

Access Denied: No mining permitted without prior consultation

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In South Africa, land ownership is separate from the right to mine minerals found in the land. The mining right holder is, however, given the right to enter land that it doesn't own to conduct mining operations. This leads to a conflict of rights when a mining company wants enter land that is being productively used as farmland or private housing.

Historically, the rights of a mining right holder trump the landowner's. If a landowner refused access, then the mining company could approach a court for an order forcing the landowner to give the company access. Any compensation payable to the landowner for the loss of the use of the property could be determined at a later date. A recent decision by the South African Constitutional Court has, however, shifted the balance of power from the mining company back towards the landowner. Even though this case dealt with the rights of a traditional community, the principles apply to all owners and lawful occupiers of land going forward.

In 2008 a mining company was granted a mining right. The company then concluded a lease agreement with the Bakgatla-Ba-Kgafela Tribal Authority to access the property. After the company started mining, 38 community members objected to the operations primarily on the argument that, (i) they were the true owners of the land, not the tribal authority; and (ii) the mining company had not consulted with them as the landowners before the mining right was granted.

In response the company alleged that they had properly consulted with the tribal authority. The company approached the High Court and was granted a court order (i) evicting the community members from the land; and (ii) preventing them from entering, or conducting farming operations, the land. In its reasoning the High Court applied a previous Supreme Court of Appeal decision (the **Maranda case**). It held that the mining company had attempted in good faith to comply with its consultative duties and were therefore free to start with their mining activities – if there was any compensation that was due to the community members, then the community members could claim compensation in terms of the "section 54 dispute process" in the Mineral and Petroleum Resources Development Act (**MPRDA**). It held that mining company didn't have to follow or exhaust the section 54 dispute process before it could access to the property.

The Constitutional Court disagreed, based on two questions. First, were the 38 community

members either owners or lawful occupiers of the property, and entitled to invoke the section 54 dispute process? If so, could the mining company get a court interdict to enforce its right to access the property before it exhausted the section 54 dispute process?

The court found that the community members had an "informal right to land" in terms of the Interim Protection of Informal Land Rights Act (**IPILRA**). This had not been extinguished when the mining company entered into the lease agreement with the Tribal Authority because the requirements of IPILRA were not followed. The community members were therefore lawful occupiers for the purposes of the section 54 dispute process.

The court then found that the mining company couldn't enforce its right to access the property before it exhausted the section 54 dispute process. This was to ensure the "balancing of the rights of mining right holders on one hand and those of the surface rights holders on the other. The eviction order was set aside.

The principles of this case apply to all lawful owners and lawful occupiers of land going forward. Practically, a mining company won't be able to access property and commence with operations unless (i) the commencement of mining operations has been permitted by regional manager, or (ii) the compensation that is payable to the landowners or lawful occupiers has been mutually agreed, or determined by a competent court.

The MPRDA section 54 dispute process

The section 54 dispute process is available if the owner or lawful occupier of a property (i) refuses access; (ii) places unreasonable demands for access; or (iii) can't be located.

The Department of Mineral Resources' regional manager must be notified, and the owner or lawful occupier may make representations. After considering the representations the regional manager has two options.

In extreme circumstances the matter may be referred for the government to expropriate the land.

Otherwise, the parties must agree the compensation payable to the owner or lawful occupier for the damage suffered. If an agreement can't be reached, the compensation payable will be determined by either arbitration or by a court.

If failure to reach an agreement is because of the actions of the mining right holder, then the Regional Manager may prohibit the commencement of operations until the dispute is resolved.

Were the community members entitled to the section 54 dispute process?

Only owners or lawful occupiers are entitled to the section 54 dispute process.

The community members alleged that they were the owners of the property because their ancestors had bought it in 1919. The property was, however, registered as being held in trust on

behalf of the Tribal Authority because the past apartheid laws prevented the property from being registered in their names as joint owners. The community members had instituted a separate claim in terms of the Land Titles Adjustment Act to rectify this on the property's title deed.

The court, however, found that it wasn't necessary to decide ownership because the community members were lawful occupiers in terms of the Interim Protection of Informal Land Rights Act. The company's mining right did not mean that the community's lawful occupation of the property was now unlawful.

The court then investigated if the company's lease agreement with the Tribal Authority stripped the community members of their informal land rights but found that the provisions of IPILRA hadn't been complied with in order to deprive the community of their rights.

The community therefore remained lawful occupiers, and were entitled to the section 54 dispute process.

Must the section 54 dispute process be exhausted?

The mining company sent a notice invoking the section 54 dispute process, but this was never followed up. The company argued that it wasn't necessary to exhaust the section 54 dispute process, and that this position was supported by the Supreme Court of Appeal's earlier decision in the Maranda case.

The Constitutional Court, however, emphasised two differences between the current case and the Maranda case. First, in the Maranda case the landowner refused all approaches by the mining right holder and the regional manager. It was clearly the landowner's objective to frustrate the objectives of the MPRDA through an unreasonable refusal.

More importantly, the Constitutional Court highlighted that the MPRDA had been amended, and the section providing for further consultation between the landowner and mining right holder for access was repealed (section 5(4)(c)). It was now imperative that the section 54 dispute mechanism is followed to balance the competing rights between an owner or lawful occupier on one hand and the mining right holder on the other.

In the future mining companies must consult

The Constitutional Court has made it clear that a mining company must engage with owners and lawful occupiers of property to agree terms of access. If there is a dispute on the terms, then the section 54 dispute process in the governing MPRDA must be followed.

However, I don't believe that the court's decision means a mining company may never be granted access commence operations without first agreeing terms. The section 54 dispute process provides that if there is no agreement on compensation because of the actions of the mining right holder, then the Regional Manager may prohibit the commencement of operations

until the disputes resolution. By implication this means that if the mining company is not at fault, then they may be granted access pending the disputes resolution.

The mining company must, however, consult. Consultation means meaningful consultation according to the principles outlined by the constitutional court in various judgements.

Without an attempt at meaningful consultation, access should be denied.

Citations:

Maledu and others v Itereleng Bakgatla Mineral Resources and Another [2018] SACC 41;

Joubert v Maranda Mining Company (Pty) Ltd [2009] ZASCA 68; 2010 (1) SA 198 (SCA);

Interim Protection of Informal Land Rights Act, No 31 of 1996 (**IPILRA**);

Land Titles Adjustment Act, No 111 of 1993;

Mineral and Petroleum Resources Development Act, No 28 of 2002 (**MPRDA**).

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