which IBMR would lease the Farm for mining purposes (SLA).

During 2012, IBMR agreed to cede its mining right, in relation to a portion of the Farm known as Sedibelo-West to Pilanesberg Platinum Mines (Proprietary) Limited (PPM), subject to obtaining consent to do so from the Minister in accordance with s11(1) of the Mineral and Petroleum Resources Development Act, No 28 of 2002 (MPRDA), which consent is yet to be granted. Furthermore, IBMR appointed PPM as its contractor to mine on the Farm in terms of s101 of the MPRDA.

The dispute in this matter seems to have commenced during 2014 when IBMR and PPM began preparations for full-scale mining operations on the Farm. During 2015, 37 members of the Lesetlheng Village Community (a constituent part of the Bakgatla Community) (Applicants), obtained a spoliation order against IBMR and PPM (collectively the Respondents) on the basis that the Respondents' mining operations had negatively impacted their peaceful and undisturbed occupation and use of the Farm. The Applicants claimed to be the true owners of the Farm due to the fact that their forebears, as members of the Lesetlheng Community, had purchased the Farm but had been precluded from registering it in their names because of the racially discriminatory laws that then prevailed. While they did not use the Farm for residential purposes, they did conduct crop and stock farming operations thereon on an exclusive basis. As a result of such farming operations, the Applicants erected stock kraals and pig pens on the Farm, as well as houses and shacks for occupation

CDH
CLIFFE DEKKER HOFMEYR

MINING COMMUNITY CONSULTATION: WHO IS THE COMMUNITY?

CONTINUED

The basis for the dispute rested on whether the Respondents had complied with the consultative requirements set out in the MPRDA.

by their employees. The Farm is currently registered in the name of the Minister of Rural Development and Land Reform who, according to the title deed, owns the Farm in trust for the Bakgatla Community.

In response to the spoliation order, the Respondents approached the High Court of South Africa, North West Division, Mahikeng (High Court) and requested an order evicting the Applicants from the Farm (Eviction Order), as well as an interdict against the Applicants, seeking to prevent them from entering, remaining or conducting farming operations on the Farm (Interdict).

In essence, the basis for the dispute rested on whether the Respondents had while applying for the prospecting and mining rights over the Farm and negotiating the SLA, complied with the consultative requirements set out in the MPRDA. The Applicants contended, amongst other things, that

(a) as they were the true owners of the Farm (as opposed to the Bakgatla Community) and were not consulted as owners in the manner contemplated in the MPRDA, the granting of the mining right was invalid;

(b) they were not consulted as required in terms of s2(1) of the Interim Protection of Informal Land Rights Act, No 31 of 1996 (IPILRA), and as they did not provide their consent to being deprived of their informal rights to the Farm, their informal rights to the Farm were not validly extinguished in accordance with the IPILRA;

(c) the Respondents were precluded from securing an interdict against the Applicants until and unless any dispute relating to the Applicant's surface rights over the Farm had been resolved in accordance with the processes set out in s54 of the MPRDA.

The High Court determined, in respect of the issues raised in the preceding paragraph, that:

(a) the Applicants were not the owners of the Farm, and as such, there was no obligation on the Respondents to consult with them as owners. Additionally, the Applicants could not challenge the validity of the mining right by other means as they had failed to challenge the validity of the mining right by way of an internal review, as they should have done. In regard to whether the Respondents had met the consultative requirements set out in the MPRDA, the High Court referred to the two separate meetings that were held with the Bakgatla Community, the first during April 2017 prior to the mining right being granted, where a meeting was held with members of the Applicants, and the second taking place during June 2008, where the Bakgatla Community (to which the Applicants form part of) agreed to enter into the SLA with the Minister of Rural Development and Land Reform and the IBMR. The High Court found that these two meetings, together with the resolution passed by the Bakgatla Community, served as sufficient evidence that the consultative processes under the MPRDA had indeed taken place;

MINING COMMUNITY CONSULTATION: WHO IS THE COMMUNITY?

CONTINUED

(b) the Applicants' informal rights derived from the IPILRA were lawfully terminated when the Bakgatla Community passed the resolution to enter into the SLA. Consequently, sufficient consultation had taken place; and

(c) the contention that the Respondents were not in a position to commence mining operations until the process under s54 of the MPRDA had been resolved was rejected. The High Court held that notwithstanding the fact that the process envisaged in s54 of the MPRDA had not been finalised, the Respondents were free to continue with the mining operations, particularly as the Respondents had attempted to comply with their consultative duties under the MPRDA in good faith. Furthermore, the Applicants were able to claim compensation in terms of s54 of the MPRDA, and thus still had a remedy available to them. The basis for the High Court's finding on this point derived from the Supreme Court of Appeal (SCA) Judgment in *Joubert v Maranda Mining Company (Pty) Ltd* [2009] ZASCA 68 (Joubert Case).

The High Court ruled in favour of the Respondents, granting both the Eviction Order, as well as the Interdict. The Applicants were refused leave to appeal the decision of the High Court by both the High Court as well as the Supreme Court of Appeal. Consequently, the Applicants petitioned and were granted, leave to appeal to the CC.

CC Judgment

The Applicants put forward the same arguments in their appeal to the CC as they had in the High Court. The CC rejected all of the Applicants' contentions, save for two. The CC resolved that the matter should be decided principally on the basis of s54 of the MPRDA and s2 of the IPILRA.

Section 54 of the MPRDA

The CC deemed the central issue to be whether the Respondents were in a position to rely on the processes under s54 of the MPRDA, and if so, whether they had an obligation to exhaust the mechanisms under s54 prior to approaching a court for an eviction or interdict against the Applicants. The CC found that the High Court's reliance on the Joubert Case was

CDH
CLIFFE DEKKER HOFMEYR

MINING COMMUNITY CONSULTATION: WHO IS THE COMMUNITY?

CONTINUED

The Applicants occupation of the Farm was found to be lawful.

misplaced, as the facts in the Joubert Case were substantially distinguishable from this matter. In the Joubert Case, as the mining right holder was denied access to the land and the landowner refused to enter into negotiations with the mining right holder, the court found that the landowner's conduct was not only obstructive but also subversive of the objects of the MPRDA. Furthermore, at the time the judgment in the Joubert Case was handed down, s5(4)(c) of the MPRDA was still in force. Section 5(4)(c) prohibited the commencement of mining activities unless the right holder notified and consulted with the owner or occupier of the land in question. Section 5(4)(c) of the MPRDA was repealed with effect from 7 June 2013.

The CC considered the purpose of s54 of the MPRDA, particularly in relation to the balancing of the rights of mining right holders on the one hand, and surface right holders on the other. The need for proper consultation exists in order to alleviate the potential serious inroads that may be made on the rights of landowners. In response to the Respondents' submission that should the CC find that s54 of the MPRDA must be exhausted before an interdict can be sought, this would unjustifiably prevent mining right holders from commencing operations until the legislative process was resolved, the CC held that this would not be the case, as s54 of the MPRDA sets out a speedy dispute resolution process (parties should first try to mediate the matter and reach an agreement, failing which, the parties may approach a court to resolve the dispute). Furthermore, s54 provides that if the parties reach a deadlock during negotiations and the regional manager concludes that any further negotiations may detrimentally affect the objects of the MPRDA, he or she may recommend to the Minister that the land be expropriated in accordance with s55 of the MPRDA.

The CC held that the Respondents failed to exhaust the processes contemplated in s54 of the MPRDA prior to obtaining the Eviction Order and the Interdict, and therefore set aside the order of the High Court and dismissed the Eviction Order and Interdict.

Section 2 of the IBILRA

As s54 of the MPRDA will only apply where the occupation of land is lawful, the CC then considered the second legal question, namely whether the granting of the mining right constituted a deprivation of informal rights to land.

The CC emphasised the need for the MPRDA to be read in harmony with the objects of other statues such as IPILRA as it determined that *"the award of a mining right does not without more nullify occupational rights under IPILRA*. Section 2(4) of IPILRA provides that *"the decision to dispose of any [...] right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for such purpose [...]"*. According to the CC, the existence of a valid mining right does not mean that occupiers of such land are doing so unlawfully. As the underlying purpose of IPILRA is to provide historically disadvantaged and vulnerable people security of tenure, the Respondents had an obligation to comply with the prescripts of IPILRA. Accordingly,

CDH
CLIFFE DEKKER HOFMEYR

MINING COMMUNITY CONSULTATION: WHO IS THE COMMUNITY?

CONTINUED

Mining companies must now place greater importance on identifying whether any individuals/communities hold occupational rights over a piece of land in terms of IPILRA.

the CC found that the resolution to enter into the SLA adopted by the Bakgatla Community and signed by the leader of the Bakgatla Community was too terse to substantiate the Respondents' assertions that the Applicants had consented to the deprivation of their informal land rights to or interests in the Farm, as per the prescripts of s2(4) of IPILRA. The Applicants occupation of the Farm was therefore found to be lawful.

Affect of the Maledu Judgment

Following the Maledu Judgment, mining right holders:

- must ensure that all consultative requirements prescribed by the MPRDA are fully complied with. Mining companies must now place greater importance on identifying whether any individuals/communities hold occupational rights over a piece of land in terms of IPILRA, and if so, not only will they need to be notified and consulted with pursuant to the provisions of the MPRDA, but surface lease agreements may need to be concluded with such individuals/communities in order to ensure that they are not deprived of their land without their explicit consent. Attention should be placed on establishing the true identities of such individuals/communities. It will no longer be sufficient to consult with and reach an agreement with Traditional Leaders within communities, or those who claim to have authority to act on behalf of a community. Mining companies must be in a position to prove that all owners and/or lawful occupiers of a piece of land have been notified and consulted;
- can no longer bypass the internal mechanisms expressly set out in s54 of the MPRDA and approach courts for relief instead, and
- may no longer commence operations pending the finalisation of the processes contemplated in s54 of the MPRDA. All consultative processes and potential disputes regarding access to land and/or compensation must be finalised prior to the commencement of operations unless the rightful communities negotiate in bad faith to subvert the aims of the MPRDA.

Ben Cripps and Allan Reid

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Mining & Minerals sector and services, please contact:

Allan Reid
Sector Head
Director
Corporate & Commercial
T +27 (0)11 562 1222
E allan.reid@cdhlegal.com

Mark Linington
Sector Head
Private Equity
Director: Tax & Exchange Control
T +27 (0)11 562 1667
E mark.linington@cdhlegal.com

Rishaban Moodley
Director
Dispute Resolution
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Sandra Gore
Director
Corporate & Commercial
T +27 (0)11 562 1433
E sandra.gore@cdhlegal.com

Deepa Vallabh
Head: Cross-border M&A, Africa and Asia
Director
Corporate & Commercial
T +27 (0)11 562 1188
E deepa.vallabh@cdhlegal.com

Nonhla Mchunu
Director
Corporate & Commercial
T +27 (0)11 562 1228
E nonhla.mchunu@cdhlegal.com

Emil Brincker
National Practice Head
Director
Tax & Exchange Control
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com

Mmatiki Aphiri
Director
Corporate & Commercial
T +27 (0)11 562 1087
E mmatiki.aphiri@cdhlegal.com

Verushca Pillay
Director
Corporate & Commercial
T +27 (0)11 562 1800
E verushca.pillay@cdhlegal.com

Willem Jacobs
National Practice Head
Director
Corporate & Commercial
T +27 (0)11 562 1555
E willem.jacobs@cdhlegal.com

Jackwell Feris
Director
Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Ziyaad Hassam
Senior Associate
Corporate & Commercial
T +27 (0)11 562 1017
E ziyaad.hassam@cdhlegal.com

Aadil Patel
National Practice Head
Director
Employment
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Lilia Franca
Director
Corporate & Commercial
T +27 (0)11 562 1148
E lilia.franca@cdhlegal.com

Ben Cripps
Associate
Corporate & Commercial
T +27 (0)11 562 1242
E ben.cripps@cdhlegal.com

Deon Wilken
National Practice Head
Director
Finance & Banking
T +27 (0)11 562 1096E
E deon.wilken@cdhlegal.com

Giada Masina
Director
Corporate & Commercial
T +27 (0)11 562 1221
E giada.masina@cdhlegal.com

Valencia Govender
Associate
Environmental
T +27 (0)21 481 6419
E valencia.govender@cdhlegal.com

Julian Jones
Sector Head
Business Rescue & Insolvency
Director: Dispute Resolution
T +27 (0)11 562 1198
E julian.jones@cdhlegal.com

Fiona Leppan
Director
Employment
T +27 (0)11 562 1153
E fiona.leppan@cdhlegal.com

Alecia Pienaar
Associate
Corporate & Commercial
T +27 (0)11 562 1017
E alecia.pienaar@cdhlegal.com

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com