

NOTES / AANTEKENINGE

HOST COMMUNITIES AND MINING PROJECTS IN SOUTH AFRICA: TOWARDS AN EQUITABLE MINERAL REGULATION

1 Introduction

The issue of host communities in the context of mining projects has become the subject of increasing attention in recent years both in South Africa and internationally. This is as a direct result of host communities asserting their interests and rights more actively than in the past. This trend incorporates both traditional concerns such as employment but also new issues such as management of social change. Indeed, it has become much easier for previously isolated host communities to attract attention to their grievances, mobilise supporters and focus criticism on government and mining companies. Host communities have become more assertive and better informed and are able to articulate their interests and rights more clearly than before (Östensson "Players in the Mineral Industry" in Bastida *et al International and Comparative Mineral Law and Policy: Trends and Prospects* (2005) 439; and see Godden, Langton, Mazel and Tehan "Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability" March 2008 26(1) *Journal of Energy & Natural Resources Law* 1-30).

2 International trends

The exploitation of natural resources has led to a variety of problems within host communities. The examples are many, Irian Jaya in Indonesia, the Niger Delta in Nigeria, the Tanasserim populations in Burma, Ok tedi in Papua New Guinea and other indigenous communities.

As indicated above, the host communities now appreciate the magnitude of environmental and human rights impacts which natural resource exploitation could have on them. The dearth of adequate legal protection in international and domestic law adds to the risk to foreign investment in many countries. Even though in general there are known traditional risks to investments such as political instability, government acts such as expropriation and confiscation of the property of the foreign investment by the host States, the instability likely to be created by host populations has created or would create new sources of risk to the foreign mining investment. This new risk takes the form of actions and reactions by members of the host communities and their supporters to the operations of

foreign mining companies that adversely impact on their environment, human rights, and general social and cultural well-being. Such actions by members of the host community are independent of host State sovereign acts. In most cases the host communities in which mining projects are located take actions that adversely affect the foreign investment or the contractual and other rights of the foreign investor. The actions of the host communities may result in suspension of the operation of the investment or may make the operation of the investment difficult or impossible or may even result in the loss of the investment altogether.

The host communities' risk takes various forms, including but not limited to –

hostage-taking of the mining company workers;

forceful occupation of mining company installations / facilities / premises;

violent sabotage of mining company operations;

court actions against mining companies in both the home and host States; and

international pressure / campaigns against mining companies.

The end result is that the foreign investors incur losses. By way of an example, court actions have been instituted against mining companies like BHP by Papua New Guinea host populations in Australia. There are also pending court actions in English courts against Cape plc by South African host populations and staff of the company who were exposed to asbestos (see *Lubbe v Cape plc Africa SA* (2000) 2 (LLR) (Pt7) 383 House of Lords). Court actions have been brought in Indonesia, United States and other countries.

The actions of the host communities result in huge financial losses. Shell reported in its first quarter report 2001 a lost production of 6.56 million barrels of crude which it computed to amount to \$164 million. The other major producers to suffer financial losses in Nigeria are Chevron Mobil and Texaco (Akpan "Host Community Hostility to Mining Projects: A New Generation of Risk?" in Bastida *et al International and Comparative Mineral Law and Policy: Trends and Prospects* (2005) 310-320).

3 South Africa

The host communities in South Africa have not reacted differently from other host communities worldwide. In recent times, South Africa has witnessed an emergence of a disturbing trend by host communities. They have embarked on activities which interfere with mining activities.

4 Relocation of communities

Most mining companies are now resorting to relocating communities to pave the way for open-cast mining activities. These relocations have been marred by controversy and instability in those communities. The situation is more complex in the sense that there are human rights lawyers who receive

funding from foreign donors, aimed specifically at initiating legal actions against mining companies and host States.

Anglo Platinum has been involved in a number of relocation projects, the most prominent being the Ga-Pila and Mothlotlo relocation projects. (The author has represented both communities in the relocation projects. Anglo Platinum has relocated 871 households and 54 churches, schools and businesses (Mothlotlo).) The Ga-Pila community's relocation process started in 1996 and had to be abandoned due to divisions within the community. The Ga-Pila community has been successfully relocated in 2001 at a cost of approximately R300 million. However, there are signs of discontent and instability within the community. This instability is also agitated by human rights lawyers, who, some of them, instigate communities to rise against mining companies.

In 2001 Anglo Platinum initiated the relocation of Mothlotlo communities comprising approximately 900 households. This relocation project has not escaped the negative publicity that has become the order of the day whenever mining companies relocate communities. The interference by non-governmental organisations in the Mothlotlo Relocation Project and divisions within the community have resulted in instability, destruction of property, attempts to interfere and stop mining operations, coupled with spurious and baseless court actions. (Thus far no fewer than 10 court actions have been brought. These actions were either abandoned or have been dismissed.)

The Benchmarks Foundation ("the foundation") has entered the fray. Reverend Seoka recently announced a plan by the foundation to start addressing the health and safety and community issues (2007-10-17 *Business Day*; and see also "Pondo Uprising" November 2007 *Nosweek* 26-27). Recently the South African Chamber of Mines organised a workshop on sustainable development. The workshop was disrupted when a protest broke out. A dozen people from Valley Environmental Justice Group and other protesters carried placards which read: "Stop turning our traditional leaders against their communities". (See "Protest at Mines Conference" 2007-10-18 *Citizen*; "Protesting Anglo Lease: Community Group want Better Terms" 2008-06-13 *Citizen*; "Villagers take on Anglo over Reburials" 2008-06-01 *City Press*; and "Mines 'Out for Fast Cash'" 2008-06-06 *Citizen*.) In March 2008, Actionaid released a report: "Precious Metals: The impact of Anglo Platinum on poor communities in Limpopo, South Africa". The report was highly critical of the way Anglo Platinum handled the relocation of Mothlotlo communities. The report alleged, *inter alia*, that certain human rights had been violated. This was followed by a detailed response by Anglo Platinum. (For Anglo Platinum's response to Actionaid allegations, see www.angloplatinum.com. The Actionaid response led to the investigation by the South African Human Rights Commission (SAHRC). At the time of writing this note, the SAHRC had not as yet issued its report. See "HRC to Probe Mines" 2008-03-28 *Mail & Guardian*; "Angloplat Denies Forced Removals" 2008-03-27 *The Times*; "Villagers Point Fingers at Miner" 2008-03-26 *The Times*; "Rural Poor Drill Mining Giant" 2008-03-30 *City Press*; and "Platinum Mining Giant Forces Communities into Destitution" April 2008 22(4) *Muslim Views*.)

The disputes are not only between the mining companies and host communities; in most instances members of the host communities are divided in their dealings with mining companies. At times, mining companies interact with the traditional leader concerned and reach agreements, only to be faced with a revolt from community members. Mining companies end up not knowing whom to deal with in negotiating access to surface rights, amongst others (Oomen *Chiefs in South Africa: Law Power and Culture in the Post-apartheid Era* (2005) 179).

An interesting development is that of the application of *Kadichuene Development Association v The Minister of Agriculture* (case no 26560/08 Transvaal Provincial Division):

The applicant is the Kadichuene Development Association, representing a rural community residing on the farm Klipplantdrift 787 LR in the District of Mokopane, Limpopo Province.

The respondents are the Ministers of Agriculture and Land Affairs and Minerals and Energy, African Red Granite (Pty) Ltd and Bestaf (Pty) Ltd.

The applicant has applied for an order in the following terms:

“The First Respondent is directed to take all necessary steps to protect the health and well-being of members of the Applicant which steps includes their relocation to, and development of, alternative land in consultation with the Applicant.

The First Respondent is directed within six (6) months of the granting of this Order, to present the Applicant with a detailed plan for total relocation of the members of the Applicant and that such plan be formulated in consultation with the Applicant.

The Second Respondent in consultation with the First Respondent is directed to make funds available, in terms of her obligations under section 3(g) and (j) of Act 67 of 2000 as read together with Section 2(2) of the now repealed Lebowa Mineral Trust Act, from such monies in the account of the Lebowa Mineral Trust, (*Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T); and *LMT Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 33(T)) which now vest in the State, for the relocation of members of the Applicant to, and development of, alternative land as compensation for damages suffered as a result of the depletion and/or exhaustion of mineral deposits and damage caused to the environment by the mining activities conducted by the third and Fourth Respondents on the Farm.”

The applicant alleges, *inter alia*, that as a result of the mining activities on the farm by the two mining companies, the surface of the land on the farm has degraded to such an extent that it has become hazardous for the community to reside on the farm and that the mining activities have constantly exposed the community to unacceptable levels of noise pollution and air pollution.

It remains to be seen how the court will respond to this unprecedented legal action. (The applicant is represented by the Legal Resources Centre. The author is representing the Ministers of Government.)

5 Tension between traditional and mineral laws

One of the contributing factors to the above state of affairs is the tension between traditional and mineral laws (Mineral and Petroleum Resources Development Act 28 of 2002). The problem is exacerbated by the interference by the colonial and apartheid regimes in customary law. It is important to trace the evolution of communal land tenure system as strengthened by the legislation and the Constitution to illustrate the likely impact on traditional communities. This, of course, impacts directly on the mining operations in South Africa.

In the past, a system of individual land tenure was never practised. It was accepted that the relevant traditional leader in consultation with his or her council will allocate portions of land to families for residential and cultivation purposes. Once the land is allocated to the family, the head of the family will not have the power to alienate such land. However, with the passage of time, it came to be accepted that the allocation of land would in the normal course be carried out by a representative of the traditional leader (headman). Even though the head of the family will exercise some measure of control over the land, it was always accepted that the land was “communal” in that the concept of ownership in the sense of western law was unknown. In *Omodu Tijani v Secretary, Southern Nigeria* ([1921] 2 AC 399 PC 404; and see also *Alexkor v The Richtersveld Community* 2004 5 SA 460 (CC) par 58) the Privy Council held that:

“Land belongs to the community, the village or the family, never to the individual. All members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode or speech is sometimes called the owner.”

In *Sobhuza II v Miller* ([1926] AC 518 PC 528), the Privy Council again emphasised the principle that individual ownership was foreign to customary law, because land belongs to the community. Now in this scheme of things, a question arises as to who had the power to terminate a right to land or alienate land. A traditional leader in terms of indigenous law had that power but he or she was required to consult with the council of elders, and later on there was also a need for a traditional leader to consult with the community. (*Mosii v Motsoeokhumo* 1954 3 SA 191 (A) 931. The *dicta* indicates that the need for consultation with the community was part of custom.)

6 Legislation governing communal land tenure during the apartheid era

In the past, various Acts were promulgated that had an impact on communal land tenure. These were, amongst others, the Black Land Act (27 of 1913) and the Development Trust and Land Act (18 of 1936). These pieces of legislation had the effect of reserving certain land in rural areas for occupation by African people. All these Acts were repealed by the Abolition of Racially Based Land Measures Act (108 of 1991; and regarding earlier legislation, see also Saunders “Southern Africa in Need of Law Reform” 11-

14 August 1980 Proceedings of Southern African Law Reform Conference 72).

7 The Upgrading of Land Tenure Rights Act 112 of 1991 (“the Land Tenure Act”)

This Act provided that “tribes” can acquire full ownership over their land with a consequent power of alienation (s 2 of the Land Tenure Act). Under sections 2(2) and 3(1) of the Land Tenure Act, an individual right to acquire ownership is confined to erven in formalised townships and surveyed lands. The “tribe” is required simply to request the Minister to have ownership of the land registered in the “tribe’s” name (s 20(1) of the Land Tenure Act). The Minister is authorised to grant such a request but is also empowered to impose a 10-year moratorium on sales, leases, donations and other forms of allocation to non-tribal members unless the “tribe” concerned obtains a court order permitting the transaction (s 19(2) of the Land Tenure Act). The authorisation by the Minister is only competent where alienation has been approved by a “tribal resolution” (s 19(3) of the Land Tenure Act) and is not in conflict with the interests of members of the tribe (s 19(3) of the Land Tenure Act; and see also Bennett *Customary Law in South Africa* (2004) 400-406 and authorities collected therein).

Section 1(1) of the Land Tenure Act had the effect of overriding earlier case law as the decisions disposing of rights in communal land were to be “taken by a majority of the members of the tribe over the age of 18 years present or represented at a meeting convened for the purpose of considering such disposal ...”

The Land Tenure Act infuses elements of democracy with the customary practices. This resulted in diluting the original absolute powers that a traditional leader had in alienating communal land. Even at that stage, it could be argued that a traditional leader and his or her council had no power to alienate land without the consent of members of the community. In practice, traditional authorities continued to encumber communal land by means of leases, donations etc. Approval of these transactions was done by way of a “tribal resolution”, without the involvement of the community.

8 Developments relating to communal land tenure before and after 1994

Before 1994 significant developments occurred in some rural communities, impacting on communal land allocations. The following scenarios could be observed:

- 8 1 Traditional leaders in other areas had relinquished their land-allocating powers and civic institutions had replaced them, or traditional leaders and civic associations exercised dual power in the sense that they both allocated land. In other instances, civic institutions and traditional authorities jointly allocated land. This caused much confusion as one could not be able to determine with a measure of certainty the *de facto*

and *de jure* position (Pienaar “Broadening Access to Land: The Case of African Rural Women in South Africa” 2002 2 *TSAR* 181-182 par 2.2.5).

- 8 2 Generally allocations would have been carried out by the *indunas* who would be required to report to the traditional authority. Individual “owners” were required to pay a certain amount to the *indunas* and in other instances, also to the traditional authority. The rule regarding payment has not been strictly observed.
- 8 3 The coming into operation of the interim and final Constitution (200 of 1993; and 108 of 1996) presented a formidable challenge to the issue of alienation and termination of communal land rights. In terms of section 33 of the Constitution, any decision taken regarding the termination of land rights had to comply with the requirement of “lawful, reasonable and procedurally fair action”. Section 33(2) provides that: “anyone whose rights have been adversely affected by administrative action has the right to be given written reasons”.
- 8 4 The above provisions have now been refined by the Promotion of Administrative Justice Act (3 of 2000) (“PAJA”), which requires that any administrative action that materially and adversely affects the rights or legitimate expectation of any person must be procedurally fair. This in fact will mean that a traditional leader can no longer terminate a right in land of any person without complying with the requirements of the Constitution and PAJA.
- 8 5 Furthermore, the principle of legality now applies. This means that an administrative body or a functionary is required to act within the powers granted by the Constitution (and acting rationally). There must be a rational connection between the action and the purpose for which a power was given (see *Fedsure Life Assurance Ltd v Greater Transitional Metropolitan Council* 1999 1 SA 374 (CC); *President of RSA v South African Rugby Football* 2000 1 SA 1 (CC); and *Pharmaceutical Manufacturers’ Association of South Africa: Ex parte President of RSA* 2000 2 SA 674 (CC) par 85).
- 8 6 Furthermore, the Constitution also introduced the property clause (s 25 of the Constitution). A way had to be found to deal with interests or rights of communal land “owners”. This brings the author to the Interim Protection of Informal Land Rights Act (31 of 1996) (“IPILR Act”).

9 Interim Protection of Informal Land Rights Act 31 of 1996

The IPILR Act was enacted in order to give customary and other interest holders more secure possession of their land. It provides that no person may be deprived of an informal right to land without his or her consent (s 2 of the IPILR Act).

It must be noted that the application of this Act has been extended from time to time by the Minister.

“Community” is defined as follows:

“any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group” (own emphasis).

“Informal right to land” means:

- “(a) the use of, occupation of, or access to land in terms of:
- (i) any tribal or customary or indigenous law or *practice of a tribe*;
 - (ii) custom usage or *administrative practice in a particular area* or community where land in question at any time vested in:
 - (aa) the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936);
 - (bb) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution, 1971 (Act No. 21 of 1971); or
 - (cc) the governments of the former republics of Transkei, Bophuthatswana, Venda and Ciskei;
 - (b) the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of public office;
 - (c) beneficial occupation of land for a continuous period of not less than five years prior to 31 December, 1997; or
 - (d) the use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991), although he or she is not formally recorded in a register of land rights as the holder of the right in question, but does not include –
 - (e) any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature; and
 - (f) any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier” (own emphasis).

It is clear that the language used in this legislation is wide enough to can accommodate even the administrative practice of civic associations and other structures of allocating land.

Furthermore, “tribe” is defined as follows:

- “(a) any community living and existing like a tribe; and
- (b) *any part of a tribe living and existing as a separate entity*” (own emphasis).

Some communities which are part of the larger traditional community have over the years acquired distinct informal land rights and have existed as a separate entity. Such communities are entitled in terms of the IPILR Act to take a decision regarding their rights without permission or consultation with the relevant traditional leader and/or the traditional council, particularly, in cases where the relevant traditional leader is determined to frustrate their rights. This becomes more clearer in terms of section 2(1) which declares the overall purpose of the IPILR Act by stating that, “no person may be deprived of any informal right to land without his or her consent”.

Notwithstanding the qualification in section 2(2) to the effect that customary land holders may be deprived of their rights in accordance with custom and usage of that community, the individual holders of informal land

rights are given stronger rights, in the sense that deprivation of their rights may only take place with their consent. The Constitution and the IPILR Act introduced a rights-based system and moved away from a pure communal-based system (Pienaar 2002 2 *TSAR* 199).

A view has been expressed that the informal land rights holders have interests which could be construed as real rights under the common law. It could be argued, for instance that the customary interests could be treated as servitude of *usus* which could be simply registered under the Deeds Registries Act (ss 16 and 3(1) of the Deeds Registries Act 47 of 1937; and see Bennett 407 and authorities collected therein).

It is significant that unlike past legislation, the IPILR Act does not refer at all to the role of a traditional leader. This omission, in the opinion of the author is deliberate, since the intervention of a traditional leader will be in direct conflict with the informal land rights which the Constitution and the IPILR Act seek to protect. However, this does not mean that the role of a traditional leader suddenly disappears. The role and functions of a traditional leader within a traditional council are provided for in the Traditional Leadership Governance and Framework Act (41 of 2003).

10 Communal Land Rights Act 11 of 2004 (“CLR Act”)

This piece of legislation has been assented to by the President on 14 July 2004. The CLR Act has not as yet been put into operation. (The constitutionality of the Act is being challenged in *Tongoane v Minister of Agriculture* case no: 11678/06 (Transvaal Provincial Division).) It is perhaps significant that the schedule to the CLR Act does not seek to repeal the Upgrading of Land Tenure Rights Act, except section 20. Most important, the CLR Act does not seek to repeal the IPILR Act, except that section 5 is amended by the deletion of subsection 2.

The preamble of the CLR Act reads as follows:

“To provide for legal security of tenure by transferring communal land, including KwaZulu-Natal Ingonyama land, to communities, or by awarding comparable redress; to provide for the conduct of a land rights enquiry to determine the transition from old order rights to new order rights; to provide for the democratic administration of communal land by communities; to provide for Land Rights Boards; to provide for the co-operative performance of municipal functions on communal land; to amend or repeal certain laws; and to provide for matters incidental thereto.”

“Community” is defined as “a group of persons whose rights to land are derived from shared rules determining access to land held in common by such groups.”

The definition of “community” must, however, be read in conjunction with the definition of “tribe” and “community”, in terms of the IPILR Act. The CLR Act applies to, amongst others, land acquired by or for a community whether registered in its name or not (s 2(1)(c) of the CLR Act).

In interpreting the provisions of section 2(1)(d) of the Restitution of Land Rights Act (22 of 1994), Moseneke DCJ in *Department of Land Affairs v*

Goedgelegen Tropical Fruits (Pty) Ltd (2007 10 BCLR 1027 CC 1041-1042, par 39 and 40; and see also *Prinsloo v Ndebele-Ndzundza Community* 2005 6 SA 144 (SCA), said:

“In the case of *In Re Kranspoort Community (supra)*, Dodson J correctly construes section 2(1)(d) of the Restitution Act to require that there must be a community or part of a community that exists at the time the claims is lodged and that the community must have existed some time after 19 June 1913 and must have been victim of racial dispossession of rights in land. I agree with Dodson J that in deciding whether a community exists at the time of the claim there must be:

- (a) ‘a sufficiently cohesive group of persons’ to show that there is a community or a part of a community, regard being had to the nature and likely impact of the original dispossession on the group; and
- (b) some element of commonality between the claiming community and the community as it was at the point of dispossession.

There is no justification for seeking to limit the meaning of the word ‘community’ in section 2(1)(d) by inferring a requirement that the group concerned must show an accepted tribal identity and hierarchy. Where it is appropriate, as was the case in *Ndebele-Ndzundza*, the ‘bonds of custom and culture and hierarchical loyalty’ may be helpful to establish that the group’s shared rules related to access and use of the land. The ‘bonds’ may also demonstrate the cohesiveness of the group and in communality with the group at the point of dispossession” (own emphasis).

The CC in *Alexkor Ltd v The Richtersveld Community (supra)* pointed out that the “living” customary law is in a constant state of development and adaptation to changing circumstances and needs.

The legislation and other changes brought about by the Constitution have indeed exacerbated tensions between traditional communities on the one hand, and their traditional leaders on the other. This tension if not properly managed can indeed derail any mining project. Over and above the said tension, there are also strife and divisions within communities. A way has to be found to create a climate conducive for the mining companies to operate and contribute to the socio-economic development of the communities and the country at large.

At the moment all parties involved, including the government, do not seem to have a solution to the problems alluded to above. The government’s approach has been inconsistent and this has not been helpful.

11 Mineral and Petroleum Resources Development Act 28 of 2002

This Act has not dealt adequately with the interest and expectations of host communities. The MPRD Act refers to communities in some significant way in section 104 which provides that:

- “(1) Any community who wishes to obtain the preferent right to prospect or mine in respect of any mineral and land which is registered in the name of the community, must lodge such application to the Minister.
- (2) The Minister must grant such preferent right if the community can prove that –
 - (a) the right shall be used to contribute towards the development and the social upliftment of the community concerned;

- (b) the community submits a development plan, indicating the manner in which such right is going to be exercised;
 - (c) the envisaged benefits of the prospecting or mining project will accrue to the community in question; and
 - (d) the community has access to technical and financial resources to exercise such right.
- (3) The preferent right, granted in terms of this section is –
- (a) valid for a period not exceeding five years and can be renewed for further periods nor exceeding five years; and
 - (b) subject to prescribed terms and conditions.
- (4) The preferent right referred to in subsection (1), shall not be granted in respect of areas, where a prospecting right, mining right, mining permit, retention permit, productions right, exploration right, technical operation permit or reconnaissance permit has already been granted.”

It is immediately clear that none of the poverty-stricken communities will be able to utilise the above provisions effectively to their benefit. Much more is needed by way of legislative intervention to assist such communities.

The lacuna in the law has led to host communities initiating actions on their own, with at times unrealistic expectations, against the State and mining companies.

12 Committee of inquiry

In order to address the problems identified above, either emanating from the host communities or the inadequacy of the law, it is proposed the South African Government considers appointing a committee of inquiry.

13 Terms of reference

The proposed terms of reference are –

- 13 1 to inquire into the causes of discontent within the host communities where mining operations are taking place;
- 13 2 to identify the causes of the tension between mining companies and host communities;
- 13 3 to study the current legislative framework and to recommend such amendments as are necessary to deal with the problems among the host communities, mining companies and the State;
- 13 4 to recommend remedial actions to deal with the problems as identified;
- 13 5 to conduct comparative research on the trends in other foreign jurisdictions; and
- 13 6 to recommend that the South African Parliament considers passing the Harmonisation of Traditional and Mineral Laws Act.

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