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Section 54 – Still a Bar to the Commencement of Mining Activity?

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On 5 December 2018, Werksmans published an article on the Constitutional Court Judgment: CCT 265/17 **Maledu v Itereleng Bakgatla Mineral Resources** ("the Maledu Judgment") which was handed down on October 2018. While celebrated for enforcement of the Constitutional imperative relating to security of tenure as contained in section 25(6), the Maledu Judgment was considered to have far reaching consequences for right holders ("RH") who face the prospect of significant delays imposed by the RM ("RM") in respect of the enforcement of their rights.

Six years on, and the concerns that the Constitutional Court had gone further than was necessary in the circumstances, have now been realised. In practice the industry has seen multiple instances where the RH was, as a result of the Judgment, effectively "interdicted" from commencing mining operations until the process set out in Section 54 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA") had "been finalised" even in circumstances where the landowner was at "fault" in demanding unreasonable compensation for access to the land.

By way of summary, the procedures in terms of Section 54 constitute statutory remedies in addition to any judicial remedies which the holder of *inter alia* a mining right might have-

- Section 5(3) of the MPRDA lays the foundation for the holder in that it deals with the legal nature of holders rights. Section 5(3) is, however, qualified by the words "Subject to this Act", thus bringing into play section 54. Consequently, this paves the way for the land owner or lawful occupier to bring spoliation action or interdictory proceedings were the holder simply to ignore the rights of the owner or lawful occupier.
- Section 54 makes provision the resolution of disputes between a RH on the one hand and the landowner or lawful occupier on the other. The view taken by the Constitutional Court was that in bypassing the express provisions of Section 54, the supervisory role of the RM (as the Director General's delegate) who is charged with the responsibility of administering and implementing the MPRDA, is undermined.
- Section 54(3) provides that if the RM, after having considered the issues raised by the holder, landowner or lawful occupier, concludes that the latter is likely to suffer loss or damage as a result of the mining activities, the RM must request the parties concerned to endeavour to reach an "*agreement for the payment of compensation for such loss or damage*".
- Section 54(4) provides that if the parties fail to reach such an agreement, compensation "*must be determined by arbitration or by a competent court*". Section 54(4) does not reveal who has the election of whether to proceed by way of arbitration or court proceedings. Recourse to "a competent court" is unlikely to opposed and the respondent can then raise as a defence the fact that the section 54 has not been exhausted as an internal remedy.

The Constitutional Court rejected the Respondents' argument that Section 54 merely dealt with issues regarding compensation and therefore such issues could run in parallel with access for mining. The Constitutional Court stated that "*having regard to the wording of this section, the submission is patently wrong*". However, the Maledu Judgment does not provide any justification for why the Respondents' argument was incorrect as the process under Section 54 was designed to finalise compensation for loss or damage suffered by a landowner or lawful occupier. It was not intended to provide a basis for halting mining operations.

It would seem that lower courts who are faced with disputes relating to Section 54 on a regular basis are starting to understand the implications of allowing litigants to use the Maledu Judgement as an informal manner of interdicting mining activity and have over the last six years seen this approach translate into a subversion of Section 5(3) of the MPRDA.

On 18 April 2024, the matter of ***Stuart Coal (Pty) Ltd ("Stuart Coal") vs CJ Williams en Seuns Boerdery (Pty) Ltd*** ("Williams Boerdery") and one other was heard before the Honourable Judge Langa in the High Court of South Africa Mpumalanga Division (Middelburg Local Seat). On 16 July 2024 Judgment ("Williams Boerdery Judgment") was handed down and the findings deal squarely with the interpretation of Section 54.

In summary Williams Boerdery (the landowner) refused Stuart Coal (the RH) access to the mining area because, *inter alia*, it argued that the parties had not reached an agreement on the compensation that Stuart Coal should pay for the loss or damage that Williams Boerdery would suffer because of mining activity on its land and that the Section 54 process to agree or determine such compensation had therefore not been finalised. Williams Boerdery (relying on the Maledu Judgment) argued *inter alia* that the non-exhaustion of the remedies provided for under Section 54 as interpreted in Maledu served as a bar for mining operations to commence. Stuart Coal on the other hand contended that this argument was incorrect as the facts were distinguishable to those in *Maledu* where the dispute related to competing rights and not compensation. In this matter, Stuart Coal argued that it had provided sufficient evidence that Section 54 had been substantially complied with and that if anything, Williams Boerdery had failed to sufficiently partake in the process directed by the RM.

One of the main questions that the Court was required to consider was therefore whether or not, based on the facts, the Section 54 process could be considered to be "finalised", therefore allowing the matter to be referred to arbitration or court. The facts in this matter played a material role in the interpretation of the Act. In the first instance, the matter was long standing and recourse to Section 54 failed to provide a quick dispute resolution mechanism led by the RM. Secondly, from the common cause facts there was sufficient evidence to support an argument that the failure to reach an agreement was due to the fault of Williams Boerdery, the landowner.

In his judgment, Judge Langa held *inter alia* that "*Nowhere in the section or the MPRDA is it provided that the compensation must be determined first before mining operations can commence*". He concluded that unless the RM has made a finding that the rights holder caused the collapse of the negotiations and makes the relevant prohibitory order, the RH should be entitled to mine pending the determination of the compensation through the processes provided for in section 54(4).

Whilst this judgment is binding only in Mpumalanga Division (Middelburg Local Seat), it is persuasive in any other High Courts and raises important issues regarding the interpretation of both Section 54 and the Maledu Judgment. Properly construed, Section 54 was merely intended to create and facilitate a quick dispute resolution mechanism led by the RM in respect of compensation to be paid and that that if this process fails, it must be dealt with in a different forum. Consequently, once there is a deadlock, the involvement of the RM in the mediation process must come to an end and so does the Section 54 mediation process. It will be interesting to see whether or not other High Courts, when seized with this question, also adopt this approach. Time will tell.



Kathleen Louw

Director

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