



**Procedural fairness through meaningful consultation in
applications for mining-related permits in South Africa**

MA Swartbooï

 **orcid.org/0009-0008-3812-358X**

Dissertation accepted in partial fulfilment of the
requirements for the degree Master of Laws in Constitutional
Law at the North-West University

Supervisor: Mr NI Raboshakga

Graduation: May 2026

DEDICATION

To my mother, Mpho Sophy Swartbooi, who passed away on the 3rd of November 2021.

Isaiah 40:31

"but those who hope in the Lord will renew their strength. They will soar on wings like eagles; they will run and not grow weary, they will walk and not be faint."

ACKNOWLEDGEMENTS

The completion of this dissertation marks an important milestone in my academic journey, and it would not have been possible without the support, encouragement, and sacrifices of several people who walked this path with me. I am deeply grateful to each of them for their role in helping me reach this point.

First, I would like to honour the memory of my beloved mother, who passed away in 2021. Although she is no longer here to witness this achievement, her presence has remained a constant source of strength and motivation throughout my journey. She instilled in me the values of perseverance, hard work, and the importance of education from an early age. Her love, sacrifices, and unwavering belief in my abilities laid the foundation for everything I have been able to accomplish. Completing this dissertation is not only a personal achievement but also a tribute to her memory and the dreams she had for me. I hope this milestone reflects the pride she always had in me. We did it, mother!

I would also like to express my deepest appreciation to my grandmother, Ms. Mariam Mogoane, whose generosity and belief in my future made the beginning of this journey possible. By paying for my first year's registration, she made a profound sacrifice that allowed me to take the first step toward pursuing my Bachelor of Laws degree, without which the pursuit of a Master of Laws degree would not have been possible. Her support was not merely financial, but also emotional and motivational. Knowing that she believed in my potential gave me the confidence to continue even when the path felt uncertain. I remain forever grateful for her kindness, faith, and the opportunities she helped create for me.

My sincere gratitude goes to my supervisor, Mr. Ngwako Raboshakga, for his guidance, patience, and mentorship throughout the research and writing of this dissertation. His academic insight, constructive feedback, and willingness to share his knowledge played a crucial role in shaping this work. I am thankful for the time and effort he invested in guiding me through the complexities of this research process. His encouragement and professional support helped me remain focused and committed

to completing this dissertation. Mr. Ngwako, I hope that the successful completion of this dissertation renumeralates the countless hours we spent in your office discussing this dissertation and the hand you offered in keeping me nourished when I truly had nothing.

I would like to extend my heartfelt thanks to Ms. Olinda Matlhare, my partner, whose support during some of the most difficult moments of writing this dissertation meant more than words can fully express. There were days when the process felt overwhelming, but her encouragement, love, understanding, and presence helped me push through the darkest moments. Her kindness and belief in me served as a constant reminder that I was not alone in this journey, and for that I will always be deeply grateful. Thank you for holding my hand through most of it and caring for more where I was unable to do so myself.

Finally, I would like to thank my friends who stood by me throughout this academic journey. Whether through words of motivation, moments of laughter, or simply being there when I needed support, each of you played a role in helping me persevere and stay motivated. Your belief in me reminded me that this journey was worth completing.

To everyone who contributed to this journey in ways both big and small, I offer my sincere and heartfelt gratitude. This dissertation is not only a reflection of my hard work, but also of the collective support, encouragement, and love that carried me through to the end.

ABSTRACT

The *MPRDA* requires consultation of interested and affected parties in applications for mining-related permits. Prior to the Constitution of the Republic of South Africa, 1996 (hereafter the *Constitution*), there was little to no legislative evidence of the kind of consultation afforded by the *Mineral and Petroleum Resources Development Act 28 of 2002* (hereafter the *MPRDA*) to interested and affected parties if a proponent mining company intends on commencing with mining operations, including prospecting activities. The consultation requirement when applications for mining-related permits (including prospecting rights, mining rights and mining permits) are made by a proponent mining company is mandated in, amongst others, sections 10, 16, 17, 22, 23 and 27 of the *MPRDA* and sections 2(4)(g)–(h) of the *National Environmental Management Act 107 of 1998* (hereafter the *NEMA*) and the regulations promulgated in terms of both these statutes. The study traces the legal history and development of this legal framework.

This study makes the point that the consultation processes in this legal framework, which includes the *MPRDA*, the *NEMA* and their regulations, are subject to the vision of procedural fairness envisaged by section 33 of the Constitution and the *Promotion of Administrative Justice Act 3 of 2000* (hereafter the *PAJA*). The study explores how the legal framework setting out consultation processes with respect to applications for mining-related permits fares in light of the procedural fairness vision envisaged by section 33 of the *Constitution*, read with the *PAJA* and the *meaningfulness* jurisprudence of South African courts.

The study analyses meaning, purpose, objects, and extent of procedural fairness in section 33 of the Constitution and the *PAJA* and the relevance thereof to applications for mining-related permits in terms of the *MPRDA* and the *NEMA*. In doing so, the study explores the development of the notion of *meaningfulness, which forms part of the right to procedural fairness*, in the legal framework regulating consultation processes in applications for mining-related permits to achieve procedural fairness. The study contends that the legal framework regulating consultation processes in

applications for mining-related permits is insufficient for purposes of giving effect to the notion of *meaningfulness*.

The study proceeds to make recommendations which are aimed at providing legal reform to the consultation processes in applications for mining-related permits so that effect is given to the vision of procedural fairness envisaged in section 33 of the *Constitution* and the *PAJA*. These recommendations include the inclusion of monitoring and internal and mandatory dispute resolution mechanisms, extending the time allowed for consultation, amending the *MPRDA* to expressly include the concept of *meaningfulness* and the need for the courts to be more flexible in adjudicating matters involving the grant or refusal of a mining-related permit based on the fulfilment, or not, of the legal framework regulating consultation processes during applications for same.

KEYWORDS: Mining-related permits, consultation process, procedural fairness, meaningful consultation, interested and affected parties, different but fair

TABLE OF CONTENTS

CHAPTER 1	4
1.1 Overview and background.....	4
1.1.1 Development of the community's rights in consultation processes during applications for mining-related permits	5
1.1.2 Current legal framework regulating consultation processes.....	9
1.1.3 The right to procedurally fair administrative action	13
1.1.4 Meaningful participation/consultation/engagement in applications for mining-related permits.....	15
1.2 Motivation.....	21
1.3 Research question	22
1.4 Research aims and objectives	22
1.5 Premises, hypotheses and limitations.....	23
1.5.1 Premises:	23
1.5.2 Hypothesis	23
1.5.3 Limitations	23
1.6 Research methodology	24
1.7 Chapter outline	24
CHAPTER 2	26
2.1 Background.....	26
2.2 The legislative framework regulating consultation processes during applications for mining-related permits.....	33
2.2.1 The MPRDA, the NEMA and their regulations.....	33
2.2.1.1 Legal interpretation under the MPRDA.....	33
2.2.1.2 Provisions dealing with consultation with interested and affected parties.....	33

2.2.1.3	First requirement for the grant of mining-related permits.....	34
2.2.1.4	Second and third requirements for the grant of mining-related permits.....	40
2.3	Purpose and limitations of the consultation requirements.....	43
2.3.1	Purpose of the consultation requirement.....	43
2.3.2	Definition of "interested and affected parties"	46
2.3.3	The exclusion of the consent requirement under the MPRDA and this study	49
2.4	The consultation process under the <i>MPRDA Regulations</i> of 2004..	53
2.5	The consultation process under the 2020 <i>MPRDA Amendment Regulations</i>	55
2.6	The consultation process under the <i>NEMA</i>.....	57
2.6.1	EIA Amendment Regulations of 2021	60
2.7	The consultation process under the <i>DMR Consultation Guidelines</i>	62
2.8	The consequences of failure to apply for a prospecting right in the prescribed manner.....	64
2.9	The lack of an internal and mandatory dispute and resolution mechanism before the granting of a mining-related permit	67
2.10	Conclusion	68
CHAPTER 3		70
3.1	Introduction.....	70
3.2	Constitutionalisation of procedural fairness	72
3.3	General purpose and objects of procedural fairness elucidated by the courts and scholars	80
3.4	Procedural fairness as required by the <i>PAJA</i>	81
3.4.1	Section 3 of the PAJA: Administrative action affecting any person.....	82
3.4.1.1	The scope of section 3(1) of the PAJA	82

3.4.1.2	Section 3(2)(a) of the PAJA.....	87
3.4.1.3	The minimum requirements (mandatory procedures) in terms of section 3(2)(b) of the PAJA.....	88
3.4.1.4	Discretionary procedures in terms of section 3(3) of the PAJA.....	95
3.4.2	Section 4 of the PAJA: Administrative action affecting the public.....	99
3.4.2.1	The scope of section 4: what is administrative action affecting the public?	99
3.4.2.2	Purpose and effect of section 4 of the PAJA	100
3.4.2.3	The content of section 4 of the PAJA	101
3.4.3	"Different" but "fair" provisions: Sections 3(5) and 4(1)(d) of the PAJA	108
3.4.3.1	"Different but fair": Section 3(5) of the PAJA, the MPRDA and NEMA.....	112
3.4.3.2	"Different but fair" Provisions: Section 4(1)(d) of the PAJA, the MPRDA and the NEMA	116
3.5	Conclusion.....	119
CHAPTER 4		122
4.1	Introduction.....	122
4.2	The "<i>meaningfulness</i>" principle in socio-economic rights cases ..	123
4.2.1	Port Elizabeth Municipality v Various Occupiers.....	125
4.2.2	Occupiers of 51 Olivia Road v City of Johannesburg	127
4.2.3	Residents of Joe Slovo Community, Western Cape v Thubelisha Homes	132

4.3 Judicial conceptualisation of <i>meaningful consultation</i> in the regulation of consultation processes during applications for mining-related permits	135
4.4 Legislative framework regulating the <i>meaningful consultation</i> principle	143
4.4.1 Criticism of the Draft Amendments to the MPRDA Regulations, 2019	144
4.4.2 The 2020 MPRDA Amendment Regulations.....	146
4.4.3 Shortcomings of the 2020 MPRDA Amendment Regulations	149
4.4.4 2025 Draft Minerals Resources Amendment Bill	150
4.5 Conclusion.....	152
CHAPTER 5	154
5.1 Introduction.....	154
5.2 Summary of research findings.....	154
5.2.1 Chapter 1.....	154
5.2.2 Chapter 2.....	155
5.2.3 Chapter 3.....	157
5.2.4 Chapter 4.....	159
5.3 Recommendations	161
5.3.1 The need to amend the legal framework to include effective oversight mechanisms (monitoring)	162
5.3.2 The need to amend the legal framework to include internal and mandatory dispute resolution mechanisms	163
5.3.3 The need to amend the legal framework to extend the time limit for representations	164
5.3.4 The need to amend sections 16(4)(b), 22(4)(b) and 27(5)(a) of the MPRDA	164
5.3.5 The need for the courts to be flexible	165
5.4 Conclusion.....	166

LIST OF ABBREVIATIONS

AD	Appellate Division (of the Supreme Court of South Africa)
AHRLJ	African Human Rights Law Journal
All SA	All South African Law Reports
B	Bophuthatswana High Court
BCLR	Butterworths Constitutional Law Reports
BEE	Black Economic Empowerment
C	Cape of Good Hope Provincial Division (Cape Town)
CALS	Centre for Applied Legal Studies
CW	Corruption Watch
CC	Constitutional Court
DMR	Department of Mineral Resources (South Africa)
E	Eastern Cape Division
EJIL	European Journal of International Law
EIA	Environmental Impact Assessment
GG	Government Gazette
GN	Government Notice
GNP	North Gauteng High Court (Pretoria)
<i>IPILRA</i>	<i>Interim Protection of Informal Land Rights Act 31 of 1996</i>
JSAIMM	Journal of the Southern African Institute of Mining and Metallurgy
LCC	Land Claims Court
<i>MRA</i>	<i>Mining Rights Act 20 of 1967</i>

<i>MPRDA</i>	<i>Mineral and Petroleum Resources Development Act 28 of 2002</i>
<i>NEMA</i>	<i>National Environmental Management Act 107 of 1998</i>
<i>PAJA</i>	<i>Promotion of Administrative Justice Act 3 of 2000</i>
PELJ / PER	Potchefstroom Electronic Law Journal
Reg	Regulation(s)
RM	Regional Manager (<i>MPRDA</i>)
RMDEC	Regional Mining Development and Environmental Committee
SA	South African Law Reports
SCA	Supreme Court of Appeal
S&EIR	Scoping and Environmental Impact Reporting (process)
SAHRC	South African Human Rights Commission
T	Transvaal Provincial Division
Tk	Transkei Division of the High Court
TPD	Transvaal Provincial Division (old series used in some citations)
W	Witwatersrand Local Division
WCC	Western Cape Division, Cape Town
ZACC	Constitutional Court (neutral citation, South Africa)
ZAFSHC	Free State High Court (neutral citation, South Africa)
ZAGPPHC	Gauteng Division, Pretoria (neutral citation, South Africa)
ZAGPJHC	Gauteng Local Division, Johannesburg (neutral citation, South Africa)
ZASCA	Supreme Court of Appeal (neutral citation, South Africa)

ZAWCHC

Western Cape Division, Cape Town (neutral citation, South Africa)

CHAPTER 1

Introduction

1.1 Overview and background

Moody asserts that significant mining activities alter not only the physical terrain of a region but also its social, economic, and political environments within the area.¹ The International Institute for Environment and Development (IIED) observed that although the development of minerals can establish new communities and bring prosperity to existing ones, it can also lead to significant disruption.² For example, mining can lead to the loss of natural resources on which communities rely for their livelihoods and well-being, including water resources, agricultural land, and important biodiversity.³

Therefore, it is useful for mining companies to consult with affected communities and for legislation to regulate how these consultations are conducted so that these adverse effects are communicated and engaged to address these adverse effects to the environment and communities. According to the Department of Mineral Resources (DMR) *Consultation Guidelines, 2016* (*DMR Consultation Guidelines*), "consultation", which enables transparency in how decisions are made, means:

a two-way communication process between the proponent mining company, on the one hand, and interested and affected parties, including the community, on the other hand, wherein the former listens to and considers the latter's response.⁴

¹ Moody *The Gulliver File: Mines, People, and Land: A Global Battleground* 10.

² International Institute for Environmental Development 2001
<https://www.iied.org/sites/default/files/pdfs/migrate/G00901.pdf>.

³ South African Human Rights Commission *National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa* 42 (hereafter SAHRC Mining Hearing Report).

⁴ Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties 2* (hereafter *DMR Guidelines on Consultation*).

According to the *DMR Consultation Guidelines*, the community includes "the members or part of the community, directly affected by prospecting or mining, on land occupied by such members or part of the community".⁵ The *DMR Consultation Guidelines* further specify that the purpose of consultation with communities is to:

provide them with the necessary information about the proposed prospecting or mining project, enabling them to make informed decisions, as well as to determine whether interference with the communities' rights to use the affected properties can be addressed.⁶

1.1.1 Development of the community's rights in consultation processes during applications for mining-related permits

The involvement of communities in applications for mining-related permits in South Africa can, on paper, be legally traced as far back as 1867 through ordinances.⁷ Legislation, such as *Law 16 of 1899*,⁸ were later enacted. In this law, the Volksraad (the former parliament of the former Transvaal Republic) provided that the government was not authorised to declare a public digging or prospecting area on privately owned land, nor could it force the landowner to permit prospecting there, unless the owner was prospecting on the land himself or had given consent for others to do so.⁹ By 1904, both the *Law of 1899 and the Orange Free State (OFS) Precious Stones Ordinance, 1904* shared a commonality: the right of consent was granted to the landowner, rather than "the community affected by prospecting or mining".¹⁰

Statutes such as the *Natives Land Act* 27 of 1913 (hereafter the *Natives Land Act*) and the *Development Trust and Land Act* 18 of 1936 (hereafter the *Development Trust and Land Act*) deprived black people of their rights to own and administer their land.¹¹ Black

⁵ *DMR Guidelines on Consultation* 2.

⁶ *DMR Guidelines on Consultation* 4.

⁷ See Chapter 2, subheading 2.1 below for a more detailed elaboration on these laws.

⁸ *Law 16 of 1899*.

⁹ Section 1 of *Law 16 of 1899*.

¹⁰ *Law 16 of 1899*.

¹¹ Mitchell, Moalusi, and Van der Walt 2012 *JSAIMM* 151.

communities were not adequately consulted about transactions related to their land.¹² For example, black communities were able to own land only through a trust-like arrangement with a government official.¹³ They were limited to ownership within geographical areas defined by statute, such as those specified in the *Development Trust and Land Act*.¹⁴

Over the years, further mining legislation was introduced, including the *Precious Stones Act 73* of 1964 (hereafter the *1964 Precious Stones Act*), which regulates diamonds and other precious stones, as well as the *Mining Rights Act 20* of 1967 (hereafter the *MRA*), which regulates mining rights.¹⁵ The *MRA* was subsequently regarded as the primary consolidating statute and incorporated provisions regulating both prospecting and mining activities.¹⁶ For example, the legislation on prospecting provides that the state shall regulate "the rights to prospect for, mine, and dispose of oil".¹⁷ In contrast, "the right to prospect for, mine, and dispose of base minerals would be vested in or bestowed on the holder of the mining rights".¹⁸

The *Minerals Act 50* of 1991 (hereafter the *Minerals Act*) initiated a shift in the regulation of specific rights and privileges.¹⁹ For example, according to section 47(4) of the *Minerals Act* "any person who immediately before the commencement of the *Minerals Act* had the right to mine any mineral under section 2(1)(b) of the *MRA* or anyone who acquired such a right from such person and had it immediately before such commencement, was deemed to be the holder of a mining authorisation granted in terms of the *Minerals Act* for a period not exceeding one year".²⁰ One year after the expiration of the right to mine, to persist with mining operations, the holder of a mining

¹² Mitchell, Moalusi, and Van der Walt 2012 *JSAIMM* 152.

¹³ Mitchell, Moalusi, and Van der Walt 2012 *JSAIMM* 152.

¹⁴ Mitchell, Moalusi, and Van der Walt 2012 *JSAIMM* 152.

¹⁵ Mathebula 2023 *PELJ* 2.

¹⁶ Mathebula 2023 *PELJ* 2.

¹⁷ Mathebula 2023 *PELJ* 2.

¹⁸ Section 2(1)(b) of the *Mining Rights Act 20 of 1967* (hereafter the *MRA*).

¹⁹ Mathebula 2023 *PELJ* 2.

²⁰ Section 47(4) of the *Minerals Act 50 of 1991* (hereafter the *Minerals Act*).

authorisation was required to secure a mining authorisation under section 9 of the *Minerals Act*.²¹

Under the *Minerals Act*, the state was empowered to award rights to mine and prospect for the processing and use of minerals, as well as to award same to eligible persons.²² State control continued to center on the rights to mine, prospect for, and extract or dispose of oil, precious metals, and base minerals, as well as the common law rights of those who held those resources.²³

The reading of these laws and the abstracts provided above reveals that there was little regulation of consultation in a strict sense during pre-democratic South Africa. To a significant extent, this study will demonstrate how far South Africa has progressed in the democratic era in developing and sustaining a framework for consultation with mining-affected communities that breaks away from the unjust, unfair, and oppressive manner in which these communities were previously treated.

Against this backdrop, the *Mineral and Petroleum Resources Development Act 28 of 2002* (hereafter the *MPRDA*) was passed, introducing the requirement to consult with mining-affected communities under section 10 of the *MPRDA*.²⁴ According to section 10(1) of the *MPRDA*, "within 14 days after accepting an application lodged in terms of sections 16, 22 or 27 (applications for prospecting and mining rights), the Regional Manager (RM) of the Department of Mineral Resources (DMR) must, in the prescribed manner:

- (a) Make known that an application for a prospecting right, mining right or mining permit has been received in respect of the land in question; and
- (b) Call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice."²⁵

²¹ Section 47(4) of the *Minerals Act*.

²² Mathebula 2023 *PELJ* 2.

²³ Mathebula 2023 *PELJ* 2.

²⁴ Section 10 of the *Mineral and Petroleum Resources Development Act 28 of 2002* (hereafter the *MPRDA*).

²⁵ Sections 10(1)(a)–(b) of the *MPRDA*.

Section 10(2) states further that suppose a person objects to the granting of a prospecting right, mining right, or mining permit, the RM must refer the objection to the Regional Mining Development and Environmental Committee²⁶ for consideration and advice to the Minister of Mineral Resources.²⁷

From the outset, it is essential to note that for this study, the term *mining-related permits* will be used to encompass a prospecting right, a mining right and a mining permit.

The *MPRDA* contains several specific provisions dealing with communities. Initially, it defines a "community" as a "coherent, social group of persons with interests or rights in a particular area of land, which the members have or exercise communally in accordance with an agreement, custom, or law".²⁸ The *MPRDA* includes several provisions that enable communities to safeguard their land interests when applications for rights under the *MPRDA* are made.²⁹ These measures pertain to "consultation, social and labour plans, preferent rights afforded to communities, the continuation of royalty payments in certain circumstances, and Black Economic Empowerment (BEE)".³⁰ Mitchell *et al*/consultation serves as the initial contact between the applicant for mining-related permits under the *MPRDA* and the community.³¹ Thus, the foundations may be laid for achieving the objects outlined in the *MPRDA*.³²

²⁶ See subheading in Chapter 2 of this study.

²⁷ Section 10(1) of the *MPRDA*.

²⁸ Section 10(2) of the *MPRDA*.

²⁹ Mitchell, Moalusi, and Van der Walt 2012 *JSAIMM* 154.

³⁰ Mitchell, Moalusi, and Van der Walt 2012 *JSAIMM* 153; see also ss 23(1)(e), 104, 11, 100.

³¹ Mitchell, Moalusi, and Van der Walt 2012 *JSAIMM* 154.

³² Mitchell, Moalusi, and Van der Walt 2012 *JSAIMM* 154; The objectives of the *MPRDA* are outlined in section 2 of the *MPRDA* and include:

- (f) "Promote employment and advance the social and economic welfare of all South Africans."
- (g) "Provide for the security of tenure in respect of prospecting, exploration, mining, and production operations."
- (h) "Give effect to s 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development"; and
- (i) "Ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating".

1.1.2 Current legal framework regulating consultation processes³³

Before commencing with the legal framework regulating consultation processes, it is appropriate to define the *interested and affected party(s)*. According to the *DMR Consultation Guidelines*, interested and affected party(s) refer to persons who are directly affected by the proposed mining activity.³⁴ Interested and affected party(s) include the landowner, lawful occupier, and community in their definition.³⁵

After an application (to mine or to prospect)³⁶ has been accepted by the DMR, the mining company must, first, "notify and consult with the landowner", tenant/occupier/resident, and other interested and affected people.³⁷ Second, the mining company must conduct an environmental assessment.³⁸ Consultation is a mandatory process under the *MPRDA* and is divided into two discrete phases. First, sections 16(4)(b) (relating to prospecting right applications) and 22(4)(b) (relating to mining right applications) of the *MPRDA* both require that consultation "with the land owner or lawful occupier or other interested and affected party occur after the relevant application has been lodged and accepted but before (and as a condition to) the grant of the relevant right".³⁹ Second, section 5A(c) of the *MPRDA* prohibits "the commencement of mining or prospecting operations without notifying and consulting

³³ See chapter 2 of this study for a more detailed version of the legal framework.

³⁴ See subheading 2.3.2 in chapter 2 of this study for a detailed discussion of the definition of interested and affected party(s).

³⁵ See heading 2.3.2 in chapter 2 of this study.

³⁶ Section 1 of the *MPRDA* defines "prospecting" as "prospecting" means intentionally searching for any mineral by means of any method-

- (a) which disturbs the surface or subsurface of the earth, including any portion of the earth that is under the sea or under other water; or
- (b) in or on any residue stockpile or residue deposit, in order to establish the existence of any mineral and to determine the extent and economic value thereof; or
- (c) in the sea or other water on land.

According to section 1 of the *MPRDA* "mine", when used as a verb, means any operation or activity for the purposes of winning any mineral on, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto.

³⁷ Section 5(4)(c) of the *MPRDA*.

³⁸ Sections 24(1), (3), (5), and (7) of the *National Environmental Management Act 107 of 1998* (hereafter the *NEMA*), respectively.

³⁹ Sections 16(4)(b) and 22(4)(b) of the *MPRDA*.

with the landowner or lawful occupier of the land in question".⁴⁰ This section provides an obligation to consult before commencing operations.⁴¹ Section 5A(c) of the *MPRDA* has been interpreted by the courts to be a separate obligation to the consultation requirements under sections 16 and 22 of the *MPRDA*.⁴² This is due to the fact that consultation under section 5A(c) occurs after a prospecting or mining right has been granted but prior to the start of operations.⁴³

The 2004 *MPRDA Regulations*⁴⁴ recognise and provide a legal framework for the regulation of consultation involving participation of interested and affected parties. According to the 2004 *MPRDA Regulations*, once compliance with section 10(1) of the *MPRDA* is achieved, a corresponding notice should be posted on a notice board that is publicly accessible at the RM's office of the Department of Mineral Resources (DMR).⁴⁵ Additionally, the RM is required to publicise the application.⁴⁶ First, the RM may publish in the official Provincial Gazette, a notice in the Magistrates' Court in the magisterial district of the land concerned.⁴⁷ Second, The RM may place an advertisement in a local or national newspaper that is circulated in the area where the land related to the application is located.⁴⁸ The required components of such a notice must comprise an invitation for the public to provide written comments by a specified date mentioned in the notice (this date must not be less than 30 days from the notice's publication date), including the name and title of the person designated to receive the comments, as well as their contact information.⁴⁹

Additionally, the *MPRDA* requires those applying for a prospecting right are required to engage in consultation processes with interested and affected parties who wish to

⁴⁰ Section 5(4)(c) of the *MPRDA*.

⁴¹ Section 5(4)(c) of the *MPRDA*.

⁴² *Meepo v Kotze* 2008 (1) SA 104 (NC) at para 16.

⁴³ *Meepo v Kotze* 2008 (1) SA 104 (NC) at para 16.

⁴⁴ *MPRDA Regulations* no R527 GG 26275 of 23 April 2004 (hereafter the *2004 MPRDA Regulations*).

⁴⁵ Regulation 3(2) of the *2004 MPRDA Regulations*.

⁴⁶ Regulation 3(3) of the *2004 MPRDA Regulations*.

⁴⁷ Regulation 3(3) of the *2004 MPRDA Regulations*.

⁴⁸ Regulation 3(3) of the *2004 MPRDA Regulations*.

⁴⁹ Regulation 3(4) of the *2004 MPRDA Regulations*.

provide their comments.⁵⁰ The applicant is required to consult with the landowner or legal occupier and any other impacted parties, including communities, and must provide the outcomes of this consultation within 30 days of receiving notification from the RM about the need to consult.⁵¹ For mining right applications, the applicant must notify and consult with interested and affected parties within 180 days of being notified by the RM of the requirement to consult.⁵²

Once a prospecting or mining right is acquired, but before starting prospecting or mining activities, the rights holder must consult with the landowner or lawful occupant of the respective land.⁵³ After consultation in terms of section 5A(c) of the *MPRDA*, the proponent mining company will conduct an environmental impact assessment, which includes a consultation requirement, in their application for an environmental authorisation to mine as mandated by the *National Environmental Management Act* 107 of 1998 (hereafter the *NEMA*) and the *Environmental Impact Assessment (EIA) Regulations*, 2014 (hereafter the *2014 EIA Regulations*).⁵⁴ The *NEMA*, which serves as environmental framework legislation,⁵⁵ bears relevance to this study because mining activities must comply with procedural requirements outlined in the *NEMA* and its regulations.⁵⁶ For instance, the *NEMA* mandates that the relevant authorities assess, investigate, and promptly communicate the possible repercussions or impacts of activities, including those like mining, on the environment and the interested and affected parties.⁵⁷ Some of the *NEMA*'s principles are concerned with public consultation and participation with interested and affected parties when activities such as mining have an impact on their living environment.⁵⁸ This includes the principle in

⁵⁰ S 16(4)(b) of the *MPRDA*.

⁵¹ S 16(4)(b) of the *MPRDA*.

⁵² S 22(4)(b) of the *MPRDA*.

⁵³ Section 5A(c) of the *MPRDA*.

⁵⁴ Regulation 39(1) of GN R982 in GG 38282 of 4 December 2014 (*2014 EIA Regulations* published under the *NEMA*).

⁵⁵ "Environmental framework legislation" means the general and foundational laws that establish broader principles, goals, and institutional mechanisms for managing the environment.

⁵⁶ Section 24 of the *NEMA*.

⁵⁷ Sections 24(1), (3), (5), (7) of the *NEMA*.

⁵⁸ Section 2 of the *NEMA*.

section 2(4)(f) of the *NEMA* which states that the participation of all communities in environmental governance must be promoted.⁵⁹ The *NEMA*'s principles 2(4)(g)–(h) provide a firm ground on which "statutory procedural rights of communities to participate in environmental matters affecting the community" can be relied upon.⁶⁰

In terms of regulation 39(1) of the *2014 EIA Regulations*, if the proponent is not "the owner or person in control of the land on which the mining is to be undertaken, the proponent must, before applying for an environmental authorisation in respect of such activity, obtain the written consent of the landowner or person in control of the land" (both of whom ultimately form part of the "community" and "interested and affected party(s)") to undertake such activity on that land.⁶¹ According to regulation 40(3) of the *2014 EIA Regulations*, the purpose of public participation in environmental impact assessment is:

so that potential or registered interested and affected parties, including the competent authority, may be provided with an opportunity to comment on reports and plans contemplated in regulation 40(1)⁶² before submission of an application for a prospecting or mining permit but must be provided with an opportunity to comment on such reports once an application has been submitted to the competent authority.⁶³

The public participation processes outlined in regulation 41 of the *2014 EIA Regulations* mainly concern the forms in which communities may be made aware of the proposed application for an environmental impact assessment and environmental authorisation. The regulations address the interrogatives (i.e. "what", "where", "when", and "how") of this public participation process and therefore, similar to that of the MPRDA.⁶⁴

Under section 6 of the *MPRDA*, decisions (of administrative nature) by the state to award prospecting or mining rights must comply with the requirements of procedural

⁵⁹ Section 2(4)(1) of the *NEMA*.

⁶⁰ Section 2(4)(g) – (h) of the *NEMA*.

⁶¹ Regulation 39(1) of the *2014 EIA Regulations*.

⁶² Regulation 40(1) speaks to (a) basic assessment report and EMPr, and the closure plan in the case of a closure activity, submitted in terms of regulation 19; and (b) scoping report submitted in terms of regulation 21, the environmental impact assessment report, EMPr, and the closure plan in the case of a closure activity, submitted in terms of regulation 23.

⁶³ Regulation 40(3) of the *2014 EIA Regulations*.

⁶⁴ Regulation 41(2) – (6) of the *2014 EIA Regulations*.

fairness, and interested or affected parties must be consulted timeously and in a formal manner so that both the state and the relevant mining company ensure that the process is procedurally fair.⁶⁵ In *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* (hereafter *Sustaining the Wild Coast NPC*)⁶⁶ the SCA confirmed that the grant of an exploration right constitutes administrative action, meaning the grant of a prospecting and mining right will have the same consequence.⁶⁷

1.1.3 The right to procedurally fair administrative action

Section 33 of the *Constitution*⁶⁸ provides that "everyone has the right to administrative action that is lawful, reasonable, and procedurally fair".⁶⁹ Additionally, "everyone whose rights have been adversely affected by administrative action"⁷⁰ has the right to be given written reasons".⁷¹ This right should be read together with the *PAJA* as the national legislation that was passed to give effect to section 33 of the *Constitution*.

Section 6(2)(c) of the *PAJA* allows judicial review of administrative action where the action was procedurally unfair.⁷² Section 3 of the *PAJA* is applicable where the affected person's rights or legitimate expectations are materially or adversely affected. In contrast, section 4 of the *PAJA* is applicable where the affected are the public.⁷³

Section 3(2)(b) of the *PAJA* refers to the "minimum requirements" which must be met for an administrative action to be fair.⁷⁴ These provide "adequate notice of the nature and purpose of the proposed administrative action, a reasonable opportunity to make representations, a clear statement of the administrative action, sufficient notice of the

⁶⁵ Humby 2012 *PELJ* 173-175.

⁶⁶ *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* 2024 (5) SA 38 (SCA) (hereafter *Sustaining the Wild Coast NPC*).

⁶⁷ *Sustaining the Wild Coast NPC* para 19.

⁶⁸ *Constitution of the Republic of South Africa, 1996* (hereafter *the Constitution*).

⁶⁹ Section 33 of the *Constitution*.

⁷⁰ See chapter 3 for a definition of "administrative action".

⁷¹ Quinot and others *Administrative Justice in South Africa: An Introduction* 230.

⁷² Section 6(2)(c) of the *PAJA*; The "public" is defined in s 1 of the *PAJA* as "any group or class of the public".

⁷³ Sections 3 and 4 of the *PAJA*.

⁷⁴ Section 3(2)(b) of the *PAJA*.

right to review/internal appeal, and adequate notice of the right to request reasons".⁷⁵ Section 3(2)(b) envisages procedural fairness to be achieved by allowing the community to make representations during the consultation process to inform the outcome of the decision to award the mining-related permit.⁷⁶

The Constitutional Court in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (hereafter *Bengwenyama 2011 (CC)*)⁷⁷ noted that:

A more general purpose of the consultation is to provide land owners or occupiers with the necessary information on everything that is to be done so that they can make an informed decision about: first, the representations to be made; second, whether to use the internal procedures if the application goes against them and; third, whether to take the administrative action concerned on review.⁷⁸ Therefore, the consultation process and its result are an integral part of the fairness process.⁷⁹

The purposes of consultation discussed in *Bengwenyama* are central to this dissertation because they establish the importance of consultation in applications for mining-related permits. Further, the purposes gave meaning to a vague already existing legal framework regulating applications for mining related permits.

In terms of section 3(3) of the *PAJA*, the administrator has the discretion to decide on whether the person affected can be assisted in making representation, while legal representations may be allowed in serious and complex cases.⁸⁰

Section 3(4) of the *PAJA* allows for a deviation from the above "minimum requirements" if it is "reasonable and justifiable in the circumstances", considering the factors set out therein (meaning that on balance, the factors must favour deviation).⁸¹

⁷⁵ Section 3(2)(b) of the *PAJA*.

⁷⁶ Quinot *et al Administrative Justice in South Africa: An Introduction* 176.

⁷⁷ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) (hereafter *Bengwenyama 2011 (CC)*).

⁷⁸ *Bengwenyama 2011 (CC)* para 66-67.

⁷⁹ *Bengwenyama 2011 (CC)* paras 66-67.

⁸⁰ Section 3(3) of the *PAJA*; See chapter 3.4.1.4 of this study.

⁸¹ Section 3(4) of the *PAJA*.

In each individual case, this deviation must be initiated by the responsible administrator. The factors are:⁸²

- (i) the objects of the empowering provision;
- (ii) the nature and purpose of, and the need to take, the administrative action;
- (iii) the likely effect of the administrative action;
- (iv) the urgency of taking the administrative action or the urgency of the matter;
and
- (v) the need to promote an efficient administration and good governance.

Section 4(1) of the *PAJA* is applicable where the administrative action "materially and adversely affects the rights of the public".⁸³ Section 4(1) goes on to provide an administrator concerned with giving effect to procedural fairness by the implementation of any of the five possible procedures:⁸⁴ First, public inquiry; second, notice and comment procedure; third, a combination of the above (i.e., implement both procedures at the same time); fourth, where there is an empowering provision permitting a fair but different procedure, that procedure can be followed, but it must be fair; fifth, follow a public inquiry.

1.1.4 Meaningful participation/consultation/engagement in applications for mining-related permits

Our courts have been clear in various contexts about the need for public participation and for consultations to be *meaningful*.⁸⁵ Further, public participation has been seen as an instrument to achieve procedural fairness.⁸⁶ In *Bengwenyama 2011 (CC)*, the Constitutional Court found that various notice and consultation requirements were "indicative of a serious concern for the rights and interests of land owners and lawful occupiers" in mining-affected communities.⁸⁷ The Court in *Bengwenyama 2011 (CC)* emphasised that the central purpose of consultations was to explore whether any form

⁸² Section 3(4) of the *PAJA*.

⁸³ Section 4(1) of the *PAJA*; See chapter 3.4.2.3.1 of this study.

⁸⁴ Section 4(1) of the *PAJA*.

⁸⁵ SAHRC *Mining Hearing Report* 60.

⁸⁶ South African Human Rights Commission *National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa* 60.

⁸⁷ *Bengwenyama 2011 (CC)* para 60.

of "accommodation" is possible between the mining right applicant and the lawful landowner or occupier.⁸⁸ Thus, adequate consultation requires an engagement in "good faith" in an "attempt to reach an accommodation" between the parties.⁸⁹ Beyond this case, the courts have on multiple occasions reiterated the obligation of conducting *meaningful* consultation.⁹⁰

To minimise the potential for disputes during the permitting stage and to ensure good relations during the operating phase, it is essential that consultations with the landowner, lawful occupier, and any interested and affected parties are meaningful and conducted in good faith.⁹¹ This means that stakeholders must be given adequate information to enable them to engage *meaningfully*.⁹² Further, the applicant must avoid the lure of a tick-box consultative process.⁹³ That said, the *MPRDA* stipulates that applicants for mining-related permits are not obliged to acquire consent from potentially mining affected parties.⁹⁴

The *meaningfulness* standard is about appreciating that the granting of mining-related permits is undeniably a:

grave and considerable invasion of the use and enjoyment of the land on which the prospecting [and mining operations are] to happen.⁹⁵

The court in *Bengwenyama 2011 (CC)* and the *DMR Consultation Guidelines* both provide that "consultation is a mechanism that assesses whether an accommodation is reachable between the parties concerning the interference with the informal rights

⁸⁸ South African Human Rights Commission *National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa* 60.

⁸⁹ *Bengwenyama 2011 (CC)* para 60.

⁹⁰ See in the context of socio-economic rights, for example, *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC). In the legislative context, see, for example, *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC).

⁹¹ Tlale 2020 *PER/PELJ* 9.

⁹² Tlale 2020 *PER/PELJ* 9.

⁹³ Tlale 2020 *PER/PELJ* 9.

⁹⁴ Tlale 2020 *PER/PELJ* 9.

⁹⁵ *Bengwenyama 2011 (CC)* para 63.

to land of the lawful occupiers".⁹⁶ Consultation respects the informal land rights of customary communities by enabling reciprocal, two-way communication between all involved parties.⁹⁷ The courts held that, in maintaining the *meaningfulness* standard, it must be borne in mind that -

Consultation cannot be a mere formal process; it requires a genuine and effective engagement of minds between the consulting and the consulted parties. A mere formalistic attempt to consult does not constitute consultation.⁹⁸

The court in *Maqoma v Sebe*⁹⁹ (hereafter *Sebe*) stated further that:

Consultation in its normal sense, without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party (also indicative of the prefix "con") in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate.¹⁰⁰

From these extracts, it is clear that consultation is a "two-way process", and mere notification can never constitute consultation; more is required to fulfil the obligations of sections 5(4) and 16 or 22 of the *MPRDA*.¹⁰¹ On the model of consultation developed in *S v Smit* 2008 (1) SA 135 (T)¹⁰² (hereafter *S v Smit*), a failure to engage genuinely and effectively may result in a contravention of the *MPRDA* and the refusal of one's application for a right.¹⁰³

The court in *Bengwenyama 2011 (CC)* held that the consultation process required by section 16(4)(b) of the *MPRDA* entails that the applicant must:¹⁰⁴

- (1) Inform the landowner in writing that his application for prospecting rights on the owner's land has been accepted for consideration by the RM concerned;

⁹⁶ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 44.

⁹⁷ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 44.

⁹⁸ *S v Smit* 2008 (1) SA 135 (T) (hereafter *S v Smit*) 153.

⁹⁹ *Maqoma v Sebe* 1987 (1) SA 483 (Ck) 490C–E (hereafter *Maqoma v Sebe*).

¹⁰⁰ *Maqoma v Sebe at 490C-E*; Mitchell, Moalusi, and Van der Walt 2012 *JSAIMM* 155.

¹⁰¹ Mitchell, Moalusi, and Van der Walt 2012 *JSAIMM* 155.

¹⁰² *S v Smit* para 135.

¹⁰³ Mitchell, Moalusi, and Van der Walt 2012 *JSAIMM* 155.

¹⁰⁴ *Bengwenyama 2011 (CC)* para 67.

- (2) Inform the landowner in sufficient detail of what the prospecting operation will entail on the land, for the landowner to assess what impact the prospecting will have on the landowner's use of the land;
- (3) Consult with the landowner to reach an agreement to the satisfaction of both parties regarding the impact of the proposed prospecting operation; and
- (4) Submit the result of the consultation process to the RM within 30 days of receiving notification to consult.¹⁰⁵

By expanding the definition of "interested and affected persons" and adding an interpretation of meaningful consultation, the latest amendment to the 2004 *MPRDA Regulations* strengthened the *MPRDA*. *The Amendment Regulations to the Mineral and Petroleum Resources Development Regulations, 2020*¹⁰⁶ (hereafter *2020 MPRDA Amendment Regulations*), provide a detailed interpretation of the term *meaningful consultation*. According to the *2020 MPRDA Amendment Regulations*, the applicant would have *meaningfully* consulted with the interested and affected parties when:

- (1) The applicant has facilitated the parties' participation in good faith;
- (2) in a manner that gives the parties a sufficient opportunity to provide their comments regarding the land and the impact of the prospecting or mining activities; and
- (3) when all the relevant information regarding the activities is provided to enable the parties to make an informed decision.¹⁰⁷

The North Gauteng High Court in *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources*¹⁰⁸ (hereafter *Baleni*) commented on the meaning of *meaningful consultation*, stating that it "entails a discussion of ideas between the interested and affected parties and the mining right applicant on an equal footing".¹⁰⁹ This meant that the advantages and disadvantages had to be examined and compromises had to be reached wherever necessary¹¹⁰

¹⁰⁵ *Bengwenyama 2011 (CC)* para 67.

¹⁰⁶ *Mineral and Petroleum Resources Development Regulations, 2020* in GN 420 GG 43172 of 27 March 2020 (hereafter *2020 MPRDA Amendment Regulations*).

¹⁰⁷ See Regulation 1 (definition of "meaningful consultation") in *2020 MPRDA Amendment Regulations*, amending *2004 MPRDA Regulations*.

¹⁰⁸ *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources* 2021 (1) SA 110 (GP) (hereafter *Baleni*).

¹⁰⁹ *Baleni* para 89.

¹¹⁰ *Baleni* para 89.

The South African courts' deliberateness in applying the *meaningfulness* standard to the consultation requirement is evident in Chapter 4 of this study. However, there appears to be a lack of a mining-related legal framework, as reflected in the *MPRDA*, the *NEMA*, and regulations published thereunder, which do not expressly reflect the standard of consultation that the courts seem to painstakingly require. *Meaningfulness* has become an important legal principle or standard that courts have developed to ensure respect for and fulfilment of vulnerable people's rights. The development of the notion of *meaningfulness* raises the question of whether Parliament and other regulatory authorities, such as the Ministers for DMR and Environmental Affairs, respectively, have heeded the call to ensure that the mining-related legal framework accords with these important developments in respect of the *meaningfulness* of consultation processes.

The *meaningfulness* of consultations is particularly threatened where there are strong differences or disagreements between the proponent mining company and the community affected by the proposed mining, often resulting in a break in communication. These disagreements or differences would be on issues such as the adverse effects the mining activities would have on their land. In such instances, proponent mining companies tend to focus on formal compliance with consultation requirements, usually placing less emphasis on building consensus (the meeting of minds on all material aspects of their agreement)¹¹¹ and agreement. What is also evident from the current mining-related legal framework is the lack of regulatory mechanisms to break the deadlock (for, example, where the proponent mining company and the interested and affected parties make no progress) in cases of significant differences or disagreements and/or communication breakdowns.

In *Balenj*, the mining-affected community did not want the proponent mining company to be granted a mining right due to the adverse effects the mining activity would have on their land.¹¹² What was correctly pointed out by the proponent mining company in

¹¹¹ Hutchinson *et al* *The Law of Contract in South Africa* 23.

¹¹² *Balenj* para 14.

Baleni was that legislation did not require the consent of the mining-affected community, but only required consultation with the community; in any event, the Minister would be the one to decide whether to grant the mining right.¹¹³

The North Gauteng High Court in *Baleni* made it clear that, in common law, the Minister (provided that there was consultation with the owner or lawful occupier of the land), "may grant a mining right against the will of the landowner, after which, the landowner will only be entitled to 21 days' notice before the commencement of operations".¹¹⁴ In addition to the already discussed purposes of consultation, the Constitutional Court in *Bengwenyama 2011 (CC)* stated that the purpose of this consultation is to provide enough information to the landowner so that they can make representations and decide whether to use the internal procedures, should the application go against them by taking the matter on administrative review.¹¹⁵

While the court held that consent was a prerequisite for the mining company to acquire from the community, it was because of the contents of section 2(1) of the *Interim Protection of Informal Land Rights Act* 31 of 1996 (hereafter the *IPILRA*), harmonised with the *MPRDA*, that the court made the determination, and not the *MPRDA* alone.¹¹⁶ Therefore, the *MPRDA* could fall short in dealing with deadlocks between the parties because the determination as to whether there has been *meaningful consultation* conforming with the procedural fairness standard is dependent on the court's interpretation of such a standard and is not prescribed by legislation which could assist in resolving deadlock situations, internally between the parties, before the involvement of the Minister and the courts.

This study suggests that procedural fairness is not a concept unique to mining-related legal frameworks; rather, it is a concept applicable to various contexts. Procedural fairness is a right enshrined in section 33 of the *Constitution*, which administrators,

¹¹³ *Baleni* para 55.

¹¹⁴ *Baleni* para 47; section 5A(c) of the *MPRDA*.

¹¹⁵ *Bengwenyama 2011 (CC)* para 66.

¹¹⁶ *Baleni* para 79.

including officials implementing and giving effect to the mining-related legal framework, should respect, protect, fulfil and promote.¹¹⁷ As indicated above, the *PAJA* is the overarching legislation enacted to give effect to section 33 of the *Constitution*. Therefore, there is a need to consider the consistency of the mining-related legislative framework with the vision of procedural fairness as enshrined in section 33 of the *Constitution*, read in conjunction with the *PAJA*.

It follows that it is an essential part of this study to assess whether the current mining legislative framework regulating the consultation processes, especially in the case of substantial differences or disagreements, disharmony and even breaks in communication between the proponent mining company and the mining affected community, accords with the procedural fairness vision envisaged by section 33 of the *Constitution* read with *PAJA* and the *meaningfulness jurisprudence* of our courts.

1.2 Motivation

Tlale makes the point that although relatively few cases have challenged the procedural dimensions of the *MPRDA* in South Africa, the existing litigation already indicates that irregularities are present within the mining-related permit application system.¹¹⁸ Tlale noted a few reasons why many customary community disputes do not reach the national courts, but highlighted one key reason: the customary communities sometimes lack the financial resources to challenge large, wealthy mining companies, thereby giving the latter an advantage.¹¹⁹

This research is significant in showing that, if deemed satisfactory, the consultation process could undermine the certainty with which the consultation requirement couldn't be enforced.¹²⁰ The core of the consultation requirement lies in the process of public participation, which guarantees that the possible effects of prospecting rights,

¹¹⁷ See section 7 of the *Constitution*.

¹¹⁸ Tlale 2020 *PER/PELJ* 9

¹¹⁹ Tlale 2020) *PER/PELJ* 9.

¹²⁰ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 47.

mining rights, and mining permits on communities affected by mining are taken into account.¹²¹

Therefore, this study is instrumental in exploring whether the established standard of *meaningful consultation* is met and reflected in the legal framework regulating the consultation process during applications for mining-related permits.

1.3 Research question

How does the legal framework setting out consultation processes with respect to applications for mining-related permits fare in light of the procedural fairness vision envisaged by section 33 of the *Constitution*, read with the *PAJA* and the *meaningfulness jurisprudence* of South African courts?

1.4 Research aims and objectives

This study aims to determine how the legal framework setting out consultation processes regarding applications for mining-related permits fare in light of the procedural fairness vision envisaged by section 33 of the *Constitution*, read with the *PAJA* and the *meaningfulness jurisprudence* of South African courts. The aim of the study will be achieved through the following objectives:

- (1) To discuss the legal framework on consultation processes in respect of applications for mining-related permits;
- (2) To analyse the purport, objects, meaning, and extent of procedural fairness in the context of applications for mining-related permits;
- (3) To explore the development of the *meaningful consultation*/engagement to achieve procedural fairness, and
- (4) To make any appropriate recommendations.

¹²¹ Legal Resource Centre *A Practical Guide for Mining-Affected Communities* 15.

1.5 Premises, hypotheses and limitations

1.5.1 Premises:

The premise of this study is that consultation processes during the application process for mining-related permits should meet the constitutional threshold of procedural fairness.

1.5.2 Hypothesis

The legal framework setting out consultation processes during applications for mining-related permits, which includes the *MPRDA*, the *NEMA* and their regulations, falls short in giving effect to the procedural fairness vision envisaged by section 33 of the *Constitution* read with *PAJA* and the *meaningfulness jurisprudence* of South African courts, particularly in cases of substantial differences or disagreements, disharmony and even break in communication between the proponent mining company and the mining affected community.

1.5.3 Limitations

This study is limited to applications for three mining-related permits, namely prospecting rights, mining rights, and mining permits, as listed in sections 16, 22, and 27 of the *MPRDA*, respectively.

The exploration of consultation processes during applications for mining-related permits is limited to consultation as outlined in the *MPRDA*, *NEMA*, and their regulations. Except as stated in subheading 2.3 of Chapter Two of this study, this study will not elaborate further on the issue of consent as a consultation requirement under the *IPILRA*.

Procedural fairness referred to in this study is limited to the *PAJA* and not the constitutional principle of legality. In addition to what is stated in Chapter Three of this study, this study will not further elaborate on procedural fairness in terms of the constitutional principle of legality.

1.6 Research methodology

This study is concluded through qualitative, quantitative, and mixed-methods research strategies. In this study, the applicable method and relevant technique are the qualitative method of data collection. That is, the primary and secondary sources of law will be used in the study to find a suitable approach to the problem under investigation. Primary sources include the *Constitution*, legislation such as the *PAJA*, *NEMA*, *MPRDA*, and their regulations, case law, and the common law. Secondary sources such as journal articles, academic books, and internet sources will also be utilised in the study.

1.7 Chapter outline

This first chapter serves as an introduction to the study and the themes that will be discussed in the following chapters. It outlines the problem statement, motivation for the study, research aims, premises, hypothesis, limitations, objectives, and research methodology.

The second chapter begins with an overview of the history and development of community rights in mining-affected areas, as well as during consultation processes for applications related to mining permits. It then sheds light on the legal framework regulating consultation processes during the application process for mining-related permits.

The third chapter examines the purpose, objectives, meaning, and scope of procedural fairness in the context of applications for mining-related permits, as they relate to the standard to which the current legal framework should adhere.

The fourth chapter analyses the meaning and development of the term *meaningful* engagement/participation and explores the nexus between this concept and the achievement of procedural fairness.

The fifth and final chapter summarises the issues dealt with in previous chapters. The chapter concludes by examining how the legal framework setting out consultation

processes in respect of applications for mining-related permits fares in light of the procedural fairness vision envisaged by section 33 of the *Constitution*, read in conjunction with *PAJA* and the *meaningfulness* jurisprudence of South African courts. The chapter also provides recommendations for amending the legal framework regulating consultation processes for applications related to mining permits.

CHAPTER 2

Legal framework on consultation processes in respect of applications for mining-related permits

2.1 Background

Chapter 2 of this study begins to explore the foundation laid out in chapter 1 of this study, specifically regarding the content of legislation regulating applications for mining-related permits. This chapter begins by tracing the development of mineral law regulation, with a focus on property ownership and the rights associated with it. It begins with an inquiry into what type of engagement, if any, is required, should anyone other than the landowner want mining-related rights over the landowner's property, thereby triggering the more recently developed notion of consultation. The requirement to consult interested and affected parties did not exist in the early days of regulating mining/mineral law, and it was gradually introduced into South African mineral law over time.¹²²

During settler colonisation in South Africa, land could be acquired by settlers through the doctrine of discovery, which holds that a settler who claims to have discovered a territory can lawfully claim the land, even when indigenous people inhabited it.¹²³ Gildenhuis defines "indigenous people" as the peoples the West encountered during the period of their colonial expansion, conquest and annexation of territory.¹²⁴ While there was an acknowledgement of indigenous land rights, those rights could be disregarded on the grounds that indigenous peoples were deemed "heathens and infidels".¹²⁵ The consent of Indigenous people was occasionally obtained through purchases and treaties.¹²⁶ Nevertheless, these two approaches to acquiring land were

¹²² Mostert *Mineral Law: Principles and Policies in Perspective* 7.

¹²³ Gildenhuis 2005 *Journal of Energy & Natural Resources Law* 466.

¹²⁴ Gildenhuis 2005 *Journal of Energy & Natural Resources Law* 468.

¹²⁵ Gildenhuis 2005 *Journal of Energy & Natural Resources Law* 468.

¹²⁶ Gildenhuis 2005 *Journal of Energy & Natural Resources Law* 466.

exploitative because indigenous communities did not fully comprehend them,¹²⁷ resulting in the loss of their land to the colonial settler population.¹²⁸

When explorations to uncover the country's mineral wealth began around 1847, standard Roman-Dutch principles of property were applied to mineral law, under which mineral rights formed part of the landowner's rights.¹²⁹ The South African common law on property, which originated from Roman-Dutch law, supports the principle of *cuius est solum eius est usque ad caelum et ad inferos* (hereafter the *cuius est solum* rule).¹³⁰ This *maxim* affords landowners the right to the surface and to what lies beneath it, in "all the fullness that the common law allows".¹³¹ In the context of minerals specifically, this principle implied that the owner of the land was the owner of all minerals within it.¹³² Significant adaptations to these laws included the introduction of the concept of "severance," which entailed that the mineral rights in respect of land could be separated from the title to the land, alienated, or dealt with separately.¹³³ *Severance* meant the owner of the land would still be the owner of the minerals contained in the land, but would no longer be able to interfere with the minerals without the government's permission.¹³⁴ Once the right to minerals is severed, the mineral rights holder is entitled to search for, mine, and dispose of minerals for their own account and benefit.¹³⁵

Some of the colonies, in what is today South Africa, had taken control over mineral rights. Control was achieved, for example, through the passage of ordinances by the

¹²⁷ This lack of comprehension was due to the fact that the legal system which settlers used was different from that which indigenous peoples used and understood.

¹²⁸ Gildenhuys 2005 *Journal of Energy & Natural Resources Law* 466.

¹²⁹ *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) (hereafter *Agri South Africa*); *Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104 (GNP) para 7; *Mostert Mineral Law: Principles and Policies in Perspective* 7.

¹³⁰ *Mostert Mineral Law: Principles and Policies in Perspective* 7.

¹³¹ *Mostert Mineral Law: Principles and Policies in Perspective* 7.

¹³² *Rocher v Registrar of Deeds* 1911 TPD 311 (hereafter *Rocher*) at 315; *Erasmus and Lategan v Union Government* 1954 (3) SA 415 (O) at 417 (hereafter *Erasmus*).

¹³³ *Mostert Mineral Law: Principles and Policies in Perspective* 7.

¹³⁴ *Apex Mines Ltd v Administrator Transvaal* 1986 (4) SA 581 (T) at 591C-D.

¹³⁵ *Hudson v Mann* 1950 (4) SA 485 (T) (hereafter *Hudson v Mann*) at 488B-D; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) at 379.

Griqualand West Government to regulate the control of precious stones after diamonds were discovered in Griqualand West in 1867.¹³⁶ These ordinances, passed to provide the state with control over mineral rights in South Africa, include the Griqualand West Ordinance 1 of 1874, Griqualand West Ordinance 5 of 1874, and *Griqualand West Ordinance* 10 of 1874.¹³⁷ The ordinances were followed by the *Precious Stones and Minerals Mining Act* 19 of 1883 of the Cape of Good Hope (*Precious Stones and Minerals Mining Act*), which applied to Crown Land, reserved the right to mine precious minerals and precious stones in favour of the Crown (British monarch, which colonies of South Africa were).¹³⁸ In terms of the *Precious Stones and Minerals Mining Act*, private landowners' consent was not required for the granting of prospecting licenses by the Government of the Cape of Good Hope.¹³⁹

The *cuius est solum* rule right was also curtailed statutorily under British colonial rule and not just by "severance".¹⁴⁰ Under the influence of British colonial policy, the English practice of reserving mineral rights to the state upon the grant of land was introduced in the Cape Colony as early as 1813.¹⁴¹ Following the discovery of diamonds and gold around 1867, the *cuius est solum* principle was modified statutorily by *Law 8* of 1885, which had the effect of depriving the owner of beneficial use or occupation of the surface and subsequently suspended beneficial ownership with regard to the surface.¹⁴² Statutory interference with the *cuius est solum* principle was the origin of state control over mineral rights in South Africa.¹⁴³ According to section 10 of *Law 8* of 1885, private land was proclaimed in consultation with the owner.¹⁴⁴ However, a change in policy towards dealing with private land occurred once again with an amendment to *Law 8*

¹³⁶ *Resolution of the Volksraad of the ZAR* 1870; *Mostert Mineral Law: Principles and Policies in Perspective* 23.

¹³⁷ Higgs 2018 *Fundamina* 34-35.

¹³⁸ Crown land is land belonging to the British Crown; section 2 of the *Precious Stones and Minerals Mining Act* 19 of 1883 (C).

¹³⁹ Div I, III, *Precious Stones and Minerals Mining Act* 19 of 1883 (C); *Mostert Mineral Law: Principles and Policies in Perspective* 23.

¹⁴⁰ *Rocher* at 315; *Erasmus* at 417.

¹⁴¹ *Mostert Mineral Law: Principles and Policies in Perspective* 7.

¹⁴² *Witwatersrand Gold Mining Co Ltd v Municipality of Germiston* 1963 (1) SA 311 (T) at 311.

¹⁴³ *Mostert Mineral Law: Principles and Policies in Perspective* 7.

¹⁴⁴ Section 10 of *Law 8* of 1885.

of 1885.¹⁴⁵ This amendment deprived the owner of private land of the entitlement to prevent the proclamation of his land.¹⁴⁶ This amendment meant that the owner of private land would not be able to take legal action to stop the government from officially declaring a specific piece of land for the statutory purpose of mining.

The prevalence of racial discrimination in South Africa influenced the development of mining laws and policies regulating natural resources.¹⁴⁷ For example, in the early 1910s, the *Natives Land Act* was passed, granting white dominance over much of South Africa.¹⁴⁸ This law made it unlawful for individuals classified as *black* to own land outside designated reserves, thus preventing them from accessing mineral resources.¹⁴⁹

After South Africa became a Union under Britain, the government adopted the *Precious Stones Act* 44 of 1927 (hereafter the *1927 Precious Stones Act*), vesting the right of mining for and disposing of all precious stones (e.g. diamonds, rubies, sapphires) in the Crown, with one of its objectives being to control prospecting activities.¹⁵⁰ Following the enactment of the *Precious Stones Amendment Act* 12 of 1960 (hereafter *Precious Stones Amendment Act*), prospecting leases (a legal right that allows a company or individual to explore an area for mineral deposits and assess their commercial viability) had to be granted for precious stones on alienated state land.¹⁵¹

While there were conflicting interests between the mineral rights holder and the landowner, the mineral rights holder had the option to either exercise or not exercise

¹⁴⁵ Van der Schyff 2012

<https://pdfs.semanticscholar.org/5b1e/7f644ad7129871e4d6a97fffd00a52181a90.pdf>.

¹⁴⁶ Van der Schyff E 2012 *South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals* <https://pdfs.semanticscholar.org/5b1e/7f644ad7129871e4d6a97fffd00a52181a90.pdf> accessed 10 September 2025.

¹⁴⁷ Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 13.

¹⁴⁸ Van Der Schyff *Property in Minerals and Petroleum* 8.

¹⁴⁹ Van Der Schyff *Property in Minerals and Petroleum* 8.

¹⁵⁰ Sections 16, 4 and 5 of the *Precious Stones Act* 44 of 1927.

¹⁵¹ Mostert *Mineral Law: Principles and Policies in Perspective* 36.

their rights.¹⁵² If the landowner's proposed surface developments posed a threat to exploration or mining activities, the rights to minerals were given precedence.¹⁵³ As a result, the mineral rights holder's interests took priority over those of the surface owner, as long as the holder acted reasonably and in good faith when exercising their mineral rights.¹⁵⁴

During the 1960s, laws were enacted to consolidate previous legislation regarding minerals and mining, with the aim of strengthening the mining registration system.¹⁵⁵ First, the *Mining Rights Act* 20 of 1967 consolidated all preceding laws relating to prospecting for and mining of precious metals, base minerals and oil. It constituted the last major revision of the so-called Gold Law (i.e. the *Precious and Base Metals Act* 35 of 1908).¹⁵⁶ In terms of the *Mining Rights Act* 20 of 1967, the right to prospect for oil and to mine and dispose of oil and precious metals (rare, naturally occurring metallic elements with high economic value, such as gold, silver, platinum, and palladium) vested in the state.¹⁵⁷ The right to prospect for, mine and dispose of base minerals (refers to common, less valuable minerals like copper, lead, and zinc that are abundant and widely used in industry) is vested in the holder of the mineral rights.¹⁵⁸ Second, the *1964 Precious Stones Act* was developed upon earlier laws that dealt with prospecting for, mining, and trade in precious stones (for example, diamonds, rubies, sapphires, and emeralds).¹⁵⁹ The *1964 Precious Stones Act* vested the right to mine and dispose of precious stones in the state.¹⁶⁰ The state did not become the owner of the precious stones in terms of this law, but no one (not even the landowner or mineral rights holder) could prospect for, mine or dispose of precious stones, unless this capacity had been conferred to such a person by the state.¹⁶¹ Third, the *Mining Titles*

¹⁵² Mostert *Mineral Law: Principles and Policies in Perspective* 36.

¹⁵³ Mostert *Mineral Law: Principles and Policies in Perspective* 36.

¹⁵⁴ *Hudson v Mann* at 488.

¹⁵⁵ Mostert *Mineral Law: Principles and Policies in Perspective* 40.

¹⁵⁶ Mostert *Mineral Law: Principles and Policies in Perspective* 40.

¹⁵⁷ Section 2(1)(a) of the *Mining Rights Act* 20 of 1967.

¹⁵⁸ Section 2(1)(a) of the *Mining Rights Act* 20 of 1967.

¹⁵⁹ Mostert *Mineral Law: Principles and Policies in Perspective* 40.

¹⁶⁰ Mostert *Mineral Law: Principles and Policies in Perspective* 40.

¹⁶¹ Mostert *Mineral Law: Principles and Policies in Perspective* 40.

Registration Act of 1967 established the office of the Registrar of Mining Titles and the corresponding registry for all mining titles statutorily created.¹⁶² Together, these laws established a system based on the conferral; the granting of rights.¹⁶³ This system was based on the assumption that the state, in its capacity as owner of state land and as the holder of rights over alienated state land, possessed exclusive authority to conduct prospecting and to obtain mining rights in relation to such land.¹⁶⁴

However, the *Minerals Act* repealed the 1960s generation of mining and mineral statutes almost entirely.¹⁶⁵ The objective of the *Minerals Act* was to establish consistent regulation of minerals.¹⁶⁶ Under the *Minerals Act*, three different forms of authorisation were established: prospecting permits, mining permits, and mining licenses.¹⁶⁷ Regarding prospecting, individuals are not permitted to explore or extract minerals unless they have received the appropriate authorisation from the Regional Director in the Department of Mineral and Energy Affairs, as per the *Minerals Act*.¹⁶⁸ The holder of the mineral right, or any person who had acquired the written consent of the holder, could apply for a prospecting permit.¹⁶⁹ A holder of a mineral right, where prospecting has already taken place, or any person who had acquired the written consent of the holder, could apply for a mining authorisation.¹⁷⁰

In 2004, the *MPRDA* was introduced as a legislative measure designed by the legislature to ensure fair access to the nation's natural resources. It constitutes a remedial measure to address the previous racial injustices related to the extraction of mineral resources.¹⁷¹ The *MPRDA* repealed the racially discriminatory policies and principles by allowing all South Africans equitable access to mineral resources, with

¹⁶² *Mostert Mineral Law: Principles and Policies in Perspective* 40.

¹⁶³ *Mostert Mineral Law: Principles and Policies in Perspective* 40.

¹⁶⁴ *Mostert Mineral Law: Principles and Policies in Perspective* 40.

¹⁶⁵ *Mostert Mineral Law: Principles and Policies in Perspective* 58.

¹⁶⁶ *Mostert Mineral Law: Principles and Policies in Perspective* 58.

¹⁶⁷ *Mostert Mineral Law: Principles and Policies in Perspective* 62.

¹⁶⁸ Section 5(2) of the *Minerals Act*.

¹⁶⁹ Sections 6(3) and 5(2) of the *Minerals Act*.

¹⁷⁰ Section 9(2) of the *Minerals Act*.

¹⁷¹ Van Der Schyff *Property in Minerals and Petroleum* 8.

the state serving as custodian of the minerals.¹⁷² The *MPRDA* shifted the South African legal framework away from Roman-Dutch laws, which supported private ownership of mineral resources, to the concept of "state custodianship".¹⁷³ This new principle emphasises that mineral resources are owned by the citizens, with no allowance for private ownership of minerals.¹⁷⁴

The *MPRDA* requires that applicants for mining rights (i.e., mining companies) must engage in public consultation regarding prospecting rights, mining rights, mining permits, and environmental impact assessments to promote community participation in mining regions.¹⁷⁵ On the other hand, in terms of the *IPILRA* (which will not be explored in much detail in this study), the holder of an informal right to land may not be deprived of their land without their full and informed consent.¹⁷⁶

It is against the above background that the next section of this chapter shall deal with the current legislative framework of the consultation process during applications for mining-related permits.

¹⁷² Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 14.

¹⁷³ Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 14.

¹⁷⁴ Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 14.

¹⁷⁵ Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 15.

¹⁷⁶ Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 13; Although this study will not explore *IPILRA* in much detail, *IPILRA* intends to provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law.

2.2 The legislative framework regulating consultation processes during applications for mining-related permits

The *MPRDA*, the *MPRDA Regulations*,¹⁷⁷ the *NEMA* and the 2014 *EIA Regulations*¹⁷⁸ are the focus of this study, notwithstanding other pieces of legislation that govern the mining industry.

2.2.1 The MPRDA, the NEMA and their regulations

2.2.1.1 Legal interpretation under the MPRDA

If there is any inconsistency between common law and the *MPRDA*, the provisions of the *MPRDA* will take precedence over common law.¹⁷⁹ This means that when interpreting any provision of the *MPRDA*, a reasonable interpretation that aligns with the objectives of the *MPRDA* must be preferred over any interpretation that conflicts with those objectives.¹⁸⁰

2.2.1.2 Provisions dealing with consultation with interested and affected parties

Section 10 of the *MPRDA* mandates consultation with interested and affected parties. Section 10 provides for the RM to notify all interested parties that an application for a prospecting, mining right, or mining permit has been submitted.¹⁸¹ Further, the RM "must call on all interested or affected parties to submit their responses to the application within 30 days of such notification".¹⁸² This is an opportunity for all stakeholders to express their grievances and complaints about the proposed project.

¹⁷⁷ The 2004 *MPRDA Regulations*; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 12.

¹⁷⁸ The 2014 *EIA Regulations*; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 12.

¹⁷⁹ Section 4(2) of the *MPRDA*.

¹⁸⁰ Section 4(1) of the *MPRDA*.

¹⁸¹ Section 10 (1)(b) of the *MPRDA*.

¹⁸² Section 10(1)(b) of the *MPRDA*.

Section 10 does not necessitate that there be a hearing after any written objection.¹⁸³ This section only states that any objections are to be referred to the Regional Mining Development and Environmental Committee (hereafter the RMDEC).¹⁸⁴

The *MPRDA* gives further flesh to section 10 by outlining application procedures for the different mining-related permits. According to the *MPRDA*, the RM must accept the application for a prospecting right, mining right or mining permit if three listed preconditions are satisfied.¹⁸⁵ First, the requirements outlined in sections 16, 22, and 27 of the *MPRDA* (which are discussed in detail below) must be met.¹⁸⁶ Second, the right or permit must be held by only one person.¹⁸⁷ Third, there must not have been any earlier application for the same mineral over the same land that has been granted or already rejected.¹⁸⁸

2.2.1.3 First requirement for the grant of mining-related permits

It is important to note that the satisfaction of section 16 of the *MPRDA* (requirements for applications for prospecting rights) triggers the application of section 17 of the *MPRDA*, which relates to "the granting and duration of a prospecting right". Similarly, the satisfaction of section 22 (requirements for applications for mining rights) of the *MPRDA* triggers the workings of section 23 of the same, which relates to the granting and duration of a mining right. These provisions will be addressed as they have been mentioned to have a relationship with each other.

2.2.1.3.1 Sections 16 and 17 of the MPRDA

Sections 16 and 17 of the *MPRDA* regulate applications for prospecting rights, as well as their granting and duration, with section 1 defining a "prospecting right" as the right

¹⁸³ Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 17.

¹⁸⁴ Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 17.

¹⁸⁵ Sections 16(2), 22(2) and 27(3) of the *MPRDA*.

¹⁸⁶ Sections 16(2)(a), 22(2)(a) and 27(3)(a) of the *MPRDA*.

¹⁸⁷ Sections 16(2)(b), 22(2)(b) and 27(3)(b) of the *MPRDA*.

¹⁸⁸ Sections 16(2)(c), 22(c) and 27(3)(c) of the *MPRDA*.

to prospect granted in terms of section 17(1).¹⁸⁹ To obtain a prospective right, one must submit an application to the Minister.¹⁹⁰ First, they must submit an application to the RM for the area in which the land is located in order to exercise the prospective right and pay the applicable fees.¹⁹¹ The RM has to make one of two decisions: (a) "either to accept the application if it complies with the relevant requirements of the *MPRDA*"; (b) "or to deny the application if it does not comply with the legal provisions prescribed".¹⁹²

If the application for the mining-related permit is not in accordance with the requirements of the *MPRDA*, the RM must notify the applicant within fourteen days of receiving the application.¹⁹³ If the RM accepts the application, they "must notify the applicant within 14 days to submit an environmental management plan and to notify and consult with the landowners or lawful occupiers of the land within 30 days of receiving notice".¹⁹⁴ The RM is then required to refer the application to the Minister, who will publicise a notice in the Gazette for interested parties (potential mining companies or communities) to apply for prospective rights.¹⁹⁵

The Constitutional Court in *Bengwenyama 2011 (CC)* emphasised that the consultation process mandated by section 16(4)(b) of the *MPRDA* requires that the applicant must:

- (a) Inform the landowner in writing that his application for prospecting rights on the owner's land has been accepted for consideration by the RM concerned;
- (b) Inform the landowner in sufficient detail what the prospecting operation will entail on the land, for the landowner to assess what impact the prospecting will have on the landowner's use of the land;

¹⁸⁹ Section 1 of the *MPRDA*; Section 1 defines "prospecting" as s intentionally searching for any mineral by means of any method-

- (a) which disturbs the surface or subsurface of the earth, including any portion of the earth that is under the sea or under other water; or
- (b) in or on any residue stockpile or residue deposit, to establish the existence of any mineral and to determine the extent and economic value thereof; or
- (c) in the sea or other water on land.

¹⁹⁰ Section 16 of the *MPRDA*.

¹⁹¹ Sections 16(1) of the *MPRDA*.

¹⁹² Sections 2 and 3 of the *MPRDA*.

¹⁹³ Section 16(3) of the *MPRDA*.

¹⁹⁴ Section 16(4) of the *MPRDA*.

¹⁹⁵ Sections 16(5) & 16(6) of the *MPRDA*.

- (c) Consult with the landowner with a view to reaching an agreement to the satisfaction of both parties regarding the impact of the proposed prospecting operation; and
- (d) Submit the result of the consultation process to the RM within 30 days of receiving notification to consult.¹⁹⁶

The results of the consultation with the interested and affected parties must be included in the environmental management plan, which must be submitted after the acceptance of the application for a prospecting right.¹⁹⁷ Suppose there is any form of objection by any interested and affected party(s). In that case, the RM must submit the objection to the RMDEC, which will assess the objections and then advise the Minister on how to proceed.¹⁹⁸ The function of the RMDEC is advisory in nature, providing non-binding recommendations to the Minister on the final decision regarding whether to grant or refuse the application for a mining-related permit. The effect of this limited function is that the provision which seeks to establish this body as an internal committee to resolve disputes or deadlocks between interested and affected parties and the proponent mining company, lacks legal authority in resolving these disputes as they are occurring. The power to resolve disputes is given to the Minister.

The Minister must award a prospecting right within 30 days of receiving the application from the RM if the requirements, which include the submission of an environmental management plan,¹⁹⁹ under section 17(1) of the *MPRDA*, are satisfied.²⁰⁰ Before granting a prospecting or mining right, no consent or agreement to the project is required from the interested and affected party(s), who, in most cases, are the landowner or land occupier.²⁰¹ Instead, the applicant is to consult with the interested and affected party(s).²⁰² According to the Legal Resources Centre, if the holder of the

¹⁹⁶ *Bengwenyama* 2011 (CC) para 67; *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd* 2019 (2) SA 1 (CC) (hereafter *Maledu*) para 80.

¹⁹⁷ Sections 16(4)(a), 22(4)(a) and 27(5)(a) of the *MPRDA*.

¹⁹⁸ Section 10(2) of the *MPRDA*.

¹⁹⁹ Section 17(1)(c) of the *MPRDA*.

²⁰⁰ Section 17(1)(a)–(f) of the *MPRDA*.

²⁰¹ Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 18.

²⁰² Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 18.

mining right has satisfied the requirements of the consultation process, the landowner must grant the holder access to the land.²⁰³ Thereafter, the holder of the mining right may enter the landowner's property by providing the landowner with a notice.²⁰⁴

According to section 17(2) of the *MPRDA*, the refusal to grant a prospecting right could be a result of two things:

First, as a result of a lack of compliance with the requirements under section 17(1) of the *MPRDA*. Second, the refusal could be based on whether the granting of the right will result in the possible limitation of equitable access to mineral resources.²⁰⁵

The latter reason for refusal is consistent with the objective of the *MPRDA* to "promote equitable access to the nation's mineral and petroleum resources to all people of South Africa".²⁰⁶ This refusal is communicated in writing by the Minister to the applicant within 30 days, along with the reasons for the Minister's decision.²⁰⁷

2.2.1.3.2 Sections 22 and 23 of the MPRDA

Section 22 of the *MPRDA* regulates applications for mining rights, while section 23 regulates the granting and duration of mining rights. Section 22 of the *MPRDA*, which is concerned with applications for mining rights, is similar to provisions of section 16 of the *MPRDA*, which is concerned with applications for prospecting rights.²⁰⁸ However, they differ in that section 22 allows the applicant 180 days to inform the landowner or lawful land occupier, as opposed to the 30 days stipulated in section 16.²⁰⁹ Further, no other person must hold a mining right, prospective right, mining permit or retention

²⁰³ Legal Resources Centre 2018 <https://africanlii.org/ebook/free-prior-and-informed-consentextractive-industries-southernafrika>.

²⁰⁴ Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 18.

²⁰⁵ Section 17(2) of the *MPRDA*.

²⁰⁶ Section 2(c) of the *MPRDA*.

²⁰⁷ Section 17(3) of the *MPRDA*.

²⁰⁸ Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 27.

²⁰⁹ Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 27.

permit (a permit issued in terms of section 32 of the *MPRDA*) for the same land and mineral.²¹⁰ The *MPRDA* mandates that companies seeking mining rights must consult on environmental issues and land access as per section 22 of the *MPRDA*.²¹¹ The state's role is limited to promoting the rights and interests of the community and ensuring that the conditions necessary for community consultation are met.²¹²

The *MPRDA* provides that the Minister must award a mining right if the requirements the section 23(1) are satisfied, being:

- (a) Whether the mineral can be mined efficiently according to the mining work programme;
- (b) The applicant has sufficient financial resources, technical ability, and a compatible financing plan;
- (c) The operation will not cause unacceptable environmental harm and has an environmental authorisation; a prescribed social and labour plan is in place;
- (d) The applicant can comply with the *Mine Health and Safety Act* 29 of 1996;
- (e) The applicant is not violating any provisions of the Act;
- (f) Granting the right promotes the objectives in section 2(d) and (f) and aligns with the mining charter and social and labour plan.

The Minister's acceptance of the application for review is a matter of fact, depending on whether the conditions set by the *MPRDA* and its *Regulations* are met.²¹³ Unlike the prospecting right, the Minister must, "within 60 days of receipt of the application, refuse to grant the mining right due to non-compliance with section 23(1) of the *MPRDA*".²¹⁴ The outcome of refusing to grant a mining right must be conveyed to the affected parties in writing within 30 days of the date of the outcome.²¹⁵

²¹⁰ Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 27.

²¹¹ Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 27.

²¹² Section 23(A) of the *MPRDA*.

²¹³ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 11.

²¹⁴ Section 23(3) of the *MPRDA*.

²¹⁵ Section 23(4) of the *MPRDA*.

2.2.1.3.3 Section 27 of the MPRDA

Section 27 of the *MPRDA* integrates the legal framework regulating applications for, the issuance, and the duration of mining permits. According to section 27(1) of the *MPRDA*, "a mining permit may only be issued if the mineral in question can be mined optimally within a period of two years and the mining area in question does not exceed 5.0 hectares in extent".²¹⁶ The application for a mining permit must be submitted to the Minister at the office of the RM "in whose region the land is situated in the prescribed Manner and together with the prescribed non-refundable application fee".²¹⁷

In the event of a non-compliance with the requirements of the application, the RM has the duty of notifying the proponent mining company in writing within 14 days of receipt of the application.²¹⁸ Under section 27 of the *MPRDA*, the Minister must accept the application if it complies with the requirements of section 27 of the *MPRDA*.²¹⁹ He/she then notifies the applicant in writing, and within 14 days of acceptance of the application, to consult in terms of section 22 of the *MPRDA* and include the results of consultation in the environmental report and submit the environmental report.²²⁰ The RM must then notify the applicant in writing to consult with the landowner and lawful occupier, and any other affected parties, and submit the result of the consultation within 30 days from the date of the notice.²²¹

In the case of a mining permit, the Minister must issue the permit if the requirements outlined in section 27(1) of the *MPRDA* are met and the applicant has submitted an

²¹⁶ Sections 27(1)(a)-(b) of the *MPRDA*.

²¹⁷ Section 27(2)(a)-(c) of the *MPRDA*.

²¹⁸ Section 27(4) of the *MPRDA*.

²¹⁹ Section 27(5)(a) of the *MPRDA*.

²²⁰ Section 27(5)(a) of the *MPRDA*.

²²¹ Section 27(5)(b) of the *MPRDA*.

environmental management plan.²²² The *MPRDA* lacks provisions regarding the refusal of a mining permit.²²³

2.2.1.4 Second and third requirements for the grant of mining-related permits

In respect of the second requirement, the RM must accept applications for a mining-related permit "if no other person holds a prospecting right, mining right, mining permit, or retention permit for the same mineral and land".²²⁴ If the RM receives multiple applications for a prospecting right, mining permit, or mining right relating to the same mineral and/or land on different days, those applications must be processed in the sequence in which they were received.²²⁵ Thus, preference for reviewing applications will be given to the parties who applied first.²²⁶

Regarding the third requirement, if no previous application for a prospecting right, mining right, mining permit, or retention permit has been accepted for the same mineral on the same land and has not been granted or denied, the RM must accept applications for a prospecting right, mining right, or mining permit.²²⁷ If the RM receives competing applications on the same day, the applications must be considered as having been received simultaneously.²²⁸ In such cases, applications from historically disadvantaged persons are given preference upon the eventual grant of a prospecting right or mining right.²²⁹

²²² Section 27(6) of the *MPRDA*; s 27(1) of the *MPRDA*'s requirements is that a mining permit may only be issued if the mineral in question can be mined optimally within a period of two years and the mining area in question does not exceed 1,5 hectares in extent.

²²³ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 12.

²²⁴ Sections 16(2)(b), 22(2)(b) and 27(3)(b) of the *MPRDA*.

²²⁵ Section 9(1)(b) of the *MPRDA*; *Aquila Steel (South Africa) v Minister of Mineral Resources* 2019 (3) SA 621 (CC) (hereafter *Aquila Steel* 2019 (CC)) para 77.

²²⁶ Sections 9(1)(b) of the *MPRDA*; *Aquila Steel* 2019 (CC) para 77.

²²⁷ Sections 16(2)(c), 22(2)(c), 27(3)(c) of the *MPRDA*.

²²⁸ Section 9(1)(b) of the *MPRDA*.

²²⁹ Section 9(2) of the *MPRDA*; *Aquila Steel* 2019 (CC) para 77.

2.2.1.4.1 Consequences of a failure to consult

Sections 17(2)(a) and 23(3) of the *MPRDA* direct the Minister to refuse a right if the application does not meet the requirements of sections 17(1) or 23(1), which include consultation of interested and affected parties, respectively. This was confirmed in *S v Smit*,²³⁰ where it was held that a failure to engage genuinely and effectively may result in a contravention of the *MPRDA* and the refusal of one's application for a right.

Furthermore, a failure to consult may result in the decision to grant a prospecting right, mining right or mining permit being deemed procedurally unfair in terms of the *PAJA* by a Court. In *Sefateng Chrome Mine (Pty) Ltd v. Minister of Resources and Energy* (hereafter *Sefateng*),²³¹ the North Gauteng High Court stated that a decision cannot be deemed procedurally rational, fair, or reasonable if it is made without taking into account the opinions of important stakeholders, without taking into account crucial information required for a proper decision, or without fully addressing the issues at hand.

Under the now-repealed section 5(4)(c) of the *MPRDA*, mining companies were required to notify and consult the lawful occupier or landowner before commencing their operations.²³² The Northern Cape High Court in *Meepo v Kotze* held that:

the consultative process envisaged in section 5(4)(c) of the *MPRDA* is intended to afford a landowner the opportunity of softening the blow inevitably suffered as a consequence of the granting of a prospecting or other right under the *MPRDA*.²³³

A failure to meet any of those requirements made the mining or prospecting a criminal offence in terms of section 98(a)(i) of the *MPRDA*.

²³⁰ *S v Smit* 2008 (1) SA 135 (T) at 153.

²³¹ *Sefateng Chrome Mine (Pty) Ltd v Minister of Resources and Energy* [2025] ZAGPPHC 622 para 125 (hereafter *Sefateng*).

²³² Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 17.

²³³ *Meepo v Kotze*; Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 17.

Section 5A amended section 5(4)(c) of the *MPRDA* by not making consultation through the old section 5(4)(c) of the *MPRDA*.²³⁴ Section 5A(c) of the *MPRDA* provides that:

No person may prospect for or remove, mine, conduct technical cooperation operations (preliminary phase of petroleum exploration), reconnaissance operations, explore for and produce any mineral, without a proper written notice to the landowner or lawful occupier of the land.²³⁵

Although section 5A of the *MPRDA* largely resembles section 5(4)(c) of the *MPRDA*, they differ in a key respect: section 5A of the *MPRDA* does not contain any provision obliging consultation with the landowner or the lawful occupier of the land.²³⁶ Section 5A of the *MPRDA* only requires that "the landowner or lawful occupier of the land" be given "at least 21 days written notice" of the commencement of mining or mining-related activities on his/her land.²³⁷ The safeguard previously provided to the landowner under the old section 5(4)(c) of the *MPRDA* has been removed by decriminalising a failure to consult.²³⁸ Contravention of section 5A(c) of the *MPRDA* (failure to give the landowner 21 days' written notice) is an offence in terms of section 98(a)(i) of the *MPRDA*, punishable by a fine not exceeding R100 000 or two years imprisonment or both.²³⁹ The amendment lessens the adverse impact of not consulting with interested and affected parties by the proponent mining company. The result of this amendment is a lack of effective deterrence mechanisms in the legal framework to prevent proponent mining companies from consulting with mining companies with more than just a notice to interested and affected parties.

²³⁴ Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 17.

²³⁵ Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 17.

²³⁶ Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 17.

²³⁷ Legal Resources Center 2018 <https://africanlii.org/ebook/free-prior-and-informed-consentextractive-industries-southernafrika>.

²³⁸ Tshitanda *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* 18.

²³⁹ Section 99(1)(a) of the *MPRDA*.

2.3 Purpose and limitations of the consultation requirements

2.3.1 Purpose of the consultation requirement

The court in *Magoma v Sebe* held that:

Consultation in its normal sense, without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate.²⁴⁰

According to the *MPRDA*, before a prospecting right, mining right, or mining permit can be granted, the applicant must first consult with the interested and affected parties.²⁴¹ The *DMR Consultation Guidelines* provide a definition of what "consultation" entails. In terms of the *DMR Consultation Guidelines*, consultation is "a two-way communication process between the applicant for a right or permit and the interested and affected parties".²⁴² This process requires the applicant to listen to the relevant parties and consider their feedback to promote "openness in the decision-making process".²⁴³

Although the *MPRDA* mandates a consultation process, it does not specify the purpose of this consultation.²⁴⁴ Various court decisions and the *DMR Consultation Guidelines* do, however, provide detailed explanations regarding the objective of the consultation requirement.²⁴⁵

²⁴⁰ *Magoma v Sebe NO and Another 1987 (3) All Sa 414 (CK)*.

²⁴¹ Section 10 of the *MPRDA*.

²⁴² Section D of the *DMR Consultation Guidelines*; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 14.

²⁴³ Section D of the *DMR Consultation Guidelines*; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 14.

²⁴⁴ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 14.

²⁴⁵ See *Meepo v Kotze; SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd* 2011 JDR 0605 (SCA) (SCA) (hereafter *SA Soutwerke v Saamwerk Soutwerke*); Bengwenyama; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 14.

In *Meepo v Kotze*,²⁴⁶ the Northern Cape High Court discussed "the purpose of the consultation requirement in the context of prospecting rights".²⁴⁷ The Court indicated that awarding prospecting rights significantly infringes upon the property rights of the interested and affected party(s).²⁴⁸ The Court indicated that one of the aims of consultation under the *MPRDA* is the minimization of adverse effects that mining related activities have on the interested and affected party(s)' rights.²⁴⁹ The Court made several examples of possible encroachments, including the ill-considered construction of roads, the breaking down or damaging of fences, the depletion of boreholes or other water resources, the construction of office buildings or housing facilities for employees on unsuitable or dangerous terrain, the construction of an aqueduct through cultivated fields, excavating in the immediate vicinity of dwellings, etc.²⁵⁰ The Court further held that the purpose of the consultation process is to address and settle any disputes or objections that may arise between the applicant or holder of a prospecting right and the landowner.²⁵¹ As a result, the requirement acts as a buffer between the conflicting interests of the landowner and the right or permit applicant.²⁵² However, the Court indicated that consultation is necessary only insofar as the landowner is "apprised of the impact prospecting activities may have on his land".²⁵³ The Court did not provide further clarification on the meaning of this statement, nor did it detail its impact on the landowner's statutory and constitutional rights.²⁵⁴ The Court stated that the

²⁴⁶ *Meepo v Kotze*; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 14.

²⁴⁷ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 14.

²⁴⁸ *Meepo v Kotze* para 13.1.

²⁴⁹ *Meepo v Kotze* para 13.1.

²⁵⁰ *Meepo v Kotze* para 15.

²⁵¹ *Meepo v Kotze* para 13.1.

²⁵² Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 15.

²⁵³ *Meepo v Kotze* para 13.1.

²⁵⁴ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 15.

consultation process applies to all rights and permits under the *MPRDA* and all interested and affected parties, including lawful occupiers.²⁵⁵

According to the SCA, in *SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd* (hereafter *SA Soutwerke v Saamwerk Soutwerke*)²⁵⁶, the goal of informing the applicant to have a consultation is to start evaluating how the proposed mining operations will affect the parties.²⁵⁷ The consultation further aids the applicant in developing the necessary environmental management plan by considering the issues raised by the interested and affected parties.²⁵⁸

In *Bengwenyama 2011 (CC)*,²⁵⁹ the Court opined on the aim of notification and consultation. The Court was of the opinion that the notification and consultation requirement relates to the effect that the award of a mining-related permit will have on the landowner or lawful occupier.²⁶⁰ Additionally, the Court echoed the *DMR Consultation Guidelines*' sentiments by stating that "the purpose of the consultation is to determine whether accommodation is possible between the applicant and the landowner about the latter's right to use the land".²⁶¹ The landowner and the applicant do not have to agree.²⁶² However, these parties must consult in good faith to reach a mutually acceptable accommodation.²⁶³

According to *Bengwenyama 2011 (CC)*, another broader aim of the consultation is to equip landowners or lawful occupiers with the essential details regarding all planned activities, enabling them to make informed decisions about any representations they

²⁵⁵ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 15.

²⁵⁶ *SA Soutwerke v Saamwerk Soutwerke*; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 15.

²⁵⁷ *SA Soutwerke v Saamwerk Soutwerke* para 29.

²⁵⁸ *SA Soutwerke v Saamwerk Soutwerke* para 29.

²⁵⁹ *Bengwenyama 2011 (CC)* para 64-67.

²⁶⁰ *Bengwenyama 2011 (CC)* para 64.

²⁶¹ *Bengwenyama 2011 (CC)* para 65.

²⁶² *Bengwenyama 2011 (CC)* para 65.

²⁶³ *Bengwenyama 2011 (CC)* para 65.

need to make, whether to utilize internal procedures if the application is unfavorable to them, and whether to seek a review of the administrative action in question.²⁶⁴ The consultation procedure and its outcomes are essential for ensuring the fairness of the process.²⁶⁵ Ntsanwisi makes the assertion that if the administrator does not completely take into account what happened throughout the consultation process to determine whether the consultation was sufficient, the conclusion cannot be considered procedurally fair.²⁶⁶

The *DMR Consultation Guidelines* state that the purpose of the consultation is "to provide the landowner, affected parties and communities with the necessary information about the proposed prospecting or mining project".²⁶⁷ According to the DMR Consultation Guidelines and the aforementioned judgments, consultation enables interested and affected parties to influence decisions made by applicants that have a direct impact on their livelihood.²⁶⁸

2.3.2 Definition of "interested and affected parties"

The *MPRDA* lacks a definition for the term "interested and affected parties". However, a definition of an interested and affected person is contained in the *2004 MPRDA Regulations* as "a natural or juristic person that has a direct interest in a prospective or existing operation".²⁶⁹ This definition also encompasses individuals who might be impacted by a current or future operation.²⁷⁰ The *2020 MPRDA Amendment*

²⁶⁴ *Bengwenyama 2011 (CC)* para 66.

²⁶⁵ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 15.

²⁶⁶ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 15.

²⁶⁷ Section E of the *DMR Consultation Guidelines*; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 15.

²⁶⁸ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 15.

²⁶⁹ Regulation 1 in the *2004 MPRDA Regulations*; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 16.

²⁷⁰ Regulation 1 in the *2004 MPRDA Regulations*.

*Regulations*²⁷¹ expressly include "holders of informal rights to land", as defined by the *IPILRA*,²⁷² in the definition of "interested and affected persons".²⁷³ This amendment is significant because it formally acknowledges that individuals with informal land rights must be consulted before those rights are taken away.²⁷⁴ The *2004 MPRDA Regulations'* specific usage of the term "direct interest" gives the impression that only a small number of people are eligible for *MPRDA* consultation.²⁷⁵ This perception runs counter to the *DMR Consultation Guidelines'* definition of interested and impacted parties, which includes a list of both.²⁷⁶ The *DMR Consultation Guidelines* provide that "interested and affected" party(s) include, but are not limited to –

- i) Host Communities
- ii) Landowners (Traditional and Title Deed owners)
- iii) Traditional Authority
- iv) Land Claimants
- v) Lawful land occupier
- vi) The Department of Land Affairs
- vii) Any other person (including adjacent and non-adjacent properties) whose socio-economic conditions may be directly affected by the proposed prospecting or mining operation
- viii) The Local Municipality,
- ix) 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.²⁷⁷

²⁷¹ *2020 MPRDA Amendment Regulations*.

²⁷² Both the *IPILRA* and the *MPRDA* seek to remedy historical land dispossession, yet they differ in their stipulations regarding community consent. The *IPILRA* necessitates obtaining the informed consent of a community to strip them of their informal land rights, whereas the *MPRDA* requires only consultation with the communities affected.

²⁷³ Regulation 1 in the *2020 MPRDA Amendment Regulations*; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 16.

²⁷⁴ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 16.

²⁷⁵ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 16.

²⁷⁶ See definition of interested and affected parties under section D of the *DMR Consultation Guidelines*; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 16.

²⁷⁷ Section D of the *DMR Consultation Guidelines*.

The *DMR Consultation Guidelines* specifically state that the list of interested and affected parties provided is not comprehensive.²⁷⁸ The definition of "any interested and affected party" in the *MPRDA* is altered by the usage of "direct interest" in the *2004 MPRDA Regulations*.²⁷⁹ Interested and affected parties are thus broad enough to include the *community*, making the two terms interchangeable. In terms of the *MPRDA*, a community is described as a cohesive social group of individuals residing in a specific area of land where the residents possess rights and interests.²⁸⁰

According to the SCA's definition in *SA Soutwerke v Saamwerk Soutwerke*, an interested party is someone who has a legal claim to the land that the mining right pertains to.²⁸¹ Interested and affected parties include landowners or lawful occupiers.²⁸² The Court drew a distinction between an "affected" party and an "interested" party, clarifying that the former describes individuals whose socio-economic circumstances may be directly impacted by the mining operations.²⁸³ Ntswanisi is of the view that, given the *MPRDA*'s requirement for the submission of the consultation outcome in a *NEMA*-compliant environmental report, the definition of an "interested and affected party" in the *NEMA* may offer clarification. The *NEMA* states that an "interested and affected party" is "any person, group of persons or organisation interested in or affected by such operation of activity".²⁸⁴ Although this definition is vague, it is clarified by the list of parties in the *DMR Consultation Guidelines*, which identifies the group of

²⁷⁸ See definition of "interested and affected parties" under section D of the *DMR Consultation Guidelines*; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 16.

²⁷⁹ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 16.

²⁸⁰ Section 1 of the *MPRDA*.

²⁸¹ *SA Soutwerke v Saamwerk* para 30.

²⁸² See definition of "interested and affected parties" under section D of the *DMR Consultation Guidelines*; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 16.

²⁸³ *SA Soutwerke v Saamwerk* para 31.

²⁸⁴ See definition of "interested and affected party" under s 1(a) of the *NEMA*; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 17.

persons who are eligible for a consultation.²⁸⁵ Defining "interested and affected parties" is vital to determining the individuals or groups eligible for consultation.²⁸⁶ Thus, the legislature must establish a consistent definition to ensure legal clarity and consider the rights and interests of these individuals through consultation.²⁸⁷

2.3.3 The exclusion of the consent requirement under the MPRDA and this study

Although this study is limited to the consultation requirements established in the *MPRDA* and the *NEMA*, it is appropriate to address the intersection of these with *IPILRA*, so as not to create the impression that the *MPRDA* and the *NEMA* operate in isolation from other pieces of legislation regulating consultation with affected communities in mineral law.

Under common law, obtaining a prospecting right requires entering into a contract with the landowner, which involves negotiating and agreeing on the terms of the prospecting agreement.²⁸⁸ The equivalent in the *MPRDA* is consultation, which aims to ascertain whether an accommodation can be reached regarding the impact on the landowner's right to use their land.²⁸⁹

According to the *MPRDA*, applicants for rights and permits are not obligated to secure consent from landowners or legal occupants who mining activities might impact, as is the case with the *IPILRA*, but rather consultation.²⁹⁰ The application of the *IPILRA* is confined to specific communities impacted by mining and is restricted in its scope.²⁹¹ The *IPILRA* ensures that communities have the right to decision-making over land they

²⁸⁵ Section D of the *DMR Consultation Guidelines*; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 17.

²⁸⁶ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 17.

²⁸⁷ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 17.

²⁸⁸ *Bengwenyama 2011 (CC)* para 65.

²⁸⁹ *Bengwenyama 2011 (CC)* para 65.

²⁹⁰ Section 2(1) of the *IPILRA*; Tlale (2020) *PER/PELJ* 14.

²⁹¹ Section 1 of the *IPILRA*.

have informal rights in and can manage the land according to customary law and usage.²⁹²

In South Africa, obtaining any mining-related rights currently requires the consultation of affected and interested parties as a legal prerequisite.²⁹³ Community consent is a legal requirement before deprivation of communal land, as stated in the *IPILRA*, only insofar as the land complies with the standards set out in the *IPILRA*.²⁹⁴ The consent principle states that communities have the "right to say no," which often leads mining companies to abandon potential mining projects.²⁹⁵ An example of where this principle was applied was in *Baleni* (where the facts were specific to informal land, therefore finding the *IPILRA* applicable), where the court ruled that the community may refuse consent to prospective mining on their land.²⁹⁶ However, under the *MPRDA*, the landowner or lawful occupier (community) does not have a "right to say no" to a proposed mining project.²⁹⁷

Consultation procedures necessitate that proponent mining companies inform interested and affected parties about a potential project, ensuring their opinions are considered during the decision-making stages.²⁹⁸ Consent processes, on the other hand, require the active involvement of interested and affected parties in decision-

²⁹² *Maledu* para 95.

²⁹³ Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 34.

²⁹⁴ Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 34; The criteria will be dealt with in section 2.3 of chapter 2 of this study.

²⁹⁵ Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 40.

²⁹⁶ *Baleni* para 79.

²⁹⁷ Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 40.

²⁹⁸ World Resources Institute 2007 <http://www.wri.org/publication/developmentwithout-conflict> 7.

making, empowering them to negotiate agreements that are mutually beneficial to all parties involved.²⁹⁹

The consultation requirement outlined in the *MPRDA* and the consent requirement under the *IPILRA* are neither separate nor contradictory.³⁰⁰ These requirements are not mutually exclusive, as a community cannot give consent to mining activities until the applicant has consulted with them regarding the right or permit.³⁰¹ The Constitutional Court in *Bengwenyama (2011) (CC)* highlighted that a "more general purpose of consultation is to provide landowners and lawful occupiers with the necessary information to make an informed decision".³⁰² Accordingly, the "lawful or lawful occupier" would be in a better position to either give or refuse consent.³⁰³ Despite this, the *MPRDA* only necessitates consultation with the "lawful or lawful occupier" and not consent.³⁰⁴ The lack of a consent requirement leads to uncertainty about whether the legislature meant for the *MPRDA* to take precedence over the *IPILRA*.³⁰⁵ This lack of clarity has, however, been resolved in *Maccsand v City of Cape Town* (hereafter *Maccsand*)³⁰⁶ which held that "the exercise of a mining right [is] subject to any other laws bearing on such a right".³⁰⁷ The Constitutional Court in *Maccsand* makes the point that the *MPRDA* was not to be read to override the

²⁹⁹ World Resources Institute 2007 <http://www.wri.org/publication/developmentwithout-conflict> 7.

³⁰⁰ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 20.

³⁰¹ Tlale 2020 *PER/PELJ* 24.

³⁰² *Bengwenyama* 2011 (CC) para 66.

³⁰³ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 21.

³⁰⁴ South African Human Rights Commission *Challenges of Mining-affected Communities* 61; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 21.

³⁰⁵ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 21.

³⁰⁶ *Maccsand v City of Cape Town* 2012 (4) SA 181 (CC) (hereafter *Maccsand*) para 44; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 21.

³⁰⁷ *Maledu* para 106.

applicability or requirements of other statutes.³⁰⁸ In support of this point, *Maledu* reiterated that the *MPRDA* must be read in conformity with the *IPILRA*.³⁰⁹

According to Tlale, the *Baleni* judgment demonstrated "conflicting levels of engagement in terms of the *IPILRA* and the *MPRDA*".³¹⁰ Whether consent under section 2 of the *IPILRA* was necessary before the Minister could approve a mineral right application was the main question to be determined by the North Gauteng High Court in the *Baleni* case.³¹¹ The Court ruled that holders of informal land rights cannot have their rights and interests taken away from them without their prior approval, and that the *MPRDA* must be compliant with the *IPILRA*.³¹² The Court in *Baleni* held that applicants have the right to decide on "mining development that will significantly affect them".³¹³ As a result, their land can only be taken away from them consensually.³¹⁴ *Baleni* made it clear that where land is held on a communal basis, the community must be allowed to assess the proposed deprivation and be permitted to make a collective decision based on their traditions and community regarding their agreement or disagreement with a proposal to dispose of their land rights.³¹⁵ According to Tlale, the *Baleni* decision set the standard for obtaining consent prior to granting rights or permits, insofar as informal rights owners are concerned, for the purposes of the *IPILRA*.³¹⁶ Both decisions in *Baleni* and *Maledu* demonstrate that "there is no conflict between the *IPILRA* and the *MPRDA*", and that "each statute must be read in a manner that permits each to serve their underlying purpose".³¹⁷

³⁰⁸ *Maccsand* para 44.

³⁰⁹ *Maledu* para 106.

³¹⁰ Tlale (2020) *PER/PELJ* 7.

³¹¹ *Baleni* para 32; Tlale (2020) *PER/PELJ* 7-23.

³¹² *Baleni* paras 47 and 83; Tlale (2020) *PER/PELJ* 7-23.

³¹³ *Baleni* para 78; Tlale (2020) *PER/PELJ* 7-23.

³¹⁴ *Baleni* para 79; Tlale (2020) *PER/PELJ* 7-23.

³¹⁵ *Baleni* para 79; Tlale (2020) *PER/PELJ* 7-23.

³¹⁶ Tlale 2020 *PER/PELJ* 12.

³¹⁷ *Baleni* para 83; *Maledu* para 106.

Although the *MPRDA* does not require agreement on these matters in order to grant the prospecting right, consultation under its provisions nonetheless necessitates acting in good faith to try to establish an arrangement in that regard.³¹⁸

2.4 The consultation process under the *MPRDA Regulations* of 2004

This section of the chapter delves into the consultation process under the *2004 MPRDA Regulations*.³¹⁹ The purpose of the *2004 MPRDA Regulations* is to supplement the *MPRDA* to mandate standards and practices that ensure the safe exploration and production of petroleum.³²⁰ The *2004 MPRDA Regulations* incorporated a definition for interested and affected persons, but remained silent on defining consultation.³²¹ The *2004 MPRDA Regulations* stipulate that those "prospecting and mining right applications made in terms of the *MPRDA* must be lodged with the RM or agency where the land is situated".³²² The RM or agent then places "a notice on the noticeboard of their office, Provincial Gazette, Magistrates' Court, or local newspaper".³²³ The notice invites the public to submit written comments within 30 days of the publication date and certifies that the application has been accepted.³²⁴ Under the regulations, interested and affected persons are consulted by applicants in accordance with the

³¹⁸ *Bengwenyama 2011 (CC)* para 65; This study will not delve into the consultation requirements under the *IPILRA* and is limited to the consultation requirements that must be satisfied in relation to the *MPRDA* and *NEMA*.

³¹⁹ The year is added to emphasise the separation between the original *2004 MPRDA Regulations* and the *2020 MPRDA Amendment Regulations*, which will be dealt with in a later section of this chapter.

³²⁰ Regulation 85(1) in the *2004 MPRDA Regulations*.

³²¹ Interested and affected persons are defined as "juristic or natural person or an association of persons with a direct interest in the proposed or existing operation or who may be affected by the proposed or existing operation" by Regulation 1 in the *2004 MPRDA Regulations*; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 30.

³²² Regulation 2(1) in the *2004 MPRDA Regulations*; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 30.

³²³ Regulation 3(1-3) in the *2004 MPRDA Regulations*; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 30.

³²⁴ Regulation 3(1) and 4(a) in the *2004 MPRDA Regulations*; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 30.

Environmental Regulations for Mineral Development, Petroleum Exploration, and Production of 2019.³²⁵ The consultation requirement focuses on the content of the scoping report,³²⁶ the environmental assessment report and the mine closure plan.³²⁷

A mining right application mandates the scoping and environmental assessment reports.³²⁸ The scoping report must document the involvement, viewpoints, and issues of all interested and affected parties.³²⁹ The environmental report describes the consultation and engagement process linked to the environmental assessment, outlining how the concerns raised have been addressed.³³⁰

An environmental impact assessment contemplated in section 39(1) of the *MPRDA* must be compiled as part of the environmental reports required for an application of a mining right. This environmental impact assessment included a scoping report as contemplated in regulation 49 of the 2004 *MPRDA Regulations*.³³¹ The report on environmental impact assessment requires a description of the environment that is expected to be impacted. Meanwhile, the scoping and environmental assessment reports must include, among others, the environmental, social, and cultural impacts of

³²⁵ Part III of Chapter 2 in the *2004 MPRDA Regulations: Environmental Regulations for Mineral Development, Petroleum, Exploration and Production*; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 30.

³²⁶ According to Mothudi, "Scoping studies are carried out early in the project life and are an initial financial appraisal, which is often included in an elementary mining plan. Scoping studies are used to evaluate the acquisition of exploration areas or initiate/proceed further with a mineral project" - Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 30.

³²⁷ Regulations 49(f), 50(f) and 62(j) in the *2004 MPRDA Regulations*; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 30.

³²⁸ Regulation 48(1)(a) and (b) in in GN 527 GG 26275 of 23 April 2004; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 30.

³²⁹ Regulation 49(1)(f) in GN 527 GG 26275 of 23 April 2004; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 30.

³³⁰ Regulation 50(f) in GN 527 GG 26275 of 23 April 2004; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 31.

³³¹ Regulation 50(a) in GN 527 GG 26275 of 23 April 2004.

the mining operation in the report.³³² During the consultation process, applicants who submit the scoping report, environmental impact assessment report, and closure plan are not required to engage with interested and affected parties regarding the properties and conditions impacting health and well-being.³³³ All that is required is for the applicant to define the engagement process and consult in good faith.³³⁴ This results in the consulted interested and affected parties not understanding how their lives will be affected by the mining operation socially and culturally.³³⁵ At this point, before 2020, the *MPRDA* and the *2004 MPRDA Regulations* had shortcomings in their definitions and explanations regarding the regulation of certain requirements to achieve the objectives of the *MPRDA*.³³⁶

2.5 The consultation process under the 2020 *MPRDA* Amendment Regulations

The *2004 MPRDA Regulations* were amended on 27 March 2020 (referred to as the *2020 MPRDA Amendment Regulations*).³³⁷ The amendment introduces significant modifications to the concept of consultation, along with defining it. Authors such as Mothudi have simplified the reading of these amendments by tabulating them.³³⁸ This

³³² Regulation 50(b)(c) and 49(1)(c) in GN 527 GG 26275 of 23 April 2004; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 31.

³³³ Section 1 of the *NEMA*.

³³⁴ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 31.

³³⁵ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 31.

³³⁶ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 31.

³³⁷ The focus of this study on the amendments is only to the extent that the amendments concerned consultation.

³³⁸ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 32.

study aims to do the same to ease reference to the specific amendments made to the regulations.

Table 1: Selected sections of the regulations, as amended in 2020

Table 1

Regulation 1³³⁹	Regulation 3³⁴⁰
<i>Meaningful consultation:</i> "Good faith facilitated participation allowing reasonable opportunity to comment by those consulted around the impact of the mining activities and their effects on their rights to use the land. Information must be given on the proposed activities." Interested and affected persons: "Persons with direct interest in or may be affected by the proposed/existing prospecting or mining operation." Mining community: "Communities, including those adjacent, where mining occurs and labour sending areas."	Regulation 3A(1) provides that <i>meaningful consultation</i> contemplated in sections 16(4)(b), 22 (4)(b) and 25(5)(a) of the <i>MPRDA</i> shall be conducted in terms of the EIA Regulations under the <i>NEMA</i>. Regulation 3A(2) provides that the office of the RM may participate in the consultation process as an observer to ensure consultation is <i>meaningful</i>.

³³⁹ Regulation 1 in the *2020 MPRDA Amendment Regulations*; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 32.

³⁴⁰ Regulation 3 in the *2020 MPRDA Amendment Regulations*; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 32.

The *2020 MPRDA Amendment Regulations* mainly have two implications. First, they define what *meaningful* consultation entails. Second, they grant the RM the authority to be involved in the consultation to ensure its meaningfulness.

2.6 The consultation process under the *NEMA*

One of *NEMA*'s objectives is to protect everyone's right to an environment that is not harmful and to protect the environment from degradation.³⁴¹ Both the *MPRDA* and the *NEMA* are statutes that give effect to the right to have the environment protected for the benefit of present and future generations, enshrined in section 24 of the *Constitution*.³⁴² Chapter 1 of the *NEMA* sets out principles that guide the implementation of environmental legislation.³⁴³ These principles emphasise the importance of achieving sustainable development and the necessity of public involvement. First, the participation of all parties with an interest in or affected by environmental governance should be encouraged.³⁴⁴ Second, interested and affected parties should have the opportunity to cultivate the knowledge, skills, and abilities needed for equal and effective involvement, particularly those who are vulnerable and disadvantaged, such as women and young people.³⁴⁵ Third, when making decisions, it is essential to consider the interests, needs, and values of all parties involved and impacted, including acknowledging traditional knowledge.³⁴⁶ Fourth, decisions must be taken openly and transparently, and access to information must be provided in accordance with the law.³⁴⁷

It is essential to note that holders of prospecting and mining rights must have complied with both the *MPRDA* and the *NEMA* consultation requirements.³⁴⁸ Under the *NEMA*,

³⁴¹ *Minister of Environmental Affairs v ArcelorMittal South Africa Limited* [2020] ZASCA 40 para 42.

³⁴² *Global Environmental Trust v Tendele Coal Mining (Pty) Ltd* [2021] ZASCA 13 (hereafter *Global Environmental Trust*) para 31.

³⁴³ Section 2(4) of the *NEMA*.

³⁴⁴ Section 2(4)(f) of the *NEMA*.

³⁴⁵ Sections 2(4)(c) and (f) of the *NEMA*.

³⁴⁶ Section 2(4)(g) of the *NEMA*.

³⁴⁷ Section 2(4)(k) of the *NEMA*.

³⁴⁸ *Global Environmental Trust* para 1.

proponent mining companies must satisfy and comply with the provisions in section 24, which outline the environmental authorisation and consultation requirements. Section 24(1) of *the NEMA* requires the investigation, assessment, and reporting of the consequences or impacts on the environment resulting from mining-related activities.³⁴⁹ These impacts must be reported to the authorities or minister unless activities can commence without environmental authorisation.³⁵⁰

According to section 24(1A) of the *NEMA*, "applicants must comply with the provisions of the Act relating to the submission of applications, reports required, consultation procedures, and environmental management and authorisation".³⁵¹ Section 24(5) of *NEMA* then authorises the Minister to make regulations for the investigation and assessment of consequences and impacts of activities on the environment, while section 25(5)(b)(vii) of *NEMA* provides for regulations regarding consultation procedures.³⁵² Section 25(5)(b)(vii) of *NEMA* is further given effect to by the *Environmental Impact Assessment (EIA) Regulations* of 2014 (*2014 EIA Regulations*). The *EIA Regulations* were published in 2014,³⁵³ amended in 2017, 2018,³⁵⁴ 2020³⁵⁵ and later in 2021. *EIA* is defined as a:

A systematic process of identifying, assessing, and reporting environmental impacts associated with an activity includes basic assessment and S&EIR.³⁵⁶

³⁴⁹ Section 24(1) of the *NEMA*.

³⁵⁰ Section 24(1) of the *NEMA*.

³⁵¹ Section 24(1A) of the *NEMA*.

³⁵² Section 24(5) of the *NEMA*; section 25(5)(b)(vii) of the *NEMA*.

³⁵³ The *2014 EIA Regulations*; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 36.

³⁵⁴ *EIA Regulations Amendment Regulations* in GG 41766 of 13 July 2018; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 36.

³⁵⁵ *EIA Amendment Regulations* in GG 43358 of 29 May 2020; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 36.

³⁵⁶ S&EIR means the scoping and environmental impact reporting process – Regulation 1 of the *Environmental Impact Assessment Amendment Regulations* in GN 326 GG 40772 of 7 April 2017; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 36.

The EIA process is defined as:

A formal process to study a major proposed project, plan, programme, or other action with potentially significant environmental, social and economic impacts to predict and evaluate its effects, examine alternative less-impactive approaches, and develop measures to avoid or mitigate impact.³⁵⁷

EIA aims to incorporate environmental considerations into development planning, thereby enhancing the potential for decisions and plans that are both environmentally sound and sustainable.³⁵⁸ Almost all EIAs include some form of public participation, and public engagement has been identified as one of the factors influencing EIA effectiveness.³⁵⁹ Zillman highlights that a key purpose of carrying out environmental assessments is to educate the public about proposed projects and to involve them in a meaningful discussion regarding the potential advantages as well as the environmental and social impacts of a proposed activity.³⁶⁰

The *2014 EIA Regulations* were promulgated to provide a framework for regulating activity on land owned by, among others, the public, with provisions for public participation.³⁶¹ These public participation provisions include the purpose and process of public involvement. Regulation 39 of the *2014 EIA Regulations* requires written consent from owners before undertaking activity on the land, as part of the application for environmental authorisation.³⁶² Regulation 40(1) of the *2014 EIA Regulations* then allows for interested and affected parties 30 days to comment on reports and plans

³⁵⁷ Zillman, Lucas and Pring *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* 38.

³⁵⁸ Zillman, Lucas and Pring *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* 38.

³⁵⁹ Zillman, Lucas and Pring *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* 38.

³⁶⁰ Zillman, Lucas and Pring *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* 38.

³⁶¹ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 36.

³⁶² A proponent is defined as "a person intending to apply for environmental authorisation and is referred to as an applicant once such application for environmental authorisation has been submitted" – Regulations 1 and 39 in the *2014 EIA Regulations*.

(basic assessment, scoping, EIA, closure plan).³⁶³ The public participation process must involve consultation and the dissemination of information.³⁶⁴ Interested and impacted parties may have the chance to comment on reports prior to application submission during consultation, but this must happen later.³⁶⁵ In terms of regulation 41(2), "applicants conducting a public participation process must inform interested and affected persons of the application by posting physical notices on boards, in local newspapers, the Gazette, and in national and provincial newspapers".³⁶⁶

Different ways of participation are available for individuals with disabilities.³⁶⁷ Regulation 41(3) of the *2014 EIA Regulations* specifies the requirements for notice boards and advertisements, while regulation 41(4) outlines the requirements for the size and format of the notice boards.³⁶⁸ According to regulation 41(6) of the *2014 EIA Regulations*, the public participation process must provide for comments from interested and affected persons after information is provided, including the facts of the application.³⁶⁹ The *2014 EIA Regulations* also require the creation of registers of interested and affected parties who have commented or attended meetings, and for their comments to be recorded in reports and plans.³⁷⁰

2.6.1 EIA Amendment Regulations of 2021

On 11 June 2021, the *2014 EIA Regulations* were amended, introducing substantial modifications to the rights of landowners or persons exercising control over land. While there were other slight amendments to regulations 40(1)(a) and (b) and 41(5) of the *EIA Regulations*,³⁷¹ the amendments to regulation 39(2) granted significant protections to landowners and those in control of the land.

³⁶³ Regulation 40(1) in the *2014 EIA Regulations*.

³⁶⁴ Regulation 40(2)(d) in the *2014 EIA Regulations*.

³⁶⁵ Regulation 40(3) in the *2014 EIA Regulations*.

³⁶⁶ Regulation 41(2)(a)(i - ii), (b)(I - vi), (c)(i - ii), (b) in the *2014 EIA Regulations*.

³⁶⁷ Regulation 41(2)(c)(i-iii) in the *2014 EIA Regulations*.

³⁶⁸ Regulation 41(3)(a) and (b)(i-iv) in the *2014 EIA Regulations*.

³⁶⁹ Regulation 41(6)(a) and (b) in the *2014 EIA Regulations*.

³⁷⁰ Regulations 42, 43 and 44 in the *2014 EIA Regulations*.

³⁷¹ *EIA Amended Regulations, 2021* in GN 517 GG 44701 of 11 June 2021.

Mothudi commented on the workings of regulations 41(5)(b) of the *EIA Amended Regulations* and regulation 39(2)(b) from the *2014 EIA Regulations*.³⁷² According to regulation 41(5)(b) of the *EIA Amended Regulations*, registered interested and affected parties are provided with written notice detailing where they can access reports, the procedure for submitting comments on these reports and plans, and the submission deadlines for these comments.³⁷³ The amendments made in 2021 also included the removal of regulation 39(2)(b) from the *2014 EIA Regulations*. Regulation 39(2)(b) required the consent of the land owner or lawful occupier of the land in question,³⁷⁴ but did not apply to activities related to prospecting or exploration of a mineral and petroleum resource or extraction and processing thereof.³⁷⁵ Following the amendment, it provided the same protections to informal rights holders,³⁷⁶ as well as to owners and those exercising control over the property.³⁷⁷ On March 3, 2022, the Minister of the Department of Forestry, Fisheries, and the Environment removed these amendments, citing a lack of adherence to public participation processes.³⁷⁸ This severance has removed essential protection for property rights on legitimate grounds, specifically the absence of a public consultation process.³⁷⁹

³⁷² Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 42.

³⁷³ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 42; Regulation 41(5)(i-iii) in GN 517 GG 44701 of 11 June 2021.

³⁷⁴ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 42; Regulation 39 (1) in GN 517 GG 44701 of 11 June 2021.

³⁷⁵ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 42; Regulation 39(2)(b) in GN 517 GG 44701 of 11 June 2021.

³⁷⁶ Sections 2(1) and (4) of *IPIRLA*.

³⁷⁷ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 42.

³⁷⁸ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 42.

³⁷⁹ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 42.

Although the *MPRDA*, *NEMA*, and their respective regulations require consultation with affected parties before prospecting and mining rights and permits are granted, issues have been noted within the public participation procedures.³⁸⁰ According to Mothudi, the issues include "inadequate legal frameworks for *meaningful* and effective consultation, corruption, lack of understanding of the technicalities of the EIA report, and a lack of public knowledge around the awarding process, resulting in a lack of proper implementation and oversight".³⁸¹ These shortcomings pointed out by Mothudi form part of the central issues that this dissertation aims to address, specifically regarding the lack of proper and adequate regulation of consultation processes during applications for mining-related permits. These issues contribute to the stagnation of the achievement of *meaningful* consultation processes.

2.7 The consultation process under the *DMR Consultation Guidelines*

The *DMR Consultation Guidelines* guide the fulfilment of the consultation requirement, but are not legally enforceable.³⁸² The *DMR Consultation Guidelines* were established before the promulgation of the *2020 MPRDA Amendment Regulations*. The purpose of these *DMR Consultation Guidelines* is to offer clear guidance on executing the consultation-required sections of the *MPRDA*.

Under the *DMR Consultation Guidelines*, three steps must be followed when satisfying the duty to consult: identification, notification and consultation.³⁸³ First, the applicant

³⁸⁰ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 42.

³⁸¹ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 42.

³⁸² South African Human Rights Commission *Challenges of Mining-affected Communities* 61; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 25.

³⁸³ Section G "Obligations of the Applicant" of the *DMR Consultation Guidelines*; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 25.

must identify the landowner or lawful occupier of the land in question, as well as all interested and affected parties.³⁸⁴ The identification step includes:

(1) the identification of any communities that are affected; (2) the identification of interested parties; (3) a statement of whether the community is a landowner; and (4) a statement of whether or not a land claim is involved.³⁸⁵

Second, the applicant is required to notify the landowner or lawful occupier, as well as any interested and affected parties, of their application and to retain proof of the notification.³⁸⁶ The *DMR Consultation Guidelines* stipulate that traditional leaders of communities should be notified in accordance with the values and traditions of the area.³⁸⁷

Third, the applicant must consult with the interested and affected parties.³⁸⁸ This consultation must include a meeting with all the parties mentioned above and provide them with sufficient details about what the prospecting or mining operations will entail.³⁸⁹ According to the *DMR Consultation Guidelines*, the consultation must result in an agreement that satisfies both parties regarding the community's "existing cultural, socio-economic or biophysical environment".³⁹⁰ The consultation must additionally

³⁸⁴ Section G "Obligations of the Applicant" of the *DMR Consultation Guidelines* 6; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 25.

³⁸⁵ Section G "Obligations of the Applicant" of the *DMR Consultation Guidelines* 6; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 25.

³⁸⁶ Section G "Obligations of the Applicant" of the *DMR Consultation Guideline* 6; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 25.

³⁸⁷ Section G "Obligations of the Applicant" of the *DMR Consultation Guideline* 6; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 25.

³⁸⁸ Section G "Obligations of the Applicant" of the *DMR Consultation Guideline* 6; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 25.

³⁸⁹ Section G "Obligations of the Applicant" of the *DMR Consultation Guideline* 7; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 25; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 25.

³⁹⁰ Section G "Obligations of the Applicant" of the *DMR Consultation Guideline* 7 Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 25.

consider the possible effects of the intended prospecting or mining activities.³⁹¹ Finally, the applicant must take minutes of the meeting and use them to prepare a report for submission to the RM.³⁹²

The consultation process cannot be treated as a mere formality, given that prospecting and mining activities are inherently disruptive to customary communities.³⁹³ The consultation process must be "a genuine and effective meeting of the minds of both the applicants and the interested and affected parties".³⁹⁴ It is therefore recognised as "commendable" that the Minister has amended the *MPRDA Regulations* to include the definition of "*meaningful* consultation", a concept which will be dealt with in Chapter 4 of this paper.³⁹⁵ It is essential to note that while the *DMR Consultation Guidelines* provide guidance on consultation, they are not legally enforceable or procedurally required for the granting of a mining-related permit.³⁹⁶

2.8 The consequences of failure to apply for a prospecting right in the prescribed manner

The failure to apply for a prospecting right in the prescribed manner was addressed by the SCA in *Pan African Mineral Development Co (Pty) Ltd v Aquila Steel (SA) Pty Ltd* (hereafter *Aquila Steel* 2018 (SCA)).³⁹⁷ In this case, the appellant (Aquila Steel) disputed whether the prospecting right granted to the holder of unused old rights (ZIZA) was invalid due to non-compliance with the requirements of section 16 of the *MPRDA* and regulations 2, 5, and 7 of the *MPRDA Regulations*.³⁹⁸ For the majority,

³⁹¹ Section G "Obligations of the Applicant" of the DMR Consultation Guideline 7.

³⁹² Section G "Obligations of the Applicant" of the DMR Consultation Guideline 7.

³⁹³ Mitchell, Moalusi, and Van der Walt 2012 *JSAIMM* 151-153.

³⁹⁴ Mitchell, Moalusi and Van der Walt 2012 *JSAIMM* 151-153.

³⁹⁵ See amendment of regulation 1 for the definition of "*meaningful* consultation" in the Amendment Regulations; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 26.

³⁹⁶ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 44.

³⁹⁷ *Pan African Mineral Development Co (Pty) Ltd v Aquila Steel (SA) Pty Ltd* 2018 (5) SA 124 (SCA) (hereafter *Aquila Steel* 2018 (SCA)).

³⁹⁸ Badenhorst *Mineral Law of South Africa: Text, Cases and Commentary* 104.

Ponnan JA upheld Hoexter's assertion that a statute does not always become invalid if formalities and other procedural requirements are not precisely followed.³⁹⁹ Ponnan JA confirmed that the position remains that even when statutory formalities are mandatory, not every departure from their literal terms is fatal; in such cases, the real question is whether, despite the irregularities, the purpose of the statutory provision has still been fulfilled.⁴⁰⁰

In a dissenting judgment, Willis JA held that section 16(3) of the *MPRDA* ought to be applied strictly and rigidly, therefore rejecting the flexible application of section 16 (the allowing of non-compliance) allowed by the majority on both counts.⁴⁰¹ Willis JA noted two non-compliances with section 16(3) of the *MPRDA*.⁴⁰² First, the application did not comply with the requirements of section 16.⁴⁰³ Second, the RM failed to notify Aquila in writing of ZIZA's non-compliance with the MPRDA within 14 days of receipt of the application and, thereafter, to return the application to ZIZA.⁴⁰⁴ Willis JA held that section 16(3) is drafted in imperative terms, meaning a defective application is a non-application and that the return of the application by the RM is merely a public manifestation of it being dead; therefore, it cannot be deemed as a rejection of the application.⁴⁰⁵ He reiterates that it is not the return of the application that brings about its death, but that it is the lack of compliance with the requirements of sections 16(1) and (2) that makes the application lifeless.⁴⁰⁶

On appeal, the Constitutional Court in *Aquila Steel (South Africa) Ltd v Minister of Mineral Resources* (hereafter *Aquila Steel* 2019 (CC)) agreed, for the most part with Willis JA, that the grant of a prospecting right to ZIZA was invalid because it clearly did not comply with the requirements for acceptance of an application for a prospecting

³⁹⁹ *Aquila Steel* 2018 (SCA) para 20.

⁴⁰⁰ *Aquila Steel* 2018 (SCA) para 20.

⁴⁰¹ *Aquila Steel* 2018 (SCA) para 40.

⁴⁰² *Aquila Steel* 2018 (SCA) para 40.

⁴⁰³ *Aquila Steel* 2018 (SCA) para 40.

⁴⁰⁴ *Aquila Steel* 2018 (SCA) para 40.

⁴⁰⁵ *Aquila Steel* 2018 (SCA) para 40.

⁴⁰⁶ *Aquila Steel* 2018 (SCA) para 50.

right in terms sections 16(1) and (2) of the *MPRDA*.⁴⁰⁷ The Constitutional Court noted that the RM should have returned the grossly defective application to the applicant. The Constitutional Court held Willis JA to be misguided on the function of the RM as well as the interpretation of section 16(3) of the *MPRDA* by correcting his seemingly conjunctive reading of section 16. Willis JA seemed to hold the position that once the application is flawed in terms of sections 16(1) and (2) of the *MPRDA*, it is dead and cannot be corrected by a return of application by a RM as section 16(3) mandates. The Constitutional Court was of the view that the RM did not have the power to refuse or grant ZIZA's application, since only the Minister enjoys that power under section 17(1) of the *MPRDA*.⁴⁰⁸ Yet the statute imposes on the RM an obligation to return an application that is not lodged in the prescribed manner.⁴⁰⁹ Section 1 of the *MPRDA* defines *prescribed* as "prescribed by regulation".⁴¹⁰ The format and contents of an application for a prospecting right under section 16 are specifically specified in both regulations 2 and 5.⁴¹¹ When approving an application, the RM is required by regulations 2 and 5 to perform an evaluation function and confirm that the application was submitted in compliance with all relevant regulations.⁴¹² It also means that an application that fails to comply with either regulation must be returned.⁴¹³ Failure by the RM to return an application that is non-compliant with the *MPRDA Regulations* constitutes failure to carry out an express, specified statutory duty (*must return*), resulting in malperformance that triggers an administratively reviewable action under the *PAJA* if the notice of motion targets the non-return of the application.⁴¹⁴

⁴⁰⁷ *Aquila Steel* 2019 (CC) para 50.

⁴⁰⁸ *Aquila Steel* 2019 (CC) para 51.

⁴⁰⁹ *Aquila Steel* 2019 (CC) para 51.

⁴¹⁰ *Aquila Steel* 2019 (CC) para 51; section 1 of the *MPRDA*.

⁴¹¹ *Aquila Steel* 2019 (CC) para 51.

⁴¹² *Aquila Steel* 2019 (CC) para 51.

⁴¹³ *Aquila Steel* 2019 (CC) para 51.

⁴¹⁴ *Aquila Steel* 2019 (CC) para 52.

2.9 The lack of an internal and mandatory dispute and resolution mechanism before the granting of a mining-related permit

Despite the provisions regulating the consultation process in applications for mining-related permits being set out in the *MPRDA* and *NEMA*, as well as their regulations, the legal framework lacks dispute resolution processes for interested and affected parties before the granting of a mining-related permit.

The Parliamentary Monitoring Group provided examples of conflicts between the proponent mining company and interested and affected parties.⁴¹⁵ For purposes of brevity, this paper dissertation refers to only one of the examples. A mining firm in the Ga-Ratau village of Limpopo was granted prospecting rights after just talking with a traditional authority who provided the company with unwritten and informal backing. Community members complained when prospecting started, claiming they had not been sufficiently consulted and that a written, inclusive agreement specifying important concerns (including the extent of activities, duration, compensation, and usage of communal resources) ought to have been reached. A competing traditional authority objected to being left out as well. The corporation claimed that since the Minister had already given the authority, its consultation was adequate. Deep tension resulted from this unresolved dispute, which finally led to the destruction of three drilling rigs as well as community splits, protests, police participation, arrests, and judicial actions.⁴¹⁶

These conflicts could not be subject to any legislative internal dispute resolution mechanism due to the lack thereof in both the *MPRDA* and *NEMA*, as well as their regulations.

⁴¹⁵ Parliamentary Monitoring Group 2007 <https://static.pmg.org.za/docs/2007/070530richard.htm>.

⁴¹⁶ Parliamentary Monitoring Group 2007 <https://static.pmg.org.za/docs/2007/070530richard.htm>.

2.10 Conclusion

This chapter examined the historical, legislative, and judicial evolution of consultation processes in mining-related permit applications in South Africa. It traces the transformation of mineral rights from private ownership under Roman-Dutch law, where the landowner held complete dominion (*cuius est solum eius est usque ad coelum et ad inferos*), to state custodianship of mineral resources under the *MPRDA*.

In the periods of colonialism and apartheid, laws like the *Natives Land Act*, *Mining Rights Act* and the *Minerals Act* reinforced exclusion by consolidating control within the government and limiting black South Africans' access to mineral resources. After 1994, the *Constitution* established the principles of equality, participation, and environmental sustainability, which paved the way for the establishment of the *MPRDA*. The *MPRDA* places mineral resources under the nation's ownership, with the state serving as the custodian of these resources.

The *MPRDA* mandates consultation with interested and affected parties before granting prospecting or mining rights.⁴¹⁷ Regulations 3 and 10 of the *2004 MPRDA Regulations* outline procedures for notifying landowners and communities, emphasising transparency and fairness. The *NEMA* complement this by integrating public participation in EIAs. However, inconsistencies between these frameworks often lead to procedural confusion and overlapping obligations.

Judicial interpretation has been pivotal in clarifying the nature of consultation. In *Bengwenyama 2011 (CC)*, the Constitutional Court held that consultation must be genuine, allowing affected parties to understand and comment on proposed activities. Similarly, SCA in *SA Soutwerke v Saamwerk Soutwerke* confirmed that consultation is a two-way engagement, not a mere formality.⁴¹⁸ The *Baleni* and *Maledu* decisions, made in the North Gauteng High Court and the Constitutional Court, respectively,

⁴¹⁷ Section 10 of the *MPRDA*.

⁴¹⁸ *SA Soutwerke v Saamwerk Soutwerke* para 28-35.

established that communities holding informal land rights under the *IPILRA* must give free, prior, and informed consent, distinguishing between consultation under the *MPRDA* and consent under *IPILRA*. This chapter made it clear that this study is limited to excluding extensive discussions on the consent requirement.

The South African legal framework for mining-related consultation has undergone significant evolution, reflecting a gradual shift from exclusionary state control to participatory governance. The *MPRDA*, read in conjunction with the *NEMA* and the *IPILRA*, establishes a foundation for inclusive decision-making, aiming to strike a balance between economic development, social justice, and environmental protection. However, persistent challenges undermine the system's effectiveness. These include a lack of uniform standards, weak enforcement, and the absence of a clear definition of *meaningful consultation*. Amendments to the *MPRDA Regulations* in 2020 introduced the concept of *meaningful consultation*, aligning it more closely with the participatory ideals of *NEMA*. The *DMR Consultation Guidelines* offer procedural clarity but remain non-binding, resulting in uneven application in practice. Before the 2020 amendments to the *2004 MPRDA Regulations*, the *DMR Consultation Guidelines* were essential in providing more detailed information on how applications for mining-related permits required consultation processes.

While the courts have reinforced the importance of genuine engagement, practical implementation often falls short, reducing consultation to a procedural matter. Although South Africa's mining law promotes transparency and participation, achieving equitable and sustainable mineral development depends on strengthening the legal framework that regulates consultation processes, ensuring that affected communities have a *meaningful* influence in mining decisions that impact their land, livelihoods, and environment.

CHAPTER 3

Meaning, purpose, objects, and extent of procedural fairness in section 33 of the Constitution and PAJA and the relevance thereof to applications for mining-related permits, in terms of the MPRDA and the NEMA

3.1 Introduction

Chapter 3 explores the meaning, purpose, objects, and extent of procedural fairness in section 33 of the *Constitution* and the *PAJA* and the relevance thereof to applications for mining-related permits, in terms of the *MPRDA* and the *NEMA*. This exploration is important for purposes of establishing the threshold of procedural fairness consultation processes during applications for mining-related permits need to meet.

Section 6 of the *MPRDA* provides that:

Subject to the *PAJA*, any administrative process conducted or decision taken in terms of the *MPRDA* must be conducted or taken within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness.⁴¹⁹

Section 6 of the *MPRDA* provision has the effect of subjecting the consultation processes set out in sections 16, 22 and 27 of the *MPRDA* to the procedural fairness principle envisaged by the *PAJA*. The *PAJA* gives effect to the constitutional right to just administrative action.⁴²⁰ The definition of administrative action in section 1 of the *PAJA* can be summarised in seven elements as:

- (a) A decision (of an administrative nature);
- (b) By an organ of a state, a natural or juristic person;
- (c) Exercising public power / performing a public function;
- (d) In terms of the Constitution or legislation / an empowering provision;
- (e) That adversely affects rights;
- (f) That has a direct, external legal effect; and
- (g) That does not fall within any of the listed exclusions.⁴²¹

⁴¹⁹ Section 6 of the *MPRDA*.

⁴²⁰ *Mapholisa v Phetoe* [2022] ZASCA 168 (hereafter *Mapholisa*) para 17.

⁴²¹ *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 33; See also section 1 of the *PAJA*.

As concluded in the contents under subheading 1.1.2 above, the courts have held that decisions made by the RM constitute administrative action.⁴²²

What follows in this chapter is a dissection of the development of and prevailing administrative law principle of procedural fairness. The chapter examines the codification, in both legislative and jurisprudential contexts, of the common law principle of natural justice, which was constitutionalised in section 24 of the Interim Constitution and section 33 of the final Constitution as *procedural fairness*. This serves the purpose of exploring the standard that the consultation process during applications for mining-related permits, as outlined in Chapter 2 of this study, should meet to satisfy the procedural fairness requirements set out in section 33 of the Constitution and the PAJA, as interpreted and developed by the South African courts. This will be done by analysing the purpose, objects, meaning, and extent of procedural fairness. To appreciate the meaning, purpose, objects, and extent of procedural fairness, this chapter of the study will dissect the meaning, purpose, objects, and extent of provisions that establish procedural fairness in the *PAJA*. These four aspects (meaning, purpose, objects, and extent) will be explored while engaging in the meaning of the provisions establishing procedural fairness in the *Constitution* and the *PAJA*. For example, this includes examining the procedures followed by an administrator who must comply with the provisions of the *PAJA*.

Prior to exploring the meaning, purpose, objects, and extent of specific provisions in the *PAJA*, it is appropriate to reflect on the general objectives of the *PAJA*. First, "to promote an efficient administration and good governance".⁴²³ Second, "to create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administration action".⁴²⁴

⁴²² See subheading 1.1.2 of Chapter 1 of this study.

⁴²³ Preamble of the *PAJA*.

⁴²⁴ Preamble of the *PAJA*.

3.2 Constitutionalisation of procedural fairness

In the latter half of the 20th century, the rise and dominance of social and liberal democracy led to two notable developments in executive government and public administration.⁴²⁵ First, the excessive and unprecedented expansion of executive power and the exponential growth of bureaucracy.⁴²⁶ Second, the emergence and constitutionalisation of human rights.⁴²⁷ Modern governments depend considerably on an influential civil service to implement their socio-economic policies with discretion and effectiveness.⁴²⁸

The core issue is the degree to which a public administration with increased power should be legally and judicially responsible for implementing these policies.⁴²⁹ According to Devenish, a healthy balance is necessary, as excessive regulatory burdens can be detrimental to government administration.⁴³⁰ Furthermore, a healthy balance is required to ensure transparency and accountability.⁴³¹ Lastly, a healthy balance can negatively affect service delivery and the enforcement of the separation of powers doctrine.⁴³² Alternatively, unchecked discretion, as clearly shown by the history of colonial apartheid, could result in excessive misuse of power and the waste of valuable resources.⁴³³

It is for this reason that administrative justice principles, such as procedural fairness, were codified in section 24 of the *Interim Constitution of the Republic of South Africa* 200 of 1993 (*the Interim Constitution*)⁴³⁴ and then later in section 33 of the final *Constitution* and the *PAJA*. However, procedural fairness was not a new concept as

⁴²⁵ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 115.

⁴²⁶ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 115.

⁴²⁷ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 115.

⁴²⁸ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 115.

⁴²⁹ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 115-116.

⁴³⁰ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 115-116.

⁴³¹ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 115-116.

⁴³² Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 115-116.

⁴³³ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 116.

⁴³⁴ *Interim Constitution* of the Republic of South Africa 200 of 1993 (hereafter the *Interim Constitution*).

part of regulating the exercise or performance of administrative power or functions, as an administrative law principle that needs to be complied with. Before the commencement of the *Interim Constitution* and the final 1996 *Constitution*, the exercise and performance of administrative power were regulated by common law principles of "natural justice", which included the "*audi alteram partem*" principle.

Baxter states that under the *audi alteram partem* principle, an affected person is entitled to two essential common law requirements: "notice of the intended action" and "a proper opportunity to be heard".⁴³⁵ Regarding the "notice of the intended action", the opportunity to be heard assumes that there is proper notification of the "intended administrative action".⁴³⁶ Regardless of whether a statute expressly requires it, any affected party must receive sufficient notice that administrative action may be initiated against them.⁴³⁷ To ensure the hearing is fair, the "notice of the intended action" must also detail the key factors motivating the proposed action.⁴³⁸ Thus, the affected individual cannot prepare their objections adequately without adequate notice.⁴³⁹ The notice must specify the time and place where the opportunity for a hearing is available, even if it does not explicitly invite him to make representations.⁴⁴⁰

The case of *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture* (hereafter *Heatherdale Farms*) examined whether, under common law, an affected individual is entitled to the same facilities as a litigant in a judicial trial.⁴⁴¹ The Transvaal Provincial Division determined that a person entitled to the *audi alteram partem* rule does not necessarily receive all the facilities provided to a litigant in a judicial trial, such as document discovery, legal representation, and an oral hearing.⁴⁴² In respect of the

⁴³⁵ Baxter *Administrative Law* 544.

⁴³⁶ Baxter *Administrative Law* 544.

⁴³⁷ Baxter *Administrative Law* 544.

⁴³⁸ Baxter *Administrative Law* 544.

⁴³⁹ Baxter *Administrative Law* 544.

⁴⁴⁰ *S v Shangase* 1962 (1) SA 543 (N) 540D-E; *Cape Town Municipality v Abdulla* 1974 (4) SA 428 (C) 439H; Baxter *Administrative Law* 544.

⁴⁴¹ *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture* 1980 (3) SA 476 (T) 486 (hereafter *Heatherdale Farms*); Baxter *Administrative Law* 552.

⁴⁴² *Heatherdale Farms*; Baxter *Administrative Law* 552.

publicity element, Baxter holds the view that it is *vital* to uphold public trust in the judicial process, and notably, that this vitality also extends to the administrative context.⁴⁴³ The court, however, noted — as will be demonstrated throughout this chapter — that the person affected must first be allowed a reasonable time to gather the relevant information, to devise and make their representations.⁴⁴⁴ Second, "he must be put in possession of such information as it will render his/her right to make representations a real, and not an illusory one".⁴⁴⁵

To emphasise the importance of these natural justice principles, they were codified in the form of procedural fairness, as found in section 24(b) of the *Interim Constitution* and later in section 33 of the *Constitution*, which was to be given meaning in the *PAJA* and the courts.

Section 24 of the *Interim Constitution* provided:

Every person has the right to –

- (1) lawful administrative action where any of their rights or interests are affected or threatened;
- (2) procedurally fair administrative action where any of their rights or legitimate expectations are affected or threatened;
- (3) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for such action have been made public; and
- (4) Administrative action which is justifiable in relation to the reasons given for it, where any of their rights are affected or threatened.⁴⁴⁶

Section 24(b) of the *Interim Constitution* required compliance with the principles of natural justice, which obligated that people impacted by administrative actions be notified of the information underlying these actions, thereby ensuring transparency in administrative decisions.⁴⁴⁷ Regarding the right to procedurally fair administrative action, a mere interest in the outcome of the action does not suffice; a legitimate

⁴⁴³ Baxter *Administrative Law* 557.

⁴⁴⁴ *Heatherdale Farms* 552.

⁴⁴⁵ *Heatherdale Farms* 552.

⁴⁴⁶ Section 24 of the *Interim Constitution*.

⁴⁴⁷ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 119.

expectation is expressly required.⁴⁴⁸ The explicit reference to legitimate expectations confirmed the meritorious decision of the Appellate Division in *Administrator Transvaal v Traub*⁴⁴⁹ that the principles of natural justice must apply in those circumstances where legitimate expectations may be influenced by executive conduct.⁴⁵⁰

Section 24 of the *Interim Constitution* was replaced by the broader language found in section 33 of the *Constitution*. The right in section 33(1) of the *Constitution*, unlike that in section 24(b) of the *Interim Constitution*, is entirely unqualified because "all administrative action must be lawful, reasonable and procedurally fair".⁴⁵¹

Section 33 of the *Constitution* provides:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must—
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.⁴⁵²

Section 33 of the *Constitution* grants the right to procedural fairness in administrative action.⁴⁵³ Fair procedure in the constitutional era refers to whether the administrator has acted fairly in reaching a decision.⁴⁵⁴ At the very least, this right secures the common law right to natural justice, though it is not limited to it.⁴⁵⁵ The common law principles of natural justice are embodied in two *maxims*: *audi alteram partem* (parties affected by a decision must be allowed an opportunity to make representations so that

⁴⁴⁸ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 119.

⁴⁴⁹ *Administrator Transvaal v Traub* 1989 (4) SA 731 (A).

⁴⁵⁰ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 119.

⁴⁵¹ Hoexter *Administrative Law in South Africa* 400.

⁴⁵² Section 33 of the *Constitution*.

⁴⁵³ Section 33 of the *Constitution*.

⁴⁵⁴ Burns and Henrico *Administrative Law* 291.

⁴⁵⁵ *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265 (CC) (hereafter *Bel Porto*) para 84.

they can influence the result(s) of that decision)⁴⁵⁶ and *nemo iudex in sua causa* (the decision-maker must be reasonably perceived to be impartial).⁴⁵⁷ Currie argues that as the seriousness of an issue and its impact on those involved increase, a greater effort is needed to meet the standards of fairness.⁴⁵⁸ Currie's point was evidenced by the court in *Masetlha v President of the Republic of South Africa* (hereafter *Masetlha*), which held the following view with the *maxim audi alteram partem* during consultations:

The procedural aspect of the rule of law is generally expressed in the *maxim audi alteram partem* which provides that no one should be condemned unheard reflects a fundamental principle of fairness that underlies or ought to underlie any just and credible legal order. This consultation provides an insurance against arbitrariness and decision ensures that the decision-maker has all the facts prior to making a decision. This principle is triggered whenever a statute empowers a public official to make a decision which prejudicially affects the property, liberty or existing right of an individual.⁴⁵⁹

It is submitted that an administrator deciding to award a mining-related permit to an applicant thereto after a consultation process in terms of the *MPRDA* and *NEMA* triggers the relevance of the Constitutional Court's utterings in *Masetlha*⁴⁶⁰ because of the already established position that this award would affect the property, liberty or existing right of an individual.⁴⁶¹

The duty to act fairly has been referred to in several South African decisions, *inter alia*, *Yates v University of Bophuthatswana*⁴⁶² and *Masetlha*⁴⁶³ where the Bophuthatswana High Court and the Constitutional Court, respectively, stressed the importance of a fair hearing in every aspect and detail.⁴⁶⁴ The Court stated that the principles of natural justice dictate that individuals who may be affected by administrative actions should

⁴⁵⁶ Hoexter *Administrative Law in South Africa* 363.

⁴⁵⁷ Currie and De Waal *The Bill of Rights Handbook* 663.

⁴⁵⁸ Currie *The Promotion of Administrative Justice Act: A Commentary* 95.

⁴⁵⁹ *Masetlha v President of the Republic of South Africa* 2008 (1) SA 556 (CC) (hereafter *Masetlha*) para 183; Quinot *et al Administrative Justice in South Africa: An Introduction* 458.

⁴⁶⁰ *Masetlha* para 183.

⁴⁶¹ See chapter 2.

⁴⁶² *Yates v University of Bophuthatswana* 1994 (3) SA 815 (B) 835C-D.

⁴⁶³ *Masetlha* para 183.

⁴⁶⁴ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 273.

have the right to a fair and unbiased hearing before any decision is made.⁴⁶⁵ The court also noted that justice presupposes that a party be afforded a fair and proper opportunity to present their case.⁴⁶⁶

The right, as encapsulated in section 33(1) of the Constitution, expands the scope of judicial review of significant "classes of administrative action" that might otherwise lie beyond judicial scrutiny.⁴⁶⁷ Devenish *et al* submit that section 33(1) makes an essential contribution to the development and sophistication of administrative law and accountability.⁴⁶⁸ Furthermore, adding this provision is beneficial as it clearly outlines the legal boundaries within which the administration should function.⁴⁶⁹

There were a couple of differences between section 33 of the *Constitution* and section 24 of the *Interim Constitution*. First, the substantive rights contained in section 33(1) and (2) of the *Constitution* are, in certain aspects, different from those set out in section 24 of the *Interim Constitution*.⁴⁷⁰ Asimow pointed out that the rights enshrined in section 33 of the Constitution are not self-executing, as they had to be implemented by legislation (the *PAJA*), in contrast to those rights contained in section 24 of the *Interim Constitution* (before the enactment of the *PAJA*).⁴⁷¹ Second, the qualifications outlined in section 24 of the *Interim Constitution* concerning affected rights, interests, or expectations have been excluded.⁴⁷²

Hoexter views the constitutional right to administrative action as extremely broad, as section 33(1) of the *Constitution* entitles everyone to procedurally fair administrative action.⁴⁷³ However, it is limited by the concept of "administrative action" as shaped by the courts after 1994.⁴⁷⁴ The provisions of section 33 of the *Constitution* only apply to

⁴⁶⁵ *Yates v University of Bophuthatswana* 1994 (3) SA 815 (B) 836B-D.

⁴⁶⁶ *Yates v University of Bophuthatswana* 1994 (3) SA 815 (B) 836B-D.

⁴⁶⁷ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 128.

⁴⁶⁸ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 128.

⁴⁶⁹ Burns "Administrative Justice" 1994 *SA Public Law* 347-351.

⁴⁷⁰ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 124.

⁴⁷¹ Asimow 1996 *SALJ* 613.

⁴⁷² Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 125.

⁴⁷³ Hoexter *Administrative Law in South Africa* 360.

⁴⁷⁴ Hoexter *Administrative Law in South Africa* 360.

conduct defined as "administrative action" in section 1 of the *PAJA*.⁴⁷⁵ The courts have noted that the phrase "lawful administrative action" is broad enough to encompass an omission to take administrative action where there was a duty to act.⁴⁷⁶ However, if action is not classified as "administrative", it cannot be tested against section 33 of the *Constitution* and provisions of the *PAJA*.⁴⁷⁷ The *PAJA*, which gives effect to the constitutional right to just administrative action,⁴⁷⁸ is therefore narrower in its application.⁴⁷⁹ Another example of the *PAJA*'s narrowed application is section 3(1) of the *PAJA*, which states that only an administrative action which "materially and adversely affects the rights or legitimate expectation of any person" needs to be procedurally fair.⁴⁸⁰ Burns and Henrico, however, emphasise the Court's sentiments that where *PAJA* does not apply, the matter will be subject to constitutional review in terms of the principle of legality.⁴⁸¹

Despite the *PAJA*'s shortcomings in its application, it has been instrumental in codifying some of the more purposeful common law principles of administrative law. For example, Baxter's allusion to the fact that where oral hearings are granted, legal representation might be regarded as a *sine qua non* of a fair public hearing in unusually complex cases involving complicated evidence or legal issues,⁴⁸² is mirrored in section 3(3)(a) of the *PAJA*.⁴⁸³

⁴⁷⁵ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 145.

⁴⁷⁶ *Vulindlela Furniture Manufacturers (Pty) Ltd v MEC, Department of Education and Culture, Eastern Cape* 1998 (4) SA 908 (TK).

⁴⁷⁷ Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 145.

⁴⁷⁸ *Mapholisa* para 17.

⁴⁷⁹ Burns and Henrico *Administrative Law* 323.

⁴⁸⁰ Section 3(1) of the *PAJA*.

⁴⁸¹ *Kwinana v Chairperson of Disciplinary Inquiry Instituted by the South African Institute of Chartered Accountants* [2025] ZAGPJHC 735 para 55; Burns and Henrico *Administrative Law* 323.

⁴⁸² *Dabner v South African Railways and Harbours* 1920 AD (hereafter *Dabner*) 583, 589 and 597-9.

⁴⁸³ *Smith v Beleggende Outoriteit van Kommandement Noord-Transvaal van die SA Weermag* 1980 (3) SA 519; Baxter *Administrative Law* 557; section 3(3)(a) of the *PAJA* states that "in order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to -
(a) obtain assistance and, in serious or complex cases, legal representation."

Currie developed summarised the interpretation interpretation of the right to procedural fairness.⁴⁸⁴ First, the right to fair administrative procedures differs from the right to fair substantive decisions because it concerns the rights used to arrive at decisions, rather than the content of those decisions themselves.⁴⁸⁵ Second, the Constitutional Court has been ready to accept that procedural fairness is necessary for "individuals with potential rights," such as those applying for mining-related permits, and for "administrative actions impacting material interests that do not meet the criteria of enforceable or prospective rights".⁴⁸⁶ Third, the "essence of procedural fairness under the Constitution depends on the specific circumstances of each case", much like it does in common law.⁴⁸⁷ This requires "a balancing of various relevant factors, including the nature of the decision, the rights affected by it, the circumstances in which it is made, and the sequences resulting from it".⁴⁸⁸ Fourth, in cases involving individual rights, fairness typically demands that individuals be informed of the impending action and be given a chance to present their arguments before a final decision is made.⁴⁸⁹ Fifth, reference to the limitation clause of the *Constitution* cannot be a justification for a failure to ensure compliance with procedural fairness in an individual case, unauthorised by a law of general application.⁴⁹⁰ Sixth, a law may allow an administrator to restrict the right to procedural fairness, but it must provide guidance on how these powers should be exercised.⁴⁹¹ Seventh, procedural fairness must be evaluated within a context that includes both practical and political aspects.⁴⁹² In respect of this last point, the Constitutional Court in *Minister of Health v New Clicks South Africa (Pty) Ltd* (hereafter *New Clicks*) stated that:

⁴⁸⁴ Currie *The Promotion of Administrative Justice Act: A Commentary* 96.

⁴⁸⁵ *Bel Porto* paras 87-88.

⁴⁸⁶ *Bel Porto* para 97.

⁴⁸⁷ *Bel Porto* para 13; *Premier, Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) (hereafter *Premier, Mpumalanga*) para 39.

⁴⁸⁸ *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) para 102.

⁴⁸⁹ *Premier, Mpumalanga* para 41; *Walele v City of Cape Town* 2008 ZACC 11 para 27.

⁴⁹⁰ *Premier, Mpumalanga* para 42.

⁴⁹¹ *Janse van Rensburg v Minister of Trade and Industry* 2001 (1) SA 29 (CC) para 24.

⁴⁹² Currie *The Promotion of Administrative Justice Act: A Commentary* 96.

An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.⁴⁹³

The Constitutional Court in *New Clicks* made two more observations to Currie *regarding* the meaning of procedural fairness. Deriving its observations of procedural fairness from the case of *Du Preez v Truth and Reconciliation Commission*,⁴⁹⁴ the Constitutional Court mentioned, first, "that where an Act of Parliament confers an administrative power, there is a presumption that it will be exercised in a manner which is fair in all the circumstances".⁴⁹⁵ Second, the principles of fairness are not fixed and can evolve, both in a general sense and in their application to specific types of decisions.⁴⁹⁶

3.3 General purpose and objects of procedural fairness elucidated by the courts and scholars

The purpose and objects of protecting procedural fairness have been expressed by several scholars and by South African courts. According to Baxter, the principles of natural justice serve three purposes: First, they enable precise and well-informed decision-making; second, they ensure that choices are made in the interest of the public; and third, they accommodate significant procedural values, such as an individual's right to be heard and to receive all information influencing the decision.⁴⁹⁷ Baxter states that a decision-maker can only be certain that they are fully informed about the facts, circumstances, and available alternatives if they not only conduct their own investigations but also listen to the input of those whose decisions may impact them.⁴⁹⁸ Baxter acknowledged the consultative process not only as a key principle of effective administration to be adhered to whenever feasible, but also identified the maxim "*audi alteram partem*" as a fundamental aspect of this process.⁴⁹⁹ *De Lange v*

⁴⁹³ *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) (hereafter *New Clicks*) para 152.

⁴⁹⁴ *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231I-232D.

⁴⁹⁵ *New Clicks* para 152.

⁴⁹⁶ *New Clicks* para 152.

⁴⁹⁷ Baxter *Administrative Law* 538.

⁴⁹⁸ Baxter *Administrative Law* 539.

⁴⁹⁹ Baxter *Administrative Law* 539.

Smuts reiterated the purpose and objects behind the constitutional protection of fairness:

Everyone is entitled to an impartial judge, not because this guarantees a correct decision, but because the human arbiter, not being omniscient, should not be presented with a point of view that his or her position inherently loads. Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance.⁵⁰⁰

Hoexter argues that engaging participants in a procedurally fair manner acts as a safeguard that respects their dignity and worth, while also enhancing the quality, rationality, and legitimacy of administrative decisions.⁵⁰¹

Against the aforementioned background, the next section of this paper explores the content of *PAJA* to the extent that it deals with procedural fairness, and then supplement it with case law and literature to give meaning and establish the standard of procedural fairness required in consultation processes during applications for mining-related permits from a legislative point of view.

3.4 Procedural fairness as required by the *PAJA*

According to Section 6(2)(c) of the *PAJA*, a court may review an administrative action if it is deemed to be procedurally unfair.⁵⁰² The *PAJA* goes much further than this in sections 3 and 4, which describe in detail the requirements of fairness in individual cases (section 3 of the *PAJA*) and in cases affecting the public or a group or class of the public (section 4 of the *PAJA*). These sections give specific content to the right to procedural fairness in section 33(1) of the *Constitution*. These have further been

⁵⁰⁰ *De Lange v Smuts* 1998 (3) SA 785 (CC) para 131.

⁵⁰¹ Hoexter *Administrative Law in South Africa* 363.

⁵⁰² Section 6(2)(c) of the *PAJA*.

fleshed out by a set of *Regulations on Fair Administrative Procedures* made in terms of the *PAJA*.⁵⁰³

3.4.1 Section 3 of the PAJA: Administrative action affecting any person

3.4.1.1 The scope of section 3(1) of the PAJA

Section 3(1) of the *PAJA* states that "an administrative action⁵⁰⁴ which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair".⁵⁰⁵ The scope of section 3(1) differs from the definition of administrative action in section 1 of the *PAJA*.⁵⁰⁶ Its effect, emphasised by Currie's earlier writings,⁵⁰⁷ is to make section 3 apply only to administrative action which "materially and adversely" affects "rights or legitimate expectations".⁵⁰⁸ Currie and De Waal hold the view that section 3 of the *PAJA* cannot apply to a broader class of administrative action than section 1 of the *PAJA*, meaning, at the outset, that section 3 of the *PAJA* applies to administrative action defined in section 1.⁵⁰⁹ This means that administrative disputes that fall beyond the scope of the definition of "administrative action" set out in section 1 of the *PAJA* cannot be resolved under section 3 of the *PAJA*, but instead, in accordance with the constitutional principle of legality.

Hoexter's expression of the *PAJA* as legislation that is of a general or "universal" kind means that the provisions in section 3 apply where the relevant enabling legislation is

⁵⁰³ *Regulations on Fair Administrative Procedures, 2002*, in GN R1022 GG 23674 of 31 July 2002 (hereafter *Regulations on Fair Administrative Procedures*).

⁵⁰⁴ Footnote added: See subheading 3.1 of Chapter 3 of this study for a definition of "administrative action".

⁵⁰⁵ Section 3(1) of *PAJA*.

⁵⁰⁶ Currie and De Waal *The Bill of Rights Handbook* 666.

⁵⁰⁷ Currie *The Promotion of Administrative Justice Act: A Commentary* 99.

⁵⁰⁸ Currie and De Waal *The Bill of Rights Handbook* 666.

⁵⁰⁹ Currie and De Waal *The Bill of Rights Handbook* 666.

silent on their fair procedures.⁵¹⁰ The Constitutional Court in *Zondi v MEC for Traditional and Local Government Affairs* (hereafter *Zondi*) indicated that:

Decision-makers who are entrusted with the authority to make administrative decisions by any statute are required to do so in a manner that is consistent with the *PAJA*.⁵¹¹ Its provisions will be read into the enabling legislation where feasible, that is, unless the legislation is actually inconsistent with the *PAJA*.⁵¹²

Within the context of this dissertation, it is accepted that the enabling legislation is the *MPRDA* (and, in part, the *NEMA*), along with their regulations. A more common scenario is for the enabling legislation to address fairness but do so incompletely or inadequately.⁵¹³ In such a case, the provisions of section 3 of the *PAJA* will supplement the *MPRDA* (and the *NEMA*), filling the gaps where provisions are insufficiently detailed. Therefore, the *MPRDA* (and the *NEMA*) must now be read in conjunction with the *PAJA*.⁵¹⁴

Hoexter provides an example of such a reading by referencing *Bengwenyama 2011 (CC)*, which concerned a decision to grant a prospecting right under the *MPRDA*.⁵¹⁵ In *Bengwenyama 2011 (CC)*, the Constitutional Court set aside the grant partly on the basis that the administrator had failed to comply with the consultation process required by the *MPRDA* and thus failed to comply with the prescripts of section 3 of the *PAJA*.⁵¹⁶ Hoexter makes the point that the *PAJA* is, in fact, referred to in section 6 of the *MPRDA*, which states that decisions under the *MPRDA* must be taken "in accordance with the principles of lawfulness, reasonableness and procedural fairness".⁵¹⁷ The fact that the *MPRDA* sometimes stipulates its own special requirements relating to fairness is acknowledged by section 3(5) of the *PAJA*, which provides that where an "empowering

⁵¹⁰ Hoexter *Administrative Law in South Africa* 367; *Sasol Oil (Pty) Ltd v Metcalfe* 2004 (5) SA 161 (W) at 166C where the court recognised that the *PAJA* aims to give effect to constitutional rights and confers rights on all those who deal with administrators.

⁵¹¹ *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) (hereafter *Zondi*) para 101.

⁵¹² *Zondi* para 101.

⁵¹³ Hoexter *Administrative Law in South Africa* 368.

⁵¹⁴ *Zondi* para 101.

⁵¹⁵ *Bengwenyama 2011 (CC)* paras 61-74.

⁵¹⁶ Hoexter *Administrative Law in South Africa* 368.

⁵¹⁷ Hoexter *Administrative Law in South Africa* 368.

provision" empowers an administrator to follow a procedure different from the provisions of section 3(2) of the *PAJA*, the administrator is empowered to do so – provided that the "different" procedure is "fair".⁵¹⁸ The provision relating to "different" but "fair" procedure will be dealt with later in this chapter, as it is essential insofar as the *MPRDA* and the *NEMA* are the enabling (different) legislation which need to be fair for purposes of the *PAJA*.

The next part of this section will deal with the phrases or terms entrenched in section 3(1) of the *PAJA*, which serve as internal modifiers to the application of the provision, namely, "materially and adversely", "rights", and "legitimate expectations". The next part of this section will illustrate the meaning and extent of these aforementioned phrases or terms created in the *PAJA*.

3.4.1.1.1 "Materially and adversely"

According to Currie, the word "materially and adversely" means a logical connection, in this case, between the administrative action and the effect on rights.⁵¹⁹ The inclusion of "materially and adversely" results in section 3 of the *PAJA* encompassing a more limited range of administrative actions than those included in the definition under section 1.⁵²⁰ Thus, under *PAJA*, only administrative actions that substantially impact rights must adhere to procedural fairness.⁵²¹ The interpretation of this phrase is found in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*, wherein the SCA held that the phrase, together with the direct external effect qualification derived from the section 1 definition of administrative action, means that administrative action "impacts directly and immediately on individuals".⁵²²

⁵¹⁸ Hoexter *Administrative Law in South Africa* 368.

⁵¹⁹ Currie *The Promotion of Administrative Justice Act: A Commentary* 100.

⁵²⁰ Currie *The Promotion of Administrative Justice Act: A Commentary* 100.

⁵²¹ *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) (hereafter *Joseph*) para 31; Currie *The Promotion of Administrative Justice Act: A Commentary* 666.

⁵²² *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 23.

3.4.1.1.1 "Rights"

Currie understands the term "right" to mean "an enforceable claim maintainable against a duty-holder" and that, in administrative law, it signals a concept distinctly narrower than "interests" and "legitimate expectations".⁵²³ According to Burns and Henrico, the term "rights" as used in defining administrative action encompasses not only the rights explicitly mentioned in the Bill of Rights but also common-law rights and those arising from customary law and legislation.⁵²⁴ They substantiate their argument with section 39(3) of the *Constitution*.⁵²⁵ The Constitutional Court in *Premier, Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* (hereafter *Premier, Mpumalanga*) indicated "that a right should be interpreted more broadly than the definition of the term in private law to include liability incurred by the state through the making of unilateral promises or undertakings".⁵²⁶ The High Court in *Dunn v Minister of Defence*⁵²⁷ confirmed this interpretation and mentioned that if it used, the term "rights" would be near the scope of "legitimate expectations".⁵²⁸ The Constitutional Court in *Joseph v City of Johannesburg* further extended the meaning of "rights" under section 3(1) of the *PAJA* by holding that the term includes "legal entitlements that have their basis in the constitutional and statutory obligations of government".⁵²⁹

⁵²³ Currie *The Promotion of Administrative Justice Act: A Commentary* 82-83.

⁵²⁴ Burns and Henrico *Administrative Law* 229.

⁵²⁵ Section 39(3) of the *Constitution* states that "the Bill of Rights does not deny the existence of other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill of Rights"; Burns and Henrico *Administrative Law* 229.

⁵²⁶ *Premier, Mpumalanga* 31 n 9.

⁵²⁷ *Dunn v Minister of Defence* 2006 (2) SA 107 (T) [5].

⁵²⁸ Currie *The Promotion of Administrative Justice Act: A Commentary* 103.

⁵²⁹ *Joseph* para 43.

3.4.1.1.2 "Legitimate expectations"

The cases of *Administrator v Traub*⁵³⁰ and *Duncan v Minister of Environmental Affairs and Tourism*⁵³¹ are essential in establishing the circumstances and requirements for the existence of legitimate expectations. In *Administrator v Traub*,⁵³² the Appellate Division held that a legitimate expectation may develop in at least two situations:⁵³³ First, "from an express promise made by the authoritative body"; or second, "from a standard practice that the person holding the legitimate expectation can reasonably anticipate will persist".⁵³⁴

In *Duncan v Minister of Environmental Affairs and Tourism*, the Supreme Court of Appeal held that for the expectation to be legitimate, it must meet the following four requirements.⁵³⁵ First, the representation that creates the expectation should be unambiguous, clear, and free from any relevant qualifications. Second, the decision-maker must have created the expectation. Third, the expectation should be reasonable. Fourth, the representation has to be one that the decision-maker is both qualified and legally permitted to make.

According to Burns and Henrico, while "materially" appears to have narrowed the field of application of procedural fairness, the inclusion of "legitimate expectations" has the purpose of extending the field of application of section 3.⁵³⁶ Furthermore, they hold the view that the inclusion of legitimate expectation in section 3(1) means that actions not included in the definition of administrative action are now subject to the principles of procedural fairness.⁵³⁷ De Ville suggests that the reason for adding legitimate expectations is that the "content of fairness in the case of individual administrative

⁵³⁰ *Administrator v Traub* 1989 (4) SA 731 (A) (hereafter *Administrator v Traub*).

⁵³¹ *Duncan v Minister of Environmental Affairs and Tourism* 2010 (6) SA 374 (SCA) (hereafter *Duncan v Minister of Environmental Affairs and Tourism*).

⁵³² *Admininistrator v Traub* 1989 (4) SA 731 (A).

⁵³³ *Admininistrator v Traub* 1989 (4) SA 731 (A).

⁵³⁴ *Admininistrator v Traub* 1989 (4) SA 731 (A).

⁵³⁵ *Duncan v Minister of Environmental Affairs and Tourism* para 15.

⁵³⁶ Burns and Henrico *Administrative Law* 294.

⁵³⁷ Burns and Henrico *Administrative Law* 294-295.

action, whereas it does not play a similar role in respect of the other grounds of review".⁵³⁸ It follows from this part of the study that once a legitimate expectation has arisen; a person is entitled to procedural fairness in relation to the administrative action that may materially and adversely threaten or affect that expectation.⁵³⁹

3.4.1.2 Section 3(2)(a) of the PAJA

Section 3(2)(a) of the *PAJA* "restates" the flexible guiding principles of procedural fairness under the common law, which is that "a fair administrative procedure depends on the circumstances of each case".⁵⁴⁰ In section 3(2)(b) of the *PAJA*, it is only after highlighting the case-specific nature of procedural fairness that a specific obligation is placed on administrators to provide a person with the components of procedural fairness outlined later in section 3 of the *PAJA*.⁵⁴¹

Hoexter makes the point that this flexible approach is upheld in the provisions of section 3 of the *PAJA*, which mirror the principles of the common law. The *PAJA* therefore softens the rigidity of its procedural rules in several ways, in particular by including open-ended standards in the rules themselves ("adequate notice", "reasonable opportunity" and so on) and allowing (in section 3(4) of the *PAJA*) departures from the minimum rules.⁵⁴² This principle is applied in the consultation process by establishing whether certain communities, for example, require translation services to achieve fairness during the consultation processes, while others would not.

⁵³⁸ De Ville *Judicial Review of Administrative Action in South Africa* 53.

⁵³⁹ *Premier, Mpumalanga* para 32-36.

⁵⁴⁰ Currie and De Waal *The Bill of Rights Handbook* 667.

⁵⁴¹ Currie and De Waal *The Bill of Rights Handbook* 667.

⁵⁴² Currie *The Promotion of Administrative Justice Act: A Commentary* 103.

3.4.1.3 *The minimum requirements (mandatory procedures) in terms of section 3(2)(b) of the PAJA*

Section 3(2)(b) of the *PAJA* states that "to give effect to the right to procedurally fair administrative action, an administrator, subject to section 3(4) of the *PAJA*, must provide a person referred to in section 3(1) of the *PAJA*";

(i) adequate notice of the nature and purpose of the proposed administrative action; (ii) a reasonable opportunity to make representations; (iii) a clear statement of the administrative action; (iv) adequate notice of any right of review or internal appeal, where applicable; (v) and adequate notice of the right to request reasons in terms of section 5 of the *PAJA*.⁵⁴³

The common law elements of procedural fairness (*audi alteram partem*) are linked to the requirements of sections 3(2)(b)(i) and (ii) of the *PAJA*, adequate notice, and reasonable opportunity to make representations, respectively.⁵⁴⁴ Subsections (iii)–(v) of the same section of the *PAJA*, however, create procedural requirements that do not derive from the common law.⁵⁴⁵ Besides the absence of a clear common law analogue, elements (iii) to (v) are distinguishable from (i) and (ii) in that they must, of necessity, apply after or simultaneously with the finalisation of the administrative action. At the same time, the first two subsections are usually required before finalisation.⁵⁴⁶ Moreover, elements (i) and (ii) are procedural in nature and relate to the process of making the decision. Elements (iii) to (v), which I will discuss below, are formal requirements concerned with the form in which the administrative action is communicated to the affected party.⁵⁴⁷

(i) *Adequate notice of the nature and purpose of the proposed administrative action*

⁵⁴³ Section 3(2)(b) of the *PAJA*.

⁵⁴⁴ Currie *The Promotion of Administrative Justice Act: A Commentary* 104.

⁵⁴⁵ Currie *The Promotion of Administrative Justice Act: A Commentary* 104.

⁵⁴⁶ Currie *The Promotion of Administrative Justice Act: A Commentary* 105.

⁵⁴⁷ Currie *The Promotion of Administrative Justice Act: A Commentary* 105.

Under common law, administrators had to provide an individual impacted by a decision with notice of the proposed action and an opportunity to present their case.⁵⁴⁸ This point is illustrated in *Kadali v Hemsworth*, in which the court held that "a man cannot meet charges of which he has no knowledge".⁵⁴⁹ Baxter made earlier contributions about the necessity of adequate notice, by stating that the notice must contain sufficient information about the matter to be addressed.⁵⁵⁰ The sufficiency of the information depends on the circumstances of the affected person and the seriousness of the matter and its consequences.⁵⁵¹

According to *Cekeshe v Premier, Eastern Cape* (hereafter *Cekeshe v Premier*), adequate notice implies the duty to provide the person concerned with the essential information that motivates the impending action.⁵⁵² The purpose of the notice requirement was stated in *Beck v Premier, Western Cape*:

To apprise interested persons of an application and to allow them to ascertain to what extent their rights may be affected and to enable them to protect their rights by appropriate objections to the proposals by the applicant.⁵⁵³

Section 3(2)(b)(i) of the *PAJA* codifies this requirement by granting "adequate notice of the nature and purpose of the proposed administrative action" to persons affected by administrative action.⁵⁵⁴ Beyond its reference to the "nature and purpose" of the intended administrative action, section 3(2)(b)(i) of the *PAJA* does not attempt to define the meaning of "adequate notice".⁵⁵⁵ There have, however, been efforts made by the courts and academics to give meaning to this provision. In the *Police and Prisons Civil Rights Union v Minister of Correctional Services* (hereafter *Police and Prisons Civil Rights Union*)⁵⁵⁶, members of the Department of Correctional Services were informed

⁵⁴⁸ Dabner 583.

⁵⁴⁹ *Kadali v Hemsworth* 1928 TPD 495 at 506; Hoexter *Administrative Law in South Africa* 369.

⁵⁵⁰ Baxter *Administrative Law* 529-533.

⁵⁵¹ Baxter *Administrative Law* 529-533; Hoexter *Administrative Law in South Africa* 369.

⁵⁵² *Cekeshe v Premier, Eastern Cape* 1998 (4) SA 935 (TK) 962D (hereafter *Cekeshe v Premier*).

⁵⁵³ 1998 (3) SA 487 (C) at 510G.

⁵⁵⁴ Currie *The Promotion of Administrative Justice Act: A Commentary* 105.

⁵⁵⁵ Hoexter *Administrative Law in South Africa* 369.

⁵⁵⁶ *Police and Prisons Civil Rights Union v Minister of Correctional Services* 2008 (3) SA 91 (E) (hereafter *Police and Prisons Civil Rights Union*) para 73.

that the Department contemplated dismissing them for unauthorised absence from work and were afforded 48 hours to make representations before the decision was taken. The Eastern Cape High Court held that the 48-hour notice cannot be said to be adequate notice of the nature and purpose of the proposed administrative action, as envisaged by section 3(2)(b)(i) of the *PAJA*.⁵⁵⁷ According to Burns and Henrico, adequate notice requires the communication of all considerations, including adverse allegations, to the party affected by the action.⁵⁵⁸ This means that the person affected by administrative action must be informed of the substance of the complaint, the circumstances surrounding it, and the basis upon which the complaint is founded.⁵⁵⁹ Currie is of the view that the term "proposed" suggests that notification must be given in advance, aligning with the common-law principle that natural justice should be adhered to before making a decision, rather than afterwards.⁵⁶⁰

Under the *PAJA*, departures from the prior hearing rule must be justified as necessary and justifiable in terms of section 3(4), as discussed below. Otherwise, the decision taken would be of no effect because the *PAJA*-entrenched procedural fairness standards would not have been met.⁵⁶¹

(ii) *A reasonable opportunity to make representations*

This requirement constitutes a rewording of one of the key components of the "*audi alteram partem* rule" or "to hear the other side".⁵⁶² It allows an individual a genuine opportunity to be heard (to share their side of the story).⁵⁶³ Such an opportunity takes into account all pertinent information that an administrative authority might consider, including any factors that could be unfavourable to a party impacted by the decision.⁵⁶⁴

⁵⁵⁷ *Police and Prisons Civil Rights Union* para 73.

⁵⁵⁸ Burns and Henrico *Administrative Law* 306.

⁵⁵⁹ Burns and Henrico *Administrative Law* 306.

⁵⁶⁰ Currie *The Promotion of Administrative Justice Act: A Commentary* 105.

⁵⁶¹ Currie *The Promotion of Administrative Justice Act: A Commentary* 106.

⁵⁶² Burns and Henrico *Administrative Law* 306.

⁵⁶³ Burns and Henrico *Administrative Law* 306.

⁵⁶⁴ Burns and Henrico *Administrative Law* 306.

The opportunity to make representations will only be effective if it pertains directly to the decision in question and is clearly communicated to those involved.⁵⁶⁵ Suppose a meeting is designated as an opportunity for making representations, but the participants are not informed of its purpose. In that case, it will not be considered an opportunity to make representations to comply with the requirements of section 3(2)(b)(iii) of the *PAJA*.⁵⁶⁶ The same non-compliance will exist if "the ultimate decision-maker does not disclose the concerns that might lead them to take an adverse decision".⁵⁶⁷

The *PAJA* distinguishes between making "representations" and "an opportunity to appear in person".⁵⁶⁸ The former is part of the mandatory minimum content of procedural fairness under the *PAJA*, while the latter is one of the discretionary procedures of section 3(3) of the *PAJA*.⁵⁶⁹ Currie noted that although it is not clear that representations is necessarily equivalent to "written representations", it would be, for purposes of fairness, best to read the representation requirement of the *PAJA* in a way that allows presenting submissions in writing or in some other form should written submissions not be possible or convenient for the applicant because they may be illiterate or uneducated.⁵⁷⁰

According to Quinot *et al*, there are two purposes for allowing an opportunity to make representations.⁵⁷¹ First, representations can have a significant influence on the outcome of decision-making.⁵⁷² For example, in the context of a decision to grant a prospecting right in respect of minerals on land, where it is necessary first for the landowners to be given notice and consulted in terms of the *MPRDA*, it has been held that "the purpose of consultation is to ascertain if some of accommodation can be

⁵⁶⁵ *Sokhela v MEC for Agriculture and Environmental Affairs, KwaZulu-Natal* 2010 (5) SA 574 (KZP) (hereafter *Sokhela*) para 55.

⁵⁶⁶ *Sokhela* para 55.

⁵⁶⁷ *Sokhela* para 55.

⁵⁶⁸ Currie *The Promotion of Administrative Justice Act: A Commentary* 106.

⁵⁶⁹ Currie *The Promotion of Administrative Justice Act: A Commentary* 106.

⁵⁷⁰ Currie *The Promotion of Administrative Justice Act: A Commentary* 106.

⁵⁷¹ Quinot *et al Administrative Justice in South Africa: An Introduction* 176.

⁵⁷² Quinot *et al Administrative Justice in South Africa: An Introduction* 176.

reached in respect of the impact" of a decision to grant a prospecting right. Alternatively, the purpose of an opportunity to make representations includes managing the impact of a decision on those adversely affected.⁵⁷³ Second, allowing representations to be made relates to enabling the decision-maker to hear all points of view to arrive at an objectively justifiable conclusion.⁵⁷⁴

(iii) A clear statement of the administrative action

Hoexter states that "clear" means something very similar to "adequate" in the context of notice.⁵⁷⁵ However, the requirement of a clear statement of the administrative action goes one step further and requires that the administrator indicate what action is taken.⁵⁷⁶ From the statement, the person concerned must at least be able to discern what was decided, at what time, by which authority, and on which legal and factual grounds.⁵⁷⁷ Hoexter notes that without this information, notice of any right of appeal or review (the next mandatory requirement) would be pointless.⁵⁷⁸ Hoexter goes on to state that this requirement ensures "transparency and accountability in administrative decision-making", as the administrator is bound by the "clear statement of the administrative action" they presented.⁵⁷⁹ It also contributes towards legal certainty.

(iv) Adequate notice of the right of review or internal appeal, where applicable

The requirement to "adequate notice of the right of review or internal appeal, where applicable" places a mandatory obligation on the administrator to inform the affected person of their right to review and appeal by way of notice.⁵⁸⁰ The reference to internal appeal is a reference to a departmental appeal (an internal remedy).⁵⁸¹ According to

⁵⁷³ Van Wyk 2014 *Stellenbosch Law Review* 44-45; Quinot *et al Administrative Justice in South Africa: An Introduction* 176.

⁵⁷⁴ Quinot *et al Administrative Justice in South Africa: An Introduction* 176.

⁵⁷⁵ Hoexter *Administrative Law in South Africa* 376.

⁵⁷⁶ Burns and Henrico *Administrative Law* 306.

⁵⁷⁷ Hoexter *Administrative Law in South Africa* 376.

⁵⁷⁸ Hoexter *Administrative Law in South Africa* 376.

⁵⁷⁹ Burns and Henrico *Administrative Law* 307.

⁵⁸⁰ Burns and Henrico *Administrative Law* 306.

⁵⁸¹ Burns and Henrico *Administrative Law* 306.

Burns and Henrico, the reference to "review" in section 3(2)(b)(iv) of the *PAJA* refers to review by a superior administrative body (internal review), as the *PAJA* clearly provides that internal remedies must be exhausted before the courts are approached for relief.⁵⁸²

Hoexter notes that the term "review" might have the same meaning as "internal appeal," or it could refer to an internal review, which involves an administrator reassessing a decision with an emphasis on legality instead of the decision's merits.⁵⁸³ The use of the qualifier "internal" in relation to "appeal" and not "review" suggests, however, that "review" is intended here in a broader and not purely domestic sense.⁵⁸⁴ On this interpretation, "review" would include special statutory review – that is, review specially provided for by the relevant enabling legislation (in this paper's instance, the *MPRDA* and *NEMA*) but conducted by a court of law or tribunal rather than an administrator.⁵⁸⁵

In accordance with the *Regulations on Fair Administrative Procedures*, the administrator must provide the person with complete details regarding the procedures that must be followed in exercising these rights – for example, the relevant person to be approached on appeal and how the appeal should be worded.⁵⁸⁶ To iterate the importance of this provision, the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* warned against allowing a litigant to pursue a general judicial review of administrative action prior to following the internal remedies avenue, for example, not pursuing the review and appeal processes set out in section 96 of the *MPRDA*.⁵⁸⁷

(v) *Adequate notice of the right to request reasons*

⁵⁸² Section 7(2) of the *PAJA*; Burns and Henrico *Administrative Law* 307.

⁵⁸³ Hoexter *Administrative Law in South Africa* 377.

⁵⁸⁴ Hoexter *Administrative Law in South Africa* 377.

⁵⁸⁵ Hoexter *Administrative Law in South Africa* 377.

⁵⁸⁶ Regulation 25 in the *Regulations on Fair Administrative Procedures*.

⁵⁸⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 17.

The requirement that an administrator furnish an applicant with "adequate notice of the right to request reasons" is essential because it is a prerequisite to accessing the right to sufficient reasons in terms of section 5 of the *PAJA* effectively.⁵⁸⁸ To understand the purpose of the requirement to give adequate notice of the right to request reasons, one must first understand the purpose of the requirement to provide reasons.

The purpose of furnishing reasons is to enable the administrator to justify the administrative action taken, thus supporting the objectives of "accountability, openness, and transparency in the exercise of public power".⁵⁸⁹ Baxter's notes on the purposes of giving reasons demonstrates the importance and purposes of the provision requiring adequate notice of the right to request reasons. Baxter noted four purposes of giving reasons. First, an obligation to provide reasons involves an obligation to "rationalise" the decision.⁵⁹⁰ Reasons assist in organising the exercise of discretion, and the need to explain the rationale behind a decision compels one to focus on the decision itself.⁵⁹¹ Second, providing reasons fulfills the essential need of the individual involved to understand the rationale behind a decision, thereby fostering public trust in the process of administrative decision-making.⁵⁹² Third, reasons enable rational criticism of a decision and serve as a crucial foundation for appeal or review.⁵⁹³ Fourth, reasons can serve a legitimate educational function, such as when a mining company is denied approval for reasons it can address in other, prospective applications.⁵⁹⁴

The *Regulations on Fair Administrative Procedures* prescribe the details that must accompany a notice to request reasons. For purposes of brevity, only some of those details will be outlined in this section. The notice must indicate that a request be "in writing, addressed to the administrator concerned, and sent to them by post, fax, or

⁵⁸⁸ Currie *The Promotion of Administrative Justice Act: A Commentary* 107.

⁵⁸⁹ Currie *The Promotion of Administrative Justice Act: A Commentary* 136.

⁵⁹⁰ Baxter *Administrative Law* 228.

⁵⁹¹ Baxter *Administrative Law* 228.

⁵⁹² Baxter *Administrative Law* 228.

⁵⁹³ Baxter *Administrative Law* 228.

⁵⁹⁴ Baxter *Administrative Law* 228.

electronic mail, or delivered to the administrator by hand".⁵⁹⁵ The notice must also indicate that, should the aggrieved person be unable to write or need other assistance, that assistance will be provided to enable them to submit a request in writing.⁵⁹⁶ In addition, the notice must specify that a particular request for reasons must cite the administrative action that has affected the rights of the requester, as well as the specific rights that have been materially and adversely affected.⁵⁹⁷ The notice must also indicate that a request for reasons must state the full name and postal address, as well as, if available, the electronic mail address, telephone number, and fax number where the person can be contacted.⁵⁹⁸ According to Currie, this requirement to provide reasons can have a positive impact on the rationality and quality of the decisions made because the requirement to provide reasons has the effect that the administrator is likely to give more thought to those decisions during the process of making them.⁵⁹⁹

3.4.1.4 Discretionary procedures in terms of section 3(3) of the PAJA

Section 3(3) of the *PAJA* outlines the procedures the administrator may consider and follow, meaning the administrator has the discretion to grant them to a person referred to in section 3(1) of the *PAJA*.⁶⁰⁰ These discretionary procedures include: (a) "assistance and legal representations"; (b) "presenting and disputing information and arguments"; and (c) "appearing in person".⁶⁰¹ Burns and Henrico demonstrate that the purpose of these discretionary elements is to mirror the common law position, in which a differentiation was made between cases that are serious and those that are less serious.⁶⁰²

Regarding discretionary elements, there is an obligation to assess awarding discretionary procedures to persons mentioned in section 3(1) of the *PAJA*, as

⁵⁹⁵ Regulation 27(1)(c) in the *Regulations on Fair Administrative Procedures*.

⁵⁹⁶ Regulation 27(2) in the *Regulations on Fair Administrative Procedures*.

⁵⁹⁷ Regulation 27(3)(a)(i)-(ii) in the *Regulations on Fair Administrative Procedures*.

⁵⁹⁸ Regulation 27(3)(b)(i)-(ii) in the *Regulations on Fair Administrative Procedures*.

⁵⁹⁹ Currie *The Promotion of Administrative Justice Act: A Commentary* 138.

⁶⁰⁰ Burns and Henrico *Administrative Law* 309.

⁶⁰¹ Section 3(3) of the *PAJA*.

⁶⁰² Burns and Henrico *Administrative Law* 309.

circumstances require.⁶⁰³ An administrative decision must comply with the law and be reasonable. Still, it is unlikely to meet these standards if, in a case where allowing legal representation is essential to ensure fairness, the administrator nevertheless refuses to permit it.⁶⁰⁴ In this regard, the SCA in *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* (hereafter *Hamata*) noted the reluctance on the part of both legislators and the courts to regard the right to legal representation of one's choice as an indispensable condition of procedurally fair administrative proceedings.⁶⁰⁵ The court, however, mentioned that there has been a gradual acceptance of the view that there will be cases in which legal representation may be essential to a procedurally fair administrative proceeding.⁶⁰⁶

(a) Assistance and legal representation

Currie notes that "legal representation" denotes "serious and complex" cases. At the same time, "assistance" is appropriate for straightforward matters where the person affected requires assistance due to reasons such as youth, illiteracy, disability, or a lack of expertise in, for example, the *MPRDA*. According to Burns and Henrico, the person assisting should respond to the action, present information, refute adverse allegations, and present new information.⁶⁰⁷ An example of where the "assistance" was triggered can be found in *Masuku v Minister of Mineral Resources* (hereafter *Masuku*), which involved a consultation process for prospecting and mining rights under the *MPRDA*.⁶⁰⁸ In this case, the RM sent a letter to the proponent mining company (Aquila Steel) to address the comment on the environmental management program regarding the need for full public participation with the descendants of the deceased buried in the grave.⁶⁰⁹ Aquila Steel engaged a consultant to assist with the consultation (PGS

⁶⁰³ Currie and De Waal *The Bill of Rights Handbook* 667.

⁶⁰⁴ Currie and De Waal *The Bill of Rights Handbook* 668.

⁶⁰⁵ *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 (5) SA 449 (SCA) (hereafter *Hamata*) para 11.

⁶⁰⁶ *Hamata* para 11.

⁶⁰⁷ Burns and Henrico *Administrative Law* 310.

⁶⁰⁸ *Masuku v Minister of Mineral Resources* [2022] ZAGPPHC 145 para 102.

⁶⁰⁹ *Masuku* para 102.

Heritage) and to work with the descendants (Mr Motloki).⁶¹⁰ The consultation centred around the issue of ancestral graves, which are located on the mining property.⁶¹¹ Amongst other things discussed at the meeting was the socio-cultural significance and use of the cave and the mountain.⁶¹² Mr Motloki said that the cave was used for ancestral rituals, mainly by the traditional healers.⁶¹³ He knew of the natural springs on top of the mountain, which he suggested were not used for any cultural practices or rituals.⁶¹⁴ According to Mr Motloki, the cultural practices or rituals at the cave started in the late 1970s, demonstrating the point that where a party to the consultation lacks expertise in the subject matter, they may be granted an opportunity by the administrator (in the *Masuku* case, the RM) to obtain assistance.⁶¹⁵

Burns and Henrico identified the crucial question an administrator needs to ask with respect to legal representation as "*What is the nature of the hearing?*" when deciding whether to allow or disallow legal representation.⁶¹⁶ For example, in *Hamata*, the court found that the absence of legal representation at the hearing was not procedurally fair and that there had been an improper exercise of discretion.⁶¹⁷ In this case, the SCA considered whether a student accused of misconduct at Peninsula Technikon was entitled to legal representation during a disciplinary hearing.⁶¹⁸ The appellants, *Hamata* and another student, were charged with breaching the institution's disciplinary code and requested permission to be represented by a lawyer.⁶¹⁹ The disciplinary committee refused, citing the institution's internal rules, which did not expressly provide for the right to legal representation.⁶²⁰ The students challenged the refusal, arguing that the decision was procedurally unfair and violated their right to a fair hearing under

⁶¹⁰ *Masuku* para 102.

⁶¹¹ *Masuku* para 102.

⁶¹² *Masuku* para 102.

⁶¹³ *Masuku* para 102.

⁶¹⁴ *Masuku* para 102.

⁶¹⁵ *Masuku* para 102.

⁶¹⁶ Burns and Henrico *Administrative Law* 310.

⁶¹⁷ *Hamata* para 21.

⁶¹⁸ *Hamata* para 18-22.

⁶¹⁹ *Hamata* para 18-22.

⁶²⁰ *Hamata* para 18-22.

administrative law principles.⁶²¹ The matter eventually reached the SCA.⁶²² The Court held that the right to legal representation in internal disciplinary proceedings is not automatic; however, fairness may require it in certain circumstances, such as when the issues are complex or the potential consequences are severe.⁶²³ The SCA found that the committee had misdirected itself by rigidly refusing legal representation without considering whether fairness in the specific case required it.⁶²⁴ The Court ruled that the decision not to grant legal representation was procedurally unfair and set it aside.⁶²⁵

(b) Present and dispute information and arguments

Baxter calls the opportunity to present, contradict or challenge evidence which is brought against an individual "the essence of a fair hearing".⁶²⁶ It is for this reason that Burns and Henrico think that, regrettably, this critical aspect of an administration hearing is at the discretion of the administrator.⁶²⁷ However, there is jurisprudence on a complainant who was allowed to reply to or rebut representations or information received by the administrator after the complainant made their initial representations. In *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* (hereafter *Earthlife Africa Cape Town*), the court noted that "it would be in the interest of justice to afford the complainant an opportunity of supplementing the record before being obliged to prosecute its appeal to the Minister".⁶²⁸

(c) Appear in person

⁶²¹ *Hamata* para 18-22.

⁶²² *Hamata* para 18-22.

⁶²³ *Hamata* para 18-22.

⁶²⁴ *Hamata* para 18-22.

⁶²⁵ *Hamata* para 37.

⁶²⁶ Baxter *Administrative Law* 553.

⁶²⁷ Burns and Henrico *Administrative Law* 310.

⁶²⁸ *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 SA 156 (C) (hereafter *Earthlife Africa Cape Town*) paras 65-68.

The court in *Cekeshe v Premier*, made a pronouncement that a fair hearing does not necessitate an affected person to appear personally (an oral hearing).⁶²⁹ Hoexter attributes the reasoning behind the inclusion of this limitation to the fact that hearings on paper are usually both quicker and cheaper.⁶³⁰ Hoexter notes that it may, on occasion, be more efficient to hold an oral hearing than to invite written representations because it may be unfair to expect poorly educated or illiterate persons to express themselves in writing.⁶³¹ This, in part, is the purpose for the inclusion of section 3(3)(c) of the *PAJA* as one of the discretionary elements of ensuring procedural fairness in administrative action affecting any person.

3.4.2 Section 4 of the PAJA: Administrative action affecting the public

3.4.2.1 The scope of section 4: what is administrative action affecting the public?

Section 4 of the *PAJA* applies to matters which involve an administrative action materially and adversely affecting the rights of the public.⁶³² Section 4 of the *PAJA* is textually different from the language of section 3 and from the language of the definition of "administrative action" in section 1 of the *PAJA*.⁶³³ The definition section, section 1(b) of the *PAJA*, is limited to "rights" and not "rights and legitimate expectations".⁶³⁴ Currie and De Waal note two fundamental differences between the scope of section 3 of the *PAJA* and the scope of section 4 of the *PAJA*.⁶³⁵ First, section 4 of the *PAJA* is narrower and only applies to administrative action affecting the public.⁶³⁶ It does not apply where the legitimate expectations of the members of the public are not in issue, as is the case with administrative action affecting an individual, as per section 3 of the *PAJA*.⁶³⁷ Second, section 4 of the *PAJA* applies when the rights

⁶²⁹ *Cekeshe v Premier* at 962.

⁶³⁰ Hoexter *Administrative Law in South Africa* 380.

⁶³¹ Hoexter *Administrative Law in South Africa* 380.

⁶³² Section 4 of the *PAJA*.

⁶³³ Currie and De Waal *The Bill of Rights Handbook* 671.

⁶³⁴ Currie and De Waal *The Bill of Rights Handbook* 671.

⁶³⁵ Currie and De Waal *The Bill of Rights Handbook* 671.

⁶³⁶ Currie and De Waal *The Bill of Rights Handbook* 671; section 4 of the *PAJA*.

⁶³⁷ Currie and De Waal *The Bill of Rights Handbook* 671.

of members of the public are concerned, while section 3 of the *PAJA* applies when any individual is concerned.⁶³⁸

Currie and De Waal proposed that the test to identify "administrative action materially and adversely affecting the rights of the public" be the following:

First, administrative action must have a general impact, meaning administrative action must apply to members of the public equally and impersonally. Second, the general impact must have a significant public effect, meaning administrative action will need to pass some threshold judgement as to "significance". This threshold will need to be determined on a case-by-case basis and may vary across different subject matters. The impact may be either on tangible assets, such as money, property, or other resources, or may affect intangible rights, such as dignity or freedom of expression. Significance should be judged collectively and not individually, meaning it is the cumulative effect or significance that is of importance for the triggering of section 4 public procedures. Third, the rights of the public members must be at issue.⁶³⁹ This means that to identify "administrative action materially and adversely affecting the rights of the public", the rights of the mining community are affected.⁶⁴⁰

Currie and De Waal's proposed test is a key component in identifying to what extent consultation processes during applications for mining-related permits must affect the interested and affected parties.

3.4.2.2 Purpose and effect of section 4 of the PAJA

The purpose of section 4 of the *PAJA* is "to provide the public with an opportunity to be heard on matters of public concern", thereby promoting public participation and transparency.⁶⁴¹ One purpose of the general procedures in section 4 of the *PAJA* is "to give administrative action greater legitimacy by emphasising openness, consultation, and reasoned decision-making".⁶⁴² A second purpose of the procedures is to inform the administrative process.⁶⁴³ The section facilitates the gathering of information and helps

⁶³⁸ Currie and De Waal *The Bill of Rights Handbook* 671.

⁶³⁹ Currie and De Waal *The Bill of Rights Handbook* 671.

⁶⁴⁰ Currie and De Waal *The Bill of Rights Handbook* 671.

⁶⁴¹ Currie *The Promotion of Administrative Justice Act: A Commentary* 118.

⁶⁴² Currie *The Promotion of Administrative Justice Act: A Commentary* 118.

⁶⁴³ Currie *The Promotion of Administrative Justice Act: A Commentary* 118.

improve administrative accountability.⁶⁴⁴ The notice and comment process may result in an interested party submitting new information, contributing to a final decision that is better informed and less susceptible to error.⁶⁴⁵ A third purpose of the procedures for administrative action is that they may expose a logical weakness or analytical flaw in the administrative action.⁶⁴⁶ The procedures also serve to force analysis and consideration of the action being undertaken.⁶⁴⁷ Finally, section 4 procedures help to make this type of administrative action accountable to *post-facto* processes, such as judicial review and parliamentary oversight.⁶⁴⁸

3.4.2.3 The content of section 4 of the PAJA

Section 4(1) of the *PAJA* provides an administrator with a choice between various procedures in instances "where administrative action materially and adversely affects the rights⁶⁴⁹ of the public".⁶⁵⁰ These procedures include:

(1) the holding of a public inquiry; (2) the following of a notice and comment procedure; (3) a combination of the above two procedures; (4) following a different (fair) procedure prescribed by another empowering provision; (5) and following another appropriate fair procedure which gives effect to section 3 of the *PAJA*.⁶⁵¹

Currie and De Waal hold the view that section 4(1) appears to be mandatory, meaning an administrator about to make a decision affecting the public must decide on a procedure to follow, with no explicit remedy for failure to comply with this duty.⁶⁵² Currie and De Waal also reiterate that "one cannot use the *PAJA* remedies (including a request for reasons) to remedy a failure to make this decision because section 4(1)

⁶⁴⁴ Burns and Henrico *Administrative Law* 318.

⁶⁴⁵ Currie *The Promotion of Administrative Justice Act: A Commentary* 118.

⁶⁴⁶ Currie *The Promotion of Administrative Justice Act: A Commentary* 118.

⁶⁴⁷ Currie *The Promotion of Administrative Justice Act: A Commentary* 118.

⁶⁴⁸ Currie *The Promotion of Administrative Justice Act: A Commentary* 118.

⁶⁴⁹ It is first important to note that the "rights" referred to in section 4(1) of the *PAJA* are broader than the "rights" mentioned in section 3(1) of the *PAJA*. The term "rights" in section 4(1) must consequently be understood in a broad sense, as also including "interests"; De Ville, *Judicial Review of Administrative Action in South Africa*, 227.

⁶⁵⁰ De Ville *Judicial Review of Administrative Action in South Africa* 257.

⁶⁵¹ De Ville *Judicial Review of Administrative Action in South Africa* 257.

⁶⁵² Currie and De Waal *The Bill of Rights Handbook* 671.

of the *PAJA* decisions are specifically excluded from the definition of administrative action in section 1 of the *PAJA*".⁶⁵³ However, Burns and Henrico's view should be reiterated that where *PAJA* does not apply, the matter will fall to constitutional review under the principle of legality.⁶⁵⁴

Affected persons (the members of the public) do not have a right to challenge the appropriateness of the administrator's choice of action relating to the procedure prescribed in section 4(1) of the *PAJA*.⁶⁵⁵ In other words, the administrator can decide to follow the particular procedure, and there is no remedy available to challenge the exercise of this choice.⁶⁵⁶ In this situation, the administrator, as the expert, has better insight into the matter and that members of the public are obliged to accept their decision.⁶⁵⁷ The Constitutional Court in *New Clicks* confirmed this point of view,⁶⁵⁸ holding that the administrator's choice, as per section 4(1) of the *PAJA*, is final. This situation, however, could be addressed by applying the principle of legality as enshrined in the constitution.⁶⁵⁹ However, the implementation of that choice is subject to judicial review, meaning that at this stage, reviewing whether procedural fairness has been complied with takes precedence.⁶⁶⁰

Currie notes that there are two ways to interpret section 4(1)(e) of the *PAJA*. On the first interpretation, the subsection can be used for proposed decisions where both general and particular effects would result.⁶⁶¹ On this interpretation, section 4(1)(e) of the *PAJA* permits administrators to combine procedures suitable for the general aspects of the administrative action with specific notice and hearing procedures for those individuals who are particularly affected by the proposed action.⁶⁶² On the second

⁶⁵³ Currie and De Waal *The Bill of Rights Handbook* 672.

⁶⁵⁴ Burns and Henrico *Administrative Law* 323.

⁶⁵⁵ Burns and Henrico *Administrative Law* 323.

⁶⁵⁶ Burns and Henrico *Administrative Law* 323.

⁶⁵⁷ Burns and Henrico *Administrative Law* 323.

⁶⁵⁸ *New Clicks* para 132.

⁶⁵⁹ Burns and Henrico *Administrative Law* 323.

⁶⁶⁰ Burns and Henrico *Administrative Law* 323.

⁶⁶¹ Currie *The Promotion of Administrative Justice Act: A Commentary* 132.

⁶⁶² Currie *The Promotion of Administrative Justice Act: A Commentary* 132.

interpretation, section 4(1)(e) of the *PAJA*'s reference to section 3 of the *PAJA* makes sense if one reads it as a reference to the statutory right of procedural fairness stated in section 3(1) of the *PAJA*.⁶⁶³

3.4.2.3.1 Public enquiry in terms of section 4(2) of the PAJA

There are three distinguishable stages in the public inquiry process under the *PAJA*: a pre-inquiry (preliminary stage), the inquiry itself, and the post-inquiry stage. The *Regulations on Fair Administrative Procedures* prescribe, in detail, the rules for giving notice of the hearing and the rules of procedure for conducting the hearing.⁶⁶⁴

(i) Pre-inquiry (preliminary) stage

This stage represents the administrator's decision to hold a public enquiry.⁶⁶⁵ The administrator is required to hold the public enquiry personally or to designate an appropriately qualified individual or panel of individuals to carry it out.⁶⁶⁶ The administrator or person or panel appointed by him/her must then determine the procedure for the public inquiry, which must include a public hearing and must comply with the procedures prescribed in the *Regulations on Fair Administrative Procedures*.⁶⁶⁷

The *Regulations on Fair Administrative Procedures* flesh out this pre-inquiry stage.⁶⁶⁸ The holding of a public enquiry would entail giving notice of the enquiry in both the Government Gazette and newspapers distributed throughout the country (if the rights of members of the public throughout the Republic are affected by the proposed administrative action).⁶⁶⁹ The notice must further indicate the names of the person who will conduct the enquiry, the period within which the enquiry must be completed, as well as the particulars of the matter to be investigated or the terms of reference of the

⁶⁶³ Currie *The Promotion of Administrative Justice Act: A Commentary* 133.

⁶⁶⁴ Currie *The Promotion of Administrative Justice Act: A Commentary* 129.

⁶⁶⁵ Section 4(2)(a) of the *PAJA*.

⁶⁶⁶ Section 4(2)(a) of the *PAJA*.

⁶⁶⁷ Section 4(2)(b)(i)-(bb) read with section 1 of the *PAJA*, according to which "prescribed" means prescribed by Regulations made under section 10 of the *PAJA*.

⁶⁶⁸ For example, Regulations 3, 4, 5, 6 and 7 in the *Regulations on Fair Administrative Procedures*.

⁶⁶⁹ Regulation 3(1) in the *Regulations on Fair Administrative Procedures*.

person or panel appointed.⁶⁷⁰ The notice must furthermore invite members of the public to submit written representations or request permission to give evidence or make oral representations at the enquiry regarding the matter to be investigated.⁶⁷¹ The closing date for written representations or to request permission to testify or make oral representations must be indicated in the notice, which period of time may not be less than 30 days from the date of publication of the notice.⁶⁷² The notice must also indicate to whom representations or requests should be made and provide the contact details of that person.⁶⁷³ The notice must furthermore contain "sufficient information concerning the proposed administrative action to enable the public to submit *meaningful* representations".⁶⁷⁴

When appropriate, the place(s) at which and times when further information concerning the administrative action will be available for public scrutiny must also be specified.⁶⁷⁵ In respect of the above requirements, the notice published in a newspaper may be more concise.⁶⁷⁶ Notice of a public enquiry may also be given to the public by other means.⁶⁷⁷ Suppose the proposed administrative action affects members of a community in which a significant proportion cannot read or write. In that case, special steps must be taken to bring the proposed action to the attention of the community and solicit their views on it.⁶⁷⁸ Of particular significance is regulation 5 of the

⁶⁷⁰ Regulation 3(2) in the *Regulations on Fair Administrative Procedures*.

⁶⁷¹ Regulation 3(3)(a) in the *Regulations on Fair Administrative Procedures*.

⁶⁷² Regulation 3(3)(b) in the *Regulations on Fair Administrative Procedures*.

⁶⁷³ Regulation 3(3)(d) and (e) in the *Regulations on Fair Administrative Procedures*.

⁶⁷⁴ Regulation 3(4)(a) in the *Regulations on Fair Administrative Procedures*.

⁶⁷⁵ Regulation 3(4)(b) in the *Regulations on Fair Administrative Procedures*.

⁶⁷⁶ Regulation 3(5) in the *Regulations on Fair Administrative Procedures*.

⁶⁷⁷ Regulation 3(8) in the *Regulations on Fair Administrative Procedures*.

⁶⁷⁸ Regulation 5 in the *Regulations on Fair Administrative Procedures*.

Regulations on Fair Administrative Procedures, which provides for special assistance for members of the public who are unable to read or write.⁶⁷⁹

(ii) *The inquiry stage*

This stage represents a mandatory formal hearing – i.e., the public inquiry itself. It is possible to characterise the formal public hearing or inquiry as the core institutional feature of any public inquiry. The procedure at the public hearing, which is mandatory in terms of section 4(2)(b)(i)(aa) of the *PAJA*, is regulated in detail by regulations 11 to 16 of the *Regulations on Fair Administrative Procedures*.

The procedures in holding a public hearing are also prescribed in the said regulations. These include the giving of notice to the public and those whose evidence or representations may be valuable, or the venue and date of the public hearing;⁶⁸⁰ the procedure to be followed at the hearing; the functions of the presiding officer at the hearing;⁶⁸¹ persons appearing at the hearing;⁶⁸² access to the hearing;⁶⁸³ access to the hearing and the adjournment of the hearing.⁶⁸⁴

(iii) *The post-inquiry stage*

This stage is represented by sections 4(2)(b)(iii) and (iv) of the *PAJA* and requires the holder of the inquiry to take two steps. First, a written report on the investigation should be compiled to provide reasons for any administrative action taken or recommended.⁶⁸⁵ This written report will presumably include an explanation of the

⁶⁷⁹ Regulation 5(1) of the *Regulations on Fair Administrative Procedures* provides that "if any administrative action that may be taken as a consequence of the public inquiry may materially and adversely affect the rights of members of a specific community consisting of a considerable proportion of people who cannot read or write or who otherwise need special assistance — (a) a notice must be publicised in the area in a manner that will bring the matter to be investigated to the attention of the community at large; and (b) the administrator must take special steps to solicit the views of members of the community on the matter to be investigated."

⁶⁸⁰ Regulation 11(2) in the *Regulations on Fair Administrative Procedures*.

⁶⁸¹ Regulation 12 in the *Regulations on Fair Administrative Procedures*.

⁶⁸² Regulation 13 in the *Regulations on Fair Administrative Procedures*.

⁶⁸³ Regulation 14 in the *Regulations on Fair Administrative Procedures*.

⁶⁸⁴ Regulations 20 & 16 in the *Regulations on Fair Administrative Procedures*.

⁶⁸⁵ Section 4(2)(b)(iii) of the *PAJA*.

response to the comments received, as well as an explanation of the administrator's decision regarding the administrative action taken.⁶⁸⁶ Such reasons will assist a court in reviewing administrative action for compliance with *PAJA*.⁶⁸⁷ Second, "the publishing of a notice containing a concise summary of any report and the particulars of the places and times at which the report may be inspected and copied".⁶⁸⁸ The written summary of the report must be in English and at least one of the other official languages in the Gazette or the relevant Provincial gazette.⁶⁸⁹ Furthermore, the person conducting the enquiry must convey the information contained in the notice and report to the public by such other means of communication as they consider effective.⁶⁹⁰

3.4.2.3.2 Notice and Comment Procedure in terms of section 4(3) of the PAJA

An administrator may decide to follow a notice-and-comment procedure.⁶⁹¹ Essentially, the procedure consists of four steps: communicating information about the proposed administrative action, soliciting comments on the proposal, considering the received comments, and making recommendations or a decision on whether to proceed with the administrative action.⁶⁹²

When adopting a notice-and-comment procedure, the administrator needs to convey information to the public regarding any proposed administrative action.⁶⁹³ Similar to the position regarding public enquiries, the administrator publishes a notice in the Government Gazette, Provincial Gazette and newspapers in the area concerned.⁶⁹⁴ Such notice must invite the public to submit representations or objections to the proposed administrative action within a period of not less than 30 days from the date

⁶⁸⁶ De Ville *Judicial Review of Administrative Action in South Africa* 259.

⁶⁸⁷ De Ville *Judicial Review of Administrative Action in South Africa* 259.

⁶⁸⁸ Section 4(2)(b)(i) of the *PAJA*.

⁶⁸⁹ Section 4(2)(b)(i) of the *PAJA*.

⁶⁹⁰ Section 4(2)(b)(iv)(aa) and (bb) of the *PAJA* respectively.

⁶⁹¹ De Ville *Judicial Review of Administrative Action in South Africa* 259; Currie *The Promotion of Administrative Justice Act: A Commentary* 130.

⁶⁹² Section 4(3) of the *PAJA*.

⁶⁹³ Regulation 18(1) in the *Regulations on Fair Administrative Procedures*.

⁶⁹⁴ Regulation 18(1) in the *Regulations on Fair Administrative Procedures*.

of publication of the notice.⁶⁹⁵ The notice must contain sufficient information concerning the proposed administrative action to enable the public to submit meaningful representations.⁶⁹⁶ When appropriate, the place(s) at which and times when further information concerning the administrative action will be available for public scrutiny must be specified in the notice.⁶⁹⁷ Thereafter, the administrator must consider all the comments received and decide whether to take the administrative action as initially proposed, with alterations, or to abandon it.⁶⁹⁸

When following the notice-and-comment procedure, an administrator is not (as compared to the case where a public enquiry is decided on) required to give reasons for any administrative action taken or recommended automatically.⁶⁹⁹ According to De Ville, this omission is regrettable, as the duty of the public authority to demonstrate responsiveness to the comments received is one of the central reasons for adopting a notice-and-comment procedure.⁷⁰⁰ De Ville submits that a duty to provide reasons automatically should be read into the subsection and that this should be provided for, preferably in the regulations or otherwise through judicial interpretation.⁷⁰¹

Section 4(3)(a) of the *PAJA* requires an administrator to "take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it".⁷⁰² Regulation 18 of the *Regulations on Fair Administrative Procedures* requires publication of a notice detailing proposed administrative action and prescribes the content, method and recipients of such a notice.⁷⁰³ As to the content, regulation 17(3)(a) of the *Regulations on Fair Administrative Procedures* states that the notice must "contain sufficient information about the proposed administrative action to enable

⁶⁹⁵ Regulation 18(2)(a) in the *Regulations on Fair Administrative Procedures*.

⁶⁹⁶ Regulation 18(3)(a) in the *Regulations on Fair Administrative Procedures*.

⁶⁹⁷ Regulation 18(3)(b) in the *Regulations on Fair Administrative Procedures*.

⁶⁹⁸ De Ville *Judicial Review of Administrative Action in South Africa* 260.

⁶⁹⁹ De Ville *Judicial Review of Administrative Action in South Africa* 260.

⁷⁰⁰ De Ville *Judicial Review of Administrative Action in South Africa* 260.

⁷⁰¹ De Ville *Judicial Review of Administrative Action in South Africa* 260.

⁷⁰² Section 4(3)(a) of the *PAJA*.

⁷⁰³ Regulation 18 in the *Regulations on Fair Administrative Procedures*.

members of the public to submit meaningful comments".⁷⁰⁴ At the conclusion of the procedure, section 4(3)(c) of the *PAJA* requires administrators "to decide whether to take the administrative action, with or without changes".⁷⁰⁵

Section 4 of the *PAJA* further provides that the requirement for a fair procedure to be followed in administrative actions with a general impact may be departed from where this is reasonable and justifiable.⁷⁰⁶ When considering whether such a departure is reasonable and justifiable, several factors must be taken into account.⁷⁰⁷ These include "the objects of the empowering provision, the nature and purpose of, and the need to take, the administrative action; the likely effect of the administrative action; the urgency of taking the administrative action or the urgency of the matter; and the need to promote efficient administration and good governance".⁷⁰⁸

3.4.3 "Different" but "fair" provisions: Sections 3(5) and 4(1)(d) of the *PAJA*

Section 3(5) of the *PAJA* provides for the use of a procedure mandated by a fair but different empowering provision.⁷⁰⁹ This implies that, provided the alternative procedure is regarded as "fair," it may be used instead of, and to the exclusion of, the procedures prescribed or suggested by the *PAJA*. The Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* (hereafter *Sidumo*) noted that nothing in section 33 of the *Constitution* precludes specialised legislative regulation of administrative action, such as section 10 of the *MPRDA*, alongside general legislation, such as the *PAJA*.⁷¹⁰ However, legislation giving effect to section 33, such as section 10 of the *MPRDA*, must

⁷⁰⁴ Regulation 17(3)(a) in the *Regulations on Fair Administrative Procedures*.

⁷⁰⁵ Section 4(3)(c) of the *PAJA*.

⁷⁰⁶ Section 4(4)(a) of the *PAJA*; De Ville *Judicial Review of Administrative Action in South Africa* 257.

⁷⁰⁷ Section 4(4)(b) of the *PAJA*; De Ville *Judicial Review of Administrative Action in South Africa* 257.

⁷⁰⁸ Section 4(4)(b) of the *PAJA*; De Ville *Judicial Review of Administrative Action in South Africa* 257.

⁷⁰⁹ Section 3(5) of the *PAJA*.

⁷¹⁰ *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) (hereafter *Sidumo*) para 91-111.

comply with its prescriptions. *Sidumo* encourages reliance on the *MPRDA*⁷¹¹ and *NEMA*, instead of the *PAJA*,⁷¹² because specialist legislation must be given preference.⁷¹³

There are two examples where the courts have used the *MPRDA* and/or the *NEMA* as specialist legislation. First, in *Agri South Africa v Minister for Minerals and Energy* (hereafter *Agri South Africa*), the Constitutional Court recognised the *MPRDA* as expert legislation.⁷¹⁴ The Court found that the *MPRDA* is legislation that seeks to effect an institutional change to the legal regime governing the "exploitation" of this country's "mineral and petroleum resources". Second, the Supreme Court of Appeal in *Global Environmental Trust v Tendele Coal Mining (Pty) Ltd* (hereafter *Global Environmental Trust*) recognised *NEMA* as specialised legislation by opining that both the *MPRDA* and *NEMA* are statutes that give effect to the right to have the environment protected for the benefit of present and future generations, enshrined in section 24 of the *Constitution*.⁷¹⁵

In light of the decisions in *Sidumo*, *Agri South Africa*, and *Global Environmental Trust*, it is crucial that the *MPRDA* and *NEMA*, as distinct from the *PAJA*, regulate consultation processes during mining-related permit applications in a manner that ensures procedural fairness, as the *PAJA* purports to do. The *MPRDA* and *NEMA* both provide regulation over a specialised field of law, namely mining and environmental law, ensuring that they are both recognised as specialist legislation for purposes of this study and sections 3(5) and 4(1)(d) of the *PAJA*.

Currie and De Waal make the point that only procedures in empowering provisions, which are defined in section 1 of the *PAJA* as "a law, a rule of common law, customary

⁷¹¹ *Global Environmental Trust* (hereafter *Environmental Trust*) para 31.

⁷¹² The *PAJA* can be classified as "general legislation" because of the following dictum by *Sidumo* para 90: "section 33(3) read with item 23(2) of Schedule 6 to the *Constitution* contemplates that the national legislation referred to in section 33 of the Constitution is to be enacted in the future. It is clear that what was envisaged was legislation of general application. *PAJA* was the resultant legislation. The definition of administrative action in *PAJA* is extensive and intended to "cover the field"."

⁷¹³ *Sidumo* para 91-111.

⁷¹⁴ *Agri South Africa* para 91.

⁷¹⁵ *Global Environmental Trust* para 31.

law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken", can qualify as fair but different.⁷¹⁶ A further submission by Currie and De Waal is that for a fair but different provision to qualify as "fair", it must be publicly accessible itself.⁷¹⁷

For this study, which explores procedural fairness during consultations for mining-related permits, the administrator would be acting in accordance with the *MPRDA* (and, in part, *NEMA*). Sections 3(5) and 4(1)(d) of the *PAJA* allow for a "different but fair" procedure from its sections 3(2) and 4(2) and 4(3) minimum requirements, subject to that procedure being "fair but different".⁷¹⁸ For an administrator to rely on sections 3(5) and 4(1)(d) of the *PAJA*, the following elements must be present:⁷¹⁹ First, an empowering provision must provide for a procedure to be followed; second, the contemplated procedure may differ from that set out in section 3(2) of *PAJA*; third, the "different" procedure must still be "fair"; fourth, the administrator must follow the "different" procedure.

Chapter 3 also explores the consistencies, or lack thereof, of the consultation processes set out in chapter 2 of this study with what *PAJA*, in sections 3 and 4, require as a minimum to respect the constitutional right to procedural fairness. This exploration will be characterised by a comparison between the *PAJA* and the *MPRDA* (and in part, *NEMA*) insofar as the right to procedural fairness is concerned. This comparison is an enquiry into whether the different procedures (found in the *MPRDA* and, in part, *NEMA*) are indeed fair.

The reason advanced for dealing with both sections 3 and 4 of the *PAJA* is devised from the *Earthlife Africa Cape Town* in which the Cape Provincial Division held that "there may be instances where the administrative action in question affects the rights,

⁷¹⁶ Currie and De Waal *The Bill of Rights Handbook* 668.

⁷¹⁷ Currie and De Waal *The Bill of Rights Handbook* 668.

⁷¹⁸ Sections 3(5) and 4(1)(d) of the *PAJA*.

⁷¹⁹ *Police and Prisons Civil Rights Union* paras 70-73.

not only of individual persons, but of the public in general, in which case both sections 3 and 4 of the *PAJA* may need to be complied with".⁷²⁰

The case of *Police and Prisons Civil Rights Union* is a landmark case in exercising discretion to follow a "different but fair" procedure. From the reading of *Police and Prisons Civil Rights Union* it would seem as though the High Court prefers to interpret this provision in a way that the different procedure the administrator may follow must at its minimum reflect some, if not most, of what is entrenched in sections 3 and 4 of the *PAJA*, depending on whether the impugned action affects an individual or the public. To reflect this point, the court in the *Police and Prisons Civil Rights Union*⁷²¹ applied some of the section 3(2)(b) of the *PAJA* requirements to the different procedure followed by the administrator (which, in the *Police and Prisons Civil Rights Union*, was the agreed-upon department's disciplinary code and procedure) to determine whether the different procedure was indeed fair.⁷²²

What the next part of this study aims to achieve is to exercise the same process as in *Police and Prisons Civil Rights Union*, to test whether the "different" enabling empowering provision (the *MPRDA* and *NEMA's consultation processes*) is "fair" for purposes of section 3(5) of the *PAJA*. It tests the *MPRDA* and the *NEMA's* (and their regulations) consultation processes during applications for mining-related permits against the provisions of procedural fairness entrenched in the *PAJA*. The same exercise will be taken for purposes of section 4(1)(d) of the *PAJA* below.

⁷²⁰ *Earthlife Africa Cape Town* para 72.

⁷²¹ *Police and Prisons Civil Rights Union* para 73.

⁷²² *Police and Prisons Civil Rights Union* para 19.

3.4.3.1 "Different but fair": Section 3(5) of the PAJA, the MPRDA and NEMA.

3.4.3.1.1 Provisions on adequate notice of the nature and purpose of proposed administrative action

In terms of section 3(2)(b)(i) of the *PAJA*, to give effect to the right to procedurally fair administrative action, an administrator must provide "adequate notice of the nature and purpose of the proposed administrative action" to a person whose "rights or legitimate expectations" have been "materially and adversely" affected by "administrative action".⁷²³ The requirement to provide adequate notice of the nature and purpose of proposed administrative action was an issue in *Bengwenyama 2011 (CC)*.⁷²⁴ The Constitutional Court in *Bengwenyama 2011 (CC)* held that the Department of Mineral Resources failed to provide adequate notice of Genorah's application for a prospecting right, as required by section 10(1) of the *MPRDA*, read in conjunction with regulation 3 of the 2004 *MPRDA Regulations*, which were promulgated in terms of section 107(1) of the *MPRDA*.⁷²⁵ It was alleged, on behalf of the appellants, that there was no proof of compliance with the Department's chosen manner of giving notice of an application to interested and affected persons, which was by sending the notice per facsimile to the Sekhukhune Magistrate's Office for display on a notice board there.⁷²⁶ The Court agreed with this submission that the notice was inadequate. The Court's position emphasised the importance of providing adequate notice of the nature and purpose of the proposed administrative action to affected parties in a manner consistent with the provisions of the *PAJA* and regulation 3 of the *Regulations on Fair Administrative Procedures*.⁷²⁷ A similar provision, as regulation 3 of the 2004 *MPRDA Regulations*, is contained in regulation 2 of the 2014 *EIA Regulations*.⁷²⁸

⁷²³ Section 3(2)(b)(i) of the *PAJA*.

⁷²⁴ *Bengwenyama 2011 (CC)* para 11.

⁷²⁵ *Bengwenyama 2011 (CC)* para 11.

⁷²⁶ *Bengwenyama 2011 (CC)* para 11.

⁷²⁷ *Bengwenyama 2011 (CC)* para 11.

⁷²⁸ Regulation 41(2) in the 2014 *EIA Regulations*.

3.4.3.1.2 Provisions on the reasonable opportunity to make representations

Section 10(1)(b) of the *MPRDA*, regulation 3 of the *2004 MPRDA Regulations* and regulation 41(6)(b) of the *2014 EIA Regulations*⁷²⁹ mirror section 3(2)(b)(ii) of the *PAJA* by allowing a person whose "rights or legitimate expectations" have been "materially and adversely" affected by administrative action a reasonable opportunity to make representations through imposing on the RM to, within 14 days after accepting an application lodged in terms of section 16, 22 or 27 of the *MPRDA* to "call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice".⁷³⁰ The difference between the *PAJA* and the *MPRDA* is that the *MPRDA* has a limit on the number of days within which the representations should be made, whereas the *PAJA* lacks such a provision. This difference gives rise to two distinct schools of thought. The first school of thought is that the inconsistency between the *MPRDA* and the *PAJA* must be addressed so that the *MPRDA* is read to align with the *PAJA*, insofar as it does not constrain the time allowed for making *representations*.⁷³¹ This would mean that the *MPRDA* needs to remove the limit on the time allowed to make representations, to be read in conjunction with the *PAJA*, which is silent on the issue of time limits. The second school of thought is that the *MPRDA* and the *PAJA* have different objectives;⁷³² therefore, the time limit placed in the *MPRDA* is suitable for achieving the objectives of the *MPRDA*.⁷³³ The *MPRDA*'s silence on this existing time limit would have resulted in the delayed realisation of the objectives outlined in sections 2(c), (d), (f), and (g) of the *MPRDA*.⁷³⁴

⁷²⁹ Regulation 41(6)(b) in in the *2014 EIA Regulations*.

⁷³⁰ Section 10(1)(b) of the *MPRDA*; Regulation 3 in the *2004 MPRDA Regulations*; section 3(2)(b)(ii) of the *PAJA*.

⁷³¹ See subheading 3.2 and 3.3 in chapter 3 of this study.

⁷³² See subheading 3.2 in chapter 3 of this study for the *PAJA*'s objectives.

⁷³³ Sections 2(c), (d), (f), and (g) of the *MPRDA*.

⁷³⁴ Sections 2(c), (d), (f) and (g) of the *MPRDA* - "(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa; (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral a petroleum resources; (f) promote employment and advance the social and economic welfare of all South Africans; (g) provide for security of tenure in respect of prospecting, exploration, mining and production operations. "

The second school of thought must be preferred because imposing a time frame does not frustrate the fairness envisioned in *PAJA*.

With regard to assistance during consultation processes, regulation 5(1) of the *Regulations on Fair Administrative Procedures*⁷³⁵ is vindicated by regulation 44(2) and of the *2004 MPRDA Regulations*⁷³⁶ and regulation 41(2)(c) of the *2014 EIA Regulations*⁷³⁷ which provides that reasonable alternative methods of recording comments must be provided for those where a person desires but is unable to access written comments due to (a) a lack of skills to read or write; (b) disability; (c) any other disadvantage.

3.4.3.1.3 Provisions on a clear statement of the administrative action

Section 10(1)(a) of the *MPRDA* places a duty on the RM "to make known that an application for a prospecting right, mining right or mining permit has been accepted in respect of the land in question within 14 days after accepting an application lodged in terms of section 16, 22 or 27 of the *MPRDA*".⁷³⁸ Regulation 41(3)(a) and (b) of the *2014 EIA Regulations* provides details on what must be on the notice for purposes of the *NEMA*.⁷³⁹ This means that the "different" procedure contained in the *MPRDA* and *2014 EIA Regulations* aligns itself with section 3(2)(b)(iii) of the *PAJA* because, as is the case with the *PAJA* which purports to give the administrator a duty to provide a clear statement of the administrative action, section 10(1)(a) of the *MPRDA* requires the administrator to make the application for a mining related permit know.

3.4.3.1.4 Provisions on adequate notice of the right of review or appeal

Another consistency between the *PAJA* and the *MPRDA* is found in section 96 of the *MPRDA* and section 3(2)(b)(iv) of the *PAJA* in which the latter gives to a "person whose

⁷³⁵ Regulation 5(1) in the *2004 MPRDA Regulations*.

⁷³⁶ Regulation 44(2) in the *2004 MPRDA Regulations*.

⁷³⁷ Regulation 41(2)(c) in *2014 EIA Regulations*.

⁷³⁸ Section 10(1)(a) of the *MPRDA*.

⁷³⁹ Regulation 41(3)(a) and (b) in *2014 EIA Regulations*.

rights or legitimate expectations have been materially and adversely affected by administrative action" the right to "adequate notice of any right of review or internal appeal, where applicable".⁷⁴⁰ The *MPRDA* also allows for the same (or a person aggrieved by any administrative decision in terms of the *MPRDA*) to appeal within 30 days of becoming aware of such administrative decision in the prescribed manner to the following people:⁷⁴¹ First, the Director-General, "if it is an administrative decision by an RM or any officer to whom the power has been delegated or a duty has been assigned by or under the *MPRDA*".⁷⁴² Second, the Minister, "if it is an administrative decision made by the Director-General or the designated agency."⁷⁴³ Additionally, section 10(2) of the *MPRDA* states that if a person objects to the granting of a prospecting right, mining right, or mining permit, the RM must refer the objection to the Regional Mining Development and Environmental Committee to consider the objection and advise the Minister accordingly".⁷⁴⁴

The *2014 EIA Regulations* are silent on the possibility of appeal processes. The effect of this silence is that it leads to uncertainty and issues regarding the possible harmonisation of the *MPRDA* and the *NEMA* due to their overlap in regulating consultation processes during applications for mining-related permits. This silence (as with any other subsequent silence of the *NEMA* in aligning itself with the *PAJA* and *MPRDA* provisions) may, however, be cured by regulation 41(7) of the *2014 EIA Regulations*⁷⁴⁵ which states that the public participation process contemplated in the *2014 EIA Regulations* "may be combined with any other public participation process prescribed in terms of a specific environmental management Act" such as the *MPRDA*. This combination will only be allowed if all relevant authorities agree to it.⁷⁴⁶ The cure is found in the *MPRDA* and its regulations' provisions dealing with the appeals. The

⁷⁴⁰ Section 96 of the *MPRDA*; section 3(2)(b)(iv) of the *PAJA*.

⁷⁴¹ Section 96 of the *MPRDA*.

⁷⁴² Section 96 of the *MPRDA*; section 3(2)(b)(iv) of the *PAJA*.

⁷⁴³ Section 96 of the *MPRDA*; section 3(2)(b)(iv) of the *PAJA*.

⁷⁴⁴ Section 10(2) of the *MPRDA*.

⁷⁴⁵ Regulation 41(7) in *2014 EIA Regulations*.

⁷⁴⁶ Regulation 41(7) in *2014 EIA Regulations*.

effect of this condition of agreement is that the combination relies on agreement, which may not happen. In cases where there is no agreement, it is unclear whether consultation processes conducted in accordance with the *NEMA* allow interested and affected parties to appeal the decision to grant a mining-related permit.

3.4.3.1.5 Provisions on adequate notice of the right to request reasons

The provisions regulating the administrative justice principle of written reasons, applicable to both the *PAJA* and the *MPRDA*, are consistent with each other. Section 3(2)(b)(v) of the *PAJA* states that "any person who has been adversely affected by the administrative action has the right to request written reasons in terms of section 5 of the *PAJA*".⁷⁴⁷ In contrast, section 6 of the *MPRDA* states that administrative action taken in terms of the *MPRDA* is subject to the administrative law principle of the right to reasons for any decision contemplated in section 6(1) of the *MPRDA*.⁷⁴⁸ The *2014 EIA Regulations* are silent on whether an interested and affected party may request reasons for the decision.⁷⁴⁹

3.4.3.2 "Different but fair" Provisions: Section 4(1)(d) of the PAJA, the MPRDA and the NEMA

Section 4 of the *PAJA* provides a framework for public inquiries, which is further elaborated upon in the *Regulations on Fair Administrative Procedures*.⁷⁵⁰ As section 4 of the *PAJA* has already been extensively dealt with preceding parts of this paper, this study shall only deal with section 4 in so far as it finds relevance to the section 4(1)(d) of the *MPRDA* provision allowing for an administrator to use a different but fair procedure from that described in sections 4(2) and 4(3) of the *PAJA*. Section 4(1)(d) of the *PAJA* allows an administrator to follow a procedure for administrative action affecting the public that is fair but different to the procedures of section 4 if permitted

⁷⁴⁷ Section 3(2)(b)(v) of the *PAJA*.

⁷⁴⁸ Section 3(2)(b)(v) of the *PAJA*; section 6 of the *MPRDA*.

⁷⁴⁹ See discussion on the effect of silence on certain provisions in subheading 3.4.3.1.4 of this study.

⁷⁵⁰ Section 4 of the *PAJA*.

to do so by any empowering provision.⁷⁵¹ Again, as with section 3(5) of the *PAJA*, this "fair but different" provision means that "as long as the other procedure is considered "fair", it may be followed to the exclusion of the procedures mandated or recommended by the *PAJA*".⁷⁵²

Sections 4(2) and 4(3) of the *PAJA* and *Regulations on Fair Administrative Procedures* are mirrored by the *DMR Consultation Guidelines*, which were introduced to provide clarity on the implementation of the *MPRDA*'s consultation processes.⁷⁵³ Therefore, when considering the different but fair decisions made by an administrator, it is essential to note that they may do so under the guise of the *DMR Consultation Guidelines*, which were introduced to provide meaning (supplement) to the *MPRDA*.

Under sections F and G of the *DMR Consultation Guidelines*, the process for "notification by the RM" and "obligations of the applicant", respectively, is explained, most of which reflect the features of the *Regulations on Fair Administrative Procedures*.⁷⁵⁴ For example, regulation 3(1)(b) of the *Regulations on Fair Administrative Procedures* requires the administrator to give notice of a public inquiry "if the administrative action affects the rights of the public in a particular province only, in the Provincial Gazette of that province and a newspaper which is distributed".⁷⁵⁵ Alternatively, the administrator may give notice of a public inquiry in newspapers which are collectively distributed throughout that province, or, in terms of regulation 3(1)(c) of the *Regulations on Fair Administrative Procedures*, "if the administrative action affects the rights of the public in a specific area only, in a newspaper which is distributed in that particular area".⁷⁵⁶ Similarly, section F of the *DMR Consultation Guidelines* places a duty on the RM to notify, by way of a notice, that an application contemplated in regulation 2 of the *2004 MPRDA Regulations* has been accepted in

⁷⁵¹ Currie *The Promotion of Administrative Justice Act: A Commentary* 133.

⁷⁵² Currie *The Promotion of Administrative Justice Act: A Commentary* 133.

⁷⁵³ Section B "Purpose" of the *DMR Consultation Guidelines* 2-3.

⁷⁵⁴ Section F "Section 10(1)(a): Notification by the Regional Manager" of the *DMR Consultation Guidelines* 5; section G "Obligations of the Applicant" of the *DMR Consultation Guidelines* 6.

⁷⁵⁵ Regulations 3(1)(b) and 3(1)(c) in the *Regulations on Fair Administrative Procedures*.

⁷⁵⁶ Regulations 3(1)(b) and 3(1)(c) in the *Regulations on Fair Administrative Procedures*.

respect of the land or offshore area.⁷⁵⁷ The notice must be placed on a notice board at the office of the RM or designated agency.⁷⁵⁸ The notice must also make the application known by way of "publication in the applicable Provincial Gazette, notice in the magistrates' court in the magisterial district applicable to the land in question, or advertisement in a local or national newspaper circulating in the area where the land or offshore area to which the application relates is situated".⁷⁵⁹

Both the *Regulations on Fair Administrative Procedures* (regulation 8) and section F of the *DMR Consultations Guidelines* require the administrator to do more to ensure that the public inquiry is brought to the attention of the public to raise comments and concerns before the application can be processed further, including by way of communications through electronic media.⁷⁶⁰

The *DMR Consultation Guidelines* requires the meeting with the community and landowner and the interested and affected parties to include the taking minutes to record the outcome of the meeting, which minutes must consist of the agenda (outlining date and venue), where applicable a stamped tribal resolution in line with the guidelines provided by Land Affairs, and a signed attendance register (with telephone numbers) of the attendees.⁷⁶¹ This requirement is consistent with regulation 11(5)(a) and (b) of the *Regulations on Fair Administrative Procedures* which mandates an administrator, or a person or panel conducting a public inquiry, to "inform every person who submitted a request for permission to testify or to make oral representations of the venue of the public hearing, and the time and date on which it will commence and if the request is granted, the date on which that person will be

⁷⁵⁷ Section F "Section 10(1)(a): Notification by the Regional Manager" of the DMR Consultation Guidelines 5.

⁷⁵⁸ Section F "Section 10(1)(a): Notification by the Regional Manager" of the DMR Consultation Guidelines 5.

⁷⁵⁹ Section F "Section 10(1)(a): Notification by the Regional Manager" of the DMR Consultation Guidelines 5.

⁷⁶⁰ Regulation 8 in the *Regulations on Fair Administrative Procedures*; section F "Section 10 (1) (a): Notification by the Regional Manager" of the DMR Consultation Guidelines 5.

⁷⁶¹ Section G "Obligations of the Applicant" of the DMR Consultation Guidelines 6.

heard".⁷⁶² These regulations/provisions are repeated for the notice and comment procedure in regulations 18 and 19.⁷⁶³

Most of the provisions found in section 10 of the *MPRDA* do not reflect what is contained in section 4 of the *PAJA*. However, section 10 of the *MPRDA* evidently aligns with section 3 of the *PAJA*. Section 4(1)(e) of the *PAJA* allows section 4 of the *PAJA* to be satisfied if the provisions of section 3 are satisfied. By virtue of the *NEMA* and the *MPRDA* aligning with section 3 of the *PAJA*, the *MPRDA* (and *NEMA*) would also align with section 4 of the *PAJA*, but with only one of the five choices (in section 4(1)), which is section 4(1)(e) of the *PAJA*.

3.5 Conclusion

This chapter has demonstrated that the principle of procedural fairness, originating from the common-law rules of natural justice, has evolved into a constitutional and statutory standard that governs administrative decision-making in South Africa. The chapter unpacked the purport, objects, and extent of procedural fairness, emphasising that fairness serves several crucial purposes: it promotes accurate decision-making, protects human dignity, enhances public participation, and fosters legitimacy and accountability within public administration.

Rooted in section 33 of the *Constitution* and given effect through the *PAJA*, procedural fairness ensures that administrative power is exercised lawfully, reasonably, and transparently. The discussion began by tracing the historical development of the *audi alteram partem* and *nemo iudex in sua causa* rules, showing how they were initially codified in section 24 of the Interim Constitution and later entrenched more broadly in section 33 of the *1996 Constitution*. The courts have since expanded these principles to ensure that every person affected by administrative action, particularly in matters

⁷⁶² Regulation 11(5)(a) & (b) in the *Regulations on Fair Administrative Procedures*.

⁷⁶³ Regulation 18 & 19 in the *Regulations on Fair Administrative Procedures*.

concerning mining-related permits, receives adequate notice, a fair hearing, and written reasons for decisions that affect their rights or legitimate expectations.

Through detailed analysis, the chapter illustrated how sections 3 and 4 of the *PAJA* operationalise procedural fairness for administrative actions affecting individuals and the public, respectively. Section 3 outlines mandatory elements, including adequate notice, an opportunity to make representations, clear statements of decisions, and notice of review rights. Section 4, on the other hand, provides for broader participatory mechanisms, such as public inquiries and notice-and-comment procedures. These provisions were shown to be flexible yet binding standards that administrators must tailor to the circumstances of each case.

Finally, the chapter examined the "different but fair" principle in sections 3(5) and 4(1)(d) of the *PAJA*, comparing it with the consultation and application procedures under the *MPRDA* and the *NEMA*. This chapter demonstrated that while the *MPRDA* and *NEMA* establish their own consultation processes, these must still satisfy the fairness standards prescribed by the *PAJA*. The *MPRDA* and the *NEMA* contain administrative processes that are different from those in *PAJA*. Still, these differences are permissible because they remain fair, align with *PAJA*'s principles, and are authorised by *PAJA*'s own "different but fair" clauses (sections 3(5) and 4(1)(d)). However, differences in the processes were noted. One of these differences is related to the opportunity to make representations, which is granted in both the *MPRDA* and the *PAJA*. The *PAJA* guarantees a reasonable opportunity to make representations but does not prescribe time limits. The *MPRDA*, however, imposes strict timelines (30 days after notice).

In essence, the chapter concludes that procedural fairness is the cornerstone of just administrative action in South African mining governance. By aligning the *MPRDA*'s and *NEMA*'s consultation processes with the constitutional and statutory framework of *PAJA*, decision-makers ensure that administrative actions are legitimate, reasonable, and consistent with the rule of law. Upholding these principles not only strengthens

public confidence in state institutions but also safeguards the rights of individuals and communities affected by resource-development decisions.

The next chapter examines how the courts must harmonise the standard of consultation required by the *MPRDA* (and *NEMA*) with that of the *PAJA* to achieve procedural fairness. The next chapter addresses the need for *meaningful consultation* as a means to accomplish this harmonisation.

CHAPTER 4

Judicial development of the notion of "meaningful" consultation/engagement

4.1 Introduction

In Chapters 2 and 3, this dissertation examined the legal framework of consultation processes during applications for mining-related permits and the standard of procedural fairness that these consultation processes must meet, respectively. Chapter 4 explores the judicial development of the notion of "*meaningful*" consultation/engagement.

Sections 16, 17 and 27 of the *MPRDA* mandate consultation of interested and affected parties during applications for mining-related permits. As part of the requirement to consult with these interested and affected parties, Mothudi noted the South African courts' opinion on the importance of mining-affected communities to be *meaningfully* consulted on decisions that affect them.⁷⁶⁴ According to *Sefateng*, a *meaningful consultation* process is required to advance the objectives of the *MPRDA*, as entrenched in section 2 of the *MPRDA*.⁷⁶⁵ Prior to the amendments to the *2004 MPRDA Regulations* in 2020, which will be discussed in later parts of this chapter, sections 16, 22 and 27 are not clear on what would amount to *meaningful consultation*, the type of information that must be furnished to interested and affected parties, the information that had to be included when submitting the consultation results, as well as the criteria for identifying who qualified as an interested and affected party.⁷⁶⁶

⁷⁶⁴ *Bengwenyama 2011 (CC)*, *Meepo Ya Sechaba v Kotze* & 2007 (1) SA 104, *Joubert v Maranda Mining Company* 2009 ZASCA 68; *Baleni*; and *Earthlife Africa Johannesburg v Minister of Environmental Affairs* 2017 (2) All SA 519 (GP) (hereafter *Earthlife Africa Johannesburg*).

⁷⁶⁵ *Sefateng* para 91.

⁷⁶⁶ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 28; See Chapter 2 under heading "2.3.2 Definition of 'interested and affected parties'".

The concept of *meaningful consultation* is a relatively new development in South Africa's regulation of consultation processes for mining-related permit applications. The notion has, however, been crystallised by South African courts in other fields of law, specifically the realisation of socio-economic rights such as the right to housing. Therefore, it is appropriate to explore the meaning of *meaningful consultation* from the prism of socio-economic rights. In interpreting whether socio-economic rights have been realised, the courts introduced the notion of *meaningful* engagement. The terms "meaningful engagement" and "meaningful consultation" have the same effect and meaning. The difference in wording serves the purpose of the context in which it is used. According to Chenwi, consultations will amount to *meaningful* engagement if they are genuine and sincere.⁷⁶⁷ The use of the qualification "genuine" is seen to imply *meaningful consultation*.⁷⁶⁸ This study prefers "meaningful consultation" over "meaningful engagement" for ease of reference and the purposes of the study title.

This chapter examines the concept and evolution of *meaningful consultation* in case law and legal academia. The chapter begins by outlining the origins of the concept of *meaningful consultation* by tracing its development in socio-economic rights jurisprudence. The chapter then delves into the adaptation of the same to the regulation of consultation processes during applications for mining-related permits.

4.2 The "*meaningfulness*" principle in socio-economic rights cases

The notion of *meaningful* engagement represents a significant advancement in the South African Constitutional Court's strategy for upholding socio-economic rights and promoting active involvement in the delivery of services.⁷⁶⁹ Chenwi asserts that the *meaningfulness* principle plays a significant role in recent rulings by South African courts, especially the Constitutional Court, serving as a mechanism through which substantive rights are identified and enforced for particular groups of individuals.⁷⁷⁰ In

⁷⁶⁷ Chenwi 2011 *SAPL* 130.

⁷⁶⁸ Chenwi 2011 *SAPL* 130.

⁷⁶⁹ Chenwi 2011 *SAPL* 129.

⁷⁷⁰ Chenwi 2011 *SAPL* 129.

general terms, *meaningful* engagement takes place when communities, individuals and the government communicate and listen to one another to reach specific goals.⁷⁷¹ The objective of any engagement is context-sensitive.⁷⁷² In other words, genuine involvement necessitates that the state focuses specifically on its constitutional obligations when formulating policies and programs, as well as delivering services, while actively seeking and considering the perspectives of beneficiaries.⁷⁷³ It serves as a neutral environment where individuals and the government can engage in dialogue and develop options and solutions for challenging issues.⁷⁷⁴

Meaningful engagement is considered to be democratic, flexible, and responsive to the practical concerns that socio-economic rights raise.⁷⁷⁵ Allowing individuals and communities to have a say in shaping and executing socio-economic policies and programs ensures their active involvement as stakeholders rather than merely being passive beneficiaries of socio-economic resources and services.⁷⁷⁶ *Meaningful* engagement means something more than mere participation.⁷⁷⁷ It acknowledges the essential role of encouraging active participation and substantiates the right of the underprivileged to participate, while also incorporating other democratic values like transparency and accountability.⁷⁷⁸ Thus, it can foster social transformation at the grassroots level by providing a platform for the marginalised and impoverished to be heard.⁷⁷⁹

The Constitutional Court, along with certain lower courts, has emphasised the significance of *meaningful* engagement in fulfilling socio-economic rights, especially regarding the right to adequate housing.⁷⁸⁰ The Constitutional Court first referred to

⁷⁷¹ Chenwi 2011 *SAPL* 129.

⁷⁷² Chenwi 2011 *SAPL* 129.

⁷⁷³ Chenwi 2011 *SAPL* 129.

⁷⁷⁴ Chenwi 2011 *SAPL* 129.

⁷⁷⁵ Chenwi 2011 *SAPL* 129.

⁷⁷⁶ Chenwi 2011 *SAPL* 129.

⁷⁷⁷ Chenwi 2011 *SAPL* 130.

⁷⁷⁸ Chenwi 2011 *SAPL* 130.

⁷⁷⁹ Chenwi 2011 *SAPL* 130.

⁷⁸⁰ Chenwi 2011 *SAPL* 138.

"engagement" in *Government of the Republic of South Africa v Grootboom* (hereafter *Grootboom*).⁷⁸¹ With regard to *meaningful* engagement, the Court held that it expected officials of a municipality responsible for housing to engage with people as soon as they became aware of their (illegal) occupation of land.⁷⁸²

The Constitutional Court subsequently developed jurisprudence on the concept of meaningful engagement in subsequent cases. This study examines cases that had the most significant impact on the notion's development.

4.2.1 *Port Elizabeth Municipality v Various Occupiers*

The Constitutional Court elaborated on *meaningful* engagement in *Port Elizabeth Municipality v Various Occupiers* (hereafter *PE Municipality*) as a means to resolve disputes before litigation.⁷⁸³ This matter concerned an eviction application brought by the Port Elizabeth Municipality against a number of adults and children who had unlawfully settled on privately owned, undeveloped land located within the municipality's jurisdiction.⁷⁸⁴ The Court mentioned that one of the more dignified and effective ways to ensure "sustainable reconciliations of different interests is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions".⁷⁸⁵ The Court went further by stressing that, wherever possible, parties should attempt respectful face-to-face engagement.⁷⁸⁶ The Court held that the state must take reasonable measures to achieve an agreed mediated solution and ensure suitable alternative accommodation, especially for vulnerable groups such as the elderly, children, disabled individuals, and female-headed households.⁷⁸⁷ This position emphasises the point that *meaningful*

⁷⁸¹ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) (hereafter *Grootboom*) paras 49 and 84.

⁷⁸² *Grootboom* para 87.

⁷⁸³ McLean 2010 *Constitutional Court Review* 233-234.

⁷⁸⁴ Chenwi 2011 *SAPL* 139.

⁷⁸⁵ *PE Municipality* para 39.

⁷⁸⁶ *PE Municipality* para 39.

⁷⁸⁷ *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) (hereafter *PE Municipality*) paras 30 and 61.

consultation entails providing vulnerable groups with even more resources during the consultation process.

The Court found that the municipality's shortcomings in engaging with the occupiers, aimed at identifying their specific needs, was not aligned with its constitutional mandate.⁷⁸⁸ It held that:

In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.⁷⁸⁹

The Court stated that the duty to engage is about taking part in the process rather than achieving a settlement.⁷⁹⁰ The Court continued by outlining the advantages of engagement, such as lowering litigation expenses, easing tensions, and reducing the scope of disputes and "facilitating mutual give-and-take".⁷⁹¹ The engagement process also "enables parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful good neighbourliness for the future".⁷⁹² The Court thus held that "a court involved in future litigation involving occupiers should be reluctant to accept that it would be just and equitable to order their eviction if it is not satisfied that all reasonable steps had been taken to get an agreed, mediated solution".⁷⁹³ The Court further observed that respectful in-person engagement or mediation processes are useful in facilitating an outcome that ends in a deadlock, "promotes respect for human dignity and underlines the fact that we all live in a shared society".⁷⁹⁴

⁷⁸⁸ *PE Municipality* paras 45, 56 and 61.

⁷⁸⁹ *PE Municipality* para 39.

⁷⁹⁰ *PE Municipality* para 40.

⁷⁹¹ *PE Municipality* para 42.

⁷⁹² *PE Municipality* para 43.

⁷⁹³ *PE Municipality* para 61.

⁷⁹⁴ *PE Municipality* para 42.

4.2.2 *Occupiers of 51 Olivia Road v City of Johannesburg*

The notion of meaningful engagement has been viewed as an expression of people's dignity, as seen in *Occupiers of 51 Olivia Road v City of Johannesburg* (hereinafter *Olivia Road*), the first case where the Constitutional Court first laid the notion down.⁷⁹⁵ The Court further took an inventive step by developing *meaningful engagement* as a remedy.⁷⁹⁶ The issue in this case was the provisions of the *National Building Regulations and Building Standards Act*⁷⁹⁷ such as section 12(4)(b) which states that the local authority may, by way of a written notice, "order an person occupying or working or being for any other purpose in any building, to vacate such building immediately or within a period specified in such notice".⁷⁹⁸ Section 12(6) of the *NBRSA* further states:

Any person who contravenes or fails to comply with any provision of this section or any notice issued thereunder, shall be guilty of an offence and, in the case of a contravention of the provisions of subsection (5), liable on conviction to a fine not exceeding R 100 for each day on which he so contravened.⁷⁹⁹

Ordinarily, the Court would provide a judgement after hearing both sides' arguments. In this case, however, the Constitutional Court provided a temporary order mandating the involved parties to interact substantively in order to address the concerns raised in the application and to improve the living conditions of the occupants by ensuring the buildings are as safe and suitable for habitation as reasonably possible; they must also report back to the Court.⁸⁰⁰

In defining *meaningful engagement*, the Court held that "[e]ngagement is a two-way process in which the City and those about to become homeless would talk to each other meaningfully to achieve certain objectives".⁸⁰¹ However, the Court noted that the

⁷⁹⁵ Chenwi 2011 *SAPL* 140-141.

⁷⁹⁶ Chenwi 2011 *SAPL* 140-141.

⁷⁹⁷ *National Building Regulations and Building Standards Act* 103 of 1977 (hereafter *NBRSA*).

⁷⁹⁸ Section 12(4)(b) of the *NBRSA*.

⁷⁹⁹ Section 12(6) of the *NBRSA*.

⁸⁰⁰ Chenwi 2011 *SAPL* 140-141.

⁸⁰¹ *Olivia Road* para 14.

City had to have known that there was a chance, if not a certainty, that people would end up homeless as a direct result of being evicted at its request.⁸⁰² In these situations, people in charge of the municipality should have at the very least had significant interactions with the occupiers, both personally and collectively.⁸⁰³ The Court further mentioned the purposes of such engagement.⁸⁰⁴ It would be to:

Ascertain what the consequences of the eviction might be; whether the City could help in alleviating the situation of those in dire need; whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period; whether the City had any obligations to the occupiers in the prevailing circumstances; and when and how the City could or would fulfil these obligations.⁸⁰⁵

The Court clarified the constitutional basis for *meaningful* engagement, which included section 26(2) of the *Constitution*, on the government's obligation to adopt reasonable measures aimed at the progressive realisation of the right to access adequate housing.⁸⁰⁶ Engagement must thus "be tailored to the particular circumstances of each situation and be done both individually and collectively".⁸⁰⁷ The Court added that it "must be understood that the process of engagement will work only if both sides act reasonably and in good faith".⁸⁰⁸ Raboshakga traced how the courts⁸⁰⁹ have defined it in the legislation-making context.⁸¹⁰ The Constitutional Court in *Doctors for Life International v Speaker of the National Assembly* (hereafter *Doctors for Life*) described the reasonableness standard of review as follows:

⁸⁰² *Olivia Road* para 13.

⁸⁰³ *Olivia Road* para 13.

⁸⁰⁴ Chenwi 2011 *SAPL* 142.

⁸⁰⁵ *Olivia Road* para 14.

⁸⁰⁶ *Olivia Road* para 16-18.

⁸⁰⁷ Chenwi 2011 *SAPL* 143.

⁸⁰⁸ *Olivia Road* para 20; See subheadings 1.1.4, 2.1, 2.3.1, 2.4, 2.5, 4.2.3, 4.3, 4.4.1 and 4.42 of this study for additional discussions on the requirement of "good faith".

⁸⁰⁹ See also *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) (hereafter *Merafong*) para 26 & 27.

⁸¹⁰ Raboshakga 2015 *South African Journal on Human Rights* 4-29.

What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people can take advantage of the opportunities provided. In this sense, public involvement may be seen as "a continuum that ranges from providing information and building awareness, to partnering in decision-making".⁸¹¹

Therefore, for consultation to be reasonable and, therefore, meaningful, the proponent mining company must take measures to allow the public a reasonable opportunity to participate effectively in the consultation processes required by the *MPRDA*, *NEMA*, and their regulations. The Court in *Doctors for Life* established two requirements that must be fulfilled for a consultation to be considered reasonable. First, *meaningful* opportunities for public participation must be provided. This requirement would be fulfilled by implementing, for example, section 10(1) of the *MPRDA*, regulation 3 of the *2004 MPRDA Regulations* and regulation 41(6)(b) of the *2014 EIA Regulations* which allow "a person whose rights or legitimate expectations have been materially and adversely affected by administrative action" a reasonable opportunity to make representations through imposing on the RM to, "within 14 days after accepting an application lodged in terms of section 16, 22 or 27 of the *MPRDA* to call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice".⁸¹² Second, steps must be implemented to ensure that people can utilise the opportunities available to them. This requirement would be fulfilled by implementing, for example, regulations 44(2) and 41(2)(c) of the *2004 MPRDA Regulations* and the *2014 EIA Regulations*, respectively, which deal with assisting people who cannot read or write.⁸¹³

In respect of "good faith", Ray warned that there may be instances where a municipality will decide not to engage in good faith.⁸¹⁴ For example, the municipality

⁸¹¹ *Doctors for Life* para 121.

⁸¹² Section 10(1)(b) of the *MPRDA*; Regulation 3 in the *2004 MPRDA Regulations*; section 3(2)(b)(ii) of the *PAJA*.

⁸¹³ See subheading 3.4.2.3.1 of chapter 3 of this study.

⁸¹⁴ Ray 2009 *Utah Law Review* 831.

may decide not to engage but not reach a compromise with residents citing the lack of resources.⁸¹⁵ The Court in *Olivia Road* warned that there may be situations where vulnerable individuals do not fully comprehend the significance of participating and choose not to be involved in the process. If this occurs, the municipality still has a duty to make reasonable efforts to engage with them and cannot simply withdraw.⁸¹⁶ The Court in *Olivia Road* seemed willing to allow the state to proceed without appropriate engagement on condition that these reasonable efforts fail.⁸¹⁷ Ray, however, suggests that in such cases, the court should not only order further engagement with additional court control, as they did in *Olivia Road*, but must also find the government liable for violating constitutional rights on procedural grounds.⁸¹⁸ In short, the Court required the City to engage meaningfully with the occupiers before deciding to evict them.⁸¹⁹ The failure of the City to engage *meaningfully* with the occupiers was not only the substantive finding of the Court, but also its remedy: two days after the hearing before the Constitutional Court, the Court ordered the parties to engage with one another to attempt to reach a settlement over the issues raised on appeal and on ways to improve the safety of the buildings occupied by the appellants.⁸²⁰ The parties were then required to file affidavits regarding the outcome of these discussions, which would be considered by the Court when rendering its final judgment.⁸²¹

These affidavits would, as *Olivia Road* confirmed, serve the purpose of ensuring that the state can "engage *meaningfully* with poor, vulnerable, or illiterate people".⁸²² That careful and sensitive individuals should preferably manage the engagement process on their side.⁸²³ Chenwi cautions that –

⁸¹⁵ Ray 2009 *Utah Law Review* 831.

⁸¹⁶ *Olivia Road* para 15.

⁸¹⁷ *Olivia Road* para 15.

⁸¹⁸ Ray 2009 *Utah Law Review* 831.

⁸¹⁹ McLean 2010 *Constitutional Court Review* 235.

⁸²⁰ McLean 2010 *Constitutional Court Review* 235.

⁸²¹ *Olivia Road* para 5.

⁸²² *Olivia Road* para 19.

⁸²³ *Olivia Road* para 15.

The use of meaningful engagement as a remedy in *Olivia Road* further raises concerns about the separation of powers and issues of polycentricity in socio-economic rights adjudication, giving the government some leeway in policy decision-making while embracing other democratic principles such as transparency and accountability.⁸²⁴

In cases involving consultation processes during mining-related permit applications, there is little to no evidence to suggest that the Court would endeavour to make an order for the proponent mining company to return to the interested and affected parties and consult with them again where they failed to do so or where consultation was not *meaningful*.⁸²⁵ The Court would have to follow the approach used in *Aquilla Steel 2019 (CC)* by the Constitutional Court, where it held that a defective application would not amount to a lifeless application.⁸²⁶ Although the Court in *Aquilla Steel 2019 (CC)* opined on the return of a faulty application in relation to a non-compliance with section 16(1) and (2) of the *MPRDA* (which are not concerned with consultation of interested and affected parties), it demonstrated flexibility in interpreting section 16(3) of the *MPRDA*.

The Court also addressed the issue of whether the notion of *meaningful* engagement requires, for example, in the instance of consultation processes during applications for mining-related permits, that the proponent mining company consult with most or some of the interested and affected parties.⁸²⁷ The Court held that most curious and affected parties must be consulted regardless of the number of people the consultation would affect.⁸²⁸ The Court considered the fact that approximately 67,000 people would be affected by the evictions.⁸²⁹ Despite this significant number, the Court still expected *meaningful* engagement in every case, arguing that the engagement process should have started when the plans to evict were adopted.⁸³⁰ Therefore, the larger the number of people potentially affected by the action, the greater the need for structured,

⁸²⁴ Chenwi 2011 *SAPL* 140-141.

⁸²⁵ See *Bengwenyama 2011 (CC)*, where the court refused to grant a mining-related permit due to a lack of *meaningful* consultation.

⁸²⁶ See subheading 2.8 in chapter 2 of this study.

⁸²⁷ *Olivia Road* para 19.

⁸²⁸ *Olivia Road* para 19.

⁸²⁹ *Olivia Road* para 19.

⁸³⁰ *Olivia Road* para 19.

consistent, and careful engagement.⁸³¹ Finally, the Court emphasised that a vital value inherent in the concept of *meaningful* engagement is openness, noting that secrecy is counterproductive to the engagement process.⁸³²

4.2.3 Residents of Joe Slovo Community, Western Cape v Thubelisha Homes

The Constitutional Court took the view that a key requirement in the implementation of a programme which involves the public is engagement, and that there must be *meaningful* engagement between the government (party affecting the interested and affected party's rights) and the residents (the interested and affected party whose rights are affected).⁸³³ According to the Constitutional Court, the requirement of engagement originates from the requirement of having to treat affected parties with dignity.⁸³⁴

The Court stressed that the engagement process does not oblige the parties to reach an agreement on every point.⁸³⁵ What is required is mutual good faith and a reasonable attitude from both parties, together with a readiness to listen to and appreciate the other side's concerns.⁸³⁶ The aim of *meaningful* engagement can be described as "to find a mutually acceptable solution to the challenging issues confronting the government and residents in their quest to provide adequate housing".⁸³⁷ This will only be possible if everyone involved participates in good faith, remains open to listening, and, where feasible, is prepared to make accommodations for each other.⁸³⁸ Mutual understanding and accommodation of each other's concerns, rather than reaching an agreement, should be the primary focus of *meaningful* engagement, since the final decision rests with the state.⁸³⁹ The decision, however, must be informed by the

⁸³¹ *Olivia Road* para 19.

⁸³² *Olivia Road* para 21.

⁸³³ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC) (hereafter *Joe Slovo*) para 238.

⁸³⁴ *Joe Slovo* para 238.

⁸³⁵ *Joe Slovo* para 243.

⁸³⁶ *Joe Slovo* para 243.

⁸³⁷ *Joe Slovo* para 243.

⁸³⁸ *Joe Slovo* para 243.

⁸³⁹ *Joe Slovo* para 243.

concerns raised by residents during the engagement process.⁸⁴⁰ In the context of consultation processes for applications related to mining permits, *meaningful consultation* does not necessarily imply agreement between the parties on the issues, as the decision to grant the mining permit lies with the Minister of Mineral Resources.⁸⁴¹ *Meaningful consultation*, according to *Joe Slovo*, requires the parties to engage in good faith, have a mutual understanding, accommodate each other's concerns, and find a mutually acceptable solution to the problematic issues confronting the proponent mining company and the interested and affected parties to the application for the mining-related permit.

The majority of the Justices of the Constitutional Court in *Joe Slovo* concluded that the flawed engagement procedures in the case did not invalidate the government's judgments, notwithstanding the progressive arguments made on meaningful involvement in *Olivia Road*.⁸⁴² The *Joe Slovo* settlement's on-site upgrading was deemed impractical by the Court, which consequently mandated the community's mass evacuation in compliance with a government-provided schedule.⁸⁴³ The Court ordered engagement as one of the mitigating aspects to render the eviction *just and equitable*.⁸⁴⁴

Despite the defective engagement, the Court ordered the eviction, citing the need to censure this regrettable shortcoming while taking into account the desirable purposes of low-income housing development.⁸⁴⁵

In a dissenting judgment, Moseneke J did not find the engagement to be *meaningful*.⁸⁴⁶ O'Regan J pointed out that although the government acknowledged that there was a lack of a coherent or sufficient consultation process and that it failed to fully and

⁸⁴⁰ *Joe Slovo* para 243.

⁸⁴¹ See chapter 2, subheading 2.2.1.2 of this study, above.

⁸⁴² Chenwi 2011 *SAPL* 146.

⁸⁴³ *Joe Slovo* para 7.

⁸⁴⁴ *Joe Slovo* para 7.

⁸⁴⁵ *Joe Slovo* para 113.

⁸⁴⁶ *Joe Slovo* paras 166-167.

meaningfully engage with the occupiers and others impacted by the housing development, this failure does not make the project's implementation unreasonable given the extent of inadequate housing and the efforts being made to address this crisis.⁸⁴⁷ Sachs J also identified significant deficiencies in the consultation process, observing that:

The evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself.⁸⁴⁸

Sachs J maintained, however, that the inadequacies do not inherently render the entire process null and void, as the overall adequacy of the scheme as it developed is what is important.⁸⁴⁹ The Court was therefore prepared to overlook the deficiencies in the consultation procedures solely because it found that the aims of the housing development project in question outweighed the flaws in the consultation process.⁸⁵⁰ To this end, Liebenberg has correctly cautioned that the South African socio-economic rights jurisprudence would fail if the willingness to condone inadequate engagement procedures were to persist.⁸⁵¹ Liebenberg states that this would not "foster the values of participatory democracy that lie at the heart of transformative developmental processes".⁸⁵² The Court's conclusion in *Olivia Road* that engagement should be structured and consistent was at odds with the hierarchical engagement that had occurred.⁸⁵³ The Court failed to recognize its own insight that procedure and substance are inextricably linked by condoning the defective engagement.⁸⁵⁴ Liebenberg has also emphasized that the realization of socio-economic rights in South Africa will demonstrate all the shortcomings of a hierarchical approach, in which the intended beneficiaries have minimal influence on development or the

⁸⁴⁷ *Joe Slovo* paras 301-302 and 304.

⁸⁴⁸ *Joe Slovo* para 378.

⁸⁴⁹ *Joe Slovo* paras 379-380.

⁸⁵⁰ Chenwi 2011 *SAPL* 147.

⁸⁵¹ Liebenberg 2013 *EJIL* 742.

⁸⁵² Liebenberg 2013 *EJIL* 742.

⁸⁵³ Chenwi 2011 *SAPL* 147.

⁸⁵⁴ Liebenberg 2013 *EJIL* 742.

nature of the services they receive, unless the courts are committed to preventing meaningful engagement from becoming a meaningless cliché.⁸⁵⁵

4.3 Judicial conceptualisation of *meaningful consultation* in the regulation of consultation processes during applications for mining-related permits

Courts interpreting laws regulating applications for mining-related permits have increasingly started to adopt the notion of *meaningful consultation*.

The Court in *Bengwenyama* then held that for *meaningful consultation* to take place,

- (1) The landowner must be informed about the mineral proper application in relation to their land,
- (2) The applicant must provide the landowner with enough information regarding the mining and
- (3) consultation should be done in good faith.⁸⁵⁶

During the consultation process, the mining company is required to supply communities affected by mining, including landowners, with information regarding the mining activities, their possible effects on the land, and the impact on community members.⁸⁵⁷

Mothudi noted the North Gauteng High Court's utterings in *Baleni*. Mothudi observed that the court had commented on what constitutes meaningful consultation, as well as on the requirement to provide sufficient information to enable lawful occupiers to make an informed decision.⁸⁵⁸ In *Baleni*, the North Gauteng High Court had to decide how the *MPRDA* and *IPILRA* relate to each other, in particular whether the consultation requirement in the *MPRDA* overrides the consent requirement set out in *IPILRA*.⁸⁵⁹ According to the Court, *meaningful consultation* entails "a discussion of ideas between

⁸⁵⁵ Liebenberg 2013 *EJIL* 742.

⁸⁵⁶ *Bengwenyama* 2011 (CC) para 67.

⁸⁵⁷ *Bengwenyama* 2011 (CC) para 66.

⁸⁵⁸ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 38; *Baleni* para 16.

⁸⁵⁹ *Baleni* para 39.

the interested and affected parties and the mining right applicant on an equal footing".⁸⁶⁰ The Court made it clear that:

An owner is on equal footing with the state, and the owner's inputs to the mining application are supposed to inform the Minister of Mineral Resources on whether the application meets requirements and necessary consultation processes.⁸⁶¹

The Court held that *meaningful consultation* involves discussing the ideas of both the mining company and the interested and affected parties regarding the proposed mining activity, considering the advantages and disadvantages of the proposed mining activity, and making concessions where necessary.⁸⁶²

Scholars have later attempted to attach meaning to the Court's utterances on the requirement of *meaningful consultation*. Mothudi makes the point that participation must mean more than just attending meetings and submitting reports.⁸⁶³ Mothudi submits that in considering whether a *meaningful consultation* occurred, "mining entities must be required to call and facilitate more than one meeting".⁸⁶⁴ Mothudi supports this point by conceding that, given the complexity of the issues to be covered, a dedicated meeting is needed to introduce and explain the mining project.⁸⁶⁵ In contrast, another is required to review reports and related documentation.⁸⁶⁶ A third meeting is needed to hold a question-and-answer session, and a fourth meeting is

⁸⁶⁰ *Baleni* para 89.

⁸⁶¹ *Baleni* para 90; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 38.

⁸⁶² *Baleni* para 89.

⁸⁶³ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 38.

⁸⁶⁴ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 41.

⁸⁶⁵ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 41.

⁸⁶⁶ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 41.

required to resolve other challenges that may emerge.⁸⁶⁷ After the consultation report has been drafted, a follow-up meeting is required to present it to the participants so they can provide additional feedback and confirm their agreement before the report is submitted.⁸⁶⁸

Mothudi argues that for participation to be *meaningful*, it must be:

(a) measured by the duration of the engagements; (b) the language used to communicate, and provision made for those who do not understand; (c) accessible mechanisms for disabled attendees to participate; (d) the information given; (e) the ability to ask questions; (f) availability and extent of responses given; (g) and continued engagement throughout the project.⁸⁶⁹

He further makes it clear that regulations 41(2)–(6) of the *MPRDA Regulations* reiterate the importance of having to consult meaning by placing a duty on the proponent mining company to take extensive steps "to ensure that potential interested and affected parties are notified about the application for a prospecting or mining right or permit".⁸⁷⁰ These extensive steps would include making mining communities aware of the application for the mining-related permit through advertisement in the local newspaper, social media engagements and community noticeboards. This deems as the start of achieving the *meaningfulness* standard of consultation.

The courts' approach in cases involving consultation or engagement of affected parties seems to reflect the international standard/model of regulating consultation processes, found in instruments like the *United Nations (UN) Guiding Principles on Business and Human Rights* of 2011 (*UN Guiding Principles*) which also makes use of the words

⁸⁶⁷ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 41.

⁸⁶⁸ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 41.

⁸⁶⁹ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 38.

⁸⁷⁰ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 39.

meaningful consultation in requiring businesses to involve affected groups the process of establishing business operations which will affect their right and interests. Before demonstrating this point, it is appropriate to define the *UN Guiding Principles*. The *UN Guiding Principles* are "a set of guidelines for States and companies to prevent, address, and remedy human rights abuses committed in business operations".⁸⁷¹ A business, for purposes of the *UN Guiding Principles*, is any enterprise, regardless of its size, sector, location, ownership, or structure, that has the responsibility to avoid infringing on internationally recognised human rights and to address any adverse impacts that occur and includes both transnational corporations and domestic businesses.⁸⁷² Proponent mining companies applying for a mining-related permit would, therefore, fall within the definition of a business and would need to comply with these *UN Guiding Principles*.

The *UN Guiding Principles* encourage businesses to identify and assess the adverse human rights impacts of their activities, to measure human rights risks.⁸⁷³ According to the *UN Guiding Principles*, the identification and assessment of potential human rights risks are conducted by drawing on human rights expertise and through *meaningful consultation* with potentially affected groups.⁸⁷⁴ The *UN Guiding Principles* also mandate that businesses must convey how they manage their human rights impacts when stakeholders voice concerns.⁸⁷⁵ Similarly, the SCA in *Aquila Steel 2018 (SCA)* and

⁸⁷¹ United Nations Human Rights Office of the High Commissioner 2011 https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

⁸⁷² United Nations Human Rights Office of the High Commissioner 2011 https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

⁸⁷³ United Nations Human Rights Office of the High Commissioner 2011 https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

⁸⁷⁴ United Nations Human Rights Office of the High Commissioner 2011 https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

⁸⁷⁵ United Nations Human Rights Office of the High Commissioner 2011 https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

other related cases⁸⁷⁶ held that mining companies are required to provide an environmental impact assessment to determine the risks that the proposed mining activities would pose to interested and affected parties, and then consult with them on the results thereof.⁸⁷⁷

To accurately evaluate their human rights impacts, business enterprises are encouraged to make an effort to understand the concerns of groups that might be affected by engaging with them directly, and doing so in ways that consider language differences and other possible obstacles to *meaningful* participation.⁸⁷⁸ The North Gauteng High Court in *Baleni* adopted this approach by making the point that vulnerable communities ("communities that tend to suffer disproportionately from the impacts of mining activities as they are directly affected by the environmental pollution, air borne diseases, loss of their farm land and grazing land, forced displacement and the loss of community amongst other") things should have an input into whether mining can take place on their land.⁸⁷⁹

The *UN Guiding Principles* make it clear that:

In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.⁸⁸⁰

This form of alternative consultation can be found in *Masuku*⁸⁸¹ where a proponent mining company engaged a consultant (who is an expert) to assist with the consultation of the affected parties.⁸⁸²

⁸⁷⁶ *Masuku* para 110.

⁸⁷⁷ *Aquila Steel* 2018 (SCA) para 36; *Baleni* paras 15 and 58.

⁸⁷⁸ United Nations Human Rights Office of the High Commissioner 2011 https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

⁸⁷⁹ *Baleni* para 19-20.

⁸⁸⁰ United Nations Human Rights Office of the High Commissioner 2011 https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

⁸⁸¹ *Masuku* para 102.

⁸⁸² See subheading 3.3.1.4 in chapter 3 of this study for a discussion of *Masuku*.

The *UN Guiding Principles* note that addressing human rights impacts *meaningfully* can take various forms, including "in-person meetings, consultations, formal public reports, or online dialogue".⁸⁸³ For example, the *Masuku* case confirmed these forms of consultation to be *meaningful* and in compliance with the legal framework regulating consultation processes during applications for mining-related permits. The North Gauteng High Court in *Masuku* dismissed an application to review and set aside a mining right being awarded to a proponent mining company.⁸⁸⁴ In finding that consultation was satisfied and therefore meaningful, the Court detailed the numerous times the proponent mining company consulted with the affected interested and affected parties at multiple stages of the application process. These consultations took the form of in-person public meetings⁸⁸⁵ and formal public reports.⁸⁸⁶

Chagwinya has identified a few shortfalls in the legal framework which are relevant to the *meaningfulness* of the consultation requirement. Chagwinya observes, as this study has shown, that the structure and content of the legal provisions setting out the manner in which consultations with interested and affected parties must occur can lead to a few issues.⁸⁸⁷ According to Chagwinya, the current legislative framework makes it possible for mining companies to take advantage of it, for example, through manipulation, coercion, and bribing of interested and affected parties, thereby "acting in bad faith".⁸⁸⁸ The mining company can thus assert that it engaged in consultation, despite having done so in bad faith.⁸⁸⁹ In some instances, companies that wish to act

⁸⁸³ United Nations Human Rights Office of the High Commissioner 2011 https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

⁸⁸⁴ *Masuku* para 144.

⁸⁸⁵ *Masuku* para 97, 100, 101, 102 and 103.

⁸⁸⁶ *Masuku* paras 98 and 104.

⁸⁸⁷ Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 31.

⁸⁸⁸ Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 31.

⁸⁸⁹ Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 31.

in good faith are unable to discern the appropriate approach to consultation in given circumstances and engage with communities in a suitable manner, resulting in resentment from these communities.⁸⁹⁰ In an effort to mitigate community resentment, mining companies can make promises they know they will fail to keep, thereby reducing tension in the short term.⁸⁹¹ These false promises do not achieve the vision of meaningful consultation due to a lack of good faith in the consultations, but instead create issues such as distrust in the long term.

Chagwinya further notes that the period granted to the applicant to start consultations with the community affected by the proposed mining company is insufficient to allow for meaningful and effective community engagement, particularly given that the mining operations will significantly affect their livelihoods.⁸⁹² This could lead the applicant to perform the task carelessly just to meet the legal requirement.⁸⁹³

Erdiaw-Kwasie & Caripis are of the view that "when consultation is *meaningful*, provision will be made to identify, involve, and work collaboratively with stakeholders at the start of, and throughout, the project".⁸⁹⁴ They note the importance of *meaningful consultation* with communities throughout the entire lifecycle, from licensing to mine closure.⁸⁹⁵ In addition, engagement with local communities continues throughout the different stages of the mine lifecycle and can take different forms including interest

⁸⁹⁰ Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 31.

⁸⁹¹ Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 31.

⁸⁹² Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 31.

⁸⁹³ Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation* 31.

⁸⁹⁴ Erdiaw-Kwasie & Caripis 2021 https://transparency.org.au/wpcontent/uploads/2021/04/TIA_CommunityConsultationBriefingPaper_vF_web.pdf.

⁸⁹⁵ Erdiaw-Kwasie & Caripis 2021 https://transparency.org.au/wpcontent/uploads/2021/04/TIA_CommunityConsultationBriefingPaper_vF_web.pdf.

group meetings, open public hearings, public meetings, and surveys.⁸⁹⁶ Furthermore, to make consultation genuinely *meaningful*, there must be well-designed, accessible, and inclusive spaces for engagement and dialogue, supported by clear and transparent mechanisms for providing follow-up feedback.⁸⁹⁷ They argue that public participation involves consulting with people about decisions that affect their lives, particularly residents of communities where cooperation processes (such as preliminary processes of petroleum exploration) occur and impact them, and empowering citizens to bring about social reform.⁸⁹⁸

Leonard, an international scholar, argues that participation transforms citizens into partners in decision-making, strengthens their capacity to engage, and improves the way local leaders address public concerns.⁸⁹⁹ Kurniawan argues that, at least in principle, the people affected are allowed to participate in decisions about launching the mining project, defining the terms under which mining will occur, monitoring how public authorities and mining companies perform, and organising citizens to enhance the governance of natural resources.⁹⁰⁰ Leonard argues that access to information is the key prerequisite for participation, because it lowers distrust and broadens the range of possible decisions.⁹⁰¹

The *MPRDA Regulations*, however, place a significant responsibility on interested and affected persons to frequently access or visit certain places to take note of notices.⁹⁰² Mothudi takes the view that the responsibility should be on applicants for mining-

⁸⁹⁶ Erdiaw-Kwasie & Caripis 2021
https://transparency.org.au/wpcontent/uploads/2021/04/TIA_CommunityConsultationBriefingPaper_vF_web.pdf.

⁸⁹⁷ Erdiaw-Kwasie & Caripis 2021
https://transparency.org.au/wpcontent/uploads/2021/04/TIA_CommunityConsultationBriefingPaper_vF_web.pdf.

⁸⁹⁸ Leonard 2019 *Land Use Policy* 290.

⁸⁹⁹ Leonard 2019 *Land Use Policy* 290.

⁹⁰⁰ Kurniawan *et al.* 2022 *The Extractive Industry and Society* 2.

⁹⁰¹ Leonard 2019 *Land Use Policy* 293.

⁹⁰² Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 39.

related permits to be available at churches, schools, clinics, town halls, banks, supermarkets, and post offices for accessibility and to answer any questions that may arise about the notice.⁹⁰³ According to Mitchel *et al*, defective consultation usually involves a failure on the part of the applicant "to make use of the appropriate channels within the traditional leadership structure of a community".⁹⁰⁴ Furthermore, defective consultation can also originate from the applicants not complying with the community's layered decision-making practices.⁹⁰⁵ By availing themselves of the aforementioned community environments, proponent mining companies will gain a better understanding of the layered nature of community decision-making practices and adhere to them. This responsibility must be taken during one of the first consultation processes as required by the *MPRDA*, such as the consultation mandated by section 16(4)(b) of the *MPRDA*, before a prospecting right is granted.

It is against this background of some of these shortfalls that the legal framework regarding consultation processes for mining-related permit applications in South Africa was amended in 2020. The next section of this paper explores such amendments.

4.4 Legislative framework regulating the *meaningful consultation* principle

When the *MPRDA* was enacted, it aimed to establish conditions that would enable the substantive participation of historically disadvantaged individuals in the mining sector.⁹⁰⁶ When the *NEMA* was enacted, its aim was to set out guiding principles for environmental decision-making and to create institutions that foster cooperative

⁹⁰³ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 39.

⁹⁰⁴ Mitchell, Moalusi, and Van der Walt 2012 *JSAIMM* 153.

⁹⁰⁵ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 47.

⁹⁰⁶ Hermanus *et al.* 2015 *Labour, Capital, and Society*.

governance, as well as the procedures necessary to coordinate the functions of state organs.⁹⁰⁷

The *EIA Regulations* deal with public participation in relation to comments on "each of the basic assessment report, EMP, scoping report and EIA report, and where applicable the closure plan".⁹⁰⁸ The focus of the *EIA Regulations* is on environmental assessments, authorisation and the consequences or impacts of mining activities on the environment.⁹⁰⁹ However, the regulations provide little guidance on what constitutes *meaningful consultation*.

As mentioned in Chapter 2 of this study, the *2004 MPRDA Regulations* were amended on 27 March 2020.⁹¹⁰ The amendment made significant changes to the concept of consultation, now including a definition of the term *meaningful* consultation and utilising it in various provisions of the *2020 MPRDA Amendment Regulations*. However, these amendments did not come without criticism.

4.4.1 Criticism of the Draft Amendments to the MPRDA Regulations, 2019

During the consultation on the *MPRDA Amendment Bill*, the Centre for Environmental Rights (CER) indicated that both the existing MPRDA and the proposed changes in the Bill failed to uphold principles of administrative justice, thereby heightening the likelihood that resulting decisions would be subjected to judicial review.⁹¹¹ The CER argued that it did not give interested parties proper notice or conduct adequate consultations, did not allow enough time for those consultations, and did not ensure

⁹⁰⁷ The *NEMA*; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 24.

⁹⁰⁸ Regulation 3(A) in the *2020 MPRDA Amendment Regulations*.

⁹⁰⁹ The *NEMA* and the *2014 EIA Regulations*; Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 13.

⁹¹⁰ See subheading 2.5 of chapter 2 of this study for a comprehensive table outlining the amendments.

⁹¹¹ Mineral and Energy Committee 'Mineral and Petroleum Resources Development Amendment Bill B15-2013: public hearings day 4' 18 September 2013 available at <https://pmg.org.za/committee-meeting/16395/>, accessed on 25 July 2025;

that interested parties had access to the necessary information, which together made the consultation process ineffective.⁹¹² The CER observed that poor communities do not have the means to challenge decisions through the courts and that conditions in communities affected by mining are increasingly giving rise to social unrest.⁹¹³ Lastly, the CER highlighted that stakeholder engagement involves "*meaningful* consultation", including arrangements being made for providing information concerning mining applications.⁹¹⁴

Corruption Watch (CW), a non-profit civil society organisation, also made comments on the Bill. CW welcomed the proposed definition of *meaningful consultation* as it is inclusive of natural persons in their individual capacity.⁹¹⁵ However, they raised concerns that the definition for *meaningful consultation* merely requires good faith on the part of the applicant.⁹¹⁶ According to CW, good faith requires the applicant to go further than merely notifying the affected and interested parties; however, it pointed out that the *DMR Consultation Guidelines* have similar requirements, which have led to limitations on participation rights for community members.⁹¹⁷ CW submitted that where *meaningful consultation* is referred to, minimum standards of global best practice, including free, prior, and informed consent, ought to have been embedded within the definition of meaningfulness, to require the applicant to provide information to enabling parties to make an informed decision regarding the impact of the proposed activities.⁹¹⁸

⁹¹² Mineral and Energy Committee 2013 <https://pmg.org.za/committee-meeting/16395/>.

⁹¹³ Mineral and Energy Committee 2013 <https://pmg.org.za/committee-meeting/16395/>.

⁹¹⁴ Mineral and Energy Committee 2013 <https://pmg.org.za/committee-meeting/16395/>.

⁹¹⁵ Corruption Watch 2020 <https://www.corruptionwatch.org.za/wp-content/uploads/2020/01/Corruption-Watch-Submissions-MPRDA-Regulations-30.01.2019.pdf>.

⁹¹⁶ Corruption Watch 2020 <https://www.corruptionwatch.org.za/wp-content/uploads/2020/01/Corruption-Watch-Submissions-MPRDA-Regulations-30.01.2019.pdf>.

⁹¹⁷ Corruption Watch 2020 <https://www.corruptionwatch.org.za/wp-content/uploads/2020/01/Corruption-Watch-Submissions-MPRDA-Regulations-30.01.2019.pdf>.

⁹¹⁸ Corruption Watch 2020 <https://www.corruptionwatch.org.za/wp-content/uploads/2020/01/Corruption-Watch-Submissions-MPRDA-Regulations-30.01.2019.pdf>.

CW noted that the amendments required Social and Labour Plans (SLPs) to be in English and one or two other languages commonly used within the mine community.⁹¹⁹ CW further submits that the amendments must mandate the DMR to be proactive in providing SLPs to communities, and that community members should not have to request access to them; nor should they be accessible only at the offices of the DMR or mining companies.⁹²⁰ All relevant stakeholders involved in the formation of the SLPs or implicated in their plans must be provided with copies of the SLPs.⁹²¹ These relevant stakeholders include mining contractors, trade unions, traditional authorities, affected communities, the local government, as well as the DMR and mining companies.⁹²² CW justifies their submission on the fact that the community will have access to accurate information about the targets set in the SLPs, enabling them to engage more effectively with compliance issues.⁹²³

4.4.2 The 2020 MPRDA Amendment Regulations

The amendments explicitly grant the RM the discretion to participate in the consultation, ensuring it is *meaningful and effective*. Ntsanwisi commended the amendments, given that consultation was not defined in either the *MPRDA* or the *MPRDA Regulations*.⁹²⁴ The amendments serve as an expansion of the existing definition of consultation contained in the *DMR Consultation Guidelines*.⁹²⁵ The *DMR Consultation Guidelines* define consultation as "a two-way communication process that

⁹¹⁹ Corruption Watch 2020 <https://www.corruptionwatch.org.za/wp-content/uploads/2020/01/Corruption-Watch-Submissions-MPRDA-Regulations-30.01.2019.pdf>.

⁹²⁰ Corruption Watch 2020 <https://www.corruptionwatch.org.za/wp-content/uploads/2020/01/Corruption-Watch-Submissions-MPRDA-Regulations-30.01.2019.pdf>.

⁹²¹ Corruption Watch 2020 <https://www.corruptionwatch.org.za/wp-content/uploads/2020/01/Corruption-Watch-Submissions-MPRDA-Regulations-30.01.2019.pdf>.

⁹²² Corruption Watch 2020 <https://www.corruptionwatch.org.za/wp-content/uploads/2020/01/Corruption-Watch-Submissions-MPRDA-Regulations-30.01.2019.pdf>.

⁹²³ Corruption Watch 2020 <https://www.corruptionwatch.org.za/wp-content/uploads/2020/01/Corruption-Watch-Submissions-MPRDA-Regulations-30.01.2019.pdf>.

⁹²⁴ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 45.

⁹²⁵ See definition of "consultation" under section D of the *DMR Consultation Guidelines*; Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 45.

allows for openness in the decision-making process".⁹²⁶ The *2020 MPRDA Amendment Regulations* provide a detailed interpretation of *meaningful consultation*. They require that the applicant would have *meaningfully* consulted with the interested and affected parties when:

(1) the applicant has facilitated the parties' participation in good faith; (2) in a manner that gives the parties a sufficient opportunity to provide their comments regarding the land and the impact of the prospecting or mining activities; and (3) when all the relevant information regarding the activities is provided to enable the parties to make an informed decision.⁹²⁷

The *DMR Consultation Guidelines* and the *2020 MPRDA Amendment Regulations*' definitions of *meaningful consultation* differ in a few ways. First, the *DMR Consultation Guidelines* emphasise communication, while the *2020 MPRDA Amendment Regulations* reiterate the importance of *meaningful* engagement with procedural obligations. Second, the *DMR Consultation Guidelines* are general and process-oriented, while the *2020 MPRDA Amendment Regulations* are outcome-oriented, emphasising access to information and fairness. The *DMR Consultation Guidelines* focus broadly on ensuring openness and dialogue in decision-making. The *2020 MPRDA Amendment Regulations* focus on providing substantive participation that allows parties to make informed decisions. Third, the *DMR Consultation Guidelines* do not specify clear criteria or steps for consultation. In contrast, the *2020 MPRDA Amendment Regulations* specify three concrete elements: (1) good faith facilitation, (2) opportunity to comment, and (3) provision of relevant information. Fourth and most importantly, the *DMR Consultation Guidelines* are advisory and policy-based, rather than legally binding. The *2020 MPRDA Amendment Regulations* are part of the law under the *MPRDA* and are legally enforceable.

The *DMR Consultation Guidelines* and the *2020 MPRDA Amendment Regulations*' definitions both share the same core principles, which are that consultation must be a

⁹²⁶ See definition of "consultation" under section D of the *DMR Consultation Guidelines*.

⁹²⁷ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 45.

two-way, open, and fair process that ensures meaningful participation and informed decision-making by all parties. The *Amendment Regulations to the MPRDA* in 2020 have introduced a legally binding and more refined definition of consultation that is consistent with current international law obligations to consult *meaningfully* when regulating proposed mining activities.⁹²⁸ Although there are no regulations detailing how consultations should be conducted, the South African Human Rights Commission (SAHRC) has noted that including a definition of *meaningful* consultation in the regulations is a positive move towards dealing with the enforceability of the consultation requirement discussed in chapter 2 of this paper.⁹²⁹

Regulation 41(6) of the *2020 MPRDA Amendment Regulations* is essential for "ensuring that interested and affected persons get access to information, engage with it, and give comments on the proposed prospecting or mining application or permit".⁹³⁰ This regulation reflects the sentiments of the Western Cape High Court in *Earthlife Africa Cape Town*, which holds that part of being able to consult or be consulted meaningfully is the duty to be provided with full and relevant information, thereby allowing for meaningful representations. For the material and information to be meaningful, it has to be provided in a language that the individuals concerned and impacted can understand, provide access and engagement opportunities for people with disabilities, and be simple to comprehend.⁹³¹ Furthermore, a representative from the mining company must be available to answer any questions, and the applicant must bear the costs of copying any necessary reports and information.⁹³² According to Mothudi, *meaningful consultation* was to be interpreted as a process that must be conducted at

⁹²⁸ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 45.

⁹²⁹ South African Human Rights Commission *Challenges of Mining-affected* 60.

⁹³⁰ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 40.

⁹³¹ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 40.

⁹³² Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 40.

the cost of the mining company and should not be rushed.⁹³³ Rushing the consultation process would not reflect the vision of meaningful consultation because consultation is often time consuming as a result of the number of stakeholders who may have to be engaged. It is also important that the proponent mining company bear the cost of the consultation because the mining communities who are consulted often lack the resources to engage in such a consultation, resulting in the consultation not being *meaningful*. To further demonstrate the point that affected parties must be *meaningfully* consulted, courts held that part of complying with the *meaningful consultation* principle is the need for the community not to be a bystander in the process.⁹³⁴

4.4.3 Shortcomings of the 2020 MPRDA Amendment Regulations

Mothudi levelled some criticism of the *2020 MPRDA Amendment Regulations*. He noted that the current 30-day period allowed for comments should be extended, so that members of the public have sufficient time to seek help from third parties with understanding and responding, where necessary.⁹³⁵ Mothudi argues that increasing the time permitted for comments "would encourage greater participation and a willingness to participate in consultations when called by mining applicants".⁹³⁶ On the other hand, this increase in the time allowed for consultations would reinforce critics of consultations, as it would lead to further delays in mining operations.⁹³⁷ However, given that the Courts have continually emphasised the importance of *meaningful consultation*, which generally requires more than one form/meetings of consultation,

⁹³³ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 41.

⁹³⁴ *Baleni*.

⁹³⁵ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 34.

⁹³⁶ Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* 34.

⁹³⁷ Pring 2001 *International Institute for Environment and Development* 3-13.

the Courts are more likely to encourage Mothudi's position, allowing for more time to consult.

After lauding the inclusion of an interpretation of "*meaningful* consultation" in the *Amendment Regulations*, the SAHRC noted a discrepancy between statutory requirements and actual practices.⁹³⁸ The SAHRC expressed concerns regarding the uncertainty about whether including the definition of "*meaningful* consultation" will inherently ensure that mining companies strictly adhere to the consultation requirements.⁹³⁹ This point raised by the SAHRC reiterates the necessity of issuing regulations that set out a procedure for consultation.⁹⁴⁰ Additionally, the SAHRC's observation highlights the need to establish a mechanism for evaluating both compliance with the consultation process and whether that process is adequate.⁹⁴¹

4.4.4 2025 Draft Minerals Resources Amendment Bill

The DMR introduced the *2025 Draft Mineral Resources Amendment Bill*. Although this study does not intend to deal with these draft amendments, it is important to note the Centre for Applied Legal Studies (CALS) and AgriSA's dissatisfaction with them to emphasise the issues emanating from the legal framework regulating consultation processes during applications for mining-related permits. According to AgriSA, the *Draft Mineral Resources Amendment Bill of 2025* purports to streamline regulation and promote inclusive economic development.⁹⁴² The *Draft Mineral Resources Amendment Bill of 2025* introduces provisions that would allow artisanal and small-scale mining

⁹³⁸ South African Human Rights Commission *Challenges of Mining-affected Communities* 61.

⁹³⁹ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 47.

⁹⁴⁰ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 47.

⁹⁴¹ Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* 47.

⁹⁴² AgriSA 2025 <https://agrisa.org.za/centre-of-excellence-natural-resources/mineral-resources-amendment-bill-threats-to-south-african-agriculture-and-food-security/>.

operations to access private agricultural land without any guidance as to how *meaningful consultation* should take place or on compensation requirements.⁹⁴³

The CALS, a human rights organisation, responded to the concerns identified by the SAHRC.⁹⁴⁴ The first issue identified by the SAHRC was the lack of adequate and timely access to information, which hinders the exercise of free, prior, and informed consent under African customary law.⁹⁴⁵ The SAHRC found that communities are not given enough time and accessible information to enable them to reach decisions through their customary law processes.⁹⁴⁶ According to the CALS, the Draft Mineral Resources Amendment Bill of 2025 did not address these issues.⁹⁴⁷

The SAHRC found that there is an immediate need for effective complaint mechanisms by mining companies, the DMR, and local government.⁹⁴⁸ The SAHRC recommended that DMR, together with relevant agencies and/or departments, should encourage

⁹⁴³ AgriSA 2025 <https://agrisa.org.za/centre-of-excellence-natural-resources/mineral-resources-amendment-bill-threats-to-south-african-agriculture-and-food-security/>.

⁹⁴⁴ Centre for Applied Legal Studies 2025 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-andmanagement/researchentities/cals/documents/programmes/environment/resources/CALS%20Commnts%20on%20draft%20Mineral%20Resources%20Development%20Amendment%20Bill,%202025.pdf>.

⁹⁴⁵ Centre for Applied Legal Studies 2025 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-andmanagement/researchentities/cals/documents/programmes/environment/resources/CALS%20Commnts%20on%20draft%20Mineral%20Resources%20Development%20Amendment%20Bill,%202025.pdf>.

⁹⁴⁶ Centre for Applied Legal Studies 2025 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-andmanagement/researchentities/cals/documents/programmes/environment/resources/CALS%20Commnts%20on%20draft%20Mineral%20Resources%20Development%20Amendment%20Bill,%202025.pdf>.

⁹⁴⁷ Centre for Applied Legal Studies 2025 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-andmanagement/researchentities/cals/documents/programmes/environment/resources/CALS%20Commnts%20on%20draft%20Mineral%20Resources%20Development%20Amendment%20Bill,%202025.pdf>.

⁹⁴⁸ Centre for Applied Legal Studies 2025 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-andmanagement/researchentities/cals/documents/programmes/environment/resources/CALS%20Commnts%20on%20draft%20Mineral%20Resources%20Development%20Amendment%20Bill,%202025.pdf>.

independent monitoring of members' compliance with applicable laws and policies.⁹⁴⁹ According to the CALS, this recommendation was not considered in the *Draft Mineral Resources Amendment Bill, 2025*.⁹⁵⁰

4.5 Conclusion

The development of the principle of *meaningful consultation* from the prism of socio-economic rights symbolises a critical evolution in the regulation of consultation processes during mining-related applications in South Africa. The two prerequisites of *meaningfulness* are established through socio-economic rights jurisprudence. First, the duty to consult or engage interested and affected parties reasonably. Second, the duty to consult or engage interested and affected parties in good faith.

Initially, the absence of clear statutory guidelines under the *MPRDA* left affected communities vulnerable to inadequate or superficial engagement. However, judicial interpretation, particularly in *Bengwenyama 2011 (CC)* and *Balení*. In addition to scholarly engagement with the legislative framework that was in place before the 2020 amendments to the *MPRDA Regulations*, it was clarified that consultation must go beyond a perfunctory exercise and instead embody a good-faith process that empowers communities with sufficient and accessible information to make informed decisions. This paved the way for amendments to the *MPRDA Regulations* in 2020.

The 2020 amendments to the *MPRDA Regulations* have strengthened the requirement to consult interested and affected parties by defining *meaningful consultation*. While these reforms provide a stronger legal foundation, concerns remain regarding their

⁹⁴⁹ Centre for Applied Legal Studies 2025 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-lawandmanagement/researchentities/cals/documents/programmes/environment/resources/CALS%20Commnts%20on%20draft%20Mineral%20Resources%20Development%20Amendment%20Bill,%202025.pdf>.

⁹⁵⁰ Centre for Applied Legal Studies 2025 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-lawandmanagement/researchentities/cals/documents/programmes/environment/resources/CALS%20Commnts%20on%20draft%20Mineral%20Resources%20Development%20Amendment%20Bill,%202025.pdf>.

implementation, particularly the lack of prescribed processes, limited timeframes, and the continued risk that mining companies will treat consultation as a box-ticking exercise.

This chapter explored the idea that *meaningful consultation* is not merely a statutory requirement but a safeguard of procedural fairness, democratic participation, and equitable decision-making. It is submitted that the proper implementation of consultation ensures that mining-affected communities are active participants in decisions that affect their rights and land, thereby resulting in *meaningful consultation*.

CHAPTER 5

Conclusions and recommendations

5.1 Introduction

The *MPRDA* serves as the main statute that regulates the acquisition, use and disposal of mineral resources in South Africa. The South African state, acting through the DMR, has the authority to grant mining-related permits after fulfilling the requirements under the prescribed application procedures.⁹⁵¹ The application for a mining-related permit triggers the requirements of consultation, respectively, found in the *MPRDA*⁹⁵² (and in part, the *NEMA*)⁹⁵³. The consultation process must be in accordance with what the *Constitution*, the *PAJA* and the Courts envisage to be procedurally fair.⁹⁵⁴ This study aims to determine how the legal framework setting out consultation processes with respect to applications for mining-related permits fares in light of the procedural fairness vision envisaged by section 33 of the *Constitution*, read with the *PAJA* and the *meaningfulness jurisprudence* of South African Courts. This chapter summarises the study's findings and offers recommendations for potential legal amendments in South Africa to address the concerns raised in the research question.

5.2 Summary of research findings

5.2.1 Chapter 1

Chapter 1 serves as an introduction to the study and the themes that of the the following chapters. As part of the problem statement, the introduction includes the history and development of community rights in consultation processes during applications for mining-related permits,⁹⁵⁵ the current legal framework regulating

⁹⁵¹ See the preamble and sections 2(b) and 3 of the *MPRDA*.

⁹⁵² See subheading 2.2 in Chapter 2 of this study.

⁹⁵³ See subheading 2.5 in Chapter 2 of this study.

⁹⁵⁴ See Chapter 3 of this study.

⁹⁵⁵ See subheading 1.1.1 in Chapter 1 of this study.

consultation processes,⁹⁵⁶ the right to procedurally fair administrative action,⁹⁵⁷ and the notion of *meaningful consultation* in applications for mining related permits.⁹⁵⁸ It further outlines the motivation for the study, research aims and objectives, premises, hypothesis, limitations, and research methodology.

5.2.2 Chapter 2

Chapter 2 discusses the application procedures prescribed by the *MPRDA* and *NEMA*, as well as their regulations for granting prospecting rights, mining rights, and mining permits, to provide context for the consultation requirement.⁹⁵⁹ Chapter two examines the development of the legal framework regulating consultation processes.

The key findings of Chapter 2 are:

- The historical and legal evolution of consultation rights within South Africa's mineral proper framework can be traced from as early as 1899 to date.⁹⁶⁰ The concept of consultation evolved from land regimes to contemporary mining legislation, including the *MPRDA* and *NEMA*, as well as their associated *regulations*.⁹⁶¹ Consultation was absent in early mineral law but became integral through gradual statutory and constitutional development.⁹⁶² The *MPRDA* institutionalised consultation as part of equitable and transparent mineral governance.⁹⁶³
- The *MPRDA* replaced private mineral ownership with state custodianship to ensure equitable access to mineral resources and redress historical injustices.⁹⁶⁴
- The *MPRDA* introduced the legal requirement for consultation between applicants for mining-related rights and interested and affected parties, which

⁹⁵⁶ See subheading 1.1.2 in Chapter 1 of this study.

⁹⁵⁷ See subheading 1.1.3 in Chapter 1 of this study.

⁹⁵⁸ See subheading 1.1.4 in Chapter 1 of this study.

⁹⁵⁹ See subheading 2.2.1.2 in Chapter 2 of this study.

⁹⁶⁰ See subheading 2.1 in Chapter 2 of this study.

⁹⁶¹ See subheading 2.1 in Chapter 2 of this study.

⁹⁶² See subheading 2.1 in Chapter 2 of this study.

⁹⁶³ See subheading 2.1 in Chapter 2 of this study.

⁹⁶⁴ See subheading 2.1 in Chapter 2 of this study.

includes landowners, lawful occupiers, and communities.⁹⁶⁵ Consultation under the *MPRDA* is a procedural prerequisite for the granting of mining-related permits, intended to promote fairness, transparency, and community participation; however, it does not constitute a requirement for consent.⁹⁶⁶

- Over time and to date, there has been a persistent challenge in the implementation of the overlapping statutes, namely the *MPRDA*, the *NEMA* and their regulations.⁹⁶⁷
- The *2004 MPRDA Regulations*⁹⁶⁸ and the *2014 EIA Regulations*⁹⁶⁹ flesh out the requirements of satisfying the consultation requirement in terms of the *MPRDA* and the *NEMA*.
- South African courts have provided clarity in respect of the standard of consultation required in applications for mining-related permits. The standard of consultation that the South African courts require for an application for a mining-related permit to be granted. Cases such as *Bengwenyama 2011 (CC)*, *Meepo v Kotze*, and *Maledu* underscored the importance of consultations being *meaningful*, informed, and conducted reasonably and in good faith.⁹⁷⁰
- Chapter 2 finds that the *2020 MPRDA Amendment Regulations* formally introduced the concept of *meaningful consultation*, aligning it with EIA processes under *NEMA* and allowing the RM to oversee its implementation.⁹⁷¹ However, inconsistencies remain due to overlapping legislative mandates and the non-binding nature of the *DMR Consultation Guidelines*, which, though instructive, are outdated and lack legislative force.⁹⁷²

⁹⁶⁵ See subheading 2.1 in Chapter 2 of this study.

⁹⁶⁶ See subheadings 2.2.1.2 & 2.3.3 in Chapter 2 of this study.

⁹⁶⁷ See subheading 2.3.3 in Chapter 2 of this study.

⁹⁶⁸ See subheading 2.4 in Chapter 2 of this study.

⁹⁶⁹ See subheading 2.6 in Chapter 2 of this study.

⁹⁷⁰ See subheading 2.3.3 in Chapter 2 of this study.

⁹⁷¹ See subheading 2.5 in Chapter 2 of this study.

⁹⁷² See subheading 2.8 in Chapter 2 of this study.

- There is a lack of internal and mandatory dispute resolution mechanisms before the granting of a mining-related permit in the legal framework regulating consultation processes during applications for mining-related permits.⁹⁷³

5.2.3 Chapter 3

Chapter 3 examines procedural fairness as a constitutional and administrative law principle, as well as its relevance to consultation processes during the application for mining-related permits under the *MPRDA* and the *NEMA*. It achieves this by examining the constitutional foundation, legislative codification, and judicial interpretation of procedural fairness, particularly within section 33 of the *Constitution* and the *PAJA*. The chapter traces the evolution of procedural fairness from its common-law origins in the rules of natural justice to its constitutional entrenchment in section 33 of the *Constitution*, and its legislative expression through the *PAJA*.⁹⁷⁴

The key findings of Chapter 3 are:

- Procedural fairness is a constitutional right rooted in natural justice and codified in section 33 of the *Constitution* and the *PAJA*.⁹⁷⁵
- Procedural fairness, rooted in the *maxims audi alteram partem* and *nemo iudex in sua causa*, aims to ensure that administrative decisions are lawful, reasonable, and procedurally fair.⁹⁷⁶
- The *PAJA* operationalises these principles, such as participation, accountability and transparency, through sections 3 and 4, which regulate administrative actions affecting individuals and those involving the public, respectively.⁹⁷⁷ Section 3 of the *PAJA* requires administrators to provide adequate notice, an opportunity to make representations, clear communication of decisions, and

⁹⁷³ See subheading 2.9 in Chapter 2 of this study.

⁹⁷⁴ See subheading 3.2. in Chapter 3 of this study.

⁹⁷⁵ See subheading 3.2 in Chapter 3 of this study.

⁹⁷⁶ See subheading 3.3 in Chapter 3 of this study.

⁹⁷⁷ See subheading 3.4 in Chapter 3 of this study.

notice of appeal or review rights.⁹⁷⁸ Section 4 of the *PAJA* extends these principles to collective or public participation through mechanisms such as public inquiries, notice-and-comment procedures, or other fair processes.⁹⁷⁹

- Sections 3(5)⁹⁸⁰ and 4(1)(d)⁹⁸¹ of the *PAJA* recognises that where another law prescribes different procedures, those procedures remain valid if they are "different but fair".⁹⁸² This provision is especially relevant to the *MPRDA* and the *NEMA*, which prescribe their own consultation and public participation requirements for mining and environmental authorisations. The courts, notably in *Sidumo*, and the *Police and Prisons Civil Rights Union*, have affirmed that sector-specific legislation may deviate from the *PAJA*, provided the procedures remain substantively fair.⁹⁸³
- The *MPRDA*'s consultation framework largely aligns with the *PAJA*, particularly regarding notice, representation, and appeals, but falls short in practical execution.⁹⁸⁴ The chapter's comparative assessment demonstrates that, while the *MPRDA*, *NEMA*, and their *regulations* incorporate procedural fairness principles through their consultation frameworks, implementation gaps persist.⁹⁸⁵ For example, section 10 of the *MPRDA* requires the RM to invite and consider public objections within 30 days of notice, mirroring *PAJA*'s requirements for adequate notice and opportunity to respond.⁹⁸⁶ However, the *PAJA* makes no mention of time limits for representations to be made.⁹⁸⁷

⁹⁷⁸ See subheading 3.4.1 in Chapter 3 of this study.

⁹⁷⁹ See subheading 3.4.2 in Chapter 3 of this study.

⁹⁸⁰ See subheading 3.4.3.1 in Chapter 3 of this study.

⁹⁸¹ See subheading 3.4.3.2 in Chapter 3 of this study.

⁹⁸² See subheading 3.4.3 in Chapter 3 of this study.

⁹⁸³ See subheading 3.4.3 in Chapter 3 of this study.

⁹⁸⁴ See subheading 3.4.3 in Chapter 3 of this study.

⁹⁸⁵ See subheadings 3.4.3.1 & 3.4.3.2 in Chapter 3 of this study.

⁹⁸⁶ See subheadings 3.4.3.1 & 3.4.3.2 in Chapter 3 of this study.

⁹⁸⁷ See subheadings 3.4.3.1 & 3.4.3.2 in Chapter 3 of this study.

5.2.4 Chapter 4

Chapter 4 traces the development of the concept of *meaningful consultation* in South African law, particularly in the context of applications for mining-related permits under the *MPRDA*.

The key findings of Chapter 4 are:

- The *MPRDA* mandated consultation with interested and affected parties, but lacked insofar as requiring consultation to be meaningful and failed to define what constituted *meaningful* engagement.⁹⁸⁸ The notion developed through South African Constitutional Court jurisprudence on socio-economic rights, particularly the right to housing.⁹⁸⁹ In cases such as *PE Municipality*,⁹⁹⁰ *Olivia Road*,⁹⁹¹ and *Joe Slovo*,⁹⁹² the Court articulated *meaningful* engagement as a two-way, good-faith process founded on dignity, transparency, and participation, not merely procedural compliance. Mining law later adopted this jurisprudence.⁹⁹³ In *Bengwenyama*, the Constitutional Court held that consultation must involve the sharing of information, an opportunity to respond, and good faith.⁹⁹⁴ In *Baleni*, the High Court expanded this to require discussion on equal footing, genuine participation, and accessible communication.⁹⁹⁵
- Scholars such as Mothudi emphasised that *meaningful consultation* demands multiple engagements, inclusive participation, and provision for vulnerable or illiterate communities.⁹⁹⁶
- Internationally, the *UN Guiding Principles* reinforced the duty of companies, which include proponent mining companies in the context of consultation

⁹⁸⁸ See subheading 4.1 of Chapter 4 of this study.

⁹⁸⁹ See subheading 4.2 of Chapter 4 of this study.

⁹⁹⁰ See subheading 4.2.1 of Chapter 4 of this study.

⁹⁹¹ See subheading 4.2.2 of Chapter 4 of this study.

⁹⁹² See subheading 4.2.3 of Chapter 4 of this study.

⁹⁹³ See subheading 4.3 in Chapter 4 of this study.

⁹⁹⁴ See subheading 4.3 in Chapter 4 of this study.

⁹⁹⁵ See subheading 4.3 in Chapter 4 of this study.

⁹⁹⁶ See subheading 4.3 in Chapter 4 of this study.

processes during applications for mining-related permits, to conduct *meaningful consultation* with affected communities to prevent human rights abuses.⁹⁹⁷ South African Courts and regulators have increasingly aligned domestic standards with these principles, requiring mining companies to provide information on environmental and human rights impacts and to engage throughout the project lifecycle.⁹⁹⁸

- The *2004 MPRDA Regulations* did not mandate the meaningfulness standard as a requirement for consultation during the application process for mining-related permits.⁹⁹⁹
- The *2004 MPRDA Regulations* lacked dispute resolution mechanisms and monitoring processes.
- The *2020 MPRDA Amendment Regulations* provided the first statutory definition of *meaningful consultation*.¹⁰⁰⁰ It is achieved when an applicant (1) facilitates participation in good faith, (2) allows sufficient opportunity for comment, and (3) provides all relevant information for informed decision-making. These amendments converted consultation from a procedural formality into a substantive, enforceable obligation, aligning South Africa's mining framework with global best practice. However, criticism persists. Civil society organisations, such as the CER, CW, and the SAHRC, argue that the regulations inadequately ensure access to information, provide sufficient timeframes, and ensure effective oversight.¹⁰⁰¹
- The *2020 MPRDA Amendment Regulations* made little to no attempt to remedy the silence of the *2004 MPRDA Regulations* on the issue of the need for dispute resolution mechanisms and/or monitoring processes in consultation processes for application during mining-related permits.¹⁰⁰²

⁹⁹⁷ See subheading 4.3 in Chapter 4 of this study.

⁹⁹⁸ See subheading 4.3 in Chapter 4 of this study.

⁹⁹⁹ See subheading 2.4 in Chapter 2 of this study.

¹⁰⁰⁰ See subheading 4.3 in Chapter 4 of this study.

¹⁰⁰¹ See subheading 4.4.2 in Chapter 4 of this study.

¹⁰⁰² See subheading 2.9 in Chapter 2 of this study.

- This study finds that there have been little to no attempts made by South African courts to grant an order for a proponent mining company to go back to the interested and affected parties and consult them again, where the initial consultation failed to meet the standard of *meaningful consultation* or where there was no consultation at all.¹⁰⁰³

The *MPRDA* (and, in part, the *NEMA*) has had a significant impact on advancing the rights and interests of interested and affected parties in consultation processes during applications for mining-related permits. However, the current legal framework (the *MPRDA* and the *NEMA*) lacks sufficient timeframes and effective oversight, resulting in the meaningfulness standard (which promotes the achievement of procedural fairness) not being met. To remedy this, this study will recommend developments to the legal framework regulating consultation processes during applications for mining-related permits, as well as the concept of *meaningful consultation* as a means to achieve procedural fairness. These are discussed in detail below.

5.3 Recommendations

Despite the efforts of the *MPRDA* and *NEMA* to better regulate consultation processes during the application process for mining-related permits, these efforts are still insufficient to address the dynamics and flexibility of these consultation processes. There have been amendments to the legal framework; however, these amendments have failed to address some of the key issues that are crucial to ensuring the purposes of consultation are achieved. These failings include, but are not limited to, the lack of dispute resolution mechanisms and monitoring processes. This study suggests that amendments should be made to the legal framework to ensure that consultations are meaningful and promote procedural fairness. The recommendations set out below serve to give effect to the vision of procedural fairness envisaged in section 33 of the *Constitution*, the *PAJA* and the courts. These recommendations are based on the findings made in Chapters 2 to 4 of this study and criticism levelled against the current

¹⁰⁰³ See subheading 4.2.2 in Chapter 4 of this study.

legal framework regulating consultation processes during applications for mining-related permits throughout same.

5.3.1 The need to amend the legal framework to include effective oversight mechanisms (monitoring)

This study recommends that the legal framework regulating consultation processes during applications for mining-related permits be amended to include effective oversight mechanisms (monitoring mechanisms). A substitution of the discretionary word would achieve this "may" with the peremptory word "must" in regulation 3A(2) of the 2020 *MPRDA Amendment Regulations*. Regulation 3A(2) of the 2020 *MPRDA Amendment Regulations* provides that the office of the RM may participate in the *meaningful consultation* process by the applicant, as an observer, to ensure that the consultation by the applicant is *meaningful* and in accordance with these regulations.¹⁰⁰⁴ The mandatory presence of the RM would ensure that the standard of consultation envisaged by section 33 of the *Constitution*, the *PAJA*, the courts and the 2020 *MRPDA Amendment Regulations*, which is *meaningful consultation*, is maintained.

The inclusion of monitoring mechanisms would not be a new concept to the legal framework regulating consultation processes during applications for mining-related permits, as such monitoring mechanisms already exist in the form of progress reports for prospecting operations. Regulation 8(1) of the 2020 *MPRDA Amendment Regulations* expects the holder of prospecting rights to produce progress reports every 12 months from the date of the granting of the prospecting right.¹⁰⁰⁵ This study recommends applying the same principle to monitoring consultation processes to ensure effective oversight. The study recommends that an amendment be made to the 2020 *MPRDA Amendment Regulations* to include this monitoring mechanism in the

¹⁰⁰⁴ Regulation 3A(2) in the 2020 *MPRDA Amendment Regulations*.

¹⁰⁰⁵ Regulation 8(1) in the 2020 *MPRDA Amendment Regulations*.

legal framework regulating consultation processes. These amendments would serve the purpose of alleviating the risk of tokenistic or bad-faith consultations.

5.3.2 The need to amend the legal framework to include internal and mandatory dispute resolution mechanisms

This study recommends two types of dispute resolution mechanisms. First, a grievance mechanism is available throughout the process. Second, internal mechanisms are designed to break deadlocks between interested and affected parties and the proponent mining company.

In respect of the first type of dispute resolution mechanism, the RMDEC, mentioned under subheading 2.2.1.3.1 in Chapter 2 of this study, cannot, for this study, be regarded as a sufficient internal and mandatory dispute resolution mechanism which is aimed at active dispute resolution between affected parties. This study takes the position that there are insufficient internal and mandatory dispute resolution mechanisms within the legal framework regulating consultation processes during applications for mining-related permits.

This study recommends that the *MPRDA* be amended to provide an internal and mandatory dispute resolution mechanism for resolving disputes between interested and affected parties and proponent mining companies throughout consultation processes for mining-related permit applications.

Regarding the second type of dispute resolution mechanism, this study recommends the establishment of alternative dispute resolution mechanisms such as conciliation and mediation processes which will allow for a third party to break deadlocks between interested and affected parties.

5.3.3 *The need to amend the legal framework to extend the time limit for representations*

This study agrees with Chagwinya's sentiments that the constraints of time created by the current legal framework hinder *meaningful consultation*.¹⁰⁰⁶ While specific 30-day periods are mentioned in the *MPRDA* for certain purposes of achieving the objectives of the *MPRDA*,¹⁰⁰⁷ the notion of *meaningful consultation* means that the time allowed must be adequate for all interested and affected parties to engage effectively. A mere 30 days might be considered too short if the circumstances demand a more extensive engagement process to be truly *meaningful*. This study recommends increasing the time allowed for interested and affected parties to make comments (representations) from a total of 30 days to 90 days. The current legal framework's timeframe of 30 days is too short for interested and affected parties to contribute *meaningfully* towards the consultation as the process might be rushed and without proper thought and consideration of issues such as conflict between the parties as well as the involvement of vulnerable groups (for example, people who cannot read and right) who may delay the consultation process. Instead, this short timeframe encourages rushed processes, making the consultation vulnerable to being neither genuine nor *meaningful*. This flexibility-seeking recommendation to extend the time limit to 90 days would also allow for adequate time to implement the above-mentioned monitoring processes and grievance (dispute resolution) mechanisms, if necessary.

5.3.4 *The need to amend sections 16(4)(b), 22(4)(b) and 27(5)(a) of the MPRDA*

This study recommends an amendment to sections 16(4)(b), 22(4)(b) and 27(5)(a) of the *MPRDA* to include the word "meaningful" before the word "consultation" so that proponent mining companies are required to consult by the *MPRDA* itself meaningfully. This legislative amendment would set the tone for the standard of consultation needed and assist in clarifying, as the Courts have already done, the tension between the

¹⁰⁰⁶ See subheading 4.3 in Chapter 4 of this study.

¹⁰⁰⁷ See subheading 3.4.3.1.2 in Chapter 3 of this study.

MPRDA and *IPILRA*. The inclusion of *meaningful consultation* in primary legislation would not be a new concept in South Africa. Examples of legislation that include *meaningful consultation* in their expression are:

Section 2(1) of the *Housing Act* 107 of 1997, which requires, amongst other things, that all levels of government must—

- (a) Give priority to the needs of people experiencing poverty in respect of housing development;
- (b) Consult *meaningfully* with individuals in communities affected by housing development.

Section 189(2)(a) of the *Labour Relations Act* 66 of 1995 provides that the employer and other consulting parties must consult and engage in a *meaningful* joint consensus-seeking process to attempt to reach consensus on appropriate measures to avoid dismissals, to minimise the number of dismissals, to change the timing and to mitigate the adverse effect of the dismissals.

As the *meaningfulness* standard is important for achieving procedural fairness, this recommendation express *meaningful consultation* into the *MPRDA* would promote alignment between section 6 of the *MPRDA* which states that "any administrative process conducted or taken in terms of the *MPRDA* be in accordance with the principle of procedural fairness", and the *PAJA* which gives flesh to the right to procedural fairness entrenched in section 33 of the *Constitution*.

5.3.5 The need for the courts to be flexible

In respect of the lack of flexibility by the courts in requiring re-consultation, the study recommends that the South African court develop a flexible approach to allow for and give orders that require the proponent mining company to reconsult interested and affected parties so that these mining companies can fulfil the *meaningfulness* standard for consultations in respect of applications for mining-related permits.

5.4 Conclusion

The study concludes that while South Africa's mining law framework has made significant progress in embedding consultation as a procedural safeguard, the current system remains procedurally inadequate to achieve the constitutional standard of fairness. The *MPRDA* and the *NEMA* recognise the importance of consultation but do not yet ensure that it is *meaningful* (except in the *2020 MPRDA Amendment Regulations*), inclusive, and enforceable in their expression of the legal framework regulating consultation processes during applications for mining-related permits.

The research demonstrates that *meaningful consultation* must move beyond formal compliance. It must embody substantive engagement that enables affected parties to understand, influence, and participate in decisions that affect their rights and livelihoods. Achieving this requires legislative reform that strengthens oversight, extends timeframes, and explicitly mandates the meaningfulness of consultation within the *MPRDA* itself.

By encouraging the courts to be flexible in adjudicating matters involving consultation processes during applications for mining-related permits, incorporating effective oversight mechanisms (monitoring), internal and mandatory dispute resolution mechanisms, and express statutory recognition of *meaningful consultation*, South Africa can close the gap between procedural fairness in theory and its realisation in practice. Such reforms would not only enhance administrative justice but also promote transparency, accountability, and social equity in the governance of the country's mineral resources.

BIBLIOGRAPHY

Literature

Ally and Murcott 2023 *Law, Democracy and Development*

Ally N and Murcott MJ "Beyond labels: Executive action and the duty to consult"
2023 *Law, Democracy and Development* 93-122

Arnstein 1969 *Journal of the American Institute of Planners*

Arnstein SR "A Ladder of Citizen Participation" 1969 *Journal of the American
Institute of Planners* 216-217

Asimow 1996 *SALJ*

Asimow M "Administrative Law under South Africa's Final Constitution: The Need
for an Administrative Justice Act" 1996 *SALJ* 613-614

Badenhorst *Mineral of South Africa: Texts, cases and commentary*

Badenhorst P.J. *Mineral of South Africa: Texts, cases and commentary 1st ed (Juta
Cape Town 2022)*

Badenhorst *et al* (eds) *Silberberg and Schoeman's The Law of Property*

Badenhorst P.J. *et al* (eds) *Silberberg and Schoeman's The Law of Property* 5th ed
(LexisNexis Butterworths 2006)

Baxter *Administrative Law*

Baxter L *Administrative Law* 1st ed (Juta & Co Ltd, Cape Town 1984)

Bryceson, Fisher, Jonsson and Mwaipopo *Mining and Social Transformation in Africa:
Mineralizing and democratizing trends in artisanal production*

Bryceson DF, Fisher E, Jonsson JB and Mwaipopo R *Mining and Social Transformation in Africa: Mineralizing and democratizing trends in artisanal production* 1st ed (Routledge 2014)

Burns 1994 *Public Law*

Burns Y "Administrative Justice" 1994 *SA Public Law* 347-351

Burns and Henrico *Administrative Law*

Burns Y and Henrico R *Administrative Law* 5th ed 2020 (LexisNexis Cape Town 2020)

Cawood and Minnitt 1998 *JSAIMM*

Cawood F.T and Minnitt R.C.A "A historical perspective on the economics of the ownership of mineral rights ownership" 1998 *Journal of the South African Institute of Mining and Metallurgy* 373

Chagwinya *An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation*

Chagwinya An investigation into the role of law in managing community engagements between mining companies, government and community: Community Consensus versus Community Consultation (LLM-Dissertation University of Pretoria 2018)

Chenwi 2011 *SAPL*

Chenwi L "Meaningful engagement" in the realisation of socio-economic rights: The South African experience" 2011 *SAPL* 128-156

Currie *The Promotion of Administrative Justice Act: A Commentary*

Currie I *The Promotion of Administrative Justice Act: A Commentary* 2nd ed (Siberink Cape Town 2007)

Currie and De Waal *The Bill of Rights Handbook*

Currie I and De Waal J *The Bill of Rights Handbook* 5th ed (Juta Cape Town 2005)

Devenish, Govender and Hulme *Administrative Law and Justice in South Africa*

Devenish G, Govender K, Hulme D *Administrative Law and Justice in South Africa*
(LexisNexis Durban 2001)

De Ville *Judicial Review of Administrative Action in South Africa*

De Ville JR *Judicial Review of Administrative Action in South Africa* 1st ed
(LexisNexis Butterworths Durban 2005)

Gildenhuys 2005 *Journal of Energy & Natural Resources Law*

Gildenhuys JA "Indigenous peoples" rights to minerals and the mining industry:
Current developments in South Africa from a national and international
perspective' 23:4 2005 *Journal of Energy & Natural Resources Law* 466

Hall & Lukey 2023 *AHRLJ*

Hall J & Lukey P.J. Public participation as an essential requirement of the
environmental rule of law: Reflections on South Africa's approach in policy and
practice' 2023 *African Human Rights Law Journal* 303-332

Hermanus *et al.* 2015 *Labour, Capital, and Society*

Hermanus A, Walker J, Watson I and Barker O "The Impact of the South African
Minerals and Petroleum Resources Development Act on Levels of Mining, Land
Utility and People" 2015 *Labour, Capital, and Society* 10

Higgs 2018 *Fundamina*

Higgs A 2018 "The Historical development of diamond mining legislation in
Griqualand West during the period 1872 to 1880" accessed 18 September 2025

Hoexter *Administrative Law in South Africa*

Hoexter C *Administrative Law in South Africa* 2nd ed (Juta Cape Town 2012)

Hutchinson *et al* *The Law of Contract in South Africa*

Hutchinson D *et al* (eds) *The Law of Contract in South Africa* 4th ed (Oxford University Press 2022)

Humby 2012 PELJ

Humby T *"The Bengwenyama Trilogy: Constitutional Rights and the Fight for Prospecting on Community Land"* 2012PELJ166-188

Kidd *Environmental Law*

Kidd M *Environmental Law* 2nd ed (Juta Cape Town 2008)

Kurniawan *et al.* 2022 *The Extractive Industry and Society*

Kurniawan NI, Lujala P, Rye SA and Vela-Armeida D "The role of local participation in the governance of natural resource extraction" 2022 *The Extractive Industry and Society* 1-4

Leonard 2019 *Land Use Policy* 290

Leonard L "Traditional leadership, community participation and mining development in South Africa: The case of Fuleni, Saint Lucia, KwaZulu-Natal" 2019 *Land Use Policy* 290-298

Liebenberg 2013 *EJIL*

Liebenberg S 2013 "Socio-Economic Rights Adjudication under a Transformative Constitution" *EJIL* 707-744

Marais, Burger and Van Rooyen *Mining and Community in South Africa: From Small to Iron Town*

Marais L, Burger P and Van Rooyen D *Mining and Community in South Africa: From Small to Iron Town* 1st ed (Routledge 2018)

Mathebula 2023 PELJ

Transitioning Old Order Mining Rights into New Mining Rights: A Critical Analysis
2023 *Potchefstroom Electronic Law Journal* 2-19

Mitchell, Moalusi and Van der Walt 2012 *JSAIMM*

Mitchell A, Moalusi L and Van der Walt M "The Avatar syndrome: mining and Communities" 2012 *The Journal of The Southern African Institute of Mining and Metallurgy* 151-155

Moody The Gulliver File: Mines, People, and Land: A Global Battleground

Moody R The Gulliver File: Mines, People, and Land: A Global Battleground
(Minewatch London 1992)

Mostert *Mineral Law: Principles and Policies in Perspective*

Mostert *Mineral Law: Principles and Policies in Perspective* 1st ed (Juta Cape Town 2012)

Mothudi *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities*

Mothudi TM *A legal analysis of the relationship between, and role of, Consultation under the MPRDA and Public Participation under NEMA in safeguarding the environmental and health rights of mining communities* (LLM-dissertation University of Cape Town 2023)

Mulenga *The Law on Mining and Environmental Protection in Zambia*

Mulenga C *The Law on Mining and Environmental Protection in Zambia* 1st ed (Juta Cape Town 2022)

Nalule *Mining Law and Governance in Africa: Transformation and Innovation for a Sustainable Mining Sector*

Nalule VR *Mining Law and Governance in Africa: Transformation and Innovation for a Sustainable Mining Sector* 1st ed (Routledge 2023)

Nhemachena and Warikandwa *Mining Africa: Law, Environment, Society and Politics in Historical and Multidisciplinary Perspectives*

Nhemachena A and Warikwandwa TV *Mining Africa: Law, Environment, Society and Politics in Historical and Multidisciplinary Perspectives* 1st ed (Langa RPCIG 2017)

Ntsanwisi *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa*

Ntsanwisi F *Consultation and consent under the MPRDA and the IPILRA: A legal analysis of the decision-making practices of customary communities in South Africa* (LLM-Dissertation University of Cape Town 2021)

Oshionebo *Mineral Mining in Africa: Legal and Fiscal Regimes*

Oshionebo E *Mineral Mining in Africa: Legal and Fiscal Regimes* 1st ed (Routledge 2021)

Paddock, Qun, Kotze, Markell, Markowitz and Zaelke *Compliance and Enforcement in Environmental Law: Toward More Effective Implementation*

Paddock L, Qun D, Kotze LJ, Markell DL, Markowitz KJ and Zaelke D *Compliance and Enforcement in Environmental Law: Toward More Effective Implementation* 1st ed (Edward Elgar Publishing Limited 2011)

Pring 2001 *International Institute for Environment and Development* 3-13

Pring G 2001 "The Law of Public Participation in Mining and Resources Development" *International Institute for Environment and Development* 3-13

Quinot *Administrative Law: Cases & Materials*

Quinot G *Administrative Law: Cases & Materials* 1st ed (Juta Cape Town 2008)

Quinot *et al* *Administrative Justice in South Africa: An Introduction*

Quinot *et al* (eds) *Administrative Justice in South Africa: An Introduction* 2nd ed
(Oxford University Press South Africa 2015)

Raboshakga 2015 *South African Journal on Human Rights*

Raboshakga N "Towards Participatory Democracy, or Not: The Reasonableness Approach in Public Involvement Cases" 2015 *South African Journal on Human Rights* 4-29

Ray 2009 *Utah Law Review*

Ray B 2009 "Extending the shadow of the law; Using hybrid mechanisms to develop constitutional norms in socioeconomic rights cases" *Utah Law Review* 797-842

Stookes *A Practical Approach to Environmental Law*

Stookes P *A Practical Approach to Environmental Law* 2nd ed (Oxford University Press 2009)

Tlale 2020 *PELJ*

Tlale MT "Conflicting Levels of Engagement under the Interim Protection of Informal Land Rights Act and the Minerals and Petroleum Development Act: A Closer Look at the Xolobeni Community Dispute" *PER / PELJ* 2-33

Tshitanda M *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime*

Tshitanda M *An analysis of the legal implications of consultation vs consent in South Africa's mineral regime* (LLM-Dissertation University of Pretoria 2019)

Van Der Schyff *Property in Minerals and Petroleum*

Van Der Schyff E *Property in Minerals and Petroleum* 1st ed (Juta and Company Ltd 2016)

Van Wyk 2014 *Stellenbosch Law Review*

Van Wyk S "Fracking in the Karoo: Approvals Required?" 2014 *Stellenbosch Law Review* 34-54

Vinti 2019 *SAJHR*

Vinti C "The right to mine in a 'protected area' in South Africa: Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs" 2019 *South African Journal on Human Rights* 35

Zillman, Lucas and Pring *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*

Zillman D, Lucas A and Pring G *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* 1st ed (Oxford University Press 2002)

Case law

Administrator v Traub 1989 (4) SA 731 (A)

Agri South Africa v Minister for Minerals and Energy 2013 (4) SA 1 (CC)

Alexkor Limited v Richtersveld Community 2003 BCLR 1301 (CC)

Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2006 (1) SA 350 (T)

Apex Mines Ltd v Administrator Transvaal 1986 (4) SA 581 (T)

Aquila Steel (South Africa) v Minister of Mineral Resources 2019 (3) SA 621 (CC)

Baleni v Regional Manager, Eastern Cape Department of Mineral Resources 2021 (1) SA 110 (GP)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC)

Beck v Premier, Western Cape 1998 (3) SA 487 (C)

Bel Porto School Governing Body v Premier of the Western Cape Province 2002 (3) SA 265 (CC)

Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC)

Cape Town Municipality v Abdulla 1974 (4) SA 428 (C)

Cekeshe v Premier, Eastern Cape 1998 (4) SA 935 (Tk) 962D

Dabner v South African Railways and Harbours 1920 AD 583

De Lange v Smuts 1998 (3) SA 785 (CC)

Doctors for Life International v Speaker of the National Assembly 2006 6 SA 416 (CC)

Du Preez v Truth and Reconciliation Commission 1997 (3) SA 204 (A)

Duncan v Minister of Environmental Affairs and Tourism 2010 (6) SA 374 (SCA)

Dunn v Minister of Defence 2006 (2) SA 107 (T)

Earthlife Africa Cape Town v Director-General: Department of Environmental Affairs and Tourism 2005 SA 156 (C)

Earthlife Africa Johannesburg v Minister of Environmental Affairs 2017 (2) All SA 519 (GP)

Erasmus and Lategan v Union Government 1954 (3) SA 415 (O)

Global Environmental Trust v Tendele Coal Mining (Pty) Ltd [2021] ZASCA 13

Government of the Republic of South Africa v Grootboom 2000 (11) BCLR 1169 (CC)

Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 313 (SCA)

Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee 2002 (5) SA 449 (SCA)

Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture 1980 (3) SA 476 (T)

Hudson v Mann 1950 (4) SA 485 (T)

Janse van Rensburg v Minister of Trade and Industry 2001 (1) SA 29 (CC)

Joseph v City of Johannesburg 2010 (4) SA 55 (CC)

Kwinana v Chairperson of Disciplinary Inquiry Instituted by the South African Institute of Chartered Accountants [2025] ZAGPJHC 735

Maccsand v City of Cape Town 2012 (4) SA 181 (CC)

Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd 2019 (2) SA 1 (CC)

Mapholisa v Phetoe [2022] ZASCA 168

Maqoma v Sebe 1987 (1) SA 483 (Ck)

Masetlha v President of the Republic of South Africa 2008 (1) SA 556

Masuku v Minister of Mineral Resources [2022] ZAGPPHC 145

Mbane v Gxenya [2023] ZAWCHC 91

Meepo v Kotze 2008 (1) SA 104 (NC)

Merafong Demarcation Forum v President of the Republic of South Africa 2008 (5) SA 171 (CC)

Minister of Defence and Military Veterans v Motau 2014 (8) BCLR 930 (CC)

Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC)

Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC 2024 (5) SA 38 (SCA)

Minister of Public Works v Kyalami Ridge Environmental Association 2001 (3) SA 1151 (CC)

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg 2008 3 SA 208 (CC)

Pan African Mineral Development Co (Pty) Ltd v Aquila Steel (SA) Pty Ltd 2018 (5) SA 124 (SCA)

Police and Prisons Civil Rights Union v Minister of Correctional Services 2008 (3) SA 91 (E)

Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC)

Premier, Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal 1999 (2) SA 91 (CC)

Rocher v Registrar of Deeds 1911 TPD 311

S v Shangase 1962 (1) SA 543 (N)

S v Smit 2008 (1) SA 135

SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd 2011 JDR 0605 (SCA)

Sasol Oil (Pty) Ltd v Metcalfe 2004 (5) SA 161 (W)

Sefateng Chrome Mine (Pty) Ltd v Minister of Mineral Resources and Energy [2025] ZAGPPHC 632

Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) SA 24 (CC)

Smith v Beleggende Outoriteit van Kommandement Noord-Transvaal van die SA Weermag 1980 (3) SA 519

Sokhela v MEC for Agriculture and Environmental Affairs, KwaZulu-Natal 2010 (5) SA 574 (KZP)

Van Rooyen v Minister of Minerals and Energy 2010 (1) SA 104 (GNP)

Vulindlela Furniture Manufacturers (Pty) Ltd v MEC, Department of Education and Culture, Eastern Cape 1998 (4) SA 908 (Tk).

Walele v City of Cape Town 2008 ZACC 11

Witwatersrand Gold Mining Co Ltd v Municipality of Germiston 1963 (1) SA 311 (T)

Yates v University of Bophuthatswana 1994 (3) SA 815 (B)

Zondi v MEC for Traditional and Local Government Affairs 2005 (3) SA 589 (CC)

Legislation

Arbitration Act 42 of 1965

Constitution of the Republic of South Africa, 1996

Housing Act 107 of 1997

Griqualand West Ordinance 1 of 1874

Griqualand West Ordinance 5 of 1874

Griqualand West Ordinance 10 of 1874

Interim Constitution of the Republic of South Africa 200 of 1993

Labour Relations Act 66 of 1995

Law 8 of 1885

Law 16 of 1899

Minerals Act 50 of 1991

Mineral and Petroleum Resources Development Act 28 of 2002

Mining Rights Act 20 of 1967

National Environmental Management Act 107 of 1998

Precious Stones Act 44 of 1927

Precious Stones Act 73 of 1964

Precious Stones and Minerals Mining Act 19 of 1883 of the Cape of Good Hope

Precious Stones Amendment Act 12 of 1960

Precious Stones and Minerals Mining Act 19 of 1883 (C)

Promotion of Administrative Justice Act 3 of 2000

Resolution of the Volksraad of the ZAR 1870 (14.06.1870)

Government publications

GN R1022 in GG 23674 of 31 July 2002

GN R527 in GG 26275 of 23 April 2004

GN 982 in GG 38282 of 8 December 2014

GN 326 in GG 40772 of 7 April 2017

GN 706 in GG 41766 of 13 July 2018

GN 420 in GG 43172 of 27 March 2020

GN 517 in GG 44701 of 11 June 2021

Internet Sources

AgriSA 2025 <https://agrisa.org.za/centre-of-excellence-natural-resources/mineral-resources-amendment-bill-threats-to-south-african-agriculture-and-food-security/>

AgriSA 2025 *AgriSA raises alarm over Mineral Resources Amendment Bill threats*
<https://agrisa.org.za/centre-of-excellence-natural-resources/mineral-resources->

amendment-bill-threats-to-south-african-agriculture-and-food-security/ accessed 20 October 2025

Centre for Applied Legal Studies 2025 [https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-lawandmanagement/researchentities/cals/documents/programmes/environment/resources/CALS%20Commnts%20on%20draft%20Mineral%20Resources%20Development%20Amendment%20Bill,%202025.pdf](https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-andmanagement/researchentities/cals/documents/programmes/environment/resources/CALS%20Commnts%20on%20draft%20Mineral%20Resources%20Development%20Amendment%20Bill,%202025.pdf)

Centre for Applied Legal Studies 2025 *Submission to the Department of Minerals and Petroleum Resources (DMPR) on the Draft Mineral Resources Amendment Bill, 2025* <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-lawandmanagement/researchentities/cals/documents/programmes/environment/resources/CALS%20Commnts%20on%20draft%20Mineral%20Resources%20Development%20Amendment%20Bill,%202025.pdf> accessed 20 October 2025

Corruption Watch 2020 <https://www.corruptionwatch.org.za/wp-content/uploads/2020/01/Corruption-Watch-Submissions-MPRDA-Regulations-30.01.2019.pdf>

Corruption Watch 2020 *Submission on the Minerals and Petroleum Resource Development Act, 2002 ("MPRDA") Draft Amendments to the Mineral and Petroleum Resources Development Regulations, 2019 for Public Comment: Government Gazette number 42870 ("The Draft Amendment Regulations")* <https://www.corruptionwatch.org.za/wp-content/uploads/2020/01/Corruption-Watch-Submissions-MPRDA-Regulations-30.01.2019.pdf>. accessed 21 October 2025

Department of Mineral Resources 2016 https://www.dmr.gov.za/Portals/0/consultation_guideline.pdf

Department of Mineral Resources 2016 *Guideline for Consultation with Communities and Interested and Affected Parties* available at

https://www.dmr.gov.za/Portals/0/consultation_guideline.pdf accessed 23 May 2024

Erdiaw-Kwasie & Caripis 2021 https://transparency.org.au/wp-content/uploads/2021/04/TIA_CommunityConsultationBriefingPaper_vF_web.pdf

Erdiaw-Kwasie MO & Caripis L 2021 *Stronger Community voices: Addressing corruption risks in community consultation in mining* https://transparency.org.au/wpcontent/uploads/2021/04/TIA_CommunityConsultationBriefingPaper_vF_web.pdf accessed 9 June 2025 International Institute of Environmental Development *Local Communities and Mines*

International Institute of Environmental Development 2002 Chapter 9: *Local Communities and Mines* available at <https://www.iiied.org/sites/default/files/pdfs/migrate/G00901.pdf> accessed 10 June 2024

Jewett 2016 <https://hsf.org.za/publications/hsf-briefs/mining-land-and-community-in-communal-areasiiimineral-rights-and-land-rights>

Jewett T 2016 *Mining, land, and community in communal areas: Mineral rights and land rights* <https://hsf.org.za/publications/hsf-briefs/mining-land-and-community-in-communal-areasiiimineral-rights-and-land-rights> accessed 19 July 2025

Legal Resources Centre 2018 <https://africanlii.org/ebook/free-prior-and-informed-consentextractive-industries-southernafrika>

Legal Resources Centre 2018 *Free, Prior and Informed Consent in the extractive industries in Southern Africa: An analysis of legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia* <https://africanlii.org/ebook/free-prior-and-informed-consentextractive-industries-southernafrika> accessed 08 August 2024

Legal Resource Centre 2016 <https://lrc.org.za/wp-content/uploads/pdf/2018%20Mining%20Guide%20Part%201.pdf>

Legal Resource Centre *A 2016 Practical Guide for Mining-Affected Communities*
<https://lrc.org.za/wp-content/uploads/pdf/2018%20Mining%20Guide%20Part%201.pdf> accessed 5 June 2024

Mineral and Energy Committee 2013 <https://pmg.org.za/committee-meeting/16395/>

Mineral and Energy Committee *Mineral and Petroleum Resources Development Amendment Bill B15-2013: public hearings day 4* 2013
<https://pmg.org.za/committee-meeting/16395/> accessed 18 July 2025.

Parliamentary Monitoring Group 2007 accessed 14 November 2025

Parliamentary Monitoring Group 2007 *Submission on the Mineral and Petroleum Resources Development Amendment Bill*
<https://static.pmg.org.za/docs/2007/070530richard.htm> accessed 14 November 2025

South African Human Rights Commission 2016
<https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf>

South African Human Rights Commission 2016 *National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South*
<https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf> accessed 7 June 2024

Tlale 2022 <https://ssrn.com/abstract=4301934>

Tlale M 2022 *Victory for Informal Land Rights Holders: The Importance of Meaningful Consultation and Consent* <https://ssrn.com/abstract=4301934>
accessed 3 October 2025

United Nations Human Rights Office of the High Commissioner 2011
https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

United Nations Human Rights Office of the High Commissioner 2011 Guiding Principles on Business and Human Rights, Implementing the United Nations “Protect, Respect and Remedy” Framework
https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf accessed 25 July 2025

World Resources Institute 2007 <http://www.wri.org/publication/developmentwithout-conflict>

World Resources Institute 2007 *Development without conflict: The business case for community consent*
<http://www.wri.org/publication/developmentwithout-conflict> accessed 24 October 2025