How the 2020 MPRDA regulations continue to deny
& undermine black property rights

The Minerals and Petroleum Resources Development Act (MPRDA) governs mining and the issuing of prospecting and mining rights by government. On the 27th March 2020, during the Covid 19 lockdown, Minister Gwede Mantashe published new Regulations to the MPRDA . The regulations are seriously problematic. They deny the constitutionally protected property rights of black South Africans in defiance of the unanimous October 2018 *Maledu* judgment of the Constitutional Court.

This document begins by examining key provisions in section 25 of the Constitution. Section 25 deals with property rights and includes three important land rights aimed at addressing past dispossession and exclusion. These are the right to equitable access to land (redistribution) in section 25(5), the right to tenure security in section 25(6), and the right to restitution for past forced removals in section 25(7). This background helps us examine and understand key features of the 2020 MPRDA regulations. It shows how the regulations seek to undermine the Constitutional right to tenure security, and also the Constitutional Court's *Maledu* judgment.

The South African Constitution – section 25(1)

Section 25 (1) of the Constitution says that no one may be deprived of property except in accordance with a law that applies equally to everyone, and that no law can allow for arbitrary deprivation (taking away) of property.

Yet we know of mining companies who have got away with evicting people from land without any due process to terminate or expropriate their surface rights. How have mining companies got away with this?

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Mining companies and government have relied on crude and oversimplified notions of property rights to confuse people. They say that the MPRDA vests custodianship of the mineral rights in the state. This is true, but that does not mean that the surface rights to the land are automatically expropriated. If that were true, why would mining companies routinely sign surface lease agreements with white landowners? They know they must compensate them for the surface rights the farmers can no longer use when their land is taken over for mining activities.

This brings us to the second oversimplification. Mining houses and government tend to treat only title deeds holders as having surface rights that require negotiation and compensation. Yet there are other categories of people who have various types of property rights to the surface of the land, for example lawful occupiers, the holders of informal land rights, the holders of customary land rights and labour tenants.

The South African Constitution - sections 25(6) and 25(9)

Our Constitution includes a specific right to tenure security that recognises and seeks to address the structural vulnerability of the *de facto* (existing in practice) land rights of most South Africans. The context is that most black people were denied formally recorded land rights by colonial and apartheid laws. In practice, black people continued to live in so-called 'white' South Africa but without recorded property rights to the houses and land they knew to be home.

Section 25(6) of the Constitution 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 alternative redress.

Section 25(9) of the Constitution states

Parliament must enact the legislation referred to in subsection (6)

IPILRA was enacted in 1996 to give effect to sections 25(6) and 25(9) of the Constitution. In brief, IPILRA defines customary land rights, and *de facto* (as they exist in practice) occupation and use of land in the former homelands to be informal land rights. It provides that no one may be deprived of their informal right to use, occupy or access land without his or her consent, except by expropriation.

This is consistent with widespread international recognition of *de facto* occupation and use rights. There have been many international land reform programmes aimed at transferring ownership from absent, often distant 'owners' to the people who actually occupy and farm the land in practice. These are called 'land to the tiller' land reform programmes. In South Africa IPILRA puts it beyond doubt that informal land rights are also property rights, requiring specific legal processes before deprivation can take place.

The MPRDA regulations

Both the MPRDA itself and the new regulations attempt to misrepresent the issue of property rights. They do this in a number of ways

- They include a **long list of interested and affected parties** to be included in consultations about social and labour plans and environmental impact assessments. They fail to differentiate between people whose property rights are directly affected, and others who may be hardly affected by mining. This is in breach of IPILRA, which protects the land rights of people **who are directly affected and will suffer deprivation**, not neighbouring villages, regardless of the tribal boundaries superimposed during apartheid.
- The processes of consultation that the MPRDA and the regulations set out are **not about the property rights at stake**, but about **other issues, such as social and labour plans, and environmental issues**. These are very

important issues, and there has been serious abuse and secrecy in relation to both. However to focus consultation exclusively on these two issues disguises the **fundamental failure of the Act and the regulations to deal with property rights and the termination of surface rights** to the land.

- The Maledu judgment found that the MPRDA must be read in conjunction with IPILRA. **The new regulations would have been the ideal vehicle for aligning the two laws and ensuring that the procedures set out in terms of the MPRDA built in compliance with IPILRA.** Instead the regulations ignore and override compliance with IPILRA.
- The final 2020 regulations do not deal with section 54 of the MPRDA that governs disputes about compensation and resettlement. The 2019 draft regulations had included section 54. Officials from the DMR say that section 54 was left out of the final regulations because it will included in future Guidelines about Resettlement. LARC has made a submission about the draft Resettlement Guidelines. They too, ignore and override IPILRA. The people whose property rights are directly affected are not separately identified or prioritised in the consultation process set out in the guidelines. This falls foul of both IPILRA and section 25(1) of the Constitution. To add insult to injury, the Resettlement Guidelines are simply 'guidelines' for people applying for mining and prospecting rights. They do not have the force of law of regulations.

The Maledu Judgment

The Maledu judgment deals with an appeal against an eviction order. The North West High Court had earlier granted an eviction order against villagers from Lesethleng village, which falls within the Bakgatla ba Kgafela area. Previous generations of the villagers had clubbed together to buy the farm in 1819. However, at the time of purchase, racially discriminatory laws prohibited them from registering the farm in their own names, as co-purchasers. Their only option at the time was to register it in the name of the Bakgatla ba Kgafela 'tribe', which is comprised of many farms and

32 different villages. It was, however, widely recognised that the land belonged to the purchasers and their descendants, who farmed the land for a hundred years until they were threatened with displacement by mining.

Itereleng Bakgatla Mineral Resources, a company headed by Kgosi Nyalala Pilane wanted the Lesethleng villagers' farm in order to expand mining operations. The villagers refused to vacate the land, partly because there had been no direct negotiations with them, nor were they offered compensation. Instead the mining company entered into a surface lease agreement with the overarching tribe headed by Kgosi Pilane. In applying for an eviction order the mining company relied on the argument that once a mining right is granted by the state, it takes precedence over the rights of landowners and lawful occupiers who are using the surface of the land. The Constitutional Court struck down the eviction order, and found by contrast, that:

The existence of a mineral right does not itself extinguish the rights of a landowner or any other occupier of the land in question (para 103)

In the context of this case, this means that the award of a mining right does not without more nullify occupational rights under IPILRA (para 106)

The court found there to be no conflict between IPILRA and the MPRDA. IPILRA is often ignored by mining houses and by government despite the fact that it explicitly protects informal land rights throughout the former homelands.

The Constitutional Court found that the MPRDA does not override IPILRA; both laws must be complied with. In other words, people whose informal land rights are affected by mining must consent before deprivation can take place. If they refuse, then a court must oversee the expropriation of, and compensation for their rights. Informal land rights cannot simply be ignored and over-ridden by government and mining houses. The judgment states:

Significantly, both statutes [MPRDA and IPILRA] make provision for the expropriation of land if all else fails (para 106)

Conclusion

IPILRA protects rights to occupy, use and access land. Rights of occupation are held by families, and will need to be negotiated family by family. Rights to fields are similarly owned by families, and will need to be negotiated family by family. It is only use rights that are 'communal' in the sense that they are shared by groups of users. Examples include shared access to grazing land, forest products, or thatching grass. Here again, the people who actually share and use these rights will have to be identified. None of this is clarified in the Regulations, which continue to encourage mining companies to negotiate directly with traditional leaders as the 'representatives' of 'tribal' communities.

Mapping mining activities onto the land, and identifying the people who occupy, use, and access that land are things that mining companies routinely do. This straight-forward mapping and stakeholder identification exercise is intrinsic to most development projects and could easily have been built into the regulations so that the holders of affected property rights are engaged with separately about their property rights.

Instead of the regulations providing guidance about how to map and identify the holders of informal land rights, the regulations continue to lump the holders of property rights in with much larger groups of people with divergent interests whose property rights are not at stake. The push is for the mining companies to engage with traditional leaders as opposed to the people whose land rights are directly affected.

This is illustrated by the definition of landowners in 1(d)(ii) of the Regulations.

Landowners Traditional Council as defined in section 1 of the Traditional Leadership and Governance Framework Act

The 2019 draft regulations had read

Landowners (traditional and title deed owners)

But that seems to have been too ambiguous for the Ministry of Mineral Resources. The current wording is bizarre in that excludes people with title deeds from the definition of 'landowner'. It attempts to convert traditional leaders into landowners despite the legislation that previously attempted to do so, the Communal Land Rights Act of 2004, having been struck down by the Constitutional Court in 2010 in the *Tongoane* judgment.

Much as the Minister may want traditional leaders to be landowners, and much as he may want rural people to have no property rights or decision-making authority over their land, he is bound by the Constitution. To publish regulations that define traditional leaders to be landowners and ignore the property rights of ordinary people will contribute to conflict, resistance and more unlawful evictions, but it will not survive Constitutional scrutiny in the long run.