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Maledu judgment: a victory for the Constitution

On the 25th of October 2018, the Constitutional Court delivered a unanimous judgment in the matter of *Maledu and Others v Itereleng Bakgatla Mineral Resources.* The Land and Accountability Research Centre, on behalf of one amicus curiae in the matter, sought to introduce expert evidence concerning the history of how land rights under customary law were treated prior to 1994.

The Constitutional Court upheld an appeal by the Lesethleng community, who were defending themselves against an eviction order granted against them in favour of two mining companies, Itereleng Bakgatla Minerals Resources and Pilanesberg Platinum Mines, in the Mahikeng High Court. Kgosi Nyalala Pilane, senior traditional leader of the Bakgatla Ba Kgafela and a director of the company that instigated the eviction, relied on the fact that a *kgotha kgothe* (general assembly) of the overarching Bakgatla 'tribe' had decided to support the mining and terminate the rights of the Lesethleng villagers whose land was targeted for mining.

The judgment affirms that the Mineral and Petroleum Resources Development Act (MPRDA) must be read concurrently with the Interim Protection of Informal Land Rights Act (IPILRA) and that mining activity and the MPRDA cannot trump the rights of the 17 million South Africans living in the former homeland areas to tenure security in section 25(6) of the Constitution. The implication of the Court's judgment is that the people directly affected by mining must consent to any changes affecting their land rights *before* mining commences in terms of the processes set out in IPILRA.

This judgment sets a powerful precedent that deals brokered between mining houses and traditional leaders, without the consent of those directly affected, infringe on the Constitutional rights of people whose tenure security is already vulnerable as a result of past discriminatory laws and practices – and it has great significance currently in relation to the Traditional and Khoi-San Leadership Bill (TKLB) and review of section 25 of the Constitution. It also fits into broader ongoing struggles for rights and accountability in former homeland areas, particularly those areas that affected by mining.

The TKLB, which is dangerously close to being passed by Parliament, gives traditional leaders and traditional councils sole decision-making authority over those living within the former homelands. Clause 24 of the TKLB provides that traditional councils, headed by traditional leaders, can sign deals binding all the people within their apartheid-era tribal jurisdictions without obtaining the consent of those whose land rights are undermined or dispossessed by such deals. The deals may be with mining companies, property developers, tourism ventures, agricultural companies, municipalities or anybody else. This clause is necessary only because currently traditional leaders do not have the legal authority to sign deals on behalf of their 'subjects', and certainly not without their consent. Last-minute amendments proposed by the Department of Traditional Affairs are being justified as a response to concerns that the TKLB conflicts with IPILRA. Yet instead of stating that the TKLB is subject to IPILRA, which the Constitutional Court has now done in respect of mining deals, the proposed amendment seeks to override IPILRA. This could effectively dispossess people living within the boundaries of traditional communities of their tenure security and property rights.

The judgment thus represents a key moment of confluence between the legal precedent being set in courts, struggles taking place on the ground, and law-making processes seemingly aimed at undermining rural democracy and land rights. It similarly illustrates the inter-connectedness of existing land, mining and traditional governance issues in the former homelands. The only way for the TKLB to be consistent with the approach in *Maledu* is for it to state explicitly that it is subject to the Constitutional rights that IPILRA was enacted to protect and secure. Failing to do so raises serious red flags about the Bill's constitutionality.

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