



# DISPUTE RESOLUTION AND REAL ESTATE LAW ALERT

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INCORPORATING  
KIETI LAW LLP, KENYA

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Where do mining rights, permission to occupy and long-term leasehold agreements fall on the food chain?

Holders of mining rights are confronted with claims to surface rights from communities holding permissions to occupy.



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## Where do mining rights, permission to occupy and long-term leasehold agreements fall on the food chain?

Holders of mining rights are confronted with claims to surface rights from communities holding permissions to occupy.

### PTOS AND LEASEHOLDS

A permission to occupy (PTO) is a personal right allowing use or occupation of rural, unsurveyed land. A PTO is not registrable against the title deed of the property in the deeds office, but it is registerable in certain state departments where a register of the allocated plot or land is kept. Despite being personal in nature, the rights flowing from a PTO are generally accepted akin to real rights. See *Maduna v Daniel and Others* [2001] JOL 9186 (Tk).

The PTO dispensation in KwaZulu-Natal is regulated by the KwaZulu Land Affairs Act 111 of 1992 (KwaZulu) that allows the revocation of a PTO by the Minister of Agriculture, Land Reform and Rural Development (Minister) after consultation with the tribal authority. Due to the insecurity of the tenure a decision was taken during 1999 that PTOs will no longer be issued.

It is in some instances difficult to determine the validity of a PTO and the rightful holder thereof. The process of recording these rights was established under apartheid legislation which has undergone numerous repeals, amendments, and re-enactments. In addition, it is difficult to establish the precise location of the allotments and obtain the relevant registers. The holder of a PTO is not deprived of any rights and a PTO is still a valid right even if it has not been converted to another right.

Although communal land rights remain legally insecure, current occupiers are legally protected by the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). The primary objective of the IPILRA is to provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law; and to provide for matters connected with them. Section 1(2)(b) provides that: *"The holder of an informal right to land shall be deemed*

*to be an owner of land for the purposes of section 42 of the Minerals Act, 1991."* (The whole of Act 50 of 1991 was repealed in terms of section 101 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).)

The Ingonyama Trust Board, more specifically the tribal authority that allocates and administers property rights such as PTOs in KwaZulu-Natal, started a movement to invite all PTO holders to convert their PTO rights to long-term leaseholds. This project is known as the conversion project. On 11 June 2021, the KwaZulu-Natal High Court held that the conversion project is unconstitutional since it was an arbitrary deprivation of rights.

PTO rights are perpetual in nature, while on the other hand, lease agreements establish a payment obligation and can be terminated if the rent is not paid in accordance with the lease agreement and the occupiers can be evicted.

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The important distinction between lease agreements and PTOs is that lease agreements are common in land redistribution and are therefore given as a new right to beneficiaries where no previous right existed. However, occupiers on communal land are regarded as de facto owners of the land and they have existing informal rights that are protected by law.

### **MINING RIGHTS**

Mining rights do not suffer from these deficiencies. They are expressly recognised in statute as limited real rights. Records of mining rights are fastidiously kept.

Difficulties arise where mining rights and PTOs become the subject of conflict between mining companies and communities.

It should be borne in mind that the application for a mining right is a cumbersome process and the MPRDA and other relevant legislation expressly impose a duty

on an applicant applying for a mining right to consult in the prescribed manner with the landowner, the lawful occupier and any interested or affected party and to include the outcome of such consultation in the relevant environmental reports. No distinction is made between landowners and lawful occupiers and this includes within its purview affected parties other than owners and lawful occupiers.

### Limited real right

A mining right that has been granted by the Minister and registered in the Mineral and Petroleum Titles Registration Office confers on the holder of such rights certain limited real right in respect of the mineral and the land. Upon registration of a mining right in the Mineral and Petroleum Titles Registration Office, the right is binding on third parties (section 2(4) of the Mineral and Petroleum Titles Registration Act 16 of 1967).

The holder of the mining right and the owner of the surface right must exercise their respective rights with due regard for the rights and entitlements of the other party. The owner of the surface rights may not unlawfully or unreasonably refuse the holder of the mining right access to the property or interfere with the holder's ability to carry on the mining activity on the land.

Exercising of a mining right and PTOs

Section 5(3) of the MPRDA echoes two fundamental principles.

Firstly, the owner of the land to which the mining right relates is obliged to allow the holder access to the land to do what is reasonably necessary to effectively exercise the mining holder's rights.

Secondly, the holder of the mining right in turn is obliged to exercise its rights in a reasonable manner to cause the least possible

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inconvenience to the rights of the owner. See *Maleku and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41.

In terms of the MPRDA, the holder of a mining right obtains a statutory right of access to land. The holder of a mining right may enter the land to which such right relates together with his or her employees, and bring onto that land any plant machinery, or equipment and build, construct or lay down any surface or underground infrastructure that may be required for the purpose of mining. During the holder of the mining right's operations, they are entitled to exercise all such subsidiary or ancillary rights, without which they will not be able to effectively execute mining operations.

Despite the mining right holder's statutory right under the MPRDA in terms of access to the property, it is common, albeit not a legal requirement, for mining companies to enter into access and compensation agreements with landowners. The reasoning behind this is to ensure a good relationship between the mining right holder and the landowner and/or in this regard the holder of the right to occupy the land. It is to mitigate the potential for disputes and disruptions to mining operations, particularly in circumstances where the land is owned or occupied by rural communities.

It is accepted that the nature of a mining right is of an invasive nature and there is no denying that when exercising their rights, a mining right holder would intrude into the rights of the owner of the land to which the mining rights relate.

Under common law, the landowner cannot use the land in a way that would interfere with the mineral right holder's use, and if the landowner does so the mineral right holder can interdict the landowner's use or intended use. Section 53(2) of the MPRDA provides that farming or any use incidental thereto, does not fall within the ambit of section 53(1). The latter section requires any person who intends to use the surface of any land in a way which may be contrary to any object of the MPRDA or likely to impede such object to apply to the Minister for approval of such intended use.

If a dispute arises between the holder of a mining right and the holder of rights to the land, there should be a determination of a question of facts. Whether the holder of the mineral (mining) right acts bona fide and reasonably while exercising their rights. They must exercise their rights

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in a manner least onerous or injurious to the owner of the surface rights, but they are not obliged to forego ordinary and reasonable enjoyment merely because their operations or activities are detrimental to the interests of the surface owner. The use to which the owner of the surface rights puts the property at an earlier point in time cannot derogate from the rights of the holder of the mineral rights. See *Hudson v Mann* [1950] (4) SA 485 (T) at 488 B-H.

It can be accepted that the right of the landowner and the mining right holder are parallel and can co-exist. The MPRDA envisages that the land to which a mining right relates can still be lawfully occupied notwithstanding the existence of such a mining right. This could be in terms of a lease, servitude, or a statutory right as under the IPILRA.

### CONCLUSION

The provisions of the MPRDA and the IPILRA are not in conflict with each other and ought to be interpreted and read harmoniously. Each of these statutes must be read in a manner that permits each to serve their underlying purposes.

In case of irreconcilable conflict, the use of the surface rights must be subordinated to mineral exploration, and it therefore follows that the permissions to occupy do not affect or trump a mining right.

**LIËTTE VAN SCHALKWYK AND  
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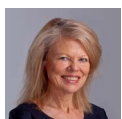
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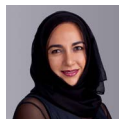
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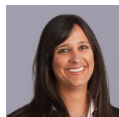
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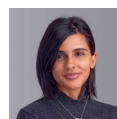
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**BBBEE STATUS: LEVEL ONE CONTRIBUTOR**

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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