

The unrealised transformative potential of preferent community mining rights

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and Siphamandla Dhlamini, Candidate Attorney

The [Mineral and Petroleum Resources Development Act No. 28 of 2002](#) (“MPRDA”) was enacted with the express purpose of promoting equitable access to South Africa’s mineral resources and effecting social upliftment, as well as to expand opportunities for historically disadvantaged persons to enter into the mining economy, as embodied in the Constitution of the Republic of South Africa, 1996 (“**the Constitution**”). These and other goals are recognised as fundamental objectives in terms of section 2 of the MPRDA. The MPRDA must accordingly be read as a fundamentally transformative piece of legislation which radically changed the mining and mineral resource landscape in South Africa.

One often overlooked but potentially highly transformative provision of the MPRDA is section 104, which provides for preferent mining rights to be granted to communities. Section 104 provides for communities who wish to prospect or mine in respect of any mineral and land which is **registered or to be registered** in the name of the community. Provided that the community can fulfil certain requirements, the Minister must grant the preferent right to the community. Communities are exempt from the ordinary requirements of submitting a social and labour plan and from compliance with the Mining Charter. This section accordingly gives effect to several of the objects of the MPRDA as set out above.

However, the major shortcoming of section 104 is its failure to recognise that an estimated 60% of South Africans hold land or tenure outside the formal deeds registry system.^[1] These South Africans accordingly do not have land that is “registered or to be registered” in their name. This problematic issue is the focus of this article. By restricting the applicability of preferent rights to communities which have formal title, the majority of South Africans are prevented from benefiting from the transformative potential of section 104.

The position enounced in section 104 is also contrary to the definition of “community” as contained in section 1 of the MPRDA which describes it as “a group of historically disadvantaged persons with **interest** or rights in a particular area of land on which the members have or **exercise communal rights in terms of an agreement, custom or law. Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community.**” It is therefore clear that the MPRDA itself recognises that much of the communities in South Africa hold informal tenure rights and in some instances on land that has not been cadastrally surveyed.

Is section 104 accordingly to be interpreted to the exclusion of communities that are not the registered owners of the property they occupy, or has our case law developed to such an extent that we may ‘read in’ the inclusion of informal and unregistered rights in section 104?

CONSTITUTIONAL AND CASE LAW FRAMEWORK

The point of departure is section 39(2) of the Constitution which states that a statutory provision should be interpreted in accordance with the spirit, purport and objects of the Bill of Rights. Furthermore, it is now trite law that legislation ought to be

construed in a manner that is consistent with the Constitution, which has equality as its cornerstone.

In *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*^[2] the Constitutional Court emphasized the importance of considering the broader social and historical context within which a particular piece of legislation operates as well as the purpose for which it was enacted and the circumstances it seeks to remedy. Moseneke DJC, as he then was, stated at paragraph 53 –

We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation.

The court moreover emphasised that registered and formal title should not always enjoy primacy over indigenous law ownership particularly in matters related to land reform.^[3] The court held that indigenous title should be considered subject only the Constitution, and that the existence of registered title does not automatically extinguish indigenous title. In other words, formally registered ownership should not be elevated over informal rights in land, especially where doing so would be contrary to the transformational aspirations of the Constitution or legislation intended to give effect to a Constitutional imperative. A similar position was adopted in the matter of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*^[4] where the court clarified that both the MPRDA and the Interim Protection of Informal Land Rights Act, No. 31 of 1996 (“IPILRA”) are pieces of legislation that are aimed at redressing the South African history of economic and territorial dispossession in the form of apartheid, and as such should be read together as opposed to preferring one over the other.

In *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and others*^[5] Ngcobo J stressed that in interpreting legislation, one must firstly have regard to the place of transformation in our constitutional democracy which is one of transition from a society based on inequality to one based on equality. Secondly, one must have regard on how that specific provision to be interpreted is to be understood in the context of the Constitution and the Act. The court further cited with approval *Thoroughbred Breeders’ Association v Price Waterhouse*^[6] where it was stated that –

The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning.

The import of the above *dicta* is that, even in circumstances where a statute is clear and unambiguous, our courts have shown a strong willingness to adopt a purposive interpretation which places emphasis on the transformative aspirations of the Constitution and the purpose and context surrounding the particular statute.

As stated above, the MPRDA is a fundamentally transformative statute. It is accordingly conceivable that despite the clear reference to registered rights in section 104, a court may place emphasis on the transformational purpose sought to be achieved by the section and ‘read in’ a reference to indigenous or informal title as protected by IPILRA which is equivalent to registered ownership. However, the value of legal certainty dictates that it would be preferable for such a development to occur through legislative amendment.

CONCLUSION

Section 104 of the MPRDA is clearly intended to enable historically disadvantaged communities to mine on their land and to enter the mining industry. It is therefore puzzling that section 104 was drafted in a manner that seeks to exclude communities whose tenure of land is legally insecure as a result of the same past racially discriminatory laws which the MPRDA itself seeks to redress. What is even more peculiar is the fact that ordinary mining right applications under section 22 do not require ownership or any other rights in land. Therefore, rather than providing an effective and expedited process whereby communities can mine on their land, the section imposes additional restrictions which may render it inaccessible and impossible for many communities to enjoy and achieve the benefits envisaged in section 104. The purposes of section 104 would be much better served by expressly including indigenous, customary or informal rights in land which are equivalent or comparable to registered ownership, and the section should be amended accordingly.

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Footnotes

[1] <https://www.plaas.org.za/land-debate-in-south-africa-is-clouded-by-misrepresentation-and-lack-of-data-2/>

[2] [2007] ZACC 12.

[3] Ibid para 22.

[4] 2019 (2) SA 1 (CC).

[5] 2004 (4) SA 490 (CC).

[6] 2001 (4) SA 551 (SCA).



Refilwe Moitse

Director

[View Profile](#)



Thomas Karberg