

# MAPELA CASE STUDY



July 2018

Telling the story of a mining-affected community

Phuhlisani NPC has published a series of publications which investigate the impact of mining rural, low-income traditional communities. The series explores how the Mapela community have had their rights trampled, their livelihoods endangered, their homes relocated, their access to cultural and heritage resources diminished, their health threatened and their environment damaged. Only through extensive resistance measures and assistance from outside organisation has some semblance of compensation been obtained.

Many communities do not have the ability to mount such resistance. It is clear that South African mining-affected communities, like Mapela, are in a weak legal position. Mining-affected communities should be more protected as a default legal position. Certain key policy and legislative changes are needed in order to ensure that mining-affected communities have greater autonomy, are able to avoid hardship and are able to obtain greater benefit from mining operations undertaken on their land. An additional question must be added to the land debate: how do we safeguard existing land rights of rural black people in the face of pressure from powerful mining companies and a dispassionate state?

The series consists of this document, a summary document and a set of explanatory videos. The series uses the experiences of the Mapela Traditional Community as a window into the weak legal and social position of many similar communities experiencing or anticipating industrial mining on their land. This case study forms the factual basis and expands on information provided and statements made in the summary document and videos.

The case study is broken up into two parts. Part 1 deals with the factual breakdown of the Mapela community's experience of mining on their land. Part 2 deals with the legal context regarding mining and the local communities it affects. The summary document and set of videos

are condensed publications of the information contained in this case study. Links to sections of the case study are provided in the summary document and videos so that people engaging with the summarised publications can easily access more information on the Mapela story and relevant law.

# Mapela Case Study

TELLING THE STORY OF A MINING-AFFECTED COMMUNITY

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## INTRODUCTION

The Mapela Traditional Community is located about 30km north of Mokopane in Limpopo. The community is made up of 42 villages, and surrounds Anglo American Platinum's (Anglo) Mogalakwena Platinum Mine (Mogalakwena), the largest open-cast platinum mine in the world. Mogalakwena is located near the town of Mokopane within the Mogalakwena Local Municipality. The platinum belt stretches for 400 kilometres from North West province across Limpopo province to Mpumalanga, and is host to 88% of the world's platinum and palladium reserves.

The villages most affected by the mining are Ga-Molekana, Ga-Puka, Ga-Sekhaolelo, Ga-Pila, Ga-Tshaba, Skimming and Sekuruwe.

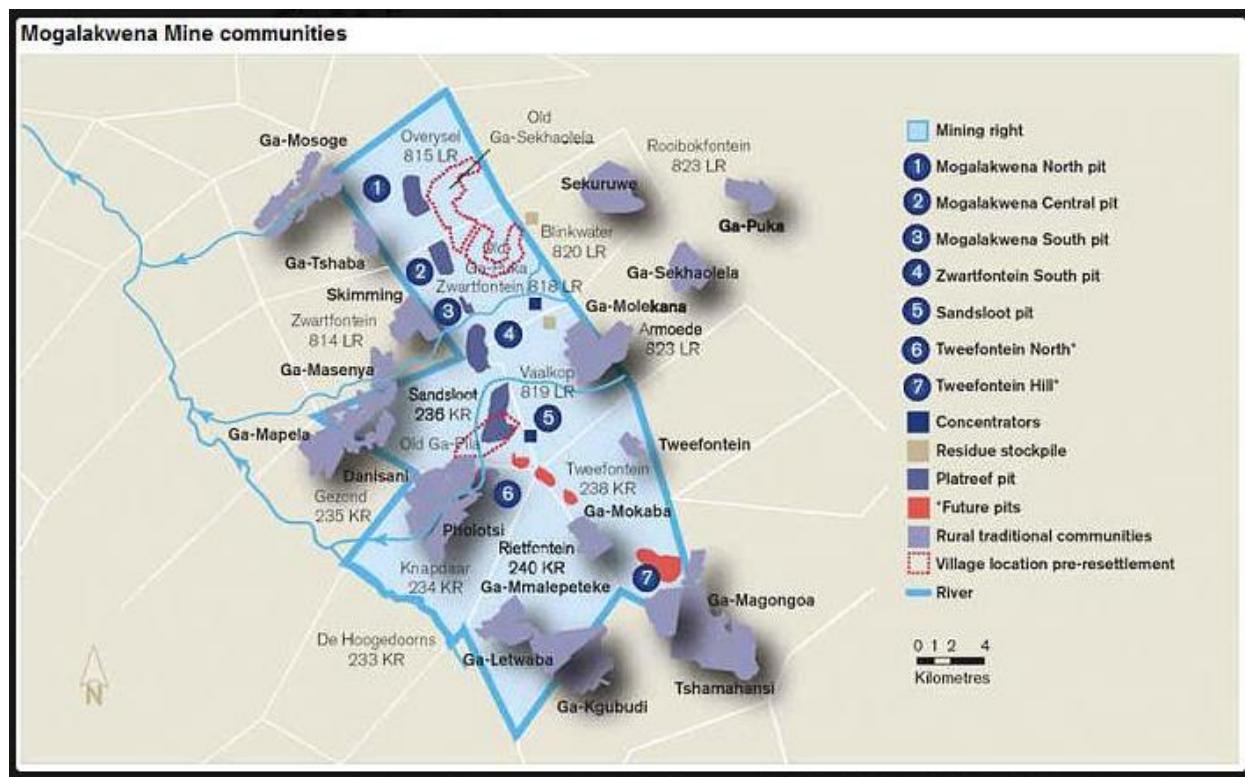


Figure 1: Areas over which PPL has legal right to mine and Mapela villages affected by mining.<sup>1</sup>

Generally, Mapela is an area of high unemployment and low income. From research conducted by Phuhlisani, it is clear that most households survive off social grants. A small number of adults are employed at the Mogalakwena mine. Some work as domestic workers in Mokopane. Others work for the Mogalakwena Municipality. Some households undertake subsistence farming and some are successful enough to obtain commercial profit from farming. However, farming in general has drastically reduced since mining started in earnest, in the 2000s. There are large problems regarding access to clean water and sanitation, which have been exacerbated by mining. In general this report shows that mining has had a largely negative effect on Mapela residents and questions the sufficiency of compensation provided by Anglo.

This report and accompanying legal summary (Addendum A) shows the precarious position that mining-affected communities often find themselves in, using the Mapela community's experience as an example. It shows the turmoil that mining can create amongst local communities and identifies inadequacies in the legal and governance system, which allow powerful companies such as Anglo to override the interests of rural communities such as the Mapela.

<sup>1</sup> Wikimapia. 2011. Mogalakwena Mine Communities. [Online] Available: <http://wikimapia.org/13554463/Mogalakwena-Platinum-Mine#/photo/1679924> [Accessed 24 April 2018]

## Timeline of Major Mining-Related Events in Mapela

For information on each event, click on the hyperlink or go to the page number provided.

Year	Event	Link/pg
1990	• Intensive platinum mining operations begin	<a href="#">Pg X</a>
1993	• Anglo secures lease agreement for farms on which Mapela residents live	<a href="#">Pg X</a>
1996	• Relocation of Ga-Pila village starts	<a href="#">Pg X</a>
1998	• Process of creating Section 21 companies begins. Section 21 companies were non-profit companies set up by Anglo in each village that was to be relocated in order to facilitate consultation with the community	<a href="#">Pg X</a>
2000	• Anglo commences grave relocations in various villages	<a href="#">Pg X</a>
2001	• Relocation of Ga-Pila village completed	<a href="#">Pg X</a>
2002	• Mohlotlo village relocation consultation starts	<a href="#">Pg X</a>
2005	• Mohlotlo residents ratify and adopt agreements made by Section 21 companies	<a href="#">Pg X</a>
2006	• Court cases brought by Richard Spoor Attorneys that aimed to stop mining from going ahead in certain villages	<a href="#">Pg X</a>
2007	• Mohlotlo relocations start, accompanied by protests	<a href="#">Pg X</a>
	• Mohlotlo Development Committee created	<a href="#">Pg X</a>
	• ActionAid finds water contamination issues, which were thereafter refuted by Anglo	<a href="#">Pg X</a>
2008	• 827 of 956 households from Mohlotlo had been relocated	<a href="#">Pg X</a>
	• SAHRC report 1: Investigation into the effects of mining on Mapela	<a href="#">Pg X</a>
	• ActionAid report 1: Investigation into Anglo Platinum'	<a href="#">Pg X</a>
	• Anglo's response to the reports	<a href="#">Pg X</a>
2009	• Section 21 companies start to be disbanded	<a href="#">Pg X</a>
	• Kgoshigadi Athalia Langa passes away, succeeded by her son, David Langa	<a href="#">Pg X</a>
2011	• Anglo launches 'Project Alchemy,' Anglo's community benefit flagship for all of its platinum operations	<a href="#">Pg X</a>
2012	• Skimming evictions	<a href="#">Pg X</a>
	• Grave relocations are completed	<a href="#">Pg X</a>
2013	• Chieftainship dispute between Hans and David Langa brought to the Commission on Traditional Leadership Disputes and Claims	<a href="#">Pg X</a>
2014	• Mohlotlo relocations cease	<a href="#">Pg X</a>
	• Remaining Mohlotlo residents protest relocations and other issues	<a href="#">Pg X</a>
2015	• General protests regarding mining in Mapela	<a href="#">Pg X</a>
	• SAHRC Task team to address protesters' concerns created	<a href="#">Pg X</a>
2016	• Draft Settlement Agreement and Trust Deed created. Kgoshi David Langa meets with Mapela Executive Committee to consult them on the Agreement.	<a href="#">Pg X</a>
	• Correspondence between MEC legal representatives and Kgoshi David Langa's legal representatives, including suggestions for amending	<a href="#">Pg X</a>

	Settlement Agreement and associated Trust Deed	
	● Ga-Tshaba protests regarding negative effects of mining	<a href="#">Pg X</a>
	● Action Aid report 2: a follow up of its previous report showing lack of progress made	<a href="#">Pg X</a>
	● Phuhlisani Workshops	<a href="#">Pg X</a>
2017	● Kgoshi David Langa gets replaced by Kgoshi Hans Langa	<a href="#">Pg X</a>
	● Latest SLP published by Anglo	<a href="#">Pg X</a>
	● SAHRC Report 2: follow up to its previous report	<a href="#">Pg X</a>
2018	● Formal Inauguration of Kgoshi Hans Langa	<a href="#">Pg X</a>
	● Trust Deed revised and signed by Kgoshi Hans Langa	<a href="#">Pg X</a>

## CASE STUDY

### Contestation: Land and Traditional Leadership

#### *History of Land Contestation*

There is a long history to the dispossession of the land and wealth of the Mapela people. Before colonial governments imposed alien rules of land ownership, households in Mapela held strong rights to the land upon which they lived and worked. After the arrival of the Boers in the area and the subsequent establishment of a Boer republic, the Zuid Afrikaansche Republiek (ZAR), in 1852, land was surveyed and cut up into farms, generating conflict between settlers and local people. The ZAR government then demarcated locations where 'large Native tribes' could occupy land. The land was, however, owned by the government. Households originally dispersed throughout the area were then moved to these locations, increasing the concentration of people and decreasing the land available to locals. Households living within such locations experienced a severe shortage of access to land. Households living outside of such locations had to pay rent to live and to work on the land but, if they were able to do so, had access to a larger amount of land. After South Africa became a union in 1910, however, the relative freedom of movement and better land that rent tenancy afforded was curtailed by the 1913 Natives Land Act, which disallowed such rent tenancy and sought to move all black people into the already over-crowded reserves.

The dispossession and concentration of Mapela people on a smaller area of land contributed to environmental degradation in the area.

In 1951, chiefs and tribal authorities were given administrative power in the locations, now called 'reserves', by the Bantu Authorities Act. This Act distortedly concentrated power in chiefs, taking power away from headmen in the area. The Bantu Self-Government Act of 1959 formed the basis for the creation of Bantustans. Bantustans were areas assigned by the South African apartheid government to groupings of South Africa that it deemed to be homogenous 'tribes.' Black people were assigned as citizens to separate Bantustans depending on what tribe they were deemed by the government to belong to and were often forcibly relocated to the Bantustan that they were assigned. The apartheid government stripped them of South African citizenship and the ability to own land in South Africa. Bantustans constituted 13% of South African land, while the majority of South Africa's population was to be forced into these areas, and the land was, in general, of poor agricultural quality. These factors placed great stress on agricultural and land rights systems in the

Bantustans. In pursuit of segregation, the apartheid government dispossessed people of their political and land rights.

The Mapela community's land and traditional leadership was placed under the domain of the Pedi-dominated Lebowa Bantustan, despite Mapela being mostly Ndebele-speaking. This further took autonomy over land and governance away from Mapela traditional leadership structures, placing greater power in apartheid-created Tribal Authorities<sup>2</sup> from which the Mapela had been historically disparate.

Upon the dissolution of the Bantsutans, in 1994, in accordance with the Interim Constitution, the assets and liabilities of the Lebowa Government (including the Mapela community's land) were transferred to the South African Government. However, in light of their customary law, the Mapela community have the right to use the land and to benefits accruing from the land. These rights are protected by the Constitution and the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA): they have the right not to have their customary law rights deprived without their consent. See [below](#) for more information on how IPILRA protects informal land rights.

## History of Leadership Contests

In 2013, a long-standing dispute over the senior traditional leadership position ('Chieftainship') of the Mapela Traditional Community was brought to the Commission on Traditional Leadership Disputes and Claims ('the Commission'), which is the body tasked with resolving such disputes. The dispute was between David Kgabagare Langa and Hans II Malasela Langa. See [below](#) for information on the law pertaining to traditional leadership disputes. The following information comes from the Commission's report on the dispute.<sup>3</sup>

It was common cause, in the commission's hearing, that Hans I was the first Chief of the "Mapela Branch of the Ndebele of Langa." Reportedly, Hans I married 29 wives in total. The first five wives have produced offspring that have been part of the senior traditional leadership of the Mapela Traditional Community.

After his death in 1905, Hans I was succeeded by his brother, Marcus Langa, who stood as regent until Hans I's firstborn son of the 'first house', Alfred Sedibu Langa, came of-age and became the Chief in 1918. The first house is the house of the candle wife' – the wife designated by the community to be the bearer of the heir to the chieftancy. The heir will be the firstborn son of the candle wife and the chief. A candle wife is said to be married to the community, not to any one man. The community contributes resources to pay *lobola* for the candle wife who is a high-ranking daughter of another respected royal house.

Alfred did not bear a male heir before his death in 1937, which is where the succession problems began. After Alfred's death, his brother, Johannes Nkgalabe Langa, stood as regent. In line with custom, the regent's duty was to marry a candle wife and produce a male heir, who would then become Chief when he became of age. The regent's duty was, therefore, temporary. He could not pass on Chieftainship to a son other than the son of the regent and the candle wife.

However, in this case, the chosen candle wife, Nana Langa, passed away before a marriage could be finalised. Johannes then passed away in 1957 without producing an heir. Thereafter, Godwin Motape Langa, Johannes' half-brother, was appointed by the Bakgomana to succeed Johannes as regent. Unfortunately, Godwin passed away six months into his reign. His younger brother, Hendrik Madikwe Langa, was nominated

<sup>2</sup> Mnwana, S., Mtero, F., & Hay, M. 2016. SWOP Working Paper Seven: Dispossessing the dispossessed? Mining and Rural Struggles in Mokopane, Limpopo. pp.7-11

<sup>3</sup> Commission on Traditional Leadership Disputes and Claims, Limpopo Provincial Committee. 2013. Report on the Senior Traditional Leadership Dispute by Langa Madimetja Joseph Against Langa Kgabkgare David of Mapela Traditional Authority Ref No L/13/23 Waterberg District.

as Godwin's successor as regent. Rosina Queen Langa was then married as a candle wife in 1958 but was rejected by Hendrik, which prompted the Bakgomana to nominate John Masebe Langa to replace Hendrik as regent in 1976.

John was the only son of Nkopo Hendrik Langa, who was the son of Raesetsha Makanu. Hendrik was the son of Madikana. Makanu and Madikana were both wives of Hans I and there is some dispute about their ranking. The commission accepted that Makanu was the second wife and Madikana was, at best, the fifth wife. Therefore, John was of the second house and Hendrik was of the fifth house.

Officially, John became the regent with the duty to marry the candle wife and produce an heir to the throne with her. He succeeded in both of these duties. Hans II Malasela Langa is the firstborn son of John and Rosina.

Hendrik rejected his deposition and mobilised supporters who violently opposed supporters of John. John fled and Hendrik retook the throne by force. Hendrik had married Athalia Thabantshi in 1960 and purported to name her as candle wife. However, there is no record of Athalia being accepted by the community as candle wife according to tradition. Further, there cannot be two candle wives at one time. The fact that Rosina was already chosen precluded Athalia from being chosen. Thus, Athalia could not have been a valid candle wife. Hendrik passed away in 1990 and Athalia succeeded him. She ruled until 2009 (women were now recognised as being able to hold senior leadership positions in the community) after which their son, David Kgabakgare Langa became Chief, as per Hendrik's documented wishes. David Kgabakgare was the incumbent Chief at the time of the Commission's hearing of this case.

The Commission decided that Hans II had a better claim to the throne than David, for the following reasons:

- Athalia was not a valid candle wife; Rosina was.
- Hendrik was only regent, not Chief, and did not have the power to pass on leadership to his son, David, unless David was born of the candle wife.
- Hendrik was deposed and John took his place as regent according to custom.
- Hendrik's retention of the throne was not according to custom.
- John's lineage is higher in rank than Hendrik, being from the line of the second house. Hendrik is of the fifth house.
- John married Rosina, the candle wife, fulfilling the regent's duty and creating a valid heir to the throne, as per custom, in Hans II.

In line with this recommendation, the Commission recommended to the Premier that David be removed from his position and be replaced by Hans II Masebe Langa. The Premier obliged. The gazetting and formal recognition by government of Hans Langa as the Kgoshi of the Mapela Traditional Community in terms of section 12(1) of Act 6 of 2006 occurred in March 2017, with effect from 01 April 2017. The public inauguration took place in March, 2018.

In terms of the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA), as shown [below](#), once the Premier removes a traditional leader from his/her position, the matter is supposed to be referred to the royal family of the traditional community in question and, thereafter, the royal family must choose the new traditional leader. Problematically, no proof of this process being followed has been found. The TLGFA does not consider situations where customary law provides for a different method of choosing chiefs that excludes a prospective royal family. It also does not include situations where there is no applicable royal family above the chief. No mention of such a royal family is made in the Commission's report. David Kgabakgare Langa has taken his deposition on review, but at the time of writing it has not yet been heard in court.

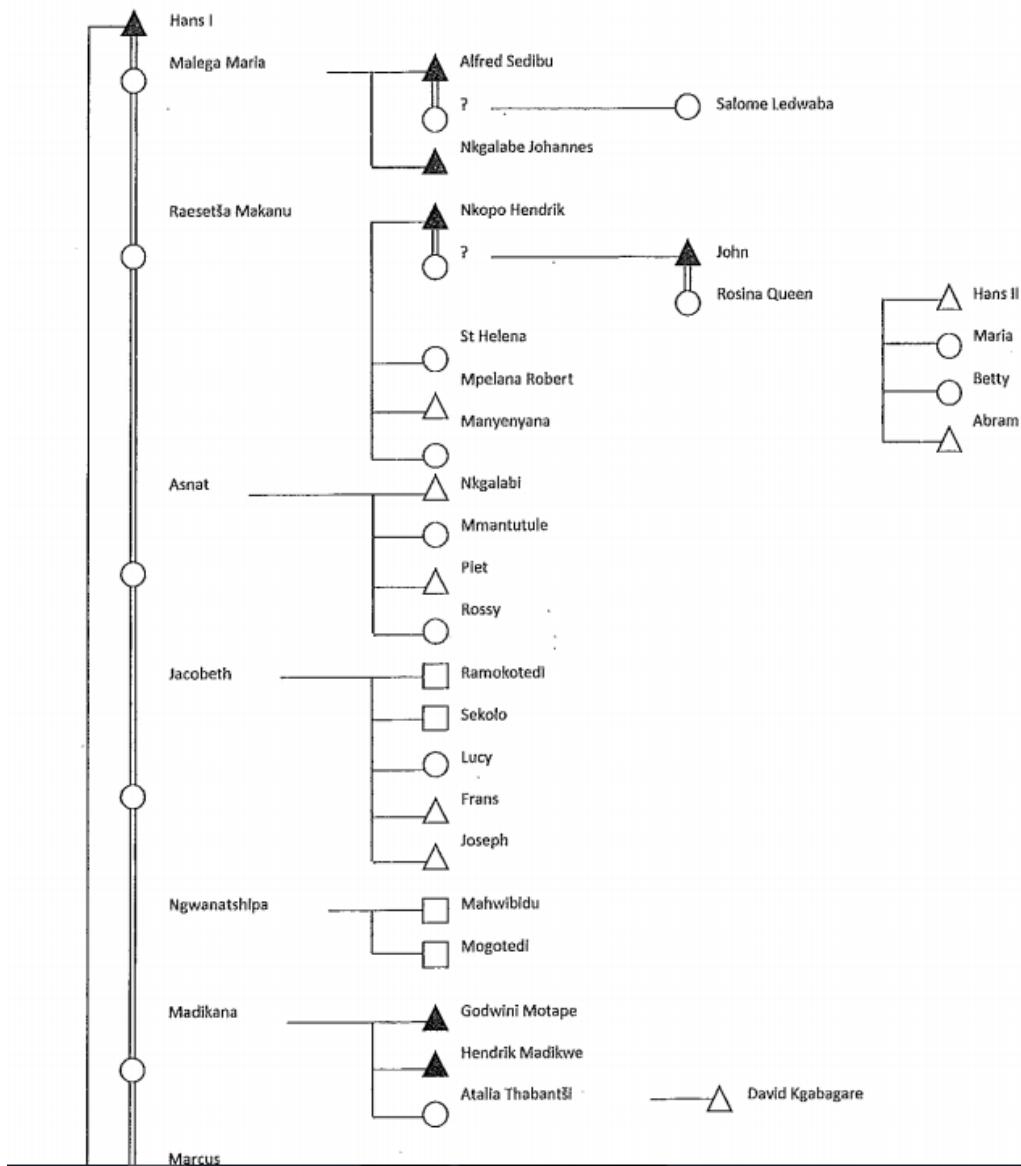


Figure 2: Genealogy of the Langa Royal Line showing that Hans II has a closer link to Hans I than David Kgabagare does.<sup>4</sup>

## History of Mining on Mapela Land

After prospecting and exploration efforts in the early 1900s, platinum was discovered in the Mokopane area in the 1920s. Legislative and administrative changes had begun allowing for the separation of rights to minerals and rights to the surface of the same piece of land. By 1926, Potgietersrus Platinum Limited (PPL), owned by Johannesburg Consolidated Investments (which later became Anglo), bought the mineral rights of farms in the area from Chief Masibi of the Mapela tribe, who received substantial personal benefit from the sale. The mineral rights allowed for extensive activities in pursuit of mining.

<sup>4</sup> Commission on Traditional Leadership Disputes and Claims, Limpopo Provincial Committee. 2013. Report on the Senior Traditional Leadership Dispute by Langa Madimetja Joseph Against Langa Kgabgare David of Mapela

"Having mineral rights gave companies 'full, free and sole right and interest in and to all precious and base metals and minerals, precious stones and mineral products, and substances of every kind including coal and oil, in upon and under' the properties. This was together with the right to prospect for and to mine, recover and exploit such metals, as well as 'all rights as may be necessary or incidental to the exercise of such rights'. This included water use rights, the right to store water in various ways, and to 'use of so much of the surface as is necessary'. They could 'erect and remove again without compensation any machinery, buildings, plant, poles, wires, pipes, rails and other erections.'"<sup>5</sup>

Platinum mining by PPL was haphazard between 1926 and 1990 due to erratic demand. In 1987, the mineral rights of the area (excluding the ones already held by PPL and other private holders) were transferred to the Lebowa Minerals Trust, administered by traditional leadership. In 1990, PPL decided to start mining intensively and, thus, sought to enlarge their mining area(s). By 1993, PPL had secured a lease agreement with Kgoshigadi Atalia Thabantsi Langa, empowered to contract on behalf of the community at the time, as part of the Lebowa Minerals Trust.<sup>6</sup> Traditional leaders no longer have such powers, as shown in part 2, [below](#). The terms of the lease allowed Anglo to mine on the lease area. Anglo records the lease agreement to be for portions of the Overysel, Zwartfontein and Vaalkop farms, in return for a lump-sum payment of R1 200 000 (worth around R5 470 000 in 2018 terms) and an annual rental (initially R5,000 per farm), escalating at 10% each year. The payment for 2018 should, thus, be R162 520.59. The rental payments have not been seen by the community and there are many allegations that the money has been used personally by Kgoshigadi Athalia Langa and her son, Kgoshi David Langa.

The mine, Potgietersrus, was later renamed 'Mogalakwena Platinum Mine' (Mogalakwena).

In order for Anglo to mine, it must also have a mineral right. Anglo held a mineral right in terms of the repealed Minerals Act 50 of 1991 (an old-order right). The MPRDA includes transitional arrangements for the conversion of old-order rights, as shown in Part 2, [below](#). Anglo undertook such a conversion process and obtained a mining right in 2010. Prior to key legislative amendments to the MPRDA and NEMA, it was common practice that an Environmental Authorisation in terms of NEMA was not required for mining activities. Rather, all that was deemed to be required was an EMP from the DMR.

Compared to Anglo's profit from Mogalekwsena (e.g. R7,97 billion in 2011, alone) the amounts paid by Anglo for the lease of Mapela land are minuscule. As will be seen below, Anglo's total expenditure for compensation and development amounts to about R350 million, which is significantly more than the lease amount and represents a substantial investment into the community. However, Anglo's social license to mine can still be questioned, when comparing the amounts earmarked for social investment with the company's earnings from the use of the community's land and when considering the negative effects of mining on the community.

## Residential Relocations and Loss of Agricultural Land

A study conducted by the Society, Work & Development Institute SWOP – a research Institute at Wits university – investigated the impact of mining on the livelihood, food security and environmental rights of the Mapela community. This confirms that:

<sup>5</sup> MNWANA, S., MTERO, F. & RAMANTSIMA, K. 2015. Reclaiming their rights: The Mogalakwena Mine and Community Resistance in the Langa-Mapela Traditional Authority Area, Limpopo, South Africa. University of the Witwatersrand: The Society Work and Development Institute (SWOP), pp 11-12

<sup>6</sup> Ibid

- loss of land and livelihood opportunities is a consequence of mining activity;
- there is an ongoing problem of intermittent water supply and the failure to deliver basic services in the surrounding villages which many people regard as being aggravated by mining activities;
- relocation of villages has resulted in the marginalisation of women and youth as a consequence of the way in which customary land rights were interpreted by the mine in determining compensation associated with relocation.<sup>7</sup>

While nobody has been forcibly evicted from their land, residents report that aggressive means of effecting relocation were undertaken by Anglo, coercing residents into relocating. In Ga-Tshaba, residents have recorded that farms were fenced off and annexed to Mogalakwena mine before compensation occurred.<sup>8</sup> In Mohlotlo (a collective name for the remaining residents of the Ga-Puka and Ga-Sekhaolelo villages) it was stated by the Mohlotlo Development Committee that “Anglo Platinum has been working purposefully and deliberately to turn Mohlotlo into a ghetto by cutting off the communities’ access to the resources that sustain them, including land for food production, water, grazing, roads and schooling. It has created conditions that are difficult, dangerous and unhealthy in an effort to force people to relocate.”<sup>9</sup> These actions could be seen as constructive eviction.

Anglo states that it supplied fodder and compensation to residents that lost land due to the expansion of Mogalakwena mine. However, the company has not denied that such unilateral mechanisms were used before people had access to alternative grazing land.

However, there is evidence of consultation processes, with varying levels of success. Originally, the consultation process was undertaken via a system of corporatisation: existing traditional leadership structures and decision-making customs were abandoned for other vehicles of consultation, such as the infamous ‘section 21 companies.’

## **Section 21 Companies**

First, in 1998 Anglo consulted with the Kgoshigadi at the time: Athalia Thabantsi Langa. She then instructed the headmen of each village to create ‘relocation steering committees’ which would represent villages in consultations and facilitate consultation with community members. The steering committees were then reconstructed into ‘section 21 companies’ by Anglo and its consultants, with the same consultative functions. One company was set up for every village that was identified by Anglo for relocation. Section 21 companies were associations or companies established under section 21 of the Companies’ Act 61 of 1973. They were non-profit in nature: no dividends from company assets could be paid to members of section 21 companies. Members vote on irregular, larger decisions and directors manage the day-to-day activities of the company. Normally, members exercise control over directors by deciding on key decisions and by hiring and firing directors via popular vote.

The companies were structured so that their only members were the directors which made them unaccountable to the residents they purported to represent. Each of these companies appointed around fifteen people as directors and ‘community representatives’. The directors are responsible for consultation with local villages on

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> CURTIS, M. 2008. Precious metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa. Johannesburg: ActionAid, p.21

behalf of the mining company. The members (also directors) of the section 21 companies (formerly steering committees) were reportedly paid stipends of R4000-R6000 by Anglo. ActionAid research<sup>10</sup> highlighted concerns about the extent to which these Section 21 companies were regarded as legitimate or representative. The report identified a range of other local structures which, it argued, had a greater following amongst local residents. However these were marginalised in the relocation negotiations as Anglo insisted on working through the Section 21 companies which it had established. The report argues that local residents affected by relocation had never seen the relocation agreements drawn up between the section 21 companies and Anglo Platinum.<sup>11</sup>

"Even though the Section 21 members were initially chosen by the communities during public meetings, the lack of a clear, formal governance framework upfront ultimately undermined their democratic legitimacy, as community members may not have fully understood the implications of their member selection decisions at the time of selection."<sup>12</sup>

There was also conflict between the companies and traditional authorities (ironically, as the existence of the section 21 companies and the identity of the members of the companies were initially affirmed by Kgoshigadi Athalia Langa). Kgoshi David Langa reported in 2015 that his mother, Kgoshigadi Athalia, withdrew from participating in the section 21 structures and headmen have reported that they were excluded by the section 21 companies.<sup>13</sup>

Section 21 companies have been deemed, in terms of the new Companies Act 71 of 2008, to have be non-profit companies in terms of section 10 of the new Act. In any case, Anglo has since abandoned the use of section 21 or non-profit companies. Officials of the company have reportedly said that Anglo "did not originally expect that the Section 21s 'would be around so long'" or be as central to the consultation process. Officials have also stated that the Anglo's payment of stipends to section 21 companies' directors was a 'key mistake,' inadvertently creating "self-interested incentives for individuals to want to represent the community," and undermining "community trust in their representatives."<sup>14</sup>

As of January 2009, resulting from widespread community outrage and settlement agreements following the 2006 court cases ([below](#)),<sup>15</sup> Anglo stopped paying stipend payments to the Section 21 company representatives. The companies were to be disbanded by the end of February 2009. The Section 21 representatives agreed to this after some initial resistance. However, a similar corporate model was to replace the section 21 system, "because, it was argued, this was the only arrangement that made sense from a legal transaction perspective."<sup>16</sup> Trusts were to be established in each village and trustees were to be

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<sup>10</sup> CURTIS, M. 2008. Precious metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa. Johannesburg: ActionAid, p.26

<sup>11</sup> CURTIS, M. 2008. Precious metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa. Johannesburg: ActionAid, p.26

<sup>12</sup> Farrell, L. A., Hamann, R., & Mackres, E. (2012). A clash of cultures (and lawyers): Anglo Platinum and mine-affected communities in Limpopo Province, South Africa. *Resources Policy*, 37(2), p.198

<sup>13</sup> CURTIS, M. 2008. Precious metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa. Johannesburg: ActionAid, p.25

<sup>14</sup> Farrell, L. A., Hamann, R., & Mackres, E. (2012). A clash of cultures (and lawyers): Anglo Platinum and mine-affected communities in Limpopo Province, South Africa. *Resources Policy*, 37(2), p.198

<sup>15</sup> Interview with Johan Lorenzen of Richard Spoor Attorneys Inc., 20 March 2018.

<sup>16</sup> Farrell, L. A., Hamann, R., & Mackres, E. (2012). A clash of cultures (and lawyers): Anglo Platinum and mine-affected communities in Limpopo Province, South Africa. *Resources Policy*, 37(2), p.201

elected and re-elected in a more representative manner. Anglo stated that stipends would no longer be paid directly to individuals.<sup>17</sup>

It is unclear whether all section 21 companies have been disbanded or whether some still remain. In Ga-Pila, the section 21 company members were directly involved in setting up and now control a new community trust tasked with handling community property and income. In Sekuruwe, a similar trust was set up to handle settlement funds, which has replaced the section 21 company in the village. However, this trust was set up in a more inclusive manner, exclusive of the discredited section 21 company and its members.

Stipends continue to be paid to members of a community Task Team, set up by Anglo, government and the SAHRC, as seen [below](#).

## **Social Assessments and Missing Resettlement Action Plan**

Anglo undertook an [Environmental Impact Assessment](#) in 2002 which included a socio-economic study. This study recorded that community members expected that compensation for relocation would be greater than the value of the physical assets they stood to lose and that relocation should improve their lives and livelihood capabilities. In spite of the study identifying key social considerations requiring attention, no formal resettlement action plan was created before relocation processes were begun. After relocation agreements had already been signed (see below), Anglo commissioned a draft resettlement action plan. However, the plan was not shared with community members and has not been used by the consultants tasked with relocation.<sup>18</sup>

### **Ga-Pila Relocation**

According to Anglo, an EIA and social impact assessment was conducted for the development of the Sandsloot open pit on the farm Sandsloot 236 KR in the mid-1990's. "The EIA revealed that the Ga-Pila community, which occupied 553 hectares of agricultural land, would be exposed to safety and significant environmental impacts including blasting vibrations, noise, dust and possible decrease in groundwater yields".<sup>19</sup> This prompted plans for the relocation of Ga-Pila.

Kgoshigadi Langa was approached by PPL to trigger discussions on relocating the Ga-Pila community to Sterkwater. These discussions were finalized in 2001 when the Ga-Pila community was relocated to Sterkwater from Sandsloot.<sup>20</sup>

Anglo reports that 706 households were relocated from Ga-Pila.<sup>21</sup> As stated above, Anglo established section 21 companies supposedly "as legitimate representatives of the communities in which it works".<sup>22</sup> Ga Pila residents who were relocated received R5000 in compensation, together with a replacement home in a new

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<sup>17</sup> Farrell, L. A., Hamann, R., & Mackres, E. (2012). A clash of cultures (and lawyers): Anglo Platinum and mine-affected communities in Limpopo Province, South Africa. *Resources Policy*, 37(2), p.201

<sup>18</sup> Farrel, L., Mackres, E. & Hamman., R. 2009. 'A clash of cultures (and lawyers): A case study of Anglo Platinum and its Mogalakwena mine in Limpopo, South Africa.' *Corporate Governance in Africa Case Study Series*. (Stellenbosch University Unit for Corporate Governance in Africa), p.6-7

<sup>19</sup> ANGLO PLATINUM 2008. Anglo Platinum's response to ActionAid allegations: Second edition, p.11

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> CURTIS, M. 2008. Precious metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa. Johannesburg: ActionAid, p.15

village named Sterkwater. The Ga Pila relocation also involved the loss of 1800 ha of agricultural land on the Sandsloot farm.

According to the ActionAid report, 28 families which refused relocation subsequently had their services cut off. The families have refused to move to Sterkwater as they do not want to leave the land of their ancestors; for which their ancestors struggled for. It was alleged that the mine was responsible for the cut off of their – a charge which the mining company denied, stating that this was the fault of the municipality.<sup>23</sup> Anglo Platinum also states that there are 14 families remaining on the land, rather than 28.<sup>24</sup>

### **Ga-Puka & Ga-Sekhaolelo (Mohlotlo)**

Despite being locally regarded as illegitimate the section 21 companies ‘representing’ Mohlotlo residents concluded agreements with Anglo regarding relocation. According to Anglo, these agreements were “ratified and adopted” at community meetings in 2005.<sup>25</sup>

However, many community members felt excluded by the above process of consultation. The Mohlotlo Development Committee (MDC) was created in opposition to the section 21 companies and to provide a platform for concerns regarding the consultation and relocation processes. The MDC held elections in 2007 that were monitored and approved by the Independent Electoral Committee (IEC) to ensure that it had the democratic legitimacy of its members.<sup>26</sup> However, the Mapela Tribal Authority did not recognise the MDC as representing the Ga-Puka and Ga-Sekhaolelo villages and Anglo continued to use section 21 companies as representative organisations, although they did have meetings with the MDC.

The MDC seems not to have been very effective in voicing concerns to Anglo. One of the reasons is that the meetings between Anglo and the MDC often took place far away from the villages (e.g. in Sandton). MDC members were transported and accommodated by Anglo and, it seems, felt a lack of agency to disagree with Anglo.<sup>27</sup> There was also another group that split from the MDC, called the Motlhotloho Relocation Resistance Committee.

According to Anglo, as well as forming the above agreements on a community level, it consulted individually with the head of each household in Mohlotlo. The head of each household signed an agreement regarding the terms of relocation such as the size and location of the house that the household would be relocated to.<sup>28</sup> Apparently, this consultation process had a number of stages, facilitated by the community operational team. First, audits of household assets were undertaken and signed off by the head of the household and the headman. Secondly, Anglo presented a proposal for relocation to head of households, whose comments were recorded. Thirdly, the comments were incorporated into a revised proposal. Fourthly, the proposal was agreed to and signed off by each head of household.

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<sup>23</sup> Ibid., p17; AngloPlatinum (Anglo). 2008. AngloPlatinum’s Response to ActionAid Allegations. Second Edition, pp.12-13

<sup>24</sup> SAHRC. 2008. ‘Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo.’ p.18

<sup>25</sup> AngloPlatinum (Anglo). 2008. AngloPlatinum’s Response to ActionAid Allegations. Second Edition

<sup>26</sup> SAHRC. 2008. ‘Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo.’ p.21

<sup>27</sup> Mnwana, S., Mtero, F., & Hay, M. 2016. SWOP Working Paper Seven: Dispossessing the dispossessed? Mining and Rural Struggles in Mokopane, Limpopo. p.24-26

<sup>28</sup> Ibid., p26

According to Anglo, the relocation initially started on 29 May 2007 as the new houses were completed. Anglo relocated Ga-Sekhaolelo residents from Overysel farm to Armoede farm and relocated Ga-Puka residents from Zwartfontein farm to Rooibokfontein farm.<sup>29</sup> However, a group of protestors, led by the MDC, blocked public roads with stones. Relocation was suspended. The protest met with a violent response from the police, with widespread reports of rubber-bullets being used by police and police beating protesters.<sup>30</sup> The Premier of Limpopo Province intervened and created a 'task team' which included members of the MDC, section 21 companies, Anglo and contractors' representatives and 'various government and non-government bodies under the leadership of the Premier's Office.' There are no discernible achievements of the task team.

By 2008, 827 households had been relocated,<sup>31</sup> to new villages with infrastructure, and services such as water supply, electricity, schools and churches. Apparently, a total of 956 households had signed agreements to relocate to the new locations apparently representing 98% of people in Mohlotlo.<sup>32</sup> It is unclear whether Ga-Puka residents were relocated after 2008. Relocations of Ga-Sekhaolelo households continued until 2014. A total of 456 households had been relocated from Ga-Sekhaolelo alone, between 2008 and 2014.<sup>33</sup>

In August 2012, as a result of negotiations between Anglo and the Mohlotlo residents' legal representatives, a settlement agreement was signed by Anglo and Mohlotlo residents to relocate the remaining residents to better-quality farms in the area and to compensate residents for hardship caused. This relocation was then blocked by Afriforum by objecting on technical grounds to the parties' attempt to re-zone the farms as townships to allow for housing development. Thereafter, the municipality made errors of procedure in the rezoning process which further stalled the rezoning application process. It has subsequently become a political keypoint, with the ANC government, the opposition in the municipality, teaming up with the EFF in order to oppose municipal actions regarding the rezoning. The community's legal representatives, Richard Spoor Attorneys, are still trying to push through the rezoning approval necessary for the township to be established and for the Mohlotlo community to find peace.

In May 2014, Mohlotlo residents that were resisting their relocation blocked access roads and damaged mining equipment in order to disrupt mining operations. Mine security dispersed the protesters by firing rubber bullets and pepper balls into the crowd. Protesters retaliated at a later stage by throwing stones. SAPS arrested a number of people and six people incurred minor injuries.<sup>34</sup> Again, in September 2015, general protests erupted in Mapela relating to mining problems, including failures in relocation processes, as elaborated on [below](#). More on these protests [below](#).

On 15 September 2017, Mail and Guardian reported that one man still remains in his homestead that used to be part of Ga-Sekhaolelo, Mr Madimetja Albert Ramatsobane. He refuses to move to Armoede or to new place where Mohlotlo residents have been relocated because of his deep connection the land and his ancestors. The article also states that, while the rest of Ga-Puka village has been moved, a few households remain.

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<sup>29</sup> Ibid., 16

<sup>30</sup> CURTIS, M. 2008. Precious metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa. Johannesburg: ActionAid., p.30

<sup>31</sup> ANGLO PLATINUM 2008. Anglo Platinum's response to ActionAid allegations: Second edition, p.21

<sup>32</sup> ANGLO PLATINUM 2008. Anglo Platinum's response to ActionAid allegations: Second edition, p.11

<sup>33</sup> Mnwana, S., Mtero, F., & Hay, M. 2016. SWOP Working Paper Seven: Dispossessing the dispossessed? Mining and Rural Struggles in Mokopane, Limpopo., p.26

<sup>34</sup> ACTIONAID. 2016. The SAHRC: Facilitating inequality: Part 5 [Online]. ActionAid. Available: <http://www.actionaid.org/south-africa/2016/02/sahrc-facilitating-inequality-part-5> [Accessed 22 March 2016]

"Lawyers [Richard Spoor Attorneys Inc.] representing Mohlotlo's residents have reached a deal with Anglo to purchase land for the last remaining residents about 80km away to the south in Mookgophong. There, unlike the majority of people who moved to Rooibokpan, they will be able to farm and live off the land... The lawyers have also convinced Anglo to provide the families with a regular supply of water, monthly food vouchers of R1 000 and daily free transport to the stores, school, work and clinics."<sup>35</sup>

The mine paid once-off compensation to the head of households for losses relating to relocation. R1000 – R5000 was paid to each household for loss of ploughing fields and R20 000 was 'paid for relocation expenses' – general compensation. This latter amount is four times the amount paid to residents relocated from Ga-Pila. The amount was paid in two instalments: R12 000 when the household was moved and R8000 when the all households had been relocated. As stated by the SAHRC, this is an "inflammatory process with the potential to create conflict between those relocating and those resisting the relocation."<sup>36</sup> Further amounts were paid to households, which differed according to assets. It seems that community members were paid R225 per hectare, R200 per productive tree and R8000 for a borehole.

Anglo feels that funds directed to the community in general is part of the compensation to individuals and 'is substantial'.<sup>37</sup> This is reported to be "R10 million committed by Anglo Platinum to the Mapela Community Development Trust," which is controlled by the traditional authorities of the Mapela tribe (which includes the Mohlotlo communities)." Further, "R50 million [was] committed by Anglo Platinum to the Ga-Puka and Ga-Sekhaolelo communities from a community benefit fund... A SMME [Small, Medium and Micro Enterprise] Business Development Fund has been established with an initial capital of R3 million earmarked for the Mapela community." However, it is unclear what the situation is with the R50 million community benefit fund. In a 2018 interview, a lawyer closely involved in the community was not aware of any such fund available to the Mohlotlo community.<sup>38</sup> It is unlikely that this trust was set up.

## Ga-Molekana

In 1970, several hundred members of the Ga-Molekana community who lived on the farms Valkop and Sandsoot were relocated from their land so that the PPL mine could be established. The families were not compensated for the loss of their homes or their land. After the community lodged land restitution claims in terms of the Restitution of Land Rights Act 22 of 1994, the Anglo has not disputed the land claims and have agreed to pay compensation for the removal.

The Ga-Molekana village has also lost a considerable amount of agricultural land since , which has been acknowledged and will be compensated for by Anglo in a trust established for the purposes of community development and carrying out 'public benefit activities.' The trust will be worth around R25 million. The trust has yet to be established due to political complications internal to the village.

## Skimming

<sup>35</sup> Ledwaba, L. 2017. 'The last people stand alone in the face of platinum's bulldozers.' Mail & Guardian [Online] Available: <https://mg.co.za/article/2017-09-15-00-the-last-people-stand-alone-in-the-face-of-platinums-bulldozers> [Accessed 20 April 2018]

<sup>36</sup> SAHRC. 2008. 'Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo.', p.52

<sup>37</sup> CURTIS, M. 2008. Precious metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa. Johannesburg: ActionAid., p.25

<sup>38</sup> Interview with Johan Lorenzen of Richard Spoor Attorneys Inc., 20 March 2018.

The residential part of the village of Skimming is mostly not on the land that is part of the Mogalakwena mining license and, thus, relocation of Skimming households has not been deemed necessary. However, the mine has closed off land that has historically been used by Skimming residents for firewood and for grazing. Further, the village is expanding and, in 2012, residents who were attempting to establish new plots on land they believed to be Skimming land were forcibly evicted by police and mine security, as reported by ActionAid.<sup>39</sup> All of the residents interviewed by ActionAid from Skimming village report some sort of harassment by mine authorities or police on behalf of the mine.<sup>40</sup>

## Sekuruwe

Sekuruwe village has not been earmarked for relocation but mine activities have led to the loss of agricultural land. In 2009, Richard Spoor Attorneys Inc initiated litigation on behalf of the Sekuruwe community to review the granting of a lease by the Minister of Rural Development and Land Reform over Sekuruwe land to Anglo for the purpose of building a tailings dam. According to the founding affidavit, at least 500 ha of land used by the Sekuruwe village for ploughing and grazing livestock (an approximate ratio of 1:1). The case was subsequently settled by agreement between the parties. The settlement agreement is confidential, however.

## General Grievances

There have been no widespread reported complaints about the quality of the new houses of the relocated residents, although the SAHRC documented soil erosion around house foundations and cracks in house walls in Sterkwater (where the Ga-Pila residents were relocated).<sup>41</sup>

For the relocation of Mohlotlo, Anglo Platinum confirmed that it would prepare 700ha of land for planting by the end of 2008.<sup>42</sup> However, there have been complaints regarding the quality and amount of agricultural land made available. Where alternative agricultural land has been provided as compensation for lost agricultural fields, much of that land is located far from relocated residents' residences. The agricultural land that is close to the new residences is poor quality: the soil is relatively infertile and the land has not been prepared for ploughing – it is still bushveld. Other parts of the land meant for ploughing has had its top-soil removed when roads for the new neighbourhoods were built. Individual fields have not been allocated to households, whereas households held rights to individual fields before the relocation. Lastly, the amount of land available for agriculture for the villages is smaller than before the relocation. Access to ploughing fields in Ga-Tshaba has dropped by more than 50% and in Ga-Sekhaolelo there has been a complete loss of access to ploughing fields.<sup>43</sup>

A major grievance is the exclusion of young adults from the relocation process. The process did not plan ahead for young people wanting to start their households, who would normally consult with the headman of a village to be allocated a stand of their own,. In 2001, it was decided "in a meeting in a meeting attended by

<sup>39</sup> ACTIONAID. 2016. Precious Metals II. *The SAHRC: Facilitating inequality: Part 5* [Online]. ActionAid. p.29 Available: <http://www.actionaid.org/south-africa/2016/02/sahrc-facilitating-inequality-part-5> [Accessed 22 March 2016]

<sup>40</sup> Ibid., p.30

<sup>41</sup> SAHRC. 2008. 'Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo.' p.42

<sup>42</sup> SAHRC. 2008. 'Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo.', p.48

<sup>43</sup> CURTIS, M. 2008. Precious metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa. Johannesburg: ActionAid., p.17

Chieftainess Langa and her traditional council, Anglo representatives, local municipality councillors, and the mantona [headmen] from three villages: Ga-Sekhaolelo, Ga-Molekana and Ga-Puka" that new stands were to be issued to youth at Armoede after relocation and Anglo promised to provide infrastructure for these new stands. However, no such preparations were made by Anglo and many youth have not received new stands in their relocated areas.<sup>44</sup>

On 5 September 2016, Ga-Tshaba residents blockaded roads leading into Mogalakwena mine, claiming that mining management had negotiated relocations and compensation in bad faith, had manipulated community structures to serve their own needs, had sowed division in the community and had not kept their promises to employ locals and develop the Mapela area. Three activists were arrested and the community refused to negotiate with the mine until the activists were released. The activists were then released and negotiations began, the outcome of which is unclear.<sup>45</sup>

Anglo has responded by pointing out that the majority of community members have consented to the relocations.<sup>46</sup> However, there are concerns that consultation with each community member did proceed on the basis of informed consent and that many people felt forced to sign due to the inevitability of relocation and the progressive encroachment on the community's land by the mine.<sup>47</sup>

The current interpretation by the DMR and mining companies that there is no legal requirement for community consent before mining (and associated relocations) may take place puts communities in precarious positions, as seen below. Communities' legal position is worsened by the fact that mining companies can move into the land before negotiating compensation with communities, as occurred in this case. Thus, it is unsurprising that community members 'consented' to mining as they had no real alternative, despite their wish to remain on their land.

Anglo argues that the new houses are of better quality than the old, that they have improved schools and clinics and implemented a number of development initiatives. In the process Anglo believes that it has enhanced the well-being of affected communities.<sup>48</sup>

A further problem regarding compensation is that it is once-off in nature. This is not necessary but it seems to be what is preferred by mining companies. It is certainly easier to administrate a once-off payment than an incremental payment. Being once-off in nature, there is danger of mining-affected communities accepting what initially seems like a large amount of money but, if it is meant to sustain the community over many years, the amount of compensation might seem like less. Most compensation payments by Anglo to residents and groupings within Mapela have been once-off. This is in line with the finding by the SAHRC that: access to assets such as land, social networks and natural resources must be considered during the calculation of fair compensation and that "once-off payments and new housing structures will likewise not provide sustainable opportunities to families."<sup>49</sup>

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<sup>44</sup> Ibid., p28

<sup>45</sup> Business Report. 2016. 'Anglo Mine Shut Down.' [Online] Available: <https://www.iol.co.za/business-report/companies/Anglo-mine-shut-down-2064572> [Accessed 20 April 2018]

<sup>46</sup> ANGLO PLATINUM 2008. 'The Facts: Anglo Platinum's response to ActionAid allegations.' Second edition., p.4

<sup>47</sup> CURTIS, M. 2008. Precious metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa. Johannesburg: ActionAid., p.29

<sup>48</sup> ANGLO PLATINUM 2008. 'The Facts: Anglo Platinum's response to ActionAid allegations.' Second edition., p.4

<sup>49</sup> SAHRC. 2017. National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa, p.19

The following graphic shows the loss of ploughing fields in four Mapela villages as a result of mining.

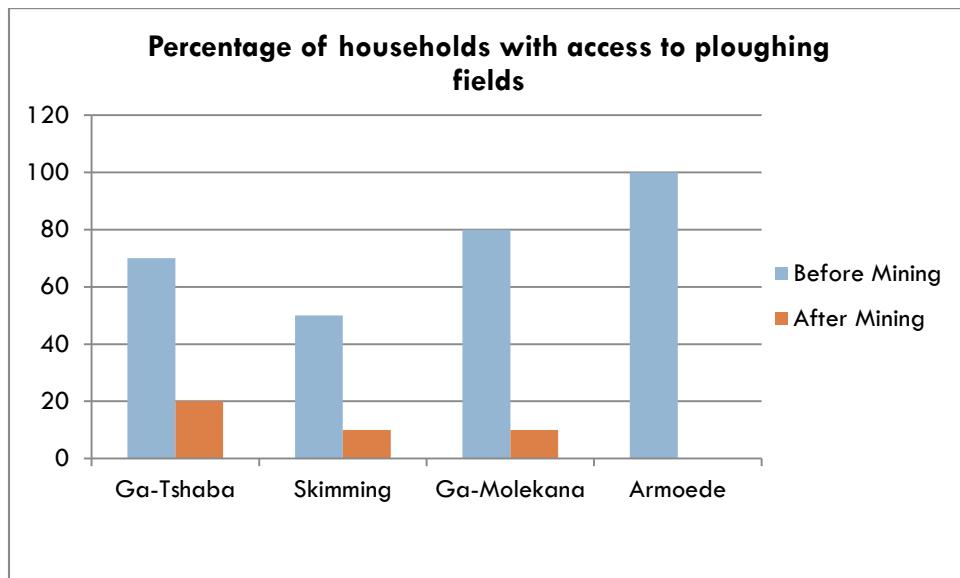


Figure 3: The percentage changes in access to ploughing fields in Mapela before and after mining.<sup>50</sup>

## Grave Relocations

Between 2000 and 2012, Anglo relocated more than 2200 graves from within its mine lease area belonging to Mapela residents.<sup>51</sup> Anglo was required to obtain environmental authorisation to relocate all the graves and special permission to relocate graves older than 60 years old from the South African Human Rights Agency (SAHRA), as is outlined in part 2, [below](#). Anglo carried out heritage impact assessments in 2002 and 2006, which formed part of their environmental authorisation application and SAHRA approval application. Saccaggi and Esterhuysen found that an EMP was granted but there is no proof of special permission being granted by the SAHRA, due to the Limpopo office of the SAHRA being disorganised.<sup>52</sup> It is assumed that SAHRA permission was granted as subsequent investigations by the agency did not mention lack of permission as part of its finding that the grave relocations may have been illegally carried out.

There are many grievances regarding the compensation, extent and location of the relocated graves. First, Anglo's compensation of R1500 per grave, is considered too little compared to the strife that the grave relocations has caused families. This is in light of the strong cultural rituals and religious beliefs regarding the deceased in the Mapela community. Ancestors are revered and are sought for guidance and favour, in prayer. Angering one's deceased (e.g. by failing to lay them to rest appropriately) is believed to bring bad luck. Secondly, not all graves were successfully moved. Some are still in Mohlotlo and some have been lost

<sup>50</sup> Mnwana, S., Mtero, F. & Ramantsima, K. 2015. Reclaiming their rights: The Mogalakwena Mine and Community Resistance in the Langa-Mapela Traditional Authority Area, Limpopo, South Africa. University of the Witwatersrand: The Society Work and Development Institute., p.17

<sup>51</sup> Mnwana, S., Mtero, F., & Hay, M. 2016. SWOP Working Paper Seven: Dispossessing the dispossessed? Mining and Rural Struggles in Mokopane, Limpopo., p30

<sup>52</sup> Benjamin Saccaggi & Amanda B. Esterhuysen. 2014. 'Sekuruwe Grave Relocation: A Lesson In Process And Practice,' South African Archaeological Bulletin 69 (200): pp173-175

beneath mine dumps because the company hired to manage the exhumations failed to move the remains of some community members' ancestors. Thirdly, many relocated graves are far away from residents' homes. People are unable to visit graves and perform rituals as often as they would like. 70% of households from Ga-Sekhaolelo (now Armoede) have lost access to their ancestors' graves. There are many complaints that Anglo did not consult with residents regarding the location of alternative burial sites.<sup>53</sup>

These allegations are repeated by Ga-Tshaba and Sekuruwe residents, who report that they were threatened by section 21 company members if they did not consent to grave relocation.<sup>54</sup> Sekuruwe residents also report that the grave relocation process was not undertaken respectfully, with a mishandling of bones and misidentification of new gravesites. This caused deep trauma to the community.<sup>55</sup> SAHRC reported, in 2008, that 1508 graves had been relocated from Mohlotlo but that 40-50 graves had not been relocated from Ga-Puka because next-of-kin were refusing to consent to the removal. The lack of consultation would be a contravention of the law, as shown [below](#). The legal complications regarding consent for graves older than 60 years can be seen [below](#). At Sekuruwe, it has been reported that "legal paperwork was all in English, and many claimed not to understand what they were signing. Community members also felt that they were tacitly coerced into signing, because they were not given any options. They were simply told that if the graves were not moved they would be buried under the tailings dam."<sup>56</sup>

The South African Heritage Resources Agency (SAHRA) produced a report examining the allegations of illegal grave exhumation in Sekuruwe. The report states that a number of graves may have been illegally exhumed as:

- Inappropriate heavy machinery was used to exhume at least some of the graves.
- Exhumation was not ceased after older, unidentified graves were discovered. Efforts should have been made to identify each discovered grave and the families related to those graves should have been notified and consulted.
- Traditional headstones and grave contents were not removed for burial.<sup>57</sup>

It has also been reported that some members of the community colluded with the exhumation company to inflate the number of their deceased relatives.<sup>58</sup> Bone fragments and parts of skeletons were found lying on the surface of and around ancestral graves after exhumation and relocation had occurred. More were found remaining in the graves when a subsequent study was undertaken. Further, "graveside rituals were not permitted, coffins were hurriedly lowered into open graves and covered with soil, and headstones were incorrectly, and in some instances, senselessly placed."<sup>59</sup> Thus, the relocation of Mapela graves, particularly those of Sekuruwe, was fraught with problems, a lack of adequate consultation and widespread negligence.

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<sup>53</sup> Mnwana, S., Mtero, F., & Hay, M. 2016. SWOP Working Paper Seven: Dispossessing the dispossessed? Mining and Rural Struggles in Mokopane, Limpopo., p.32

<sup>54</sup> SAHRC. 2008. 'Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo.' p.44

<sup>55</sup> Ibid.

<sup>56</sup> Benjamin Saccaggi & Amanda B. Esterhuysen. 2014. 'Sekuruwe Grave Relocation: A Lesson In Process And Practice,' South African Archaeological Bulletin 69 (200): 180

<sup>57</sup> SAHRC. 2008. 'Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo.', p.46

<sup>58</sup> Benjamin Saccaggi & Amanda B. Esterhuysen. 2014. 'Sekuruwe Grave Relocation: A Lesson In Process And Practice,' South African Archaeological Bulletin 69 (200): 175

<sup>59</sup> Ibid.

The lack of care involved in the relocations created intense emotional hardships, in light of the important role that ancestors and their peace and appeasement play in the lives of Mapela residents, like many traditional communities in South Africa. There is a strong belief that the “state of health and economic success of the living is tied to and depends on the recognition and commemoration of the ancestor and fulfilment of associated duties and responsibilities needed to achieve this.”<sup>60</sup>

“The spiritual consequences of the exhumations engendered feelings of uncertainty, guilt, and fear amongst the next-of-kin and symptoms of illness were attributed to ancestral forces. This was a malicious cycle of stress that was difficult to break. Further, the impact on the social fabric was marked. The community had been riven by the fraudulent activities of some of its members, and families had been divided, particularly in cases where one member of the family had agreed to the relocation of the grave(s), while others had not.”<sup>61</sup>

The Sekuruwe Community Council sent the following letter to Anglo on 28 June 2010:

“The community of Sekuruwe have written many letters to the mine requesting the mine to stop all activities in the land but the mine ignored all the requests. The inhumane and careless [sic] of Anglo has caused problems at Sekuruwe. What hapene [sic] is something against our culture. Our ancestral spirit is roaming all over looking their grand-children and the place to rest. As a result of this shamefull [sic] and disrespect of the mine, on graves, people are sick and others dead already. This is a very serious and sad moment of Sekuruwe community. You stop now and all missing bones to be found where ever they are. If not there will be no peace and more people young and old still going to die [sic].”<sup>62</sup>

The community reached out to the South African Human Rights Agency (SAHRA) and asked them to investigate the matter in January 2009. After their investigation, the SAHRA requested Anglo to follow a rectification process for 24 graves that were proved to be older than 60 years. Anglo agreed and, after a long process of reviewing the original exhumation and relocation processes, rectification processes took place for those 24 graves. Subsequently, Anglo accepted that the undertaker company had been negligent in the treatment of all of the graves and that remedial action would be necessary. A different company was hired to re-exhum the remaining graves. Many of the problems could not be fixed: e.g. some bones, grave goods and headstones were irrecoverably lost in the first round of exhumation. The community had to accept that nothing more could be done. As a result, individual families carried out reburial and cleansing ceremonies on 26 October 2012 in order to ‘conclude this suffering.’<sup>63</sup>

In spite of the EMPR and (assumed) approval from the SAHRA for graves older than 60 years, terrible hardship was inflicted on the Mapela community from the grave relocation procedures. The lack of care exhibited by the undertaker occurred in spite of the prior approvals by the regulatory authorities. It is clear that greater oversight of grave relocation process is needed.

## Environmental Hazards

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<sup>60</sup> Ibid., 176

<sup>61</sup> Ibid.

<sup>62</sup> Ibid., 177

<sup>63</sup> Ibid., 176

As shown in part 2 [below](#), environmental authorisations must include a requirement that mining companies are required to provide their Environmental Authorisations, Environmental Management Programmes (EMPr), closure plans and other important environmental information publically on their website. However, this only applies to environmental authorisations after 2017. Thus, such information must be requested from Anglo or from the DMR if it was submitted to them as part of their mining right application. For more information on this process, see Part 2, [below](#).

## Blasting and Dust

Blasting and dust emissions substantially affect property (e.g. causing houses to crack), health (e.g. respiratory problems from dust) and wellbeing (e.g. sleep deprivation from loud blasting). Property, health and wellbeing are explicitly protected by our Constitution.<sup>64</sup> Significant blasting was experienced by Ga-Pila and Ga-Puka villages before they were relocated, as shown [above](#). Ga-Puka residents that still resist relocation and remain in the village still experience these dangerous and invasive effects of mining. Blasting and dust from mining has affected many other villages, particularly in Ga-Tshaba. There, residents have complained of being affected by dust from Mogalakwena, particularly after mining. All residents that were interviewed in a 2016 ActionAid report from Ga-Tshaba, Ga-Molekana and Skimming state that their houses have incurred structural damage as a result of blasting<sup>65</sup> and that they experience airborne dust pollution from blasting.<sup>66</sup>

The Ga-Puka village, prior to relocation, was badly affected by blasting due to the mine's proximity to the village and operations continuing despite the village having not yet been relocated. The blasting was so dangerous that the mine paid members R300 to vacate their houses each time that blasting occurred, to avoid injury.<sup>67</sup> Anglo Platinum acknowledged the noise and dust impacts of mining but states that "it does its utmost to minimise any harmful effects and operates strictly within the law."<sup>68</sup> Clearly, refraining from mining for a year in the area immediately adjacent to a highly populated area until relocation had occurred was not an option they had considered in order to 'minimise any harmful effects' of mining. The SAHRC reported that, during a visit to Ga-Puka by SAHRC representatives in 2008, extensive blasting occurred but residents were not moved. The representatives reported that blasting was a "terrible experience,"<sup>69</sup> obviously affecting the wellbeing of the residents.

## Water contamination

In 2007, a water expert commissioned by ActionAid took samples from 10 water-use points in Mapela. The water from five of these points was deemed unfit for human consumption. In Ga-Molekana village, water-use points at a primary school, secondary school and community drinking tap was deemed unfit for human use. The water contained high levels of nitrate, dissolved salts and sulphate. When consumed over long periods of

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<sup>64</sup> Sections 25 and 24 of the Constitution, respectively.

<sup>65</sup> ACTIONAID. 2016. Precious Metals II. *The SAHRC: Facilitating inequality: Part 5* [Online]. ActionAid. p.17 Available: <http://www.actionaid.org/south-africa/2016/02/sahrc-facilitating-inequality-part-5> [Accessed 22 March 2016]

<sup>66</sup> Ibid., p.28

<sup>67</sup> Ibid., 26

<sup>68</sup> ANGLO PLATINUM 2008. Anglo Platinum's response to ActionAid allegations: Second edition., p.2

<sup>69</sup> SAHRC. 2008. 'Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo.' p.39

time, such water can cause cancer. Apparently, types of chemicals in the water made it clear that the contamination can be attributed to the mine.<sup>70</sup>

However, Anglo denied such allegations, stating that the high nitrate levels in the vicinity of the high school were attributed to pit latrines located too close to the respective water-use point<sup>71</sup> and, conducting their own tests in 2008, Anglo found that that the nitrate levels in the other problematic water points identified by ActionAid were at an acceptable, non-dangerous standard. No mention is made of the presence of dissolved salts and sulphate in the water. Anglo did not sample all water sources used by the surrounding villages as it felt that water testing and securing water quality is the responsibility of the Department of Water Affairs.<sup>72</sup>

However, this view disregards the environmental duties of care in NEMA and the NWA, as discussed in part 2, [below](#). These duties dictate that the mine has a legal responsibility to ensure that its operations do not affect the water quality of the surrounding areas.

Residents from Ga-Tshaba and Ga-Molekana – the villages that are currently closest to mining operations – also report that natural springs have dried up since mining operations began. These allegations have not been tested but water scarcity was confirmed as a problem by officials of the Mogalakwena Municipality. Research undertaken by Phuhlisani in 2016<sup>73</sup> shows a general breakdown supply of water by municipal water use. Many villages reported that communal standpipe water often runs dry and that residents have to buy water from those who have boreholes. At the time, it was recorded that a 200 litre drum can cost up to R40 to buy. Some villages reported that water had not run from municipal supply for three years. Residents often have to travel long distances to get access to such privately pumped water. Tensions over the general scarcity of water have been exacerbated by the sentiment that Anglo has contaminated and used up existing water at the Mogalakwena mine.

In 2010, The Legal Resources Centre and Richard Spoor Attorneys Inc filed an interdict against Anglo to get it to stop building a tailings dam (mining waste deposit) on land adjacent to a wetland that feeds the water storage dam of the Sekuruwe village. By the time that Anglo's answering affidavit was filed, Anglo had pumped 1.6 million tons of slime waste into the tailings dam. Anglo had done so without obtaining written permission from the Minister of Mineral and Energy Affairs in terms of the Minister of Mineral and Energy Affairs, as required by Regulation 69(5) of the MPRDA when a construction of a dam is envisaged to be placed on the banks of a wetland. Further, it had not obtained environmental authorisation for the construction of the dam and ancillary activities, as required by NEMA due to their being listed activities in terms of NEMA regulations (shown in part 2, [below](#)). At the time, Anglo denied that it needed to obtain any such authorisations. However, the matter was not heard or finalised in court but, rather, was settled by way of agreement between the parties. This settlement agreement is confidential and, thus, more information is available for inclusion, here.

## **Influx of Job-Seekers from Labour Sending Areas**

<sup>70</sup> CURTIS, M. 2008. Precious metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa. Johannesburg: ActionAid.

<sup>71</sup> ANGLO PLATINUM 2008. 'The Facts: Anglo Platinum's response to ActionAid allegations.' Second edition., p.2

<sup>72</sup> ANGLO PLATINUM 2008. 'The Facts: Anglo Platinum's response to ActionAid allegations.' Second edition., p.13

<sup>73</sup> Village-level research undertaken by local researchers in 2016, trained and equipped by Phuhlisani. [Online]

Available: <https://trello->

<attachments.s3.amazonaws.com/574ebb4d1bd0ec48f6d27eda/574ebb4d1bd0ec48f6d27f4d/a31ff37d8809f6836f52972c2f9aa568/MapelaLB1Villageprofiles.pdf> (Accessed 14 May 2018)

A common side-effect of mining is that it attracts job-seekers from all over Southern Africa. Mining labour is becoming increasingly more skilled in nature and teams (e.g. construction or drilling teams) often move around to where there is demand for their services. New work seekers also arrive in hope of gaining new employment at the mine. The influx of seekers has the effects of increasing the population, demand for housing, food and services and potentially breaking down the social fabric of the local community.<sup>74</sup> Because of the rise in demand for housing, food and services, the cost of living in the area is likely to increase, disadvantaging local residents, especially those without the ability to benefit from the demand increases. The influx of job-seekers can also impact on levels of security or perceived security. Local residents often experience an increase of crime or fear of crime when a rapid influx of job-seekers to the area occur. There may also be increased levels of xenophobia.<sup>75</sup>

There have been no widely circulated concerns regarding the potential problems mentioned above, at Mapela.

## Social and Labour Plan

Anglo's social and labour plans (SLPs) are available on their website<sup>76</sup> in line with section 14(1)(e) of the Promotion of Access to Information Act and the DMR's PAIA Manual.<sup>77</sup> These SLPs have been updated in 2010, 2015 and 2017. The latest social and labour plan provides for a number of development initiatives, as follows:

<b>Project</b>	<b>Cost</b>	<b>Jobs Created or Reach of Project</b>
Installation of solar street lights.	R23 million	20 Jobs for a 5-year period.
Ga-Pila sanitation instalment project.	R5,5 million	10 jobs for 2-year period and trained to run and manage plant after the handover.
Water Provision to 22 Villages over 10-year period until Mogalakwena Water Master Plan commences (2028). 1 750 000 L/d to 35 000 people.	R31 079 601	40 Jobs. 40% community ownership.
Construction of water and sanitation facilities in five schools.	R7 912 000	20 Jobs (temporary)
Upgrades to five schools in Mapela	R15 million	15 Jobs over 5 years
Construction of new Seritarita School in Skimming Village as community has rejected other constructed school, which is now a technical high school, instead.	R5 million transferred immediately to the Department of Education	15 Jobs (construction; temporary)
Sports complex.	R8 650 000	93 jobs over 3 years (construction;

<sup>74</sup> Atkinson, D., Schenk, R., Matebesi, Z., Badenhorst, K., Umejesi, I. and Pretorius, L. 2016. Impacts on Social Fabric. In Scholes, R., Lochner, P., Schreiner, G., Snyman-Van der Walt, L. and de Jager, M. (eds.). 2016. Shale Gas Development in the Central Karoo: A Scientific Assessment of the Opportunities and Risks. Pretoria: CSIR, p. 11-18

<sup>75</sup> Ibid., 11-7

<sup>76</sup> Anglo American Platinum's SLP Repository. [Online] Available: <http://www.angloamericanplatinum.com/sustainability/communities/our-communities.aspx> [Accessed 25 April 2018]

<sup>77</sup> Department of Mineral Resources. 2009. PAIA Manual., section 5.1

		temporary)
Support to learner development by supplying materials and funding maths, science and accounting camps.	R25 million over 5 years	Scholarships for 10 learners in boarding schools 5500 attendees of camps
Early childhood development, leadership and character building programme.	R14,8 million	Reaching 6800 people over 4 years.

This is a total of R136 million, with 213 community jobs created, although almost all of the jobs will be temporary. The construction of the new Seritarita school should not be considered part of the SLP but, rather, as part of compensation. The old school site was no longer viable as a place of learning due to Anglo's blasting in close proximity to the school. There is no evidence of wide-ranging processes of consultation to identify priorities for the SLP and none is mentioned in the plan. Anglo is not expressly required, in terms of the MPRDA or its regulations, to consult with the community on its SLP, although the DMR's Revised Social and Labour Guidelines of October 2010 mention that the mining company should consult with communities and relevant authorities to provide a plan for mine community economic development.<sup>78</sup> However, the enforceability of this provision is questionable – the Guidelines do not hold legal weight on their own.

Likewise there is no information publicly available on progress against the plans, no monitoring and evaluation framework to assess the programmes and projects in the SLP and no information on wages paid, skills transferred etc.

### ***Lack of local employment***

Despite Anglo's undertakings to increase employment in the area via preferential hiring practices, there have been numerous protests and complaints around the lack of fulfilment of promises, in this regard. According to officials at Mogalakwena Local Municipality, via research undertaken by SWOP, Anglo's recruitment strategy has not enhanced employment opportunities for local youth at Mogalakwena mine. The officials state that Anglo has mostly sought workers outside of Mapela because it believes that there are "no qualified people" in Mapela. The Kgoshi at the time of SWOP's research, Kgoshi David Langa, concurred with this viewpoint, stating that the mine has declined to employ unskilled Mapela youth and adding that the main problem is that the mechanised nature of platinum mining means that total employment numbers are not high enough to meet the expectations of the community.<sup>79</sup>

From the village profiling exercise undertaken by [Phuhlisani](#), it can be seen that employment in Mogalakwena differs per village, but there does not seem to be a geographical trend – villages close to the mine do not have higher numbers employed than others. Mostly, up to five people are employed per village out of thousands of residents. Ga-Sekhaolelo is an outlier with around 20 people being employed, according to Phuhlisani's research. However, these are figures reported by leaders in each village surveyed and, thus, the figures may not be completely accurate.

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<sup>78</sup> DMR Revised Social and Labour Guidelines of October 2010, Section 3

<sup>79</sup> Mnwana, S., Mtero, F., & Hay, M. 2016. SWOP Working Paper Seven: Dispossessing the dispossessed? Mining and Rural Struggles in Mokopane, Limpopo., p.29

# Settlement Agreement and Trust Deed

## Settlement Agreement

Anglo proposed a settlement agreement between Kgoshi David Langa (on behalf of the community) and itself in an attempt to regain community approval, dispel criticism and avoid future liability. In January 2016, Kgoshi Langa met with the Mapela Executive Committee, a community representative forum (see [below](#)). It appeared as if this meeting was to seek endorsement of a draft 'settlement agreement' drawn up by Anglo which envisages the payment of R175 million to the Mapela Traditional Council to be channelled through the establishment of a Trust and a Holding Company. Conditions of this agreement include that:

- the payment of the R175 million settles any outstanding payments due to the MTC under any settlement talks between the compensation.
- the MTC supports Anglo's extension of its tailings dams 'on such terms and conditions to be agreed upon between the parties.'
- the MTC has no objection to Anglo conducting exploration activities in the Northern limb
- that all lease agreements currently in place will remain in force
- that the MTC will withdraw any demands for an ownership or equity share in Mogalakwena mine.

The agreement and conditions raised the stakes locally and created social divisions between those in favour of the deal and those who opposed it.

## OBJECTIONS

After the meeting, the Mapela Executive Committee (MEC) drafted a letter to the Kgoshi with the assistance of LARC, in which it made the following points:

- The MEC did not agree to the Kgoshi signing the settlement agreement and it could not do so in the absence of crucial information which it was lacking. They requested the following information:
  - The final version of the agreement (only a draft was provided)
  - Three appendices in the trust deed: the MTC Trust Deed, the means by which the money will be held by the MTC's lawyers (Fasken Martineau), and the Memorandum of Incorporation of the Operating Company of the MTC Holding Company.
  - The 'Relationship Agreement' – an agreement between the MTC and Anglo preceding the settlement agreement that was not signed.
  - The financial data on how the amount R175 million was decided upon.
  - Copies of all the lease agreements entered into between RPM and the Mapela Traditional Authority
- The Kgoshi did not have the authority to sign the settlement agreement until adequate consultation has been undertaken and the explicit consent of those whose rights are at issue has been given. The consent is needed from specific families, groups and villages, depending on the rights at issue. To sign the agreement without such consent would be a contravention of IPILRA, as [below](#).
- The MEC members should have been given adequate time to consult with their constituencies in order to bring their constituencies positions to consultations with the MEC.

Kgoshi David Langa replied in March 2016. He dismissed the MEC's assertion that he was required to consult with the community in terms of IPILRA. The MEC then obtained support from Richard Spoor Attorneys, who reiterated the MEC's demands to both Kgoshi Langa, above, and stated that the Mapela Traditional Council

does not have the authority to authorise the settlement agreement on behalf of the Mapela Traditional Community because it was not constituted in compliance with the TLGFA. Less than 40% of the members of the Council were democratically elected and less than a third were women. This poses problems in terms of legislation, as shown [below](#).

Anglo asked LARC to send them a memorandum on the ability of the Council and Kgoshi Langa to sign the Settlement Agreement. Replying on 1 July 2016, LARC stated that the Limpopo Provincial government had not held elections for 40% of the Traditional Council and, therefore, it was not validly constituted. “Any power that traditional institutions in Limpopo do have, is therefore derived solely from living customary law.” Further, even if it were statutorily compliant, the “TLGFA and the Limpopo Act provide that traditional leaders and traditional councils only have functions and powers established by customary law or otherwise specifically allocated to them. This means they could only enter into an agreement like the Settlement Agreement if authorised in terms of customary law.” Thus, LARC provided the following input on customary law in Mapela: based on inclusive, democratic decision-making structures and multi-layered participation in traditional governance. The system provides for several accountability mechanisms. Crucially, it requires informed consultation at all levels of the community before taking proposed decisions and actions, and obliges traditional leaders at different levels to provide regular and detailed feedback to the people on those decisions and actions.

There are various different structures, in terms of living customary law, that limit kgoshi’s power. These are still relevant, as shown [below](#):

- Examples:
  - *Bakgoma*: Close group of elders - Kgoshi’s immediate family.
  - *Bakgomana*: Wider group of elders by ruling lineage.
  - *Lekgotla la bakgomana le mantona*: As above but including headmen.
  - *Kgoshi le mantona*: Kgoshi & headmen of each kgoro (a largely kin-based territorial subdivision of the broader community)
  - *Khudu-thamaga*: the headman’s cabinet. These are the advisers to each headman or headwoman.
  - *Pitso*: a mass community meeting to discuss important or contentious issues.
  - *Pitso at Kgoro-level (village level)*

Major or potentially contentious decisions need to be taken through those structures. First, the kgoshi must consult with *bakgomana* and *mantona*. *Mantona* are then expected to discuss issue with each *kgoro* (village). The kgoshi then calls a *pitso* to discuss the decision and to provide detailed feedback on any developments. “The kgoshi is ... expected to listen to the opinions of his community and to amend his proposed action or decisions accordingly.” A common saying in the area is ‘kgoshi ke kgoshi ka morafe: “a king is king by grace of the people.”’

The settlement agreement clearly stipulates a deprivation of informal land rights because it includes clauses that Anglo may extend its operations on Mapela land. Thus, IPILRA would apply, as shown [below](#), and Anglo would need to consult with the community for the extension of its operations to be valid in terms of IPILRA. LARC reiterated that consultation only with a traditional leader is not sufficient. Therefore, Anglo and Kgoshi’s lack of consultation and failure to follow customary law decision making processes may mean that the settlement agreement is invalid.

## **Trust Deed**

### **ORIGINAL TRUST DEED**

As an addendum to the Settlement Agreement, a draft trust deed was created. The trust aimed to corporatize assets belonging to the Mapela Traditional Community (including the R175 million settlement, above) with the view of managing those assets in a more commercial manner. The trust would manage the large, important decisions and a subsidiary company would manage the day-to-day management of assets. There were, however, many objections to the formulation of the trust deed.

### **OBJECTIONS**

In their 1 July 2016 memorandum to Anglo, LARC identified a number of problems with the trust deed. First, it was not completed in consultation with the community, as required by customary law, shown above. Secondly, the prospective structure of the trust overly concentrated the power of the kgoshi. He was to be made first trustee, with power over other trustee appointments, and the trust deed purported to give him the ability to make binding decisions regarding the customary law of the Mapela Community. It also stated that the kgoshi had extensive business interests in Mogalakwena mine – a blatant conflict of interest as first trustee. AmaBhungane revealed that Langa and his wife own two companies employed by the mine for operations worth a combined R183-million a year. This was confirmed by David and his wife. He seems to believe that having advisors from the community disabled any conflict of interest when negotiating with the mine.<sup>80</sup>

A further problem was that trustees had broad discretionary powers without frequent accountability measures in place – only at end of year would financial statements have to be delivered to the community and there was no provision for the community to take any action once the statements are delivered. There was no provision for access to any other info held by Trust. Lastly, the trust deed enabled the trustees, in consultation with the Traditional Council, to make amendment to the trust deed. This means significant changes could be made to the trust deed without consulting or accounting to the broader community.

On 5 July 2016, prompted by their clients, Richard Spoor Attorneys wrote to Kgoshi David Langa's lawyers, Fasken Martineau (Fasken), requesting a number of fundamental changes Settlement Agreement and draft Trust Deed entered into by Anglo American and Kgoshi Langa. They stated that additional community consultation process is needed to allow the community to make an informed decision and such a decision must be followed. Spoor made a number of recommendations regarding the greater involvement of beneficiaries in deciding what occurs with trust funds, regarding financial accountability measures. Regarding the selection of trustees, the following demands were made:

- There should be four trustees elected by beneficiaries, at a meeting called for this purpose. At least two trustees should have matric certificates and two should be women.
- A further trustee should be elected by the *bakgomana*.
- The kgoshi's powers to appoint trustees on behalf of the Traditional Council, the Council of Headmen, the *bakgomana*, and the Community should be removed.
- The independent trustee, elected by the trustees, should be the chairperson of the trust
- The kgoshi should not serve on the trust himself but should, rather, choose a trustee to represent him and report to him.

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<sup>80</sup> Phalane, M. 16 June 2016. 'Kgoshi accepted R175m deal while on Anglo Platinum's dime.' Amabhungane. [Online] Available: <http://amabhungane.co.za/article/2016-06-17-kgoshi-accepted-r175m-deal-while-on-anglo-platinums-dime> [Accessed 23 April 2017]

Fasken, on behalf of Kgoshi David Langa did not respond to most of the allegations in the Spoor Attorneys' letter. In their reply, Fasken argued that the community (beneficiaries) could have no right to vote regarding budget approval and approval of financial statements, or how assets are managed and controlled. Fasken stated that would go against trust law and may be seen as fettering trustees' discretion. Fasken stated that trustees are normally required to act independently but with fiduciary duty to the beneficiaries. Also, Fasken stated that their Kgoshi David Langa has no objections to trustees obtaining the consent of beneficiaries when amendments are made to the Trust Deed and such amendments will affect the rights of beneficiaries.

Prompted by a roundtable discussion in October 2016 between organisations working in the land and accountability space, Richard Spoor Attorneys' sent an alternative proposal to the trust structure. Broadly, Spoor Attorneys' proposes bottom-up decision-making centred around *dikgoro*, the village-level consultation mechanisms established in terms of customary law and that the trust be replaced by a non-profit company (NPC). Spoor Attorneys believed that a NPC was preferable to a trust structure because statutory compliance in terms of the appointment and removal of directors is more efficiently managed by the Companies and Intellectual Property Commission as opposed to the Master's office, which handles compliance with trust deeds. Further, a NPC will ensure that all financial reporting is up-to-date and members' rights are far stronger than beneficiaries' powers in a trust. The proposed NPC would have a membership made up of elected members from each village. Each village would elect four representatives and provide these members with a mandate. These members then elect four directors of the NPC. The other directors would be an Anglo representative, an independent chairperson and the Kgoshi as an ex officio director. The NPC would wholly own a for-profit company which would handle investments and create revenue for the Trust and NPC.

## **CURRENT AMENDED TRUST DEED**

However, Kgoshi David Langa was replaced by Kgoshi Hans Langa with effect from 01 April 2017. Resulting from continual communication between the legal representatives and spurred on by the change in leadership, a compromise was reached. The parties agreed to proceed with a trust that had a management structure much more representative of the community. This trust structure was signed by the new Kgoshi in November 2017. The new Trust has nine trustees. Four will be elected directly by local communities, one will be the Kgoshi, one will be an independent chairperson, one will be a member appointed by the council of headmen and one will be a senior Anglo representative.

The new Trust, called the Mapela Community Development Trust has the following objectives: to hold the trust assets on behalf of the Mapela Traditional Community and an NPC which would be established in order to manage community development projects – a more day-to-day management role than the Trust. The Trust will also incorporate a holding company, entirely owned by the Trust, in order to raise funds for the Trust, which will be distributed to the Trust in the form of dividends. The Trust's main focus is to direct the bulk flow of funds and assets for the benefit of the Mapela Community. The specific management of individual projects and initiatives would be handled by subsidiary entities. All material decisions of the Trust have to be passed by a unanimous consensus of the Board of Trustees.

The trustees would have to hold at least two community meetings each year where the trustees will report on the activities of the Trust since the last meeting, the reports will be discussed, community members will give input on the budget presented by the trustees, for approval of any proposed amendment to the Trust Deed which affects the rights of the Mapela community and to allow community members to express their views on any other matter on the agenda. Additional meetings must be convened if a majority of headmen of the villages request such a meeting. Many decisions must be taken in accordance with Mapela customary law

decision-making structures. For example, trustees have to manage communal property in accordance with the tradition, customs, norms and values of the Mapela Traditional Community. This would include obtaining the approval of the community for contentious or major decisions, as stated [above](#).

It is unclear whether there was greater community consultation occurred in the formulation of the amended Trust Deed than in the formulation of the Settlement Agreement and original Trust Deed. However, the amended trust certainly provides for greater community control and accountability than the previous Trust Deed.

## NPC

The NPC Memorandum of Incorporation (MOI) has not been finalised. It is yet to be signed into force. As of the time of writing – May 2018 – the latest draft MOI for the NPC states that the primary objects of the NPC are to undertake ‘welfare and humanitarian activities’ such as counselling services and ‘anti-poverty initiatives,’ to provide health care services, to develop land and housing for ‘poor and needy persons,’ to provide education and training and to provide for environmental conservation and animal welfare. All of these activities are restricted to the Mapela area.

The MOI states that the NPC will have no members.<sup>81</sup> Thus, community members cannot become members with voting rights in the company. Rather, community control over company affairs is included in the election of directors. The objective of not having community members as being members of the company may be because there are restrictions on transferring funds to members of non-profit companies. Not being able to transfer funds to community members could interfere with community development objectives of the NPC, stipulated above.

The companies’ affairs are managed by a board of directors. The board consists of one non-executive director appointed by Anglo. Four non-executive directors will be appointed by the ‘Representative Forum’ which will be a democratic community structure. The constitution of the representative forum is yet to be decided. Two independent directors (not a Mapela Community member) will be appointed by the rest of the Board, one of whom will become the chairperson of the Board. The Kgoshi of the Mapela Traditional Community will become an ex-officio non-executive director. The directors may not be paid for their services as directors. Directors may be reimbursed for reasonable and necessary expenses incurred in good faith. Financial statements of the NPC must be presented by the board to the Representative Forum each year at the Forum’s AGM. The NPC will register as a public benefit organisation, which give it tax benefits. As stated above, the NPC is yet to be finalised.

## Project Alchemy & Ditholwana Trust

In 2011, Anglo launched ‘Project Alchemy’, a R3.5 billion project across all of its platinum-producing mines for the purpose of improving sustainable development and “ensuring the upliftment of communities so they are not solely dependent on future mining.” The Lefa La Rona Trust is the over-arching trust which directs funds to subsidiary development trusts at Anglo’s four platinum mines and to a non-profit company that does development work in labour-sending areas.

Each development trust will be in charge of promoting development in mining-affected communities. Project Alchemy trusts are supposed to be structured so that in the first two years, there would be no community

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<sup>81</sup> The Company’s Act, Item 4(1) of Schedule 1

appointed trustees, only two Anglo-appointed trustees and 3 independent trustees. In years 3-30, at least 3 community-appointed trustees would be added and the independent trustees would be reduced to one. After 30 years, Anglo would no longer be involved but there would be at least two independent trustees.<sup>82</sup> Despite the Mogalakwena settlement agreement stating that there will “not be a separate trust established under Project Alchemy granting the MTC parallel benefits to the development trust to be established under Project Alchemy in respect of the Mine,” Anglo set up the Ditholwana Community Trust on the 17<sup>th</sup> of July 2017 as part of its Project Alchemy trust suite . The Ditholwana Trust conforms to the above structure. The amount of funding available to the trust, each year, will depend on dividends from Anglo. The minimum amount funded will be R20 million each year, no matter what Anglo earns.

Anglo has stated that the trust will focus on providing bulk water to the Mapela community.<sup>83</sup> This is puzzling, however, as bulk water supply is already included as a project in its SLP, [above](#). The Ditholwana Trust's beneficiaries are all people within a 15km radius of the mine. This is different to the Mogalakwena Development Trust, which aims to benefit the Mapela people in general, regardless of distance to the mine. No tangible actions have been undertaken by the Ditholwana trust, as yet.

## Organisations Involved in Issues Regarding Mining in Mapela

### Mapela Executive Committee

The Mapela Executive Committee (MEC) was formed in May 2015 in order for Mapela community members to voice their concerns regarding exclusion from consultations regarding mining and unhappiness regarding relocations and other effects of mining. The Mapela Executive Committee formed an alternative political structure to the Mapela Traditional Council, in line with the opposition to the chief at the time, Kgoshi David Kgabakgare Langa. He was viewed as an absent chief, living outside Mapela and rarely visiting the area. He has also been dogged by corruption allegations.

Being an informal and unconstituted structure, the membership of the MEC is fluid. The leaders are established in a democratic manner but it seems that leadership positions change fairly often, in response to changes in political dynamics and factionalism. The MEC is one of the main structures of resistance to the mine, organising protests and representation on important issues.

“Protest, albeit violent and risky (residents risk being shot or imprisoned at times) seemed to be the most uniting and somewhat effective form of resistance to the mine. Our findings suggest that loss of rural livelihoods and new forms of marginalisation were at the root of the escalating tensions between locals and mining capital.”<sup>84</sup>

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<sup>82</sup> As found in Anglo's explanation of its 'Incremental establishment of Trusts. [Online] Available: <http://www.angloamericanplatinum.com/~/media/Files/A/Anglo-American-Platinum/documents/incremental-establishment-of-trusts.pdf> [Accessed 26 April 2018]

<sup>83</sup> AngloAmerica Media Release. 22 March 2018. ‘Anglo American Platinum Commits To Local Community Water Provision At Mogalakwena Mine’. [Online] Available: <http://www.angloamericanplatinum.com/media/press-releases/2018/22-03-2018.aspx> (Accessed 16 May 2018)

<sup>84</sup> Ibid.

A two-week protest against Anglo and its Mogalakwena mine took place in August and September of 2015, with residents blockading access roads to the mine, burning down and vandalising property of the Mapela Traditional Authority and community development infrastructure implemented by the mine. More than 50 protesters were arrested.

Primary concerns included a lack of prioritising the employment of youth from Mapela by Anglo, the loss of access to agricultural land and a lack of consultation regarding mine-driven community development infrastructure. Residents that have been relocated and/or resisting relocation protested around relocation-related grievances, as [above](#). Residents from villages close to the mine demanded that dust pollution and damages caused by blasting be remedied. Residents of Ga-Tshaba and Skimming villages protested Anglo's relocation of Seritarita Secondary School from Skimming to Sandsloot village, several kilometres away. The school had been closed due to blasting at the mine.

The protests resulted in moderate success for Mapela residents. The relocation of Seritarita School to Sandsloot was cancelled and will now be placed in Skimming village, as per the 2017 SLP, [above](#).

The protests also resulted in a 'task team' being set up by the Minister of Mineral Resources and the SAHRC, as elaborated on [below](#).

Subsequent protests have been organised by the MEC but none have been as large or widespread as in 2015.

In an interview (15 May 2018), Mr Christopher Rutledge of ActionAid stated that the Mapela Executive Committee was no longer operational and that its role had been taken up by the 'Concerned Task Team' (see below).

## Outside Organisations

### SAHRC

#### Reports

SAHRC published two reports on the mining-conflict situation in Mapela. One was published in 2008: 'Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo.' The other was published in 2017 as part of a broader report: 'National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa.'

#### Task Team

In addition to a 2008 task team established by the Premier, a subsequent task team was created in response to the two-week protest in August and September of 2015. On 11 September of that year, on the initiative of the Minister of Mineral Resources at the time, Minister Ngoako Ramathodi, and the SAHRC. Anglo, the Municipality and some villages sent representative who became part of a task team, facilitated by the SAHRC. The purpose was to create a 'terms of reference for engagement,' to revisit agreements between Anglo Platinum and the relocated villages and to create further agreements on 'outstanding action and implementation.' It was agreed, at the first meeting, that Seritarita High School would reopen and that Anglo would provide transport for learners to get to the school. It was agreed that blasting schedules close to the School would be discussed and agreed upon by the 'community leaders' of the affected villages. The SAHRC

committed to engaging with representatives of villages not represented at the first meeting to bring them into the task team.<sup>85</sup>

On 15 September 2015, a community meeting was convened by the SAHRC in order to bring all villages into the task team. The task team was intended to deal with the complaints of the community regarding mining. It is unclear why the existing Mapela Executive Comm was not used as the basis for the task team, considering it was formed for the exact purpose for which the task team was intended – dealing with mining-related concerns of the community. It seems that the SAHRC steam-rolled the creation of the task team over which it would have power. At this meeting, a steering committee was created with the mandate of engaging with disgruntled communities in order to re-establish community unity in Mapela and facilitate the establishment of the task team.

In October and November of 2015, various meetings of the task team are held but it soon becomes clear that there is deep local mistrust of this structure and concerns that it will become co-opted by Anglo Platinum. Overall, the initiative was poorly communicated. According to ActionAid, “as with previous “Task Teams”, this task team were offered stipends and possible roles and positions in a new R5million Anglo project under Project Alchemy and that this serves to alienate the task team from the community rendering the task team moot and compromised”.<sup>86</sup> It is reported that the Mapela Executive Committee refused to participate in the task team. However some members of the Committee did serve of the task team initially – which itself created a source of tension locally. The Task Team has been opposed by an opposing group of community representatives called the ‘Concerned Task Team.’ ActionAid has found that the Task Team has lost all legitimacy and has not provided any real resistance to mining interests in Mapela.

## ACTIONAID

In 2008, ActionAid released a report, ‘Precious metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa,’ which prompted extensive responses from Anglo and is used widely in this report.

In its 2016 report, ‘Precious Metals II: A Systemic Inequality,’ ActionAid draws on the [SWOP research](#) and reviews the recommendations made by the South African Human Rights Commission (SAHRC) to Anglo in 2008. It highlights how, despite recommendations to ensure continued access to water of relocated communities and those resisting relocation this has not been addressed. At the same time the report is critical of the recent SAHRC intervention in Mapela following the protests in September 2015. The intervention is characterised as

- the continuation of the strategy that is not worked in the past;
- a denial of local community agency;
- ignoring mistrust between groupings in the community and the SAHRC and local perceptions of possible collusion between the mining house and the Chapter 9 institution which calls its neutrality into question.

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<sup>85</sup> ANGLO AMERICAN. 2015. Mogalakwena Mine Resolution of Community Protests [Online]. Available: <http://www.angloamericanplatinum.com/media/press-releases/2015/11-09-2015.aspx> [Accessed 11 September 2015].

<sup>86</sup> ACTIONAID. 2016. The SAHRC: Facilitating inequality: Part 5 [Online]. ActionAid. Available: <http://www.actionaid.org/south-africa/2016/02/sahrc-facilitating-inequality-part-5> [Accessed 22 March 2016].

The report recommends that the SAHRC recuse itself as a facilitator of the negotiations process and dismantle the Task Team. This recommendation is repeated in a 2017 letter to the SAHRC. It has further demanded an investigation into Project Alchemy (below) to identify who runs it and who benefits from it.<sup>87</sup>

ActionAid is also involved in assisting schools in the area, with food gardens and by providing ongoing support to political groupings within Mapela. In this regard, in an interview (15 May 2018), Mr Christopher Rutledge of ActionAid stated that the SAHRC's Task Team (see above) was diluted by the SAHRC whereby an original group representatives from each village was halved. According to Mr Rutledge, the excluded group consisted of members from each village that are 'more outspoken'. The group of Task Team members from each village that were alienated by this process have formed a 'Concerned Task Team,' which ActionAid has provided advisory, organisational and representative support to. Anglo only recognises the Task Team, although they have committed to resolving the problems.

## **ANGLO'S RESPONSE**

As a result of public pressure, the 2008 reports by ActionAid and the SAHRC Anglo Platinum underwent several internal organisation reforms. The Sustainable Development Department was incorporated into the Corporate Affairs Department "in order to facilitate better coordination across these closely linked domains." Recognising social movements and NGOs as stakeholders was also emphasised and, across the Anglo American Group, management required greater inclusion of social science expertise in the carrying out of projects. 'A group-wide resettlement working group and steering committee has also been established.'<sup>88</sup>

However, as can be seen from this document, Anglo's internal restructuring has not succeeded in addressing grievances in Mapela.

## **RICHARD SPOOR ATTORNEYS**

### **Legal Representation**

In 2006, a series of court applications were brought by Richard Spoor Attorneys Inc. on behalf of some villages in Mapela. The firm represented Ga-Tshaba community members in an interdict against Anglo carrying out mining operations on arable land which they have rights to. The interdict was brought on the urgent role, which does not follow the normal time periods for court proceedings. The interdict was not granted because the Judge felt that the applicants delayed unreasonably in applying for the interdict and that the matter did not create sufficient urgency that required the shortening of ordinary timeframes for court proceedings. To shorten the timeframes would unfairly prejudice the respondents. The Judge also stated that the applicants had not shown, on the face of their evidence, that they held rights to the land that could be protected.

A similar interdict was sought by the Mohlotlo and Sekuruwe communities in terms of their land. However, after court papers were exchanged by the parties (Anglo and the Community), the case was settled out of court.

Richard Spoor Attorneys Inc have also negotiated for greater benefits from mining, more democratic benefit structures and on behalf of the Mapela Executive Committee and on behalf of smaller groups of residents,

<sup>87</sup> ACTIONAID. 2016. Precious Metals II. *The SAHRC: Facilitating inequality: Part 5* [Online]. ActionAid. Available: <http://www.actionaid.org/south-africa/2016/02/sahrc-facilitating-inequality-part-5> [Accessed 22 March 2016].

<sup>88</sup> Farrell, L. A., Hamann, R., & Mackres, E. (2012). A clash of cultures (and lawyers): Anglo Platinum and mine-affected communities in Limpopo Province, South Africa. *Resources Policy*, 37(2), p.201

such as the residents still remaining in Mohlotlo after the majority of Motlhotlo residents have been relocated, as stipulated above.

## **LAND AND ACCOUNTABILITY RESEARCH CENTRE (LARC)**

LARC has provided support in an legal advisory and funding capacity to the Mapela Executive Committee. It has also written a memorandum on traditional governance in Mapela for Anglo, see [above](#).

## **PHUHLISANI NPC**

Phuhlisani undertook to assist the Mapela Executive Committee (MEC) by providing workshops, informed by research such as [village profiling](#) and desktop studies. The research was undertaken by local matriculants equipped with tablets. The purpose of the first workshop, held in June of 2016, was to:

- enable a report back of the findings a rapid research scan conducted in more than 20 villages in the Mapela area and enable representatives from different villages in the Mapela area to review the research findings, make corrections and additions where required and identify the priority issues for local action
- build on local knowledge and experience to examine different ways to access information held by government departments, traditional councils and private companies
- provide an introduction to the policies, laws and regulations relating to land, mining, water, environment and heritage issues required to address the priority issues emerging from the Mapela context
- help develop a shared strategy and actions to address priority issues identified by the MEC and affiliated village structures.

The second workshop, held 3 months later, focussed on updating information and identifying priority issues affecting the community, developing organisational and campaigning skills and introducing the MEC to a wider affiliation of rural development organisations, the Alliance for Rural Development. The workshop also covered making submissions to the High Level Panel, an investigation into issues affecting land rights in South Africa commissioned by the Speakers of South Africa's national and provincial legislatures. Workshop 3, held in November 2016, brought Mapela representatives to another mining affected community, Atok, that gained a lot of success in the form of development funds and employment opportunities from its engagement with mining. Workshops 1 and 2 are comprehensively documented and all the materials are available online<sup>89</sup>

Phuhlisani also contributes this document, along with a summary document and video, with the objective of telling the Mapela community's story and aiding organisations involved currently or in the future by providing condensed information required for informed action in the community.

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<sup>89</sup> Mapela Learning Block 1 <https://trello.com/b/Ljir9pyW> Mapela Learning Block 2  
<https://trello.com/b/iG33DPJj>

# PART TWO: UNDERSTANDING THE LEGAL CONTEXT

This Part is written in such a way so that people interested in learning about laws affecting mining affected communities will be able to fully understand the legal context without having to read the Part 1 case study on Mapela. Thus, no reference to the Mapela experience is made in this Part.

## Mineral Rights

In South Africa, mining cannot legally take place without the government giving certain rights to a mining company.<sup>90</sup> There are different types of rights that allow different types of mining activities, such as prospecting and mining rights as well as mining permits. As a group, these rights are termed ‘mineral rights.’ The mining company does not need to be the owner of the land in order to undertake mining operations on that land. It only needs to hold a mineral right to undertake the mining operation contemplated by that right in respect of the land in question.

### What Are Mineral Right Holders Allowed To Do?

A prospecting right allows mining companies to search for minerals on the property for which the mining right is given. A prospecting right only allows the mining company to remove a small amount of land and minerals – only enough necessary for the company to test and analyse the land and minerals.<sup>91</sup> A prospecting right may be held for a maximum of five years<sup>92</sup> but may be renewed for a maximum of three more years.<sup>93</sup> The holder of the prospecting right has the exclusive right to apply for a mining right in respect of the same property and minerals for which the prospecting right is held.<sup>94</sup> A mining right allows for more extensive activities to take place. Under a mining right, there is no limit on the amount of land and minerals which may be removed by the mining company. A mining right can be held for a maximum of thirty years,<sup>95</sup> but can be renewed for a maximum of thirty more years.<sup>96</sup>

A mining company that holds either of these rights may carry out any activity, additional to prospecting or mining, which is required for the completion of the prospecting or mining operation in question.<sup>97</sup> This may include freely entering the land for which the mineral right was granted, relocating owners or occupiers of the land, building anything required for prospecting or mining, or using water located on the land subject to any other authorisations required (see below).<sup>98</sup>

A mining permit is for small-scale mining operations. It allows a holder of such a permit to mine a piece of land that is maximum five hectares.<sup>99</sup> The permit may be held for a maximum of two years but the permit may be renewed three times for maximum one year, each time.<sup>100</sup> A company cannot be granted a mining

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<sup>90</sup> MPRDA, section 5A(b)

<sup>91</sup> MPRDA, section 20(1)

<sup>92</sup> MPRDA, section 17(6)

<sup>93</sup> MPRDA, section 18(4)

<sup>94</sup> MPRDA, section 19(1)(b)

<sup>95</sup> MPRDA, section 23(6)

<sup>96</sup> MPRDA, section 24(5)

<sup>97</sup> MPRDA, section 5(3)

<sup>98</sup> MPRDA, section 5(b-d)

<sup>99</sup> MPRDA, section 27(1)(b)

<sup>100</sup> MPRDA, section 27(8)(a)

permit if it holds a mining permit on the same or adjacent land.<sup>101</sup> A holder of a mining permit may enter the land, build any infrastructure on the land that is required for the purposes of mining and use water located on the land (more on this below).<sup>102</sup>

## How Do Mining Companies Get These Rights?

A mining company seeking to obtain a prospecting right, mining right or mining permit must submit an application to the Regional Manager of the Department of Mineral Resources (the Regional Manager). The mining company must also apply for environmental authorization (see below) at this time.<sup>103</sup> If the application is for a mining right, the company must also submit a social and labour plan (see below) at this time.<sup>104</sup> The Regional manager must dismiss the application if another company has already submitted an application or holds a mineral right for the same mineral on the same piece of land. If no other person has made an application for or holds a prospecting or mining right for the property and mineral in question, the Regional Manager continues with the process and notifies the mining company that it must consult with the landowner, lawful occupier(s) and any interested and affected party.<sup>105</sup> ‘Affected party’ means any person whose socio-economic conditions might be directly affected by the mining operations.<sup>106</sup>

Normally, once a prospecting or mining right application is accepted for consideration (but not yet granted) by the Regional Manager, no other prospecting or mining right applications will be accepted for consideration.<sup>107</sup> However, section 104 of the MPRDA gives communities a preferential right to be granted a prospecting or mining right over property that they occupy. A local community may choose to make their own application even if another company has submitted an application for a prospecting or mining right. As long as no application has yet been granted over the property the local community has a preferential right to be granted the right.

The Regional Manager must also give notice to interested and affected parties to submit their comments regarding the application within 30 days after the notice was given.<sup>108</sup> Such notice “must be placed on a notice board at the office of the Regional Manager or designated agency, as the case may be, that is accessible to the public.”<sup>109</sup> The Regional Manager must also publish such notice in the Provincial Gazette, at the Magistrate’s Court of the area and by advertising in a local or national newspaper.<sup>110</sup> The mining company must then submit a report on the consultation process and outcome, as well as an environmental authorisation application (see below) to the Regional Manager,<sup>111</sup> who sends the full application to the Minister of Mineral Resources. The Minister then considers the applications,<sup>112</sup> although he or she normally delegates this role to an official in the Department of Mineral Resources (DMR).

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<sup>101</sup> MPRDA, section 27(3)(c)

<sup>102</sup> MPRDA, sections 27(7)(a)-(b)

<sup>103</sup> MPRDA, sections 16(1); 22(1); 27(2)(a)

<sup>104</sup> MPRDR, regulation 10(1)(f)

<sup>105</sup> MPRDA, sections 16(2)-(4); 22(2)-(4); 10(1)(a)

<sup>106</sup> SA Soutwerke v Saamwerk Soutwerke 2011 (4) ALL SA 168 (SCA)

<sup>107</sup> MPRDA, sections 16(2)(c); sections 22(2)(c)

<sup>108</sup> MPRDA, section 10(1)(b)

<sup>109</sup> MPRDR, regulation 3(2)

<sup>110</sup> MPRDR, regulation 3(3)

<sup>111</sup> MPRDA, sections 16(4)(b); 22(4)(b); 27(5)

<sup>112</sup> MPRDA, section 16(5); 22(5); 27(6)

Objections to the granting of a prospecting right, mining right or permit can be made to the Regional Manager, who must then refer the objection to the Regional Mining Development and Environmental Committee. This Committee will then consider the objections and advise the Minister on the content of the objections.<sup>113</sup>

The Minister can choose to grant or refuse the rights applied for. He or she can also choose to grant the rights subject to terms and conditions.<sup>114</sup> “If the application relates to land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.”<sup>115</sup> A prospecting right, mining right or mining permit can be suspended or cancelled by the minister if the mining company disobeys any important condition of the right or permit, disobeys the provisions of the MPRDA or does not uphold a condition in the environmental authorization.

The MPRDA came into force in April 2004 and changed the mineral right authorisation regime fundamentally. In order to avoid undue prejudice holders of rights under the old regime, it allowed for the transitional continuation of old-order rights and for the conversion of old-order rights into mineral rights under the MPRDA. Prospecting rights held by mining companies continued for two years after the MPRDA came into force. During those two years, the holder of an old-order prospecting right could apply for the conversion of the right into a current prospecting right. If the holder did not do so, the right would lapse.<sup>116</sup> The same contingency plan was made for mining rights, but the period of continuation and application was for five years, in that case. Along with a number of extensive supporting documents, an approved Environmental Management Plan was required for both of these rights. A social and labour plan was required for the conversion of old-order mining rights.<sup>117</sup> Unused old order rights would remain in force for a total of one year, during which time the holder would have to apply for a prospecting or mining right, as the case may be, in terms of the above MPRDA processes. The holder had the exclusive right to apply for such rights during for that period of one year.<sup>118</sup>

## Environmental Rights and Authorisations

### Constitution

Section 24 of our Constitution gives protection to people’s environment by stating that ‘everyone has the right to an environment that is not harmful to their health or wellbeing.’<sup>119</sup> It also states that government must create legislation that upholds this right.<sup>120</sup> A large amount of legislation has been enacted, as a result.

### MPRDA

One of the objects of the MPRDA is to give effect to section 24 of the Constitution “by ensuring mineral resources to be developed in orderly and ecologically sustainable manner while promoting justifiable social

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<sup>113</sup> MPRDA, section 10(2)

<sup>114</sup> MPRDA, section 17(1)-(3)

<sup>115</sup> MPRDA, section 17(4A)

<sup>116</sup> MPRDA, schedule II, section 6

<sup>117</sup> MPRDA, schedule II, section 7

<sup>118</sup> MPRDA, schedule II, section 8

<sup>119</sup> The Constitution of the Republic of South Africa, 1996, section 24(a)

<sup>120</sup> Ibid., section 24(b)

and economic development.”<sup>121</sup> Further, the principles set out in section 2 of the National Environmental Management Act (NEMA), the country’s foundational environmental Act, apply to all mining and prospecting operations and serve as guidelines for the interpretation of all environmental requirements of the Act. The most relevant of these principles are:

- Development must be socially, environmentally and economically sustainable.<sup>122</sup>
- “Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.”<sup>123</sup>
- Pollution, waste, disturbance of ecosystems and landscapes, disturbance of cultural heritage sites, loss of biological diversity and negative impacts on people’s environmental rights should be avoided. Where these negative effects of development are not able to be avoided, they should be minimised and remedied.<sup>124</sup>
- A risk-averse and cautious approach should be applied, “which takes into account the limits of current knowledge about the consequences of decisions and actions.”<sup>125</sup>
- “Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.”<sup>126</sup>
- “The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.”<sup>127</sup>
- “Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.”<sup>128</sup>

Besides the inclusion of the above flexible principles, the MPRDA has many solid environmental requirements. Any water use in mining is subject to the NWA – which requires that a water use licence be obtained (see below).<sup>129</sup> The Minister of Mineral Resources must be satisfied that no unacceptable pollution, ecological degradation or environmental damage will occur in order to grant a mineral right.<sup>130</sup> Further, all mineral rights may not be granted without environmental authorisation.<sup>131</sup> The holder of a mineral right is required to comply with the conditions of the environmental authorisation.<sup>132</sup>

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<sup>121</sup> MPRDA, section 2(h)

<sup>122</sup> NEMA, section 2(3)

<sup>123</sup> NEMA, section 2(2)

<sup>124</sup> NEMA, sections 2(4)(a)(i)-(iv) & (viii)

<sup>125</sup> NEMA, section 2(4)(a)(vii)

<sup>126</sup> NEMA, section 2(4)(c)

<sup>127</sup> NEMA, section 2(4)(f)

<sup>128</sup> NEMA, section 2(4)(g)

<sup>129</sup> MPRDA, section 5(3)(d)

<sup>130</sup> MPRDA, section 17(1)(c); 23(1)(c)

<sup>131</sup> MPRDA, sections 5A(a); 17(1)(c); 23(1)(d); 27(6)(b)

<sup>132</sup> MPRDA, sections 19(2)(e) MPRDA; S 25(2)(e); S35(2)(a)

## **Environmental Authorisation**

In terms of the National Environmental Management Act 107 of 1998 (NEMA), it is an offense to start mining before environmental authorisation is obtained.<sup>133</sup> All mining and related activities require the most extensive form of application for environmental authorisation – a dual scoping and environmental impact assessment (EIA) process.<sup>134</sup> While environmental authorisations for all other types of developments are processed by the Department of Environmental Affairs, environmental authorisations for mining developments are processed by the Minister of Mineral Resources.<sup>135</sup> According to the EIA Regulations, an application for environmental authorisation can only be submitted once an application for a prospecting right, mining right or permit has been accepted by the Regional Manager.<sup>136</sup> This contradicts the MPRDA, which states that mineral and environmental applications should happen simultaneously.<sup>137</sup>

A mining company applying for environmental authorisation must first submit a scoping report,<sup>138</sup> which is an introductory report to identify social and environmental impacts, provide context and focus the main EIA. After that, the EIA report must be submitted, along with an environmental management plan (EMP).<sup>139</sup> The scoping report provides an opportunity for the Regional Manager and other government officials to comment on the scoping report. These comments must be incorporated into the company's EIA report and EMP.<sup>140</sup> An EIA is an extensive study of the environmental and social impacts of a proposed development. It is an in-depth study of all the environmental and social risks that may arise from the proposed development. An EMP is a detailed proposal of strategies that a developer will implement to reduce the negative environmental effects of a project during the operation of the development and in closure and rehabilitation of the project site.<sup>141</sup>

An EIA of a proposed mining project must include information on alternatives to mining.<sup>142</sup> This is to provide information regarding whether an environmental authorisation should be granted for the mining project. The SAHRC has noted a widespread bias in government towards mining land use (exhaustive in nature) for development rather than more sustainable land use functions such as agriculture and tourism (non-exhaustive in nature). This is worrying: the SAHRC states that mining normally reduces the diversity of economic sectors or forms of income. Diverse rural economies are more resilient as they are able to absorb economic/social/physical shocks better than economies centred around a single land use.<sup>143</sup> Alternatives to mining should be more highly valued due to their social and environmental sustainability.

During the compilation of a scoping report, EIA and EMP, fair public participation must take place. Public participation is a period of notice, comment and consultation with interested and affected parties. Interested and affected parties must be registered by the company.<sup>144</sup>

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<sup>133</sup> NEMA, section 24F read with section 49A(1)(a)

<sup>134</sup> GN 545, items 20-23

<sup>135</sup> NEMA, section 24(2A)

<sup>136</sup> EIA Regulations, regulation 16(2)(a)

<sup>137</sup> MPRDA, sections 16(1); 22(1); 27(2)(a)

<sup>138</sup> MPRDR, regulations 21; 22

<sup>139</sup> NEMA, section 24N(1A)

<sup>140</sup> MPRDR, regulations 49(3)-(6)

<sup>141</sup> NEMA, section 24N(2)

<sup>142</sup> NEMA, section 24(4)(b)(i)

<sup>143</sup> SAHRC. 2017. National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa, p.17

<sup>144</sup> EIA Regulations, regulation 42

Notice of the application for environmental authorisation must be given by the company by fixing an accessible notice board along the boundary of the proposed development. The company must also place an advertisement giving notice of the proposed project in a local newspaper. If the project is likely to have an impact beyond the municipality in which it the project is proposed to take place, the company must place an advertisement in a national or provincial newspaper as well. However, the company does not need to place such advertisements if it publishes notice of the proposed project in an official government Gazette. The company must also send written notice to the occupiers and/or owners of the site (or sites) where the project is proposed to take place.<sup>145</sup> If there are interested and affected people that are unable to participate in the process due to illiteracy, disability or any other disadvantage, the company must use reasonable alternative methods to participate in the process.

There must be a period of at least 30 days per report for interested and affected parties to comment on the information to be contained in each document. However, if the company submits the EIA report and EMP together then the company may combine the commenting periods into a single 30-day period.<sup>146</sup> The company must provide interested and affected parties with full access to any information that has the potential to influence the Minister's decision regarding the environmental authorisation application. All comments must be included in the reports.<sup>147</sup> Interested and affected parties must be allowed to comment on the final EIA report, as well. Further, potential and registered interested and affected parties must be directly consulted regarding the proposed project.<sup>148</sup>

The consent of the landowner before applying is not required for environmental authorisations involving activities directly related to prospecting and mining although it is for applications for all other projects requiring environmental authorisation.<sup>149</sup> Although mining-related environmental authorisation applications are processed by the Minister for Mineral Resources, the Minister for Environmental Affairs is responsible for appeals. Thus, aggrieved parties can appeal the granting of an environmental authorisation to the Minister for Environmental Affairs,<sup>150</sup> perhaps receiving a more sympathetic ear.

## **Other Authorisations**

Typically, a licence for the use of water is required to be obtained by the mining company.<sup>151</sup> In making an application for a water use licence, an applicant for a licence would need to furnish an assessment of the effect of the proposed development on the quality of the water resource.<sup>152</sup>

In terms of the National Water Act (NWA), the responsible authority “may invite written comments from any organ of state which, or person who, has an interest in the matter.”<sup>153</sup> There is no requirement that such comments must be invited. Further, the responsible authority may require the applicant for a water licence to “give suitable notice in newspapers and other media” that interested an affected parties may object to the

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<sup>145</sup> EIA Regulations, regulations 41(2)(a)-(d)

<sup>146</sup> EIA Regulations, regulation 40(1)

<sup>147</sup> EIA Regulations, regulation 44

<sup>148</sup> EIA Regulations, regulation 40(2)(d)

<sup>149</sup> EIA Regulations, regulation 39(2)(b). Petroleum exploration and production also do not require the consent of the landowner or lawful occupier.

<sup>150</sup> NEMA, section 43(1A)

<sup>151</sup> NWA, section 21

<sup>152</sup> NWA, section 41(2)(a)(ii)

<sup>153</sup> NWA, section 41(2)(c)

granting of the water licence.<sup>154</sup> As the NWA does not require that these procedures must occur, there is no absolute requirement for public participation. Public participation may not always be part of the application process. However, all interested and affected parties may appeal the granting of a water use licence. A party aggrieved by the granting of a water-use licence can appeal to the Minister<sup>155</sup> or to the National Water Tribunal.<sup>156</sup>

Restrictions are imposed under regulation 4 regarding the location of an activity based on its proximity to water resources. No person in control of a mine or related activity may mine or place mineral deposits, waste material or store other harmful substances likely to pollute water within 100 metres of any watercourse or estuary.<sup>157</sup> Clean and dirty water systems must be kept separate.<sup>158</sup> Mining companies and people in control of related activities must take reasonable steps to prevent water pollution arising from mining or such related activities.<sup>159</sup>

"[T]he current census for determining water reserves does not include measures to account for anticipated migration and population growth and other potential impacts on the availability of water resources, such as droughts."<sup>160</sup> This ignorance of changing dynamics causes massive problems, down-the-line, with water shortages or deterioration of water sources afflicting many mine-affected communities.

Other environmental licenses that often have to be obtained before mining may commence are:

- Atmospheric Emissions License<sup>161</sup>
- Waste Management License<sup>162</sup>
- Threatened/Protected Species Permit<sup>163</sup>

Holders of mineral rights granted in terms of the MPRDA will need to undertake an enquiry whether there is a town planning scheme over the land and whether the land is zoned to allow for mining in terms of the scheme. If not, the mining company will need to apply for a zoning change in terms of SPLUMA, provincial planning legislation and/or municipal planning by-laws. The need for proper zoning was confirmed in the case of *Maccsand (Pty) Ltd v City of Cape Town and Others*;<sup>164</sup> mining cannot occur if the proper zoning for the land has not been acquired. However, a recent SAHRC report noted that mining companies and government officials "appear to systematically disregard key pieces of legislation," particularly SPLUMA. Further, the report noted a general failure of government to monitor and enforce compliance with environmental and related authorisations.<sup>165</sup>

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<sup>154</sup> NWA, section 41(4)(a)(ii)

<sup>155</sup> NWA, section 41(6)

<sup>156</sup> NWA, section 148(1)(f)

<sup>157</sup> Regulations on Use of Water for Mining and Related Activities Aimed at the Protection of Water Resources GN 704, regulation 4

<sup>158</sup> Ibid, regulation 6

<sup>159</sup> Ibid, regulation 7

<sup>160</sup> SAHRC. 2017. National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa, p.8

<sup>161</sup> NEMAQA

<sup>162</sup> NEMWA

<sup>163</sup> NEMBA

<sup>164</sup> 2012 (4) SA 181 (CC)

<sup>165</sup> SAHRC. 2017. National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa, p.6

## **What Happens When Mining Ends?**

A closure plan is required for mining environmental authorisation applications. It details the objectives and mechanisms in place to close a mine in a sustainable manner and is included as part of the EMP.<sup>166</sup> Financial provision must be made by the company for the remediation of negative environmental effects and rehabilitation of the environment after the closure of the mine.<sup>167</sup> Such financial provision made when applying for a mining right and is held by the Department of Mineral resources. The funds are administrated by its Director-General. Financial provision can be made by means of bank guarantees, trust fund contributions or cash deposits.<sup>168</sup>

Despite these two requirements, a mining company must also apply for a closure certificate from the Minister of Mineral Resources when it ceases mining operations in order to lawfully stop mining activities.<sup>169</sup> The Minister must then return all of the financial provision made by the mining company or retain some of the funds for future unforeseen environmental hazards that may arise from the closed mine.<sup>170</sup> There is a contradiction between NEMA and the MPRDA regarding liability for environmental hazards after a closure certificate has been given. The MPRDA states that environmental liability for mining right holders ceases after a mining company has obtained a closure certificate.<sup>171</sup> However, NEMA states that holders of mineral rights remain responsible for any environmental liability caused by the operations pursued under the specific mineral right, even where a closure certificate has been obtained.<sup>172</sup>

Many companies do not make adequate information available regarding rehabilitation and possible use for land post-closure. Also, “[t]he DMR has not taken adequate steps to secure financial provision for rehabilitating damage to the environment and water resources.”<sup>173</sup>

## **What Happens If Mining Still Causes An Environmental Hazard?**

There is a duty of care on any mining company who causes, has caused or might cause significant environmental pollution or degradation to take reasonable measures to prevent or minimise such harm from occurring.<sup>174</sup> If the mining company in question does not take such measures, the empowered officials (the Director-General of the DEA, the Director-General of the DMR or the head of the relevant provincial department) may direct the responsible person to undertake measures to remedy the situation, after hearing the interests of the mining company. If the mining company does comply with the directive, the empowered officials can take necessary measures to avoid or minimise environmental degradation or pollution and then recover costs from the mining company.<sup>175</sup> If the empowered officials do not direct the mining company to

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<sup>166</sup> MPRDR, regulation 62; EIA regulations, regulation 19(5)

<sup>167</sup> NEMA, section 24P

<sup>168</sup> NEMA, section 1 definition

<sup>169</sup> MPRDA, section 43(3)

<sup>170</sup> MPRDA, section 43(6)

<sup>171</sup> MPRDA, section 43(1)

<sup>172</sup> NEMA, section 24R

<sup>173</sup> SAHRC. 2017. National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa, p.7

<sup>174</sup> NEMA, section 28(1)

<sup>175</sup> NEMA, sections 28(7)-(11), ECA sections 31A(3)-(4)

take such measures, any person may apply to a court for an order directing such officials to direct the mining company to take reasonable measures to prevent or minimise the degradation.<sup>176</sup>

An unrepealed section of an old piece of legislation, the Environment Conservation Act 73 of 1989 (ECA), extends similar powers to municipalities<sup>177</sup> and the NWA extends similar powers to catchment management agencies in terms of water pollution or degradation.<sup>178</sup>

The Minister of Mineral Resources and the DMR are also empowered to monitor, investigate and issue compliance notices to mining companies regarding environmental hazards that are caused by mining operations.<sup>179</sup> The Minister of Mineral Resources may suspend or cancel a mineral right where there is contravention of the conditions of the environmental authorisation.<sup>180</sup> If an environmental hazard or degradation occurs as a result of mining or if the mining company contravenes the conditions of its environmental authorisation, the Minister can direct the company to fix the problem. If the company does not fix the problem, the Minister can direct the DMR to fix the problem and can claim the expenses from the company.<sup>181</sup> A ‘complainant’ (undefined in NEMA) may submit a complaint alleging that a specific compliance monitoring and enforcement action relating to prospecting or mining has not been implemented or has been implemented inadequately.<sup>182</sup>

Where there is an unexpected, sudden and uncontrolled release of a hazardous substance created by a mining company, the mining company must report such incident to the relevant authorities: the Director-General of the Department of Environmental Affairs, the South African Police Service, the head of the provincial or municipal environmental department and all persons whose health may be affected by the substance.<sup>183</sup> The mining company must then immediately take steps to avoid or minimise the effects of the incident on public health and the environment<sup>184</sup> and submit a report to the Director-General, provincial head and municipal head of environmental departments within 14 days on the steps taken.<sup>185</sup> One of the relevant authorities may direct the mining company to take any measures in order to avoid or minimise harm from the incident.<sup>186</sup> If the mining company fails to comply with the directive, the relevant authorities can take measures themselves to avoid or minimise harm from the incident,<sup>187</sup> claiming for any expenses from the mining company.

Again, similar powers are extended to the Department of Water Affairs, SAPS and the relevant catchment management agency in terms of emergency incidents regarding water resources.<sup>188</sup>

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<sup>176</sup> NEMA, section 28(12)

<sup>177</sup> ECA, section 31A

<sup>178</sup> NWA, section 19

<sup>179</sup> MPRDA, section 31

<sup>180</sup> MPRDA, section 47(1)(c)

<sup>181</sup> MPRDA, section 45

<sup>182</sup> NEMA, section 31D(5)-(9)

<sup>183</sup> NEMA, section 30(3)

<sup>184</sup> NEMA, section 30(4)

<sup>185</sup> NEMA, section 30(5)

<sup>186</sup> NEMA, section 30(6)

<sup>187</sup> NEMA, section 30(8)

<sup>188</sup> NWA, section 20

## Social and Labour Plans

A mining company must submit a social and labour plan (SLP) in order to obtain a mining right.<sup>189</sup> A SLP is a document produced by a mining company that shows how it intends to invest in the local community development and labour in order to benefit the lives of people living close to the mine and workers working at the mine.<sup>190</sup> Other objectives of a SLP are to contribute to transformation of the mining industry, promote employment and “advance the social and economic welfare of all South Africans.”<sup>191</sup>

A SLP is not necessary for a mining company applying for a prospecting right or mining permit. It is only necessary for an application for a mining right. SLPs must include a human resources development programme which aims to improve skills, employment numbers, employment equity, access to internships and bursaries.<sup>192</sup> SLPs must include a local economic development programme, aiming to improve the social and economic spheres of the area in which the mine operates and bring greater socio-economic wellbeing to mineworkers. A SLP remains in force until the mining company obtains a closure certificate.<sup>193</sup>

There is no legislative requirement for consultation with affected local community members or mineworkers regarding the formulation of a social and labour plan. The DMR’s Revised Social and Labour Guidelines of October 2010 mention that the mining company should consult with communities and relevant authorities to provide a plan for mine community economic development.<sup>194</sup> However, the enforceability of this provision is questionable – the Guidelines do not hold legal weight on their own.

The holder of a mining right must submit an annual report on its compliance with its SLP to the relevant Regional Manager<sup>195</sup> but it is not immediately clear what consequences there are if the mining company does not comply with its SLP. The Minister of Mineral Resources is not explicitly empowered to cancel a company’s mining right if it is non-compliant with its SLP. However, section 47(1)(a) of the MPRDA states that, if a company is conducting any prospecting or mining operations in contravention of MPRDA, then the Minister may cancel the mining right. Section 25(2)(f) of the MPRDA obliges the company to comply with its SLP. Therefore, if the company does not comply with its SLP, the company will be conducting mining operations in contravention of the MPRDA and the Minister will be able to cancel the mining right as a consequence.

## The Mining Charter: Transformation, Investment, Upliftment

The Minister of Mineral Resources is mandated by the MPRDA to develop a “broad-based socio-economic empowerment Charter” (the Mining Charter). This Charter sets the framework for targets and sets a timeline for promoting the inclusion of previously disadvantaged South Africans into the mining industry as well as

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<sup>189</sup> MPRDA, section 23(1)(e)

<sup>190</sup> MPRDR, regulation 41(c)

<sup>191</sup> MPRDR, regulations 41(a)-(b)

<sup>192</sup> MPRDR, regulation 46(b)

<sup>193</sup> MPRDR, regulation 43

<sup>194</sup> DMR Revised Social and Labour Guidelines of October 2010, Section 3

<sup>195</sup> MPRDR, regulation 45

increasing the mining benefits to previously disadvantaged people.<sup>196</sup> This is in line with the objectives of the MPRDA.<sup>197</sup>

The 2017 Charter<sup>198</sup> introduced some large changes to the targets of the previous charter. However, the Charter has been challenged and is yet to come into force. There has been push back from mining companies and other stakeholders on the 2017 amendments to the Charter. Because of the uncertainty of when or whether the new Charter will be enforced, only the still-in-force 2010 Charter<sup>199</sup> is discussed in this publication.

The 2010 Charter has number of requirements regarding transformation of the mining sector. The 2010 Charter requires 26% ownership of mining ventures by historically disadvantaged South Africans. It requires mining companies to procure a minimum of 40% of capital goods, 70% of services and 50% of consumer goods from BEE entities by 2014. 40% of all management positions must held by historically disadvantaged South Africans by 2014.

There are no specific targets set by the 2010 Charter regarding mine community development. However, the Charter requires that stakeholders must be “consistent with international best practices in terms of rules of engagement.”<sup>200</sup> Further, mining companies must collaborate and consult communities in order to assess appropriate local development projects to invest in. In terms of the Charter, ‘Mine community’ means “communities where mining takes place and labour sending areas.”

The Charter provides a scorecard to evaluate the level of a mining company’s compliance with the Charter. Every year, mining companies must report their level of compliance with the Charter.<sup>201</sup> Non-compliance with the Charter may come with consequences: a non-compliance level of between 5 and 8 will entail that the company is considered non-compliant with the provisions of the Mining Charter and in breach of the MPRDA, thus enabling cancellation of the company’s mineral right. A non-compliant company may also be guilty of an offence and a penalty.<sup>202</sup> Lastly, the Minister must not award a mining right to a company that is not compliant with the Charter.<sup>203</sup>

## Residential and Agricultural Relocation

Beyond section 54 of the MPRDA, there is no mining or mining-related legislation regarding the process of relocating households that live upon or next to land that is to be mined. Section 54 deals with compensation more generally and is elaborated upon below. There are no explicit guidelines that must be complied with in terms of South African law regarding the relocation of households and compensation for loss of agricultural land. However, as shown above, the compulsory EIA process requires research by mining companies and consultation with affected parties regarding social impacts of mining operations. The mining company must then produce and EMP which must show how it intends to deal with the social impacts identified. Through these

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<sup>196</sup> MPRDA, section 100(2)

<sup>197</sup> MPRDA, section 2

<sup>198</sup> General Notice 450 GG 39933, of 15 April 2016

<sup>199</sup> General Notice 543 GG 33573 of 20 September 2010

<sup>200</sup> 2010 Amended Mining Charter section 2.6

<sup>201</sup> MPRDA, section 28(2)(c)

<sup>202</sup> 2017 Mining Charter, item 2.12; MPRDA sections 47, 98 & 99

<sup>203</sup> MPRDA, section 23(1)(h) read with s23(3)

mechanisms, it is clear that consultation and compensation for residential and agricultural relocation are compulsory obligations for mining companies to carry out.

As above, compliance with the 2010 Charter requires consistency with international best practices in terms of rules of engagement. An example of widely used international best practice is the International Finance Corporation (IFC) guidelines. The guidelines are spread out among multiple documents and are extensive in nature. The IFC Performance Standard 5 contains the following objectives regarding relocation: forced or involuntary relocation should be avoided where possible, livelihoods and standards of living of relocated people should be improved or restored, adequate compensation for the loss of assets should be provided and that relocations should be carried out with the “appropriate disclosure of information, consultation and the informed participation of those affected.”<sup>204</sup> The IFC Handbook for Preparing a Resettlement Action Plan provides a series of steps for fair resettlement: detailed maps of the area regarding population, infrastructure and environmental features, a census of the affected people, an inventory of lost and affected assets of the community and of each household, surveys of the socioeconomic impact of the relocation, analysis of the surveys to create adequate compensation and income restoration strategies and, lastly, consultation with affected parties regarding the mitigation of negative impacts and opportunities for development.<sup>205</sup>

The IFC guidelines do not require the consent of the affected parties before relocation is to occur. As is shown below, the Interim Protection of Informal Land Rights Act (IPILRA) fills this gap. It explicitly requires the consent of the majority of members of a community before that community’s land rights can be negatively affected.<sup>206</sup> However, IPILRA is often ignored by mining companies and by government. Mining companies operate as if communities’ consent is not needed for them to infringe on communities’ land rights. Communities often feel that they have no choice but to accept an offer by mining companies, even if they do not wish to relocate or feel that the alternative location, compensation or agricultural lands are inadequate.

## Grave Relocation

Mining takes place in rural areas where people bury their ancestors on the properties that they live. Thus, when residential relocation is necessary, grave relocation is often necessary as well. Grave relocation is, therefore, a frequent side-effect of mining. The primary source of legislation regarding grave relocations is the National Heritage Resources Act 25 of 1999 (NHRA).

An application for environmental authorisation must include an evaluation of the impact of ancestral grave relocation, via an EIA, and the method of relocation must be approved as part of an EMP.<sup>207</sup> Thus, environmental authorisation must be approved before ancestral graves can be moved. If graves are older than 60 years and are situated outside a formal cemetery, then additional authorisation is required. A mining company will then have to obtain a permit granted by the South African Heritage Resources Agency (SAHRA).<sup>208</sup>

In order for it to issue a permit for the relocation of a grave older than 60 years, the SAHRA must be satisfied that the mining company applying for such a permit has “made a concerted effort to contact and consult communities and individuals who by tradition have an interest in such grave or burial ground; and reached

<sup>204</sup> IFC Performance Standard 5, pgs 1-2

<sup>205</sup> IFC Handbook for Preparing a Resettlement Action Plan, pg 13

<sup>206</sup> IPILRA, section 2

<sup>207</sup> NEMA, section 24(4)(b)(iii) read with the NHRA, section 3(2)(g)

<sup>208</sup> NHRA, section 36(3)(b)

agreements with such communities and individuals regarding the future of such grave or burial ground.”<sup>209</sup> In this regard, the mining company must do extensive documentary research regarding grave origins; it must consult directly with local community organisations and/or members; it must give notice of the proposed relocation by erecting a notice board at the graves or burial grounds for 60 days and by advertisement in a local newspaper. However, if the mining company and community members are not able to agree on the terms of the grave relocation, the mining company must submit records of the consultation and the comments of all interested parties as part of the application to the SAHRA.<sup>210</sup>

There is a contradiction between the applicable legislation and resultant regulations. The regulations do not seem to require the consent of affected parties in order to relocate their graves. They do not say that agreement is not necessary, only that an applicant for a permit to relocate graves must attempt agreement, whereas the legislation seems to require actual agreement.<sup>211</sup> It seems that the regulations are at odds with the legislation. The latter is the more powerful legal object. The legal existence of the regulations flows from the existence of the legislation. The regulations should be amended to be in line with the legislation. Despite this, recent case laws shows that courts, perhaps erroneously, are willing to favour the lesser requirements of the regulations and overlook the legislation.<sup>212</sup>

“[T]here is a very real potential for the infringement of cultural and other human rights as a result of inappropriate grave relocation practices that are carried out by mining companies. Many mining companies appear to overlook or undervalue the sanctity and importance of grave relocations.”<sup>213</sup> The SAHRC has recorded that general practice by mining companies is to provide a ‘wake fee’ covering “exhumation, transportation, temporary storage, re-internment of the remains, as well as any associated cost for conducting cultural practices” but not covering additional compensation for emotional hardship.<sup>214</sup>

## Consultation or Consent?

As can be seen from the above, consultation is required at the following instances:

- When applying for a mineral right<sup>215</sup>
- When compiling a scoping report, EIA or EMP<sup>216</sup>
- When applying for a grave relocation permit<sup>217</sup>
- Consultation may be required in planning a SLP<sup>218</sup>

Also, a mining company must give the landowners or lawful occupiers at least 21 days written notice that the company intends to begin such operations before starting prospecting, mining or related operations (essentially, before moving onto the land).<sup>219</sup>

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<sup>209</sup> NHRA, section 36(5)

<sup>210</sup> NHRA Regulations GNR 548 (2 June of 2000), regulation 40(3)

<sup>211</sup> NHRA, section 36(5)(b)

<sup>212</sup> See *Langa v Ivanplats* [2017] JOL 37388 (GP)

<sup>213</sup> SAHRC. 2017. National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa, p.7

<sup>214</sup> SAHRC. 2017. National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa, p24

<sup>215</sup> MPRDA, sections 10(1)(b);16(4)(b); 22(4)(b); 27(5)(b)

<sup>216</sup> EIA Regulations, regulation 42

<sup>217</sup> NHRA, section 36

<sup>218</sup> DMR Revised Social and Labour Guidelines of October 2010, Section 3

The current practice of the DMR allows mining companies to mine on community land without local communities' permission and in terms of the MPRDA, NEMA, NWA and related regulations, there is no explicit requirement of consent. This is in spite of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), which states that "no person may be deprived of any informal right to land without his or her consent."<sup>220</sup> The granting of mineral rights and the physical act of prospecting or mining on land that is occupied by a community are certainly deprivations of that community's rights. Occupiers are deprived of the right to occupy and use the land to its full extent. Such land rights may be contained in customary law.<sup>221</sup> Regarding prospecting and mining rights, the MPRDA holds that those rights are subject to "any other relevant law."<sup>222</sup> IPILRA and customary law are relevant to the deprivation of customary communities' rights. However, the DMR and mining companies do not take IPILRA into account in the granting and operation of prospecting and mining rights.

There may be a number of reasons that cause the DMR and mining companies to believe that they do not need the consent of communities to grant mining rights and mine, respectively. First, section 4(2) of the MPRDA explicitly states: "In so far as the common law is inconsistent with this Act, this Act prevails." However, IPILRA is statutory law, not common law. Thus, the DMR and mining companies should not use this provision to justify the opinion that the MPRDA trumps IPILRA and the latter's requirement of community consent. Secondly, IPILRA community consent is not required if another law providing for the expropriation of land or land rights applies to the situation.<sup>223</sup> However, the granting of mineral rights under the MPRDA does not constitute expropriation of land or land rights. Expropriation entails that the rights impacted are acquired by the government. The MPRDA does not do this.<sup>224</sup> The granting of mineral rights is not expropriation but, rather, a deprivation of rights. Thus, the need for community consent is still required.

The need for community consent is supported by the fact that there are four international treaties that South Africa has signed which require community consent before their rights may be deprived.<sup>225</sup> There are also a number of sources of 'soft environmental laws' which require community consent and involvement in developments affecting them.<sup>226</sup> This includes a number of best-practice guidelines.<sup>227</sup> It is clear that international law requires community consent before mining can occur.

This is important for two reasons. First, section 233 of the Constitution requires that, when there are multiple interpretations of legislation available, the interpretation that is consistent with international law must be preferred. Second, as stated above, the 2010 Mining Charter requires that stakeholders must be "consistent with international best practices in terms of rules of engagement." International law and international best practice requires community consent and, thus, compliance with the Constitution and with the Mining Charter

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<sup>219</sup> MPRDA, section 5A(c)

<sup>220</sup> IPILRA, section 2(1)

<sup>221</sup> IPILRA, section 1(1)(a)(i)

<sup>222</sup> MPRDA, sections 17(6); 23(6)

<sup>223</sup> IPILRA, section 2(4)

<sup>224</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC), para 72

<sup>225</sup> The Convention on the Elimination of All Forms of Racial Discrimination (CERD); The International Covenant on Economic Social and Cultural Rights (ICESCR); The International Covenant on Civil and Political Rights (ICCPR); The African Charter on Human and People's Rights (African Charter)

<sup>226</sup> United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); Report of the Special Rapporteur on the situation of human rights and Fundamental Freedoms of Indigenous People E/CN.4/2003/90; The International Labour Organisation Indigenous and Tribal Peoples Convention, Convention 169, 1989

<sup>227</sup> Such as World Bank Environmental and Social Framework (2017)

require a mining company to seek community consent before it undertakes prospecting or mining on community's land.

At the time of writing, there was a pending court case regarding whether consent or mere consultation is required before a mining right can be granted.<sup>228</sup> Until this court case is finalised, the DMR and mining companies will continue to operate as if community consent is not required, only adequate consultation.

The DMR has published Consultation Guidelines<sup>229</sup> in which it states that mining companies undertaking consultation must meet with the affected community. Such meetings must include information on what the prospecting or mining operation will entail, consulting with "a view to reach an agreement to the satisfaction of both parties." In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*,<sup>230</sup> the Constitutional Court emphasized the importance of "good faith" consultations attempting to reach an accommodation and "full information" when notifying surface owners and occupiers of the consequences of mining on their land. The SAHRC has found that the DMR "has not been sufficiently involved in community consultation processes and there is insufficient time given to communities to undertake decision making processes as required by their customary law."<sup>231</sup>

Often, the strategy of mining companies to secure rights to mine in the former homeland areas has involved their incorporation of "chiefs as junior partners" which has enabled them to "join the ranks of the BEE elite."<sup>232</sup> Some chiefs have been co-opted by mining companies and there is a prevailing belief amongst mining companies and the DMR that consulting with chiefs is sufficient for complying with consultation requirements in the legislation. This can be seen by the emphasis on consultation with traditional leaders in the DMR's consultation guidelines and lack of focus on consulting with broader community structures or individual members.<sup>233</sup> The DMR's stance was confirmed by the Chamber of Mines' submission to the High Level Panel, where it stated that the DMR to transact with traditional authorities, rather than with individuals or other representative structures.<sup>234</sup> However, traditional leaders do not have the "sole authority to represent rural people in negotiations with mining houses"<sup>235</sup> and bilateral agreements with mining companies, without broader community consultation, are not valid.

## Compensation

Section 54 of the MPRDA provides for compensation to be paid to mining-affected communities that object to their land being used for mining. The section applies in situations where a mining company has notified the Regional Manager that the landowner and/or lawful occupiers are preventing the prospecting or mining

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<sup>228</sup> Duduzile Baleni & 128 Others // Minister – Department of Mineral Resources & 6 Others (High Court, Pretoria) - Case Number: 73678/2016

<sup>229</sup> Department of Mineral Resources: Guideline for Consultation with Communities and Interested and Affected Parties, 2008

<sup>230</sup> 2011 (4) SA 113 (CC)

<sup>231</sup> SAHRC. 2017. National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa, p.9

<sup>232</sup> CAPPs, G. 2015. Labour in the time of platinum. *Review of African Political Economy*, 42, p.504

<sup>233</sup> Department of Mineral Resources: Guideline for Consultation with Communities and Interested and Affected Parties, 2008

<sup>234</sup> Report Of The High Level Panel On The Assessment Of Key Legislation And The Acceleration Of Fundamental Change. 2017, pp.490

<sup>235</sup> Ibid., p.264

rights holder from entering the land.<sup>236</sup> Section 54 also applies if the landowner and/or lawful occupiers have notified the Regional Manager that they have suffered or are likely to suffer any loss or damage resulting from prospecting or mining.<sup>237</sup> In both situations, if the Regional Manager decides that the surface landowner and/or lawful occupiers have suffered or are likely to suffer loss or damage as a result of the prospecting or mining operations, the Regional Manager will direct the parties to negotiate and try to reach an agreement regarding adequate compensation.<sup>238</sup> If the parties cannot agree on compensation, the matter must be arbitrated<sup>239</sup> or litigated in court. The arbitrator or court will determine the amount of compensation payable.<sup>240</sup> This section does not provide for a surface rights holder to apply to stop prospecting or mining while negotiations take place.

Most compensatory deals do not go through the above process; DMR officials are not normally involved. The mining company and community negotiate, on their own, at the same time that the mining company begins operations on community land, without the community being able to stop the mining company. This process predominantly takes place on unequal footing, where the mining affected community feels that it must accept what the mining company is offering or risk losing compensation altogether. Compensation is often inadequate and often does not account for the loss of agricultural land by the affected communities and individuals, often their 'main means of livelihood.'<sup>241</sup> Compensation for the physical worth of the land alone is often "below what is considered to be appropriate in terms of global industry standards."<sup>242</sup>

"[T]here are no formal guidelines or oversight provided for the calculation of compensation and the finalisation of compensation agreements... [R]elocations are often carried out before compensation agreements are reached on surface land leases, livestock, crops or housing."<sup>243</sup>

The Court in *Haakdoornbult Boerdery CC and Others v Mphela and Others*<sup>244</sup> stated that compensation is intended to put the disposed in the same position as if the land had not been taken away and that fair compensation is not always the same as the market value of the property. Market value is only one aspect that must be considered. "Western concepts of expropriation and compensation are not always suitable when dealing with community held tribal land."<sup>245</sup> Further, the SAHRC found that access to assets such as land, social networks and natural resources must be considered during the calculation of fair compensation and that "once-off payments and new housing structures will likewise not provide sustainable opportunities to families."<sup>246</sup>

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<sup>236</sup> MPRDA, section 54(1)

<sup>237</sup> MPRDA, section 54(7)

<sup>238</sup> MPRDA, section 54(3)

<sup>239</sup> Under the Arbitration Act, 1965 (Act No. 42 of 1965)

<sup>240</sup> MPRDA, section 54(4)

<sup>241</sup> CURTIS, M. 2008. Precious metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa. Johannesburg: ActionAid., p.5

<sup>242</sup> SAHRC. 2017. National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa, p.6

<sup>243</sup> Ibid.

<sup>244</sup> 2008 (7) BCLR 704 (SCA)

<sup>245</sup> Ibid., para 48

<sup>246</sup> SAHRC. 2017. National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa, p.19

# Traditional leadership

## History of Traditional Leadership

Preliminarily, it must be stated that this section provides a general overview of the history of traditional leadership in South Africa. The nuances of the history of traditional leadership and customary law cannot be fully detailed in this publication.

In the mid to late 1800s, the British colonial government formally established a system of indirect rule over 'native reservations' – areas of predominantly indigenous people. They did this by formally recognising traditional leaders and establishing 'native administrations' of which traditional leaders formed a part. They also established local 'native courts.' This created the impression of independence and self-governance. Indigenous communities could govern themselves except where such governance conflicted with colonial interests and rules. Chiefs' power was elevated above what it was in precolonial times, as they now had greater decision-making powers regarding property and disputes under colonial law. However, chiefs' power was curtailed by the colonial governor of the area who was the 'supreme chief,' the 'ultimate authority'.<sup>247</sup> These strategies were aimed at providing legitimacy to the colonial government as it co-opted traditional leaders, while the British colonial government still ruled, in effect. The British also sought to divide the majority population into tribes, rather than forming unified force.

"The view that traditional leaders historically held ultimate decision-making power in South African traditional communities has been shown to be erroneous. 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. 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. 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."<sup>248</sup>

During the Union period of 1910-1947, the Black Administration Act 39 of 1927 retained the paramountcy of the white authority over customary rule. The Governor-General had the power to 'recognise or appoint any person as a chief or headman in charge of a tribe or of a location, and ... to make regulations prescribing the duties, powers and privileges of such chiefs or headmen' as well as to 'depose any chief so recognized or appointed'. The Black Administration Act also subjugated married women to be perpetual minors – seen as children in the eyes of the law and excluded from positions of power or decision-making.<sup>249</sup>

During the apartheid period of 1948-1994, the white minority government extended the concept of indirect rule further. A key step in creating apartheid was the Black Authorities Act 58 of 1951. Under this Act, the State President held the power to establish 'tribal authorities' to govern 'tribes'.<sup>250</sup> These 'tribal authorities'

<sup>247</sup> Himonga, C., *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives*, 2014 (Himonga 2014), section 1.2.3

<sup>248</sup> Joanna Pickering & Thabiso Nyapisi, 2017, In Good Company 2nd Edition - Conversations around transparency and accountability in South Africa's extractive sector by Open Society Foundation for South Africa (Cape Town: OSF), 28

<sup>249</sup> Himonga 2014, section 1.3.3

<sup>250</sup> Black Authorities Act, sections 2 &3

could only exercise powers and functions that were assigned to them by the Governor-General.<sup>251</sup> Initially, there was widespread opposition to the imposition of Bantu authorities, which resulted in rebellions in many rural areas. “Those traditional leaders who supported the Bantustan agenda were rewarded with large areas of land, while those who resisted were stripped of their power or relegated to headman status and confined to small areas. In many places, disputes about the apartheid manipulation of ‘tribal’ boundaries and the elevation and imposition of compliant leaders continue to this day.”<sup>252</sup>

The Bantu Self Governance Act 46 of 1959 and a number of other Acts<sup>253</sup> created the Bantustan system where 10 ‘homelands’ were created out of the existing reserves, based on language and culture. These ‘homelands’ Bantu authorities were created in the ‘homelands’ with the idea that the ‘homelands’ would become independent of South Africa, with independent governments. Their citizens would no longer be South African citizens but, rather, be citizens of the ‘independent homeland.’ Only the Transkei, Ciskei, Bophuthatswana and Venda ‘homelands’ became formally independent, although their actual independence was farcical – they were always beholden to the South African government militarily, financially and politically. This was the position until 1993 when, pursuant to the Interim Constitution, the assets and liabilities of the homelands were transferred to the South African Government and the homelands and their residents were formally reincorporated into South Africa. The following section shows how traditional leadership was not overhauled in post-democracy South Africa, retaining most of its features, subject to some changes.

## ***Post-TLGFA traditional leadership***

There are now three main sources of law regarding traditional leadership: the Constitution, the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) and living customary law. Living customary law is the non-legislated body of laws and customs that a customary community uses to regulate its own affairs. It is flexible and “develops over time to meet the changing needs of the community.”<sup>254</sup> However, living customary law has been curtailed by the TLGFA read with section 211(2) of the Constitution, which states that “[a] traditional authority that observes a system of customary law may function subject to any applicable legislation.”<sup>255</sup> The Traditional and Khoi-San Leadership Bill is currently being processed but the TLGFA is the only relevant legislation at this time.

In terms of the TLGFA, the above-mentioned ‘tribal authorities’ of apartheid are now called ‘traditional councils,’<sup>256</sup> although their functions and scope have not changed significantly. A traditional leader that was recognised under previous (apartheid) legislation continues to be recognised in terms of the TLGFA unless their status was revoked before the TLGFA came into effect.<sup>257</sup> Thus, the traditional councils and leadership structures have remained largely unchanged since apartheid. A ‘headman’ or ‘headwoman’ is defined, in the TLGFA, as “a traditional leader who is under the authority of, or exercises authority within the area of jurisdiction of, a senior traditional leader in accordance with customary”.<sup>258</sup> A ‘senior traditional leader’, in terms of the Act, is someone who is a “traditional leader of a specific traditional community who exercises

<sup>251</sup> Black Authorities Act, section 4(1)(d)

<sup>252</sup> Claassens, A. “Contested power and apartheid tribal boundaries: the implications of ‘living customary law’ for indigenous accountability mechanisms.” *Acta Juridica*, 2011 (1), 187

<sup>253</sup> Such as the Land Act

<sup>254</sup> *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC), at 35

<sup>255</sup> The Constitution, section 211(2)

<sup>256</sup> TLGFA, section 28(4)

<sup>257</sup> TLGFA, section 28(1)

<sup>258</sup> TLGFA, section 1

authority over a number of headman or headwoman in accordance with customary law, or within whose area of jurisdiction a number of headmen or headwomen exercise authority.”<sup>259</sup> These are normally called chiefs or chieftianesses. A ‘king’ or ‘queen’ is defined as someone “under whose authority, or within whose jurisdiction, senior traditional leaders exercise authority in accordance with customary law”.<sup>260</sup> A ‘royal family’ is defined as “the immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom.”

In general, traditional councils are empowered to administer a traditional community’s affairs according to custom and tradition and aid the traditional leader in carrying out their duties. Their role is predominantly supportive in nature.<sup>261</sup>

If a traditional community has been recognised by the Premier of a Province, the community must establish a traditional council. Traditional councils will only be officially recognised if they comply with certain requirements, such as that a third of the membership of a council must be women and 40% of the membership must be democratically elected.<sup>262</sup> These are drastic changes and, mostly, these requirements have not been met, which would render most traditional councils invalid. A deadline of one year was initially set for these requirements to be met. This deadline has been extended several times by provincial laws enacted in terms of the TLGFA.<sup>263</sup> However, this deadline lapsed in 2011. An amendment Bill<sup>264</sup> has been formulated that seeks to extend the deadline again and to empower the Minister of Traditional Affairs to ‘take necessary steps’ to ensure that the transformation measures of section 3(2) are complied with if a council is not compliant within one year of the Amendment. At the time of writing, the Bill was currently before the National Council of Provinces, having passed by the National Assembly. Both houses of parliament must pass the Bill before it becomes legislation.<sup>265</sup>

However, the matter is complicated by the *Pilane* judgment. Living customary law is still relevant to traditional leadership as the status and role of traditional leadership is only recognised if it is in accordance with customary law.<sup>266</sup> In *Pilane v Pilane*,<sup>267</sup> it was stated that “statutory authority accorded to traditional leadership does not necessarily preclude or restrict the operation of customary leadership that has not been recognised by legislation.”<sup>268</sup> Thus, it seems that traditional leadership not recognised by legislation may still undertake valid functions under living customary law. It is unclear whether an invalid traditional council can take on non-customary functions governed by statute which require statutorily constituted bodies, such as the creation of trusts.

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<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

<sup>261</sup> See the long list of functions in TLGFA, section 4(1)

<sup>262</sup> TLGFA, section 3

<sup>263</sup> Claassens, A. and Budlender, G., 2013. Transformative Constitutionalism and Customary Law. Constitutional Court Review, 3, p.81

<sup>264</sup> The Traditional Leadership and Governance Framework Amendment Bill [B8-2017]

<sup>265</sup> Fact Sheet on the Traditional Leadership and Governance Framework Act & 2017 Amendment Bill, 2017, Land & Accountability Research Centre [Accessed online]

[http://www.larc.uct.ac.za/sites/default/files/image\\_tool/images/347/FactSheets/Fact%20sheet\\_TLGFA\\_Dec%202017%20updated\\_final.pdf](http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/FactSheets/Fact%20sheet_TLGFA_Dec%202017%20updated_final.pdf)

<sup>266</sup> The Constitution, section 211(1)

<sup>267</sup> 2013 (4) BCLR 431 (CC)

<sup>268</sup> Ibid. at 44

Recognition of traditional communities can be withdrawn if the community requests the Premier to withdraw such recognition. Alternatively, if the Premier is asked to reconstitute the traditional communities because of a mis-classification by colonial or apartheid authorities, the Premier may do so if they feel it is necessary.<sup>269</sup> This Act does not contemplate the possibility of a minority group of community members requesting to withdraw and form their own traditional community for reasons other than historical mis-classification. This is, seemingly, contrary to section 235 of the Constitution, which states that communities “sharing a common cultural and language heritage” have the right to self-determination.

The TLGFA does not allow for much variation of the structures of traditional leadership. The Act does not provide guidance for when there is only one traditional leader of a community, e.g. there are no headman or women underneath a chief or no chief above a headman or women. The Act also assumes that there must be a system of traditional leadership in order for the community to live under customary law – a traditional community is only recognised if it is ‘subject to a system of traditional leadership’ and if it functions under a system of customary law.<sup>270</sup> In that away, it does not allow for living customary law to be developed. However, communities can develop their customary law to exclude traditional leadership. In *Shilubane* it was found that a community may develop its living customary law and traditional leadership rules even if such development is inconsistent with the traditions pre-dating the Constitution.<sup>271</sup>

If there is a vacancy in a traditional leadership position, the royal family concerned must identify a suitable candidate for appointment to the position and notify the Premier of the respective province of their choice. The Premier must then recognise the traditional leader in accordance with the applicable provincial legislation, which must require that the Premier publish a notice in the *Provincial Gazette* and issue a certificate to the identified person recognising them as the respective traditional leader. The Premier must also inform the provincial house of traditional leaders of such recognition.<sup>272</sup>

Disputes or contests of traditional leadership must be referred to the Commission on Traditional Leadership Disputes and Claims ('the Commission'), which has the power to investigate the dispute<sup>273</sup> and must decide the matter in terms of the “customary law and customs of the traditional community as they were when” the dispute arose.<sup>274</sup> The Commission then makes recommendations in line with its decision to the Premier. Thereafter, the Premier must withdraw the certificate of recognition and publish a notice regarding the removal in the *Provincial Gazette*.<sup>275</sup> Finally, the royal family concerned is to elect the new traditional leader to be recognised by the Premier.<sup>276</sup> However, the TLGFA is problematic as it does not contemplate a situation where there is no royal family to elect the new traditional leader, or where the royal family does not hold such power, in terms of customary law. It does not account for variations in customary law between communities.

Traditional leaders must perform the functions that the traditional community’s ‘customary law and customs’ and applicable legislation dictate.<sup>277</sup> Legislation may be enacted that transfer certain non-traditional

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<sup>269</sup> TLGFA, sectin 28(3)

<sup>270</sup> TLGFA, section 2

<sup>271</sup> *Shilubana*, at para 45

<sup>272</sup> TLGFA, section 11

<sup>273</sup> TLGFA, section 21(1)(b), read with section 25(2)

<sup>274</sup> TLGFA, section 25(3)(a)

<sup>275</sup> TLGFA, section 12(2)

<sup>276</sup> TLGFA, section 11(1)

<sup>277</sup> TLGFA, section 19

government functions to traditional leaders, such as functions regarding service delivery.<sup>278</sup> However, no such legislation or transfer has been enacted. The Communal Land Rights Act 11 of 2004 (CLRA) attempted to do so, by transferring the powers and duties of land administration committees to traditional councils.<sup>279</sup> However, this Act was declared unconstitutional on procedural grounds and consequently repealed.<sup>280</sup>

Traditional leaders do not have the power to administer land or represent their communities regarding deprivations of land rights, unless a respective community has given its consent for such deprivation, if the land is not held on a communal basis.<sup>281</sup> The SAHRC and High Level Panel have documented the common misconception amongst traditional councils that they are owners of communal land and that the consent of traditional councils is needed for mining to take place, rather than that of the community.<sup>282</sup> This goes against IPILRA. If the land is held on a communal basis, then the traditional leader or traditional council may only deprive the community of their land rights if such a decision is taken in accordance with the custom and usage of that community and a majority of community members have voted for such a deprivation.<sup>283</sup> Traditional leaders do not have the power to negotiate or transact on behalf of their communities without consulting their communities and they do not have the right, in terms of legislation, to be their sole representatives for consultation pursuant to mining.<sup>284</sup> Traditional authorities do not have the right to ban community meetings in opposition to recognised traditional leadership or decisions taken by recognised traditional leadership.<sup>285</sup>

## Access to Information

The Constitution holds that everyone in South Africa has the right to access any information held by the state and any information held by a private body as long as the information held by that private body is required for the exercise or protection of any rights.<sup>286</sup> However, as with all rights in the Constitution, this right may be limited if it is reasonable and justifiable to do so.<sup>287</sup> The main piece of legislation dealing with access to information is the Promotion of Access to Information Act 2 of 2000 (PAIA). It holds different requirements for public and private bodies. Examples of public bodies are government departments, branches of government and state-owned institutions. Examples of private bodies are individuals and companies

## Public Bodies – The Department of Mineral Resources

PAIA states that a requester must be given access to information held by a public body, like the DMR, if the requester complies with procedural requirements provided in the Act and if there are no valid grounds for refusing such access. From the outset, the requester does not have to provide reasons for requesting access to

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<sup>278</sup> TLGFA, section 20(1)

<sup>279</sup> CLRA, Section 21

<sup>280</sup> *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC), at 109

<sup>281</sup> IPILRA, section 2(1)

<sup>282</sup> SAHRC. 2017. National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa, pp.57-58; Report Of The High Level Panel On The Assessment Of Key Legislation And The Acceleration Of Fundamental Change. 2017, pp.487-488

<sup>283</sup> IPILRA, section 2(2) read with section 2(4)

<sup>284</sup> *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC)

<sup>285</sup> *Ibid.*, at 50-51

<sup>286</sup> Constitution, section 32(1)

<sup>287</sup> Constitution, section 36

information in order to gain access to information held by public bodies. One does not have to show a special interest in the record.<sup>288</sup>

PAIA holds that access to information held by a public body must be refused "if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual." However, there are a number of exceptions to this prohibition, only a few of which are relevant to accessing mining records. Information may still be given to the requester if the information was originally provided to the public body by an individual who was informed by the public body that the information might be made available to the public.<sup>289</sup> Access to information must also be refused if the record contains trade secrets of a private body or if disclosing the information is likely to cause harm to the financial or commercial interests of the third party. However, such information may still be provided to the requester if the information was obtained as part of an investigation by the private body and its disclosure would reveal a 'serious public safety or environmental risk'<sup>290</sup> or if the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law.<sup>291</sup>

The DMR is required by PAIA to provide a guideline for accessing information that it holds and is required to update such guide annually.<sup>292</sup> This guideline is instructive of procedures for requesting information as well as detailing which types of records should be freely accessible on the DMR's website. The guideline can be found at the following web address: <http://www.dmr.gov.za/portals/0/PAIA.pdf>

The guideline contains a list of records for which the DMR cannot refuse access for any reason. This list of records accounts for the majority of information held by the DMR that is relevant for mining affected communities or organisations assisting mining affected communities, including: SLPs, Mining Works Programmes, Environmental Management Programmes, Environmental Authorisations, financial provision for rehabilitation made by mining companies, proof of consultations, title deeds, details of holders of mineral rights and the contents of prospecting and mining rights.<sup>293</sup> The Guideline states that a requester must fill out a form marked 'Annexure A' to the Guideline in order to obtain access to the above information. Despite the form stating that it only applies to interested and affected parties, occupiers and landowners, the Guideline states that above information is voluntarily available and 'does not require an application process for access.' The objective of the form is purported to merely be to 'facilitate the copying of such records, to monitor service delivery and to keep appropriate records and statistics.'

Thus, even if a person does not qualify as an interested an affected party, they should be granted access to the above information. They also should not be required to provide a reason for the above information. This is in line with the strong right of access to records of public bodies detailed in PAIA and the Constitution. The Annexure A form is reproduced on the next page of this document. The poor quality of the copy is as provided by the DMR. It also has not been updated to include the information listed as 'voluntarily available' in section 5.1.5 of the guideline. 'Voluntarily available' information should be listed on the form under the heading 'additional information required'.

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<sup>288</sup> PAIA, section 11

<sup>289</sup> PAIA, section 34

<sup>290</sup> PAIA, section 36

<sup>291</sup> PAIA, section 46

<sup>292</sup> PAIA, section 14

<sup>293</sup> DMR PAIA Guideline 2017, section 5.1.4. [Online] Available: <http://www.dmr.gov.za/portals/0/PAIA.pdf> (Accessed on 14 May 2018)

The 'Annexure A' form can be sent by post to the following addresses:

The Information Officer  
Department of Mineral Resources  
Private Bag X59  
ARCADIA  
0007

OR      The Deputy Information Officer  
Chief Director: Legal Services  
Department of Mineral Resources  
Private Bag X59  
0007

The 'Annexure A' form can also be sent by email to:

The Information Officer  
Adv. T Mokoena  
[nwabisa.qwanyashe@dmr.gov.za](mailto:nwabisa.qwanyashe@dmr.gov.za)  
[tsepo.motsuenyane@dmr.gov.za](mailto:tsepo.motsuenyane@dmr.gov.za)

OR      The Deputy Information Officer  
Mr P Alberts  
[pieter.alberts@gov.za](mailto:pieter.alberts@gov.za)  
[diphoko.modiselle@dmr.gov.za](mailto:diphoko.modiselle@dmr.gov.za)

ANNEXURE A

DEPARTMENT OF MINERAL RESOURCES

REQUEST FOR ACCESS TO RECORDS

(In terms of section 18(1) of the Promotion of Access to Information Act, 2000, Act No. 2 of 2000)

This document may be used by *landowners and or lawful occupiers of land, or any other interested or affected party, in terms of the Minerals and Petroleum Resources Development Act, 2002 (Act No 28 of 2002)* who wish to obtain information from DMR. In terms of the Departmental Information Manual abovementioned parties may obtain certain information automatically and the process for Access to Information is not applicable to them. Such applicants for information are however advised to submit proof of ownership, etc. In cases where the applicant is representing a Land owner, Tribal Authority, Company, etc, authorization to represent will also be required, and need to be attached to this document.

Name and Surname:.....

Representing:.....

Short description of information required and reason(s) for request:

.....  
.....  
.....  
.....  
.....

*Property description:*

1. .....
2. .....
3. .....
4. .....
5. .....

*DME Reference No:*

1. .....
2. .....

Please indicate information required

- Fully completed application form DME 274
- Details of the land or area applied for (Plan)
- Prospecting work programme \*

- Proof of financial and technical competence or access thereto \*
- Proof of consultation with interested and affected parties
- Environmental Management Plan \*
- Social and Labor Plan \*
- BFF documents \*
- Shareholders or Joint Venture Agreements \*
- Title deed(s) or certified copy, copies in respect of land
- Details of existing rights within R.S.A. and past compliance
- Status of identified land
- Details on holder of prospecting or mining rights in respect of specific land

\* Any request for this information will be forwarded to the 3<sup>rd</sup> party concerned

Additional information required!!

- .....
- .....
- .....
- .....
- .....
- .....

The Requester may have to pay a prescribed administrative fee. Proof of deposit should be submitted along with the request form. Currently the fee is R35.00 and can be paid via deposit into the following account:

ABSA Bank

Branch code: 632005

Account Number: 406 176 9154

Reference Number: 01005629AI09

The DMR has 30 days to reply to a request. If they do not reply to the request or if it is denied, the requester has 60 days to submit an appeal to the information officer (as above). The submission must state the reasons for the appeal and may include any other relevant information known to the appellant. If the appeal is denied or if there is no response within 30 days, the requester may take the decision or lack of decision on review by applying to the High Court within 180 days from the date of the decision or the end of the previous 30 days allotted for the department's reply regarding the appeal.<sup>294</sup> A requester should contact an attorney for assistance in such litigation.

## **Private Bodies – Mining Companies**

As well as complying with procedure, a party requesting access to information from a private body has to show that the information is required for them to exercise or protect any rights.<sup>295</sup> This is a hurdle not present with information held by public bodies, as above. Further, private bodies can refuse access for the same reasons stated above: to protect the reasonable privacy or commercial interests of third parties. Private bodies may also refuse access to their information in order to protect their own trade secrets, contractual negotiations, commercial competition and other commercial interests.<sup>296</sup> However, a private body cannot use such reasons for denying access if the disclosure of the requested information would show evidence of “a substantial contravention of, or failure to comply with, the law; or imminent and serious public safety or environmental risk; and the public interest in the disclosure of the record clearly outweighs the harm” to the private party resulting from disclosure.<sup>297</sup>

Reg 26(h) of the EIA Regulations states that, from 7 April 2017, “An environmental authorisation must specify ... a requirement that the environmental authorisation, approved EMPr, any independent assessments of financial provision for rehabilitation and environmental liability, closure plans, where applicable, audit reports including the environmental audit report contemplated by regulation 34, and all compliance monitoring reports be made available for inspection and copying— (i) at the site of the authorised activity; (ii) to anyone on request; and (iii) where the holder of the environmental authorisation has a website, on such publicly accessible website.”

Large private bodies should have their own prescribed form of accessing information from them. If they do not, however, there is a template form in the PAIA Regulations, ‘Form C’. The essential information that needs to be included in any request is:

- Particulars of the private body
- Particulars of requester

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<sup>294</sup> Promotion of Administrative Justice Act 3 of 2000 (PAJA), section 7

<sup>295</sup> Constitution, section 32(1)(b)

<sup>296</sup> PAIA, section 68(1)

<sup>297</sup> PAIA, section 70

- Particulars of person on behalf of whom the request is made (if applicable)
- Particulars of the record (description, reference number (if applicable))
- Applicable fees
- The form of access that is requested
- The particulars of the right that is sought to be exercised or protected

The requester must sign every page in the request submission.

If a private body refuses access to a record, the requester will have to go to a court to obtain an interdict mandating the private body to provide the requester with access. There is a 30-day time limit within which the requester can bring such an application to a court.<sup>298</sup>

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<sup>298</sup> PAIA, section 78

# CONCLUSION

## Summary and Analysis of the Mapela Case Study

The history of the Mapela community has been filled with land and leadership crises. Colonialism and apartheid brought forced removals and an overconcentration of the black Mapela population, placing great pressure on traditional rural livelihoods. Traditional Leadership suffered by being subordinated under the Lebowa government and from internal succession battles. The tenure security and governance of the Mapela people was weakened over time. The Mapela community's history is the norm for rural traditional communities in South Africa. In the post-constitutional South Africa, a society in pursuit of equality and justice, it is clear that the rural Mapela community's land and political rights should be prioritised. Thus, it is a bitter irony that the Mapela community, like many other rural traditional communities in South Africa, are finding their land tenure increasingly insecure and their political rights increasingly ignored as a result of mining companies' desire to mine on their land. According to the High Level Panel, "there is a widespread sentiment that the laws that do exist are not implemented and rural peoples continue to have their constitutional rights trampled."<sup>299</sup>

According to the DMR and mining companies, the consent of landowners or lawful occupiers is not needed in order for a mining right to be granted and for mining to go ahead. They believe that all that is required is that landowners or occupiers are consulted and compensated for the infringement of their land rights and damage to their livelihoods. This viewpoint is consistent with the MPRDA, which does not require landowner or occupier consent. However, as has been shown, this viewpoint disregards IPILRA and customary law, both of which require that the community's consent is required before their land rights are infringed.

This report has shown that, in spite of varied consultation processes undertaken by different actors, consultation has often not brought about the expected outcomes for community members. Consultation has been overshadowed by the aggressive means by which Anglo's mining operations have expanded and encroached on Mapela land before consultation, relocation or compensation processes have been completed. There has certainly been no equality of bargaining power for Mapela residents. There is insufficient information on consultation carried out prior to Anglo obtaining its mining rights and environmental authorisation in order to assess on the adequacy of this consultation.

Regarding relocation of affected villages, consultation methods have excluded existing customary law methods of consultation, favouring methods of corporatisation alien to the everyday lives of most Mapela residents. They have also featured financial incentives for community members involved in organising consultation processes (as part of section 21 companies and 'task teams'), which has co-opted community members and disabled them from being effective representatives of the community in consultations and negotiations, as well as sowing internal divisions. ActionAid research highlighted concerns about the extent to which the section 21 companies were regarded as legitimate or representative. The report identified a range of other local structures which, it argued, had a greater following amongst local residents. However, these were marginalised in the relocation negotiations as Anglo insisted on working through the section 21 companies which it had established. Only after much protest and input from outside organisations did this attitude change. Anglo has since acknowledged that it was unwise to use financial incentives and has stated its

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<sup>299</sup> Report of The High Level Panel on the Assessment of Key Legislation and The Acceleration of Fundamental Change. 2017, pg 265

intent to bring a greater social science presence into its projects in order to bring greater equity to its projects.

While no ‘forced removals’ have been recorded regarding the relocation of entire villages (Ga-Pila and Mohlotlo), the removals have certainly been coerced. Anglo has proceeded with mining, undertaking blasting in close proximity to people’s houses, fenced-off agricultural land and applied verbal pressure to residents of villages that it requires to be relocated. Residents that have refused to relocate, despite these pressures, have suffered terribly as mining has continued around or in close proximity to their homes. In Skimming (which has not been relocated) people were forcibly removed when they moved onto land historically used by them for forestry and grazing but which is now being used by the mine.

Anglo’s handling of grave relocations was fraught with problems. In general, the company and its agents showed a lack of care and respect for the culture, religion and tradition of the Mapela community. Again, there were problems regarding the adequacy of consultation prior to the relocation of graves, with some residents reporting being coerced into consenting to Anglo’s terms for relocation and compensation. Many residents have lost easy access to their families’ graves. Many are disgruntled by the amount of compensation (R1500) provided by Anglo. Some residents complained that their families’ graves were not moved and have been lost under mine dumps. There are indications that the methods of relocation were illegal.

Environmental effects on individuals and on community include blasting (cracking, dust and noise) and water contamination. Environmental authorisation is concerned with the social, economic and environmental effects of proposed projects. Without access to the EA, it is unclear whether there Anglo is flouting the terms of its environmental authorisation. However, if the cracking, dust, noise and water contamination allegations are true, then it is clearly flouting its environmental duties of care. Further, the economic and social vulnerability of the Mapela community has been increased by Anglo’s mining. Due to a loss of access to agricultural resources and a lack of employment in mining, Mapela residents are now more dependent on social grants.<sup>300</sup> Mining has also disrupted the social fabric, causing internal divisions and uprooting entire communities. There are no readily available statistics regarding the influx of job seekers into the area, which can cause significant problems by increasing demand for food, housing and services and driving up the cost of living, as well as decreasing the security of local residents. The negative effects of mining need to be properly evaluated in EIAs and environmental authorisations should not be granted if the negative effects on local communities are too large.

In general, compensation has often been inadequate or inappropriate. Ga-Pila residents received R5000 in 2001 as base compensation for the inconvenience and trauma of relocating. The village also suffered a large loss of agricultural land. Between 2008 and 2014, R20 000 was paid as base compensation to Mohlotlo members. And more was paid for loss of agricultural assets. The difference in payment is much more than is accounted for by inflation. Agricultural land that has been provided in recompense for that which has been lost is smaller, lower in quality and was not prepared for cultivation before relocation occurred. A further problem may be that compensation has been paid in once-off payments; there is no system of gradual payments over time. As stated by the SAHRC, access to assets such as land, social networks and natural

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<sup>300</sup> Mtero, F. (2017). Rural livelihoods, large-scale mining and agrarian change in Mapela, Limpopo, South Africa. *Resources Policy*, 53, 190-200

resources must be considered during the calculation of fair compensation and that “once-off payments and new housing structures will likewise not provide sustainable opportunities to families.”<sup>301</sup>

Mining has had an unequal impact on women and youth, especially regarding relocation. Individual consultations occurred with heads of households – the majority of whom are men. Heads of households also received compensation payments. Thus, women and youth were excluded from consultations and compensation. Women and youth are also less likely to be employed by Anglo for permanent jobs in mining.

Anglo’s Social and Labour Plan (SLP) is extensive: R136 million worth of development projects has been outlined for the Mapela area. However, only 213 community jobs are earmarked for creation between 2015 and 2020 and almost all of the new jobs will be temporary in nature. There is no evidence of Anglo widely consulting with community members regarding projects and implementation of the SLP. Many of these projects may be inappropriate. On average, a maximum of five of residents from each village are employed by the mine, currently, which is far below what residents expected. Likewise there seems to be no system for reporting on and evaluating progress to assess whether the SLP targets have been met.

The above problems have caused widespread disgruntlement with the community. Many protests have erupted and alternative political groups have grown out of unaddressed grievances and a seeming conflict of interest by the previous Kgoshi, David Langa. Traditional leadership has been seen to be complicit in promoting the interests of mining. The community has put up substantial resistance to mining despite internal divisions. Protests have been violent, with large-scale damage to property and protesters have suffered harsh repression from police and mining security. The volatility has created a greater breakdown in trust but has pressured the mine to try to find amicable solutions in order to keep its operations running.

In trying to allay some of the concerns and grievances related to the numerous negative effects of its mining, in 2016, Anglo created a settlement agreement worth R175 million. This money was to be managed by a trust. However, again, Anglo did not consult with community members, only with Kgoshi David Langa. Despite major concerns about the accountability of the trust and agreements, on behalf of the community, regarding the expansion of Mogalakwena mine, Kgoshi signed the agreement. However, since then, he has been replaced by Kgoshi Hans Langa, who has been amenable to changing the trust structure. Now, the trust includes a majority of community-elected trustees and greater accountability measures. The trust empowers customary law structures to elect trustees.

Part of the problem in finding solutions is the plethora of fora of representative and interest groups which the mine must consider: traditional leadership, section 21 companies, trusts and non-profit companies, Mapela Executive Committee and other splinter representative groups, task teams, lawyers and other outside organisations. The multiplicity of fora and actors produces an unfocused more complicated landscape than if there were more coherence in representativity in the community. Many of these have been created by the mine and many of these have been born out of a history of exclusion from representation and consultation.

It is notable that mining law contains very little role for local government officials. They are treated as interested and affected parties with which the mine must operate and are involved in approving zoning licenses. However, they have little authority over whether mining occurs and how it occurs in an area. This is surprising, given the harsh local effect that mining often has on communities, as shown in this case study of

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<sup>301</sup> SAHRC. 2017. National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa, p.19

Mapela. Local municipalities should have greater control in protecting the interests of their constituencies. They should have a greater say in whether mining should occur in their municipality or not.

This report has provided a substantial amount of information on mining and its effects on the Mapela community, as well as key socio-legal considerations at play. It is questionable whether the total amount of compensation paid by Anglo is sufficient to cover the negative effects and outlined above. However, the amount of information available on mining effects on the Mapela community and the success that the Mapela community has had in regaining some benefit from mining has been relatively successful. They have been able to have their resistance to mining widely publicised and have garnered powerful legal and social support for their cause. They have been able to retain pockets of strong unity despite internal divisions being sown. Despite the numerous negative impacts that mining has caused on Mapela, the community has received moderate success in regaining some benefit from mining.

The question is, can other mining-affected communities that do not have the same strengths as Mapela find as much success or resist mining and its effects as much? What if the community is not as big or form strong representative groups, or as politically active? What if the community is unable to secure adequate legal support? Such communities will likely find their precarious legal position devastating, in the face of a powerful and repressive mining company and government. Their precarious legal position needs to be amended. Below are some recommendations for policy and legislation which will aid all mining-affected communities.

## Policy Recommendations:

### Consent and compensation:

In *Baleni v Department of Mineral Resources* (in the Pretoria High Court, case number: 73768/2016), the High Court judge has been asked to decide whether the DMR and mining companies are correct in ignoring IPILRA or if they must obtain customary law communities' consent before mining goes ahead. This case will likely be appealed no matter the outcome and go all the way to the Constitutional Court to be resolved; it could take up to 3 years to complete. Even if the courts resolve that consent is not required, the legislature and executive should act to make the mining process more equitable. The legislature could require, for instance, that relocations and adequate compensation must occur before mining may start, so that communities are able to negotiate without mining encroachment on their land. This could be done by the executive via a policy which states that a term must be included by the DMR in every mining right and/or environmental authorisation that relocation and compensation must occur before any mining commences.

The DMR's consultation guidelines are inadequate and need to be updated to provide greater clarity and emphasis of consulting with individual community members, rather than only with traditional leaders. The extent of information to be conveyed to community members need to be fully explained. The guidelines should provide that companies do not only consult with head of households and include women and youth in their consultations. There should be a requirement that companies consult in terms of customary law as far as possible.

Guidelines on compensation for communities affected by mining should include an express statement that the market value of land is not sufficient. Social, cultural, emotional and economic considerations should all be

accounted for within compensation evaluations. This is already the position of the South African common law, as found in *Haakdoornbul Boerdery CC and Others v Mphela and Others*.<sup>302</sup>

Grave relocations:

The Regulations of the National Heritage Resources Act 25 of 1999 (NHRA) should be amended. The NHRA states that the family's agreement is required before a permit for grave relocation can be acquired. The Regulations, however, only state that agreement must be sought, not that it must be obtained. This confusion in the law must be remedied. The Regulations are subordinate to the Act and should be amended to reflect the Act's position. In the meantime, The South African Heritage Rights Agency should not grant relocation permits without the agreement of the families affected, in line with the Act, which is the stronger piece of legislation.

Environmental issues:

Alternative options for development projects, required to be listed in EIAs, should be afforded greater weight in deciding whether to grant an environmental authorisation or not. The opportunity cost of mining needs to be realised.

Community complaints regarding environmental hazards from mining, often publicised in the media, should be paid greater heed by local and provincial environmental authorities. Such authorities need to be proactive in addressing their complaints and upholding mining companies' duties of care, irrespective of the content of environmental authorisations. The current legislative standard states that 'reasonable steps' need to be taken to avoid environmental problems such as wall cracking from mine blasting and water contamination. Considering the severe effects of such environmental hazards, 'reasonable steps' should be interpreted to mean the complete eradication of such problems flowing from mining, even if doing so requires the cessation of mining while residents are moved and compensated or other contingency plans are put in place.

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<sup>302</sup> 2008 (7) BCLR 704 (SCA)