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Declaration

1. I declare that this dissertation is my own work and that I have not copied the work of another student or author.

2. I declare that the written work is entirely my own except where other sources are identified.

3. I certify that this research paper has not been submitted in this or similar form in another module at this or any other University.

Sicelo B Bhengu

Signed: _____ Date: 23 November 2020

Approved for final submission:

Promoter: Professor M.A.Kidd

Signed: _____ Date: _____

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To the Creator of creation, be exalted! I trust that this is a meaningful contribution to the advancement of humanity.

Abstract

In developing economies, large infrastructure projects are inevitable. In certain instances of infrastructure development, displacement of people, although it may be inadvertent, is ineluctable. Whilst there remains an option not to displace people from their homes, this option is often neither attractive nor economically viable as it may erode the return on investment. Therein lies the conundrum: the developer's drive for return on investment competes with upholding the respect of human dignity.

The study looks at global and domestic practices applied when undertaking resettlement caused by involuntary displacement. In the review of practices applied in undertaking relocation and resettlement, the focus is mainly on two processes. Firstly, there is the framework that underpins the process of consultative public participation or involvement. Secondly, it evaluates practices and processes to determine full recompense for replacement of loss.

The review of the theoretical framework underpinning public involvement and compensation for loss encompasses the evaluation of assurance protocols, models, guidelines and standards including those that are endorsed by international multilateral institutions and organizations. The relevance and application of key requirements for public participation and compensation within the South African situation is evaluated in relation to their use when handling impacts of displacees affected by infrastructure-induced projects.

It seems that the failure to make provision for a meaningful voice through public participation undermines and excludes the views and feedback from interested and *mainly* affected parties when infrastructure development projects are executed. This is contrary to the intent of the global standards, Constitution, NEMA, MPRDA and its regulations on consultation, public involvement and determination of compensation for loss.

In spite of the provisions of South African legal and regulatory instruments on public involvement and determination of compensation for loss, there are still areas needing improvement in order to meet international standards. This study submits areas of improvement to close gaps in regulatory and applicable practices.

Mozambique's Regulations for the Resettlement Process Resulting from Economic Activities[1] is recommended as a good practice. It is suggested that this example of regulations can be adapted to improve domestic framework for meaningful public participation and compensation for loss in situations of involuntary displacement.

Recommendations to ensure that future projects treat displacees in a transparent manner with dignity and protect their rights, assets and livelihoods, are suggested. The study suggests that Sapkota and Ferguson's framework, which incorporates principles of sustainable development, are adopted. This will ensure that implementers adopt a theoretical framework that endeavours to accomplish a meaningful and sustainable resettlement. The study submits specific considerations in determining how to calculate compensation methods and rates.

[1]Regulations for the Resettlement Process Resulting from Economic Activities Decree 31/2012 ACIS www.acismoz.com

Acronyms and Abbreviations

CPI: Consumer price index.

DFA: Development Facilitation Act.

EIA: Environmental impact assessment.

ECA: Environmental Conservation Act.

EMP: Environmental management programme.

FPIC: Free prior informed consent.

ICMM: International Council on Mining and Metals.

IFCPS: International finance corporation performance standard

IDA: Infrastructure Development Act

IPILRA: Interim Protection of Informal Land Rights Act.

MPRDA: Mineral and Petroleum Resources Development Act.

NEMA: National Environmental Management Act.

NEMPAA: National Environmental Management of Protected Areas Act.

PAIA: Promotion of Access to Information Act.

PAJA: Promotion of Administrative Justice Act.

S: section.

Ss: sections.

s24: section 24 of NEMA.

SPLUMA: Spatial Planning and Land Use Management Act.

SAPVP: South African Property Valuers Profession.

RLRA: Restitution of Land Rights Act.

UN: United Nations.

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Table 2: Suggested insertions to the NEMA EIA Regulations listed or specified activities.

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CHAPTER ONE: INTRODUCTION AND BACKGROUND

1.0. Introduction

Chapter 1 first looks at the context of the research, including the general problem statement, rationale, and objectives of the study. These are followed by the research questions, methodology and limitations of the research.

1.1 Background and Context

Increasingly around the world, including South Africa, large-scale infrastructure developments encroach upon communities and areas of habitation. This may lead to frequent occurrences of involuntary displacement whereby affected people are required to relocate. According to Terminski, in order to advance the welfare and wellbeing of people, the world has seen massive economic development through large-scale infrastructure projects in the last century.[2]

South Africa is not immune to this large-scale infrastructure development. As Makhanya[3] notes: 'South Africa as a developing country has a challenge to meet the needs of economic growth. The challenge of economic growth requires infrastructure development to satisfy, for example, the electricity demands, water supply and other services of a growing and developing population.'

Historical and recent instances of involuntary displacement, which in turn causes relocation and resettlement, are recorded globally and locally. According to Sapkota and Ferguson,[4] development projects displace about 10 million people globally each year.

Terminski, Makhanya and Banashree state that global economic development[5]induced movements displace 15 million people across the world each year.

[2]B Terminski 'Development Induced displacement and resettlement: theoretical frameworks and current challenges'(2013) at 26

[3]K K Makhanya *An evaluation of a development –induced relocation process in the Ingquza Hill Local Municipality* (2015) 10

[4]S Ferguson and N Sapkota 'Involuntary resettlement and sustainable development conceptual framework, reservoir resettlement policies, and experience of the Yudongxia reservoir' no 9 (2017) at 2

[5]B Terminski (n2) at 26 states that 'Economic development is not undertaken to improve the lives of all the inhabitants of a country, but to serve the interests of government, private business or narrow social elites. Economic development, rather than contributing to the expansion of personal and communal freedom, in many regions becomes a cause of progressive enslavement and marginalization of an increasing number of people.'

In the 1980s and 1990s, 10 million people worldwide were estimated to have been displaced by development projects.[6]

According to Human and Steyn,[7] 90 to 100 million people were displaced in the last decade, with 40 to 80 million due to large-scale dam construction. Furthermore, they estimate that 250 million people will be displaced in future because of climate change. Adeola[8] describes the extent of displacements arising from mining, oil and agriculture-related developments.

These include displacement of 2,000 families in Mozambique, 30 000 people being relocated for gold mining in Ghana, 4,537 people in Sierra Leone, violent displacement of individuals and burning of 6,000 houses in Sudan, and the displacement of 7,000 people in the Niger Delta in Nigeria. Smyth and Vanclay[9] describe negative impacts of displacement as causing landlessness, joblessness, homelessness, marginalization, food insecurity, increased morbidity, and loss of access to community services and assets and social disarticulation.

The act and process of moving people during the implementation of large-scale infrastructure is described using various terminology depending on the circumstance and locality. In South Africa some of the practices and phenomena of induced relocation and resettlement have similar attributes to global characteristics described in the next paragraphs.

Involuntary displacement is characterised firstly by the absence of consent and wilful choice. Secondly, involuntary displacement is characterised by eviction without adequate compensation or social support. Thirdly, it is described as an act of deprivation and dispossession if meaningful recompense is not put in place as a mechanism to mitigate resettlement impacts. The absence of consent, deprivation and inadequate compensation as attributes of displacement implies plausibility for disregard

[6]B Terminski(n2)13, K K Makhaya (n4)5, & B Banashree & M van Eerd 'Working Paper 1: Evictions, Acquisitions, Expropriations and Compensation: Practices and selected case studies' (2013) *UN-Habitat* at 38
[7]W J Human & H Steyn 'Establishing project management guidelines for successfully managing resettlement projects' *South African Journal for Business Management* (2013) at 1
[8]K Adeola 'The responsibility of business to prevent development induced displacement in Africa' (2017) vol 17 *African Human Rights Law Journal* at 246-251
[9]E Smyth & F Vanclay 'The Social Framework for Projects: a conceptual but practical model to assist in assessing, planning and managing the social impacts of projects' (2017) *Impact Assessment and Project Appraisal* at 67

of basic rights. This is in conflict with universal human rights and the South African Constitution.

Yumba states that 'resettlement, removals and relocation are terms used to describe the removal of people from one place to another, without prior consent and in most cases against their will. This removal relatively constitutes moving of people from one geographical location to another.'[10] Another description of moving of people characterizes displacement as 'eviction of people from their habitual homeland without adequate compensation, guarantees or mechanisms of social support.'[11]

The International Finance Corporation Performance Standard (IFCPS) 5 defines involuntary resettlement in a similar vein by stating that it 'refers to both physical displacement (relocation or loss of shelter) and to economic displacement (loss of assets or access to assets that leads to loss of income sources or other means of livelihood) as a result of project related land acquisition and/or restrictions on land use.'[12] The IFCPS 5 definition expands on what is meant by involuntary resettlement by stating that 'resettlement is considered involuntary when affected persons or communities do not have the right to refuse land acquisition or restrictions on land use that result in physical or economic displacement.'[13]

In the above definitions, firstly, it seems that resettlement, relocation, removals and displacement deny the project-affected persons the right of choice because these appear inherently involuntary and/or forced. Makhanya underscores the disenfranchising nature of displacement by stating that 'communities affected by development do not ask to be moved and make way for such development.'[14] Secondly, it seems that at the core of resettlement, removals and relocation, both physical and economic loss, is unavoidable.

It is for this reason that Makhanya states that 'the financial compensation of affected communities should never be viewed as a favour, but as a right . . . Their living conditions usually worsen within five to ten years of the project having been completed.'[15]

Throughout this paper, eviction, forced removals, relocation and resettlement may be used interchangeably as they are integral to the phenomenon of involuntary displacement.

[10]D Yumba *The Final Resettlement of the Bakwena Ba Ga Molopyane at Tsetse* (1977) at 4
[11]Ibid 11
[12]International Finance Corporation (IFC) Performance Standard (PS) 5 World Bank Group (2012) at 1
[13]Ibid 1
[14]K K Makhanya (n3) 13
[15]Ibid.13

Irrespective of varying terminology, impacts of this phenomenon during various project phases may result in deprivation, dispossession, and denial of livelihood.

At the root of the aforestated disempowering impacts is the inadequacy of public involvement of the directly-affected persons. Further, the failure to consider the affected persons' input regarding the loss of sources of livelihood subjects them to untenable circumstance which can be mitigated through transparent and open engagement. In this regard, involuntary displacement as currently practiced in South Africa is perceived as constituting subordination of rights in the Constitution of South Africa and as well as those protocols endorsed by global multilateral organisations in so far as humane treatment of displacees is concerned.

The legal and regulatory framework on involuntary displacement and its consequent relocation and resettlement in South Africa is contained in various acts and regulations. This reality requires that various provisions be considered when dealing with the subject of involuntary displacement. A discussion on involuntary displacement is likely to include those aspects of legislation, regulations and case law covering land dispossession and forced removals, some relevant aspects of certain apartheid legislation and policies, mining and environment, expropriation, land use and planning and the land restitution regime.

It should be noted that in this study that the inclusion of relevant clauses from various legal and regulatory frameworks that may fall into the era of the past should not be regarded narrowly as an exercise of nostalgic reminiscing about the apartheid and/or historical era of disenfranchisement. On the contrary, only relevant aspects in the various elements of legislation, regulations and case law are deliberately cited insofar as they are relevant to the point under consideration. The primary focus area of the study is analysis of the adequacy of meaningful consultative engagement for the achievement of a transparent public involvement and acceptable determination for loss of assets.

In South Africa, examples of involuntary displacement are similar to impacts identified by Yumba[16] such as socio-economic hardships, land dispossession, loss of livelihoods and natural resources, and uprooting of people from connectedness to their habitats as illustrated in the examples of case law. The citation of case law below is not necessarily to examine legal principles of law but merely to sketch examples that happened to be resolved through courts of law.

[16]D Yumba (n10) 2

In *District Six Committee v Minister of Rural Development and Land Reform,*[17] forced eviction affected 4,373 out of 6,122 properties resulting in 35,000 individuals evicted from District Six. Although this displacement at the time was not for any planned infrastructure layout, forced removals and relocation were aimed at creating space for other race groups. In some instances, settlements, towns and agricultural activities followed forced relocation which then required that some infrastructure be established for new purposes and activities. This forced removal can then be categorised as having effect on displaced persons as infrastructure layout was required for incoming residents' settlement.

A recent example of this is *Duduzile Baleni v Minister of Mineral Resources,*[18] in which the uMgungundlovu community, comprising of 70 to 75 households of 600 individuals, is being forced to relocate from their communal ancestral land. This community has been living on the rich titanium mineral sand deposits ancestral land in the wild coast in the Eastern Cape Province. The area is now earmarked for mining development, however, not all of the land use rights holders support the development of a mine. This is due to potential threats of mining and developer's failure to obtain consent. Further, there is cultural and spiritual connectedness to this ancestral land.

One of impact is relocation that may result in this community to lose their land used for grazing, cultivating crops, ecosystem services such as building materials, firewood, edible and medical fruits, plants, fish, shellfish, and water, as well as tourism. This is because the area is now earmarked for extraction of titanium, pending government's approval of the licence to mine.

Ironically, the competent authority is perceived by the Umgungundlovu community to be eager to relocate this community with no guarantee for compensation and their cry for a transparent public consultation seems to be falling on deaf ears. Following lengthy and violent engagements regarding consent and after not getting response from government as well as the mining company, the uMgungundlovu community eventually successfully sought relief through the courts. The court ruled in their favour agreeing with Umgungundlovu community that prior informed consent is a prerequisite for granting a mining right by Minister of Mineral Resources.

[17] *District Six Committee v Minister of Rural Development and Land Reform* LCC54 (2018) at 12 to14
[18] *Duduzile Baleni & Others v Minister of Mineral Resources and Others* Case No 73768 (2016) at 2, 4 and 7

An ActionAid report[19] states that in the Ga Pilla village, 7,000 residents were resettled to Sterkwater in 2003 to make way for the expansion of mining activities.

This relocation was characterised as a forced eviction because villagers were offered no choice, not informed of their rights and not allowed to negotiate terms of resettlement directly with the mining company except through a Section 21 company[20] formed by the mining company itself. Twenty-eight families consisting of 150 people who refused to be relocated were punished by having their electricity, water and other basic services cut off.

In the same ActionAid report, the Mohlohlo community, comprising the villages of Ga Puka and Ga Sekhaolelo, occupied by approximately 1,000 families with 10,000 residents, complained about the loss of agricultural land, the amount offered for compensation, and being pressured to enter into agreements by a Section 21 Anglo American appointed company.[21]

In *Baphiring community v Uys,*[22] the Baphiring community, consisting of 450 households, were evicted in 1971 from old Mabaalstaat. Following this relocation to new Mabaalstaat, this resettled community, comprising 925 people, found the new area unsuitable because of the lack of reliable water which forced them to rely on boreholes, and their cattle died due to inadequate grazing area. Some of the persons previously employed at the nearby farms lost employment due to resettlement. The Baphiring community were also dissatisfied with the insufficiency of compensation to rebuild homesteads of similar quality and functionality.

In *Maledu v Itereleng Bakgatla Minerals (PTY) Ltd,*[23] a mining company attempted to evict 13 families and their tenants without proper consultation, around 2014. The Lesetlheng community obtained an interdict against the mining company on the basis that no consent had been obtained. The mining company responded by applying for its eviction order against the community.

In the matter between *Alexkor Limited v Richtersveld Community,*[24] although at face value the disagreement seemed to have been about a claim for land restitution, the core of the

[19]M Curtis 'Precious Metal: The Impact of Anglo Platinum on poor communities in Limpopo South Africa' Actionaid 14 to16

[20]'Section 21 companies were established by Anglo Platinum and do not provide for any form of democratic control or accountability over them. Their only members are the directors; villagers are not members and the majority have no right to vote or participate in the operation of the companies' ActionAid report. 16

[21]Ibid.21

[22]*Baphiring community v Uys and Others* LCC 63/98 2003 (LLC) at 10 to 13

[23]*Maledu and Others v Itereleng Bakgatla Minerals (PTY) Ltd and Another* 2018 (ZACC) 41 at 13 to 15

[24]*Alexkor Limited and Another v Ritchersveld Community and Others* Case CCT 19/03 2003 (ZACC) at 4 to 5 & 8 to 9

dispute was dispossession of the Richtersveld community's right to this mineral rich land for use by the State and a State owned entity.

The large area under contestation where the Richtersveld community resided was in the north-western part of the Northern Cape including the strip of land along the West Coast from the Orange River to just below Port Nolloth in the south.

The Land Claims Court affirmed that the Richtersveld community had occupied the land for a continuous period of no less than 10 years prior to its dispossession after 19 June 1913. The Supreme Court of Appeal affirmed the right to land under common law ownership and found that when diamonds were discovered, the State ignored their rights, which led to their dispossession and eventual granting of these rights to Alexkor. In a different matter, the Bangwenyane Community successfully defended their right of occupation over a century-old, and right to consent, and they advanced their right to express an interest in minerals on their land.[25] This meant that had the Richtersveld and Bangwenyane communities not sought relief in the courts, not only would they have remained displaced but would have been robbed of their livelihood through loss of the benefit of the mineral rich deposits.

In the matter between *Ngidi Braai Sibanyoni & Branavan John Suahatsi v Umcebo Mining (PTY) Limited*,[26] the contest was over terms and conditions of relocation. The applicants had occupied the farms where mining had taken place for 20 years, and they had extended their dwellings and kraals. When the owner sold the farm, they were told that they would be relocated and their needs would be taken care of. This is another example of mining induced involuntary displacement that is devoid of adherence to the requirements for undertaking a relocation. When the new owner took over mining operation, the promises did not materialize.

Another example of dispossession and displacement is *Salem Party Club and Others v Salem Community and Others,*[27] which was an appeal to the Constitutional Court over the disputed ownership of the Salem Commonage. The Salem community, comprising 152 claimants totalling 1,170 beneficiaries in 378 households, claimed to have been dispossessed of their traditional indigenous ownership rights over the Salem farm No 498 between 1947 and 1980. The Salem community lived on this farm and used it for grazing, agricultural activities, traditional rights and practices, access to firewood and as a burial site. On the other hand,

[25]*Bangwenyane Minerals (PTY) Ltd and Others v Genorah Resources (PTY) Ltd and Others* Case CCT 39/10 2010 (ZACC) 26 at 7 to 8

[26]*Ngidi Braai Sibanyoni and Branavan John Suahatsi v Umcebo Mining (PTY) Limited* Case No LCC 03/12 at 2 to 4 and 4 to 7

[27]*Salem Party Club and Others v Salem Community and Others* 2017 (ZACC) at 4 and 161

the Salem Party Club and other landowners used the Commonage for agriculture, grazing, recreation, rights of way and for letting out to others. This dispute points to difficulties faced by landowners in defending their rights against dispossession, displacement and removal.

In the case of *Port Elizabeth Municipality v Various Occupiers,*[28] the Municipality obtained an eviction order in the High Court against 68 people who occupied private land illegally. In response, the occupiers successfully applied to the court for this eviction to be set aside, citing the need for alternative land, entitlement to housing and secure tenure. The Municipality sought to challenge the decision of the court. The importance of the direction taken by the courts in this matter is the recognition of the rights of non-title holders who are often on the receiving end of infrastructure-induced displacements

Further, in terms of land use planning, the occupied land had been zoned and approved by the Municipality for different purposes that required laying out of infrastructure. This unauthorised occupation was impeding laying out of infrastructure thus justifying forced removal.

It is due to the global displacement events and domestic case law examples sketched above of displacement, that multilateral international organisations developed very clearly defined protocols, standards and procedures to govern the process of fair and meaningful displacement.

In this regard, Sapkota and Ferguson[29] state that multilateral banks adopted policies of sustainable resettlement and livelihood restoration as a mechanism for persons affected by development projects. The key elements of sustainable resettlement are as follows:

(i) minimizing resettlement by exploring design options;
(ii) improving or restoring livelihoods of displaced persons by proper assessment, planning, and management of land acquisition and resettlement;
(iii) making efforts to share project benefits;
(iv) ensuring participation of displaced persons;
(v) considering the needs of host communities; and
(vi) addressing the needs of vulnerable groups.

Whilst international protocols exist to guide the process of undertaking displacement, and standards for fair compensation for loss of assets are established, a gap still exists between their intentions and on-the-ground implementation. The proposed solution for

[28]*Port Elizabeth Municipality v Various Occupiers* 2004 CCT 53/03 (ZACC) at 1 and 5
[29]N Sapkota and S Ferguson (n4) 4

addressing gaps lies in the effective use of the NEMA's s24 environmental impact assessment (EIA) tool.[30]

The appropriate use of EIA in conjunction with other regulatory provision must go beyond mere compliance. Identification and amelioration of involuntary displacement impacts has not been consistently effective in accomplishing a meaningful process of displacement and sustainable resettlement. This may be attributable to inadequate application of the EIA.

The EIA is a generally accepted tool for soliciting inputs and comments before the authorisation of large-scale projects. The EIA was formalized at the Stockholm Conference in 1972 and later through the Espoo Convention in 1991.[31] Although it does not explicitly specify impacts caused by involuntary displacement, one might argue that interpreted broadly and generally, meaningful participation and mitigation of loss, implicitly extends to the study, planning and implementation of displacement and resettlement in large-scale projects.

This is because identification, evaluation and mitigation of impacts has evolved beyond biological, physical, water and land which tends to focus on the direct impacts without considering the indirect knock-on and downstream effects. It is therefore a prudent approach to ensure that EIA also considers holistically positive and negative value chain evaluation of effects on cultural heritage, livelihoods, habitat and spiritual connection that may be visited upon people on the footprint of the intended infrastructure development.

In South Africa, the undertaking of the EIA is limited by insufficient regard of the value chain that would have assisted in proactively identifying relocation and resettlement issues upfront. Resettlement impacts are thus only investigated as an afterthought when projects are too significantly advanced.

It may seem odd to 'pure' environmentalists as to how the phenomenon of involuntary displacement, relocation and resettlement enters the arena of environment law. The response lies in understanding the concept of integrated environmental management contained in Chapter 5 s23 (2) read together with s2 (3) and (4) of Chapter 1 which speak to principles

[30]M Kidd *Environmental Law* 2nd (2011) at 235 EIA defined by Sands as '… statement to be used to guide decision – making, with several related functions. First, it should provide decision –makers with information on the environmental consequences of proposed activities and, in some cases, programmes and policies and their alternatives. Secondly, it requires decisions to be influenced by that information. And , thirdly, it provides a mechanism for ensuring the participation of potentially affected persons in the decision-making process'
[31]Ibid 235

and objectives of integrated environmental management. In this regard, these principles and objectives seek to balance the environmental, social, cultural, heritage and economic needs of development.

1.2 Statement of the problem

In the post-democratic era, South Africa legislated a number of international multilateral conventions, protocols and standards into domestic law. In this regard, the Bill of Rights and other clauses in the Constitution[32] recognise rights to access to information, just administrative action, equality, respect, freedom of expression and dignity, as well as the principle of public involvement in the democratic process. The recognition and obligatory adherence to these rights also extends to fair, equitable and just treatment of displaces in situations of involuntary displacement.

The abovementioned rights are central to the realisation of the principle of public involvement and protection of loss of assets. It is for this reason that in reviewing legislation and regulatory framework when undertaking consultative engagement and determination of compensation for loss, the centrality of these constitutional and legislative provisions is the prism to gauge the adequacy of applicable practices. The relevance of these principles is dealt with in detail in Chapter 3 and 4.

In order to bring into effect the mandatory public involvement, the National Environmental Management Act (NEMA)[33] and its regulations were enacted. NEMA s24 (5) empowers the Minister to make regulations, specifically those that include the procedure to be followed when undertaking EIA. The NEMA EIA regulations were published providing for mandatory public participation in the EIA consultations.

The NEMA s24 (2) is therefore an embodiment of a domestic standard to achieve informed consent that describes the activities without which no environmental authorisation is granted if there hasn't been meaningful public involvement. This provision was specially intended to ensure those who may be affected by negative impacts and risks arising from the implementation of infrastructure projects are given the opportunity to table concerns and participate in developing mitigation strategies.

Although NEMA 24(2) does not explicitly mention displacement, loss of assets and livelihoods, relocation and resettlement, it is implied as part of the assessment of positive and negative socio economic impacts.

[32]Constitution of the Republic of South Africa Act 108 of 1996
[33]National Environmental Management Act 107 of 1998

This therefore means that authorisation must have been preceded by demonstrable sufficient consideration of socio economic elements inclusive of assessment of meaningfulness of engagement and principles for acceptability of methods for determining loss of assets for those that are directly impacted.

In South Africa, financial compensation for loss of property or assets is an obligatory Constitutional imperative. The Constitution makes provision to ameliorate loss of assets, property and /or land use rights. This practice is protected in the Constitution's s25 (3) (a) – (e)[34] considered together with other land use rights and property laws. These provisions in the Constitution are explained in details in chapters 3 and 4. These provisions can be interpreted to extend to loss of livelihoods and actual physical asset loss when the directly affected have to move their homesteads and possessions elsewhere in order to make way for the project infrastructure.

Although the Constitution, NEMA and Minerals and Petroleum Resources Development Act (MPRDA)[35] together with its regulations are tools for identifying and assessing all positive and negative effects of projects including resettlement inducing involuntary displacement, the challenge is that there is no explicit process in screening and scoping phases requiring the studying and planning of resettlement.

Whilst all affected and interested parties may be impacted by the nonexistence of explicit resettlement planning, it is often the non-title holding indigenous communities that are prone to deprivation and dispossession. This is because the interpretation and application of the EIA regime tends to only focus on negative effects of large-scale infrastructure as it affects the legally-secure land owners.

This narrow interpretation misses the opportunity to further understand land ownership and land use rights in the context of the Interim Protection of Informal Land Rights Act (IPILRA).[36] It is for this reason that consultation has to be meaningful for the often disempowered insecure legal land us rights holders and occupiers of land in traditional communally living settings. If meaningful participation in such settings is accomplished, consent is wilfully granted. When consent is given at will and mitigation of loss is done from the affected people's point of view, collaborative planning and implementation of resettlement is better managed.

[34]Constitution (n32)
[35]Minerals and Petroleum Resources Development Act 28 of 2002
[36]Interim Protection of Informal Land Rights Act 31 of 1996

Another challenge of the EIA process is that the recording of the concerns, issues and comments of the directly affected are limited only to the screening and scoping stages of the EIA. Further, once the environmental authorisation is granted, there is sometimes no continuity in update, realignment and adjustment as project infrastructure design changes from one phase to the next. This may result in disconnect and inadequate integration of available project design information in relation to clarity of information to those negatively affected by impacts.

1.3 Rationale

In South Africa, public participation and compensation for protection of property rights is an established and guaranteed in the Constitution, details thereof are elaborated in chapter 3 and 4.[37] However, in spite of the constitutional obligation on public involvement, and the protection of property rights or asset loss, its application in situations of involuntary displacement arising from infrastructure development projects varies. This is because affected property owners or occupants with land use rights are sometimes not accorded this protection when faced with displacement.

In the light of the fact that displacement with the resultant relocation and resettlement is considered a socio economic impact, then the process of undertaking involuntary displacement and resettlement is mainly through an EIA. The EIA requires a transparent, participative and consultative engagement process described in NEMA s24[38], read together with the purpose of integrated environmental management in s23[39], known as public participation. The impact assessment process identifies risks and impacts for those directly affected by construction.

The extent of risks and impacts becomes the basis for determining and negotiating mitigation through some form of compensation. The key element to the procedure for identification and mitigation of impacts is the undertaking of EIA – a precursor for environmental authorisation without which no large-scale development is allowed to proceed, especially if the large-scale development comprises of activities that are listed and /or specified in the NEMA's EIA regulations.

It is noted that current NEMA EIA regulations do not explicitly list involuntary displacement, relocation and resettlement. Notwithstanding the non-explicit listing of

[37]In terms of ss 72, 118, 59 and s25 (3) of the Constitution.

[38]NEMA chapter 5 s24(2)*(a),* 24 (2A)(a) and 24 (2A) (4) (*a) (iv) and (v)*

[39] NEMA chapter 5 s23 (2) ***(****a) to (f)*

relocation and resettlement, the requirement for transparent public engagement to receive and record input from those directly affected implies that by extension those impacts, once brought forward, have to be resolved prior to the project proceeding. The non-listed activities that have negative impacts on the affected may delay progress of the project.
The proactive assessment of risks therefore requires adoption of an approach that goes beyond mere administrative and compliance exercise.
The EIA provides an administrative and procedural mechanism that informs EA decision making. In a sense, an EIA is presumed to be evidence and an assurance that environmental, social, economic, cultural and heritage risks and impacts have been sufficiently assessed and evaluated prior to the approval of any large-scale development. It should thus be able indicate that persons affected by large-scale infrastructure development are afforded sufficient access to project information and permitted to give input. This then allows for putting sufficient measures in place to prevent, avoid and eliminate such risks and impacts from harming people and the environment.

The challenge is that this current EIA public participation process is presumed to be an adequate framework for identifying potential involuntary displacement impacts. This is not often the case because, in reality, removal, relocation and resettlement are not expressly listed or specified activities in s24 of NEMA. In some instances EIA application submitted to competent authorities fail to provide evidence of studies, plans and mitigation of project induced relocation and resettlement.

Impacts on people living on land or owning property on the pathway of large-scale development bear the brunt of environmental authorisation that omit relocation and resettlement studies. In certain instances, where and once developers receive their environmental authorisation without undertaking full relocation and resettlement planning, the environmental authorisation is sometimes used to claim that consent is given. This then effectively may imply forcible removals without prior proper quantification, planning and mitigation of their loss of individual and communal land, economic resources, neighbourhoods' networks and livelihoods. In this regard, public participation is merely a requirement that insists on obtaining and including comments in the Basic Assessment or full Environmental Impact Assessment.

It is for this reason that this study within the context of s24 of NEMA purports to deal with the deficiencies in the manner in which the EIA regulations are crafted.

The study examines shortcomings and gaps in the manner in which s24 of NEMA and EIA regulations as amended is crafted. Thus, this study submits that in spite of this legislative framework, the inadequacies in the existing legislative and regulatory framework may result in the negative impacts. The failure to identify relocation and resettlement impacts may cause dispossession of sources of livelihood and deprivation of access to cultural heritage and links to ancestral places, and the loss of dignity of project-affected people.

1.4 Objectives

The paragraph below sums up the challenges and relationship between involuntary displacement and the consequent resettlement impacts:

> Development projects that displace people involuntarily generally give rise to severe economic, social, and environmental problems: production systems are dismantled, productive assets and income sources are lost, and people are relocated to environments where their social and productive skills may be less applicable and the competition for resources greater. Involuntary resettlement thus may cause severe long-term hardship, impoverishment, and environmental damage unless appropriate measures are carefully planned and carried out. Past experience indicates that the absence of explicit guidelines regarding involuntary resettlement has contributed in many projects to underestimating the complexity and impact of displacement.[40]

In the light of resettlement effects brought about by involuntary displacement, the study seeks to examine and review the current legal framework that is applicable to the process of public involvement and determining loss of assets originating from involuntary displacement. This study deals firstly with the challenges posed by the inadequacies in the framework for undertaking the process; in other words, the extent to which requirements for assessing the risks and impacts of a project, as articulated in the NEMA environmental management principles and impact assessment process in s24 of NEMA.

The focus is on ensuring that free, prior informed consent (fpic)[41] and restoration of loss by persons affected by involuntary displacement is integral to decision making.

Secondly, restoration of loss requires evaluation of the extent to which methods and rates applied to determine the quantum of compensation results in full recompense for both tangible and intangible losses.

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[40]Guidelines for Aid Agencies on Involuntary displacement and resettlement in development projects No 3 (1992) at 20

[41]K Adeola (n9) 259-260 fpic is explained as *free* meaning the absence of intimidation and manipulation, *prior* referring to before project implementation, *informed* as adequate information and knowledge, and *consent* as voluntary

The study will:

(i) Review the application of existing public participation and engagement in impact assessment and relocation processes in terms of global standards, and as provided for in the South African constitution, NEMA and other relevant legislation.

(ii) Assess the current domestic compensation practices during involuntary resettlement in relation to equitable, equivalent and just compensation.

(iii) Assess the adequacy of both the impact assessment engagement processes and compensatory framework to ensure fair, equitable and just mitigation of impacts in line with the constitutional imperatives and other applicable legislation, regulations and standards.

The hypothesis of the study is that people in the pathways of large-scale infrastructure development are negatively impacted when they are involuntarily displaced due to dispossession. This is because:

(i) The process for identifying impacts caused by involuntary displacement during relocation and resettlement has deficiencies requiring improvement.

(ii) The practices applied in valuing and calculating compensation for loss of assets and livelihood sources during resettlement are insufficient.

1.5 Research questions

Research questions will seek to clarify necessary ways to improve the process for undertaking resettlement in a transparent and even-handed manner. Further, these questions also aim to establish the legislative and regulatory improvements needed to ensure that people affected by infrastructure development are treated fairly and asset loss replacement is of commensurate value.

The questions therefore are:

1.6.1 What are the international protocols and standards for dealing with involuntary displacement and resettlement?

1.6.2 How does the law in South Africa deal with development-induced displacement, specifically, compensation for loss and the process of resettling displaced persons?

1.6.3 What are the deficiencies and gaps in the existing compensation framework and process of resettlement?

1.6.4 What are the improvements required to establish a generally-acceptable framework for compensation, and a just, inclusive and transparent resettlement process within the South African context?

1.6 Research methodology

The study uses qualitative reviews of existing literature in order to respond to the study's question. The review of existing information will encompass case law, books, journal and newspaper articles, domestic standards, statutes, dissertation and internet-based sources on involuntary displacement, relocation and resettlement, and compensation for loss.

In order to determine the appropriateness of the existing compensatory framework and process for undertaking resettlement, South African and global examples of past and recent resettlement shall be reviewed in order to highlight the desired state in comparison with the current situation. . Outcomes of case law where decisions reflect on the conflicts arising from involuntary displacement shall be applied in order to reflect upon and formulate the required recommendations to improve the current compensation and resettlement process framework.

There is an existing domestic and global theoretical framework and knowledge base on how best to handle involuntary displacement. This theory and literature includes various standards and guidelines developed by expert, commissioned work, and adopted by international multilateral organizations. The views and propositions from such expert knowledge shall be used as a lens through which the current practices are examined, assessed and evaluated.

1.7 Limitations

Whilst literature may be available on the broad subject of resettlement, insufficient knowledge and material exists on the legal and regulatory framework specific to the governance and practice for handling the involuntary displacement impacts of infrastructure development in South Africa. In addressing the increasing concern about the mishandling and mistreatment of displacees during resettlement, and the mitigation of loss suffered during displacement, this study aims at making a meaningful contribution to resettlement literature.

In this regard, many examples of involuntary displacement constitute settlement and spatial patterns, restitution, security of tenure and mining-induced infrastructure development which are a legacy of past policy.

It has to be emphasised that the study does not focus on the aforementioned categories – instead, examples of these categories are used insofar as they are appropriate to the phenomenon of involuntary displacement.

NEMA is the overarching framework for the identification of impacts, public participation and in determining mitigation. Compensation for loss in the broad definition of socio economic impacts is thus a form of mitigation for loss.

NEMA is a recent framework and therefore there is insufficient literature and jurisprudence specific to relocation and resettlement stemming from NEMA.

It is for this reason that in addition to NEMA, implementation of the Mineral and Petroleum Resources Development Act (MPRDA) is considered for its contribution to the body of knowledge, practices, and jurisprudence in involuntary displacement. This is because of the historical manner in which the extractive sector handled displacement when developing large-scale mining projects. This does not necessarily imply that all large-scale infrastructure projects stem from mining activities.

1.8 Study Chapters

Chapter 1 introduced and provided the context of the study. It described the extent to which the phenomenon of involuntary displacement is prevalent, both globally and domestically. The rationale and motive of the study was explained as well as the research question, methodology and arrangement of the rest of the chapters.

Chapter 2 provides exposition of a theoretical framework for consultation and compensation during resettlement. It reviews experts' knowledge of global standards, protocols and practices upon which domestic standards and practices should be anchored.

In **Chapter 3** legislative and regulatory instruments that inform the use and application of public participation, consultation and compensation tools in development-induced displacement projects are examined. The review of such instruments examines their level of adequacy insofar as they function as a vehicle to achieve equity and fairness for those impacted by involuntary displacements.

In **Chapter 4** standards and practices will be reviewed to reveal gaps in the application of these protocols in the South African context. The discussion will evaluate and assess the shortcomings in the application of the framework of consultation and compensation. This discussion will conclude by submitting the findings emanating from its evaluation.

Chapter 5 concludes the study by submitting specific recommendations for improving the current practices in the undertaking of public participation process and determination of loss during involuntary resettlement.

1.9 Conclusion

As an introductory chapter, this chapter introduces the study by describing the extent to which the phenomenon of involuntary displacement is prevalent both globally and domestically. The concept of sustainable resettlement is introduced as a way of indicating the need for sustainable decision making that takes into account the balancing of environmental and socioeconomic needs in large-scale development.

This chapter also covers a statement of the problem, rationale, research question and methodology as well as the structure of chapters.

In this dissertation the law is stated as at 30 November, 2019. However, shortly before submission, the Draft Mine Community Resettlement Guidelines 2019 for Public Comment[42] were gazetted for comment. These draft guidelines are not finalized since the date of publishing on December 2019 for public comment. The study comments on the Draft Mine Community Resettlement Guidelines in Chapter 4 in relation to their relevance to the process of consultation and the compensatory framework in situations of involuntary displacement.

The next chapter discusses the theoretical framework containing practices for handling involuntary displacement. The theoretical framework reviews global protocols and standards.

[42]Draft Mine Community Resettlement Guidelines 2019 for Public Comment GG 42884 GN R1566 04 December 2019

CHAPTER TWO: THEORETICAL FRAMEWORK UNDERPINNING PROCESS OF CONSULTATION AND COMPENSATION IN SITUATIONS OF INVOLUNTARY DISPLACEMENT

2.0 Introduction

Involuntary displacement continues to affect humankind across the globe. This chapter reviews protocols established by global forums. These assurance protocols ensure that impact arising from the inevitable involuntary displacement are managed in a universally humane manner.

2.1 Review of theoretical framework

Terminski,[43] and similarly van der Ploeg and Vanclay,[44] state that in response to the phenomenon of displacement, global multilateral forums have established principles, standards, policies, guidelines and protocols, reflected in the following:

(i) IFCPS on Environmental and Social Sustainability.
(ii) United Nation's (UN) Basic Principles and Guidelines on Development-Based Evictions and Displacement.
(iii) African Charter for Human Rights & Peoples Rights.
(iv) American Human Rights and the Inter American Democratic Charter.
(v) European Banks for Reconstruction Environmental and Social Policy.
(vi) The World Banks' Resettlement Policy-Operational policy and procedure 4.
(vii) The Asian Development Bank policy.
(viii) African Development Bank policy.
(ix) The Inter-American Development Bank's Operational Policy on Involuntary Resettlement.
(x) Organization for Economic Co-operation and Development Guidelines for Aid on Involuntary Displacement and Resettlement in Development Projects.

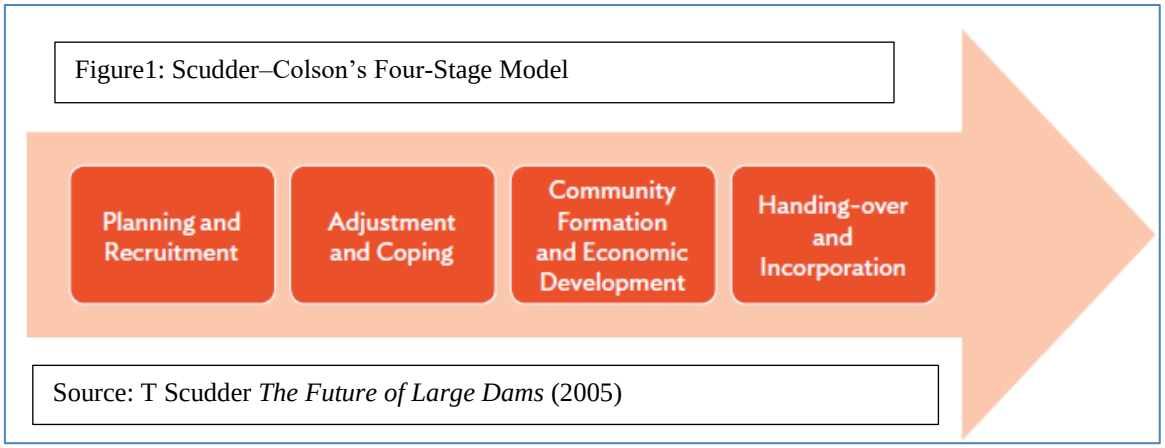
These forums endorsed and ratified universally-recognized practices, standards and protocols that are reviewed regularly to deal with the ever-changing development needs. The abovementioned instruments serve as a framework to guide implementation of projects in situations of involuntary displacements resulting from infrastructure development projects.

[43] B Terminski (n2) 92 to 94
[44] L Van der Ploeg and F Vanclay 'A human rights based approach to project induced displacement and resettlement' *Impact assessment and project appraisal* (2017). 34 to 35

This response became necessary when the negative effects and risks of the impacts on persons within the footprint of development projects became increasingly disenfranchising and impoverishing.

Arising from the protocols of multilateral organization, models that can be adapted for guiding processes for implementing relocation and resettlement evolved and improved over time. One such model is Scudder-Colson's four staged[45] model for large dams' infrastructure development. This model, developed in the 1970s, did not consider any relocation and resettlement impacts as shown in Fig 1 below.

Figure 1

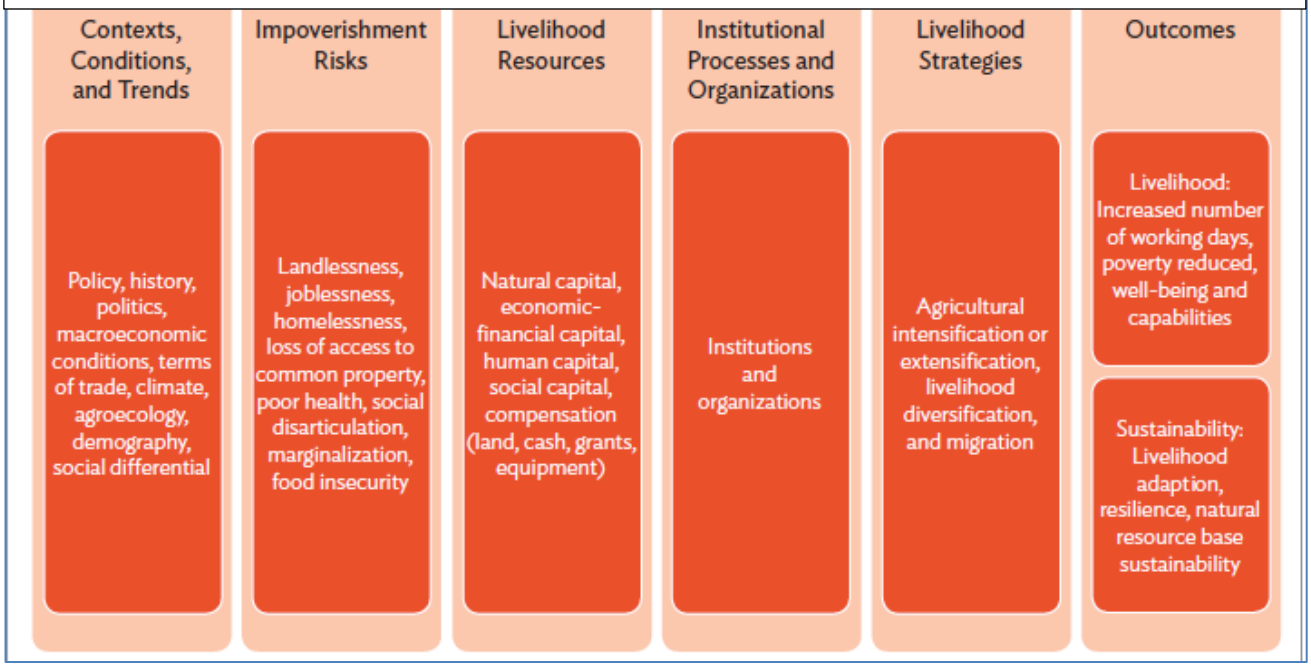


In the 1990s, Cernea developed the Impoverishment Risks and Reconstruction model (IRR) which does not specify any stages but identifies landlessness, joblessness, homelessness, marginalization, food insecurity, increased morbidity and mortality, community disarticulation and loss of access to common property resources as major impoverishment risks caused by involuntary resettlement. The IRR model suggested mitigation measures against the eight risks in order to rebuild livelihoods of displacees. Other experts including T Downing (2002) later added to this model loss of access to public services, disruption of formal education, loss of civil and human rights as well as increase of costs of resettlement. McDowell's framework of Forced Displacement, Sustainable Livelihoods and Impoverishment Risks improves on earlier models by integrating elements in infrastructure development such that the implementation of the project is conscious and take on board involuntary displacement impacts.

[45]Scudder –Colson's Four Stage model in N Sapkota and S Ferguson (n4) 2 to 3

The outcome of this approach is that project development and consequent involuntary displacement are undertaken within the framework of sustainable development as shown in Figure 2 below[46]

Figure3: McDowell's Forced Displacement, Sustainable Livelihoods, and Impoverishment Risks Framework



Source: C McDowell 'Involuntary Resettlement, Impoverishment Risks, and Sustainable Livelihoods' (2002) *The Australasian Journal of Disaster and Trauma Studies* at 2 http://trauma.massey.ac.nz/issues/2002-2/mcdowell.htm.

The transition from mere description of process in four stages model to risk based and mitigation approach of the IRR and Forced Displacement, Sustainable Livelihoods and Impoverishment Risks is therefore significant in dealing with the impacts of involuntary displacement. This is because of its attempts to ensure that displacement considers sustainable livelihoods. This aligns to the risk averse approach and sustainable development principles as espoused in the NEMA. In practice following this approach is an empowering bulwark against mistreatment of displacees during the undertaking of involuntary displacement.

[46]C McDowell Forced Displacement, Sustainable Livelihoods, and Impoverishment Risks Framework in N Sapkota and S Ferguson (n4) 4

2.2 International guidelines on the process of consultation in situations of displacement.

The foundation of public involvement in decision making on environmental matters gained importance with the establishment of the Rio Declaration guiding principles in 1992. Rio Declaration Principle 1 recognises that human beings are entitled to a healthy and productive life. This recognition puts humans at the centre of decision making.[47]

The entitlement to healthy life is reinforced by the Rio Declaration Principle 10. This principle requires that States facilitate and encourage public awareness and participation by making information widely available, and giving effective access to judicial and administrative proceedings.[48]

In these principles, with regards to information, it is not only adequate to avail the information but it has to cover widely all interested and affected persons. This implies the need for transparency and openness. The requirement for effective judicial and administrative proceedings underscore the essence of a public involvement process that is fair and just.

The Aarhus Convention of the UN's Economic Commission for Europe stipulates requirements similar to the Rio Principle 10. This is because both protocols insist on sharing of information and encourage public involvement. Aarhus Convention requirements that are similar to Rio Principle 10 are three forms of public participation:

(i) Participation in decision making by allowing public comments, input, and feedback.

(ii) Disclosure of relevant information to the public.

(iii) Access to justice so that proceedings are fair, equitable and not prohibitively expensive, and remedies are adequate and effective.[49]

The Rio principles and Aarhus Convention therefore set out foundations of public participation as embodied in access to justice, information and fair judicial and administrative decision-making process. The IFCPS on Environmental and Social Sustainability[50] is another foremost global leading practice mechanism for sustainable development. The IFCPS are used by banks and financial institutions to guide the implementation in large scale funded infrastructure projects.

[47]Review of Implementation of Rio Principles Stakeholder Forum for Sustainable Future (2011) at 5
[48]Ibid at 68
[49]J Razzaque and B J Richardson *Public Participation in Environmental Decision-Making* (2006) at 175
[50]IFCPS on Environmental and Social Sustainability (2012) World Bank Group at 2

Its objective is to ensure that social and environmental impacts are considered and balanced with economic benefits of projects. It consists of requirements and guidance notes on how to ensure due diligence so that infrastructure projects incorporate social, economic and environmental elements of sustainable development.

This IFCPS's Social and Sustainability Framework comprises policies on access to information and performance standards. These performance standards are a guide on how to identify risks and impacts as well as to ensure that appropriate due diligence is embedded within infrastructure project-level activities.[51] Regarding the process of undertaking resettlement, the IFCPS1's, firstly, indicates that environmental risks and impacts are identified, evaluated and mitigated either through avoidance, minimization, compensation and/or offset. Secondly, where grievances are lodged by those impacted by the project risks, the project is obliged to provide response.

In order to implement these objectives, a process for identifying project risks and impacts has to be implemented and monitored. The process for identifying risks varies according to the scale of the project and may encompass full scale, limited or focused environmental and social impact assessment. Importantly, this process must identify individuals or groups that may be disadvantaged or rendered vulnerable by the effects of the project.[52] This impact assessment process constitutes elements detailed in the footnote.[53] When executing relocation, application of these elements is central to the administrative justice and the process of participation.

Terminski[54] notes similar requirement as those stated in above referred seven steps stating that the project affected people need to be:

(i) Informed about their options and rights pertaining to resettlement.

(ii) Consulted on, offered choices among, and provided with technically and economically feasible resettlement alternatives.

(iii) Provided prompt and effective compensation at full replacement cost for losses of assets attributable directly to the project.

[51] Ibid 6 to 9

[52] Ibid

[53] Ibid at 12 to 15 these elements include stakeholder analysis and engagement planning, disclosure of information, informed consultation and participation, grievance mechanism for the affected communities, indigenous people, and private responsibilities under government led stakeholder engagement, external communications and ongoing reporting to the affected communities.

[54] B Terminski (n2) 90

It can then be submitted that the aforestated requirements affirms certain mandatory rights that resonate with principles policies, guidelines and standards in the global protocols. Some of these rights are:

(i) **Right to relevant information:** Van der Ploeg and Vanclay[55] state that displacement must guarantee affected people their right to relevant information, full consultation and participation throughout the process and sufficient time to process information such as rights and options, relevant government legislation, procedures for participation in decision making, formulae to determine compensation and/or methods used to value assets, access to independent advice, and handling of complaints.

(ii) **Respect:** In order to uphold the respect for human rights, project activities are required to respect the right to self-determination with policies that ensure execution of projects in a manner that enable active, free participation and fair distribution of benefits as a process mechanism to prevent economic marginalization and social disintegration. This specific requirement is to prevent the dispossession of lands, territories and resources as well as the undermining of indigenous people' rights.[56]

(iii) **Consultation:** Article 7(3) (c) of the UN's Basic Principles and Guidelines on Development-Based Evictions and Displacement, like IFCPS1 is an important multilateral guideline. It emphasises the essence of the consultative process in order to obtain fpic. It obligates developers to seek consent through requesting and considering demands of persons likely to be impacted by the development. Further, it encourages consulting with affected persons in order to reach a reasonable compromise.[57]

(iv) **Participation:** Article 5 of the International Covenant on Civil & Political Rights stipulates that citizens have the right and opportunity to participate in public affairs directly or through freely chosen representatives. Article 19 refers to the right to freedom of expression including freedom to seek, receive and impart information. Similar rights are contained in the African Charter for Human Rights and Peoples Rights Articles 9, 13 and 25 as well as in Article 23 of the American Human Rights and the Inter American Democratic Charter.[58]

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[55]L van der Ploeg and F A Vanclay (n44) 39 to 42
[56]B Terminski (n2) 94 to 98
[57]K Adeola (n8) 259 to 260
[58]*Doctors for Life v The Speaker of the National Assembly CCT12/05* at 90 and 94

All the standards, guidelines and protocols referred to above obligate, not necessarily in a legalistic way, the essence of upholding genuine and transparent identification of risks and impacts of the project on affected persons. This means that if public participation is devoid of sufficient, transparent information-sharing and negotiating of alternative options with those affected by the project, it is inadequate.

In the international standards described above, the key requirements and obligation for the developer in the process of resettlement can be summarised in the following:

(i) A mechanism for identifying risks, concerns, impacts and issues caused by project activities.

(ii) Project activities that affect people, and which should therefore identify various categories of directly-impacted persons including individuals, communities, vulnerable groups and other interested parties including state institutions, government departments and permitting authorities.

(iii) A two-way exchange; firstly, for a transparent, upfront, prompt and continuous sharing of project information, and secondly, a process of receiving input, views, expectations and feedback. Locally, the environmental impact assessment provided for in s24 of NEMA remains the key lever for enabling a two-way exchange application to the process of resettlement.

(iv) Project activities invariably have negative impacts which then requires a grievance and complaints mechanism to be in place for receiving, documenting, resolving and reporting these grievances.

(v) Process implementation should be flexible enough to allow for negotiated and mutually-beneficial outcomes in the handling of concerns, risks and expectations.

(vi) Ultimately, the process should inform collaborative and collective decision making regarding management of project risks, impacts and opportunities so that there is an all-inclusive consideration of options for the project design and implementation.

2.2.1 A good practice example: Mozambique's Regulations for the Resettlement Process Resulting from Economic Activities

It is Mozambique's resettlement regulations that seems to provide a leading practice by incorporating provisions specific to the resettlement process. Its importance is that not many States have enacted regulations specific to the undertaking of relocation and resettlement into their domestic regulatory regime. In this regard, the Regulations for the Resettlement

Process resulting from Economic Activities in articles 4(a), 13, 14 and 23[59] stipulates amongst key requirements that public participation is guaranteed during the entire preparation and implementation process of resettlement.

Article 14 also stipulates that affected and interested people have a right to information on the resettlement process. In the same article 14, it is compulsory to disseminate information on the decision relating to the start and duration of public consultation as well as its conclusions.

This requirement on transparent resonates well with the protocols and requirements to public involvement in shaping laying of the infrastructure from the perspective of those to be directly affected.

Articles 4, 13 and 14 are to be read in conjunction with article 23 which stipulates at least four public consultation meetings advertised in media and sites where meetings are to be held. Article 23 further requires that information dissemination on public consultation must guarantee adequate public participation so that citizens' rights to information is guaranteed.

Prior informed is the key operative term. This is because any consent secured without full disclosure and access to project information renders those to be directly affected powerless to make informed input. It is important to note that informed consent applies throughout all the phases and should not only be limited to the EIA's scoping and screening phases. A point to be made is that from concept to execution phase, consultation must be continuous. However, even with such extensive engagement throughout all phases, relocation and resettlement remains non-voluntary.

All the principles, protocols, obligations and requirements in 2.2 embody international guidelines, requirements and standards on principles of informed consent. Informed consent is mandatory pre requisite for any public involvement process where displacement is involuntary.

These protocols can be localized to domestic circumstance similar to Mozambique's Regulations for the Resettlement Process resulting from Economic Activities example.

[59]Regulations for the Resettlement Process resulting from Economic Activities (n1) 10 to 11 and 16

2.3 International standards and requirements for compensation

The concerns over the loss of assets or access thereto which causes the loss of income and livelihoods during implementation of infrastructure development projects resulted in global fora and finance institutions to establish protocols and conventions on compensation for loss. The review of literature on handling compensation for such losses shows that this concern is ongoing. Downing[60] lists the following failures of compensation as a tool to ameliorate negative impacts:

(i) Calculation of losses for project-affected persons is inadequately and improperly done.

(ii) Often, only legal title owners are considered, to the exclusion of the most vulnerable such as tenants, sharecroppers, and encroachers.

(iii) Communal utility resources such as grazing and forests, which are critical to livelihoods, are not considered.

(iv) Legal and regulatory information to support or challenge the quantum of the rate of compensation is often not available, limited or beyond affordability.

(v) Cash compensation (often once-off) is often used for needs other than restoration and therefore dissipates quickly.

(vi) The general practice is to pay for the loss of fixed assets; in other words, value of exchange rather than value of replacement with requirement of proof of individual legal ownership. This neglects collective or communal rights, effectively ignoring the loss based on rights of the shared productivity of the community.

Cernea[61] states that financial compensation is flawed and limiting because it does not cater for financial impact arising from the uprooting of communal social networks, dispossession, emotional pain and economic impoverishment.

This view is supported by Perera's[62] caution against the risk of subjectivity, and variability of compensation calculation methods.

[60]T E Downing 'Avoiding New Poverty: Mining- Induced Displacement & Resettlement' *International Institute for Environment and Sustainable Development* (2002) at 9

[61]M M 'Cernea Compensation and Benefit Sharing: why resettlement policies and practices must be reformed' *Water Science and Engineering* (2008) (1) 89 at 1

[62]J Perera 'Lose to Gain: Is Involuntary Resettlement Development Opportunity' (2014) at 119

It is stated that this risk might arise when valuators use their own discretion and rates to determine losses. At other times, the risk comes from the absence of reference prices in the market for land, properties and crops.

Perera[63] emphasises the need to quantify the payment for loss as the amount required by the owner to replace the loss rather than their market value or amount needed to purchase property of equal productivity or value. The aforestated sentiment is echoed by Tagliarino[64] who states that this implies that calculation and quantification of such loss should not only be based on the market value but should also incorporate the cost of replacement, particularly where those displaced are resettled. This would include intangible losses such as sentimental attachment, proximity to social networks, access to spiritual sites and environmental services.

This meaningful replacement and recompense are echoed in the International Council on Mining & Metals (ICMM) Land Acquisition and Resettlement[65] which states that the replacement costs must include the following:

(i) Agricultural land – the market value of land of equal productive use or located in the vicinity of the affected land, plus the cost of preparation to levels similar to or better than those of the affected land, plus the cost of any registration and transfer taxes.

(ii) Household and public structures – the cost of purchasing or building a new structure, with an area and quality similar to or better than those of the affected structure, or of repairing a partially-affected structure, including labour and contractors' fees and any registration and transfer taxes.

(iii) In determining the replacement cost, depreciation of the asset and the value of salvage materials should not be accounted for, nor should the value of benefits to be derived from the project deducted from the valuation of an affected asset.

Tagliarino[66] supports accounting for replacement cost by describing it as 'a method of valuation yielding compensation sufficient to replace assets plus necessary transaction costs associated with asset replacement'. This is echoed by the criticism that compensation calculations used to estimate and calculate value of the assets of the impacted households

[63]Ibid 171

[64]N K Tagliarino 'The Status of National Legal Framework for Valuing Compensation for Expropriated Land: An Analysis of Whether National Laws in 50 Countries/Regions across Asia, Africa and Latin America Comply with International Standards on Compensation Valuation' (2017) *Land 6.37* at 4

[65]International Council on Mining and Metals (ICMM) Land acquisition and resettlement: Lessons learnt at 10

[66]N K Tagliarino (n64) 4

are one sided. In this regard, according to Perera[67], calculation methods used are discretionary mechanisms employed by state or project appointees with risk of subjectivity and variability in the final rates, particularly where there are no baseline prices to inform the quantum or thresholds of cash compensation.

With regard to the aforestated criticism, Terminski[68] further notes that cash compensation does not cater for loss of personal skills and institutional support as a shared asset employed in the income generation aspect of livelihood. In this regard, Terminski bemoans valuations applied in a rural traditional community setting where land is intertwined with spiritual, cultural and social life, submitting that cash compensation neither caters for intangible losses nor recognizes the entitlement to land use rights of those who do not hold any legal title to the land being utilised or occupied.

Van der Ploeg and Vanclay[69] cite provisions of UN's Basic Principles and Guidelines on Development-Based Evictions and Displacement, IFCPS5 and its Guidance Note, which states that for compensation to be full and fair, it has to be at full replacement costs of like for like, including costs for loss of all assets, livelihoods, and opportunities such as employment, education, social benefits, material damages and loss of earnings that covers earning potential, moral damage, and costs for legal or expert assistance.

Further, the abovementioned UN's Basic Principles and Guidelines on Development-Based Evictions and Displacement, IFCPS5 and its Guidance Note also require that fair compensation does not discriminate with regard to the nature of land title or form of occupation by ensuring that where land takes are applicable, replacement land is of equal or better quality, size and value. Regarding housing replacement, the requirement is that it be accessible, affordable, habitable, culturally adequate and suitably located with secure tenure and access to essential public services such as health and education.

The considerations which ought to be factored in the calculation of compensation and payment described above illustrate that the current compensation framework falls short of the justice and equity imperative. To address these issues, it is proposed that compensation should go beyond just the replacement value by considering the inclusion of loss of access to resources for livelihood, food security and property.[70]

[67]J Perera Lose (n62) 119
[68]B Terminski (n2) 38
[69]L van der Ploeg and FA Vanclay (n44) 43
[70]T E Downing (n60) 9

The above review of compensation practices emphasises the need for full replacement value as being central to achieving fair, just and full restoration of assets and livelihoods. Most commentators are concerned about the inadequacy of the practices to achieve full restoration of livelihoods and asset value for those who accede to involuntary displacement when major projects are undertaken. The aforesaid sentiment is supported by the fact that investigation into valuation compensation shows that acquisition mechanism and the amount of compensation is often delayed, insufficient and inadequate to restore livelihoods.[71]

In the discussion above, it seems that for compensation to be meaningful it needs to ensure full and fair replacement in value, and substantive participation and consultation. This creates an obligation that entitles project-affected persons to the following:

(i) Resettlement planning integrated into the project with schedule-bound actions and corresponding budget.
(ii) Involuntary resettlement be avoided or social impacts minimized.
(iii) Land lost by individuals or communities be compensated.
(iv) Full information and compensation options made available.

Furthermore, displacement must be such that there is equitable treatment, sharing of project benefits, minimization of project-affected livelihoods, and resettlement assistance provided to displacees so that their standards of living, income-earning capacity and production levels are improved, and customary rights are fully recognised.[72] Direct negotiation and engagement with persons directly impacted by project activities is essential in any situation of displacement. This direct engagement identifies persons eligible and entitled to compensation. In this regard, the IFC's Environmental and Social Framework[73] lists the following classification of eligible persons:

(i) Those who have formal legal rights to land or assets.
(ii) Those who do not have formal legal rights to land or assets but have a claim to land and/or assets that is recognized or recognizable under national law.
(iii) Those who have no recognizable legal right or claim to the land or assets they occupy or use.

[71]N K Tagliorino (n64) 2
[72]B Terminski (n2) 90 to 92
[73]IFC Environmental and Social Framework International Bank of Reconstruction and Development The World Bank (2017) at 54 to 5

In order to determine eligibility, a census of affected people and their assets must be undertaken. Once the eligible persons are identified, the developers are required to determine compensation ensuring the following:

(i) Disclosure and consistent application of compensation standards for both land and fixed assets.
(ii) The basis for calculation of compensation is clear, transparent and documented.
(iii) Where livelihoods are land based or where land is collectively owned, offer the option of replacement land.
(iv) The developer only takes possession of the acquired land and assets after compensation, resettlement and moving allowance have all been provided.[74]

Compensation for physical displacement requires that displaced persons are offered options that include adequate housing or cash compensation, relocation assistance and new settlement location preparation, that will be equivalent to or better than previous circumstances. Compensation for legal rights holders requires the developer to offer choice of replacement property of equal or higher value, security of tenure with equivalent or better characteristics, and an advantageous location or cash compensation at replacement cost. Compensation for eligible persons who do not have recognizable ownership rights requires the developer to arrange for them to obtain adequate housing with security of tenure and compensation for improvements and dwellings at replacement cost.[75]Compensation for economic loss should improve or restore income and livelihoods.

Economic loss for those operating commercial enterprises should be compensated 'for the cost of identifying a viable alternative location; for lost net income during the period of transition; for the cost of the transfer and reinstallation of the plant, machinery, or other equipment; and for re-establishing commercial activities. Affected employees will receive assistance for temporary loss of wages and, if necessary, assistance in identifying alternative employment opportunities.'[76]

[74]Ibid 56
[75]Ibid 58
[76]Ibid 59

2.4 Conclusion

In examining the global practices on involuntary displacement, this chapter reviewed international multilateral forums and multinational platforms' protocols, conventions and standards. These tools are not intended to restrict development but merely aspire to development that occurs within the acceptable universal human rights and sustainable development framework.

In this regard, sustainable displacement will imply impact mitigating decision-making that balances the rights to socio-economic assets or property, aesthetic, cultural, spiritual and heritage resources, without impeding the rights to source of livelihoods and access to natural resources.

In the light of protocols, requirements and standards for compensation of loss reviewed above, the emerging obligations supported in this study are that the developer employs compensatory mitigation of the following attributes:

(i) A fair and transparent valuation of loss that leads to compensation that is equivalent or better.

(ii) Any compensation can only be meaningful when and if it is based on full replacement value/costs.

(iii) Compensation must yield full restoration by considering all losses and entitlements including tangible and intangible assets.

(iv) Calculation and quantification methods for determining loss of assets must be above board by adhering to the principles of free, prior and informed consent.

Mozambique decreed Regulations for the Resettlement Process resulting from Economic Activities.[77] These regulations provides specific national standards in article 16 containing seven elements.[78]

The fact that these elements are legislated through a decree consisting of these regulations sets the clearly expected minimum requirements, thereby eliminating any grey areas on what is a country standard. The next chapter discusses South African legislation and regulations which form the basis of the process of consultation and compensation for loss. Further, past and recent court judgements that constitute jurisprudence which informs involuntary displacement practices are analysed.

[77] Regulations for the Resettlement Process resulting from Economic Activities (n1) 12 to 13

[78] Ibid 12 to 13

CHAPTER THREE: SOUTH AFRICAN LAW ON THE PROCESS OF CONSULTATION AND COMPENSATION FOR LOSS OF ASSET AND/OR LIVELIHOODS

3.0 Introduction

In this chapter, legislative and regulatory instruments that dictate the use and application of public participation consultation and compensation tools in development-induced displacement projects is examined. In this discussion, local consultation procedures and compensation methods and rates are described, focussing on their level of adequacy in their function as a vehicle to achieve equity and fairness for those impacted by involuntary displacements.

3.1 The process of consultation and participation when undertaking resettlement

In 2.2 of Chapter 2, the international guidelines and practices established by various global multilateral forums establishes that at the core of public participation are principles of access to information through disclosure, fair and just judicial and administrative process as well as public involvement through two-way communication and feedback. The discussion below describes how these principles are legislated into the South African legal framework.

3.1.1 Constitution of the Republic of South Africa

S72 (1) (a) and (b) and (2), and s118 (1) (a) and (b) and (2) of the Constitution[79] states the same mandatory obligation on public involvement for the National Assembly, National Council of Provinces and the Provincial legislatures. It states that all the aforementioned houses of parliament must (a) facilitate public involvement in the legislative and other processes of the houses and their committees; (b) conduct their business in a transparent manner. In ss72 and 118 (2) it states that the houses may not exclude the public including the media from a sitting of a committee unless it is reasonable and justifiable to do in an open and democratic society.

Further, s231 (2) of the Constitution reiterates public involvement by stating that an international agreement can be legislated into law only after a resolution of the National Assembly and National Council of Provinces is passed to approve such an agreement.

S231 (4) and (5) of the Constitution state that such an agreement can only become law of the Republic once a law has been enacted to give the agreement legal effect. Further, such

[79]Constitution (n32) ss72 and 118

an agreement or law cannot be inconsistent with the provisions of the Constitution.[80] This requirement establishes right of the public to participate in the enactment of protocols that may affect their well-being through the parliamentary representation.

In this regard, this established principle in ss 118(2) and 231 (4) and (5) of public involvement may be perceived to be specific only to parliamentary processes; but implicit is extension of such democratic practices to any administrative process that may impact on any directly affected or interested parties beyond parliamentary hallways. It is therefore an empowering clause for broadening democratic participation. These provisions resonate with the provisions of the IFCPS1 and 5 on consultation and engagement.

This Constitutional obligation of public involvement and participation is supported by s32 (1) (a) and (b) of the Constitution. It states that 'everyone has the right of access to any information held by the state or by another person if it is required for the exercise or protection of any rights.' In s33 (1) and (2) of the Constitution s32 is reinforced by stating that 'everyone has a right to administrative action which is lawful, reasonable and procedurally fair including being given reasons.'[81]

The provisions of the Constitution described above are in line with the global principles of public involvement, access to information and just administrative process. Essentially, the Constitution imposes obligations that make public involvement a 'must' in any process of decision making. In other words, it is an obligation upon the State, its institutions and all spheres of government as well as individual and private establishments. Public participation is therefore a mandatory constitutional requirement in terms of ss72, 118, 59 and 231.

Secondly, public involvement is an embodiment of the advancement of democratic participation because it recognises human rights as contained in the Bill of Rights of the Constitution. It is intertwined with the upholding of universal human rights as espoused by the United Nations (UN) Declaration on Human Rights.

It is therefore obligatory that any involuntary displacement impacting upon the affected persons' loss of land use rights, whether secure or insecure, is conditional to and preceded by informed consent obtained through open and transparent engagement.

This therefore implies that informed consent precedes and precludes any authorisation by the competent authority. In practice, this requires that displacement prior to submission of evidence of informed consent and commencement of development is an administrative

[80]Ibid. s231

[81]Constitution (n32) ss33and 32

process omission. This requirement is to ensure that a just, lawful, reasonable, non-arbitrary, procedural and equal treatment process is imposed upon project developers to follow a participatory consultative engagement to obtain consent.

This requirement is similar to that of the UN's Declaration on the Rights to Development which requires active, free and meaningful participation for affected people. In the event the individual(s) or the public feels that the process does not embody administrative justice and procedural fairness, the Constitution provides recourse.

This recourse is through the stipulation that 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum' as per s34 of the Constitution.[82]

3.1.2 Promotion of Access to Information Act

To ensure that access to information is exercised as provided in s32 (1) (a) and (b) of the Constitution, the state promulgated the Promotion of Access to Information Act (PAIA).[83] In chapter 3 s9 (a), (d) and (e), the objectives of PAIA include giving effect to the Constitutional right of access to information, establishing voluntary and mandatory mechanisms or procedures to give effect to right to information. Further, it promotes transparency, accountability and effective governance of all public and private bodies.

These objectives in s9 are brought into effect in s50 (1) (a) (b) (c) of PAIA. The afforested clause allows the right to access to records of private bodies if the request is for the exercise or protection of any rights, complies with procedural requirements in this Act, and access to those records is not refused in terms of any ground for refusal in the PAIA Chapter 4. In s11 (1) (a) and (b) of PAIA contains clauses on the right to access records of public bodies in Chapter 1. This law is in line with international instruments that bring fpic to life.

3.1.3 Promotion of Administrative Justice Act

The Promotion of Administrative Justice Act (PAJA)[84] was passed in order to give effect to s33 (1) of the Constitution. In this regard, s3 states that 'administrative action which affects materially or adversely the right or legitimate expectations of any person must be procedurally fair.'

[82]Constitution (n32) s34
[83]Promotion of Access to Information Act 2 of 2002
[84]Promotion of Administrative Justice Act 3 of 2002

In order to put into effect procedural fairness, s3 (b) requires that the administrator must give a person adequate notice of the nature and purpose, reasonable opportunity to make representations, a clear statement of administrative action and adequate notice of any right of review or internal appeal.

The administrator must hold a public inquiry as prescribed in s4 (2), and follow a notice and comment procedure prescribed in s4 (3). This requires communicating the administrative action to those who are likely to be materially or adversely affected, calling for and considering any comments received, deciding whether or not to take administrative action with or without changes, and ensuring compliance with the procedures to be followed in connection with notice and comment procedures prescribed.

The requirement for guaranteed access to information as per ss32 of the Constitution and ss 9 (a), (d) and (e), 11 (1) (a) and (b) and 50 of PAIA embodies the principle of fpic. As such, s33 of the Constitution and ss 3(b) (1) and s 4 (2) and (3) of the Promotion of Administrative Justice Act (PAJA) are the embodiment of the international principle of fair and just administrative process.

3.1.4 Environment Conservation Act

Although the Environment Conservation Act (ECA) 73 of 1989[85] is overtaken by NEMA, there is a body of jurisprudence emanating from court decisions when its provisions on listed activities and EIA regulations on public participation were challenged. What is relevant to public participation is that s32 (1) of the ECA requires ministers and competent authorities wishing to issue a regulation under this Act, to undertake public comment by issuing a draft of the regulation, declaration and direction as outlined in s32 (2) (b), requesting that interested parties submit comments within the period stated in the such a notice.

Whilst the public participation requirement in terms of s32(1) does not address involuntary displacement public involvement per se, its insistence on obtaining public input nonetheless underscores the essentiality of the principle of public participation.

The criticism of the ECA is that even though the Minister was empowered to make EIA regulations, the first regulations made in terms of this act did not explicitly refer to social and economic impacts.

[85]Environment Conservation Act 73 of 1989

This omission ignored social and economic interests as key elements of sustainable development and may reinforce the notion that sustainable development is about ‘‘green issues’’ rather than environmental justice.[86]

The ECA provisions were overtaken by s24 of NEMA, however, prior to its repeal, debates emanating from its application contributed to development of jurisprudence and as such the debates were probably a precursor to informing the formulation of the NEMA.

3.1.5 Expropriation Act

The key elements of the Expropriation Act 63 of 1975 are now contained in s25 of the Constitution. It is included in this discussion as it has historically been applicable to some events of removals and displacements. Further, this study is not making reference to the expropriation act with the intention to imply that induced displacement and the consequence relocation and resettlement due to expropriation. It acknowledged that the expropriation does result in forced removal but in this context is not equated to involuntary displacement.

In terms of the Expropriation Act[87], the Minister is not obliged to inform the public except the owner of the property to be expropriated. In circumstances where the owners of the property are unknown or cannot be found or if the whereabouts of the owner or any interested person is not readily ascertainable and the Minister is satisfied that the serving of notice is not implementable, s7 (5) the Minister is obliged to publish the notice in the gazette or in an Afrikaans or English newspaper once a week every two consecutive weeks in the area where the said property is located.

The use of only of two languages in notices may have prejudiced other language groups who may be impacted by expropriation. In the post 1996 constitution, more languages were recognized as official languages. The provisions of this Act may have disadvantaged property owner or land use rights owner as it seems it was not a ‘must’ for the Minister to ensure that the affected land owner is searched and found before expropriation.

This is contradictory to the requirements of administrative action and access to information because the Minister could proceed with expropriation if in his/her wisdom deemed the notice not implementable. This implies that the rights to property could be expropriated without the owner having been informed or been aware of such action – such application may have prejudiced many land rights owners thus robbing them of their asset and source of livelihood.

[86]M Kidd (n30) 257 and 260
[87]Expropriation Act 63 of 1975

3.1.6 Land use and planning legislation

Other legislation that give effect to the public participatory process according to Nealer[88] are:

(i) The Development Facilitation Act (DFA) Act 67 of 1995.[89] s3 (1) (d) provides for active public involvement in order to obtain the input of affected communities in local development.

(ii) The Spatial Planning and Land Use Management Act (SPLUMA) [90] in s12 (1) (o) stipulates that in preparing the spatial development frameworks, requires a consultative process and, where necessary, incorporation of the outcomes of substantial public engagement, including direct participation in the process through public meetings, public exhibitions, public debates and discourses in the media, and any other forum or mechanisms that provide such direct involvement.

(iii) In a similar vein, the Local Government: Municipalities Structures Act[91] and Municipal Systems Act[92] require public participation to afford communities and residents opportunities to co-determine priorities and needs. In addition to stipulating public participation, the Local Government: Municipal Systems Act[93] contains processes, mechanisms and procedures including public notices, regulations and guidelines for public meetings in s16-22. In the same act, Chapter 5 s29 details the public participation process required for undertaking Integrated Development Planning.

3.1.7 National Environmental Management Act

The prevention of the arbitrariness often associated and meted out against those who are on the footprint and pathways of development projects came with the enactment of NEMA.[94] Central to enabling a transparent, inclusive consultation and participation, and in pursuance of a just and fair process, NEMA adopts integrated environmental management through the sustainable development approach. The objectives of integrated environmental management approach are contained in Chapter 5, s23 (2) (c) (d) and (f).

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[88]E J Nealer 'Access to Information, Public Participation and Access to Justice in Environmental Decision-Making' (2005) at 475-478
[89]Development Facilitation Act 67 of 1995.s3
[90]Spatial Planning and Land Use Management Act 16 of 2013 s12
[91]Local Government: Municipal Structures Act 117 of 1998
[92]Local Government: Municipality Systems Act 31 of 2000
[93]Ibid. s16 to 22 and s29 of chapter 5
[94]NEMA (n33)

These objectives amongst others, are to 'ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment; ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them and ensuring an activity is conducted in accordance to principles of integrated environmental management'.

This sustainable development approach in Chapter 1, s2 (2) (3) (4) (a) to (o), requires that decision-making regarding development must balance social, economic, environmental and heritage needs.

The process of surfacing both negative and positive concerns, issues, impacts and benefits is undertaken through a public participation impact assessment process integral to the environmental impact assessment described in s24 of NEMA.[95]

In this regard, s24 (7) (a) to (i) of NEMA stipulates minimum procedural requirements for investigation, assessment and communication of impacts with (d) requiring public information and participation, independent review and conflict resolution throughout all the phases of investigation and assessment of impacts. In s24 (2) the Minister or the MEC is empowered to make regulations for authorisation of activity whilst s24 (3) (b) empowers the Minister to prescribe regulations laying down the procedure to be followed and the report to be prepared. Since the promulgation of NEMA in 1998, the first EIA regulations gazetted were challenged. Subsequently, the Minister published EIA regulations in 2010,[96] 2014,[97] and with the amendment gazetted on 07 April 2017.[98]

In the 2014 EIA regulations the procedure and steps for public participation meant that compliance is mandatory. Against the backdrop of mandatory compliance with EIA regulations on participation, Makhanya[99] underscores public input in the development process by stating that resettlement must be guided by the outcome of the EIA for that specific development. This is to ensure that concerns and issues raised by those to be affected by resettlements are considered during EIA.

In this regard, EIA is an important tool for surfacing and documenting resettlement impacts. However, the application of this process tool at times has invited challenge in the courts as demonstrated in the examples below under 4.3. This contestation relates to the subversion

[95]Ibid Chapter 1 s2 and s24 of chapter 5

[96]NEMA Environmental Impact Assessment Regulations GG 33306 GNR 543 2 August 2010

[97]NEMA Environmental Impact Assessment Regulations GG R 982 GN 38282 4 Dec 2014

[98]NEMA Amendment of the Environmental Impact Assessment Regulations Listing Notices 3,2 and 1 GG40772 GNR 324, 325 and 327 07 April 2017

[99]K K Makhanya (n3)16

of the exercise of the right to public involvement so fundamental to administrative action process, such as the undertaking of resettlement.

The requirements for public participation are aligned to integrated environmental management in accordance with the environmental principles stated in Chapter 1 of NEMA. The integrated environmental management approach requires that decisions on authorisation or non-authorisation of displacement-inducing projects assess the impacts on the physical environmental, heritage and socio-economic elements of the project.

In instances where adverse negative impacts are detected, mitigation to avoid and minimize such risks is implemented. This imposes a duty to respect human dignity, equality, the right to an environment that is not harmful, protection of property rights, the right to just administrative action, and access to information as obligated by the Constitution.

3.1.8 Mineral and Petroleum Resources Development Act

The Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002 is a recent statute governing the mining sector. Since its promulgation, historical and recent disputes over dispossession and removals for mining activities have been resolved by courts of law. Due to the fact that disputes of dispossession by mine developers have received prominence, it may be useful to include it in discussions, as jurisprudence has emerged out of such disputes.

In order to ensure public involvement, within 14 days of the lodged application, the Regional Manager publicizes that the application has been accepted as per the MPRDA[100] in Chapter 4 s10 (a); s10 (a). This is then followed by the Regional Manager calling upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice as stipulated in s10 (b) of MPRDA .

The above-stated provisions essentially allow the interested and affected to be aware i.e. they talk to transparency and some sort of disclosure, and to affected people being able to make submissions with regards to planned mining infrastructure development.

In addition to the provisions of the Act, the MPRDA Regulations GN R 348 GG 34225[101] in Chapter 2, s3 (1) (2) require the same as s10 (a) and (b) of the Regional Manager. Further, s3 of the Regulations requires that the Regional Manager publishes the notice in the provincial gazette, placing it in the appropriate magistrate's office and advertising it in the local or national newspaper where the land in question is situated.

[100]Minerals and Petroleum Resources Development Act 28 of 2002
[101]Minerals and Petroleum Resources Development Act Regulation GN R 348 GG 34225 18 April 2011

The regulation in s4 states that the notice must include invitation to members of the public to submit comments in writing on the dates specified in the notice within 30 days from the date of publication. In furtherance of s10 of the Act and s4 of the Regulations, a directive must be issued to all applicants to submit a consultation report with 30 days of notification by the Regional Manager of the acceptance of their application.

In section G of Guidelines for Consultation with Communities and Interested and Affected Parties[102], the applicant must retain a list with names and roles of the landowner or lawful occupiers and interested and affected parties. The applicant is also required to retain proof of notification of all affected and interested parties for submission to the Regional Manager. Lastly, the applicant has to consult with the landowner or lawful occupier, interested and affected party in a meeting, informing them in sufficient detail as to what the activity will entail. The applicant must also consult with a view to obtaining satisfactory agreement with regard to existing cultural, socio-economic or biophysical environment, ascertain whether there is a land claim or not, take minutes, and where possible obtain a stamped resolution.

The provisions of the Constitution and legislation described above clearly indicate that the post-democratic dispensation makes public participation process obligatory. Further, a key attribute of the constitutionally-entrenched participatory process is the mandatory access to information and the requirement that the administration of this participatory process must be procedurally fair. All other legislation, in furtherance of the Constitutional imperative, must contain mechanisms, processes, guidelines and regulations for undertaking mandatory engagement and consultative public participation.

NEMA and MPRDA together with their regulations require participation by those who will be affected. This entails informing them about the extent, scale, duration and potential impacts of the envisaged development. This should be done before execution stage of the development in order for potential impacts that may cause displacement to be known, and so that the affected are in a position to give consent voluntarily.

In this regard, the affected and interested parties are empowered to anticipate potential impact and express their views regarding the effects thereof.

[102]Guidelines for Consultation with Communities and Interested and Affected Parties in terms of sections 10(1)(b),16(4)(b),22(4)(b),27(5)(b) of the Mineral and Petroleum Resources Development Act 28 of 2002 DMR

The decision-makers are then required to consider their inputs. NEMA and MPRDA do not allow for arbitrary decisions, and therefore those who do not consider the views of affected and interested parties are in contravention of our legislative provisions.

3.2 Jurisprudence on the process of consultation

In Chapter 2, international protocols on the requirements for undertaking the process of consultation were reviewed. These international protocols are integrated into the local framework by making public participation obligatory through ss 59, 72, 118, and 231 of the Constitution and s24 of NEMA. In this regard, the Constitution is the foundation of mandatory public participation in the consultation process.

Whilst the Constitution provides this cornerstone, NEMA provides a legislative framework for effecting the Constitutional obligation on all developers to undertake this participatory engagement for infrastructure development through the environmental impact assessment mechanism. This section reviews case law that informs and promotes adherence to public participation through EIA and other legislative mechanisms applicable to instances of resettlement.

The theme in both the global and domestic framework when undertaking any form of process requiring public participation is access to information, reasonable, procedurally and fair administrative action as well as open, transparent engagement and consultation. These elements are the applicable practices in undertaking the process of relocation and resettlement. The next section reviews and evaluates the outcomes and implications of court decisions on the right to participate, and how these judgements influence development of a body of practices which inform the undertaking of involuntary displacement during large scale infrastructure projects.

3.2.1 Review of case law on public involvement and participation

One such case is *Doctors for Life v Speaker of the Assembly*,[103] in which the applicants alleged that the National Council of Provinces (NCOP) failed to ensure that there was public participation and involvement as required in terms of s72 (1) (a) and 118(1) (a) of the Constitution. This case is relevant because it establishes and affirms an unquestionable justification for requiring that any process or infrastructure project such as induced involuntary relocation and resettlement should undertake public participation for those impacted by the project risks.

[103] *Doctors for Life v Speaker of the Assembly & Others* (n58) para 2

In this *Doctors for Life* matter, the judgement affirmed the applicant's plea regarding the NCOP's failure to comply with a Constitutional obligation. The court pointed out that ss72 (1) (a), 118(1) (a) and 59(1) (a) use the word 'must', thus making this obligation mandatory. In other words, it is neither an option nor is there an opportunity to act contrary to this constitutional obligation.[104] This is because ss72 and 118 require that the NCOP and the National Assembly have to conduct their business in an open manner and may not exclude the public unless it is reasonable and justifiable to do so.[105]

Secondly, in *Doctors for Life matter*, the court concurred with the applicant by stating that exclusive jurisdiction over the exercise of determining Constitutional obligations is granted in terms of s167 (4) (e) of the Constitution. The court supported its concurrence by applying the narrow definition of the term 'constitutional obligation in *President of the Republic of South Africa v South African Football Union.*[106] In this regard, the court agreed with the applicants on the grounds that the relationship between the NCOP and provincial spheres justified a political right, expressed through public participation.

The court reasoned that the process of drafting the Bills which were a subject of contention, before the NCOP, had shortcomings in its public participation. It pointed out that the Bills under contention were likely to have an impact on the Provinces but the NCOP had not extended public participation to provinces. The consequence thereof is that the public participation required of the NCOP to conduct public participation before the Bills could be passed had not been followed. This is because 'participation in terms of s72 (1) (a) of the Constitution, it is a must for this the end to be achieved and that any contrary action would conflict with accountability, responsiveness and openness.'[107]

Although the voice of the applicants could be assumed to be through the public representative (i.e. members of the NCOP voting for the Bills that were subject of challenge), the court's sentiment was that the right to political participation extends beyond mere voting, to include participation in the conduct of public affairs.[108] This approach resonates with the essence of why public participation is fundamental in involuntary resettlement and that people affected by projects should be accorded their Constitutional rights. It is for this reason that when NEMA was enacted, specifically, s24 spelt out a public involvement process.

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[104]Ibid (n58) para 14
[105]Ibid. paras 73 to 74
[106]Ibid para 20
[107]Ibid. paras 141 to142
[108]*Doctors for Life* (n67) para 98

In order to bring to life s24 of NEMA, EIA regulations whose objective is to receive inputs and concerns from the interested and affected persons were gazetted. Therefore, large-scale projects, which sometimes result in relocation and resettlement have to subject their processes to public participation, not only to receive comments but also to accord dignity and respect to displacees.

In the *Land Access Movement of South Africa v Chairperson of the National Council of Provinces*[109] similar reasons to those in *Doctors for Life* were advanced in a restatement and affirmation of the exclusive jurisdiction of the court in terms of s167 (4) (a) and (b) over disputes about the constitutional status, powers and function amongst state organs. The relevance of clarifying jurisdictional competence of the Constitutional Court was essential, since the referral of a matter was to argue that there should have been public participation was challenged. In this regard, the court had first to confirm its competency on the matter of public involvement as a constitutional issue, prior to considering the issue of whether the public participation requirement was fulfilled or not.

In this matter, the court also reached a determination that public participation was indeed mandatory in terms of ss 72 (1) and (2). Accordingly, the plea of the applicant using the principle of reasonableness as a test or yardstick, passing of the Amendment Act being deemed important enough to deserve reasonable public participation process.

The court rejected the submission on time frame restrictions due to the imminent recess of Parliament. The court stated that imminent recess could not justify not allowing for engagement and involvement of Provincial Legislatures. This approach adopted by the NCOP was found to have failed the test of reasonableness, thus rendering public participation insufficient and resulting in the ruling in favour of the aggrieved applicants.[110]

The test of reasonableness requiring consideration of all circumstances, practicalities, and facts such as nature, urgency, importance, cost, time and method, in determining the adequacy of public participation was debated in *Poverty Alleviation Network v President of the Republic of South Africa.*[111]

Although the applicants' prayer was dismissed on the basis that the test of reasonableness was adequately adhered to in the circumstances of this public participation. In this matter, it is not so much success in proving reasonableness that is important. It is the essence of the

[109]*Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (ZACC) 22 at 6

[110]Ibid. para 76 to 80

[111]*Poverty Alleviation Network v President of Republic of South Africa* CCT 96/08 2010 (ZACC) 5 at 33 & 35 to 36

court's sentiment that 'when a decision is made without consulting the public, the result can never be an informed decision.' This statement affirmed public participation as a mandatory procedural process requirement.

The principle of public involvement extends beyond just mere parliamentary process in South Africa. This requirement was ventilated in *Law Society of South Africa v President of the Republic of South Africa*[112] wherein the actions of the President of suspending the initial Tribunal of the SADC Treaty, reconstituting the Second Tribunal, and signing the SADC Treaty drafted by the Second Tribunal was perceived to have infringed on the rights of citizens affected by the SADC Treaty.

The treaty drafted by the First Tribunal would have given access to courts in disputes between States whereas the Second Treaty denied such access. This is because in signing the SADC Treaty drafted by the Second Tribunal, the President had not sought a resolution of the Parliament as required by s231 (2) of the Constitution. In effect, the signing of the Second Tribunal's SADC Treaty was unconstitutional because the Constitution makes Parliament the final body with the final word on treaty-making process.

The exercise of democracy through public participation is also confirmed in the *South African Veterinary Association v the Speaker of the National Assembly and Others*[113] wherein the court mentions the exclusive jurisdiction of the Constitutional Court as the only court empowered to decide whether Parliament or the President has failed or fulfilled a constitutional obligation, as given through s167 (4). It is also said to stem from ss59 (1), 72(1) and 118(1), as established in *Doctors for Life and King v Attorneys Fidelity Fund Board of Control*.

The affirmation of the constitutional obligations in s167 (4) (a) and (b), and mandatory public participation in ss72 (1) (a), 118(1) (a) and 59(1) (a), is complemented by ss32 and 33 of the Constitution respectively guaranteeing everyone the right to have access to information and administrative justice when undertaking public process.

These rights to information and administrative justice are pertinent when undertaking resettlement as they embody the exercise of fpic as non-negotiable and upon which the rights of affected persons to human dignity, respect, equally and freedom depend.

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[112] *Law Society of South Africa & &Others v President of the Republic of South Africa and Others* Case No 20382 2015 at 66 to 71

[113] *South African Veterinary Association v Speaker of the National Assembly & Others* 2018 (ZACC) 49 at 15 to 16, 17, 26 & 33

The essence of these aforestated rights and principles of fpic are affirmed in *Bengwenyama Minerals (PTY) LTD v Genorah Resources (PTY) LTD*, where it states that 'equality, dignity and freedom lie at the heart of the constitution.'[114]

In *Earthlife Africa v Director General: Department of Environmental Affairs and Tourism,*[115] access to administrative justice and information was contested. The applicant contended that the obligatory public participation was emaciated, because although they participated in the initial phases, they were later denied opportunity to make representations in the final draft of the environmental authorisation process.

The court soundly agreed with the applicants that an opportunity had been denied, stating that 'fair hearing means opportunity to present evidence in a meaningful way or representation.' In support of its approach, the court stated that public participation is not a single event but a multi-stage event continuously accommodating input until its final stage of decision making.

The court felt that allowing the applicant opportunity even in the final draft would not have overburdened the department, and suggested that procedurally, fairness should be a generous rather than a legalistic approach.[116]

The challenge in implementing public participation as part of the NEMA EIA process is that the approach tends to be narrow by focusing on issues of environmental preservation and conservation. In this regard, the multi-staged process that the court decision refers to is applied only as sequential or chronological steps wherein if a stage of comments and inputs is passed, the window is 'forever' closed, with environmental practitioners and department officials wanting to proceed irrespective of the strength and gravity of further information and/or submissions which may emerge.

This practice is compounded by the fact that the NEMA's EIA and regulations do not explicitly list relocation and resettlement impacts and planning as triggers and /or thresholds requiring prior assessment before authorisation, as mandatory, listed or specified. This then results in the omission or inadequate consideration of input regarding the extent of resettlement impacts. It is for this reason that NEMA EIA regulations need to be augmented to include explicit provisions for assessing and evaluating these relocation impacts.

[114]*Bengwenyama Minerals v Genorah* (n25). para 3

[115]*Earthlife Africa v Director General: Department of Environmental Affairs & Tourism* 2005 7653/03 (ZAHC) at 79

[116]Ibid para 89 to 91

This leads to administrative justice such as in the *Earthlife Africa* matter, where the applicants' right to administrative justice was denied because opportunity for the hearing and submission of their input into the Environmental Impact Report (EIR) was technically and legally out of sync with the process requirements of s3 (b) (c) of PAJA .The reason for this denial was that the applicant did not exhaust internal review or appeal mechanisms.[117]

In this *Earthlife Africa* case, the court seemed correctly sympathetic to the applicants' cry, substantiating its sympathy on the basis that in exceptional circumstances and in the interests of justice, internal appeal mechanisms could not be used to deny the applicant an opportunity to be heard. Therefore, the court felt that in terms of s7 (2) (c) of PAJA which conveys a discretion, it was correct to lean towards accepting the applicants' exceptional circumstance, in furtherance of administrative justice and promotion of access to the courts.[118]

Based on the above considerations, the court concluded that in terms of s3 (2) (b) (ii) of PAJA, the applicants' right to procedural fairness through access to reasonable opportunity to make representations should be upheld. This approach confirmed that in these circumstances, public participation was flawed because it infringed on the rights to information and a procedurally-fair process.

This principle of fpic is contested in *Duduzile Baleni v Department of Mineral Resources.*[119]

In this matter, the aggrieved occupants of the land on which mining was proposed insisted that transparent information and open consultation was requisite prior to the issuing of any licence to develop a mine on the land they occupied.

The dispute in *Duduzile Baleni* matter[120] was over the interpretation of consent arising from the rights of non-title holders to land as contained in the IPILRA versus consent derived from the consultation required by MPRDA. In this matter, land use rights holders to communally-owned land insisted that their consent was mandatory before the developer was granted mining rights or the Minister of DMR granted an environmental licence to mine.

The applicants which is the Xolobeni community of Umgungundlovu disputed the Minister's competence to grant mineral rights to the developer, which required consent from land use rights holders and not just mere consultation, because the consent of land use rights holders is a mandatory requirement in the IPILRA.[121]

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[117]*Earthlife Africa v Director General: Department of Environmental Affairs & Tourism* 2005 7653/03 (ZAHC) at 27 to 33

[118]Ibid para 43 to 45 and 68

[119]*Duduzile Baleni and Others v Department of Mineral Resources and Others Case No 73768/2016 (ZAHC)*

[120]Ibid

[121]Ibid *paras* 24 to 27

This outcome is game a changer on the dynamics on the application of meaningful consultation to yield informed consent. It challenges practices of the EIA processes i.e. the scoping phase can no longer be a mere recording of conventional environmental risks such water, air , land , dust and atmospheric impacts. This outcome requires a holistic and integrated approach that considers in equitable regard the impact on human life and activity. In this regard, people living on the land have to be satisfied that their living and way of life is truly considered before they consent. This consent can no longer be glibly conferred without prior full disclosure. In this regard, the current EIA screening and scoping seems to be insufficient in delivering a meaningful informed consent. It is for this reason that this study recommends improvement of certain aspects of EIA regime for surfacing concerns. This is in order to ensure that genuine consent is an outcome of a robust meaningful consultation.

The applicants also insisted that they were entitled to information on how the impacts of granting the mining rights were to affect their way of life. Further, the applicants wanted to know mitigation of those effects prior to the start of mining activities.

In granting a declaratory order in favour of the applicants, the court substantiated its reasoning on the basis that where there is conflict on the interpretation of legislation, s39 (2) of the Constitution requires that the interpretation must promote the objectives of the Bill of Rights. In addition to using s39 (2), the court must first determine the interests of contending parties in terms of existing or future rights. Once this determination favours one of contesting parties, the court is empowered to use its discretion and consider all relevant circumstances. In this matter the court found that the prevailing tensions and history were adequate circumstances for intervention.[122]

Secondly, the court asserted that MPRDA and IPILRA are not in conflict but should be interpreted and read harmoniously. The court insisted that the Minister's prerogative to grant mineral rights neither subverts nor diminishes the obligation to obtain prior consent from the community. This is because their right to land use is recognised as they are a community whose rights originate from indigenous ownership recognised by the Constitution and IPILRA.[123]

The court also clarified that MPRDA was not created to deal with the deprivation of the right to land use or protection of insecure or informal rights as is the case in the Xolobeni

[122]Ibid paras 3 and 34

[123]*Duduzile Baleni v DMR* (n119) paras 34 and 77 read with paras 24 to 26

community's communal land. It stated that s2 (1) of IPILRA was the appropriate legislation dealing with deprivation and expropriation mechanisms in the eventuality of deprivation.

In essence, this abovementioned court sentiment exposes the deficiency of only granting authorisation and licence to mine by only seeing the impacts through the prism of MPRDA. This aforestated approach may have similar consequence if when assessing and making environmental authorisation decision there is no evidence on effect of deprivation through displacement and resettlement effects on people living and sustained by the land to be mined. It is for this reason that this study will suggests that both MPRDA and NEMA EIA regulations explicitly consists displacement induced resettlement and relocation as specified activity.

Accordingly, MPDRA or the Minister has no jurisdiction over the land use rights of informal landowners merely because of the authority to grant mining rights based on the outcome of consultation. Although the granting of a mining right within the ambit of the MPRDA only looks at its own requirement without necessarily evaluating obligations of other statute in so as they applicable to subject land where mining is to take place, the Minister of DMR may not disregard these rights to land use.

In this regard, granting mining rights to the developer based on MPRDA consultation and not on prior consent as defined in IPILRA would have meant deprivation as the developer would engage in activities that had the potential of interfering with the use and enjoyment of land, and consequent mining would interfere with agricultural activities and the community's general way of life.[124]

The court concluded that IPILRA protected the communities with insecure or informal land use rights, which meant that meaningful consent not just mere consultation was supported by domestic legislation and also in line with international law.[125] This in turn implies that fpic is mandatory for informal land use right holders who are threatened by infrastructure development. This obligatory consent is required so that the affected community has access to accurate and detailed information regarding planned development on their land, and as to how these impacts will be mitigated, before the start of the project. This is in order to make informed decisions.[126]

The outcome in the *Duduzile Baleni* matter is significant for communal land use rights holders with insecure legal title. This is because often it is in such communities where

[124]Ibid paras 56,58 ,59 and 63
[125]Ibid para 78
[126]*Duduzile Baleni v DMR* (n119) paras 18 and 66 to 67

involuntary displacement suppresses respect, fair treatment and meaningful restoration, because such land use rights holders are deemed to have no secure legal power to bargain and therefore can be easily 'bullied'.

The fundamentality of consent where land is communally owned under common law was reinforced in *Maledu v Itereleng Bakgatla Minerals (PTY) Limited*.[127] In this matter, as in *Duduzile Baleni v DMR*, the court considered the interests of justice and therefore applied the principles of consistency with the Bill of Rights using s233 on interpretation of legislation in line with international law.

In this regard, the court amplified the role of constitutional democracy by elevating customary law, stating that s211 of the Constitution protects customary law institutions. It clarified that in situations where land is held on a communal basis, affected parties deserve sufficient notice and reasonable opportunity to participate in person or through a representative at a meeting where the decision to dispose the right to land use takes place.[128]

The court also emphasized that the granting of mineral rights does not expunge the right of an occupier of land presumed to be included amongst informal land use rights holders under the IPILRA. It further stated that the developer could be given consent under IPILRA, but the informal right holder might still be entitled to occupation depending on the terms and conditions.[129]

Securing the rights to land use or assets of vulnerable, insecure informal rights holders is even more imperative in the situation where project activities have negative impacts for both legal title holders and informal rights holders.

Adherence to the constitutional obligation and to public participation protocols contained in NEMA s24 (7) and MPRDA s10 (b) and the regulations thereunder is crucial to equal and fair treatment. This process protocol ensures that the rights of displacees to equality, human dignity, residence, property and environment outlined in the Constitution remain paramount as a lever for attaining environmental justice during relocation and resettlement. This strengthens meaningful consent and participatory democracy.

In the above-stated court matters, consent obtained through public involvement of the directly affected land use rights holders, whether informal or formal, is obligatory.

The dilemma is that as long as the NEMA EIA regulations and MPRDA consultation process remains limited to comments and inputs, and does not provide a clear process of planning

[127] *Maledu v Itereleng Bakgatla Minerals* (n23) paras 32 and 44 to 46
[128] Ibid paras 94 and 97
[129] Ibid (n23) paras 103-105

for the process of relocation, the mitigation of resettlement impacts will continue to be subordinated. This is because this phenomenon of displacement is not specified as an activity requiring its own detailed process which extends beyond merely registering comments.

Further, a point has to be made that current NEMA, MPRDA and their regulations on public participation is inadequate in so far as process for addressing resettlement impacts upon land use rights holders. This is because regulations do not go far enough to integrate the obligations such that they are mandatory.

Whilst it is acknowledged that it should not be the burden of the NEMA and MPRDA to be seized with the rights of land use holders in terms of their protection under the IPILRA, it may be myopic to be dismissive. This is because the need to balance the interests and protection of land use rights holders under the IPILRA with the consent required by the developer are intertwined and overlap. These competing requirements of legislation require careful navigation, especially after the land use rights holders under the IPILRA are emboldened by the outcome in the *Duduzile Baleni* matter on consent.

It is these contesting contradictions that are the cause of weaknesses in the NEMA and MPRDA's fulfilment of consultation requirements. This weakness results in the erosion of a robust approach which should consider relocation and resettlement arising from displacement as an integral element of assessment the risks and impacts.

NEMA's s24 (4) (1A) makes it obligatory to comply with the requirements for applying for EIA. The requirements include compliance with 24(4) (1A) (c) in relation to any procedure for undertaking public participation and information gathering where risks and impacts of development are anticipated. In s24 (4) (a) it is stated that procedures for investigating, assessing and communicating potential consequences or impacts to the environment must ensure amongst other things in s24 (4) (a) (v) that public information and participation procedures provide all interested and affected parties with reasonable opportunity to be included. These procedures for consultation with land owners, lawful occupiers and other interested and affected parties are gazetted by the competent minister in terms of s24 (5) (b) (vii).

In *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga,*[130] the court set aside the lower court's ruling because it found against the authorities for approving the construction of a filling station. The court agreed with the submission that the EIA process was flawed because they did not adhere to the spirit and objective of legislated EIA process as required by the Constitution, and set out by the ECA and NEMA ss22 and 24 respectively. Due to a flawed EIA process, the decision of the respondent also meant that there was error in the administrative action stipulated in PAJA s6 (2) (b).

The flaw in the EIA process was not that the process was not undertaken. It was the neglect or disregard of inputs by various interested and affected parties that rendered the process lacking in the requisite due diligence; yet the authorities found nothing irregular. The court found incorrect handling of certain aspects during the EIA process: for example, in terms of ECA and NEMA and its regulations, a risk averse approach should have informed the authorities' sense of awareness, especially when the applicant referred to a need to assess possible accumulative impacts that could result in the contamination of underground water in the aquifer.

Secondly, the action by the Department of Water Affairs and Forestry (DWAF) of merely noting the report on possible impact on underground water seemed to indicate lack of technical expertise or abdication of a duty of care to uphold the right of all to an environment that is not harmful to their health and wellbeing, as well as protecting the environment as required by s24 of the Constitution. Thirdly, another act of abdication was the reliance on town planning rezoning to consider the need and desirability of a fuelling station notwithstanding the regulator's obligation to undertake their own impact assessment in the decision-making process as required by ECA and NEMA.[131]

Central to public participation is a transparent process. It is for this reason that in *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs,*[132] the court ruled in favour of the applicant not only because the provisions National Environmental Management Protected Areas Act (NEMPAA) were disregarded but also

[130]*Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga* Case NO CCT 67/06 2007 (ZACC) 13 at 43 to 63

[131]Ibid paras 81 to 86

[132]*Mining and Environmental Justice Community Network of South Africa & Others v Minister of Environmental Affairs & Others* Case No 50779 2017 (ZAHC) at 11.2.1 to 11.2.7

because the ministers deliberately deviated from the procedures stated in PAJA s3 (1) - (4) and 4 (1) - (3). The ministers as respondents claimed that these deviations were because other functionaries had heard the objections of the applicants. The court found this to be unjustifiable as there had been no written or documented motivation. The court characterised this as mere tick box rather than a well-considered application, with resulting denial of a transparent public process.

In *HTF (PTY) Limited v Minister of Environmental Affairs and Tourism*,[133] the court found that the applicants failed to undertake the mandatory impact assessment. The impact assessment would have required a mandatory public participation process. The court based its decision on the fact that activities undertaken were listed in terms of ECA and NEMA regulations 1182, 1183 and 1184, which required compliance with the mandatory EIA process and public participation.

In *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape*,[134] the court found that the decision-making in granting the record of decision without public involvement was flawed. This assertion was based on the fact that the public space to be developed was hitherto used by the public. This meant that the public were an interested and affected party whose comments, concerns and potential risks had to be considered before a decision was reached under NEMA 24 and its EIA regulations.

Secondly, as part of the decision-making, the MECs failed to request an expert report to determine whether the land in question should be kept as a public space or not. It is for these reasons that the process of decision-making was found to have not complied with s22 (2) of ECA and EIAR R1183. These omissions constituted administrative action breaches and therefore were in contradiction with the requirements of s6 (2) (b) of PAJA when considered in conjunction with s24 of NEMA and its regulations.

The outcome of the case law detailed in the preceding sections underscores how fundamental meaningful public involvement and participation is to a fair and just process.

The provisions of ss 32, 33, 72, 118, 59 and 231 of the Constitution and NEMA s24 (4) (a) (ii) and (v) and (b) read with s24 (5) of NEMA are a vehicle for manifesting a meaningful voice of the will of the people in all processes of human endeavour and in all spheres of

[133] *HTF (PTY) Limited v Minister of Environmental Affairs and Tourism & Others* Case No 24371/05 (ZAHC) at 21,22, 26 and 33

[134] *Sea Front for All & Another v MEC: Environmental and Development Planning, Western Cape* Case No 15974/07 at 39 and 47

State and private entities. This true voice is sometimes suppressed during displacement and that is in dissonance with the intent of Constitutional imperatives.

This suppression is attested to by the numerous referral of the disputes to various courts for intervention described in 3.2.1. Insofar as the jurisprudence discussed above is concerned, certain principles or objectives of public participation can be deduced as follows:

(i) Public involvement is compulsory and therefore it is a must that it takes place. This is established in *Doctors for Life, Sea Front for All, Land Access Movement, Law Society of South Africa* and *HTF (PTY) Ltd.*

(ii) Fulfilment of the interests of justice in a reasonable manner as far as possibly practicable. This principle was applied in the *Poverty Alleviation Network* matter.

(iii) Access to information and the informed consent principle were demonstrated in *Veterinary Association* and *Duduzile Baleni* matters.

(iv) The principle of administrative justice is demonstrated in the decisions in matters such as *Earthlife, Fuel Retailers Association of South Africa and Environmental Justice Community Network.*

3.3 Compensation framework for loss of assets and livelihoods

3.3.0 Introduction

This section examines legislative and regulatory instruments that are applied as a compensation tool in infrastructure-induced displacement projects. In this discussion, local compensation methods are described focusing on their level of adequacy as a vehicle for ameliorating loss for those impacted by involuntary displacements.

In South Africa, there is no singular, all-encompassing law specific to compensation arising from these displacements. A number of statutes, starting with the Constitution, contain provisions on the right to property and land. These statutes contain requirements and mechanisms for transfer of assets. These mechanisms of transfer are reviewed in relation to their use in situations of involuntary dispossession.

3.3.1 Constitution of the Republic of South Africa

In s25 (1) of the Constitution[135] protects property rights are protected by precluding any citizen from being arbitrarily deprived of property other than by generally-applicable law. In order to prevent arbitrary dispossession, s25 (1) and s25 (2) of the Constitution allow expropriation only for public purpose and in public interest subject to stipulated conditions.

[135]Constitution (n32) ss25(1) and (2)

The conditions for expropriation are that there must be compensation for deprivation, and that the amount, time and manner of payment is agreed to by those affected, and/or approved by the court.

Regarding s25 (3), Erasmus[136] and the Constitution[137] both state that it requires that the determination of the amount, time and manner of compensation must be just and equitable by taking into account current use of the property, history of the acquisition and use of the property, market value of the property and the extent of direct investment in improvements on the property.[138]

The provisions of s25 (1) to (3) together with s26 (1) of the Constitution[139] obligate the State to respect the right of property owners and ensure that citizens have access to adequate housing. Thus s26 (3) prohibits arbitrary evictions or demolishing of homes without an order of the court after considering all circumstances.

The right to property is enshrined in s25 (1) and requires that the rights of citizens are respected and protected. In situations of displacement, loss of property, as in the physical dislocation of brick and mortar structures, is not the only factor which should be considered. In such instances, loss goes beyond the mere physical. It also includes dislocation and spiritual disconnection from land, burial grounds, livelihoods and a sense communalism, even if the relocated do not have a legally-secure land right. Project developers may do their utmost to lessen the impact, but change from one's psychological, spiritual and habitat milieu constitutes an irreversible loss in terms of mental versus physical location construct.

It is for this reason that any dispossession of property and land use rights must respect the rights to human dignity, equality, freedom and security per ss9 to 12 in Chapter 2 of the Constitution.[140] The protection against loss of property and the right to land use therefore extends to loss and dispossession in situations of involuntary displacement and relocation.

In South Africa, in furtherance of respect and protection of property rights and/or land use rights, payment of compensation for the loss of these rights is an established practice in terms of the Bill of Rights of the Constitution, specifically s25. The Constitution and the law guarantee the right to property, security of tenure and, by extension, compensation for loss

[136]J Erasmus 'The interaction between property rights and the land reform in the Constitutional order in South Africa' at 268.
[137]Constitution (n32) s25(3)
[138]Ibid
[139]Constitution (n32) s26(1)
[140]Ibid ss9 to 12

of assets and property. This protection is brought into life through various legislation and regulatory provisions described in the sections that follow.

3.3.2 Expropriation Act

Although not directly addressing compensation for involuntary displacement, the Expropriation Act[141] describes in s10 and 11, requirements for compensation in cases of expropriation for public use or benefit, whilst s13 and 14 set out clear requirements for compensation. Expropriation in terms of this Act may happen especially within the provision of the Infrastructure Development and Development Facilitation Acts.

In s12 (1) - (5) of the Expropriation Act, the basis upon which the quantum of compensation shall be determined is described. In s12(1) (a) (i) and (ii) it is stated that the compensation amount shall not exceed the amount which the property would have realized in the open market by a willing seller to a willing buyer, and any other amount to make good any actual financial loss caused by the expropriation.

In instances where there is no open market, the amount will be the cost of replacing improvements on the property. This Act provides detailed ways of calculating financial compensation in the situation of expropriation. The calculation proposed in the Act can be considered for adaptation to situations of involuntary displacement even though its shortcoming remains the market value approach.

The Expropriation Act, predates the 1996 Constitution wherein s25 contains the right to property. The usefulness of the Expropriation Act may have come from the fact that then it at least provided a mechanism for determining compensation. This Act was disempowering for subjects of involuntary displacement as in its description and application, it implies dispossession with limited administrative action fairness.

3.3.3 Security of tenure and restitution legislation

Prior to the new constitutional dispensation the land rights of non-legal title owners were not guaranteed, thus making them susceptible to arbitrary removal without compensation.

This failure to protect informal rights holders was therefore in conflict with the new Constitution as it could be deemed arbitrary, which is outlawed by ss25 (1) and 26(1) of the

[141]Expropriation Act (n87)

Constitution. In order to protect non-legal title owners, the IPILRA[142], Extension of Security of Tenure Act[143] and Land Reform (Labour Tenants) Act were enacted.[144]

The common objective of these statutes is to protect the rights and interests in land of informal rights holders and to ensure that appropriate compensation is paid for deprivation, damages and costs of suffering or inconvenience. Further, these statutes require that eviction or deprivation adheres to due process of notification, participation or a court order, where necessary.[145] Unlawful occupiers are also protected by the Prevention of Illegal Eviction from Unlawful Occupation of Land Act. This Act requires that prior to taking action to evict unlawful occupiers, the conditions of ss4 (2) – (12), 5 and 6 are adhered to.[146]

Another statute that provides for compensation for dispossession is the RLRA.[147] In s2 (3) of the Act it is stated that it is required that appropriate compensation is paid upon expropriation or acquisition of the informal land rights holder's land. Further, amongst other considerations, s33 of the RLRA stipulates that the court must consider requirements of equity and justice, amount of compensation or any other consideration in respect of dispossession, the history of dispossession, hardships caused and, in the case of equitable compensatory redress, changes over time in the value of money.[148]

Due to historical deprivation where customary law or indigenous communities were denied the full benefit of their land use rights or partial property ownership. In s25 (6)[149] of the Constitution a provision is made to accommodate for historically discriminated person(s) or communities whose tenure is legally insecure as a result of past racially-discriminatory practices. Most of these communities lived communally under a customary-law system or as tenants whose informal rights were often suppressed during displacement. It is essential that their rights, as contained in IPLRA s2, are recognised, as they are entitled to and as equally eligible for compensation as are legal title holders.

[142]IPILRA (n36)
[143]Extension of Security of Tenure Act No 62 of 1997
[144]Labour Reform (Labour Tenants) Act 3 of 1996.
[145]J Erasmus (n136) 424 - 431
[146]Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998
[147]Restitution of Land Rights Act No 22 of 1994
[148]Ibid
[149]Constitution (n32) s25(6)

3.3.4 Local government legislation

Local and provincial spheres of government are controlled by laws regulating compensation for loss of assets when undertaking development. In this regard, the Municipality Finance Management Act,[150] whilst limited to the disposal of municipal assets, in Chapter 3, s14 (2) (b) makes mention of fair market value, and s14 (5) states that the process should be fair, transparent, equitable and competitive.

The Planning and Development Act,[151] is a KwaZulu-Natal provincial tool used to enable planning and development that also recognises compensation to mitigate loss. In Chapter 9, ss95 to 98 different categories of entitlement to compensation are dealt with. In s99 mechanism for the determination of the amount of compensation arising from loss of any property are detailed. In the same aforestated section, the court is described as a resolution mechanism in the event that an agreement is not reached. The Act does not provide any specifics regarding the manner and method in which compensation is to be determined.

The basis for determining compensation is also contained in the Local Government: Municipality Property Rates Act,[152] specifically in Chapter 5 s46 (1) which recognizes the market value as the criterion for determining compensation, and s46 (4) states that when valuing property any annual crops or growing timber not yet harvested, and any unregistered lease, must be disregarded.

3.3.5 Mineral and Petroleum Resources Development Act

The mining sector's infrastructure development requirements tend to be associated with involuntary displacements. It is perhaps for this reason that the Minerals and Petroleum Resources Development Act (MPRDA)[153] in s54 speaks to compensation. In s54 (3), (4) and (7) of the MPRDA it is required that within the process of consultation for access to land or property in order to prospect or mine, property owners and developers must agree on the compensation for suffering or likely suffering of the owner through loss or damage.

In the event that no agreement is reached on compensation, parties should use arbitration or litigation to reach agreement. The wording in these sub-sections is inclined to favour the developer - the title of s54, 'Compensation Payable Under Certain Circumstances', implies

[150]Municipality Finance Management Act No 56 of 2003
[151]Planning and Development Act 6 of 2008
[152]Local Government: Municipality Property Rates Act 6 of 2004
[153]MPRDA (n43)

that it is not mandatory, and 54 (1) (2) allows the developer to report the landowner to the regional manager if access is denied or the landowner is deemed unreasonable.[154]

3.3.6 Property Valuation Act

The relevance of the Property Valuation Act is that it is the authorative tool to be used in assessing and determining loss of assets. This is because it requires its practitioners to be authenticated by being professionally registered. It is therefore imperative that in situation of relocation and resettlement, only these registered experts are utilized so that the calculations of loss and outcomes thereof are professionally defendable.

In terms of s15 (2) of the Property Valuation Act[155] valuation reports issued by valuators must provide relevant information including the current use of the property, its history of acquisition, use of the property, market value of the property, an explanation of how the value was determined, and the methodology used in determining the value.

The importance of the Act is that it provides methods of assessment and valuation of property: registered valuers are required to follow certain professionally-acceptable practices when valuing the loss of properties. This competency is important as it is used in determining a just and fair value of loss in situations involuntary displacement. Fairness in valuation is central to determining fair compensation which the directly affected deserve.

3.4 Jurisprudence dealing with compensation for loss of assets and livelihoods

The fears, concerns and expectations of persons affected or likely to be affected by the effects of non-equivalent restoration and compensation during the resettlement process has been a subject of numerous court disputes. Below is discussion on the reasons and court decisions over these disputes.

3.4.1 Review of case law on compensation for loss

One such example is *Alexkor Ltd v Richtersveld Community*.[156] In this matter, the Richtersveld community was being deprived and dispossessed of rights in land as well as mineral endowment without compensation for benefits from the exploitation of minerals by Alexkor, a government entity. In dismissing the contention of Alexkor, the claim of the Richtersveld community's right in land was based on communal indigenous ownership prior to the annexation, which predated 19 June 1913 where they had occupied the land continuously for 10 years.

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[154]MPRDA (n43) s54

[155]Property Valuation Act 17 of 2014

[156]*Alexkor Community v Ritchersveld Community* (n24) para 50 to 51

In supporting communal ownership under a customary setting, firstly, the court stated that indigenous law should be applied 'without importing English conceptions of property law'. Secondly, because s211 (3) of the Constitution implores the court to interpret any legislation in the spirit and objects of the Bill of Rights, such interpretation recognises customary law as integral to South African law as long it is consistent with the Constitution.

It then followed from the affirmed right to land that Alexkor's claim that the community was not entitled to the minerals was correctly rejected by the court. The court substantiated its rejection by stating that the community provided historical evidence that mining was already taking place before annexation. The court rejected the suggestion that annexation extinguished customary ownership, as the history of usage, ownership and occupation pre-dating 1913 was evident.[157]

The Richtersveld community dispute was not just about the right to land but extended to entitlement to benefits from the use of land including the minerals.

The Richtersveld community's dispossession was systematically applied, firstly with the establishment of a reserve in 1926 covering the areas where diamonds had been discovered. Subsequently, the Precious Stones Act 44 of 1927, which established the State's alluvial digging, constantly extended the area until the entire mineral-rich area had been appropriated. This Act did not recognise indigenous rights to the land.[158]This non-recognition of the indigenous rights to land is in dissonance with the global standards and domestic customary law. It therefore was an instrument that subjugated land ownership and use rights of indigenous people.

In *Duduzile Baleni v Minister of Mineral Resources*,[159] the court ruled in favour of the Umgungundlovu community who, if they had not sought relief, would have been displaced if the Minister granted the mining right to the developer without prior consent of the Umgungundlovu community. The reasoning of the court was similar to that in the Richtersveld community.

The court recognised the applicants as a community as defined by customary law and therefore their rights were protected by the IPILRA. The court further stated that the granting of the mining right would have meant the infringement and deprivation of the community in their use and enjoyment of their land.

[157]Ibid paras 60 to 64 and 68
[158]Ibid. (n24) paras 84 to 85 and 89
[159]*Duduzile Baleni v Minister of Mineral Resources* (n18) para 59

In order to halt this deprivation, the court declared that the Minister and developer required prior consent before any mining activity or mining licence could be granted.

These court articulations established not only the rights of informal landowners but are also in line with s2 (3) of IPILRA which insists that any deprivation and prevention of enjoyment of rights to land have to be compensated appropriately. This resonates with s25 (1) (2) (b) of the Constitution. In many instances of resettlement and displacement, dispossession of land use and deprivation of benefits of resource endowment is the motive. This happens without appropriate compensation.

The court decision in *Baphiring Community v Tshwaranani Projects CC*[160] could be regarded as fundamentally leap-frogging the recognition of entitlement to compensation by displaced people. In this matter, the Baphiring community were relocated 80km away to new Mabaalstaad. They were now seeking compensatory restitution and restoration of their land.

The lower court confirmed that this community had been dispossessed of the land including its minerals. It reasoned that prior to expropriation and displacement the community had rights to the land, for which they were compensated R181 million. In this regard, the Supreme Court stated that the dispossessed claimant is entitled to have the land restored whenever feasible. In determining feasibility, the court looked at the financial cost of undertaking sustainable resettlement and relied on the test applied by the court in the *Kranspoort Community* case which considered nature of the land, changes that had taken place and nature of use of land by claimants.

In this *Baphiring Community* matter, the court acknowledged constraints imposed by the financial cost of restoring the land. However, it reasoned that in order to consider whether the cost was indeed prohibitive, evidence and facts should be placed at its disposal so that the decision arrived at was based on legal principles and facts. The court reasoned that otherwise the non-restorative order could be materially irregular if facts were not available.[161]

The view of the court was that the evidence provided on cost implications was insufficiently credible to prove that restoration of the Baphiring Community's land was not feasible.

[160]*Baphiring Community v Tshwaranani Project* CC 806/12 2013 (ZASCA) 99 at 1 to 3
[161]Ibid. para 15

The court stated it should not be put in a position to second-guess facts. The court's decision was therefore that the lower court should undertake a feasibility assessment which amongst other factors included:

> The cost of expropriating the land . . . the institutional and financial support to be made available for the resettlement, the extent of the compensation that shall be payable to the current owners of the land, the numbers of the current occupants of the land. . .[162]

In *Baphiring Community v Uys*[163], the court ruled that the Baphiring community had not received just and equitable compensation. This was attributed to the use of market value which is but one of the determinants in s25 (3) of the Constitution and s2 (2) of IPILRA.

The inadequacy and/or over-reliance on market value to determine compensation is aptly recorded in a quote that states that 'compensation would be mockery if what was paid was something that did not compensate.'[164]

The court seemed to prefer an approach where compensation is not based on narrow market value but takes into cognisance wider socially-relevant factors and circumstances. It is for this reason that in this matter the expert valuation report was regarded as too narrowly focused on the application of market value considerations for calculating compensation for the Baphiring Community.[165]This points to the need of ensuring that compensation is reasonable, just and appropriate to each circumstance rather than basing it only market determinants for appropriateness of methods of calculation. This is the submission that this study recommends and concurs with when dealing with compensation for loss in situation of involuntary displacement.

The principle of entitlement to fair and just compensation also arose in the appeal matter in *City of Cape Town v Helderberg Park Development (PTY) Ltd*.[166] In this matter, the respondent argued entitlement to compensation claim. The respondent's claim was on the basis that the approved portion of land appropriated by the local municipality was beyond normal need. The respondent further stated that the local municipality's approval of the subdivision implied acceptance of entitlement to fair and equitable compensation. This is because the local authority would be entitled to free ownership of land beyond its normal needs.

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[162]*Baphiring Community v Tshwaranani Project* (n160) para 22
[163]*Baphiring Community v Uys* (n22) para 19 and 24
[164]Ibid para 12
[165]*Baphiring Community v Uys* (n22) para 13
[166]*City of Cape Town v Helderberg Park Development (PTY) Ltd* 291/07 2008 (ZASCA) 79 at 2

In its reasoning, the court therefore concurred that since in this matter the local authority was appropriating land that was beyond normal need after subdivision, the respondent's claim to entitlement to compensation was in line with s25 (2) of the Constitution and therefore comprised a constitutional obligation to provide fair and equitable compensation.[167] It can thus be submitted that in this matter, the principle of fair and equitable compensation where there is transfer of ownership or loss of use of land was reinforced.

In an appeal matter in the Supreme Court in *Farjas (PTY) Ltd v Minister of Agriculture and Land Affairs for RSA*[168] the applicants right to seek compensation that is fair and equitable as provided in s25 (7) in furtherance of constitutional obligation was affirmed. This affirmation was in terms of s33 of the RLRA.[169]In this Act, it is stipulated that determination of fair and equitable compensation originates from consideration of factors specified in s33 (eA) which refers to the amount of compensation, and 33 (eC) which states that in the case of an order for equitable redress in the form of financial compensation, consideration is to be given to the changes over time in the value for money.

In order to cater for changes in the value over time, the lower court had leaned towards the use of the Consumer Price Index (CPI) which was opposed by the applicants who favoured compound interest. Although the court acknowledged that 'interest was the life blood of finance', it reasoned that the RLRA did not make provision for compound interest as method of calculating compensation over time, stating the restitution is a not commercial transaction subject to interest but an instrument for social and historical redress.

The court recorded factors for determining just and equitable as being only those in s33, which implied that they do not include interest. Further, the court's view was that the use of compound interest may be inconsistent with the objects of the RLRA because its use could lead to overcompensation.

In order to deal with changes over time in the value of money, the court reasoned that the CPI was an official government mechanism published monthly, and has been used regularly to adjust amounts of financial compensation. The court therefore concurred with the lower court's ruling on the use of CPI mechanism to ensure fair and equitable compensation over time.[170]

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[167]Ibid para 41

[168]*Farjas (PTY) Ltd v Minister of Agriculture & Land Affairs for RSA* 753/11 2012 (ZASCA) 173 at 4 and 8

[169] Restitution of Land Rights Act (n147) s33

[170]Ibid para 24

The preference by the court in the *Farjas* matter to use CPI to determine compensation in order to cater for changes in the value of money over time has been challenged. In the matter of *Florence v Government of the Republic of South Africa,*[171] the court seemed to be in agreement with the appellant's reasons for consideration of alternatives to the CPI. The proposed alternatives included the use of market value, mortgage, government bonds, ABSA House Index and 32-day notice deposit rate. The court noted reservations and challenges with regard to each of these instruments. However, in its view, the 32-day notice deposit rate seemed a more plausible metric because it addresses redress without unduly eroding the public purse. This means that a practical approach is to be adopted, depending on the time of compensation. It seems a 32 days' notice deposit rate is preferred for redress over time whilst the CPI may be appropriate for real-time or current compensation. This points to guidance on pragmatism to be adopted in calculate interest or value of money time, with each case treated on its own merit. This guidance provides guidance to be applied when determining value of compensation in resettlement events.

An example of poor treatment and disregard of the rights of those without secure legal title to land is in *Ngidi Braai Sibanyoni and Brananza John Suahatsi v Umcebo Mining (PTY) Ltd*.[172] In an interdict application by the mining company, the court ruled in favour of the miner on the basis that the safety, danger and hardships posed by blasting activities were urgent compared to hardships suffered by residents due to unsatisfactory size and suitability of the alternative accommodation for relocation. The court granted an interdict and ordered parties to finalize outstanding issues pertaining to relocation.[173]

The residents had lived there for over 20 years, yet the court did not even consider the provisions of IPILRA s2 (3) as this removal impacted rights to land of unsecured informal occupiers in this occupation. It is therefore submitted that the court may have failed to consider the obligation prescribed in s25 (2) of the Constitution for handling disputes involving deprived informal rights holders in a just manner.

The court directed payment of relocation but excluded the payment of transportation costs for livestock as part of the relocation.[174] This omission points to unjust calculation of replacement value and costs of relocation which prejudice the project-affected displacees.

[171] *Florence v Government of the Republic of South Africa* 2014 (ZACC) 22 at 59 to 62 and 82
[172] *Ngidi Braai Sibanyoni and Brananza John Suahatsi v Umcebo Mining (*n26) para 9
[173] Ibid para 12
[174] *Ngidi Braai Sibanyoni and Brananza John Suahatsi v Umcebo Mining (*n26) para 14

Restorative compensation is dependent on ensuring that there is full replacement value for incurred loss. The Constitution in s25 (3) and Expropriation Act in s12 (5) lists the determinants for compensation. Notwithstanding the aforesaid determination, IPILRA s2, prevents arbitrary deprivation through the process and requirements as per IPILRA s2.[175] This protects land use rights holders of the legally insecure persons and establishes requirement for payment of appropriate compensation for dispossession.

Although provisions of the Constitution, Expropriation Act, MPRDA and IPILRA make compensation mandatory subject to specified considerations, displacees have yet to experience complete adherence to these provisions in a manner that makes compensation to mitigate impacts of resettlement in a meaningful way.

It is for this reason that there is a need to improve these provisions such that there are specific clauses for genuine restorative compensation because only when compensation is to the full extent can fairness be achieved.

When restoring the dignity of the affected persons, it is important that the mechanisms are seen to be fair, transparent, equitable and equivalent. Although rights of land users and occupiers are secured and guaranteed, their entitlement to full and fair replacement of loss is not fully complied with. This is because legislation is inclined towards preference for market value-based cash compensation when calculating compensation for asset loss. The challenge with the market value approach is that it is not all-encompassing in terms of the definition of replacement cost. Market-based compensation also does not necessarily consider inconvenience especially with regard to inconvenience associated with involuntary displacement.

It is this under-accounting that is blamed for leaving those displaced worse off post-uprooting and displacement. The consequence is lack of fairness and justice in compensation which infringes upon the human rights of those displaced. In order to prevent inadequate compensation practices, compensation has to be at full replacement cost.

[175]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 purposes 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

In other words:

> Defined as a method of valuation yielding compensation sufficient to replace assets, plus necessary transaction costs associated with asset replacement . . . Transaction costs include administrative charges, registration or title fees, reasonable moving expenses, and any similar costs imposed on affected persons.[176]

The use of full replacement costs when calculating compensation can achieve equity and equivalence. In other words, compensation that is neither more nor less than the loss. In *Food and Agricultural Organisation (FAO) Land Studies 10* Table 1[177] elements of loss that should be considered to achieve full replacement value, are suggested. These elements of loss indicate the diverse nature of losses experienced by the project-affected persons, which are often not taken into consideration when valuers verify and assess the extent of impacts arising from the loss induced by the project development.

Table 1: FAO Land Tenure Studies 10

Losses for which compensation may be considered	**Losses of customary rights that may require compensations**
The land	Agricultural land
Improvements to the land including crops	House plot(owned or occupied)
The value of any financial advantage other than the market value that the person may enjoy by virtue of owning or occupying the land in question	Business premises (owned or occupied)
Interest on unpaid compensation from the date of possession	Access to forest land
Expenses incurred as a direct and reasonable consequence of the acquisition	Traditional use rights
Loss in value of other land owned by the affected owner due to projects; in some countries, the compensation will be reduced if the retained land increases in value as a result of the project, a condition sometimes referred to as 'betterment'	Community or pasture land
Legal or professional costs including the costs of obtaining advice, and of preparing submitting documents	Access to fish ponds and fishing places
Costs of moving and costs of acquiring alternative accommodation.	House or living quarters
Costs associated with reorganization of farming operations when only a part of a parcel is acquired.	Other physical structures
Loss in value of a business displaced by the acquisition, or if the business is permanently closed because of the acquisition	Structures used in commercial/industrial activity
Temporary loss of earnings	Displacement from rented or occupied or commercial properties

[176]IFCPS 5 (n12) 54

[177]FAO Land Tenure Studies 10: Compulsory Acquisition of Land and Compensation (2009) at 31 and 36

Personal hardships	Income from: standing crops, rent or sharecropping, wage earnings, affected business, tree or perennial crops, forest products, fish ponds and fishing places, grazing lands
Other losses or damages suffered	Subsistence from any of the sources
	Schools, community centres, markets, health centres
	Shrines, religious sites, places of worship & sacred grounds
	Cemeteries & other burial sites
	Access to food, medicines & natural resources

3.5 Conclusion

The body of jurisprudence emanating from court judgements as well as the legislative framework were reviewed. The key themes emerging from the discussion on various legislation regarding entitlement and practices in compensation indicate the following:

(i) Property rights for legal title holders and non-legal land use rights holders are protected by the Constitution and statutes. This recognition, protection and respect of property accords the same obligation to those displaced in the situation of involuntary displacements. In section 3.2.1 reference was made to court cases on disregard right of participation of informal rights holders including those governed by customary practices.

In section 3.4.1 examples of dispossession without compensation for informal rights is discussed. These examples indicate that historical dispossession implemented in order to make way for developments did not at the time consider the use of compensation to mitigate the impact of forced evictions. In this regard, the enactment of laws that protect informal rights not only restores the dignity of displacees during involuntary displacement but ensures respect and recognition of human rights enshrined in the Bill of Rights of the Constitution.

There may still be incidents of differences in quantum of compensation between legal and non-title land holders. This practice may be deemed discriminatory. The only determinant of the quantum of compensation should be the use of land and the improvements; unfortunately, this unequal treatment based on the ownership status is still practiced in situations of involuntary displacement.

(ii) South Africa has a multiplicity of legislation dealing with compensation. There is no single statute specifically legislated to regulate compensation arising out of

involuntary displacement. There seems, however, to be commonality in the various statutes with regards to the motive for providing compensation. The motive stems from recognizing the impact and effect of dispossession, deprivation, loss or damage, suffering, inconvenience and hardships which must be avoided, minimized or mitigated.

In this regard, international standards, the Constitution and the various statutes recognise restoration, replacement and compensation as the mechanisms for mitigating the impacts and effects of loss broadly and specifically to the situation of involuntary displacement.

In this chapter, the gaps identified in the law and regulations for dealing with the process of consultation and compensation suggest that there is a need to review and make additions to certain sections and clauses of the law and regulations.

The next chapter evaluates shortcomings in practices applied when undertaking the process of public involvement, calculation and valuation to determine compensation.

CHAPTER FOUR: EVALUATION AND ASSESSMENT OF THE PROCESS OF CONSULTATION AND COMPENSATION FRAMEWORK

4.0 Introduction

Literature review and outcomes of court judgements discussed in Chapter 3 provide evidence to support a conclusion that as far as compensation of displaced persons is concerned, full replacement, recompense and locally appropriate, prior, informed, consultative consent is not achieved.

The discussion below evaluates and assesses the shortcomings in the application of the framework of consultation and compensation.

4.1 Evaluation of the process of consultation and engagement in resettlement situations

The legislation and court decisions discussed in **C**hapter 3 underscore the essence of public involvement to ensure collective decision-making. Public participation is therefore fundamental to assessing and evaluating the impact of large-scale projects causing displacement. Whilst there is explicit legislative obligation to undertake full public involvement and participation during the assessment and evaluation of impacts in development projects, the practices and conduct of project owners described in examples of displacement in Chapter 3, and a number of court cases referred to, show that project-affected people do not always experience fair administrative processes and equal treatment.

In theory, the abovementioned constitutional and legislative provisions seem fundamentally empowering; however, the court disputes over dispossession and deprivation arising from induced displacement points to a need for strengthening certain provisions of the public participation framework. Notable deficiencies are:

a) NEMA was promulgated in 1998, and the gazetting of the EIA Regulations started in 2006,[178] followed by the regulations of 2010,[179] 2014[180] and 2017.[181]

   None of the provisions in the regulations' consultative participation in relation to the directly affected and interested deal specifically with consequences of resettlement caused by large-scale development. As an example, Chapter 6 of the

[178]NEMA EIA Regulations GN R 385 of GG NO 28753 of 21 April 2006
[179]NEMA EIA Regulations 2010 (n96)
[180]NEMA EIA Regulations 2014 (n97)
[181]Amendment to the EIA Regulations 2017(n98)

2014 EIA Regulations,[182] covers the requirements of public participation. Chapter 6 of 2014 Regulations in s39 requiring the applicant to obtain written consent from the landowner or the person in control of the land prior to submitting application for environmental authorisation.

The mere requirement of written consent is insufficient as it only serves a compliance or 'ticking the box' administrative process. It is suggested that written consent should be preceded by an explicit process under the NEMA regulations that would insist on a mandatory process for further work study and planning to be undertaken where EIA scoping and screening surfaces any concerns relating to the potential threat of relocation, resettlement and loss of livelihoods.

In s 39 (2)[183] certain types of projects such as linear and strategic infrastructure projects in terms of the Infrastructure Development Act 23 of 2014 (IDA) waives normal time frames for EIA. In s17 (1) of the IDA, it states all application for authorisation, approvals, permitting or exemption must run concurrently with project implementation. Further , s17(2) of the IDA insists that even with this concurrence of approvals, permitting and authorisation, the project timeframes in Schedule A of the IDA must not be exceeded.

This is retrofitting the EIA process and creates a parallel authorisation process. The consequence thereof is that meaningful consultation for true consent by directly affected persons is constrained. This is in spite of such projects often being large-scale developments that affect numerous community members by virtue of resettlement impacts.

Whilst the objective of this Act of prioritising infrastructure development during all project planning and implementation phases is understandable. However, the waiving and exemption of such project from mandatory NEMA EIA stages of screening, scoping and public participation negates the very essence of integrated management and is at odds with sustainable development approach. This misnomer has a direct impact on the directly affected persons living on the footpath of the infrastructure. The retrofitting or omission of mandatory EIA results in the failure to identify and assess of risks relocation impact.

[182]NEMA EIA Regulations 2014 (n97)
[183]Ibid

This demonstrates the manner in which government policy can be in conflict with itself as it pursues economic advancement to the detriment of project-affected persons who, as a consequence, may be denied fair compensation for losses arising from these allegedly strategic initiatives.

This inadequacy due to the EIA regulations not providing a specific procedure or process for involuntary displacement suggests that there is a process or procedural gap for risk identification.

b) The global requirement in Chapter 2 is that consent is to be obtained from the directly affected. In this regard, the EIA regulations' S 39 (1) requires an applicant to obtain consent from the landowner or the person in control of land where project activity is to take place. These procedures are largely administrative notices to inform potential affected people and are silent on what process is to be followed for consulting with land occupiers where there is potential for relocation impact.

In s43 of the 2014 EIA regulations merely requires that the registered affected and interested parties comment on the basic assessment and /or scoping report within 30 days, and thereafter the window closes regardless of other potential impacts which may emerge later on. A point has to be made that land use rights holders and occupants are not merely interested. As affected, they cannot be regarded as persons with passive interest. The affected are primary recipients of direct impacts and therefore cannot be reduced to just noting their commentary. The project planners should adopt an approach where alternatives are considered by both in order to reach mutually acceptable approach.

In situations of involuntary displacement, the habit is to register the community as a homogenous group of interested and affected people. The effect of impacts on them as individuals is sometimes missed or neglected. This is often the case in communally-led communities where there is gatekeeping because leadership is not mandated by the individuals directly affected, and leaders are frequently self-appointed spokespersons and negotiators.

A case in point is the establishment of a section 21 company[184] purportedly to represent the directly affected without them participating or mandating the formation of the company.

[184] Section 21 company (n20)

In reality, this procedure is limited to registration and noting of comments and concerns of interested and affected parties. It therefore does not go far enough by making it compulsory to provide proof of the existence or non-existence of potential relocation and resettlement.

In s34 of the amended EIA Regulations[185] has attempted to deal with post basic assessment and/or scoping report by requiring submission of mandatory auditing reports post EA, Environmental Management Programme (EMPr) and closure plan, if the mitigation contained in the approved EA is found to be insufficiently mitigated. In such instances, further public participation is required.[186] It is noted that all these instruments for managing risks and impacts such as the EA, EMPr, Closure Plan, and post-authorisation mandatory environmental audit reporting, fall short of expressly including relocation and resettlement study, planning and execution. This amended s34 of EIA Regulations seems to be a post effect reaction response tool very much in conflict with fpic.

c) The challenge of insufficient participation of displacees affects legally insecure informal rights land holders governed by customary law. Mining is one such large-scale construction that is associated with displacement impacts.

An example of a dispute involving noncompliance with public participation is *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others,*[187] wherein the cry of the affected non-title holders regarding the non-assessment of impacts and lack of consultation was rejected on the both facts and law by the court in this instance.

The basis for the court's rejection of the application was that: i) the law could not be applied retrospectively; ii) the applicants' failure to file an affidavit mentioning consultation as the point of contention; iii) the environmental management plan was sufficient in impacts identification and finally iv) exhumation and removal of graves had been undertaken with prior approval may in the facts of law be correct. However, in the eyes of the community it meant desecration of their graves and continued suppression of their dignity and respect.

[185]Amendment to the EIA Regulations 2017 (n98)

[186]Ibid

[187]*Global Environmental Trust & Others v Tendele Coal Mining (PTY) Ltd & Others* paras 57 to 59 and 89 to 106

The RLRA and IPILR described under 3.3.3, considered together with expositions in the *Duduzile Baleni, Maledu, Baphiring Community and Alexkor Community* matters in sections 3.2.1 and 3.4.1, attest to the subordination of meaningful involvement and engagement of insecure tenure displacees.

Due to many historic and current disputes over displacement caused by large-scale mining projects in South Africa, the review of the phenomenon of resettlement is incomplete without reviewing the MPDRA, a piece of legislation relevant to mining-induced resettlement. This is because the MPRDA and its regulations do not explicitly identify relocation and resettlement impacts as a listed activity. Attempts to address this shortcoming in the consultative process with property and landowners, especially in the mining sector, the Guidelines for Consultations with Interested and Affected Parties[188] were promulgated under MPRDA. These gaps are also contained in the 2008[189] and 2018[190] Social Audit Baseline Report on South Africa.

The aforestated Social baseline Audit reports identify the following gaps in the MPRDA in relation to consultation for relocation and resettlement study, planning and execution:

(i) Although the MPRDA and its regulations require the applicant to consult with the community and report back to DMR before the issuing of a mining right, this does not mean that there is an explicit requirement to obtain permission beyond a demonstration through the submission of a report that consultation has actually taken place.

(ii) DMR and the Minister are not obligated to consult with the community but rely on the report submitted by the applicant which the community has no right to see.

(iii) Once the right has been granted, the law does not require the applicant to obtain permission from occupiers. This means that the landowner does not have the right to give explicit consent. This assertion has been successfully challenged by the community in *Duduzile Baleni v Minister of Minerals Resources and Others*[191] wherein the High Court affirmed that consent was required before the mining right is granted. This ruling emboldens many impacted indigenous communities.

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[188]Department of Mineral Resources Guidelines for Consultation with Communities and Interested and Affected Parties (n102)

[189]M Curtis 'Precious Metals: The Impact of Anglo Platinum on poor in Limpopo, South Africa' (2008) at 12 to 13

[190]M Curtis 'Mining in South Africa Whose Benefit and Whose Burden' Social Audit Baseline Report ActionAid: SA 2018.32

[191]*Duduzile Baleni v Minister of Minerals Resources*(n18)

(iv) In the case of communally-owned land, DMR does not require submission of written lease agreements, whereas this is a standard required for privately-owned land.

These gaps illustrate that despite provisions in the Constitution, NEMA and MPRDA, the manner in which the requisite public involvement for genuinely inviting issues and concerns seems inadequate and inconsistently applied. It does not go far enough to embody the international guidelines in Chapter 2 as it does not mention relocation and resettlement planning, which have become synonymous with any infrastructure development project.

In order to address these gaps, against the lack of explicit reference to relocation and resettlement issues as part of social impacts assessment and mitigation in NEMA Regulations, officials of the Department of Environmental Affairs are already implementing the practice of placing special conditions on Environmental Authorisation to ensure redress of involuntary displacement impacts. These environmental authorisation conditions require applicants and developers to provide evidence of consultation and informed consent or to only proceed with approved activities on condition that consent and compensation for relocation impacts is agreed upon up front.

An example of this is found in DC28/0010/2016 Environmental Authorisation uMfolozi River Bridge and Link Road Linking eSiyembeni and Novunula Areas, uMfolozi and Mtubatuba Local Municipalities and DC28/004/2018: Environmental Authorisation For The Proposed Esikhaleni Road Safety Improvements: Upgrades of Mthombothi/Mdlebe Ntshona Intersection, Esikhaleni, uMhlathuze Local Municipality.[192]

In these decisions, the competent authority insisted on evidence of resettlement planning prior to making its decision even though it is not necessarily stipulated in regulations as a listed or specified activity. In DEA/EIA/0001181/2012[193] the applicant included the Resettlement Action Plan (RAP) even though there was no requirement imposed by the competent authority.

This additional requirement in the abovementioned examples to provide evidence of resettlement prior issuing of environmental authorisation decision notwithstanding the fact that it is an unspecified or unlisted requirement seems to point to an implicit admission that

[192] a) DC28/0010/2016 Environmental Authorisation uMfolozi River Bridge and Link Road Linking eSiyembeni and Novunula Areas, uMfolozi and Mtubatuba Local Municipalities at 9
b) DC28/004/2018: Environmental Authorisation For The Proposed Esikhaleni Road Safety Improvements: Upgrades of Mthombothi/Mdlebe Ntshona Intersection, Esikhaleni, uMhlathuze Local Municipality, KZN at 3

[193] In the Environmental Authorisation decision DEA/EIA/0001181/2012 EA registration no 14/12/16/3/3/3/3/39 for Richards Bay Mining Zulti South Project – EMP Amendment, EIA, IWULA and NNR Certification.

its absence can no longer be ignored. Hence, the inclusion of this requirement as a listed or specified activity is recommended by this study.

This non-specification of involuntary induced relocation in the NEMA EIA listed and specified activities is an unfortunate omission. In terms of the NEMA's provision that the Minister or an MEC may identify listed or specified activities in s 24 (2) that may not commence without environmental authorisation, and s24 (10) the Minister or an MEC may develop norms and standards for listed or specified activities, nothing precludes the authorities to extend current lists/activities to include resettlement within the element of socio economic risks.

NEMA s24 (4) (a) (v) makes it mandatory for public information and participation procedures to afford reasonable opportunity for all interested and affected parties to participate, whilst NEMA s24 (4) (b) (ii) (iii) insists that measures to lessen impacts must be investigated including the option of not proceeding with implementing an activity if the adverse impact cannot be minimized.

Notwithstanding the above stated , a review of the ECA, NEMA and its EIA regulations and listed activities, specifically, the provision in 24 (5) (b) (vii) of NEMA requiring procedures for consulting of landowners, lawful occupiers, and interested and affected parties, none of these contain specific requirements for the procedure for handling resettlement consultation during infrastructure development-induced involuntary displacements.

Impact assessment specific to those displaced is considered an afterthought when project-impacted inhabitants resist being moved. Impacts identification simply focuses on what is currently regarded as 'real' impacts, such as dust, noise, light, endangered species, water use and wetlands, as well as heritage issues.

It is for this reason that strengthening the requirements of NEMA s24 and EIA regulation's, particularly dealing with public participation during EIA to include specific regulations for handling issues of relocation and resettlements, is necessary.

In conclusion, the study's submissions with regard to the process of public participation and consultation in situations of displacement are:

(i) Current NEMA EIA regulations, as amended, at best require recording of comments rather than meaningful involvement i.e. the regulations do not require evidence or proof of resettlement impacts identification and resettlement planning was undertaken with the submission of environmental authorisation applications.

(ii) Consultation and engagement of the interested and affected persons seems to omit or treat differently those whose land use rights holders and occupiers are legally

insecure. Legally secure rights holders tend to be the only ones accorded the status of being primary occupiers with whom consent and agreement are entered into. This is despite the fact that legally insecure occupiers are often at the coalface of large-scale projects' induced impacts.

(iii) The provisions in DMR's Regulations dealing with Consultation and Involvement of Interested and Affected Parties[194] are silent on a public involvement process specific to people to be displaced and resettled.

In order to address these gaps and shortcomings, the DMR gazetted Draft Mine Community Resettlement Guidelines, 2019 for Public Comment.[195] Amongst significant improvement that these guidelines bring about are:

(i) Duty to consult

In ss7, 10.1, and 10.2 makes consultation mandatory for activities where resettlement occurs.

In s10.5 (3) the phrasing 'proof of such consultation and outcomes meaningful' goes beyond just recording of input and comments as currently required in the 2014 EIA Regulations and DMR's Guidelines for consultation with interested and affected parties. The concept of consultation is strengthened by precussing consultation with the word '*meaningful'* in s2. This demonstrates a significant departure from the mere recording of comments if read together with s10.5 (3) and s7.1.1 to 7.1.5, which describe the objectives of this meaningful consultation.

In addition to the above requirements, the draft guidelines in s 8.1.1 and 8.1.2 imposes obligation to the developer to consult with a range of stakeholder listed in s7.2.

(ii) Resettlement Procedure or Process

In ss11.1 to 11.3., a Resettlement Action Plan is described. It is essentially a process tool covering steps, participants and content required to enable the Resettlement Action Plan.

This description of the process and expected content of the plan in the final gazette of regulations signals a significant shift in acknowledging and prescribing a process to be complied in situations where relocation and resettlement results from infrastructure development involuntary displacements.

[194]Regulations dealing with Consultation and Involvement of Interested and Affected Parties (n102)
[195]Draft Mine Community Resettlement Guidelines, 2019 for Public Comment (n42)

(iii) Dispute Resolution Mechanism

In clauses 13.2 to 13.5 a dispute resolution mechanism is detailed. The sequence of intervention are Party-to-Party, Regional Manager-led Process, Formal Mediation, Arbitration and Conciliation Process and lastly, a Court Process. This is a significant clarification as many projects are delayed due to lack of publicly-legislated, transparent escalation mechanisms.[196]

The proposed guidelines, once finalized, will go a long way to improve the process of consultation in situations of displacement. These draft guidelines are in line with the recommended improvements in Chapter 5 under 5.2.1.

Essentially, the guidelines make the following fundamental improvements that align with the IFCPS1 and the Constitution:

(i) Consultation is meaningful beyond mere recording of comments, and obligatory.

(ii) A process or procedure specific to the undertaking of displacements, relocation and resettlement is to be mandatory notwithstanding the non-listing of the relocation and resettlement as a specified or listed activity.

(iii) The process would seem to embody the requirement for procedural fairness required for administrative action.

(iv) A clear grievance and dispute resolution process will be in place, thus strengthening procedural fairness and administrative action.

It is regrettable, yet understandable, that this process is initiated only by a single competent authority in the name of DMR. In this regard, there is not integration into the overarching impact assessment regime contained in the NEMA s24 and EIA regulations.

This is a missed opportunity that would have upheld the principle of integrated environmental management espoused by NEMA. In order to improve integration, it is advisable that DMR and DEA finds way of ensuring that the regulations, once finalized, they become a mandatory required under both NEMA and MPDRA together with its regulations.

4.2 Assessment of compensation practices for loss of assets and livelihoods

Notwithstanding that compensation for loss of assets or property is guaranteed by s25 of the Constitution, in practice, compensation for loss fails to cover full replacement, which is advocated in various international standards, guidelines and protocols on involuntary

[196]Draft Mine Community Resettlement Guidelines, 2019 for Public Comment (n42)

displacement is insufficient. Below are gaps and challenges identified in the compensation practices:

(i) There is a myriad of legislation addressing rights to property and compensation for loss of property or use of property, but with no specificity to situations of involuntary displacement, relocation and resettlement. Historically, due to government's policy of segregation, forced movements, relocation and resettlement did not follow proactive planning incorporating international standards and protocols, particularly regarding landless non-title holders and informal land rights holders, for example, customary land use rights holders traditional communities.

(ii) Although there has been constitutional and legislative reform on land ownership and restitution, the application of a plethora of legislation to determine the quantum of compensation in situations of involuntary resettlement and displacement is somewhat inconsistent and differentiated. Consequently, this does not advance the justice and fairness enshrined in the Bill of Rights and universal human rights standards and conventions in in compensating for infrastructure development-induced displacement. Determination of compensation does not cater for unique involuntary displacement impacts.

The review of current legislation in the previous chapter discusses various provisions and requirements for compensating for property loss, but these are more limited to recompense for land restitution, expropriation and acquisition, or asset disposal in government and private institutions.

The common attribute in compensation methodology and valuation of assets suggested in the Constitution, Expropriation, Municipality Finance Management, Restitution of Land Rights, Expropriation, Municipality Property Rates, and Property Valuation and Extension of Security Tenure Acts is that it is determined and driven largely from a market value perspective. Market value-driven compensation is an insufficient practice for situations of involuntary displacement because it does not cater for intangibles such as sense of place, survival networks, and cultural and spiritual rootedness from physical location of ancestral origin.

In addition, market-driven compensation is inclined towards only considering costs at the point of current location of the impacted persons but often lacks attention to the costs to be incurred at their new location. This approach is at odds with the concept of full replacement value, which is prejudicial to the affected persons and

therefore does not achieve equitable, equivalent and just compensation espoused in the rights to dignity, respect and equality before the law.

In some instances of displacement there is lag between the time of actual lodging of a claim for compensation, and the time of dispossession. In such situations, compensation may not fully redress loss or the change in the value of money over time. In such circumstances, in *Florence v Government of the Republic of South Africa*[197], it is suggested the courts are seen to be generous and not be bound rigidly by text in order to afford the claim the fullest protection of their constitutional guarantees. Such an approach allows the dispossessed to benefit from the appreciation of land or the interest accrued on the monetary value.

The South African market value approach uses the willing-buyer and willing-seller model which favours legal title holders of property. This impacts negatively on non-legal titleholders who are disempowered to engage at an equal level when negotiating quantum of compensation.

(iii) Valuation practices and methods are insufficient and inconsistent in delivering compensation that is equivalent, equitable and fair. In the preceding chapter, listed legislation contains provisions stating determinants or the basis for compensation. However, these determinants differ for each statute and so does the suggested calculation methods and rates. The common thread of these determinants is their inclination to market value and the failure to account for full replacement compensation of losses. This failure means that fair, just and equitable compensation is not accomplished, which leads to poor mitigation of the impacts of loss.

Firstly, the central causes for inadequacy of calculation and valuation stem from considering only tangible physical and economic assets, to the total exclusion of cultural and communally-shared resources, emotional and sentimental attachment, spiritual aspects, social networks and environmental connectedness.

The second shortcoming is an inclination to consider only market value, and cash to lessen the burden on those displaced. This may be attributed to the fact that historically, property definition is always linked to land and therefore valuation is always defined from a property rights law perspective.

This approach is at variance with the dynamics in the majority of settings where development projects impact on inhabitants. This variance is due to the fact that in

[197] *Florence v Government of the Republic of South Africa* (n171) para 47 to 49

some of the areas land is communally-owned, and informal land use rights holders, secured title deed holders and tenants coexist in sharing land utilisation.

In this regard, valuation methods which only consider market value are rendered unsuitable to deliver equivalent and equitable compensation. This approach to valuation has a negative outcome for displacees because it only accounts for losses and costs at the point of uprooting, but fails to consider losses incurred at locations of re-establishment.

Thirdly, the weakness identified in calculation and valuation is the failure to recognize losses of non-legal title holders in communally-shared ecosystem property, which leads to disempowering and disruptive dispossession – this holds true in the domestic rural setting ruled by the traditionally-led institutions.

Fourthly, valuation of loss of assets requires professionally- accredited expert valuators. However, in practice, project developers tend to use environmental assessment practitioners who also double up as assessors and valuators of the loss. The challenge is that not only are these environmental experts acting outside their professional mandate but they are also not recognized and/or registered with the South African Council for the Property Valuers Profession.

This means that they have neither accountability nor is there any guarantee that they are professionally accredited. Consequently, the quantification of loss is susceptible to under-counting, inadequate scrutiny, and a resultant prejudicial impact upon project-affected persons.

These calculation and valuation practices result in inconsistent and subjective application of compensation packages. The effect is that displacees are placed in a disadvantageous position as the legal recourse is often beyond their knowledge or affordability. The inadequate manner in which calculation and valuation compensation is formulated is contrary to full and fair replacement. This variance is in conflict with respect of dignity and equal treatment as espoused by established global standards, and guaranteed by the Constitution and laws of South Africa.

The Draft Mine Community Resettlement Guidelines, 2019 for Public Comment[198] make attempts to address these shortcomings. Key sections of the guidelines to strengthen the compensation framework are:

[198]Draft Mine Community Resettlement Guidelines, 2019 for Public Comment (n42)

(i) Definition of resettlement is broadened to include both voluntary and involuntary displacement. It is also significant that those affected include lawful occupiers, holders of informal and communal land rights, and mine and host communities, where the current definition is silent on communal and informal rights holders, mine and host communities. It is also significant that it covers planned and current operational activities.

(ii) An important provision is s9.2 which states that no mining activities shall commence until a resettlement agreement is reached on the amount of compensation. This is in line with the principle of fpic that was reinforced in *Baleni v Minister of DMR.*

*(iii)*S 9.2 is reinforced by factors in s9.3 (a) to (m). Adherence to these factors is key to ensuring redress and restorative recompense. S 9.4 on calculation of compensation seems to be in line with recommendations in this study in Chapter 5 under 5.2.2.

The draft guidelines in s 9.4.1 miss an opportunity in stating that 'there is no standard formula for determining of sufficient compensation.'[199] Although there is no all-encompassing formula or calculation method, the study submits that it is possible to develop an upfront agreed methodology and rates quantification framework using methods and rates that are sector specific and localized as well as specifically appropriate to the project duration and implementation timing.

It is risky to simply leave an open-ended discretion for determining formulae. It is strongly suggested that at least s9.4.1, should list minimum principles or requirements to be adhered to as a standard for determining compensation. It is also suggested that losses as described in Table 1 in section 3.4.1 be used as the point of departure and reference. In this regard, the recommended phrasing of s9.4.1 would be that '*project-specific compensation methodology and rates should be in place and reviewed annually, taking into consideration input from the representatives of the directly-affected displacees or persons'* (my emphasis).

[199]Draft Mine Community Resettlement Guidelines, 2019 for Public Comment (n42)

4.3 Conclusion

In summary, the framework for compensation for loss of asset and livelihoods seems insufficient for the following reasons:

a) Protection of property and land use rights by the Constitution should extend to the protection of both legal title holders of property as well as land use rights holders. In this regard, such protection has to be just and fairly applied to displacement situations, and this seems not to be the case in several instances in South Africa.
b) If it were not for the Constitution, together with the provisions of IPILRA, RLRA and Security of Tenure Act, the rights of informal occupiers or legally insecure persons would be disregarded during displacement.
c) The complexity posed by the existence of numerous statutes which refer to compensation yet contain limited explicit reference to impacts of resettlement, continues to be a challenge.
d) Most legislation and regulation dealing with compensation prefers market value metric. This preference adopts an approach of asset loss valuation that does not recognise intangibles such spiritual, ancestral and cultural practices, neighbourliness networks and communalism that is central to the place of habitat and heritage of the displacees.

The next chapter concludes by submitting recommendations to be considered to improve the practices applied in the undertaking of the process of public participation and compensation for loss of assets in situation of involuntary displacement.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

In Chapter 4, the gaps identified in the law dealing with the process of consultation and compensation suggest that there is a need to review and make additions to certain sections and clauses of the relevant statutes and regulations. The literature review and court judgements discussed in Chapter 4 support the conclusion that insofar as compensation for persons impacted by involuntary displacement is concerned, full replacement, recompense, and locally appropriate, prior, informed, consultative consent is not achieved.

5.1 Conclusion

In examining the phenomenon of involuntary displacement, the study analysed domestic examples and the body of knowledge on international practices and protocols. The study focused mainly on two areas: (i) the process for undertaking consultation, and mechanisms for restoration and, (ii) recompense for asset loss and livelihoods. The existing global practices and protocols were evaluated with the objective of assessing their applicability and implementation in large scale projects in South Africa. The principle of fpic fundamental to public involvement and participation is not optimally applied in some of large scale infrastructure projects.

The legislative and regulatory provisions in NEMA, MPRDA and their regulations for impact assessment must accordingly embody this principle of fpic in theory and in practice.

In domestic jurisprudence, this principle of fpic is established by the outcome i*n Duduzile Baleni v DMR*.[200]Further, the South African Human Rights (SAHRC) Report[201] directs and recommends that any mining activity that will result in the relocation of community members' homes must obtain a two-thirds consent majority of the people to be affected by the relocation, without which community consent is insufficient and invalid. This directive needs to be expressed in the NEMA EIA and MPRDA Regulations in order to give expression to SAHRC's[202] directive on meaningful consultation.

It is submitted that this evaluation confirms that the domestic framework for these public involvement and compensation mechanisms is disjointed, because of the way it has been spread across a variety of legislation. Although resettlement is not a typical developmental

[200]*Duduzile Baleni v DMR* (n119)
[201]National Hearing on the Underlying Socio Economic Challenges of Mining affected Communities in South Africa, South African Human Rights Commission (201) at 29
[202]Ibid 71-72

activity on its own, however, certain instances of resettlement-induced development have the potential to become an infrastructure development activity. This is because human settlement has to follow its project by phases planning within the larger project infrastructure development. It therefore requires the same level of study i.e. conceptual planning, design, cost estimation and budgeting, stakeholder engagement and implementation. The fact that resettlement is not listed contributes to the underestimation, poor design, planning, execution and disregard of its effects.

In the face of this disjuncture and absence of a singular protocol or law on public participation and compensation, the body of jurisprudence derived from court decisions has identified gaps and shortcomings that need to be addressed, hence the recommendations in 5.2 of this chapter.

Although substantial work has been achieved to integrate global standards and protocols for undertaking relocation and resettlement into our domestic law, it is strongly contended that the following recommendations will go a long way to achieve an optimal balance between fair and humane treatment of displacees. Further, the suggestions below will go a long way in supporting the delivery of infrastructure development projects on schedule, within cost, and in compliance with regulatory and permitting requirements.

5.2 Recommendations

In the following paragraphs, suggestions are made for the improvement of laws, practices and regulations so that these frameworks are adequate vehicles of genuine redress. These suggested improvements largely focus on NEMA, MPRDA, and the regulations promulgated thereunder.

5.2.1 Recommended considerations on the process of consultation and engagement

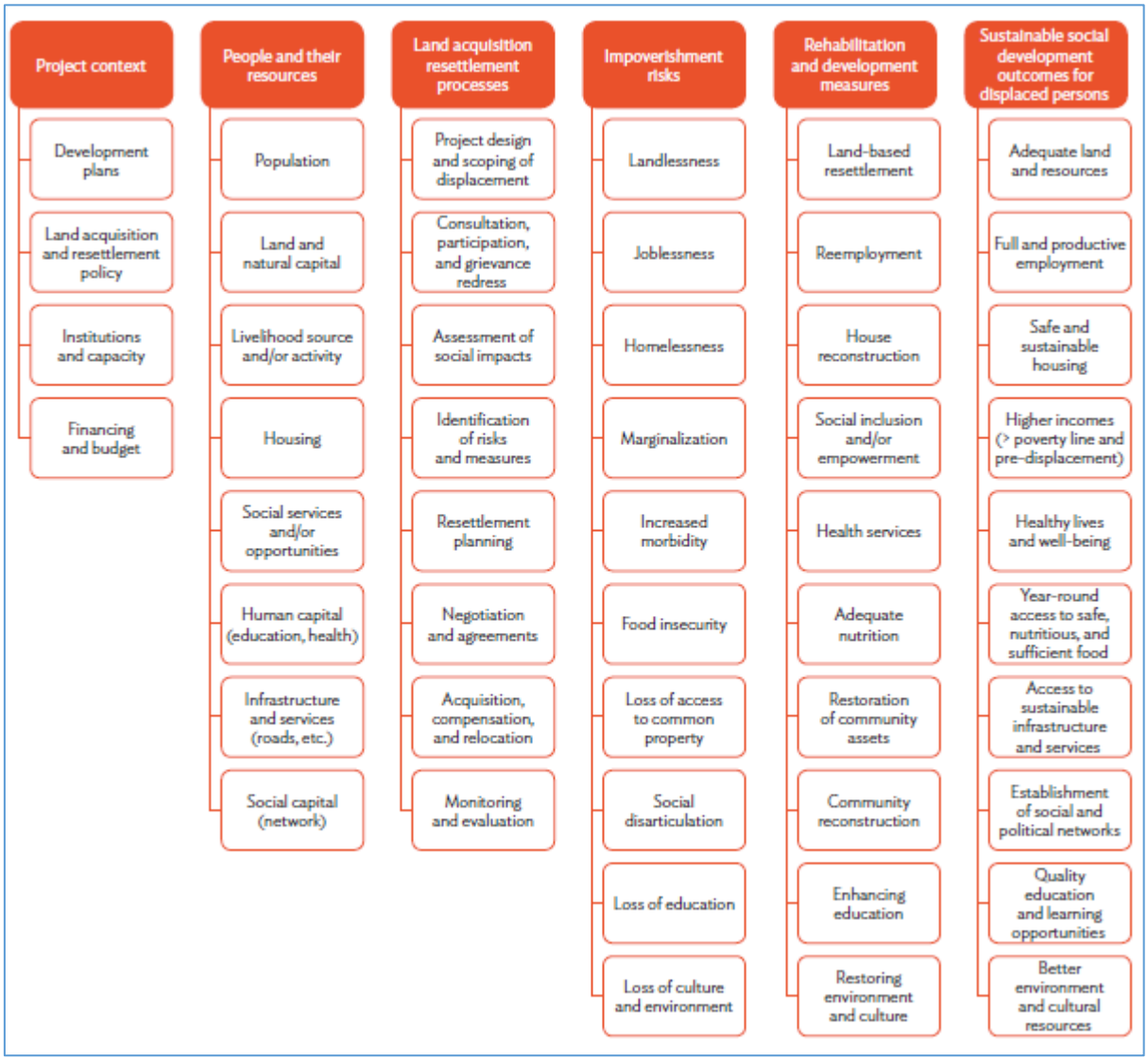
The importance of applying public participation process specific to relocation and resettlement within the ambit of NEMA, MPRDA and its regulations is recommended. In this regard, this study therefore strongly encourages practitioners and project developers to adopt the Sustainable Developmental Resettlement Framework[203]as a theoretical framework underpinning public participation, consultation and engagement process in the planning and execution of resettlement.

This Sustainable Development Framework in Fig 4 is all encompassing because it consists of elements from project design, people and their resources, risks, livelihood, and sustainable outcomes.

[203]N Sapkota and S Ferguson (n5) at 4 to 5

This framework is appropriate for achieving a successful, sustainable resettlement and livelihood restoration in line with the NEMA principles and integrated environmental management.

Figure 4: Sustainable Developmental Resettlement Framework



Source Sapkota and S Ferguson *Involuntary resettlement and sustainable development conceptual framework, reservoir resettlement policies, and experience of the Yudongxia reservoir* (2017)

(i) The public participation clause contained in the NEMA EIA 2014 Regulations[204] covers the process of public participation. This consultation limits itself largely to recording a narrow interpretation of environmental impacts, and fails to acknowledge a complex sub-component of the participative process which requires time and planning. In some instances, authorities and regulators have

[204]NEMA EIA Regulations 2014 (n97)

begun to insist that developers provide evidence as to whether their development shall result in resettlement. In instances where a possibility for displacement is anticipated, applicants/developers are requested to provide a resettlement plan study as part of environmental authorisation before the application is considered, despite the fact that relocation and resettlement as an activity is not explicitly articulated in NEMA, MPRDA or any of the regulations.

Although authorities and regulators do use their discretion to request a resettlement plan study, the downside is that this proactiveness is not explicitly stipulated in any of the regulations and standards. It is therefore suggested that the NEMA EIA and MPDRA regulations are integrated so that consider the requirement for resettlement study and planning in undertaking a public participation process is mandatory in both the NEMA and MPRDA and its regulations. This will go a long way to deliver meaningful consent. A promising development is that the Draft Mine Community Resettlement Guidelines, 2019 for Public Comment[205] which makes mandatory to follow an explicit resettlement process once finalized will go a long way to enhance a voice for those affected by large-scale projects.

(ii) In order to support objective valuation of assets as part of determining compensation, it is recommended that requirements for granting environmental authorisation and mining licences should be preceded by a concluded framework agreement. This framework should contain a transparent commitment to implement the principles of resettlement planning and execution, and the determinants of compensation, before licences and environmental authorisation are issued. This will enhance substantive and administrative fair process, and just treatment of those displaced. This framework of prior agreement before issuing of a mining licence could be implemented by adding a provision to the NEMA and MPRDA regulations which makes this an express, requires mandatory requirement.

(iii) The 2014 EIA Regulations[206] contain a section that describes types of environmental impact assessment i.e. it makes a distinction between the Basic Assessment, and the Scoping and Environment Impact Report. The Basic

[205]Draft Mine Community Resettlement Guidelines, 2019 for Public Comments (n42)
[206]NEMA EIA Regulations 2014 (n97)

Assessment in s19 (a) has a 30 day stage whilst (b) is 140 days. The Scoping and Environmental Impact Report in s21 (1) stipulates 44 days and then in s23 (1), 106 days. It is recommended that in addition to specifying special reports, the Resettlement Action Plan Study and Plan should be expressly stated in a manner similar to the EMPr in s19, 21 and 23.

In s19, s21, s23, s44 and s41 reference is made to public participation. In all aforestated clauses this reference to public participation should also expressly mention the undertaking of a resettlement action plan study where necessary, as part of the140-day and 106-day time period stipulated in s19, s21 and s23.

Additionally, insertions/additions in italics are suggested into some sections of NEMA EIA 2014 Regulations:[207]

- Chapter 4 part 2 s19 (1) (a): 'a basic assessment report . . . where applicable, a closure plan *and a relocation and resettlement survey report*.'
- Part 2 s21 (1): 'and which reflects incorporation of comments received *as well as indication of whether the development may trigger or require involuntary displacement and relocation.'*
- S23 (1) (a): 'an environmental impact report . . . public participation *that incorporates relocation and resettlement plan study where applicable.'*
- Chapter 6 s40 (1): 'and where applicable the closure *and relocation and resettlement plans.'*
- S41 (2) (b): after (iii) insert a new line same as in (iii) except that it starts with '*The Traditional Council and Induna*'.
- S41 (6): add '(c)', '*that granting of consent by the land use rights owner or landowner to be displaced is explicit and reduced into an agreement signed by both parties.'*

(iv) The DMR's MPRDA Guidelines for Consultation with Communities and Interested and Affected Parties must be amended to include a mandatory procedure specific to undertaking relocation and resettlement. This will improve the consultation and engagement process with affected landowners and serve to expand assessment of socio-economic conditions within the ambit of NEMA and

[207]Ibid

MPRDA. When resettlement planning becomes a compulsory listed activity, regulations must be inserted to expand on the minimum process requirements.

It is noted that the Draft Mine Community Resettlement Guidelines, 2019 for Public Comment seem to be aimed at correcting this shortcoming. It is noted though that clauses in the aforestated Guidelines pertaining consultation are similar to those in the current Guidelines for Consultation with Communities and Interested and Affected Parties. This may show lack of integration, consolidation and unnecessarily adding more guidelines which may impose a compliance burden due compliance to various regulations.

This study suggests that the current process for commenting on the Draft Mine Community Resettlement , 2019 for Public Comment be utilized to ensure that that the two guidelines are synchronised, rationalized and amalgamated into a single set of guidelines. The practical benefit of this amalgamation will be the reduction in the number of guidelines that the public, authorities, and implementers of projects have to contend with during relocation and resettlement implementation.

In the event, there is no amalgamation of the two guidelines, the study proposes additions to the current wording of certain clauses of the Guidelines for Consultation with Communities and Interested and Affected Parties. The additions or insertions in the form of new sentences or words in italics in sentences denote my emphasis. Below are suggested topics and clauses taken from the Guidelines for Consultation with Communities and Interested and Affected Parties:

Definitions:

'Any other person(s) who may suffer loss or damage and /or may be required to move or relocate due to the proposed prospecting or mining operation.'

Obligation of the Applicant:

Consult with such landowner or lawful occupier, including the community, and any other identified interested and affected party, which consultation must include; below are my suggested additions italics:

- *Identification and description of the number of homes/homesteads to be impacted.*
- *Recording of assets and inventory to be impacted within homesteads and elsewhere used as a source for the socio-economic livelihoods.*

- *Reducing outcomes of compensation negotiation and recording compensation payments by entering into a signed compensation agreement.*
- *Providing a detailed relocation and resettlement planning and execution report.*

  4. 2. A description of existing status of the cultural, socio- economic, biophysical or *potential relocation and resettlement*

  4.3. An identification of the anticipated environmental, social, cultural or *relocation and resettlement (my emphasis)* impacts.

  4.5.4. Provide a list of their views in regard to the existing cultural, socio – economic, *relocation and resettlement(my emphasis)* or biophysical environmental, as the case may be.

(vi) The competent authorities should gazette specific resettlement regulations similar to that of Regulations for the Resettlement Process Resulting from Economic Activities in Mozambique. Draft Mine Community Resettlement, 2019 for Public Comment is a good start. The objective of protocols similar to Mozambique's regulations should be to provide clear process and content guidelines specific to resettlement that is currently missing under both NEMA and MPRDA and their regulations. The good lessons from Regulations for the Resettlement Process Resulting from Economic Activities[208] include:

- Article 15.1 that makes it obligatory for the preparation and approval of resettlement to precede the issuing of an environmental licence.
- Article 15.2 stipulates that the Resettlement Plan is an integral part of the Environmental Impact Assessment Process.[209]
- Article 13 lists requirements on public participation.[210]

These abovementioned articles are specific to framework for the resettlement process. It is recommended that in order to improve domestic handling of resettlement impacts and processes, perhaps the NEMA, MPRDA and Land Use and Planning law should develop and adopt similar regulations to deal with informed consent and asset loss resulting from dispossession and deprivation.

[208]Regulations for the Resettlement Process resulting from Economic Activities (n1) at 12
[209]Ibid 12
[210]Ibid10 to 11.

The enactment of laws specific to the handling of relocation and resettlement will not only provide a coordinated approach to the resettlement process, but also ensure that the same principles, standards and requirements specific to the process of consultation, methodology and set minimum rates upon which the calculation of compensation packages is to be based, are applied across all infrastructure development projects.

It is notable that in the case of Mozambique, the regulations also list transgressions and sanctions for not adhering to the set standard and norms of resettlement process. It is suggested adoption of similar corrective measures will go a long way to address non-compliance with global and domestic requirements when undertaking involuntary displacement.

5.2.2 Suggested improvements to the compensation framework

(i) EIA Regulations should be amended to incorporate a resettlement study, and implementation as a listed or specified activity. As indicated in Chapter 3, the fact that displacement, relocation and resettlement are not regarded and explicitly recognised in the NEMA EIA regulations as listed or specified activities, shall forever remain an afterthought or a reactive response attended to once the project-affected persons refuse to be evicted or resort to a court of law to protect their rights.

The underestimation of the complexity of displacement and relocation because it is not a listed EIA activity. It then becomes another administrative process ticking the box merely recording comments and concerns during the public participation process. As such, the non-listing in listed and specified activities in the NEMA EIA Regulations is the very cause for disregarding relocation and resettlement impacts caused by involuntary displacement.

In this regard, Table 2 below suggests additions to the specified lists/activities in order to augment listed and specified activities by including relocation and resettlement activities that often arise due to infrastructure development projects. These insertions will complement proposed protocols for handling resettlement in the Draft Mine Community Resettlement Guidelines 2019 for Public Comment once finalized and gazetted.

Table 2: Suggested insertions to the NEMA EIA Regulations listed or specified activities:

Activity number	Activity description	Competent authority
01	Any activity whose construction/development shall require land take from legal title land holders, individual land rights users or communally-shared land and physical moving of homes/homesteads and associated sources of economic livelihoods.	Competent authority in the province
02	Any other construction/development-associated activity whose impact results in loss of use, access to livelihood and dispossession.	Competent authority in the province

(ii) In order to ensure that compensation is at full replacement value, this study suggests that the list by *FAO Land Tenure Studies 10:* Table 1[211] in Chapter 4 is included in the thresholds for listed or specified activities in the NEMA EIA Regulations and MPRDA community consultation guidelines, as a guideline for determining valuation of compensation.

In addition, the list in the FAO Land Tenure Studies can be complemented by legislating requirements similar to the resettlement model in the Regulations for the Resettlement Process resulting from economic activities.[212]

This amendment is crucial as a response to criticism levelled against the government department authorities by the SAHRC for not sufficiently playing their oversight role ensuring equivalent compensation, particularly in the mining-sector infrastructure projects.

The SAHRC's report[213] expressed concerns with regard to challenges in the calculation of compensation, non-compliance with compensation agreements, and failure to monitor agreements. The SAHRC laments the absence of a regulatory guideline for the calculation and payment of compensation, due to inconsistencies, especially because of the practice of bias towards market value-based determination of compensation.[214]

The difficulty with this recommendation is that it may not be easy to provide a generally-acceptable calculation formula for the so-called non-intangible losses.

[211]FAO Land Tenure Studies 10 (n177) 31 and 36
[212]Chapter 3 of Regulations for the Resettlement Process resulting from Economic Activities (n1) 34
[213]National Hearing on the Underlying Socio Economic Challenges of Mining affected Communities in South Africa, South African Human Rights Commission (2016) at 17
[214]Ibid19

However, this deficiency could be moderated by applying a transparent fpic based negotiated outcome with the objective of delivering a mutually-beneficial settlement.

Such a settlement would not be aimed at non-monetary compensation but could include a kind and/or commonly-shared benefit, such as a public or community facility to benefit a collective. This approach should allow for flexibility and be discretionary in application, taking into consideration the relevant local circumstances.

A locally-acceptable compensation methodology, formula and rates framework should be established upfront during the consultative resettlement planning engagement as part of the resettlement agreement and resettlement action planning.

This compensation methodology and rate should also take into account compensation for change in the value of compensation over time by either using the 32 days' notice deposit rate or CPI for real time /current compensation as alluded to under 4.5.

(iii) In undertaking the prescribed EIA process under s24 (5) and contained in the NEMA 2014 EIA Regulations, as amended, s13 prescribes the use of independent consultants. Whilst these consultants may be registered as independent environmental consultants, they are not qualified valuers of assets. Assessment, calculation and determination of rates for compensation requires the expertise of a professional valuator endorsed by the South African Property Valuers Professionals (SAPVP). Therefore valuations undertaken by Environmental Assessment Practitioners (EAP) independently does at times raise suspicion and distrust. In situations of involuntary displacement, the independence and neutrality of EAPs is contradicted by the reality that such consultants are themselves not experts in valuation, and are contractually bound to developers.

This study proposes that this difficulty can be overcome if in NEMA and DMR regulations and guidelines, specific clauses are incorporated that make it mandatory to use only professional valuators registered with SAPVP in terms of the Property Valuation Act, to undertake valuation of loss.

5.3 Concluding thoughts

Principles and objectives in the NEMA, MPRDA and their regulations on impact assessment and participatory consultative engagement are informed by the Constitution and global multilateral standards and protocols. These domestic and global practices seek to balance the environmental, social, cultural, heritage and economic needs of development. This study submits that the consideration of social, cultural, heritage, economic restoration, and upholding of transparent processes are very much at the core of mitigating impacts of involuntary displacement, removal, relocation and resettlement arising from large-scale projects.

The exposition of the existing domestic and global theoretical framework and knowledge base on how best to handle involuntary displacement illustrates that there may be a need to investigate ways to fully incorporate best practices into domestic regulatory framework to accommodate these recommendations.

Further, there is an obligation at global and domestic level to ensure that those affected by the unavoidable impacts of infrastructure development are accorded due respect and dignity. It has to be appreciated that until such time displacees are treated humanely, the social and civil voice shall continue to clamour for a development process that is conscious, responsive and accountable. This aforestated sentiment reflects the conflicts and contradictions that arises between those that have to be displaced and project developers.

> More widely, the saga highlights many of the issues . . . where property rights, community consultation, the power of traditional authorities, and environmental concerns versus economic development imperatives often come into play, giving rise to violence and social unrest.[215]

There seem to be strong linkages between the Constitution, NEMA and MPRDA regulations regarding the applicability of certain clauses on the handling of public involvement and compensation that affect displacees. These links and connections do not seem well integrated in practice, so as to consistently uphold a fair, transparent and equitable treatment of displacees.

It is therefore hoped that this investigation has demonstrated that the decision makers, practitioners, investors and developers should adopt these recommendations.

It also hoped that these proposals will go a long way as an effective means to mitigate displacement loss, whilst still enabling the unconstrained execution of projects.

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[215]E Stoddard Petmin defends its resettlement plan for the controversial Somkhele mine at https://www.dailymaverick.co.za accessed on 19 November 2020

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