



MINING

A mining right is not a surface use right

15 October 2026 6 min read

by Bulelwa Mabasa, Director and Head of Land Reform, and Kathleen Louw, Director

South Africa's mining and land reform framework is entering a pivotal period of change. The Expropriation Act has been signed but is not yet in force, while the Mineral Resources Development Bill has completed public participation and is now before Parliament, where the Portfolio Committee has commenced its deliberation phase.

For mining companies, these legislative developments have a material bearing on whether a mineral resource can be successfully mined. In particular, the identity of the landowner is central to this inquiry.

This is particularly important in South Africa's changing mining geography. The minerals that built the industry were largely located on freehold land. However, many of the minerals that will increasingly sustain South African mining are situated within a different land rights landscape.

Three of South Africa's four world-leading mineral reserve positions – platinum group metals, chrome and vanadium – sit almost entirely on former homeland land. Manganese, the fourth, is located on freehold farms surrounded by communal land. Namaqualand's rare earths present another category altogether, involving land associated with the Transformation of Certain Rural Areas Act (TRANCRAA).

Several pieces of legislation are moving in parallel, governing how land may be acquired, who must be recognised as a rights holder and what consultation or consent may be required before mining can proceed. None has yet brought complete certainty.

Land reform itself is not one legal question but three. Restitution, under section 25(7) of the Constitution, concerns the restoration of rights lost as a result of racially discriminatory laws or practices after 19 June 1913. Redistribution, under section 25(5), concerns equitable access

to land going forward. Tenure reform, under sections 25(6) and (9), seeks to secure rights left insecure by racially discriminatory laws and practices.

A mining right can intersect with all three.

The distinction at the centre of the issue is relatively simple. The state holds mineral resources in custodianship, while surface land is not similarly held. A mining company therefore does not need to own the land to hold a mining right, but the granting of that right does not automatically resolve the rights of those who own or occupy the surface.

That distinction is particularly important on communal land, where registered ownership does not necessarily reveal who holds legally protected rights to occupy, use or make decisions about the land. Those rights may arise from the Interim Protection of Informal Land Rights Act (IPILRA), customary law or other tenure arrangements.

As previous disputes have shown, unresolved questions about who holds land rights can become questions about whether, and when, a mining right can be exercised.

In the absence of finalised legislative reform, the courts have played an important role in defining how these rights interact with the Mineral and Petroleum Resources Development Act (MPRDA).

In *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd*, the Constitutional Court confirmed that the granting of a mining right does not extinguish informal land rights. The Court also held that the dispute-resolution mechanism under section 54 of the MPRDA must be exhausted before occupiers can be displaced through eviction or interdict proceedings.

Baleni v Minister of Mineral Resources and Others further developed this position. Where IPILRA applies, full and informed consent is required – not MPRDA consultation alone. This places greater emphasis on identifying the actual holders of informal rights and ensuring that they have sufficient information to understand the proposed mining and its implications.

The distinction between consultation and consent is significant. Consultation cannot be the mere presentation of a decision already made. Affected persons must have a genuine opportunity to engage with and influence an outcome before it is finalised.

Early engagement, disclosure of relevant information and continued communication are therefore not merely procedural exercises. They can determine whether a project develops the relationships and legal certainty necessary to proceed.

The experience at Somkhele, Tendele Coal's anthracite mine in KwaZulu-Natal, demonstrates the practical consequences of leaving these issues unresolved.

Tendele Coal's mining right over the expansion area runs from 2016 to 2046 and was not set aside. The court nevertheless required the environmental process to be redone and IPILRA consent to be obtained. Approximately 1,600 employees were subsequently retrenched from June 2022 because the company could not access the new mining areas, while an estimated R4.7 billion in projected community benefit over the ten-year expansion period was held up.

The lesson is clear: while land rights do not prevent mining development, holding a valid mining right does not guarantee that it can be exercised.

The revised Mineral Resources Development Bill proposes a definition of "landowner" that includes holders of unregistered land rights protected by law. This reflects principles that have increasingly emerged through cases such as *Maledu* and *Baleni*.

The Equitable Access to Land Bill is also intended to give fuller effect to section 25(5) of the Constitution. The Communal Land Tenure and Administration Bill is intended to address the long-standing insecurity of communal land tenure and may reshape the legal framework within which informal and communal land rights are recognised.

For mining companies, a practical difficulty is that several categories of rights holders and claimants may overlap on the same land.

Restitution claimants, IPILRA rights holders and lawful occupiers under ESTA or the Labour Tenants Act are legally distinct groups governed by different statutes and remedies. Their rights may nevertheless overlap on the same property. An agreement with one group does not necessarily resolve the rights or claims of another.

This makes understanding the land rights landscape at the outset essential. A comprehensive land rights audit should extend beyond registered title to include restitution claims, informal land rights, lawful occupiers and servitudes. Consultation and consent processes should

be properly documented. Notices, attendance records, translated information, material disclosed to affected parties and the mandate of those participating may all become important if the validity of a process is subsequently challenged.

Where land ownership or tenure may change through land reform processes, agreements should anticipate those changes rather than assume that today's landholding arrangements will remain static.

The proposed reforms to mineral and land legislation will determine how rights are granted and, increasingly, how they can be exercised where several different legal interests coexist. South Africa's constitutional framework does not require a choice between mining development and the protection of land rights. It requires both interests to be properly recognised and balanced.

For mining companies, that means understanding not only what lies beneath the land but also who holds rights to its surface. Increasingly, both will determine whether a mineral resource can successfully become a mine.



Bulelwa Mabasa

Head of Land Reform

[View Profile](#)



Kathleen Louw

Director

[View Profile](#)