

## **Landowner compensation agreements – a possible halt to mining?**

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Compensation for a landowner or lawful occupier where there has been, or may be, loss or damage suffered as a result of mining operations is provided for in section 54 of the Mineral and Petroleum Resources Development Act ("**MPRDA**"). Prior to the Constitutional Court's judgment of *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* ("**Maledu**"), handed down in October 2018, the position was that this compensation process could take place in tandem with mining operations. In other words, mining could commence while compensation negotiations were ongoing. The *Maledu* judgment has changed this position.

Section 54 of the MPRDA is triggered in two events: firstly, where a mining company is refused access to the land which it intends to mine by the landowner or lawful occupier, and secondly where the landowner or lawful occupier has suffered, or is likely to suffer, loss or damage as a result of mining operations. In both instances, the Regional Manager at the Department of Mineral Resources and Energy *must* be notified. Within 14 days of receipt of this notification, the Regional Manager is obliged to request written representations from both sides, consider these and on this basis, determine whether the landowner or lawful occupier has suffered, or is likely to suffer, loss or damage. Where the Regional Manager concludes that there has been, or may be, loss or damage, the parties will be directed to reach an agreement on compensation for such loss or damage. Compensation negotiations must then take place. In practical terms, reaching an agreement on what is fair and acceptable compensation will invariably take a significant amount of time and will in most cases require external specialist input (whether legal or to assess the quantum of loss or damage). Section 54 of the MPRDA further caters for a situation where an agreement cannot be reached, in which case, the parties may agree to arbitration or seek relief from the courts. Again, in practical terms, undertaking either of these processes will probably be time-consuming and expensive. Lastly, section 54 of the MPRDA, read with section 55, empowers the Minister of Mineral Resources and Energy to expropriate the land on the basis that certain of the objects of the MPRDA are being undermined (expropriation similarly being a lengthy process).

The section 54 compensation process has typically played out within the following factual matrix:

- The mining operation obtains the requisite approvals to mine, namely a mining right in terms of the MPRDA and an environmental authorisation in terms of the National

Environmental Management Act (in addition to any other required authorisations, such as a water use licence or rezoning approval). In applying for both a mining right and an environmental authorisation, there are certain mandatory public participation requirements, which include consultation with the landowners and lawful occupiers (as well as any other affected stakeholder, such as neighbours and the surrounding community).

- Once all the required approvals are in place, the mining company then tries to gain access to the land in order to mine.
- The landowners or lawful occupiers refuse the mining company access.
- The mining company notifies the Regional Manager in terms of section 54 of the MPRDA (as it is statutorily required to do).
- The Regional Manager in all likelihood finds that there will be loss or damage suffered by the landowners or lawful occupiers, and the potentially very prolonged process of agreeing on compensation begins.
- In order to gain access to the mining area (and commence with mining) in the interim, the mining company seeks recourse from the courts, namely an interdict against the landowners or lawful occupiers from refusing it access.

Prior to the 2018 *Maledu* judgment, a court would grant such an interdict, *notwithstanding* that the section 54 compensation process had not been finalised. This position was notably endorsed by the Supreme Court of Appeal in 2009 in the case of *Joubert v Maranda Mining Company (Pty) Ltd* which held that a mining company would be entitled to access the land in question provided it had obtained the necessary approvals and complied with the associated consultation requirements.

The Constitutional Court's *Maledu* judgment changes this position in the case of *interdicts*. In this respect, one of the requirements of an interdict is that there is no *other* satisfactory remedy. The central question for the Constitutional Court in *Maledu* was whether section 54 of the MPRDA constituted another such remedy which must then be exhausted *before* an interdict may be sought. In other words, whether a mining company is precluded from obtaining an interdict until the section 54 compensation process has reached finality. The Constitutional Court answered in the affirmative – where triggered, the section 54 compensation process is an alternative satisfactory remedy to that of an interdict and therefore must be exhausted before a mining company may be granted an interdict. In this respect, the Constitutional Court held that "*section 54 ... provides for a speedy dispute resolution process ... [Section 54 of the MPRDA] ... also provides that if parties fail to reach an agreement, then they may approach a court [or undertake*

arbitration]. *It is unclear why, pending the finalisation of this process, a mining rights holder should be entitled to mine. On the contrary, to allow them to do so will undermine the purpose of section 54 and the MPRDA: to strike a balance between the interests of the mining right holder and the [land]owner [or lawful occupier]. ... [Further if] the Regional Manager concludes that any further negotiations may detrimentally affect the objects of the MPRDA, he or she may recommend to the Minister that the land be expropriated in terms of section 55."*

The take-home is this: if the section 54 compensation process has been triggered (bearing in mind that it may be triggered by *either* the mining company or the landowner/lawful occupier), it is unlikely that a court will grant an interdict (which may mean that mining cannot commence) until this process has been finalised. As alluded to above, the finalisation of this process may take months, if not years. As such, there is a risk that landowner compensation agreements may become a possible halt to mining.