

# MINING & MINERALS ALERT

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### COMMUNITY CONSENT VS CONSULTATION – HIGH COURT RULES IN FAVOUR OF COMMUNITY

Following the recent Constitutional Court judgment, *Maledu and Others v Itereleng Bakgatla Mineral Resources Pty Ltd and Another* [2018] ZACC 41, the Pretoria High Court in *Baleni and Others v Minister of Mineral Resources and Others* Case No 73768/2016 has found that the Minister of Mineral Resources must obtain the full and informed consent of the Umgungundlovu Community, which holds land rights, prior to granting a mining right in terms of the Mineral and Petroleum Resources Development Act, No 28 of 2002 (MPRDA), and that consultation with the community does not suffice.

# COMMUNITY CONSENT VS CONSULTATION – HIGH COURT RULES IN FAVOUR OF COMMUNITY

The court handed down the *Baleni* judgment on 22 November 2018, following a long-standing dispute between the community in the Eastern Cape and an Australian mining company, Transworld Energy and Mineral Resources (SA) (Pty) Ltd.

The dispute centred around the competition between the informal land rights held by the community in terms of the Interim Protection of Informal Land Rights Act, No 31 of 1996 (IPILRA) and the legal requirements to grant a mining right under the MPRDA.

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The dispute centred around the competition between the informal land rights held by the community in terms of the Interim Protection of Informal Land Rights Act, No 31 of 1996 (IPILRA) and the legal requirements to grant a mining right under the MPRDA. The court considered the relationship between the IPILRA and the MPRDA in respect of the level of engagement that is to be achieved prior to the granting of a mining right. The tension is that the IPILRA requires the informed consent of a community which has informal rights in land before

the community may be deprived of such rights, whereas the MPRDA requires only that a community be fully consulted prior to the granting of a mining right.

The court found that because these two pieces of legislation have a similar purpose – to redress historic economic and territorial dispossession – they should be read together. The court considered the elevated status that customary law enjoys under the constitutional dispensation and the special protection afforded to traditional communities under the IPILRA. The court also noted that the MPRDA does not specifically state that the MPRDA prevails in the event of an inconsistency with customary law, and that, in addition to requiring consultation with interested and affected parties, the MPRDA makes specific reference to promoting the rights and interests of



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*The implication of the Baleni judgment is that when a community has informal land rights, the Minister will lack the lawful authority to grant a mining right in terms of the MPRDA unless the provisions of the IPILRA have been complied with.*



communities. Given these factors, the court was satisfied that the Minister had additional obligations under the IPILRA to obtain the community's consent prior to granting TEM's mining right.

As was held in the *Maledu* judgment, the court echoed the sentiments that the IPILRA seeks to protect traditional communities by ensuring that communities have a right to decide what should happen to the land in which they have an interest; that it offers communities legal protection to assume control over and deal with their land according to customary law and usages practised by them; and most significantly, that the IPILRA provides that no person may be deprived of any informal right to land without their consent.

The implication of the *Baleni* judgment is that when a community has informal land rights, the Minister will lack the lawful authority to grant a mining right in terms of the MPRDA unless the provisions of the IPILRA have been complied with. Furthermore, in the event that the IPILRA is not complied with, a court may be willing to grant a declaratory order to uphold the informal land rights of a community.

The Minister has expressed concern over the judgment and has indicated that the Government will appeal certain parts thereof.

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*Nonhlanhla Mohlaba  
and Giada Masina*

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