A COMMUNITY LEFT IN THE DARK: THE CASE OF MAPELA

Struggles for transparency and accountability in South Africa's Platinum Belt

Joanna Pickering and Thabiso Nyapisi

Introduction

From the 1960s onwards, large deposits of valuable minerals such as platinum, chrome, titanium and coal were discovered in vast areas of the former homelands of South Africa, that is, in what is now the Limpopo, North West, Mpumalanga, Eastern Cape and KwaZulu-Natal provinces. A new mining boom erupted and powerful mining companies charged into these areas to set up shop, each scrambling to claim a share. Today, some of the most profitable South African mines are therefore situated on land in the former homelands that is occupied by traditional communities and is governed in terms of customary law.

These areas, underdeveloped as they are on the surface, are rich in mineral wealth. Although these mines have proved highly profitable in many instances, the communities have largely suffered the disruption without the reward. South African mine-hosting communities, far from benefiting from these lucrative mining deals, experience high levels of poverty and unemployment and receive poor basic services. Moreover, communities are frequently left in the dark as to the lucrative mining deals taking place on their mineral-rich land.

South Africa's Platinum Belt provides many examples of a systemic lack of accountability and transparency by traditional leaders and mining companies towards ordinary rural citizens. In violation of customary law, traditional leaders frequently purport to be the sole community representatives in negotiation processes with mining companies. Mining companies, for their part, often claim excessive secrecy over the terms of agreements entered into with mining communities, often refusing to allow individuals access to information except through their traditional leader. This has led to regular explosions of anger and frustration by local people 'excluded from, and unable to get information about, the lucrative mining deals taking place on their mineral-rich land'.[1]

This widespread lack of transparency is due to a number of factors. Firstly, it arises from a push by government to advance distorted colonial versions of the power of chiefs that

vest sole decision-making authority in traditional leaders to the exclusion of the people living on the land, thereby undermining the real customary-law structures on the ground that promote participatory decision-making, inclusion and transparency. Secondly, the lack of transparency is exacerbated by weaknesses in the regulatory framework with respect to ensuring consultation, consent, and downward accountability in mining communities. Thirdly, the problems are intensified by the failure to uphold the constitutionally protected, informal land rights of local people, leaving them vulnerable to exploitation by traditional leaders and mining companies.

Ultimately, this opacity in dealings with ordinary community members leads to deep divisions within communities and to heightened tensions and frustration, as rural citizens are unable to get basic information about the decisions made in their name. Traditional leaders frequently enter into mining deals that are not good for the broader community, at least partly because they are not required to consult with, or account to, community members. Sustainable mining cannot be achieved in this context.

We illustrate the gravity of these problems through the example of the Mapela community, a Limpopo mine-hosting community on South Africa's Platinum Belt. Here, a lack of transparency and accountability has had devastating consequences for the community and risks making mining unsustainable in the area.

Traditional leadership and customary law in South Africa

The view that traditional leaders historically held ultimate decision-making power in South African traditional communities has been shown to be erroneous.[2] This understanding is a distortion of the nature of the power of chiefs used to further the processes of 'indirect rule', in terms of which the institution of chieftaincy was controlled and manipulated by colonial and, later, apartheid authorities to further their own causes.[3]

In fact, in precolonial chieftaincies, the general availability of land meant that members were able to 'break ranks and strike out on their own' if they felt that their chief was acting improperly or inadequately.[4] Given the advantages of social accumulation through a large following, the possibility of members deserting a chief created a check on his power and an incentive to remain accountable to, and transparent with, his community.

In post-apartheid South Africa, the Constitution recognises traditional leadership institutions 'according to customary law' and subject to the Constitution.[5] The content of customary law thus determines both the scope of the chief's power and the customary entitlements vesting in ordinary people in respect of both procedural rights (e.g. in decision-making processes) and substantive rights (such as land rights).

There has been much litigation about the nature and content of customary law in the Constitutional Court over the last 15 years. In judgments such as *Alexkor*,[6] *Bhe*,[7] *Shilubana*,[8] *Gumede*,[9] *Pilane*[10] and *Bakgatla-Ba-Kgafela Communal Property Association*,[11] the court warned of the dangers of adopting at face value the distorted version of autocratic customary law inherited from colonialism and apartheid and directed us instead to an examination of the changing 'living law' which existed, and exists, in practice on the ground.[12]

The court has handed down far-reaching judgments concerning the nature of indigenous ownership of land, inheritance rights for women, accession to traditional leadership positions, rights to freedom of association and expression, and choice of landholding entities in customary communities. These judgments have repealed and amended

THESE JUDGMENTS HAVE REPEALED AND AMENDED EXISTING LAWS AND STRONGLY CRITICISED RESTRICTIONS IMPOSED ON THE RIGHTS AND FREEDOMS OF RURAL PEOPLE IN THE INTERESTS OF AUTHORITARIAN INTERPRETATIONS OF THE POWER OF CHIEFS.

existing laws and strongly criticised restrictions imposed on the rights and freedoms of rural people in the interests of authoritarian interpretations of the power of chiefs. Moreover, these judgments are evidence that the nature of customary law is largely inclusionary, participatory and transparent.

Despite these pronouncements, however, there is nevertheless a push by government to propose bills and policies[13] that strengthen the powers of traditional leaders at the expense of the customary rights of ordinary community members. This is particularly problematic in mining communities where lucrative deals with mining companies are at stake. Ordinary local people become vulnerable in these circumstances, given that, 'when there are opportunities for capital accumulation, some traditional leaders abuse their power to advance the interest of business while compromising the livelihoods of community inhabitants'.[14]

This has been exacerbated by the perceived success of corporate models of holding money and assets belonging to the community which place traditional leaders at the centre of decision-making roles while ordinary community members are given little to no say in the decisions regarding their own assets. Perhaps the best known of these 'corporatisation' models is that of the Royal Bafokeng Nation (RBN) whose assets were corporatised (in other words, to preserve, and make decisions about, communal assets through a corporate vehicle) in Royal Bafokeng Holdings (RBH).

While RBH has built up a valuable portfolio, its corporate ownership structure is designed to consolidate decision-making and is therefore very closely controlled by the chief. Community members are not the owners of RBH and have, at best, only an indirect influence on the use of dividends and almost no say in the governance of the corporation. An individual community member cannot, for example, sell a share of his or her collective holding in RBH. Accordingly, the nation's great wealth does not meaningfully benefit individual community members and it is perhaps for this reason that the RBN is said to be a 'rich nation of poor people' by some of its residents.[15]

The RBN model has been described as 'melding corporatisation with traditional governance'.[16] The Comaroffs have captured why this is so problematic and why it has not received overwhelming support in the Bafokeng community:

> *But the quiet skepticism among Bafokeng about the wealth of their ethno-nation … is not confined simply to the specter of royal riches. It also extends to the Geist of the morafe [nation]: 'Not all Bafokeng approve of the trend towards positioning their king as a CEO, redefining them as shareholders, and running the community like a company,' note Cook and Harding (n.d.:23). Of these clauses, the first, the 'king as CEO,' is especially likely to be troubling. It raises the possibility of a species of executive privilege quite foreign to the Tswana ideal of* bogosi yo bontle *('good government'), an ideal captured in idioms of accountability:* Kgosi ke kgosi ka morafe *[– as] all Tswana are fond of saying, 'a king is king by grace of the people.' Company executives, by contrast, are governed less by accountability than by accountancy, less by the sociomoral needs of a nation than by the amoral imperatives of profit.*[17]

There is an obvious disjuncture between elevating traditional leaders on the basis of their customary authority and imposing profit-sharing structures and models that bear no resemblance to the customary nature and identity of the group concerned. The RBN remains locked in recurrent litigation with community members and land-buying syndicates whose argument is that the RBN brand sells itself as customary and

consultative, yet fails to consult in practice. These groups claim that land-buying syndicates and subgroups own much of the land on which mining is taking place, land that the RBN is seeking to have transferred to itself.

Moreover, some critics have argued that the wealth has not 'trickled down' to the broader community and that most members of the community 'do not understand the complex financial and business deals the Royal Bafokeng Administration engages in, thus creating an "information gap" between it and the local people'.[18]

It is clear, then, that the RBN model, though perceived as a phenomenal success because of its ability to generate enormous profits, in reality fails to achieve transparency and accountability. As a result, equitable distribution of community wealth does not occur. Rather than achieving sustainability, it deepens inequality in a context of already extreme poverty.

Regulatory context

Weaknesses in the legislative framework intensify the problems of opacity and secrecy around decisions regarding communal property such as land and mining revenue.

Laws that enhance the power of traditional leadership such as the Traditional Leadership and Governance Framework Act (TLGFA) 41 of 2003 and the Communal Land Rights Act 11 of 2004[19] have rightly been criticised for 'fortifying the powers of local chiefs and tribal councils over communal property, particularly land and mining revenues, and making downward accountability impossible to realise'.[20]

DISQUIETINGLY, THE SOUTH AFRICAN GOVERNMENT IS PROPOSING FURTHER BILLS AND POLICIES THAT WILL LEGITIMISE THE ERRONEOUS NOTION OF CENTRALISED POWER OF CHIEFS.

Disquietingly, the South African government is proposing further bills and policies that will legitimise the erroneous notion of centralised power of chiefs. The Traditional and Khoi-San Leadership Bill (TKLB), which is currently before Parliament, is intended to replace the TLGFA. The TKLB will further strengthen the powers of traditional leaders to act on behalf of their communities, without provision for community participation and consent on matters affecting community members. This will surely cause transparency and accountability issues to worsen.

Furthermore, the Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002 has helped to facilitate the central role played by traditional leaders in negotiating mining deals with mining companies. The MPRDA and related legislation has sought to redress past injustices by adopting a range of measures aimed at the transformation of the mining industry, such as black economic empowerment (BEE) and mine–community partnerships. The state has also encouraged mine-hosting communities that previously received royalty payments for the exploitation of their mineral resources to convert these into equity stakes in the mining companies.[21]

As Mnwana and Capps explain:

> *The combined effect of these laws is that chiefs are increasingly controlling the interactions between mining corporations and the 'traditional communities' they formally represent. It is far easier for mining companies to talk to a single chief than the thousands of rural people who are affected by each mining development. As the presumed custodians of communal land, chiefs thus enter into mining contracts and receive mineral revenues on behalf of their rural subjects. With the state's support, traditional leaders have become powerful intermediaries of mining deals and mineralled development in the former homelands.*[22]

The MPRDA also lacks adequate provisions relating to consultation with, and consent of, mine-hosting communities. Moreover, existing rights of communities are frequently ignored. For example, the Interim Protection of Informal Land Rights Act (IPILRA) 31 of 1996 was passed by Parliament to provide protection for people living in the former homelands and in informal settlements.[23] The IPILRA provides that nobody may be deprived of their informal rights to land without their consent. Informal land rights include the right to use, live on or access land. This implies that the IPILRA protects people's rights to their household fields and common natural resources such as grazing and ploughing fields.[24] However, the IPILRA has frequently been ignored or has been inadequately applied in the context of mining. This is also due in part to the lack of agreement over whether the mining rights issued to mining companies under the MPRDA are subject to the IPILRA.[25]

The case of Mapela

The Mapela Traditional Community[26] is located about 30 km north of Mokopane in Limpopo. The community is made up of 42 villages and surrounds Anglo American Platinum's Mogalakwena mine, the largest opencast platinum mine in the world.

Mining operations commenced at the mine in 1993 after Anglo American Platinum, through its subsidiary, Potgietersrus Platinum Limited, secured mining rights and a surface lease agreement over several farms in the area. Mining had taken place on and off in the area since 1926, but only boomed in the 1990s. The effects of the mine on villages within Mapela have been extensive. Villages located close to the mine suffer the severe effects of frequent rock blasting, dust, and other environmental hazards such as water contamination. Many residents of Mapela have lost ploughing or grazing land to the mine, and, in some cases, entire villages have been relocated to make way for the extension of the mine's operations.[27]

MANY RESIDENTS OF MAPELA HAVE LOST PLOUGHING OR GRAZING LAND TO THE MINE, AND, IN SOME CASES, ENTIRE VILLAGES HAVE BEEN RELOCATED TO MAKE WAY FOR THE EXTENSION OF THE MINE'S OPERATIONS.

People in Mapela have suffered the disruption of these mining operations with limited and inadequate compensation that has often been mismanaged, and without a significant share in the profits. This is due in part to the long history of unaccountable traditional governance in the area. The chief (or Kgoshi), David Langa, has repeatedly failed to account to villagers about the mining revenue due to them. It has also emerged that he has not been transparent, in that that he has been benefiting personally from contracts with the mine. Kgoshi Langa's mother, who preceded him as Kgoshigadi, entered into surface lease agreements in the past without the consent of the community members affected. Moreover, it seems that she never accounted for the rental payments paid in terms of these lease agreements. This history has led to high levels of frustration.

Tensions came to a head dramatically in September 2015 when violent and widespread protests broke out amid local residents' growing frustrations at what they saw as a lack of transparency, accountability, and inclusion in decision-making processes.

The protests drew participation from members of villages all over Mapela, each having suffered their own frustrations at the hands of the mine and the Kgoshi. For example, the catalyst for the village of Skimming, which is located close to mining operations, was the mine's announcement that it would be relocating the village's Seritarita Secondary School to another venue 12 km away. The Seritarita Secondary School had been built in the apartheid era from the community's own scarce funds. The relocation of the school, it was explained to the villagers, was so that the mine could use the land as a waste-dumping site. Villagers of Skimming told researchers that they were neither informed nor consulted when it was agreed that the school would be relocated. When engagements

between affected village members and the local and provincial education government did not bear any fruit, Skimming village joined the rest of Mapela in the community protests.

The protests caused significant disruption to mining operations for almost two weeks, as protestors blockaded roads to the mine and many contractors and employees were unable to enter. Violent clashes between police and protestors led to injuries, the destruction of infrastructure, and the arrest of 36 community activists.

The protests led to an intervention by the Minister of Mineral Resources and the South African Human Rights Commission. Through their interventions, a 'Task Team' was established to resolve conflicts in the area. However, the Task Team did not resolve the issues of transparency and accountability in the community. Instead, it was perceived as exclusionary by its failure to include local representative groups, some of which existed long before the establishment of the Task Team. Many members of representative community groups felt sidelined by their exclusion from Task Team processes. Mapela community members were in any event wary of this intervention, given that similar interventions in 2008/2009 and in 2012 had failed to adequately address fundamental problems, which, at base, all derive from inadequate engagement with the people directly affected by mining.[28] It appears that the Task Team has played only a limited role in representing the broader community's interests and concerns around mining-related issues. Far from unifying the Mapela community, it seems that the Task Team has had a divisive effect.

THE PROTESTS LED TO AN INTERVENTION BY THE MINISTER OF MINERAL RESOURCES AND THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION. HOWEVER, THE TASK TEAM DID NOT RESOLVE THE ISSUES OF TRANSPARENCY AND ACCOUNTABILITY IN THE COMMUNITY.

The fact that community members' frustrations have not been resolved is evidenced by continued protests in the area. For example, operations at the mine were again disrupted on 5 September 2016 (with some reports claiming that it was in fact forced to shut down)[29] when protestors blockaded roads to the mine, frustrated that mine management had, in their view, negotiated in bad faith, manipulated community structures, and used payments to the tribal authority to sow division in the community.[30]

The problems around transparency and accountability in Mapela are recurrent and systemic. In fact, the Mapela community continues to struggle to achieve transparency regarding deals entered into between Kgoshi Langa, ostensibly on their behalf, and Anglo American Platinum. Some of these struggles are highlighted through the engagements between the mine and Kgoshi Langa around a particular agreement between the mine and the 'community'.

One of Mapela's representative bodies, the Mapela Executive Committee, had been trying to arrange meetings with the Kgoshi during 2015 and early 2016 to talk about their grievances relating to the lack of financial accountability around income generated by mining in the area, but without much success. Kgoshi Langa finally agreed to meet with the Committee in early 2016. It was during their meeting that members of the Committee heard for the first time about a 'settlement agreement' that was being negotiated between Anglo American Platinum and Kgoshi Langa, ostensibly on behalf of the community. The settlement agreement had purportedly been negotiated to resolve certain 'legacy issues' between the mine and the community, although the full purpose of the agreement, as well as its terms, remained opaque to virtually everybody but the Kgoshi.

The Committee managed to convince the Kgoshi to provide its members with a copy of the agreement, still in draft form. The agreement provided that Anglo American Platinum would pay an amount of R175 million to the community in settlement of certain legacy

issues. After studying the agreement, members of the Committee were uncomfortable with many of its terms, including the fact that, according to the agreement, the R175 million would be paid into a trust of which the Kgoshi would be the chairman. The trust's purpose was to hold the R175 million and to enable the 'corporatisation' of community assets. No provision was made for community participation in the trust's decision-making.

Alarmed by these provisions, the Committee wrote a letter to the Kgoshi asking that he hold off on signing the agreement until he had consulted adequately, as required by customary law, and asking that he provide the final version of the agreement including its annexures. However, in a letter to the Committee in March 2016, these requests were refused.

The Committee and others later became aware that the agreement had in fact been signed, this after Anglo American Platinum had published press statements in which the agreement was hailed as resembling the corporatisation model adopted by the RBN.

Given that, in the past, many of the frustrations in Mapela have arisen from inadequate consultation on decisions affecting the community, it was unfortunate that community members were denied information that they were in fact entitled to in terms of customary law. The knowledge that the Kgoshi had signed the agreement despite clear requests to the contrary caused considerable frustration. A group of community members instructed attorneys to prepare court papers to review the decision to enter into the agreement without consulting the community. This litigation is on hold pending an attempt by the parties to try to resolve the conflict.

The above description is intended to illustrate the extent to which the lack of transparency, inclusion and accountability has caused recurrent problems in the area. Community members are routinely left out of the process of making crucial decisions concerning their communal assets, such as land and mining revenue. The chief purports to be the sole decision-maker on issues affecting the community and fails to consult in the manner required by customary law. Anglo American Platinum, from its side, should do more to ensure that decision-making processes are inclusive. These problems frequently result in explosions of anger on the part of frustrated community members – and will continue to do so until structural problems in the legal and political context are resolved.

Conclusion

The problems illustrated by the case of Mapela are symptomatic of the failures of the broader legal and political context in which mining communities find themselves. The lack of transparency and accountability in Mapela arises out of, among other things, an inadequate legislative framework and the increasing abuse of power by the chief. Until these issues are properly addressed by the state, we can expect frustrations in mining communities to continue to grow, making sustainable mining impossible to achieve.

ENDNOTES

1 A Claassens & B Matlala (2014), Platinum, Poverty and Princes in Post-Apartheid South Africa: New Laws, Old Repertoires, in D Pillay, G Khadiagala, P Naidoo & R Southall (eds), *New South African Review 4: A Fragile Democracy – Twenty Years On*, Wits University Press, Johannesburg, 118.

2 M Buthelezi & S Yeni (2016), Traditional Leadership in Democratic South Africa: Pitfalls

and Prospects. Paper presented at a Symposium On Land, Law And Traditional Leadership hosted by the Nelson Mandela Foundation and the Council for the Advancement of the South African Constitution, Johannesburg, 4.

3 JC Myers (2008), I*ndirect Rule in South Africa: Tradition, Modernity and the Costuming of Political Power*, University of Rochester Press, Rochester, 2.

4 Ibid. at 4.

5 Section 211(1).

6 *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).

7 *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC).

8 *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC).

9 *Gumede (born Shange) v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC).

10 *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC).

11 *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* 2015 (6) SA 32 (CC).

12 A Claassens & G Budlender (2016), Transformative Constitutionalism and Customary Law, *Constitutional Court Review*, 75–104.

13 See the section 'Regulatory context' below.

14 Buthelezi & Yeni (n 2 above), 7.

15 I Kriel (2007), A Rich Nation of Poor People: Land and Ethnicity in a Village of the Royal Bafokeng Nation. Paper presented to the AEGIS Conference, Leiden.

16 S Cook (2005), Chiefs, Kings, Corporatization and Democracy: A South African Case Study, *Brown Journal of World Affairs*, 12(1):136.

17 J Comaroff & J Comaroff (2009), *Ethnicity Inc*, The University of Chicago Press, Chicago, 110.

18 A Manson & BK Mbenga (2014), *Land, Chiefs, Mining: South Africa's North West Province since 1840*, Wits University Press, Johannesburg, 144).

19 The Communal Land Rights Act, which would have given traditional leaders the power to represent communities, was struck down by the Constitutional Court in 2010 in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) as a result of concerted civil society opposition.

20 S Mnwana (2015), Mining and 'Community' Struggles on the Platinum Belt: A Case of Sefikile Village in the North West Province, South Africa, *The Extractives Industries and Society*, 1(1):501.

21 These deals have in many instances been highly contested. In 2012, members of the Bapo ba Mogale community in North West province launched an application in the North Gauteng High Court to review and set aside a controversial 2014 deal between Lonmin plc and the Bapo ba Mogale Traditional Council to swap their statutory right to royalties, as well as rights in land, for cash and equity controlled by the disputed leader of the community and his supporters. This litigation is ongoing. Also see S Mnwana & G Capps (2015), 'No Chief Ever Bought a Piece of Land!' Struggles over Property, Community and Mining in the Bakgatla-ba-Kgafela Traditional Authority Area, Working Paper: 3. Society, Work and Development Institute, University of the Witwatersrand, 6.

22 Mnwana & Capps (n 21 above), 6.

23 This statute gives effect to section 25(6) of the Constitution, which provides that: 'A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.' While intended to be interim legislation, the IPILRA has been renewed each year, given that the replacement Communal Land Rights Act of 2004, which would have given traditional leaders the power to represent communities, was struck down by the Constitutional Court in 2010 in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC).

24 Buthelezi & Yeni (n 2 above), 8.

25 Members of the Xolobeni community in the Eastern Cape recently launched litigation in the North Gauteng High Court to seek a declaratory order to the effect that the Minister of Mineral Resources may not grant a mining right in terms of the MPRDA unless the provisions of the IPILRA relating to community consent have been complied with, on the basis that section 25(2)(f) of the MPRDA provides that the holder of a mining right must comply with the relevant provisions of any other relevant law.

26 The TLGFA replaces the word 'tribe' with 'traditional community' and retains the disputed tribal boundaries created in terms of the 1951 Bantu Authorities Act.

27 See ActionAid's report, *Precious Metal: The Impact of Anglo Platinum on Poor Communities in Limpopo*, South Africa, published in 2008, and the follow-up report *Precious Metals II: A Systemic Inequality*, published in 2016.

28 See ActionAid (2016), *Precious Metals II: A Systemic Inequality*, 50–51.

29 See, for example, Labour reporter (5 September 2016), Amplats Mine Shut Down, *Independent Online*. Available at: http://www.iol.co.za/business/companies/amplats-mine-shut-down-2064572.

30 Ibid.