

CASES / VONNISSE

THE INTRODUCTION OF “FREE, PRIOR AND INFORMED CONSENT” TO THE LAND REFORM LEGAL LEXICON

Baleni v Minister of Mineral Resources
2019 (2) SA 453 (GP)

1 Introduction

Although decided four years ago, *Baleni v Minister of Mineral Resources* (2019 (2) SA 453 (GP) (*Baleni*)) stands out regarding four significant features and it remains surprising that the decision has not attracted more attention in connection with the land-reform programme. The first feature was the interpretation of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). The second feature was the emphasis on customary law in the interpretation of IPILRA. The third feature was the application of multiple international-law instruments in the interpretation of IPILRA. The fourth feature was the court’s conclusion that these international-law instruments determine that no decisions may be taken regarding the lands of indigenous peoples without the latter’s “free, prior and informed consent” (FPIC). This conclusion has far-reaching implications for the South African land-reform process introduced by section 25 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

2 Purpose of IPILRA

The aim of IPILRA is to provide for the temporary protection of certain rights and interest in land that are not adequately protected by law for the duration of the land-reform process. Originally intended as a temporary measure, but owing to the complexity of the land reform programme, the application of the Act has been extended on an annual basis. The specific aim of IPILRA is to protect insecure rights held by many South Africans, especially in the previous so-called national states, self-governing territories and the South African Development Trust land. These so-called “informal rights” enjoy protection against deprivation similar to that afforded to traditional property rights. “Informal right” is broadly defined in section 1(1)(iii) of IPILRA. It includes the use of occupation of or access to land in terms of:

“(a) any tribal, customary or indigenous law or practice of a tribe.

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- (b) the custom, usage or administrative practice in a particular area or community.
 - (c) the rights or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established under an Act of Parliament.
 - (d) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997.
 - (e) the use or occupation of any erf as if the person is the holder of Schedule 1 or 2 rights under the upgrading of Land Tenure Rights Act 112 of 1991, although that person is not formally recorded as such in a land rights register.”

Section 2(1) of IPILRA declares that holders of such informal rights may not be *deprived* of any such rights without their *consent*.

3 Facts

Transworld Energy and Mineral Resources (SA) Pty (Ltd) (TEMR) applied for mining rights in the Xolobeni area in the Eastern Cape. Most of the applicants (who can be seen to be a “community” in terms of section 1 of IPILRA) lived in close proximity or even within the proposed mining area. It was not disputed that the applicants held informal rights to the land as defined in section 1 of IPILRA, and that they occupied such land in accordance with their laws and customs. It was also not disputed that the “community” was unequivocally opposed to the proposed mining activities. The applicants consequently applied for a number of declaratory orders, *inter alia* that the proposed mining activities would constitute a “deprivation” of their informal rights to land as contemplated in section 2(1) of IPILRA and, that being so, under this provision their full and informed *consent* was required prior to the granting of any mining licence.

TEMR and the State rejected the submission that such consent was required, and relied on the provisions of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which merely require “consultation” with a “community” before awarding mining rights to an applicant (e.g., TEMR) for such rights. The respondents submitted that the MPRDA trumped IPILRA.

In a nutshell, there was a fundamental dispute as to the interpretation of and relationship between IPILRA and the MPRDA regarding the “consent” requirement in section 2(1) of IPILRA. The court had to consider the interaction between the MPRDA and IPILRA and decide whether the *consultation* requirement contained in the MPRDA was included in the exclusions from the *consent* requirement contained in IPILRA. Complicating the issue was the fact that both the MPRDA and IPILRA were enacted to redress this country’s history of economic and territorial dispossession and marginalisation owing to apartheid. Both Acts had as their purpose the restoration of land to Black people who were the victims of historical discrimination.

4 The applicants

On the Wild Coast, there is an area known as uMgungundlovu, which is part of a coastline of great natural beauty. The sands on this coastline are extremely rich in titanium. Several hundred people (the applicants) have lived on this land for centuries according to their traditions and customs. These households are known in isiMpondo as the “imizi” and consist of approximately 650 individuals. The applicants represented 68 of these imizi and comprised 128 adults. As stated, it was not in dispute that the applicants held informal rights to the land as defined by IPILRA and that they occupied the land in accordance with their laws and customs.

5 The respondents

The respondents consisted of TEMR, the Minister of Mineral Resources (and the latter department’s Director-General, Deputy-Director General and a regional manager); and the Minister of Rural Development and Land Reform (and a Director-General of that department). These respondents comprised virtually the full array of state departments concerned with the exploitation of mineral resources and rural development and land reform.

It is an understatement to describe the dispute between the applicant community and the respondents as one of David-and-Goliath proportions.

6 The MPRDA

In terms of the MPRDA, the State (and no longer the common-law owner of the land) becomes custodian of all mineral resources on behalf of all the people of South Africa. As stated by the Constitutional Court in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (2011 (4) SA 113 (CC) (*Bengwenyama*) (par 31)), the MPRDA aims to place the country’s mineral and petroleum resources under the control of the State and to expand opportunities in the industry to historically disadvantaged persons – by considering and preferring applications for prospecting rights to historically disadvantaged persons and to communities who wish to prospect on communal land. Similar sentiments were expressed by Mogoeng CJ in *Agri SA v Minister of Minerals v Energy* (2013 (4) SA 1 (CC) (*AgriSA*) (par 1)), when he stated that legislative measures had been taken to facilitate equitable access in the mining industry to address gross economic inequality.

What these two Constitutional Court judgments were attempting to convey was summarised by the Constitutional Court in *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd* (2019 (2) SA 1 (CC) (*Maledu*) (par 1)), in which that court quoted Frantz Fanon’s *The Wretched of the Earth* ((1963) 43):

“For a colonized people the most essential value, because the most concrete, is first and foremost the land which will bring them bread and, above all, dignity.”

The Constitutional Court in *Maledu* embellished on this quote by stating that the clamour for redistribution of land in South Africa has not only heightened the interest in land but has also put at centre stage the socio-political discourse raging in the country (par 2).

Section 22(4)(b) of the MPRDA emphasises the importance of *consultation* in light of the impact of the granting of a mineral right on surface rights. *Bengwenyama* sees this consultation as comprising the involvement and active participation of the landowner in respect of possible interference with rights in respect of property, and meaning that the landowner must get all necessary information on everything that is to be done on the property (par 65–67) – in addition to the consultation process being procedurally fair.

The MPRDA goes no further than requiring consultation before the mineral right is granted. This has fundamental implications, the most important of which – as held in *Bengwenyama* (par 47) – is that the Minister may grant a mining right against the will of the common-law owner of the land, provided that there was prior consultation. At best for the landowner, section 5A(c) of the MPRDA states that the landowner is entitled to 21 days' notice prior to commencement of the mining operations.

7 IPILRA requirements

In contrast to the MPRDA, IPILRA requires *consent* before the granting of a mineral right. As with the MPRDA, IPILRA together with other pieces of legislation intended in terms of section 25(6) of the Constitution to redress the gross inequalities of the past. Section 25(6) of the Constitution specifically refers to past unequal access to land and insecurity of tenure, and states:

“A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”

As stated in *Mashava v President of the Republic of South Africa* (2005 (2) SA 476 (CC) (par 51)), our “shameful history” has to be redressed. IPILRA was adopted specifically to protect those who held insecure tenure because of the failure to recognise customary tenure. The short title of IPILRA sets out as its purpose to provide temporary protection “of certain rights and interests in land which are not adequately protected by law; and to provide for matters connected therewith”.

Section 1 of IPILRA defines a “community” as “any group or portion of a group of persons whose rights in land are derived from shared rules determining access to land held in common by such group”. *Baleni* held the Umgungundlovu community (applicants) to be such a community (par 54). This was not disputed by TEMR. (Even in terms of section 1 of the MPRDA, the applicants would be regarded as a community, being “[a] coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law”.) *Baleni* held that IPILRA is in the main concerned with the

protection of informal rights in land of those communities (such as the applicants) as defined in the Act and that, in terms of section 2(1) of IPILRA, the consent of a holder of an informal right is required before he or she may be deprived of property (par 55). Section 2 of IPILRA determines:

“Deprivation of informal rights to land.

- (1) Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.
- (2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community.
- (3) Where the deprivation of a right in land in terms of subsection (2) is caused by a disposal of the land or a right in land by the community, the community shall pay appropriate compensation to any person who is deprived of an informal right to land as a result of such disposal.
- (4) For the purpose of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.”

Because IPILRA recognises that there can be informal rights that are not held individually, but as a “community”, the Act provides that a “person” can include a community – hence section 2(2), which requires communal consent under the circumstances set out in section 2(1) above.

7.1 “Deprivation”

Does the grant of mineral rights over the land of the applicant community constitute a deprivation (in terms of section 2(1) of IPILRA) of their informal rights that would mean that the applicants’ consent was required? The court in *Baleni* (par 61), after referring to *Maledu* (par 98–102), accepted that the granting of mineral rights to TEMR constituted a “deprivation” in terms of section 2(1) of IPILRA, and that this triggered the *consent* requirement referred to in section 2(1). The court clearly saw the nature of a mining right as being invasive, intruding on the rights of the owner of the land or holder of informal rights to the land, thus constituting a “deprivation” of such rights.

Having accepted that the granting of a mineral right on the land of an informal rights holder was a deprivation of such rights, the court was confronted with an added question. This was whether in terms of section 2(1) of IPILRA the requirement of consent in the event of a deprivation was subject to the provisions of the “Expropriation Act ... or any other law which provides for the expropriation of land or rights in land”. Did this mean that the MPRDA was “*any other law*” and thus excluded from IPILRA’s consent requirement?

The court was not persuaded that, on a plain reading of section 2(1) of IPILRA, it could be inferred that the reference to “any other law” was a reference to the MPRDA (par 63). The court (par 63) was in agreement with

AgriSA (par 67–70) that the granting of a statutory mineral right under the MPRDA did *not* constitute expropriation.

7.2 *IPILRA and the MPRDA: Different purposes*

Taking the above into account, the court in *Baleni*, having regard to the overall purposes of the MPRDA and IPILRA and the historical context within which those two Acts operated, came to the conclusion that the two Acts purported to serve different purposes (par 75). The MPRDA set out to regulate mining activities in South Africa for the benefit of all South Africans. IPILRA, on the other hand, was enacted first to provide for the temporary protection of certain rights and interests in land that were not otherwise adequately protected by law owing to racially discriminatory laws of the past. Secondly, the provisions of IPILRA had to be interpreted benevolently so as to afford the holders of informal rights to land the fullest protection. Thirdly, during the interpretative exercise, the mischief that IPILRA sought to remedy must be kept uppermost in mind. Allied to this was the constitutional imperative to construe legislation (like IPILRA) in a manner consistent with the Constitution.

Despite holding, as mentioned above, that the MPRDA and IPILRA serve different purposes, the court, taking into account the status now afforded to customary law, could see no reason why the two Acts could not operate alongside one another (par 76). However, communities such as applicants must be afforded broader protection under IPILRA than the protection afforded to common-law landowners as contemplated under the MPRDA, when mining rights are considered by the Minister. As held by the court:

“That is not to say that the MPRDA does not apply. It does, but so does the IPILRA which imposes the additional obligation upon the Minister to seek the consent of the community who hold land in terms of customary law as opposed to merely consulting with them as is required by the MPRDA.” (par 9)

Seen in this way, the court held that the MPRDA and IPILRA can be interpreted and read harmoniously, except that, taking the clear purpose of IPILRA into account, the *consent* of holders of informal rights to land is required before they may be deprived of their land (par 76).

8 FPIC

The court’s major contribution to our jurisprudence in the context of the land reform programme was that indigenous communities must be given special protection in that, before being deprived of their informal rights and interests in land, it was necessary to gain their consent. Here the court applied various international-law instruments to justify this approach (par 78–82). These instruments all state that indigenous communities (such as the applicants) may grant or refuse their “*free, prior and informed consent*” (FPIC) regarding developments (such as mining) that will significantly affect their lives on the land where they live.

The seeds of FPIC were planted in common article 2 of the International Covenant of Civil and Political Rights (ICCPR) 999 UNTS 171 (1966) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS 3 (1966), which declares:

“All peoples may, for their own ends freely dispose of their natural wealth and resources, without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

FPIC has evolved into a norm of customary international law (Barrie “International Law and Indigenous People: Self-Determination, Development, Consent and Co-Management” 2018 51 *CILSA* 171). It is to be welcomed that Basson J in *Baleni* introduced FPIC into our land reform debate, and it is for this reason that it is surprising that the decision has not attracted the attention it deserves.

FPIC has had a major impact in countries with significant indigenous communities who are also grappling with land-reform issues. Random examples of such communities can be found in Australia (McRae *Indigenous Legal Issues* (2003); Host and Owen *Its Still In My Heart, This Is My Country* (2009)); Canada (Isaac *Aboriginal Law* (2004), Wilkins *Advancing Aboriginal Claims* (2004); Henderson *First Nations Jurisprudence and Aboriginal Rights* (2006); Newman *Revisiting the Duty to Consult Aboriginal Peoples* (2014); Barrie “The Canadian Court’s Approach to the Duty to Consult Indigenous Peoples: A Comparative Approach” 2020 53 *CILSA* 1); New Zealand (Knafla and Westra *Aboriginal Title and Indigenous Peoples* (2010); McHugh “Aboriginal Title in New Zealand: A Retrospect and Prospect” 2004 2 *New Zealand Journal of Public and International Law* 139); and the United States of America (Prevar *The Rights of Indians and Tribes* (2002); Sulton *Irredeemable America* (1985); Roberts *The American Indian in Western Legal Discourse* (1991)).

The court accepted that international law plays an important part in interpreting statutes. Section 233 of the Constitution (par 37) provides that “every court must prefer any reasonable interpretation of the legislation that is consistent with international law”.

The international-law imperatives that the court referred to (in emphasising that IPILRA requires FPIC of the applicant uMgungundlovu community before the proposed mining rights on their land could be granted) were the following: (i) *General Recommendation No XXIII: Indigenous Peoples* (1997) issued in terms of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (660 UNTS 195 (1965)); (ii) *General Comment 21: Right of Everyone to Take Part in Cultural Life* (E/C.12/GC/21 (2009)) of the ICESCR (ratified by South Africa); (iii) the *Angela Poma Poma v Peru* decision [2009] UNHRC 93 of the Human Rights Committee of the ICCPR and (iv) *Centre for Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya* 2009 AHRLR 75 (ACHPR 2009), a decision of the African Court of Human and People’s Rights (*Endorois* decision).

Since these international-law instruments and international-tribunal decisions are a significant part of Basson J's judgment regarding FPIC, these are now more extensively discussed.

8 1 General Recommendation XXIII issued in terms of CERD

According to the Recommendation:

3. The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.
4. The Committee calls in particular upon States parties to:
 - (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
 - (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
 - (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
 - (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informal consent.
5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such Compensation should as far as possible take the form of lands and territories."

8 2 General Comment 21 of the ICESCR

The General Comment states:

"[36] ... States parties must therefore take measures to recognize and protect the rights of indigenous people to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories."

8 3 *Angela Poma Poma v Peru* decision of the ICCPR's Human Rights Committee

The complainant in this matter owned an alpaca farm in a region of Peru where she and her family raised alpacas and llamas as their only means of

subsistence. These farming activities were practised according to the traditional customs of the family as part of the way of life for thousands of years and passed from generation to generation. Owing to water-diversion projects by the State, the grazing lands dried out. This situation was exacerbated when the government approved the drilling of wells, which led to the degradation of the pastures of farmlands, and this led thousands of animals to perish, which deprived the community of their only means of survival. It was not in dispute that the complainant was a member of an indigenous group and that the raising of llamas was an essential element of her community's culture as a form of subsistence. The committee took into account the failure of the State properly to consult with the affected community and to obtain their consent to the water-diversion projects that had had such a dramatic impact on the community's economic activities:

"7.6 In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free prior and informed consent of the members of the community. In addition, the measures must respect the principles of proportionality so as not to endanger the very survival of the community and its members."

8 4 The ACHPR's *Endorois* decision

The Endorois, an indigenous community, used to have their home around Lake Bogoria in the Rift Valley province of central Kenya. From the earliest times, they were regarded by neighbouring peoples as the *bona fide* owners of the land and their customary rights to "hold, use and enjoy" their lands went undisturbed, even under British colonial administration. Upon independence from Britain in 1963, the British Crown's claim to Endorois land passed to the relevant Kenyan County Councils, who were bound under section 115 of the Kenyan Constitution to hold the land in trust for the benefit of the Endorois community. In 1973, the Kenyan government evicted them from their ancestral land and went on to establish the Lake Hannington Game Reserve (re-gazetted and renamed the Lake Bogoria Game Reserve in 1978). The Endorois were thus deprived of their ancestral land, which was central to their religious beliefs and traditional cultural practices.

The Endorois sought restitution of their land with legal title as well as compensation for all the loss they suffered through the loss of their property, development and natural resources. The ACHPR found that Kenya not only failed to consult the Endorois people but also failed to obtain their "prior, informed consent, according to their customs and traditions" (par 291). The Commission ordered Kenya to recognise the rights of ownership of the Endorois people and restore their ancestral land. The State was also ordered to pay adequate compensation to the Endorois people for all loss suffered. (This case is discussed in depth by Barrie (2018 *CILSA* 171) and

by Beukes (“The Recognition of Indigenous Peoples and their Rights as a People: An African First” 2010 35 *SAYIL* 216)).

8.5 Supplementary support

Besides these four specific international-law tribunal decisions and developments referred to in *Baleni*, the court’s approach receives further overwhelming support. The Indigenous and Tribal Peoples Convention (International Labour Organization C169 (1989) EIF: 05/09/1991) in article 4 states that “special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of indigenous and tribal persons” and that “such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned”. The World Commission on Dams (in *Dams and Development: A New Framework for Decision-Making* (2000) 12) stated:

“In a context of increasing recognition of the self-determination of indigenous peoples the principle of free, prior and informed consent to development plans and projects affecting those groups has emerged as the standard to be applied in protecting and promoting their rights in the development process.”

A similar standard is emphasised by the World Bank (*Striking a Better Balance: The Final Report of the Extractive Industries Review* (2000) 21) when it concluded that indigenous peoples have the right to participate in decision-making and to give their free, prior and informed consent throughout each phase of a project cycle.

The right to FPIC has also been recognised within the Inter-American human-rights system. In the case of the *Saramaka People v Suriname* (Inter-Am Crt, HR (Ser C) No 172), the Inter-American Court of Human Rights held:

“When planning development projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major developments or investment plans that may have a profound impact on the property rights of members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior and informed consent of the Saramakas, in accordance with their traditions and customs.” (par 137)

This same approach was followed by the Inter-American Court of Human Rights in the case of the *Kichwa Indigenous People of Sarayaku v Ecuador* (Inter-Am Crt HR, (Ser C) No 245). In this case, the court held that, by failing to consult the Sarayaku people on the execution of a project that would have a direct impact on their territory, the State had failed to comply with the principles of its own domestic law but also with the principles of international law; it had failed to

“adopt all necessary measures to guarantee the participation of the Sarayaku people ... in accordance with their values, practices, customs ... in the decisions made regarding matters ... that could have an impact on their territory, their life and their cultural and social identity affecting their rights to communal property and the cultural identity.” (par 232)

Although the term “consent” is not used, this term can be clearly implied in the quoted paragraph. In the case of the *Kalina and Lokono Peoples v Surinam* (Inter-Am Crt HR (Ser C) No 309), a dispute originated between the State and the Kalina and Lokono indigenous peoples owing to the State’s actions in creating nature reserves on their territories without consulting them. The court concluded that the State had failed in not meeting its obligation of ensuring “free, prior and informed consultation” with the Lokono peoples (par 207 and 212). Here too, despite not using the term “consent”, it is clearly implied by the court (par 202–203; see Tomaselli and Cittadino “Land, Consultation and Participation Rights of Indigenous Peoples in the Jurisprudence of the Inter-American Court of Human Rights” in De Villiers, Marko, Palermo and Constantin (eds) *Litigating the Rights of Minorities and Indigenous Peoples in Domestic and International Courts* (2021) 148, 169).

9 UNDRIP

The international developments, recommendations and international-tribunal decisions discussed above have all been encapsulated in article 10 of the United Nations Declaration on the Rights of Indigenous Peoples (UN General Assembly (2007) A/Res/61/295) (UNDRIP), which declares:

“Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”

Repeated use of UNDRIP has gained it wide acceptance internationally and domestically. In the landmark case of *Cal v Attorney-General of Belize and Minister of Natural Resources and Environment* (Claims No 171 and 172 of 2007 (18 Oct 2007) par 131–133), the Supreme Court of Belize referred to UNDRIP as upholding the constitutional rights of the Maya people to their lands and resources. In Bolivia, UNDRIP was adopted at national level as Law No 3760 of 7 November 2007 and incorporated into the new constitution that was promulgated on 7 February 2009 (UN Permanent Forum on Indigenous Issues *Information received from the Governments* UN Doc E/C 19/2009/4/Add 2 (24 Feb 2009) par 26 and 57).

In a further landmark ruling, the ACHPR in the *Endorois* decision (par 155 and 204) held that UNDRIP is applicable to all African states regardless of whether they voted in its favour at the UN General Assembly – and regardless of whether indigenous rights are recognised as such in the state’s constitutional and legal framework. Sections 30, 31, 39(2), 39(3) and 211 of the South African Constitution accommodate customary law as part of the Constitution. South Africa, together with all UN member states except four – the United States, Australia, New Zealand and Canada – voted in favour of UNDRIP. The latter four states have since endorsed UNDRIP. (UNDRIP is analysed in detail by Barrie in “The United Nations Declaration on the Rights of Indigenous Peoples: Implications for Land Rights and Self-Determination” 2013 2 *THRHR* 292).

10 FPIC in a South African context

Basson J in *Baleni* has introduced FPIC into our legal lexicon – especially in regard to its application to the land reform programme. FPIC may be described as a broad and comprehensive right, with attendant obligations on the State. FPIC must be distinguished from consultation, which consists merely of an exchange of views, and which in most instances excludes decision-making on the part of the indigenous peoples (e.g., holders of informal rights to land).

It is submitted that, for practical purposes, FPIC should be interpreted as follows: “Free” means the absence of coercion and outside pressure, including monetary inducements. Indigenous peoples such as the applicants must be able to say “no” and not be threatened with or suffer retaliation if they do so. “Prior” means that there must be sufficient time to allow information-gathering and -sharing processes to take place, including translations into traditional languages. Verbal dissemination according to the decision-making processes of the indigenous peoples is imperative. This process must take place without time pressure or constraints. “Informed” means that all relevant information reflecting all views and persons must be available for consideration by the indigenous community concerned. This includes the input of traditional elders and traditional knowledge holders. The decision-making process must allow adequate time for the indigenous peoples to consider impartial and balanced information as to the potential risks and benefits of the proposal under consideration. “Consent” is the clear and compelling demonstration by the indigenous peoples concerned of their agreement to the proposal under consideration. The mechanism used to reach agreement must itself be agreed to by the indigenous peoples concerned and must be consistent with their customary decision-making structures and criteria. Agreements must be reached according to the traditional consensus procedures.

Ayoade (“Towards ‘Free, Prior, Informed Consent’ in Natural Resource Development Projects” 2019 44 *SAYIL* (journal not paginated)) sets out a conceptual basis of FPIC and its nature and extent (see further MacKay “Indigenous People’s Rights to Free, Prior and Informed Consent and the World Bank’s Extractive Industries Review” 2004 4 *Sustainable Development and Policy* 50; McGee “The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development” 2009 27 *Berkeley J Int L* 570; Tamarg “An Overview of the Principle of Free, Prior and Informed Consent and Indigenous People in International Law and Practices” 2005 9 *Australian Indigenous Law Reporter* 111).

The author’s submissions and references to the interpretation of FPIC in the South African context must be augmented by noting the importance of customary law in our new constitutional dispensation, as was emphasised in *Bhe v Magistrate Khayelitsha* (2005 (1) SA 580 (CC) (par 41)):

“Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be

accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. Sections 30 and 31 of the Constitution entrench respect for cultural diversity.”

As stated by Basson J in *Baleni* (par 70), the status of customary law has likewise been acknowledged and endorsed by the Constitutional Court in *Alexkor Ltd v Richtersveld Community* (2004 (5) SA 460 (CC)):

“While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The Courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights. Our Constitution ... does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill of Rights.

...
It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time, the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation that is consistent with the Constitution and that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.” (par 51)

11 Conclusion

The conclusion of Basson J in *Baleni*, succinctly put, was that, in keeping with the purpose of IPILRA, the applicants have the right to decide what happens to their land (par 83). As such, they may not be deprived of their land without their consent. Where the land is held on a communal basis, the community must be placed in a position to consider the proposed deprivation and be allowed to take a communal decision in terms of their custom and community on whether they consent or not to a proposal to dispose of their rights to their land.

A declaratory order was made that the Minister of Mineral Resources lacked any lawful authority to grant a mining right to TEMR in terms of the MPRDA unless the provisions of IPILRA were complied with by all the respondents representing the State. It was also declared that in terms of IPILRA the Minister of Mineral Resources was obliged to obtain the *full and informed consent* of the applicant uMgungundlovu community as informal holder of rights in land before granting any mining right to TEMR in terms of the MPRDA.

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