

# South African CRIME QUARTERLY

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- > Mining, accountability and the law in the Bakgatla-ba-Kgafela Traditional Authority Area
- > Challenging traditional authority in the platinum belt
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Platinum miner returning from shift underground north of Rustenburg, February 2012

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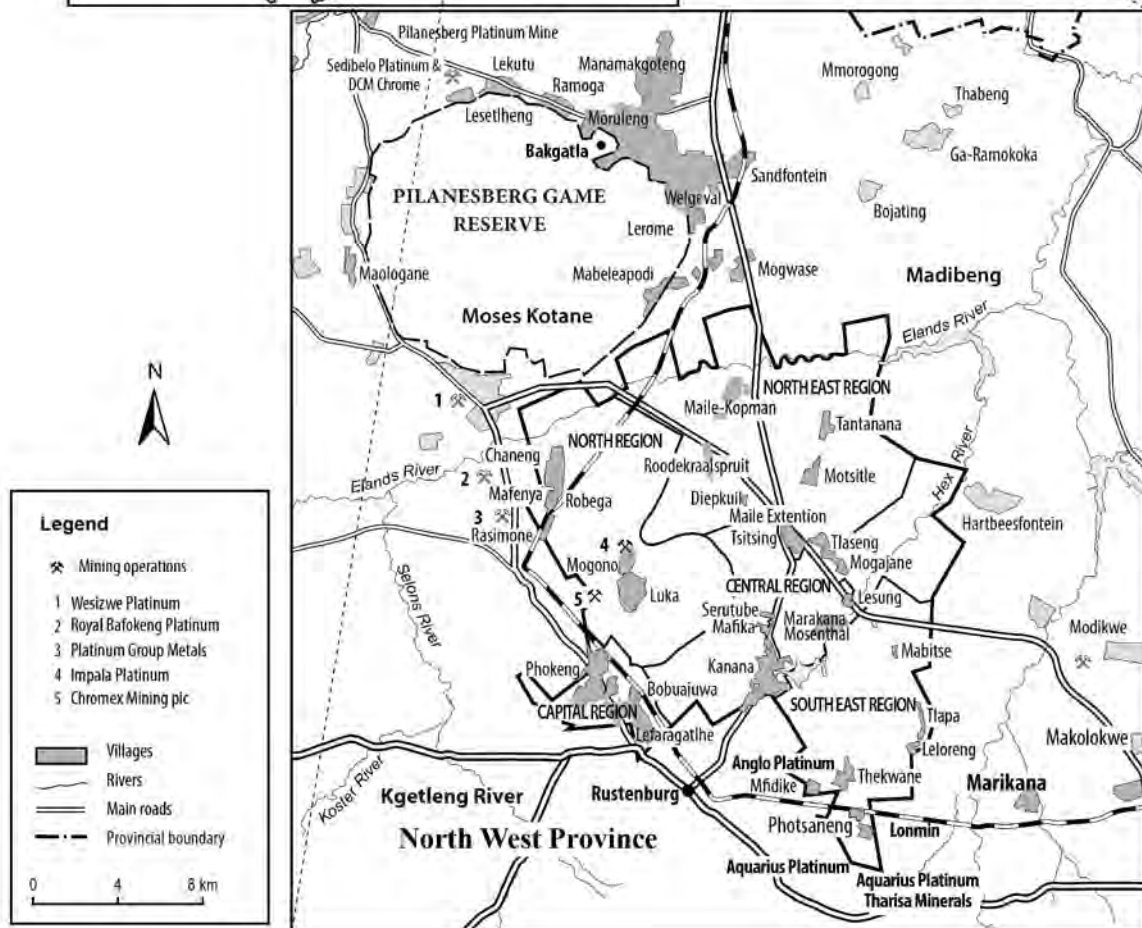
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Cartographer: Wendy Phillips



## Accessing land and capital in rural South Africa – new forms of old power

An immense irony characterises the scramble for land in democratic South Africa. Some of the ethnic homeland areas to which people were confined by colonial and apartheid segregationist laws and policies have become extremely valuable real estate since the discovery of platinum and other minerals beneath the land. As Sonwabile Mnwana explains in his article in this issue, the mining economy has progressively shifted to these areas over the past 20 years, often with devastating consequences and few benefits for the groups whose historical lands are now being mined.

A series of overlapping developments since the transition to democracy 20 years ago has left people in rural South Africa, especially in the platinum mining areas of the North West and Limpopo provinces, squeezed ever more tightly between the state, mining companies and unaccountable chiefs (or, in state parlance, traditional leaders).

Communities affected by mining find themselves caught up in the contradictions and tensions generated by different visions and agendas for reshaping the democratic state. New relationships between the state, capital and labour aim to transform the economy to include black South Africans who lost land and power with the arrival of white settlers 350 years ago. In addition, the place and status of customary forms of leadership, authority and decision-making within the democratic state have to be redefined.

Under apartheid, customary structures played the role of local government in homeland areas such as Bophuthatswana, but in the extensively negotiated 1996 Constitution they received only recognition, with no clearly defined roles, functions or resources. This has not stopped many chiefs from exerting their authority over citizens in the areas they presume to rule – whether their legitimacy is recognised by the people over whom they purport to rule or not. In the platinum belt this has translated into traditional leaders entering into mining deals on behalf of communities without their consent.

The articles in this edition of SACQ reveal the extent to which the promise of the democratisation of rural South Africa in the 1990s has turned to bitter disappointment for residents of mining areas in North West Province.

The stated intention of the Traditional Leadership and Governance Framework Act of 2003 (TLGFA) was to redress the deep damage done to modes of pre-colonial governance by colonial and apartheid governments, which manipulated the institutions of bokgosi/ubukhosi/chiefship/traditional leadership to subjugate indigenous populations.

The TLGFA sought to interrogate the legitimacy of claims to traditional leadership through a quasi-legal process undertaken by the Commission on Traditional Leadership: Disputes and Claims. It mandated the establishment of the Commission, colloquially known as the Nhlapo Commission after its first head, Professor Thandabantu Nhlapo. As Jeff Peires describes in his article in this volume, the Commission's mandate, simply stated, was to decide who was a legitimate king, queen or chief and who was not. Peires shows through an examination of the cases of the Mpondo in the Eastern Cape and the Ndzundza in Mpumalanga that the Commission's determinations were riddled with inconsistencies and contradictions, to the point of being almost illogical. Further, almost every determination of the Commission is being, or has been, challenged in court. The Commission's failure to resolve leadership disputes implies that tensions are running high in communities

across the country, as various contenders for positions of traditional leadership vie to gain access to power and influence, state salaries and other benefits.

The TLGFA also sought to transform the deeply unpopular apartheid-era tribal authorities into more democratic 'traditional councils'. These councils were required by the Act to democratically elect 40% of their members, while a third had to be women. By law the new councils should have been established within a year of the promulgation of the Act. Yet, as Monica de Souza's article demonstrates, this transformation was an unmitigated failure in the North West for many years, as it has been in every other province. The repeated failures, until recently, of the North West government to organise credible traditional council elections raise questions about the status of untransformed apartheid-era structures and the lawfulness of their activities on behalf of communities, particularly in respect of land and mining revenue that should, according to the Minerals and Petroleum Resources Development Act, be directed towards community development.

In the North West, council elections were held in January 2014, but at the time that De Souza's article was written, in July 2014, the provincial government had not yet published the names of the new traditional council members. However, just before this edition of SACQ went to print, the North West Premier announced the members of 'reconstituted' traditional councils in an Extraordinary Provincial Gazette notice dated 8 August 2014. While the notice provides information with which to assess traditional councils' present compliance with certain composition requirements, further research is required to assess its impact on the legal status of traditional councils. It is doubtful that the notice alone will undo all of the problems relating to the traditional council reconstitution process in North West, reported in De Souza's article and signalled in attorney Hugh Eiser's discussion with Brendan Boyle.

In *On the Record*, Eiser describes how, in the Bapo-ba-Mogale community, mismanagement, greed and corruption have set in to such an extent that it is 'winner takes all' for whomever can push himself to the forefront as the legitimate representative of the community, and surround himself with people who will go along with his way of conducting community affairs.

On the platinum mining belt, the failures of the TLGFA and the state have particularly significant consequences, as traditional leaders have the power to enter into mining deals, ostensibly on behalf of communities. When the communities these leaders purport to represent have little say in the nature of the deals, or how the spoils are shared, and are unable to hold the leaders to account, the result is deep dissatisfaction and even violence, as Mnwana's and Boitumelo Matlala's articles show.

Mnwana and Matlala both demonstrate the effects of the 'traditional leader takes all' situation that has been created by the failure of the state to transform apartheid-era community structures, combined with the cavalier attitude of mining companies towards communities – and the jostling for power and wealth that can come with power – in places that are at the centre of the new scramble for mineral-rich land.

Despite the failures of transitional and accountability mechanisms, the state continues to move towards giving more powers to chiefs. Attempts to give judicial powers to 'senior traditional leaders' through the Traditional Courts Bill, in a way that undercut all other customary dispute management systems, were only stopped when the Bill failed to be passed in Parliament in February this year. It took over six years of extensive mobilisation by civil society organisations and rural citizens opposing the undemocratic nature of the Bill to stop it being rammed through Parliament.

Moreover, the Traditional Affairs Bill (TAB), which was published for public comment last year, is likely to begin its journey in Parliament towards becoming law before the end of the year. In draft form, the TAB will, among other things, compel each group that applies for recognition as a 'traditional community' to be headed by a 'senior traditional leader' with several 'traditional leaders' or 'headmen' under him. This law, like the TCB and every other law to do with custom and traditional leadership, will only apply in the former ethnically delineated homelands. Hence rural communities continue to be locked within boundaries drawn up during apartheid under the notorious Bantu Authorities Act of 1951. The democratically elected government continues to see unelected

chiefs as legitimate governors of rural citizens, despite vocal objections and accelerating unaccountability, mismanagement of community resources, and corruption.

Courts of law are an important player in this game, but their role as arbiter is fraught. When called upon to be referee, the North West High Court created a legal precedent that enabled the suppression of dissent against allegedly corrupt chiefs (as Mnwana, Matlala and Eiser discuss in their contributions), and served to legitimise these chiefs and their councils, ultimately preventing communities from calling their leaders to account.

This leads to the second irony – that the courts of today appear to perpetuate the long tradition of colonial and apartheid times in suppressing those who question the authority and legitimacy of undemocratic and unaccountable leaders. The law and courts are, therefore, not neutral referees in the jostling for the form of state and economy that is being shaped post-apartheid.

Yet there may be some hope for communities in a judgement by the North West High Court, discussed by Wilmien Wicomb in the case note in this edition. Wicomb describes a case in which the Bafokeng Landbuyers Association (BLA) challenged the authority of the kgosi of the Bafokeng to litigate on their behalf. The land owned by the Royal Bafokeng Nation (RBN) came to vest in the larger Bafokeng group because of the ‘six native rule’ in the Native Trust and Land Act of 1936, which disqualified groups of more than six Africans from buying and holding land in their own name. They had to either form a tribe or affiliate to an officially-recognised tribe. The BLA argues that its land was simply appropriated by the RBN. Wicomb concludes that in its ruling on a minor aspect of the case, the Mafikeng High Court may have opened the path to better accountability by traditional leaders in that they might have to seek the consent of those they lead before making decisions.

Rural areas in the North West, as elsewhere in South Africa, are fraught with tensions. The time is ripe for a serious debate about the role of chiefs in local governance. Twenty years into democracy, the jostling for position, influence, resources from the state and proceeds from commercial activity on communal land has brought us to a place where mismanagement, maladministration and corruption are rife. Checks and balances are failing. The Nhlapo Commission has not resolved who is a legitimate customary leader, and who is not. The democratisation of ‘traditional councils’ has been a failure. The result is that the people in affected communities are increasingly frustrated and see their only option as resorting to illegal and often violent protest action, since all other avenues have failed to resolve their concerns. Urgent action is required on the part of government to set a new course.

This special edition of SACQ offers insight into issues that are not usually the domain of the journal. However, in many respects it follows on from the discussions and debates raised in SACQ 35 (March 2011) about the Traditional Courts Bill. The edition offers important insights into the local struggles for power and resources that provided the context for the clash between miners and the police that led to the massacre at Marikana in August 2012. This edition, unlike the special edition on the Traditional Courts Bill, does not include the voices of traditional leaders themselves. Despite this, we hope it will serve to inform the debate that it will undoubtedly provoke, and lead to dialogue about the place of traditional authority, and its limitations, in a democratic state.

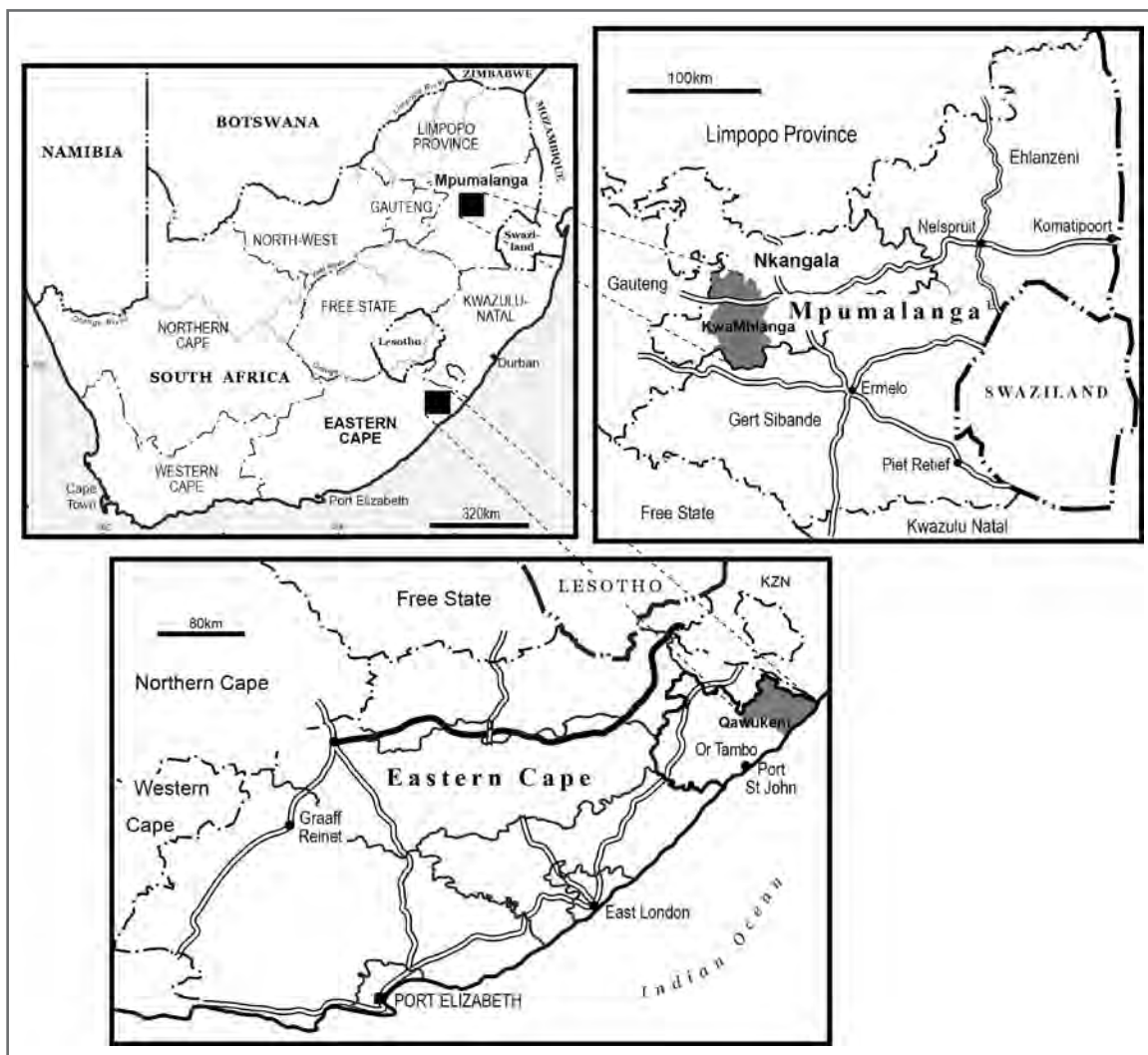
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*South African Crime Quarterly* is an inter-disciplinary peer-reviewed journal that promotes professional discourse and the publication of research on the subjects of crime, criminal justice, crime prevention and related matters, including state and non-state responses to crime and violence. South Africa is the primary focus for the journal but articles on the above-mentioned subjects that reflect research and analysis from other African countries are considered for publication, if they are of relevance to South Africa.

SACQ is an applied policy journal. Its audience includes policymakers, criminal justice practitioners and civil society researchers and analysts, including the academy. The purpose of the journal is to inform and influence policymaking on violence prevention, crime reduction and criminal justice. All articles submitted to SACQ are double-blind peer-reviewed before publication.



Cartographer: Wendy Phillips



# History versus customary law

## Commission on Traditional Leadership: Disputes and Claims

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*This article examines the practices of the Commission on Traditional Leadership: Disputes and Claims, set up under the Framework Act of 2003 to 'cleanse' the institution of traditional leadership by ridding it of the illegitimate traditional leaders installed during the colonial and homeland eras. Close analysis of the Commission's hearings and determinations with regard to kingship claims by the Western Mpondo and Mpumalanga Ndebele shows that the Commission violated not only the historical past but even the limited constraints of binding legislation, in order to impose its own preferences in the name of custom. The experience of the Commission therefore highlights one of the most fundamental deficiencies in the Framework Act, namely insisting on the guiding role of 'custom' while failing to define the meaning of the term and its implications.*

The Traditional Leadership and Governance Framework Act 2003 (Act 41 of 2003),<sup>1</sup> intended to resolve the hiatus in the 1996 Constitution with respect to the role of traditional leadership, has imploded in a welter of inconclusive legislation, more especially because its implications in terms of land rights and judicial authority have proved unacceptable to both rural communities and the Constitutional Court. However, the judicial debates around the Communal Land Rights Act<sup>2</sup> at least did manage to produce consensus with regard to the validity of 'living customary law', as opposed to the discarded and discredited colonial version sometimes referred to as 'official customary law'.<sup>3</sup>

One facet of the Framework Act that has hitherto escaped attention is its attempt to regulate the institution of traditional leadership by defining the

categories of traditional leadership; more precisely, identifying the traditional leadership positions to be recognised, and settling disputes between rival claimants to specific positions. In former years, such decisions had been taken by the Department of Bantu Affairs or the homeland administrations, but the demise of the old order left this particular loose end unattended, leaving government in areas such as Sekhukhuneland paralysed by rivalry between competing factions. In addition, discrepancies in the jurisdictions – and the pay slips – of the traditional leaders in different provinces urgently needed to be addressed, with 11 recognised paramount chiefs of other provinces aspiring to the privileges and perquisites of the Zulu king.

It was, moreover, common cause in government circles that the institution of traditional leadership had been tainted by its association with colonialism and apartheid; that many legitimate traditional leaders had been deposed in favour of compliant stooges; and

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that the very kingships themselves, such as that of Matanzima in Western Thembuland, required further scrutiny. Since the entire thrust of President Thabo Mbeki's policy, as reflected in the Framework Act, was to empower traditional leaders and augment their authority, it was deemed necessary to 'cleanse' the institution of its colonial accretions so as to officially recognise traditional leaders as shining lights of pre-colonial African democracy.

In Chapter 6 of the Framework Act, this cleansing function was assigned to a Commission on Traditional Leadership: Disputes and Claims, usually referred to as the Nhlapo Commission after Professor Thandabantu Nhlapo, its first chairperson. Twelve commissioners were appointed on the basis of being 'knowledgeable regarding customs and the institution of traditional leadership'. The judicial status of this Commission rendered it entirely independent of government, in line with the thinking of Section 5.10 of the White Paper,<sup>4</sup> which had noted the tendency of former commissions to be influenced by vested interests. The National House of Traditional Leaders, which would have much preferred to settle all traditional disputes according to its own discretion, regarded the Commission with deep suspicion, and there was a general perception that Mbeki had set it up to serve his own purposes while preserving the fiction of deniability, which was such a hallmark of his political style.

Although Section 5.10 of the White Paper noted that 'the customary law of African communities was characterized by a lack of effective mechanisms to deal with claims and dispute resolution',<sup>5</sup> Section 25(3) of the Framework Act nevertheless instructed the Commission to 'consider and apply customary law and the customs of relevant traditional communities' and to be 'guided by ... customary norms and criteria'.<sup>6</sup> 'Custom' was never defined in the Framework Act, and 'customary institution or structure' was defined merely as 'institutions or structures established in terms of customary law', a solipsistical pronouncement of classic proportions. The problem of applying 'customary law' to historical events was left to the commissioners to work out for themselves.

It has to be said that the Commission was singularly ill equipped to meet this challenge, although Nhlapo had been chair of the Project Committee on Customary Law at the South African Law Commission. Of the 11 other commissioners, six specialised in law, three in language and culture, one in education and one (myself) in history.<sup>7</sup> Besides myself, the only person attached to the Commission who had any background in politics, sociology or anthropology was Welile Khuzwayo, an anthropologist seconded from the National Department of Traditional Affairs, who, being a seconded official, was excluded from the deliberations of the Commission.

## Two kingdoms of the same lineage?

This article will concentrate on one specific category of the Commission's cases, where the kingships called into question dated back to the pre-colonial period or the period where any kind of colonial intervention was demonstrably absent. The case of Western Mpondoland goes back to the 1840s, a full 50 years before the colonial annexation of Mpondoland in 1894. The case of the Transvaal Ndebele goes as far back as the early 17<sup>th</sup> century, long before Jan van Riebeeck first set foot on African soil. I will argue that customary law is entirely inappropriate in such cases, and that the Commission's determinations in this respect are utterly invalid and lacking all foundation.

## Western Mpondoland

The Western Mpondo claim to kingship dates back to the reign of the great King Faku (c. 1815–1867). Faku's original Great Place was located at Qawukeni east of the Mzimvubu River, but following two Zulu invasions in the 1820s he was driven back to the Mngazi River, which is west of the Mzimvubu. After the Zulu threat had subsided, Faku returned to Qawukeni but some time in the 1840s, his Right-Hand Son Ndamase again crossed the Mzimvubu to establish – as far as the claimants are concerned – the kingdom of Western Mpondoland. According to Chief Victor Poto, Ndamase's great-grandson:<sup>8</sup>

One morning, when Faku had gone out with his shield-bearer, he emerged from the bush to see someone lurking around the small calf-kraal. When

he realised that it was Ndamase, he called him and asked where he had come from. Before Ndamase could explain, Faku said 'Yes, my boy, I am aware that you will be killing me.' With that they went inside the house, and Faku advised Ndamase to leave Qawukeni, saying this would have to be done because Ndamase's people were clashing with those of the Great Place, and this would become even worse because Mqikela (Faku's heir in the Great House) was just approaching the age of manhood.

Ndamase left with his people; men, women and children, taking all their possessions and burning their houses on the eastern side. Faku went with him to make sure he never came back. When they got to the Mzimvubu River, Faku said that each of them should keep to his own side, and he granted Ndamase authority over all the minor Mpondo chiefdoms who were already living to the west of the river.

The essence of the above oral tradition is amply confirmed by independent sources. Ndamase was a renowned warrior who had led the Mpondo armies against the Zulu regiments. Although junior in rank as the son of the Right-Hand Wife, Ndamase would always be a threat to Mqikela, his much younger brother of the Great House, and was therefore encouraged to exercise his undoubted talents elsewhere. Ndamase ruled Western Mpondoland for about 30 years, subjugating his cousins, defeating his neighbours and greatly expanding Mpondo territory. It would be fair to say that the Kingdom of Western Mpondoland was more the creation of Ndamase than the gift of Faku.

When Mpondoland was annexed by the imperial power in 1894, two treaties were made on two different days in two different places, one with Eastern Mpondoland and the other with Western Mpondoland, and each of the two kings was recognised as a 'Paramount Chief'.<sup>9</sup> Nevertheless, a strong case can be made – and the Great House of Eastern Mpondoland did make it – that only one king should have been recognised. The case rests on the fact that, when Ndamase died in 1876, the Great House of Mqikela asserted that the authority conceded by Faku had been entrusted to

Ndamase on a personal basis only, and that this authority had automatically expired with Ndamase's death. Upon which, Nqwiliso, Ndamase's heir – shameful to relate – obtained colonial recognition of his kingship by literally selling his territory of Port St Johns to the intruder.<sup>10</sup>

Two years after Faku's death, the Governor, Sir Philip Wodehouse applied personally to Ndamase for the cession of the Port and was met by a distinct refusal ... In 1878 renewed efforts were made by the Government, and Ndamase's son, Nqwiliso, was more easily persuaded than his father. An agreement was made with him through Major Elliot, the Chief Magistrate at Umtata, whereby the chief ceded to the Cape Colony all the sovereign rights which he then possessed over the water and navigation of the Umzimvubu ... He was in recognition of this, to be acknowledged as independent of Mqikela, from whose attacks he was promised protection, so long as he maintained friendly relations with the Cape Government.<sup>11</sup>

## The Commission hearing on Western Mpondoland

Chaired by Advocate D Ndengezi, the Commission sat at Libode on 17 August 2005.<sup>12</sup> The initial presenter for the Western Mpondo was Bishop Joseph Kobo, not a royal, but seemingly respected as a learned man. As the hearing proceeded, members of the royal family became increasingly uncomfortable with the Bishop's inability to respond adequately to the questions of the Commission. Kobo was followed by Prince Mlamli Ndamase, much younger, but much more fluent and determined.

It soon became apparent that the commissioners really wanted to elucidate the conditions under which Ndamase established his authority west of the Mzimvubu River. According to the Western Mpondo claim, Ndamase was definitively established as an independent king by his father Faku. The Commission found it difficult to understand how two kingdoms could be created within the same family, more especially during the lifetime of the reigning king. Unfortunately for the Western Mpondo, they initially shied away from the somewhat shameful story (Faku's being frightened at the sight of his own son) recorded by Victor Poto. They further embellished

Poto's narrative by implying that Ndamase could have succeeded to the kingship of the whole Mpondoland, had he chosen to do so. The probing of the Commission exposed several such petty contradictions, causing the Western Mpondo to shift their ground more than once and putting the credibility of their argument in question.

**Bishop Kobo:** When Ndamase arrived in this part of the area, he went back to report to his father King Faku, and Faku came over and anointed him as king. Faku was delighted that his son was so courageous to be able to subdue various tribes that lived in the area between Mzimvubu and Mthatha rivers. Ndamase voluntarily decided against contesting the kingship of his father at Qawukeni, though he would have had a legitimate claim. He decided against contesting allowing the next in line or his brother Mqikela to take over the kingship. At that time, Mqikela was nineteen years old. But Ndamase, because he was a warrior, he said to his father, I will go and establish my own kingdom. I will fight and fight and establish myself. I don't want to interfere or worry my brother.

**Commissioner Ndou:** Is that according to your culture for the father to install the son whilst he is still alive?

**Bishop Kobo:** It is not a custom that is followed [today] but on this particular occasion it was a new kingdom, not part of the kingdom of King Faku ...

**Commissioner Ndou:** I just want to know whether the son and the father were on the same status, on the same kingdom?

**Bishop Kobo:** According to the tradition, Sir, it is always common knowledge that the father is always senior to the son. And I think that tradition and that custom have been observed throughout the history of the existence of the Nyandeni [i.e. Western Mpondo] Kingdom. There was never a time where the son or his kingdom would challenge the decision of the Qawukeni [i.e. Eastern Mpondo] Kingdom.

**Commissioner Poswa-Lerotholi:** Are you saying that Ndamase was the rightful ... or had a legitimate claim to the kingship in that he was the

first born, or are you saying that it was by some other means that he had a legitimate claim?

**Bishop Kobo:** I am saying, Sir Commissioner, that he could have had. He could have staged a claim to the kingship, because he was the eldest son and had the advantage over his younger brother because he was also a warrior ... But he was aware of the fact that there is a younger brother, which was Mqikela, who is the legal one who should be succeeding his father Faku.<sup>13</sup>

The good Bishop has been caught contradicting himself. The Commission pounces.

**Commissioner Ndengezi:** You say there was Mqikela who was still young, but was in fact according to custom going to be the king. How could Ndamase also have a legitimate claim? He could not have had a legitimate claim, if Mqikela was the lawful one to succeed. They could not both be legally qualified to succeed Faku, they could not.<sup>14</sup>

The Bishop was in a corner and did not know how to get out of it. He told a story about how Chief Poto complained to the Minister of Bantu Affairs, De Wet Nel, that his salary should match that of the Eastern Mpondo king, and that Nel responded by raising his salary. The Commission was not impressed.

**Commissioner Ndengezi:** De Wet and the then king are not really relevant. Tell us about the seniority.

**Bishop Kobo:** There is a Right Hand House and a senior house.

**Commissioner Ndengezi:** And here in Mpondoland, which is it? Which is a Great House, which is a Small House, which is a Right Hand House ... ? So we want to know, don't assume that we know. Tell us. That is what she wants (Commissioner Pungula), and we all want that.

**Bishop Kobo:** I think I have clarified that, that the senior house is Qawukeni.

**Commissioner Ndengezi:** You did not. You did not, with due respect, explain it, Dada.<sup>15</sup>

The Western Mpondo argument was not accepted, and the Commission ruled unequivocally that there could be only one king in Mpondoland.<sup>16</sup>

5.1.11 Having made a determination that the kingship of amaMpondo as a whole resorts under the lineage of Mqikela, the only other leadership positions available within the traditional institution of amaMpondo in terms of the Framework Act are senior traditional leadership and headmanship.

If the Commission had simply ignored the Ndamase oral tradition and proceeded on the basis that the Western Mpondo kingship was nothing more than the payoff made to a colonial puppet for selling out Port St Johns, it would be difficult to fault its reasoning. This article falls short of endorsing the Western Mpondo claim to independent kingship, but it does, however, insist that the Commission was wrong to base its determination on the single argument that 'custom and tradition' precluded the possibility of two kingdoms on Mpondo soil. The Commission also discarded the Rharhabe Xhosa claim on similar grounds, again applying its perception of customary law to historical events and again ruling out the possibility of two legitimate kingdoms emerging from the same royal lineage.

## Transvaal Ndebele

The most important event in Transvaal Ndebele history, in the view of the Commission, took place some time between 1620 and 1680, in all probability before 1652, the year of the first Dutch settlement at the Cape.<sup>17</sup> During the reign of King Musi, the third in line to the reputed founder of the Transvaal Ndebele kingdom, his junior son Ndzundza stole the succession from his senior brother Manala by underhand means.<sup>18</sup>

The mother of Ndzundza said to him, 'Get up early, because your father is dying, and he wants to hand over the chieftainship to Manala'. Then next morning Ndzundza was aroused by his mother, who told him to go to his father ... his father said, 'Who are you?', he replied, 'It is I, Manala.' Ndzundza deceived his father by having put on skins with the hair on the outside on his hands, since Manala was hairy on the hands, so his father thought it was he who touched him, because

he was blind. He [Musi] said, 'O, there, take the chieftainship here,' and gave him the *namxali* [a kind of oracle, which only the king was entitled to consult].

Heard this before? The Commission was certainly not slow to recognise that this was a Transvaal Ndebele version of the Biblical story of Esau and Jacob (Genesis, Chapter 27). But the story does not end there. Manala was understandably furious and Ndzundza judged it wiser to decamp, not forgetting, however, to take the *namxali* with him. Three wars were fought between the two brothers before peace was made at the Bhaluli (Oliphant) River through the mediation of a wise man named Mnguni. It was resolved that (1) Manala was to rule west of Bhaluli and Ndzundza east of it; and that (2) in a conscious deviation from the normal exogamy rule, Manala could marry a wife from Ndzundza and Ndzundza could marry a wife from Manala. The issue of seniority remained something of a grey area. On the one hand, the story makes it clear that Manala was the rightful heir to Musi; on the other, the Ndzundza seem to have succeeded in holding on to the *namxali*.

By the 1830s, Manala and Ndzundza had sufficiently reconciled to combine their forces against the invasion of Mzilikazi, who took everything they had, including the name 'Ndebele'.<sup>19</sup> Sibindi of the Manala died in battle, while Magodongo of the Ndzundza suffered a lingering death on Mzilikazi's orders, impaled on a stake for two days and two nights. The *namxali* disappeared, never to be seen again. Both kingdoms were destroyed, but the Ndzundza survived under their capable leader, Mabhoko.<sup>20</sup>

The Ndzundza ... developed fortified mountain strongholds. By the 1860s, their capital, Erholweni, was probably the most impregnable single fastness in the eastern Transvaal. The security and the resources which the chiefdom offered attracted a steady stream of refugee communities to settle within its boundaries ...

Conflicts flared with the Ndzundza refusing Boer demands for labour and denying their claims to ownership of the land ... the Ndzundza also secured large numbers of guns ... A number of Boer attempts to subdue the kingdom failed, and by the late 1860s many farmers who had settled



in the environs of the Ndzundza trekked away in despair. Those who remained recognized the authority of the Ndzundza rulers and paid tribute to them.

The Ndzundza kingdom survived longer than its Pedi neighbour, but by 1883 it had been defeated and Nyabela, Mabhoko's successor, jailed in Pretoria for 15 years. After the British victory over Paul Kruger's republic, Nyabela attempted to return but was arrested, this time by the British, and told that he could never go home again.<sup>21</sup> Unlike, for example, the Pedi or the Venda, the Ndebele were left without even the shred of a 'native reserve' and were forced into slave-like indenture on white farms. Nevertheless, despite their dispersion, the Ndzundza Ndebele clung to their historical culture, as exemplified in their distinctive beadwork and wall decorations. Matsitsi, Nyabela's brother, managed to re-establish male initiation and its associated age-regiments. Informal headmen were recognised on every farm with a significant number of Ndebele households. These 'headmen' negotiated with the farmers, adjudicated internal disputes and referred difficult cases to the royal court. They met every year at the site of their 1883 defeat, to keep alive their hopes of restoring the ancient Ndzundza kingdom. Although entirely lacking in legal status or formal authority, the Ndzundza kingdom thus succeeded in surviving as a meaningful political entity throughout the first half of the 20<sup>th</sup> century, a truly remarkable achievement. The Manala, on the other hand, never recovered from their destruction by Mzilikazi, though remnants of the group maintained a precarious existence at Wallmansthal Mission.<sup>22</sup>

As the Bantustan project took off, some Ndebele areas found themselves incorporated into Lebowa, others into Bophuthatswana. In July 1974 the Ndzundza Tribal Authority was excised from Lebowa and reconstituted as KwaNdebele. Three more Tribal Authorities (two Ndzundza plus the single Manala area) from Bophuthatswana were added in 1977. The question of the two paramountcies was problematic from the very earliest stages of this consolidation. The Manala faction, knowing its numerical weakness, initially evaded a vote, but a compromise was eventually reached by the KwaNdebele Traditional Authorities Act 1984 (Act 6 of 1984),<sup>23</sup> which

recognised four 'tribes' (three Ndzundza and one Manala), and two kings – one for Ndzundza and one for Manala.

Independence, scheduled for December 1986, was approved by the KwaNdebele legislature but opposed by the Ndzundza Royal Family, allied with youth organisations and the United Democratic Front. More than 160 people were killed in the bloody civil war of mid-1986, which pitted the pro-government Mbokotho vigilantes against the Ndebele youth. In July 1985 the KwaNdebele government withdrew its recognition of the Mahlangu chiefship. Prince James Mahlangu was repeatedly detained, and the future Ndzundza King Mayitsha III was briefly imprisoned. Many leading Ndzundza royals went into hiding in Pretoria and the East Rand until, with the advent of the democratic transition, Mahlangu took over as Chief Minister in May 1990.

The role of the Manala family was, sadly, rather less glorious:<sup>24</sup>

When the independence issue emerged in the early 1980s, members of the [KwaNdebele] cabinet promised to make the present Manala paramount – previously a taxi driver in Pretoria who had opened a number of businesses in KwaNdebele – supreme paramount of the Ndebele on the basis that the land where KwaNdebele was created was historically Manala land. In early 1986, Rhenosterkop, previously under the Ndzundza regional authority was handed over to the Manala tribal authority ... the Manala paramount was both a businessman and an enthusiastic member of Mbokotho ...

The headman [of Rhenosterkop] was forced to sign papers agreeing to move to Manala under the 'threat of a sjambok.' Shortly thereafter the headman and his council were deposed ... Young men were expected to join the Mbokotho and older men the Manala.

## Commission hearings on Ndebele

The first hearings of the Commission were held at KwaMhlanga in Mpumalanga Province, taking a full week from 17 June 2005. The Manala speakers were straightforward and smooth. They had a good case, and they made the most of it.

Ndzundza took *namxali*, and when Manala discovered that, he chased after him, and caught him at Masongololo. All these things were happening while the old man [King] Musi was still alive ... the old man said to Manala, go and catch up with Ndzundza and bring him back here. Should he refuse, then you should kill him. It was difficult to do that, to kill him in actual fact ...

Here comes Manala, he is returning home to Ngwenyama [the King]. And Ndzundza is remaining there in Bhalule and even crossing the Olifants River. On his [Manala's] arrival at home, the old man asked him, where is Ndzundza? Manala responded by saying that, by now I believe he has already crossed the Olifants River. You know the old man screamed out of surprise.

Now this is a question, according to the culture, is it possible that the king should rule whilst another king is still ruling? By the time when Ndzundza was crossing the Olifants River, the fact was that Musi was still alive. I am still repeating myself on the question that, is it possible that somebody else, whether Ngwenyama or Inkhosi, take over the reins to rule whilst another one is still alive, is that possible? History is telling us clearly that by the time Musi died, Ndzundza was no longer nearby by then. Which clearly means that the child who buried Ngwenyama, his father, was Manala ...

Because they were the ones who remained in the royal kraal, in the headquarters. While Ndzundza proceeded with Ubukhosana or Ubukhosi on the other side of Bhalula.<sup>25</sup>

Thus, according to the Manala, there could be only one kingship (*UbuNgwenyama*). Ndzundza had departed with nothing more than chiefship (*UbuKhosi*).

It was a strong argument, which the Ndzundza did not even try to contest seriously. The Ndzundza king, Mayisha III, shrunken and congested, said very little and – a significant omen, this – died in his chair the very evening of the Commission's departure. The Sokulumi, Litho and Pungutye branches of the Ndzundza had acquired their own lands independently of the senior Ndzundza line and were primarily concerned with maximising their autonomy.

Even worse was the ghostly presence of Mahlangu, hero of the anti-independence struggle and pro-ANC Chief Minister of KwaNdebele during the transition to democracy. He had moved to Cape Town in 1994, under the impression that then President Nelson Mandela had promised him a seat in the national cabinet. Returning home disappointed and empty-handed, he had visions calling on him to assume the Ndzundza kingship, despite his junior status within the Ndzundza royal house. His attempts to establish his own political party failed, and he attended the hearings in a state of visible emotional disturbance. Absorbed in their own troubles, the Ndzundza let their case go, almost by default.

The majority of the Commission had no qualms about embracing the Manala position in its entirety. Its determination for the Ndzundza – apart from the proper names – is identical to that for the Western Mpondo:<sup>26</sup>

5.1.10 Having made a determination that the kingship of amaNdebele as a whole resorts under the lineage of Manala-Mbhongo, the only other available positions of leadership within the traditional institution of amaNdebele in terms of the Framework Act, are senior traditional leadership and headmanship.

The Commission's eventual determination on the Ndebele case is an excellent illustration of its line of approach, and is worth quoting at length:

10.3.9 The Commission finds that:-

- a) It is improbable that Manala could have cowered upon catching up with Ndzundza at Balule River as claimed by the Ndzundza-Mabhoko in that:
  - i) he pursued Ndzundza with the clear intention to take him back alive to Ingwenyama Musi or kill him if he resisted.
  - ii) Ndzundza never returned home but settled across the Balula River.
  - iii) Manala had no kingship to surrender as Ingwenyama Musi was still alive. Therefore, Ndzundza could not receive ubuNgwenyama as it is common cause that a successor cannot reign while the incumbent is still alive.

10.3.10 In accordance with customary law, kingship remained with Manala even during the colonial and apartheid eras although there was no official recognition of the institution of ubuNgunwenyama ...

10.3.11 Officially, the institution of ubuNgunwenyama for amaNdebele was created by section 6 and recognized under section 7 of the KwaNdebele Authorities Act.

10.3.12 Whilst official recognition of the institution of ubuNgunwenyama was laudable and in line with the historical and customary evidence presented, the creation of dual kingship was irregular. This was because it was not in line with the customary practice of the community of amaNdebele.

11.1 In conclusion, the Commission finds that:-

11.1.1 The kingship of amaNdebele was established by Ndebele through conquest and subjugation.

11.1.2 Since Ndebele, the kingship has been passed on from one generation to another, according to the custom of amaNdebele.

11.1.3 At the split, Manala retained kingship of amaNdebele as a whole.

11.1.4 In the circumstances, amaNdebele kingship exists under the lineage of Manala.

11.1.5 In terms of customary law, and the Framework Act, Ndzundza-Mabhoko paramount is not a kingship.

Both the Western Mpondo and Ndzundza Ndebele kingships thus fell by the wayside. But did the Commission really have any other alternative? To answer this question, we will need to return to the question of the Commission's legal mandate and the reasons why it was established in the first place.

## The Traditional Leadership and Governance Framework Act (41/2003)

For the purposes of this article, it is necessary to consider three salient aspects of this Act.

### Mandate of the Commission

The preamble to the Framework Act identified its three main purposes, of which the third was especially relevant to the mandate of the Commission:

To restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices.

The context of this imperative was clearly spelled out in the White Paper on Traditional Leadership and Governance, adopted by cabinet in June 2003 and which *inter alia* proposed the establishment of the Commission. Although in the South African context a White Paper is no more legally binding than any other document circulated for discussion purposes, reading the White Paper in conjunction with the Framework Act makes it clear that the latter is the former's direct descendant.

Section 5.10 of the White Paper highlighted the extent to which traditional leadership had been manipulated by the colonial and apartheid regimes:

[Colonial] legislation transferred powers to identify, appoint and/or recognise and depose traditional leaders from traditional institutions to the [colonial] government. In the process, the role of customary institutions in the application of the substantive customary rules and procedures ... were substantially reduced. In some instances, not only was [sic] illegitimate traditional leaders and authority structures appointed or established. But other legitimate traditional leaders were removed and legitimate authority structures disestablished.<sup>27</sup>

The homeland system carried the same processes even further:

Homeland governments, too, passed their own laws that empowered them to ... appoint and/or terminate services of traditional leaders, in some cases in a manner that did not comply with custom ... In a number of cases, the courts

were also asked to pronounce on the legality of administrative acts as well as on the application of customary rules and procedures. They held that the statutory and subsequent administrative framework superseded customary processes. They took cognisance of customary processes only to the extent that the legislation concerned provided for the recognition thereof, if at all.<sup>28</sup>

Let us flag, in passing, the strong contrast drawn by these paragraphs; between the oppressive administrative acts of illegitimate regimes on the one hand, and authentic customary procedures on the other. From this distinction, the White Paper correctly infers two categories of traditional leaders: illegitimate and legitimate. But who is to tell the difference?

There is a strong body of opinion, also supported by traditional leaders and traditional communities, that an independent mechanism should be established to deal with the legitimacy and/or illegitimacy of traditional leaders. Indeed, this is the correct approach. An independent national commission should be established within the national sphere of government to address this situation.<sup>28</sup>

Thus was the Commission born. It did buy into this mandate, to cleanse the institution of traditional leadership of its apartheid accretions and deformities, and to endorse only those traditional leaders recognisable in terms of customary law. As Commissioner MA Moleleki explained at the Western Mpondoland hearing:

It is common knowledge that the institution over the years has been undermined. It has been eroded and distorted by among others colonialism, repressive laws. In particular, the Black Administration Act 38 of 1927, apartheid laws which provided for among others territorial authorities, self-governing states, and so-called independent homelands.

Evidently the dignity of the institution has been affected negatively. In order to restore the dignity of the institution, the State President of the Republic of South Africa appointed a Commission on Traditional Leadership Disputes and Claims, and this is our official label.<sup>30</sup>

## The 1927 deadline

The first mention of the year 1927 occurs in Clause 25(2) (a) of the Framework Act:

The Commission has authority to investigate, either on request, or of its own accord –

(vi) where good grounds exist, any other matters relevant to the matters listed in this paragraph, including the consideration of events that may have arisen before 1 September 1927.

The significance of this date is nowhere articulated in the legislation, but is made very clear in the White Paper:

The European colonial expansion ... significantly altered the social organization of African societies and transformed them in a manner which made them amenable to European control. To this end, various statutes were introduced in South Africa. One of them, the South Africa Act of 1909, designated the Governor-General as the 'Supreme Chief', a position that gave him the power to create and divide 'tribes' and to appoint any person he chose as a chief or headman, and to depose such persons as he deemed fit. The Black Administration Act No. 38 of 1927 consolidated these powers and vested them in the Minister of Native Affairs. The Bantu Authorities Act of 1951 finally rendered traditional leaders part of the state's bureaucratic machinery.<sup>31</sup>

In its Section 5.10, where the establishment of the Commission is first proposed, the White Paper's text reads as follows:

The commission may ... consider cases dating as far back as 1927. This is the year in which the Black Administration Act No. 38 of 1927 was promulgated.

This is one of the very few points on which the wording of the Framework Act, already quoted, deviates from that of the White Paper, which gave birth to it. The White Paper clearly intended that 1 September 1927, the date of the promulgation of the Black Administration Act, would be the cut-off point beyond which disputes and claims would not be entertained. The Framework Act, however, explicitly permitted the consideration of earlier events 'where

good grounds exist', thereby opened the door to the controversial decisions here under review.

Why was the Framework Act so revised? I can only speculate, but it is probably safe to say that the Framework Act never intended to deviate from the purposes expressed in the White Paper and articulated in its preamble, namely 'to restore the integrity and legitimacy of the institution of traditional leadership'. The Native Administration Act was, as the White Paper pointed out, only a consolidation of prior colonial legislation, dating back to the South Africa Act of 1909, also quoted in the White Paper, or even to its direct predecessor, the Natal Ordinance 3 of 1849. The Natal Ordinance first came up with the bright idea of declaring a colonial official (in this case, the Lieutenant-Governor of Natal) the 'Supreme Chief' of the colony's African population 'with full power to appoint and remove the subordinate chiefs, or other authorities among them'.<sup>32</sup> However, the colonial authorities in the old Cape Colony had no such powers before the passage of the 1927 Act. It was therefore necessary to allow for some degree of flexibility, though surely not to the extent of undermining the integrity and legitimacy that the Framework Act was intended to uphold.

## Defining a kingdom

The Framework Act recognised three different levels of traditional leadership: kingship, senior traditional leadership and headmanship (Clause 8). For a kingship to be confirmed, it would be necessary to establish not only that the kingship was valid according to customary law, but also that the claimant in question was a king or queen rather than a senior traditional leader. The definition of kingship thus becomes of the utmost importance, and the Framework Act defines it thus:<sup>33</sup>

- (aa) that comprises the areas of jurisdiction of a substantial number of traditional leaders that fall under the authority of such king or queen
- (bb) in terms of which the king or queen is regarded and recognised in terms of customary law and customs as a traditional leader of higher status than the senior traditional leaders referred to in subparagraph (aa); and

- (cc) where the king or queen has a customary structure to represent the traditional councils and senior traditional leaders that fall under the authority of the king or queen

This seems very simple and straightforward – too simple and straightforward, in the view of Commissioner JC Bekker, who calculated that it could open the door to at least 773 kingship claims,<sup>34</sup> but pertinent nonetheless. If these criteria had been applied, the Manala Ndebele should have been disqualified as a kingdom (having only one subordinate senior traditional leader), whereas the Rharhabe Xhosa (having a clearly defined area of jurisdiction with no fewer than 40 senior traditional leaders, every one of whom attended the Commission hearing to enthusiastically confirm their allegiance to the Rharhabe King) should not have been disqualified. The Commission, however, chose to come up with its own set of criteria, which – after several revisions – eventually looked like this:<sup>35</sup>

- 6.2.1 In order to assume the position of a king or queen the person so identified must qualify in terms of the customary law of the traditional community.
- 6.2.2. Once the position has been established, it becomes hereditary and is passed on from one generation to the next, according to customary law and the customs of the traditional community.
- 6.2.3 The king should rule over the entire traditional community with linguistic and cultural affinities rather than a section thereof.
- 6.2.4 There cannot be a multiplicity of kingships emanating from one kingship.

The Commission does not quote any legal authority of any kind in support of this extraordinary set of criteria, nor – I suspect – is there any such to be found in all the many libraries of history, anthropology, politics or customary law. The Commission was established in terms of the Framework Act. It had no right to ignore the definition of kingship embedded in that selfsame Act and substitute something entirely unsubstantiated of its own devising.



Most significant of all these criteria, and most far-reaching in all its implications, is criterion 6.2.2, which not only casts the hereditary principle in stone but elevates it to a status whereby it overdetermines any other aspect of customary law. It is therefore important to point out that the selfsame hereditary principle is similarly echoed and invoked by the Commission in its rejection of the Western Mpondo and Ndzundza Ndebele claims.<sup>36</sup>

7.2.4 Once the position has been established, it becomes hereditary and is passed on from one generation to the next, according to customary law and the customs of the traditional community.

7.2.5 The traditional leader may not establish or create a multiplicity of traditional leaderships equal in status to his. Customary law and customs of amaMpondo do not allow a multiplicity of traditional leaders emanating from one traditional leader.

Let us, for the sake of progress, ignore the fact that the Commission (not a traditional institution) in Clause 7.2.5 has arrogated to itself the right to determine what traditional leaders may or may not do. Let us ponder the implications of its deification of the hereditary principle in conjunction with its rejection of the 1927 deadline. Taking as our example the three Eastern Cape kingships confirmed by the Commission, we find the hereditary principle violated in each and every case: among the amaXhosa, when Tshawe replaced Cirha; among the abaThembu, when Dhlomo replaced Hlanga; and among the amaMpondo, when Gangata replaced Qiya.<sup>37</sup> These events happened several centuries ago, but all these deposed factions have their descendants, and the logic of the Commission's criteria should surely have obliged it to restore the kingly status quo as it had been in the Eastern Cape around the year 1650, that is before the arrival of Van Riebeeck.

Moreover, in each of these three cases, the victorious faction justified its assumption of power in terms of the abuse of customary law by the deposed king. This is not the place to enter deeply into such questions but, as long ago as 1981, I had argued that the right to depose unjust rulers

was an integral part of indigenous Xhosa political culture. By subordinating all other aspects of traditional governance to the hereditary principle, the Commission entirely negates the more democratic dimensions of customary law and legitimates its despotic tendencies.

## History versus customary law?

Most of the claimants disappointed by the rulings of the Commission have challenged its determinations in court. At least one of its rulings has been overturned on the basis that the Commission's proceedings were procedurally unfair,<sup>39</sup> but, to the best of my knowledge, it is the practice of the Commission that is being challenged rather than the principles on which it operated. Moreover, because each case is handled on an individual basis, neither the inconsistencies in the Commission's findings nor the fundamental flaws in its overall approach have been thoroughly grasped. In this concluding section I will attempt to critique the Commission's shortcomings; firstly in the light of my own discipline of history, secondly in terms of the broader debate on customary law.

History by its very nature is a series of unique events, whereas law seeks to define and articulate the recurrent norms and usages by which any given society tries to function. Any attempt, therefore, to apply the consistencies of law to the inconsistencies of history is bound to fail. What would have happened, for example, if the Commission had applied its version of customary law to the well-known case of the Zulu kingdom? Ignoring the 1927 cut-off date, as it usually did, the Commission would have had no difficulty going back to 1840, some years before British colonial authority was imposed on the colony of Natal. That was the year in which Mpande fled his homeland to enlist the support of the Voortrekker leader, Andries Pretorius. In February 1840, the Boers destroyed the army of Dingane and proclaimed Mpande King of the amaZulu. The Commission should have asked whether that was in accordance with Zulu customary law.

By the criterion of customary law, all the descendants of Mpande onwards can only be seen as illegitimate, and the Commission is duty bound to replace

Zwelithini with a more legitimate incumbent. But who? Mpande's predecessor, according to customary law, was his brother Dingane. But Dingane had murdered his own predecessor, Shaka, another clear contravention of Zulu custom. Further research by the Commission would have revealed that Shaka himself had usurped the chiefship of his father Senzangakhona, leaving the Commission with no option but to identify the most senior descendant of Sigujana, Senzangakhona's rightful heir, and to place him on the Zulu throne.

The Zulu case is presented as proof of the inapplicability of customary law to pre-colonial history by means of the ancient logical argument of *reduction ad absurdum*, defined by Webster's dictionary as 'proof of a proposition by showing the falsity of its contradictory opposite; also, disproof of a proposition by arguing from it to an impossible or false conclusion'.<sup>40</sup> Let me spell this out: if customary law is applicable to the pre-colonial period, then the descendants of Mpande should be dethroned in favour of the descendants of Sigujana. By analogy with the logic applied in the cases of the Western Mpondo and the Ndzundza Ndebele discussed above, descendants of Mpande, such as King Goodwill Zwelithini, have no other leadership positions available to them in terms of the Framework Act than senior traditional leadership or headmanship. This is palpably absurd. Therefore customary law is not applicable to the pre-colonial period.

This article, however, takes its stand not on theoretical logic but on historical grounds. No historical event of the pre-colonial period should be adjudicated by the criteria of the post-colonial period, because the circumstances of the pre-colonial period were so fundamentally different that the fundamental assumptions of the present simply do not apply. This is clearly illustrated by one of the dialogues from the Western Mpondo public hearing. It is worth quoting again:

**Commissioner Lerotholi-Poswa:** Are you suggesting that the Prince over there (indicating a young royal in the audience) could also do the same, and be legitimately placed by Queen Mother Bongolwethu elsewhere?

**Bishop Kobo:** Under the circumstances prevailing then, [it could be done] because there were places where the consolidation and management of tribal nations was not in place. But at this present moment, it wouldn't be possible to do that. Because now everything is cut and dried, there are boundaries ... At that time there were no declared boundaries. There was a process of invading and conquest to people trying to invade new territories to expand their empires. It is no longer the case now. The boundaries have already been declared of every tribe and nation. But when nations were born, they go forward invading, trying to gain as much territory as they can.<sup>41</sup>

Although Kobo's response refers directly to only one specific aspect of the pre-colonial context, namely the greater political fluidity contingent on greater territorial fluidity, similar considerations apply across the entire spectrum of social, political and economic life. During the pre-colonial era there were no constraints of land, water and natural resources to tie traditional communities down, no territorial boundaries to constrain political expansion and innovation, no overarching national state to set out norms and standards or to demand transformation in line with constitutional imperatives. There was no Framework Act Clause 8 to reduce the great diversity of traditional institutions into three categories only. And no Commission either.

Does the case of the Nhlapo Commission hold any significance for the broader debate on customary law? In most respects, it must be admitted, the issues raised in this article are tangential to the more vigorous and significant battles that have been fought in the Constitutional Court with regard to the Communal Land Rights Act, the Traditional Courts Bill and other draft legislation, in which the customary arena has become a battleground on which chiefly elites and community interests contest power and resources.

While the protagonists appearing before the Nhlapo Commission argued historical cases going back some hundreds of years with sincerity and passion, disinterested analysts might easily reduce the importance of these struggles to nothing more than

contests between rival factions for access to the status and power of the traditional elite.

However, the Nhlapo Commission, marginal though it may be to more significant national concerns, affords us a prism through which to view the dangers posed by the nebulous and solipsistic references to 'customary norms and criteria' that appear too often in the Framework Act. Although the mantra of 'custom' is frequently invoked as a universal panacea to solve all problems and cure all ills, the experience of the Nhlapo Commission shows the extent to which it serves as a mask, or even a blunt instrument, to facilitate outcomes that are the very reverse of customary.

However much it may owe its being to the 'new South Africa', the Commission's understanding of custom has not proved itself demonstrably superior to that of Colonel John Maclean in 1858 or Professor AC Myburgh in 1985.<sup>42</sup> Furthermore, as the above discussion on 'criteria for kinship' has shown, the Commission's version of custom did not even derive from 'official customary law', but was blatantly contrived by the commissioners themselves. The flaws of the Commission thus highlight and magnify one of the most fundamental flaws of the Framework Act itself, namely its failure to grapple with, much less clarify, the meaning of custom within the context of a democratic dispensation.



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## Notes

- 1 Traditional Leadership and Governance Framework Act 2003 (Act 41 of 2003), Pretoria: Government Printer.
- 2 Communal Land Rights Act (Act 11 of 2004), Pretoria: Government Printer.
- 3 Olaf Zenker, Judicial renegotiations of 'customary law' in post-apartheid South Africa, Max Planck Institute for Social Anthropology Working Paper No. XXX, 16. For an informed discussion on the broader context, see Aninka Claassens, Contested power and apartheid tribal boundaries: the implications of 'living customary law' for indigenous accountability mechanisms, *Acta Juridica* (2011), 174–209.
- 4 The White Paper is published in full in Department of Provincial and Local Government, *The role of traditional leadership in democratic governance: a consolidated set of policy instruments*, Midrand: Kwandza Branding and Design, 4–39.
- 5 Ibid, 29–30.
- 6 Verbatim transcript by author, hearings on Western Mpondo Kingship, Libode Campus, King Sabata Dalindyebo Technikon, 17 August 2005.
- 7 The commissioners were appointed by Government Notice 2394 of 22 October 2004. I remained a commissioner until my resignation on 11 April 2007. As commissioner I was obviously privy to all the internal meetings and documentation of the Commission. I would like to stress that in this article I have respected the rules of confidentiality that normally bind official appointees and without which no government could ever function. Every statement and inference in this article is based on information already available in the public domain, including evidence given at the Commission's public hearings. Special thanks to Dumisani Tabata for helping me to source some of this material.
- 8 Victor Poto Ndamase, *Ama-Mpondo: Ibali neNtalo*, Lovedale: Lovedale Press, 1927, 20–21. For further discussion of the early history of Western Mpondoland, see William Beinart, Production and the material basis of chiefship: Pondoland, c. 1830–80, in Shula Marks and Anthony Atmore, *Economy and society in pre-industrial South Africa*, London: Longman, 1980, 120–147.
- 9 Ndamase, *Ama-Mpondo*, 42, 46; Christopher Saunders, The annexation of the Transkeian territories, *Archives Yearbook for South African History* 39 (1978), 165.
- 10 Godfrey Callaway, *Pioneers in Pondoland*, Lovedale: Lovedale Press, 39–40.
- 11 CC Saunders, "The Annexation of the Transkeian Territories," *Archives Yearbook for South African History*, Pretoria: Government Printer, 1978, 71.
- 12 Quotations taken from the official transcription by ELT Pro Transcriptions cc, M Pretorius Transcriber, dated 6 July 2006. Copy in my possession. Proper names, which obviously caused M Pretorius great difficulty, have been corrected.
- 13 Verbatim transcript by author, hearings on Western Mpondo Kingship, Libode Campus, King Sabata Dalindyebo Technikon, 17 August 2005, comment T11 R10.
- 14 Ibid.
- 15 Ibid.
- 16 The Commission's final determinations with regard to the 12 paramountcies were made on 29–30 April 2008: see Determinations on the positions of the paramount chiefs, [www.gov.za/documents/download](http://www.gov.za/documents/download) (accessed 29 September 2014). This quotation comes from Determination on the position of the paramount chief of amaMpondo aseNyandeni, 85.
- 17 Documents supplied to the Commission give the dates of Musi's reign as '1580?–1620?'. My own, more conservative estimate gives 1650, if one calculates the average reign in terms of the Ndzundza genealogy; 1680, if one calculates in terms of the Manala genealogy.
- 18 HCM Fourie, *Amandebele fan Fene Mahlangu*, Zwolle: La Rivière Voorhoeve, 1921, 33–39; NJ van Warmelo, *Transvaal Ndebele texts*, Pretoria: Government Printer, 1930, 61.
- 19 Mziki, *Mlimo: the rise and fall of the Matabele*, Pietermaritzburg: Natal Witness, 1926, 51–55.
- 20 Peter Delius, The Ndzundza Ndebele: indenture and the making of ethnic identity, 1883–1914, in Philip Bonner et al

- (eds), *Holding their ground*, Johannesburg: Ravan Press, 1989, 229.
- 21 Ibid., 245.
- 22 Edwin Ritchken, The KwaNdebele struggle against independence, in Glenn Moss and Ingrid Obery (eds), *South African review* 5, Johannesburg: Ravan Press, 1989, 426–445.
- 23 KwaNdebele Traditional Authorities Act 1984 (Act 6 of 1984), Official Gazette of KwaNdebele, No. 199, Siyabuswa, 19 October 1984.
- 24 Ritchken, The KwaNdebele struggle against independence, 440–441.
- 25 Verbatim transcript by author, public hearings, KwaNdebele Old Legislature, 26 June – 1 July 2005.
- 26 Determination on the position of the paramount chief of Ndzundza Mabhoko, in Determinations on the positions of the paramount chiefs, 108.
- 27 White Paper, Ref T9R8.
- 28 Ibid.
- 29 Ibid.
- 30 Verbatim transcript, Western Mpondoland hearings, Libode, 17 August 2005.
- 31 White Paper, 7.
- 32 David Welsh, *The roots of segregation*, Cape Town: Oxford, 1971, 17.
- 33 Framework Act, Clause 9(1)(b)(iii).
- 34 J Bekker, The establishment and the identification of kings and queens in terms of the Traditional Leadership and Governance Framework Act 41 of 2003, *PER/PELJ* XI(3) (2008).
- 35 Determination on the position of the paramount chief of amaGcaleka, 150–151, in Determinations on the positions of the paramount chiefs. The Gcaleka Paramount was recognised as a king. The same wording was used to justify the kingship of the abaThembu. See Determination on the position of the paramount chief of abaThembu baseDalindyabo, in Determinations on the positions of the paramount chiefs, 169.
- 36 Determination on the position of the paramount chief of amaMpondo aseNyandeni, in Determinations on the positions of the paramount chiefs, 89; the same phraseology is repeated word for word in Determination on the position of the paramount chief of Ndzundza Mabhoko, in Determinations on the positions of the paramount chiefs, 112.
- 37 All these cases are well documented in the relevant indigenous histories. For the sake of convenience, one need only cite John Henderson Soga, *The south-eastern Bantu*, Johannesburg: Witwatersrand University Press, 1930, 105–6, 302–3, 470–2.
- 38 Jeff Peires, *The house of Phalo*, Johannesburg: Ravan Press, 1981, 14–5, 36.
- 39 Case 2062/2011, Eastern Cape Division: Mthatha, L Matiwane v President of the Republic and others, Judgement of J Griffiths, delivered on 12 December 2013. Although the judge was highly critical of the Commission's blatant disregard of relevant information, his ruling was based on its neglect of the *audi alteram partem* rule, i.e. the applicants were not given an opportunity to respond to the evidence on which the Commission based its decision.
- 40 Webster's *New International Dictionary*, 2<sup>nd</sup> ed, Springfield, Mass: Merriam, 1944, 2089.
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# Chief's justice?

## Mining, accountability and the law in the Bakgatla-ba-Kgafela Traditional Authority Area

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*Drawing on research conducted in the Bakgatla-ba-Kgafela traditional authority area in North West Province, this article explores how the expansion of platinum mining on communal land is generating resistance to a local chief. The point at issue is the chief's refusal to account for the mining revenues and business transactions that his traditional authority manages on the community's behalf. The article argues that the North West High Court's interpretation of customary law not only leaves the chief's unaccountability unchecked but also endorses the punishment of village activists who call the chief to account. Hence it remains extremely difficult for ordinary rural residents to challenge the chief to account for vast mineral revenues that he controls on behalf of their communities. Consequently rural anti-corruption activists are losing faith in the justice system.*

Unlike the gold industry, which largely affected urban industrial centres, the platinum industry has shifted the geographical focus of post-apartheid mining. The vast platinum-rich rock formation of the Bushveld Complex primarily spreads beneath rural communal land under the political jurisdiction of traditional (formerly known as 'tribal') authorities.<sup>1</sup> In the past two decades these densely populated rural areas have become the focus for the expansion of the platinum industry, particularly in the North West and Limpopo provinces. Having previously fallen under the 'independent homelands' of Bophuthatswana and Lebowa respectively, they bear the hallmarks of the apartheid order: extreme poverty, massive unemployment, poor education and a paucity of basic public services. Major operations of the world's largest platinum producers such as Anglo American Platinum Limited (Amplats), Impala Platinum Holdings Limited (Implats) and Lonmin Plc (Lonmin) compete

for space with communities in these overcrowded areas.<sup>2</sup>

The expansion of the mining industry in communal areas coincides with post-apartheid attempts to redefine residents in these areas, through law, as subjects of 'traditional communities' (or 'tribes') under chiefs. Legislation that has been enacted since the early 2000s has not only legitimised the mediation of mine–community relationships by traditional leaders, but has also significantly enhanced the powers of chiefs in South Africa. Although the post-1994 African National Congress (ANC) government at first vacillated about defining and codifying the powers and status of chiefs, it eventually passed legislation that significantly increased the powers of chiefs in rural local governance. The Traditional Leadership and Governance Framework Act 2003 (Act 41 of 2003, or the TLGFA)<sup>3</sup> is the main piece of legislation in this regard.

The TLGFA re-enacts traditional (tribal) authorities to preside over precisely the same geographic areas that were defined by the apartheid government.<sup>4</sup>

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Among other things, the Act enables chiefs and their traditional councils to be granted power over the administration and control of communal land and natural resources, economic development, health and welfare, and to administer justice.<sup>5</sup> As such, not only does this Act impose the former colonial tribal authority demarcations on rural citizens, it also promotes a controversial governance role for chiefs. Other controversial laws that, so far, have been successfully resisted by rural citizens include the Communal Land Rights Act 2004 (Act 11 of 2004)<sup>6,7</sup> and the Traditional Courts Bill.<sup>8,9</sup>

Post-apartheid laws regulating mineral rights, particularly the Minerals and Petroleum Resources Development Act 2002 (Act 28 of 2002, or the MPRDA) and its accompanying regulations, also drive the inclusion of traditional communities in South Africa's platinum industry. In seeking to redress past injustices by transforming relationships between the mining companies and local communities, this legislation has adopted a range of measures, including continued royalty payments, black economic empowerment (BEE) mine-community partnerships, and social labour plans, as requirements for mining companies. The state has encouraged communities who previously received royalty compensations for loss of land due to mining, to convert their royalties into equity shares. Consequently, with the state's support, chiefs, as assumed custodians of communal resources, have become mediators of mineral-led development and mining deals.

This means that traditional communities' interactions and engagements with mining companies are mediated and controlled by local chiefs. As assumed custodians of rural land and other tribal properties, chiefs enter into mining contracts and receive royalties and dividends on behalf of rural residents who live in the mineral-rich traditional authority area. This traditional-elite mediated model of community participation in the mining industry<sup>10</sup> has received increased media attention, particularly since the 2012 Marikana massacre.<sup>11,12</sup> In the face of protracted labour unrest in the platinum sector, the dominant view propagated by the government, mining companies and the chiefs is that tribal-elite mediated community control of mineral revenues is crucial for

congenial relations within the rural-based platinum sector. For instance, Kgosi (Chief) Nyalala Pilane of the Bakgatla 'tribe' has recently argued that,

[a] local community with strong leadership is an [asset] to a mining company, providing easy access to labour and lowering costs ... Companies ... can approach these communities in a structured way ... it's a win-win situation for everyone.<sup>13</sup>

Thus chiefs see themselves as legitimate mediators and gatekeepers through whom mining capital can gain 'easy access' to cheap local labour and communal land. However, recent research has shown that this model has not yet led to tangible benefits for community members, instead it has enhanced the power of the chiefs and caused a lack of transparency, unaccountability, heightened inequality, deepened poverty and local tensions.<sup>14</sup>

Post-apartheid laws regulating and governing traditional leadership and mining reform have been criticised for promoting exclusion and corruption by using 'distorted constructs of custom' to 'impose contested identities' and 'undermining [rural residents'] capacity to protect their land and ... mineral rights'.<sup>15</sup>

However, is custom really distorted in these post-apartheid arrangements? Recognised by the Constitution,<sup>16</sup> customary law in South Africa falls into two main categories: the 'official' and the 'living' law. 'Official' customary law is a product of the state and legal experts,<sup>17</sup> while "living" law refers to the law actually observed by the people who created it'.<sup>18</sup> Official customary law is a product of colonial formalisation of indigenous peoples' law, which imposed rigid, Western, rule-oriented conceptions of law and order. Living law, on the other hand, evolves organically out of ever-changing African socio-cultural 'processes' of dispute resolution.<sup>19</sup> Thus it is through codification that authentic 'living law' became distorted. This process of 'formalisation' of custom enhanced the power of chiefs during colonial and apartheid periods. For Mamdani, customary law became both 'all embracing' and divisive. It 'embraced' under the power of chiefs 'previously autonomous social domains [among others] the household, age sets, and gender'. Yet, the purpose

of customary law, argues Mamdani, 'was not about guaranteeing rights, it was about enforcing custom. It was not about limiting the power [of chiefs], but about enabling it'.<sup>20</sup>

The Constitution of South Africa mandates the courts to:

[A]pply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.<sup>21</sup>

However, this mandate seems difficult to realise in the light of post-1994 legislation that reinforces the apartheid-style power and authority of chiefs. Claassens cautions:

[T]o determine the content of customary law by standards of 'formal' law is to apply a distorted paradigm.<sup>22</sup>

This article demonstrates how judgements by the North West High Court not only promote these distorted versions of custom, but also bolster and protect the power of the chiefs. Drawing on research conducted in the Bakgatla-ba-Kgafela traditional authority area, North West, the article argues that the court's interpretation of customary law not only leaves the chief's unaccountability and power abuse unchecked, it also endorses the punishment of village activists who call the chief to account. Hence it is extremely difficult for ordinary rural residents in the platinum belt to challenge the chief and hold him to account for the vast mineral revenues under his control on behalf of their communities.

The empirical section of this article begins with a summary of local resistance against the Bakgatla-ba-Kgafela chief, who refuses to be held accountable to his community about mining revenues. This is followed by a discussion of selected court judgements, focusing particularly on the interpretation of customary law.

## A note on data collection

This article is based on a study that began in August 2009, when I spent three months collecting ethnographic data in the villages of Moruleng and Lesetlheng.<sup>23</sup> I returned to the research site again in July 2013 and spent two months conducting another round of field research, focusing on platinum mining

and evolving forms of struggles in the villages of Lesetlheng, Motlhabe and Sefikile (See Figure 1). The study is still in progress and I continue to make sporadic follow-up research visits to the study area. The ethnographic material presented here is based on selected semi-structured key-informant interviews with village activists in the selected villages.<sup>24</sup> This selected ethnographic material is corroborated by reference to selected archival documents in the South African National Archives in Pretoria.

## The Bakgatla-ba-Kgafela traditional authority area

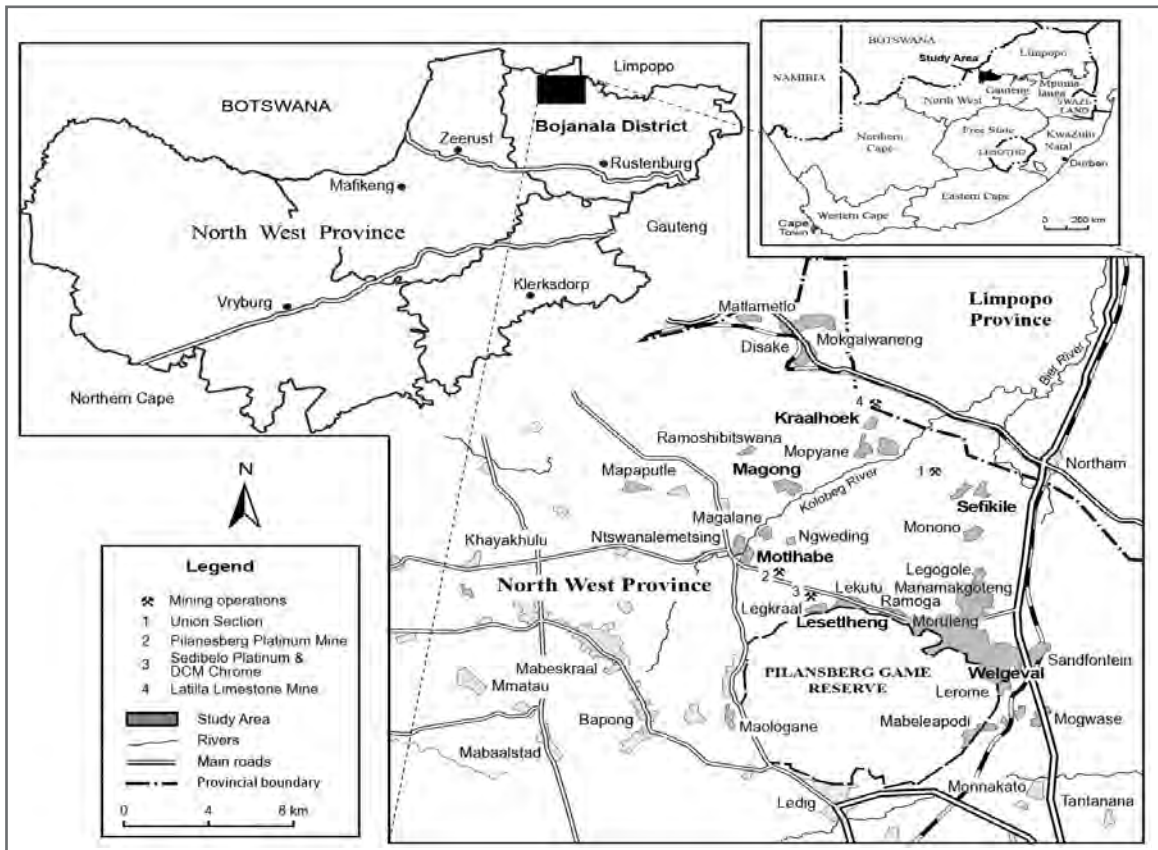
The Bakgatla-ba-Kgafela are a Setswana-speaking traditional authority community under the leadership of Kgosi Nyalala Pilane, and they occupy one of the largest communal areas in North West. Their 32 villages (see Figure 1) are spread over a vast area of more than 35 farms in the Pilanesberg region, about 60 km north of the town of Rustenburg, and fall under the Moses Kotane Local Municipality (MKLM). With approximately 300 000 residents, the Bakgatla-ba-Kgafela area is the epitome of a prominent tribal authority territory with vast mineral resources.<sup>25</sup>

## Resistance to the chief's control over mining revenues

The platinum boom, which began in the early 1990s, ushered the Bakgatla-ba-Kgafela area to centre stage. Over the past two decades, several mining operations have developed in Bakgatla-ba-Kgafela territory. On behalf of the residents in the area under his jurisdiction, Pilane has entered into numerous deals and concessions with the mining companies and other investors.<sup>26</sup> As a result of these deals, the Bakgatla-ba-Kgafela community has become a huge business empire worth approximately R15 billion.<sup>27</sup> This has elevated the chief's power and status.

There is mounting resistance by members of the community to Pilane, due to his lack of transparency and accountability in corporate dealings, and allegations of corruption against him. The contribution by Boitumelo Matlala in this issue covers in detail these struggles and their different trajectories. The investments that the kgosi has entered into through contracts with mining companies are legion. He is the director of numerous companies in a complex

**Figure 1:** Map showing the Bakgatla-ba-Kgafela area



Source: Mining and Rural Transformation in Southern Africa (MARTISA), Society Work and Development Institute (SWOP), University of the Witwatersrand

network that bear the Bakgatla-ba-Kgafela name. Some village groups contest these mining contracts that are signed by the chief. They argue that their forefathers bought the mineral-rich farms as private properties and that they should never have become tribal land.

In 2006 the regional court at Mogwase convicted Pilane and his close associate, Koos Motshegoe, on more than 40 counts of fraud and theft.<sup>28</sup> The fraud charges centred on the allegation that in 1998 Pilane signed three loan agreements to the value of R13 million with the Land and Agricultural Bank of South Africa on behalf of the community, but without a community mandate. He pledged to repay this money through the annual royalties that the tribal authority receives from Anglo American Platinum. The regional court found that Pilane 'was not authorised

to act on behalf of the tribe to enter into a loan agreement'.<sup>29</sup> Subsequently the court denied the kgosi and his co-accused the right to appeal. His lawyer filed a petition to the then Judge President of the North West High Court, who in 2009 granted the chief and his co-accused permission to appeal against their criminal convictions.<sup>30</sup>

In September 2010 the high court upheld the application and acquitted Pilane and his co-accused of all criminal charges.<sup>31</sup> This ruling surprised and devastated the villagers. The blow was even more severe for members of the Concerned Bakgatla Anti-Corruption Organisation (COBACO). COBACO, a village-based grassroots movement, had worked hard, with limited resources, to get the chief convicted. It had taken it from 1997 to 2006 to finally get Pilane to court. One of the active members of COBACO explained:

After that [Pilane's acquittal] we did nothing. We were there but we did not communicate, we did not hold meetings, things went quiet.<sup>32</sup>

Through summaries of selected court judgements, the next section demonstrates how the court's interpretation of custom leaves the chief's unaccountability unchecked in the Bakgatla-ba-Kgafela area. The 1950s judgement is included, not to compare judgements during apartheid with post-apartheid judgements, but to provide an indication of how the courts' interpretation of customary law in the Bakgatla-ba-Kgafela community still results in punishment of the chief's opponents. Ironically, this situation continues in the post-1994 democratic era.

### The law: a chief's weapon for punishing 'troublemakers'?

During the rule of Kgosi Tidimane Pilane – Pilane's predecessor – there were sporadic instances of resistance against the traditional authority. In one instance in 1953, Kgosi Tidimane imposed a levy of one ox per person on every adult male member of his tribe for the purchase of the farms Middelkuil No. 564 and Syferkuil No. 372. The combined price for both farms was £14 000.<sup>33</sup> Those who could not offer oxen were obliged to pay £15 per person. In June 1956 a group of village residents, led by Jacob Pilane, a village activist and relative of the chief, filed a court petition accusing the chief for failing to account for the money he collected and 'wrongfully and unlawfully using and appropriating tribal funds for [his] personal benefit'.<sup>34</sup>

The hearing took place at the Transvaal Supreme Court in Pretoria on 28 June 1956. Jacob Pilane was listed as the only 'petitioner' against Tidimane. Judge C Bekker dismissed Jacob's application on 16 August 1956. His judgement was primarily based on the argument that the chief had no responsibility to account 'to anyone of his individual subjects' concerning the tribal accounts and that Jacob, although a member of the tribe, did not have *locus standi* to file a court application against the chief. Bekker continued:

[I]n native law the chief, in circumstances such as the present is held accountable only to the tribe acting in, or through a *lekgotla* or tribal meeting

... the petitioner [Jacob], in his private capacity is not, in my view of the matter entitled to the relief he claims – reliefs personal to himself and not to the tribe.<sup>35</sup>

The judge also awarded costs against Jacob. This verdict was not the last of his troubles. The chief's loyalists in Moruleng harassed his family for challenging the chief and accused him of trying to overthrow the chief. Since the judge awarded Tidimane the costs in the case, this gave him more ammunition with which to punish Jacob. Jacob was unable to pay the legal costs, so Tidimane sent a group of men to his home to confiscate his cattle and agricultural tools by force. When this happened Jacob was in Swaziland, where he worked as a chef. One of his sons, who witnessed these events, said:

The year was 1956 and I was doing Sub B when they came and took all my father's possessions. They came looking for my father's cattle. They took three cows together with all the ploughing equipment and left. They sold them to a white farmer called Piet Koos ... in Pilanesberg.<sup>36</sup>

Jacob never recovered his confiscated property.

The judgement against Jacob Pilane relied significantly on a distorted version of 'official' custom, which absolved chiefs from accounting to individual community members, thus providing them with enormous leverage to manipulate the downward accountability processes. As the only person entitled to call meetings (according to the 'official custom'), if a chief wants to avoid accountability he can simply refuse to convene community meetings.

The courts' use of distorted 'official custom' continues in the post-apartheid democratic era. Over the past decade, Pilane has filed several court interdicts against a number of villagers who have challenged his power over the Bakgatla-ba-Kgafela community. This has intensified as more and more community members display displeasure with the chief's unilateral control over mining revenues.

In May 2008 Pilane filed an urgent court interdict at the North West High Court against a group of residents led by David Pheto. Identifying themselves as the 'Royal House', Pheto and other disgruntled community leaders had called an urgent general

community meeting (a *Kgotha-Kgothe*) in order to oppose the mining transactions that the chief was about to sign on behalf of the community. The meeting was to be held on 21 May 2008. The dissenting group of residents also wanted to pre-empt another general meeting called by the chief on 28 June 2008 to co-opt the community into endorsing a murky mining transaction. Through this meeting Pilane intended to obtain a tribal resolution for a transaction between Itereleng Bakgatla Mineral Resources (Pty) Ltd (IBMR) (owned by the Bakgatla-ba-Kgafela) and Barrick Platinum South Africa (Pty) Ltd (Barrick), a subsidiary of Barrick Gold Corporation.<sup>37</sup> The villagers opposed this transaction, mainly because they felt marginalised. They felt that the chief was unilaterally signing a mining contract that undermined their land rights without fully involving them.<sup>38</sup>

At the time, Pilane was facing a case of numerous instances of fraud and theft.<sup>39</sup> Pheto and other villagers demanded that he step down from his position. In response, Pilane interdicted Pheto and five other leaders of the dissent 'from interfering with a ... general meeting which was to be held on 28 June 2008'.<sup>40</sup>

In the North West High Court, Judge AM Kgoele consolidated the two interdicts and handed down the judgement, confirming both the interim interdicts by the chief against Pheto and others on 3 December 2008.<sup>41</sup> The central argument in the judge's decision was that Pheto and five other community leaders did not have *locus standi* to call meetings of the tribe or to mobilise for the removal of Pilane from his position. Kgoele dismissed their claim that they were members of the 'Royal House' and refused them leave to appeal. The Supreme Court of Appeal also turned down their request for leave to appeal this decision.

Subsequent judgements at the North West High Court have reinforced Kgoele's decision. This has helped to suppress opposition against Pilane. For instance, in September 2011 Judge RD Hendricks confirmed an interdict by Kgosi Nyalala Pilane against Pheto and other leaders, preventing them from calling community meetings. In line with previous judgements and the North West High Court, the judge found that Pheto and others were not

members of the 'Royal Family', therefore they did not have *locus standi* to call meetings or to represent any group of villagers in Bakgatla-ba-Kgafela territory.

Hendricks imposed punitive costs on Pheto and his fellow dissenters. He averred:

... it is quite apparent that the [r]espondents are doing everything within their means to unseat and undermine the authority of the [a]pplicants [Kgosi Nyalala and the Traditional Council] and to litigate as often as possible in an attempt to create confusion within the tribe. This behaviour borders on being vexatious. This, to my mind, calls for a punitive costs order.<sup>42</sup>

In other cases involving local activists against Pilane, decisions at the North West High Court were no different. The court's decisions continue to endorse the version of custom that ossifies the chief's power over communal property and endorses the tribal authority as the only legitimate authority with *locus standi* to represent village residents. For instance, in a land dispute case between Pilane and a group called Bakgatla-ba-Sefikile Traditional Community Association (BBSTCA),<sup>43</sup> Judge MM Leeuw, citing the Constitution and customary law, argued:

In this matter I am enjoined by the Constitution to recognise that land that is held by the Kgosi or traditional leader on behalf of a tribal community should be dealt with in terms of legislations that have been enacted for the purpose of regulating amongst others, the ownership thereof as well as the role and powers of the traditional leaders.<sup>44</sup>

The judge dismissed the application of the BBSTCA with costs.

Also at the North West High Court on 30 June 2011, Judge AA Landman's judgement upheld Pilane's interdicts against Mmuthi Pilane and Reuben Dintwe. Mmuthi Pilane and Dintwe are two activists leading a secession attempt by the residents of Motlhabe village. The judge argued:

Any action by a parallel but unsanctioned structure that is neither recognised by law or custom seeking to perform or assume functions that are clearly the exclusive preserve of recognised authorities ought to incur the wrath of law.<sup>45</sup>



The North West High Court and the Supreme Court of Appeal denied Mmuthi Pilane and Dintwe leave to appeal against this judgement. The lawyers who represented the two activists took the matter to the Constitutional Court, which set aside the three interdicts in February 2013, mainly on the basis that these 'interdicts adversely impact on the applicants' rights to freedom of expression, association and assembly'.<sup>46</sup> The Constitutional Court judgement was a landmark victory for traditional communities: it affirmed the freedom of expression, assembly and association of rural residents. It should be cautioned, however, that the setting aside of the three interdicts against Mmuthi Pilane and Dintwe (also mentioned in Monica de Souza's contribution in this edition) did not reverse the previous judgements or the cost orders issued against Pheto and other village activists.

### **Pheto's punishment and dwindling faith in the justice system**

As a result of one of several punitive costs orders, Pheto has suffered great personal loss, including loss of his livelihood. On 18 October 2013 the North West High Court issued a 'Writ of Execution' of punitive costs against Pheto. According to this document Pheto owes Pilane R372 204,30 in legal costs. This originated from Kgoele's judgement in December 2008 when she confirmed two of Kgosi Nyalala's interdicts and imposed punitive costs on Pheto and the six other respondents.<sup>47</sup> The baffling irony remains the fact that, out of seven respondents, the North West High Court has targeted Pheto alone with the execution of legal costs: the amount is not divided among the court respondents. Obviously, Pheto perceives himself as being targeted as a leader of the 'rebellion':

Why did the apartheid government kill Steve Biko? Why did they arrest Nelson Mandela? It's because these leaders were causing trouble to that oppressive regime. The punitive costs are targeting the 'troublemakers'. That is why I am the only person who is being punished.<sup>48</sup>

Before this incident Pheto was running a legal practice in Mogwase, about 10km from Lesetlheng village where he lives with his family. The sheriff has since attached all his office equipment and Pheto

has not been able to continue with his legal practice. The small butchery that he had been running with his siblings in Moruleng was also closed down after the sheriff attached all the equipment inside. Pheto and his ailing mother have fought to defend the property at his home in Lesetlheng from being attached.

Pilane's numerous court applications against Pheto and other leaders have also contributed towards Pheto's financial demise. As one of the few villagers who had some kind of income in the impoverished Bakgatla-ba-Kgafela territory, Pheto and other leaders had to pay the lawyers who represented them out of their personal funds. It is therefore unsurprising that some of the community activists who were previously with Pheto in these court battles against the chief have now abandoned the struggle. Some have even shifted allegiances to join forces with Pilane, and now occupy senior positions in the traditional political hierarchy. These positions are allegedly accompanied by good salaries and other benefits.

It is no exaggeration to argue that court cases and costs orders have, even if accidentally, functioned as a potent tool for chiefs to suppress opposition and constrain the rights of rural villagers, especially in the face of rural-based platinum mining expansion in North West. This instils fear in the villagers and prevents them from challenging the power of the chief. It is against the backdrop of the North West High Court's judgements that Bakgatla-ba-Kgafela activists have experienced a loss of faith in the justice system. The evident difficulties in removing the chief's control over the mining revenues have led to some nicknaming him 'Mr Untouchable'.<sup>49</sup>

The situation is aggravated by the fact that villagers have had to use their meagre financial resources in their efforts to obtain justice. With a despairing tone, Pheto described the situation:

The chief uses tribal funds to enjoy the luxury of hiring the most expensive legal expertise in the land to fight against ordinary rural community members like us. We act on behalf of the tribe. The police arrest us. The courts target us with punitive costs so that the chief can hold us in subservience. The grand apartheid is not yet over. We don't have money to hire big lawyers and private investigators.

We have tried everything we could to defend our rights from the chief and the vultures [mining companies] from all over the world who converge on our forefathers' land to prey on the poorest of the poor. We've been fighting for so long without any help from the current government. Time is moving fast. You grow up every day, then you get sick and you die.<sup>50</sup>

As pointed out earlier, the leaders of COBACO have not only struggled to maintain their support in their villages after losing the appeal case against the chief at the North West High Court in 2010, but their faith in the justice system has also dwindled.

## Conclusion

Using the Bakgatla-ba-Kgafela community as a case study, this article has demonstrated a threefold paradox. Firstly, it has revealed that vast mineral wealth has enhanced the chief's power. Secondly, it has shown that it remains extremely difficult for ordinary villagers to hold the chief to account about communal resources. This hardship is exacerbated by the courts' application of distorted custom, which punishes villagers through costs orders. This means that marginalised rural residents are afraid of challenging their chiefs, and diffuses resistance to unaccountable traditional authorities. The chief also uses tribal finances generated through platinum mining to suppress resistance and intensify his hold over mineral revenues. Thirdly, the general lack of faith in the justice system must be understood against the backdrop of this process of marginalisation and punishment. Although it is impossible to generalise from just one case, one can still argue that unaccountability is likely to continue in the rural platinum belt as long as the interpretation of custom applied by the North West High Court functions as a tool for unaccountable chiefs to punish villagers who challenge them.

Such a phenomenon reveals a serious deficit in the current democratic order: unelected traditional leaders champion mineral-led development with very limited accountability measures. As shown in this article, the court's interpretation of custom makes it even more difficult for villagers to hold the chief to account.



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## Notes

- 1 The establishment of traditional authority areas in South Africa owes much to several pieces of colonial legislation, including the 'Native' Land Acts of 1913 and 1936 and the Bantu Authorities Act 1951 (Act 68 of 1951, or BAA).
- 2 Other communities with stakes in platinum mining in North West include the Bafokeng, Bakubung ba Rutheo, Bapo-ba-Mogale and baKwena ba Mogopa. Traditional authorities mediate the transactions between these communities and mining companies. Details of these transactions are complex and beyond the scope of this article.
- 3 Traditional Leadership and Governance Framework Act 2003 (Act 41 of 2003); Pretoria: Government Printers.
- 4 A Claassens, Resurgence of tribal levies: a double taxation for the rural poor, *South African Crime Quarterly* 35 (2011), 14.
- 5 See Section 20 of the Traditional Leadership and Governance Framework Act (TLGFA).
- 6 Communal Land Rights Act 2004 (Act 11 of 2004), Pretoria: Government Printers.
- 7 Rural communities successfully opposed this Act on the basis that it undermined their private property rights enshrined in the Constitution and unfairly leveraged the powers of the traditional councils over vast areas of communal land. See *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* (CCT 100/09) [2010] ZACC 10 (11 May 2010).
- 8 Traditional Courts Bill 2008 (Bill 15 of 2008), published in Government Gazette No. 30902, 27 March 2008, <http://www.justice.gov.za/legislation/tradcourts/B15-2008.pdf> (accessed 12 April 2012).
- 9 S Mnisi, The Traditional Courts Bill: controversy around process, substance and implications, *South African Crime Quarterly* 35 (March 2011), 3–10.
- 10 S Mswana, Are communities benefiting from mining? Bafokeng and Bakgatla cases, *South African Labour Bulletin* 37(3) (2013), 30–33.
- 11 For details of the Marikana massacre see P Botes and N Tolsi, Marikana: one year after the massacre, *Mail & Guardian Marikana*, <http://marikana.mg.co.za/> (accessed 12 September 2014).
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# ‘We want the bread, not the crumbs’

## Challenging traditional authority in the platinum belt<sup>1</sup>

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*Members of the Bakgatla-ba-Kgafela traditional community have attempted to hold their traditional leader to account for decisions affecting the community. This article describes the interactions between some community members, traditional leaders, the state and courts, as members of the community have sought to challenge unilateral action by the traditional leader with regard to how community assets and revenue are managed and accounted for. The article examines the various actions groups and individuals have resorted to in an effort to confront traditional leadership and appeal to politicians, officials and the North West provincial government.*

The Bakgatla-ba-Kgafela Traditional Council Area has been beset by disputes and contestations over the access to, and management of, assets and revenue derived from mining operations in the area, as far back as 2001.<sup>2</sup> Platinum mining is a significant source of revenue in the area, and some of the most visible contestations have been about to whom the benefits of mining accrue.

The Traditional Council presides over the Bakgatla-ba-Kgafela, a group located in the Pilanesberg, spread across 32 villages that fall under the Moses Kotane Municipality in North West Province, South Africa. This traditional council area was first established in 1953 as the Bakgatla-ba-Kgafela Tribal Authority under the leadership of Chief Tidimane Ramona Pilane. To date, the number of inhabitants in this locality ranges from 350 000 to a conservative 160 000.<sup>3</sup> The area is located on some of South Africa's most platinum-rich land in the western limb of the Bushveld, a site of large-scale mining of platinum

group metals. It is estimated that South Africa holds 87% of the world's platinum group metal reserves.<sup>4</sup>

As is the case with the neighbouring Barokologadi<sup>5</sup> and Bafokeng,<sup>6</sup> Bakgatla-ba-Kgafela territory consists of both syndicate-purchased and state-owned land. This is a product of history. Discriminatory laws, such as the Native Trust and Land Act 1936 and its 'six native rule', forced groups of land buyers to associate themselves with tribes recognised by the apartheid government in order to buy land.<sup>7</sup> In the case of the Bafokeng, the Bafokeng Land Buyers Association is in essence a federation of the descendants of those families and clans that clubbed together to buy farms, such as the Setuke and Thekwane families.<sup>8</sup> Among the Bakgatla-ba-Kgafela, the subgroups with the most prominent claims have been the Dibeso of Lesetlheng – clans that descend from the original buyers of some of the mineral-rich farms, represented by the Lesetlheng Land Committee; and descendants of 52 original buyers among the Bakgatla-ba-Sifikile, represented by the Bakgatla-ba-Ses'fikile Community Development Association.

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Sub-groups such as those represented by the Lesetlheng Land Committee and the Ses'fikile Community Development Association have objected to the investments on specific farms that were bought by the family syndicates they represent.<sup>9</sup> They have also objected to the manner in which decisions about these investments have been made; in particular that the decision-making processes have excluded the descendants of the original buyers and those with customary entitlements to land in the area.

The various actions and reactions directed at the traditional leader and the state, concerning the management of mining assets and revenue, came to the attention of the Centre for Law and Society (CLS) at the University of Cape Town following our involvement in a Constitutional Court case against the Bakgatla-ba-Kgafela traditional leader, Kgosi Nyalala Pilane, and the Bakgatla-ba-Kgafela Traditional Council heard in the Constitutional Court in 2012.<sup>10</sup> In this case the complainants, Mmuthi Kgosietsile Pilane and Rabushibidu Reuben Dintwe, sought to have an interdict, obtained by Kgosi Pilane in the North West High Court to prevent villagers in Motlhabe from meeting, overturned. The central point of contention was over the right of members of a traditional community to call a public meeting. I discuss this case in more detail later in the article.

During this case it became apparent that the interdict in question was one of several interdicts that Pilane had obtained to prevent community leaders, including members of the royal family, from holding public meetings, on the basis that only he has the *locus standi* to convene meetings of the *morafe* ('tribe' in Setswana).

CLS conducted secondary research to understand the scope and nature of the contentions related to traditional leadership, mining operations and land rights in the area. This article is based on an analysis of media articles; on submissions to the national parliament by Mmuthi Pilane, by a representative from Motlhabe village, and by one of the leaders of the Concerned Bakgatla Anti-Corruption Organisation (COBACO); on information gathered during five consultation meetings in 2013 with members of COBACO, representatives from Motlhabe Village, and two members of the Bakgatla-ba-Kgafela Communal

Property Association; and on interviews with a representative of the Lesetlheng Land Committee and an official in the Moses Kotane municipality.<sup>11</sup>

Largely, the purpose of the consultation meetings was to develop a litigation strategy aimed at enforcing the checks and balances provided for in the North West Traditional Leadership and Governance Act (Act 2 of 2005, or the North West Act), in order to achieve greater transparency and accountability in the management of assets and revenue by the Bakgatla-ba-Kgafela Traditional Council and Administration.<sup>12</sup>

The article begins with an outline of the legislative context from which the notion of traditional community emerged. The simple application of the concept of 'traditional community' conceals diverse histories and identities within traditional communities, and obscures the historical ownership of land by some subgroups within these communities. However, for the purposes of this article the term 'traditional community' is used as defined in the Traditional Leadership and Governance Framework Act 2003 (Framework Act).<sup>13</sup> In this article, 'traditional community' refers to the collection of the 32 villages that are within the (legal) boundaries of the Bakgatla-ba-Kgafela Traditional Council, headed by Pilane.<sup>14</sup>

The article describes the actions taken and demands made by members of the Bakgatla-ba-Kgafela Traditional Community in efforts to hold Pilane accountable, and to demand clarity from the state on matters of land and asset ownership, accountability and the distribution of benefits. The article shows how members of the traditional community adapted their objections and protest action in relation to the contexts in which they were undertaken.

## Legal framework: a legacy of apartheid

The Framework Act provides for the recognition of traditional communities.<sup>15</sup> It deems 'tribes' that existed prior to the commencement of this Act as the present-day traditional communities. It also deems tribal authorities established by the Bantu Authorities Act 1951 (Bantu Authorities Act) and recognised as such prior to its commencement, to be traditional councils, provided they meet new composition requirements.<sup>16</sup> De Souza, in this edition of SACQ,

points out how several traditional councils failed to meet these requirements, which brought into question their legal status.

The Act does not undo the contested tribal authorities boundaries established by the Bantu Authorities Act. In an effort to establish 'neat tribes', the Bantu Authorities Act forced together people with varied identities, histories and rights to land.<sup>17</sup> According to Claassens,

People with different identities, who clubbed together to purchase land, lived on mission settlements, moved from distant areas to be near work, or were evicted from 'black spots' and dumped in the reserves, suddenly found themselves defined as the 'tribal subjects' of leaders with whom they had little or no shared history.<sup>18</sup>

The current contestations in relation to governance, land allocation and rights in communal areas are indicative of the adverse implications that the apartheid consolidation of Bantustans has had on groups that reside in these areas.

This article is concerned with the ways in which different members of the community have taken action to register their complaints, and to confront and appeal for assistance from the state.

## Direct petitions

In August 2008, at a government-convened imbizo,<sup>19</sup> members of COBACO – a grassroots residents forum opposed to corruption – handed President Thabo Mbeki a dossier detailing allegations of theft and the mismanagement of funds that had been taking place in the Bakgatla-ba-Kgafela Traditional Administration (BBKTA).<sup>20</sup> The residents forum did not receive a response from the president to the allegations contained in the dossier.

At the centre of these allegations was the traditional leader, Pilane.<sup>21</sup> Earlier that year, he had been found guilty in the Mogwase Regional Court of theft and fraud.<sup>22</sup> He was convicted of defrauding the Land and Agricultural Bank of South Africa (Land Bank) by misrepresenting the annual revenue that would be received by the Bakgatla-ba-Kgafela in his applications for a loan to the bank. In this application,

he had stated that the traditional community would receive an amount of R6 million in royalties but failed to mention that these royalties were pledged to Anglo Platinum for a loan that the company had given him. Three loans were granted to the Bakgatla-ba-Kgafela on the basis of this application. He was also convicted on 39 charges of theft. These charges related to monies that were paid from tribal accounts to his private account and were subsequently used for personal needs.<sup>23</sup> Pilane appealed the judgement, which was successfully overturned in 2010 by the North West High Court in Mafikeng.<sup>24</sup>

The provincial government had declined, after the first ruling, to suspend Pilane, citing the possibility of an appeal. In response to the provincial government's decision, the royal family, acting on 'behalf of the community', wrote a letter to the ANC secretary-general, requesting the removal of the then Premier, Edna Molewa. According to media reports,

At a mass meeting at Moruleng Stadium, Saulspoort, the tribe decided it would deliver a letter backing its call [for the removal of Molewa] to ANC secretary-general Gwede Mantashe today.<sup>25</sup>

Pilane was acquitted in 2010 on the basis that it was not 'necessary that a trust of a company conduct business in accordance with section 11 when the monies in question are not provided by the state but involve a commercial concern'.<sup>26</sup> The judge did not explain his reasoning in the light of s11(2)(d) of the Bophuthatswana Traditional Authorities Act 1978 (Act 23 of 1978, or the Bophuthatswana Act) that stipulates:

- (2) There shall be paid into the account of the tribal authority --
- (d) all other amounts derived from any source whatsoever for the benefit of the tribal authority including any amounts payable to the tribal authority which the National Assembly may grant for the purpose.

Before 1994, the Bakgatla-ba-Kgafela and other tribal authority accounts of s11(2), also known as tribal trust accounts, were controlled by the Bophuthatswana government. Mining revenue was deposited into these accounts rather than distributed to groups whose land was mined. The North West

Act has preserved these state-controlled accounts for mining and other revenue under the supervision of the premier in s30.<sup>27</sup>

## Litigation

Despite the 2008 case of fraud and theft, Pilane's management of assets and revenue of the traditional community continues to be characterised by a lack of accountability. In their objection to this approach, the Bakgatla-ba-Sifikile and Bakgatla-ba-Kawutlwale have asserted an autonomous identity, rejecting the imposition of a rigid tribal identity that was to a large extent achieved through land acquisition and ownership.

The descendants of the original buyers among the Bakgatla-ba-Sifikile, represented by the Ses'fikile Community Development Association, brought an application before the Gauteng High Court in 2010 that was transferred to the North West High Court in 2011. At the centre of this dispute was the claim that the farm known as Spitzkop 410KQ was bought in 1910 by 52 purchasers who were not of the Bakgatla-ba-Kgafela Tribe, as it was then called. Spitzkop 410KQ is one of the farms on which Anglo Platinum's Union Section Mine is located.

The law at the time prohibited black people from owning land as individuals, and many were thus forced to associate with tribes recognised by the union government to enable them to acquire land.<sup>28</sup> Consequently, the purchasers had no option but to request that Chief Ramono Kgamanyane Pilane (1902–1910) of the Bakgatla-ba-Kgafela purchase the land as their nominee.<sup>29</sup> In its application, the Ses'fikile Community Development Association asked the court to transfer the ownership of this farm to the association, as a body representing the 52 purchasers. The North West High Court judge ruled against their application on the basis that the association had not proven that its members had historical ownership rights, and had failed to show that their forefathers were deprived of these rights as contemplated by section 25(1) of the Constitution.<sup>30</sup>

There was a similar revival of historical ownership and of an independent identity in the dispute between Mmuthi Pilane, as a representative of the Bakgatla-ba-Kawutlwale, and the Bakgatla-ba-Kgafela

Traditional Council. In February 2010, Nyalala Pilane obtained an interdict preventing the Bakgatla-ba-Kawutlwale from meeting to discuss their intention to secede from the Bakgatla-ba-Kgafela. Some members of the Bakgatla-ba-Kawutlwale thought that with greater independence through secession, they could have direct control over the management and allocation of resources that were due to their village, Motlhabe.<sup>31</sup> As mentioned earlier, Nyalala Pilane interdicted this meeting, but the interdict was overturned in 2013 in a Constitutional Court case. In their court papers, representatives of the Bakgatla-ba-Kawutlwale claimed that, from the 1600s to the 1900s, they and other subgroups tracing back their lineage to Pilane Pilane had been autonomous and equal in standing. They argued that this had been the case until the consolidation of these groups into one tribe, the Bakgatla-ba-Kgafela under Kgosi Tidimane, by the apartheid government in 1953.<sup>32</sup> The subgroup remains part of the Bakgatla-ba-Kgafela and has not set in motion any plans to secede.

In their objections to what they believe to be the mismanagement of revenue, both these subgroups have sought to revive their historically autonomous identity in reclaiming their rights to property. Through the use of the courts, they have attempted to reconfigure current property relations, drawing on histories and identities that were denied by colonial and apartheid legislation. These are not the only subgroups that have made these assertions. The Dibeso in Lesetlheng have, through the Lesetlheng Land Committee, also asserted their independent ownership rights to at least two mineral-rich farms, in an effort to gain direct control and be included in the management of mining benefits. This article focuses on the plight of the Bakgatla-ba-Sifikile and ba-Kawutlwale because in both cases there are court judgements that provide a record of these subgroups' histories and current experiences.<sup>33</sup>

## Protest action

In May 2012, villagers marched to the office of the Bakgatla-ba-Kgafela Traditional Council to raise concerns about the manner in which the assets and revenue of the traditional community were being controlled, and to present a memorandum of demands. The BBKTA Chief Executive Officer

received the memorandum in which he was given 14 days to respond to the demands expressed in it. The memorandum registered demands that ranged from employment for locals, service delivery and transparency, to matters of local accountability. When the BBKTA failed to respond within the agreed time frame, residents embarked on a protest in June 2012. The second day of the protest turned violent and was marked by vandalism, barricades and the closure of a school. Among other things, a school, a councillor's house and several vehicles were destroyed. A number of protestors were arrested. During the protest, demands similar to those registered in the memorandum that was previously handed to the BBKTA CEO were aired.<sup>34</sup>

The protest was also fuelled by BBKTA involvement in a number of lucrative deals with some of the big mining houses and public investment institutions in the platinum mining sector; this while residents in the area continue to experience high levels of poverty and unemployment.

In 2008, the Bakgatla-ba-Kgafela converted royalties to a 15% share in Union Mines operations, majority-owned by Anglo Platinum.<sup>35</sup> The BBKTA also has 26% equity in Sedibelo Platinum Mines Limited, a consolidation of mining operations in which Bakgatla, Pallinghurst and Platmin hold interests.<sup>36</sup> The Independent Development Corporation has invested R3.2 billion in this venture.<sup>37</sup> Outside of mining, the group has interests in tourism – with partial ownership of the Pilanesberg Game Reserve and other tourist lodges in the area – agriculture, and manufacturing. However, some villagers maintain that they have not experienced the material benefits of these investments. One villager stated in a media interview that 'we get to hear in the media about all the multimillion rand deals while our children remain unemployed and communities live in poverty'.<sup>38</sup>

While the 2012 protest was directed at the traditional leader and council, the protestors also held the state responsible for the poor state of affairs in the area, and demanded that the provincial government assume greater responsibility for resolving the problems that plague the traditional community. The leaders of the protest made it clear that one of the objectives of the protest action was to get

the attention of the state: 'We want government to take us seriously hence education was interrupted. We want Premier Thandi Modise here,' said a 'community' representative.<sup>39</sup>

Two demands were central to the protest: preferential employment for locals, one of the expected objectives of social and labour plans (SLPs); and a democratically elected traditional council. SLPs are required by the regulations of the Minerals and Petroleum Resources Development Act 2004 (the MPRDA),<sup>40</sup> and are one of the key tools designed to regulate contributions by mining companies to local economic development and basic services in mining-affected communities. Yet the Department of Mineral Resources has not held mining companies to account regarding commitments that were undertaken in these plans.<sup>41</sup> The second demand was related to the long overdue elections of traditional councils that kept being postponed. (The elections eventually took place in January 2013.)

The Framework Act requires that a traditional council should consist of 40% democratically elected representatives and 60% members appointed by the traditional leader. A third of the total number of council members should be women.<sup>42</sup> In March 2011, the North West Department of Local Government and Traditional Affairs issued a circular, calling on traditional councils not to enter into any contracts or conclude any commercial deals, as these might be invalid given that traditional councils at the time were not properly constituted.<sup>43</sup> On 25 January 2014 elections were held in an attempt to reconstitute traditional councils in the North West, including those of the Bakgatla-ba-Kgafela and the Bapo-ba-Mogale.<sup>44</sup>

The manner in which grievances and demands were framed in the protest action points to how they are contextualised and thereby validated. For instance, residents demanded recognition and preferential employment on the basis of their status as 'community members' or 'locals' amid the state's emphasis (or rhetoric) on local development: 'We're not benefiting at all from these mines that are extracting wealth from our own land,' said one resident.<sup>45</sup> They also relied on the language of employment creation, a topical issue in South Africa.

This collective action took place in a context of increased use of social protests as expressions of local indignation, grievances and marginalisation.<sup>46</sup> Tapela observes that despite the greater attention given to violent protests in urban and peri-urban areas, there has been of late an expansion of violent and non-violent protests to rural areas as well.<sup>47</sup> The South African Police Service's more comprehensive data show that in 2012 there were 1 214 incidents of public violence across the country. Increases were recorded in seven provinces, with significant escalations in the North West (76%), Eastern Cape (60%), Gauteng (38%) and the Western Cape (31%).<sup>48</sup>

## Parliamentary submissions

Along with court action, appeals to authority and protest action, local representatives from the traditional community also used institutional avenues to register their complaints and assert their rights. As mentioned above, two submissions were made to members of Parliament in 2013.<sup>49</sup> A representative from Motlhabane and one from COBACO made submissions to Parliament about the denial of land rights and the traditional leader's unilateral approach to the management of mining assets and revenue.

In 2013, a COBACO representative made a submission to Parliament's Ad Hoc Committee on the Legacy of the Native Land Act of 1913 that conducted an oversight visit in the North West in September 2013. The committee's objective was to 'interact with the beneficiaries [of land reform]' in order to understand the challenges they face.<sup>50</sup>

While his objective was to raise concern about corruption, which is central to COBACO's mandate, the representative was unable to approach the committee as a member of COBACO, as the meeting was focused only on the performance of communal property associations and the challenges they experience. However, since he was a member of the CPA, he was able to assume this status in order to address the committee. He raised concerns about the challenges the community had experienced in trying to get the BBKTA to account for the revenue and assets of the traditional community. He was also able to recount the difficulties they had experienced

with the local office of the Land Claims Commission. This was couched in an account that foregrounded the failures and constraints experienced in the CPA's co-management of the Pilanesberg Game Reserve, rather than expressing the concerns of the traditional community regarding allegations of theft and the mismanagement of funds in the BBKTA that persisted even after Pilane was acquitted in 2010.

The oversight visit had been prompted by a submission made in Cape Town by Mmuthi Pilane.<sup>51</sup> This submission, made at a parliamentary workshop on 'Redressing the legacy of the 1913 Land Act', emphasised the ways in which the MPRDA pre-empts comprehensive restitution for those who were historically dispossessed of land.<sup>52</sup>

The MPRDA does not provide restitution claimants with the right to claim the minerals that they lost with land dispossession. Although, under the MPRDA, landowners were allowed to apply for the conversion of old order rights to new order rights, this was only advantageous to those (largely white owners) who possessed the old order rights to minerals to begin with. Those who did not have title deeds and were therefore without 'legal' rights to the minerals prior to the enactment of the MPRDA, could not participate in the conversion.

The submission recounted a history of the Bakgatla-ba-Kawutlwale, one of the subgroups in the Bakgatla-ba-Kgafela Traditional Community, explaining that their current strict association with the overarching Bakgatla-ba-Kgafela group is a relatively recent construct. In the 1800s, the tribes under the leadership of Kawutlwale, Tshomankane, and Mandries were separate, independent and equal in standing. They were then placed under the leadership of Tidimane, in no small part because of his cooperation with the apartheid government. The consolidated tribe that he came to lead, established in 1953, is today known as the Bakgatla-ba-Kgafela. The submission described how the forefathers of some Bakgatla-ba-Kawutlwale families acquired land in 1909 and 1926, and how they were dispossessed of that land when they were forcefully removed in 1932. It described the occupation and use of this purchased land prior to dispossession, and how it has become the site of one of the biggest open



cast mining operations in the North West today. The submission outlined the layers of dispossession, and simultaneously highlighted the degree and need for a nuanced approach to restoration, in a context where 'land restitution laws and policies have underscored the importance of origin and ancestry'.<sup>53</sup>

Although these parliamentary forums provided the local representatives from the Pilanesberg with the opportunity to formally and publicly register their grievances,<sup>54</sup> and while there was at the very least an acknowledgement of the state of affairs in their area in the final outcomes of the two submission processes, no public action has been taken to resolve the conditions that have given rise to these grievances.<sup>55</sup>

## Discussion: actions, claims and meaning

Contrary to a trend in urban townships of resorting to protest action, groups and individuals in Bakgatla-ba-Kgafela territory have primarily relied on institutional channels to express and register their grievances.<sup>56</sup> They have also used formal and direct petitions to question the manner in which Pilane controls their assets and revenue, and to appeal to politicians, officials and the North West provincial government to resolve the challenges in the area. Through these petitions, local residents have sought to bring to the attention of government the extent of unaccountability and the scale of unilateral action by Pilane and the BBKTA.

Two local representatives, a member of COBACO and a leader from Motlhabe village, had the opportunity to present similar grievances before Parliament. While the invitation gave the COBACO representative an opportunity to address members Parliament, the expectations of the Ad Hoc Committee on the Legacy of the Native Land Act of 1913, expressed in their agenda, constrained the representation, his form of expression, and the claims and demands that he could make.

The agenda defined what could be said and how it should be said, reminding us that 'as "invited spaces" the institution of the participatory sphere is framed by those who create them'.<sup>57</sup> Nevertheless, the matters he raised in his submission made it into the Ad Hoc

Committee's report that was tabled in the National Assembly.<sup>58</sup> The inclusion of the local representatives in the parliamentary workshop and oversight visit indicate that these formal participatory spaces hold the potential to influence decision-making processes.

Through the use of courts, members of the Bakgatla-ba-Kgafela traditional community have sought to challenge those in power and strengthen their access to community resources by asserting counter claims, rights, histories and identities. Select representatives from the area have made submissions to Parliament in an attempt to make parliamentarians aware of how the ownership rights of subgroups are affected by legislation, in particular the Restitution of Land Rights Amendment Act 2014 and the MPRDA, and the context in which these laws are enacted.

However, it is the march and protest action that took place in 2012 that starkly illustrate the connection between the attitude and behaviour of authority, and the action citizens take in response. The response by the provincial government and its inaction, in spite of petitions imploring it to intervene, also demonstrate how groups might be compelled to turn to the courts to hold traditional leaderships accountable.

Yet even court action has been unsuccessful in resolving the intractable problems that this traditional community has been faced with. Instead, Pilane has used the courts to prevent residents and members of the royal family from meeting, on the basis that they don't have the *locus standi* to convene public meetings.<sup>59</sup> The provincial government's reiteration of its official recognition of Pilane's status as traditional leader has only served to embolden his claim that he is the only person with the *locus standi* to call meetings of Morafe. A local activist told a newspaper reporter that,

Frustrated community members have been unable to hold public gatherings to discuss these and other issues they face, as their gatherings are routinely dispersed by police officers from the Mogwase police station, who claim the chief had an interdict to stop the community from holding public gatherings.<sup>60</sup>

Mnwana, in this volume, shows how Pilane's use of the law, which is reminiscent of the actions of his

predecessor Kgosi Tidimane Pilane, has undermined opposing and dissenting voices in this community.

The provincial government's response, exacerbated by the expedient manner in which Pilane has used the courts in the North West, has fuelled perceptions of impunity, and has led residents to believe that the traditional leader has undue protection from key figures in the judiciary and the ruling party. Given this perception, some local activists resolved to appeal to opposition parties. One activist explained this, saying 'we have realised that the ANC [African National Congress] is behind the problems in our communities. We needed a political figure to represent us just like Chief Nyalala has the ANC under his wing'.<sup>61</sup> The African People's Convention (APC) has become another mobilising agent and has lent its support to 'community' requests for an investigation by the Public Protector.<sup>62</sup> According to reports by the *New Age*, it is the APC that 'lodged a complaint with the Public Protector on behalf of the Bakgatla-ba-Kgafela communities'.<sup>63</sup>

## Conclusion

At the centre of the collective and individual actions that this article has examined, are grievances about the lack of accountability, and the opaque deals involving property *belonging* to the traditional community. These grievances have also been about the marginalisation of members of the traditional community as a result of unaccountable authority in a context of poverty and high levels of unemployment.

In their reactions to these challenges, subgroups, representatives and activists have appealed to and confronted Parliament, provincial government, the courts and traditional leaders on numerous occasions. Through these actions and in interactions with politicians, provincial officials, Parliament and the courts, they expressed and registered grievances, claims, demands and expectations, framed in ways that were defined by the contexts in which the actions took place. While these actions have been successful to a degree in providing the space to register complaints, assert rights and attract attention, they have not led to a resolution in favour of those groups and individuals in the traditional community that have complained and instituted legal

action against the traditional leader. Instead, with the infrastructure and service developments that were launched in the area in October 2013,<sup>64</sup> and with an expanded public role in mining as a shareholder, the Bakgatla-ba-Kgafela Traditional Community is regularly held up in the media and by government as a model of rural development and revitalisation for other traditional communities to emulate. In particular, the provincial government's inaction, and its attempts to distance itself from the challenges raised by local stakeholders, raise questions about the openness of the state to the voices of citizens. Its failure to enforce the accountability measures contained in the North West Act also exposes the limited ability of the law to protect those that do not have direct access to institutional power.



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## Notes

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# Justice and legitimacy hindered by uncertainty

## The legal status of traditional councils in North West Province<sup>1</sup>

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*The Traditional Leadership and Governance Framework Act 2003 provides for the transformation of apartheid-era tribal authorities into constitutional-era traditional councils with a role in traditional governance. The process involves reconstituting these councils to meet certain thresholds of women and democratically elected members. Where councils have failed properly to meet the thresholds – seemingly the case in much of North West Province – their present legal status is called into question. In North West, the ambiguity surrounding their status has been compounded by the conduct of the provincial government, underlying tensions in the legislation, and a confusing series of contradictory government notices and court judgements dealing with the issue. This article examines how the reconstitution requirements have been applied in practice in North West and considers the legal and material impacts of the existing uncertainty surrounding traditional councils' status. Where these councils are put forward as democratic bodies representing traditional communities in North West's platinum mining belt, these are particularly important issues to consider in relation to the legitimacy of traditional councils.*

The government has enacted legislation aimed at transforming traditional institutions that were set up or altered under colonialism and apartheid, into institutions that are compatible with constitutional values such as democracy, accountability, equality and freedom.<sup>2</sup> Traditional councils – presided over by traditional leaders and established in respect of traditional communities – constitute one part of this transformative project. In this article, the process by which the transformation of traditional councils has been attempted in North West Province is considered. It is argued that uncertainty around the legal status of untransformed traditional councils

can in part be attributed to underlying tensions in the rationale and provisions of legislation governing these councils. Finally, in the context of traditional councils representing traditional communities and being included in recent policy proposals, the article considers the broader material impact of this uncertainty, particularly on traditional communities in the North West platinum mining belt.

### Transitional arrangements in the Framework Act

When it came into force in 2004, the Traditional Leadership and Governance Framework Act 2003 (Act 41 of 2003, hereafter the TLGFA) provided a framework for the hierarchical recognition and regulation of various traditional leadership institutions

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in South Africa. The government hoped to define a role for traditional leaders 'within the new system of democratic governance' by transforming what remained of traditional leadership after colonialism and apartheid into something that could comply with the values set out in the Constitution, and with the view to 'restore the integrity and legitimacy of the institution'.<sup>3</sup>

To this end, the TLGFA includes certain 'transitional provisions' that require some traditional institutions to reconstitute themselves as pseudo-democratic bodies, while others are dissolved or conditionally given new life.<sup>4</sup> The transformation of surviving tribal authorities – originally formalised in terms of the Bantu Authorities Act 1951 (Act 68 of 1951, hereafter the BAA)<sup>5</sup> – is dealt with in s 28(4) of the TLGFA.

When it was first promulgated, the BAA empowered the Governor-General of the Union of South Africa<sup>6</sup> to establish a 'Bantu tribal authority' over a tribe or community (or groups of these).<sup>7</sup> Tribal authorities were headed by chiefs or headmen and had general administrative authority in respect of these leaders' areas of jurisdiction.<sup>8</sup> This framework supported decades of forced removals and calculated traditional leadership appointments, in order to further an apartheid agenda and consolidate people into ethnic tribes.<sup>9</sup>

Against this tainted backdrop, s 28(4) of the TLGFA deemed all of the tribal authorities that had not expressly been disestablished by the time of the Act's commencement on 24 September 2004 to be 'traditional councils' recognised in terms of s 3 of the Act, which envisions the establishment of traditional councils for newly recognised traditional communities according to certain procedures.<sup>10</sup>

What this means is that, despite their apartheid origins, old tribal authorities were assumed to have legal recognition in democratic South Africa. However, a proviso was included: tribal authorities who were automatically recognised had to reconstitute themselves within certain timeframes.<sup>11</sup> At first, they had only one year within which to complete their reconstitution. However, in a 2009 amendment this deadline was retrospectively extended to seven years, ending on 23 September 2011.<sup>12</sup> North West Province formulated its own

version of these transitional arrangements – the significance of which will be returned to later.<sup>13</sup>

## **Requirements for reconstitution of traditional councils**

The reconstitution requirements for traditional councils are those set out in s 3(2) of the TLGFA. The legislation envisions that traditional councils consist of a certain number of members, of which certain percentages must be women and democratically elected. Similar requirements are set out in provincial Acts, which are supposed to govern traditional leadership according to the TLGFA, but adapting, where necessary, to each province. In the following sections, North West's description of requirements for reconstitution and the actual steps taken to meet these will be discussed in conjunction with the TLGFA's requirements.

There is an evident link between traditional council reconstitution and broader dissatisfaction with the state of traditional governance within communities and governance by the North West provincial government more generally. The struggles for recognition and transformation of traditional councils in North West do not happen in isolation – they happen within a context of community poverty, mineral wealth, workers' unrest in the mining sector, and seemingly unaccountable leadership, greed and corruption.<sup>14</sup> Under these circumstances the legitimacy of traditional councils in North West – even if properly reconstituted in terms of the procedure detailed below – becomes seriously questionable.

## **Elected and selected members**

The first s 3(2) requirement considered here pertains to the portion of traditional council members who must be 'elected' in comparison with those who are 'selected'. The provision states that 40% of the council must consist of ordinary community members who have been democratically elected by the traditional community.<sup>15</sup> The remaining 60% of the council must consist of members selected by the community's senior traditional leader according to custom, and can include other traditional leaders.<sup>16</sup> The senior traditional leader is automatically also a member and the chairperson of the council.<sup>17</sup> All members of the council serve a five-year term of

office that is supposed to coincide with the term of the National House of Traditional Leaders.<sup>18</sup> Significantly, the apportionment between selected and elected members does not affect the gender threshold to be discussed later – whether elected or not, in total at least one-third of members must be women.<sup>19</sup>

Oddly, the North West Traditional Leadership and Governance Act 2005 (Act 2 of 2005, or the NWA) does not include a similar elected/selected split for traditional councils, nor, unlike other provinces, are there any North West regulations to prescribe procedures for holding traditional council elections.<sup>20</sup> Provincial government notices make this omission apparent by using other, only indirectly relevant, provisions in the NWA to justify the actions of government officials relating to traditional council elections. Traditional councils in North West are, however, still subject to the elected and selected member composition requirements in the TLGFA.<sup>21</sup> From provincial government notices announcing the dates of traditional council elections, as well as the holding of elections in practice, it is clear that North West accepts these requirements.<sup>22</sup> However, without provincial regulations to govern traditional council elections, the election process has been plagued by confusion and conflict.<sup>23</sup> The legal basis for actual procedures followed is also dubious, since no election guidelines are provided in the TLGFA.

In July 2008, the North West Premier issued a Gazette notice announcing the ‘reconstitution’ of all traditional councils in the province, to ‘substitute’ old tribal authorities that ostensibly still existed in terms of a provision in the NWA.<sup>24</sup> The significance of the precise wording of this provision will be returned to later. While the notice listed the name, surname and gender of each traditional council member in the province, it did not reveal whether they had been selected or elected, nor did it indicate whether the members were, for example, royal family members – information that would not be obvious to outsiders. Whether the selected and elected members were correctly constituted for each traditional council in the 2008 notice can therefore only be assessed upon further investigation of each individual council. There have been no traditional council membership lists for North West since, and it is therefore not clear whether

membership is properly apportioned at present. This raises a further question about whether reconstituted traditional councils can be said to legally exist at all if the names of members have not been officially gazetted in terms of s 3(3) of the TLGFA.<sup>25</sup>

Nonetheless, the proper reconstitution of traditional councils depends on more than whether the prescribed elected/selected split has been complied with. Reconstitution also depends on whether elections actually took place when they were supposed to, and whether the electoral processes qualify as ‘democratic’. The evidence recounted in the following sections suggests that North West has failed in both respects.<sup>26</sup>

### **Traditional council elections in North West**

Although the 2008 notice purports to ‘reconstitute’ traditional councils in North West, there seem to be no prior Gazette notices announcing the dates and procedures to be followed for elections of the 40% component. According to one account from the province, traditional council elections did take place on 8 October 2005 but were ‘fatally flawed’.<sup>27</sup> Without any official notices concerning these elections, it is difficult to know how they were conducted or what was done with the results. Presumably these elections formed the basis for council membership as listed in the 2008 notice.

A second round of North West traditional council elections was held in the latter half of 2011, after the Premier had published how many members each council should have. This is apparent from a 2013 North West Gazette notice in which elections held on 28 September, 2 November and 12 November 2011 were annulled – almost two years later.<sup>28</sup> No information about these elections had been published in the Gazette before. The notice states that ‘credible reconstitution’ will occur at a later date in 2013 ‘under the auspices of the Independent Electoral Commission (IEC)’,<sup>29</sup> suggesting that the 2011 elections were not credible and not up to the electoral standard maintained by the IEC.<sup>30</sup> At least two traditional communities held elections – marred by ‘shortcomings’ – earlier in June 2011,<sup>31</sup> but these are not mentioned in the annulment notice. There was confusion about how elections were to be conducted

on a practical level in the absence of election guidelines, and information about nomination and election dates was lacking.<sup>32</sup> Presumably this must have hampered the ability of people to participate in the elections. Instances of women being disregarded in the electoral process were also reported.<sup>33</sup> Although these elections were not annulled in 2013, the results were also not officially declared,<sup>34</sup> and certainly do not seem to have been published in the North West Gazette.

However, the second round of elections did not encompass all traditional councils in North West. In September 2012 it was reported in the media that a traditional community in North West, the Bapo-ba-Mogale, was finding it difficult to hold the North West government accountable for outstanding mining revenues precisely because its traditional council had not yet been reconstituted.<sup>35</sup> According to the report, the Bapo held an *ad hoc* second traditional council election in 2009,<sup>36</sup> related to a purported disbandment of the council by the senior traditional leader,<sup>37</sup> but this was never officially recognised.<sup>38</sup> Unlike other traditional communities, elections were not held for the Bapo in 2011 and,<sup>39</sup> despite requests from sections of the community, elections had not yet been held by the time of the media report.<sup>40</sup>

The 2011 election results remain excluded from any public official government communication. North West's next reference to traditional council elections appeared on 26 April 2013, with a press release about a Memorandum of Understanding with the IEC to hold elections for 56 traditional councils.<sup>41</sup> These were expected to take place during July 2013 and the Bapo-ba-Mogale complaints were indirectly referenced to justify a third round of elections, only two years after the previous process:

The election process which is due to start in July, is expected to quell down tensions in the traditional councils following disputes lodged regarding lack of transparency about the running of traditional funds and developments.<sup>42</sup>

Without regulations to govern the elections, the IEC was put in control of the electoral process, which had to be 'free and fair'.<sup>43</sup>

After mistakenly publishing an 8 June 2013 date for elections<sup>44</sup> – later revoked<sup>45</sup> – North West announced that on 31 May the IEC would be operating door-to-door voter registration, upon presentation of a South African identity document, in three out of four districts in the province.<sup>46</sup> Elections were set for 6 July 2013 and an election timetable was published, scheduling the certification of a voters' roll, nomination of candidates, and finalisation of candidate lists leading up to the elections.<sup>47</sup>

Then, one day before elections were to take place, North West announced that they were being postponed indefinitely.<sup>48</sup> Again, reference was made to tensions surrounding the electoral process in some traditional communities:

A number of challenges have emerged in various communities ... some of the communities did not fully participate nor support the electoral process from inception, legal challenges and incomplete candidate nomination process [sic] in some villages which resulted in stalling the ballot production process.<sup>49</sup>

By November 2013, North West announced preparations for another attempt at traditional council elections, to be held by March 2014.<sup>50</sup> The IEC had been discarded as an electoral partner in favour of the Electoral Institute for Sustainable Democracy in Africa, a non-profit organisation.<sup>51</sup> The province continued to motivate for traditional council elections as an important 'cornerstone of democracy' and a potential solution to the conflict existing in some traditional communities.<sup>52</sup> Thus, a new date for elections was gazetted on 22 January 2014 – three days before elections were scheduled to take place.<sup>53</sup>

After several setbacks, a third round of elections was finally held on 25 January 2014.<sup>54</sup> Results for the Bapo-ba-Mogale were announced in the community on 27 January.<sup>55</sup> However, the North West government had at the time of writing not yet gazetted the final results of these elections or the names of selected members for any traditional council.<sup>56</sup> Current membership of these councils is therefore unclear, and it cannot be assessed whether they have properly met the TLGFA's composition requirements.

Despite the rhetoric in press releases, North West does not seem to be treating the election of traditional council members with due seriousness.<sup>57</sup> One journalist noted a lack of public information about the elections and pointed out that a press release issued on the day of voter registration would never have made it into print media in time for ordinary people to become aware of the registration process.<sup>58</sup> Furthermore, North West's inclusion of 'legal challenges' as a reason for postponement possibly refers to litigation – sometimes against the provincial government itself – by the Bapo-ba-Mogale, relating to traditional leadership status, threats of violence and intimidation, platinum miners' strikes, fraud, maladministration and outstanding mining revenues.<sup>59</sup> This highlights the connection between poorly executed traditional council elections and broader contestations by traditional communities like the Bapo-ba-Mogale, implicating the North West government and thereby calling into question the province's adherence to the rule of law.

Although beyond the scope of this article, it should be noted that North West is not the only province that has experienced difficulties with the election of traditional councils. Reports from the Eastern Cape reveal that elections were opposed by civil society organisations,<sup>60</sup> while Limpopo has at the time of writing held no elections at all.<sup>61</sup> In KwaZulu-Natal there was an attempt in 2012 to interdict elections from proceeding, based on allegations of incorrect procedure being followed.<sup>62</sup> When elections continued nonetheless, there was negligible voter turnout in at least one area due to protest action against names being omitted from the ballot.<sup>63</sup> This is indicative of a broader failure by the government to give proper effect to the TLGFA's reconstitution requirements.

## Gender component

The second reconstitution requirement – that at least one third of traditional council members must be women<sup>64</sup> – coincides with the TLGFA's stated goal of 'progressively' advancing 'gender equality within the institution of traditional leadership'.<sup>65</sup> This requirement was incorporated into the NWA without substantial change.<sup>66</sup> The requirement therefore seems absolute, except where provincial legislation provides a premier

with the discretion to lower a particular council's gender threshold.<sup>67</sup> The NWA does not provide for this. Traditional councils in the province are therefore always required to have at least one-third women members in order to be properly reconstituted.

In litigation challenging the constitutionality of the Communal Land Rights Act 2004 (Act 11 of 2004), the Director-General of the then Department of Provincial and Local Government included statistics on the gender composition of traditional councils in her answering affidavit.<sup>68</sup> These statistics, dated April 2007, revealed that in North West 29% of traditional council members were women, while only seven out of 54 councils exceeded the one-third women requirement.<sup>69</sup> From the July 2008 Gazette notice it is similarly apparent that some traditional councils managed to achieve the one-third quota, while others did not.<sup>70</sup> It is unclear whether traditional councils in the North West at present meet the gender requirement because, as explained above, the official membership of the councils is unknown. Once it is clear who the members of each traditional council are, compliance with the requirement can be assessed on a case-by-case basis.

## Number of members

The final requirement to be considered here is that each traditional council must have a number of members as specified by the premier of the province in which the traditional council is situated.<sup>71</sup> When determining an appropriate number of members for each council, premiers must be guided by a national formula, determined by the Minister of Cooperative Governance and Traditional Affairs.<sup>72</sup>

Prior to the TLGFA's amendment in 2009, all traditional councils were permitted to have a maximum of 30 members, 'depending on the needs of the traditional community concerned'.<sup>73</sup> Some provincial Acts, including the NWA,<sup>74</sup> have not yet incorporated the 2009 amendment and still reflect a 30 member limit.<sup>75</sup> However, since the TLGFA provides the framework within which provincial legislation can deal with traditional leadership and governance, provinces arguably have to comply with the 2009 amendment, regardless of whether provincial legislation has been updated accordingly.<sup>76</sup>

National guidelines on traditional council member numbers were published in April 2011.<sup>77</sup> These guidelines provide premiers with two methods for determining the number of members: either based on the number of recognised headmen in the traditional community, or on the estimated population size of that community. The guidelines further indicate how council membership should be apportioned between ordinary community members and, for example, royal family members.

The national guidelines are applied to 56 traditional communities in two North West Gazette notices in 2011 and 2013.<sup>78</sup> Both notices used an estimated population size to determine member numbers, and the apportionment of membership was further detailed.

Although the number requirements seem trivial, if traditional council members are not constituted exactly as prescribed, councils will have failed to reconstitute themselves properly. However, as per the gender threshold, it is unclear whether at present traditional councils in North West meet the number requirements, because recent membership of these councils has not been gazetted.

## Meeting reconstitution deadlines

There are further questions about the timing of reconstitution attempts in North West. These are complicated questions, considering the TLGFA deadline's retrospective extension and that the NWA's own deadlines are different to those in the TLGFA.

When it was first promulgated, s 28(4) of the TLGFA required traditional council elections and reconstitution to take place within one year – by 23 September 2005. The first round of traditional council elections in North West took place about two weeks after that date.<sup>79</sup> Although this was late at the time, the lateness was ostensibly rectified by the retrospective 2009 amendment of the TLGFA as discussed above.

The NWA only came into operation on 20 March 2007.<sup>80</sup> This provincial Act required that old tribal authorities in the province be disestablished within one year of its commencement – by 19 March 2008.<sup>81</sup> Although late<sup>82</sup> and not in full compliance with

the disestablishment requirement,<sup>83</sup> this is ostensibly what the 15 July 2008 notice attempted to do.<sup>84</sup>

As stated earlier, in terms of the original TLGFA a traditional council was only meant to serve a term of five years, after which new membership had to be selected and elected. The TLGFA and NWA provide two different starting points for this five-year period, further complicated by the aligning of traditional council members' terms with that of the National House of Traditional Leaders, and the retrospective correction of late or incomplete reconstitutions through the TLGFA's amendment.

The unfolding of traditional council elections in practice suggests that the province has alternately considered each of these starting points as applicable. There seems to have been much confusion about how traditional councils are meant to be formed, by when, and via which procedures – and understandably so. There have been attempts to solve the legal puzzle about the correct deadline for reconstitution in North West – most notably in litigation involving the Bapo-ba-Mogale.<sup>85</sup> However, these will not be assessed in detail here. Whatever the correct deadline for reconstitution, a second round of elections, assuming they were credible, only took place in January 2014 and the official gazetting of resulting reconstituted traditional councils is yet to take place. The TLGFA imposes a limitation on the duration of the transition from old tribal authorities to new traditional councils, and also sets parameters for the term of office of a particular traditional council. The present situation in North West seems to flout both of these time restrictions.

In light of ambiguity around the current apportionment of traditional council membership in respect of women and elected members, the apparent failure of traditional council election processes, and the likely lapsing of reconstitution deadlines as discussed above, what are the consequences for North West traditional councils' legal status and recognition? Has a failure to comply with the TLGFA's reconstitution requirements for traditional councils caused a lacuna in traditional governance in the province at present? The following section considers these questions.



## Effect of failing to meet reconstitution requirements

### Looking to the legislation

Section 28(4) of the TLGFA does not elaborate on the consequences of non-compliance with the s3(2) requirements within the specified time period.<sup>87</sup> The use of peremptory language in the provision makes it clear that the transformation of traditional councils is not optional. The wording 'provided that' also suggests that the automatic and immediate deeming of a particular tribal authority as a traditional council only stays put after the transitional period if there is compliance with the reconstitution requirements – thus, recognition is conditional on transformation.<sup>88</sup> Presumably then, not complying with the reconstitution requirements also means not being recognised as a traditional council.<sup>89</sup> Yet this conclusion is not obvious from the Act and may actually undermine the democratisation aim of the transitional provisions. The Act also does not specify whether unrecognised tribal authorities should then be dissolved and how that dissolution would practically proceed.<sup>90</sup>

The NWA's manifestation of this provision treats the deeming of tribal authorities differently – although this arguably cannot be interpreted so as to conflict with the TLGFA.<sup>91</sup> Instead of immediately deeming tribal authorities as traditional councils, provided that they meet certain requirements, the NWA states that tribal authorities will continue to exist as such until they are replaced with reconstituted traditional councils.<sup>92</sup>

This may explain what happens to tribal authorities in North West that fail to be properly reconstituted – they do not cease to exist, because s 43(1) extends their lifespan until they are properly replaced.<sup>93</sup>

However, the NWA then imposes a one-year deadline for the disestablishment of tribal authorities by the premier.<sup>94</sup> If read with s 43(1), this could mean that tribal authorities continued to exist after the NWA's commencement, but only for a maximum of one year, by which time they would have had to be substituted. It is unclear whether s 43(1) still applies if the premier fails to disestablish tribal authorities in time, as was indeed the case in North West. Moreover, it is doubtful whether the NWA could successfully

extend the lives of tribal authorities in the province if the TLGFA's provisions have resulted in their extinguishment.<sup>95</sup>

Judges have grappled with the murky interface between the transitional provisions in the TLGFA and the NWA in litigation involving the Bapo-ba-Mogale. Their judgements have regrettably added to the murkiness, instead of providing clarity, and the conclusions drawn across cases are sometimes contradictory. Although there are several pronouncements to examine from these court battles, only some highlights from the judgements will be mentioned in the following section.<sup>96</sup>

### Have the courts provided answers?

In July 2010, Judge AA Landman in the North West High Court considered which body (and members thereof) was responsible for traditional governance in the Bapo-ba-Mogale traditional community, noting the existing 'crippling uncertainty about which institutions are in charge of the tribe's affairs'.<sup>97</sup>

The judge concluded that, at the time of the judgement, old tribal authorities in North West no longer existed and therefore could not be disestablished (despite the provisions of the NWA) because the TLGFA's transitional provisions immediately converted them into traditional councils with the same members.<sup>98</sup> Furthermore, initial membership was meant to be temporary, pending a correct composition of women and elected members.<sup>99</sup> When, after one year, membership still had not been rectified, the traditional council continued to exist as such, but with old members.<sup>100</sup> This interpretation meant that the two Acts were in conflict,<sup>101</sup> because while the TLGFA's transitional arrangements enabled old tribal authorities to perform the newly legislated functions of traditional councils, the NWA left them 'in limbo'.<sup>102</sup> Landman finally concluded that because of the retrospective amendment of the TLGFA, traditional councils still had until 23 September 2011 to be correctly constituted.<sup>103</sup>

Yet North West again failed to constitute traditional councils by that date, which renders Landman's judgement noteworthy but ineffectual. Furthermore, his conclusions were directly contradicted by a

judgement delivered in the North Gauteng High Court on the same day.<sup>104</sup> There, Judge MF Legodi decided that 'traditional councils' as such had never come into existence in North West, since they failed to comply with the reconstitution requirements within the original one-year deadline.<sup>105</sup> Yet, the institution itself continued to exist as a 'tribal authority' with legal standing, because of s 43(1) of the NWA that extends the lifespan of untransformed traditional authorities.<sup>106</sup>

In June 2011, Judge RD Hendricks of the North West High Court dealt with an attempt to interdict an official second election process for Bapo-ba-Mogale traditional council members.<sup>107</sup> His judgement in effect acknowledged a lacuna in traditional governance for the Bapo-ba-Mogale – stating that the council members' term of office had ended by September 2010, but that no new members had yet been elected to replace them.<sup>108</sup> He concluded thus that the old members had no legal standing to interdict new elections from taking place.<sup>109</sup>

Three months later Hendricks decided, to the contrary, that another North West traditional council – similarly with an expired term of office and no new elected members – did have legal standing and continued to exist, with its members remaining in office until proper reconstitution.<sup>110</sup> This time the judge stated that it was impermissible to allow a governance vacuum pending a second round of elections, delayed as a result of North West's failure to clarify council jurisdictions and member numbers.<sup>111</sup>

## Status remains unclear

It is difficult to reconcile the rulings made in these cases into a coherent legal position on the current status of traditional councils in North West. Nor do the cases shed light on the legal consequences of North West's recent reconstitution attempts. The totality of legislative intervention, case law and government action related to traditional councils in North West only exacerbates the confusion and uncertainty about how these councils should be dealt with in policy and practice.

Despite previously acknowledging traditional councils' questionable status, North West continues in its attempts to establish and recognise lawfully

reconstituted councils in the province. An April 2011 circular by the North West Department of Local Government and Traditional Affairs warned chairpersons of traditional councils not to enter into contracts until the councils were 'duly reconstituted'.<sup>112</sup> The circular notes that the term of office of traditional council members ended on 24 September 2010 'by operation of law' and goes on to say:

The danger about contracts/deals concluded post 24 September 2010 is that they might be of no force and affect, therefore invalid. The basis therefor [sic] being that such traditional councils lacked legal standing at the time the said contracts/deals were concluded.<sup>113</sup>

Since traditional council elections were a failure in 2011, there could have been no subsequent change in uncertainty about councils' legal standing – at least not until the most recent election process in 2014.

National government also seems aware of the problems with reconstituting traditional councils. In a draft Traditional Affairs Bill, intended to repeal the TLGFA and published for comment in September 2013 by the national Department of Cooperative Governance and Traditional Affairs, a transitional provision is proposed that jumps back in time to deem the tribal authorities that existed at the time of the TLGFA's commencement as new traditional councils.<sup>114</sup> It furthermore requires them to be reconstituted by a specific deadline according to the same requirements currently in the TLGFA – effectively starting the transformation process afresh.<sup>115</sup> If the deadline is not met, the Minister of Cooperative Governance and Traditional Affairs 'may take the necessary steps to ensure' compliance with the reconstitution requirements.<sup>116</sup> This would, to an extent, clarify what the weak consequences are for untransformed traditional councils, but also potentially raises a number of practical problems regarding the new starting point and deadline for reconstitution. If this provision is enacted as is by Parliament, confusion relating to the legal status and composition of traditional councils is unlikely to be resolved.

## Uncertainty arising from tensions in the legislation

It is submitted that uncertainty about the status of traditional councils in North West has arisen in part as a cumulative result of several underlying tensions in the legislation. While these tensions serve to explain conceptual reasons for the murky status of traditional councils, they fail to explain fully the practical reasons for non-compliance with the reconstitution requirements in the legislation. This requires further research beyond the scope of this article.

The first tension exists between s28(4) and s3 of the TLGFA. A process that aims to replace old authorities because of their tainted origins becomes inherently self-contradictory when the old authorities are retained as a starting point to establish new authorities. While s28(4) puts measures in place to ensure the transformation of these old authorities, the nature of the transition necessarily leaves an old authority intact for a period of time and therefore to an extent validates its existence. When a particular institutional foundation is maintained, and, moreover, is historically entrenched, there is also a danger that it becomes a default reference point – particularly when attempts at transformation have repeatedly failed, as is the case in North West. The interaction between new requirements for constitution in terms of s3 and a validation of the status quo in s28(4) furthermore creates confusion about how the two provisions are to be applied together in practice, or when s3 is to be applied in isolation. This confusion manifests similarly for ss6 and 43 of the NWA, as was apparent when the North West government cited s6(3) of the NWA – concerning traditional councils constituted for *newly* established traditional communities – as the basis for reconstituting old tribal authorities that had been deemed traditional councils.<sup>117</sup>

There is a similar underlying tension between the rationale for s 28(4) of the TLGFA and its actual effect. The provision aimed to revive pre-colonial customary practices of traditional leaders making decisions in council, while simultaneously trying to introduce post-colonial and post-apartheid notions of democracy and equality.<sup>118</sup> The provision thus aimed for traditional authorities to progress forward while gazing far backward, but then rejected both

motivations altogether when choosing a basis for new traditional councils. Instead, the authorities that existed precisely as a result of colonialism and apartheid were favoured as starting points.<sup>119</sup>

Secondly, much of the uncertainty that has shrouded traditional councils in North West can be attributed to the tension that was created when the TLGFA's provisions were translated into the NWA. There is a likely delay between the commencement of national framework legislation and provincial legislation based on that framework.<sup>120</sup> Thus, while the TLGFA commenced in 2004, the NWA was created in 2005 and commenced only much later, in 2007. This delay automatically undermines the ability of provincial governments to perform tasks set out in framework legislation for completion according to provincial legislation, but within a stipulated time period – particularly when that period is as short as one year.

As mentioned earlier, the TLGFA's transitional and reconstitution provisions concerning traditional councils were not adopted with the same wording by North West. As pointed out by one North West judge,<sup>121</sup> the different formulation of these provisions is not purely grammatical – it fundamentally changes the legal meaning of the provisions and potentially results in a conflict between the two Acts.<sup>122</sup> The NWA furthermore omitted important features of the national Act.<sup>123</sup> These omissions meant that North West government officials had to rely indirectly on the TLGFA, or on technically irrelevant provisions in the NWA, as legal authority when issuing provincial notices concerning traditional councils. The absence of a North West provision for traditional council elections has also meant that regulations to authorise and practically guide election procedures are lacking. The legal position and procedure concerning the reconstitution of traditional councils in North West has, as a result, been marred with ambiguity.

Notwithstanding the confusion created by these tensions, North West's application of the legislative provisions has been remarkably slack. Prompt and attentive compliance with the reconstitution requirements could have prevented at least some of the existing uncertainty. If North West possesses the political will to lawfully reconstitute traditional councils – as suggested in its press releases – this has not

translated into effective action. Indeed, the provincial government's conduct has only served to amplify the questionability of traditional councils' status in the province.

## Broader impact of uncertainty around status

The disarray regarding traditional council reconstitution in North West exists within a broader everyday political context, and acts in conjunction with other policy initiatives by the government. Rhetoric surrounding the traditional leadership legislation, along with *de facto* election processes (no matter how flawed in reality), have created the impression that traditional councils are democratic governance structures representative of traditional communities.<sup>124</sup> As a result, traditional councils have been included in several policy proposals, and in practice participate in important decision-making processes.

Policy proposals suggest the government's intention to entrust traditional councils with increasing governmental responsibility. In a September 2012 'submission' on the (presently lapsed) Traditional Courts Bill, the national Department of Justice and Constitutional Development proposed that traditional councils are also constituted as traditional courts for the purposes of dispute resolution.<sup>125</sup> An August 2013 Communal Land Tenure Policy by the national Department of Rural Development and Land Reform similarly proposed that ownership of communal land be transferred from the state to traditional councils.<sup>126</sup> In terms of these policies, traditional councils would not merely represent traditional communities; they would also be adjudicators and landowners.

Moreover, the government is channelling *ad hoc* funding and resources to traditional councils,<sup>127</sup> including salaries for staff at traditional council offices. This is questionable, given the dubious legal status of these structures where they have not been properly reconstituted. In 2010, North West published details of a revenue allocation to municipalities in the province, including funding to subsidise the 'salaries of traditional community staff' in order to provide 'support to traditional councils'.<sup>128</sup> A lack of effective accounting systems within traditional councils was acknowledged as the reason for not transferring

funds directly to them on an annual basis.<sup>129</sup> Yet this has not deterred the government from interactions with traditional councils, or from proposing greater responsibility for these councils in policy.

North West's 2011 circular, warning traditional councils not to enter into transactions because of their dubious status, reveals that the councils are in practice entering into agreements on behalf of traditional communities. These transactions could be quite substantial – taking the form of multi-million rand deals with mining companies, for example.<sup>130</sup> Uncertainty concerning traditional councils' legal status could thus contribute to obfuscation around community representation or consultation, and diminish accountability by mining companies in the platinum belt.<sup>131</sup>

Traditional councils' questionable status could also have a negative impact on access to justice for harmful, criminal or unaccountable conduct by traditional and other governance structures. People in traditional communities in North West, such as the Bapo-ba-Mogale, have struggled against corrupt and unaccountable leadership in a context where mining companies continuously strive to gain larger profits from the platinum-rich land on which they live.<sup>132</sup> When the status of traditional councils becomes a site for contestation, the danger is that material issues will be lost in technical arguments *in limine* about legal standing – or, that the broader context will be overlooked in favour of narrow legal questions. This seems to have happened in the cases discussed above. What should be a challenge about fraud, corruption, mismanagement of funds and maladministration, committed to the detriment of ordinary people, becomes all about the status and position of a small elite.<sup>133</sup>

A compelling issue for further research is how the existing legislative schema, North West's conduct and diverging court opinions in respect of traditional councils have an impact on the rule of law, which is a fundamental constitutional value in South Africa.<sup>134</sup> Not only has legal certainty around traditional councils' status been compromised; North West's disregard for correct compliance with the reconstitution requirements undermines the principle of legality and calls into question whether North

West actually recognises the binding authority of the traditional leadership legislation.<sup>135</sup> The relationship between national and provincial government is also unsettled: if provinces no longer comply with relevant national law and policy, what does that mean for cooperative governance in the country, as enshrined in chapter 3 of the Constitution? Further, if non-compliance extends beyond the North West province, does legitimacy not demand revision of the legislative schema as a whole?<sup>136</sup>

## Conclusion

The need for clarity on the legal status and membership of traditional councils in North West is accentuated when considering the possible legal, political and social impacts of terminating their legal authority. Who would then be responsible for traditional governance and how would they be held democratically accountable? The North West government would furthermore have to determine the appropriate legal method of dealing with prior decisions and transactions by traditional councils that have been declared unlawful.

Meanwhile, traditional councils continue to exist, function and receive local recognition in practice, despite their uncertain legal footing; and this may in fact not be problematic. There is legal support for the existence of customary authorities separate from, and parallel to, traditional institutions officially recognised by state legislation.<sup>137</sup> However, it is questionable whether traditional councils operating *de facto* in North West are actually customary in nature and origin. If they remain untransformed and do not enjoy statutory recognition, are they not still the same tribal authorities that were created under apartheid?<sup>138</sup>

Acceptance of untransformed traditional councils may render futile the TLGFA's underlying transitional rationale and defy the Constitution's broader demand for democracy, equality and accountability.

These important considerations require that national and provincial government take seriously the difficulty and dissatisfaction that has been noted in respect of traditional council reconstitution in North West. If not, the legitimacy of these supposedly democratic institutions could be undermined.



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## Notes

- 1 The author would like to thank Professor Hugh Corder, Dr Aninka Claassens and other senior staff at the Faculty of Law, University of Cape Town, for invaluable feedback on earlier drafts of this article, as well as the reviewers and editors of this publication, for their useful comments.
- 2 Tom Bennett and Christina Murray, Traditional leaders, in Stu Woolman et al (eds), *Constitutional law of South Africa*, 2<sup>nd</sup> ed (OS 12–05), Cape Town: Juta & Co., 2005, 26–21 and 26–65.
- 3 Preamble to the Traditional Leadership and Governance Framework Act 2003 (Act 41 of 2003, or TLGFA), Pretoria: Government Printer.
- 4 TLGFA, Section 28.
- 5 This statute was later renamed the Black Authorities Act 1951 (Act 68 of 1951, or BAA).
- 6 Later amendments to the BAA handed this power over to the State President of the Republic of South Africa.
- 7 BAA, Section 2(1).
- 8 BAA, Sections 2(2), 3(1) and (1)(a).
- 9 Department of Provincial and Local Government, The White Paper on Traditional Leadership and Governance, GG 25438 GN 2336, 10 September 2003, 1.2 and 2.
- 10 Section 28(4) thus states: 'A tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council contemplated in section 3 and must perform the functions referred to in section 4: Provided that such a tribal authority must comply with section 3(2) within seven years of the commencement of this Act.'
- 11 For a general discussion of this transitional provision, see Centre for Law and Society, Questioning the legal status of traditional councils in South Africa, fact sheet, August 2013, [http://www.cls.uct.ac.za/user/lrg/downloads/CLS\\_TCStatus\\_Factsheet\\_Aug2013.pdf](http://www.cls.uct.ac.za/user/lrg/downloads/CLS_TCStatus_Factsheet_Aug2013.pdf) (accessed 17 July 2014).
- 12 Traditional Leadership and Governance Framework Amendment Act 2009 (Act 23 of 2009), Section 22(1)(a), Pretoria: Government Printer.
- 13 For a general discussion of North West's transitional provision, see Centre for Law and Society, Questioning the legal status of traditional councils.
- 14 For an account of the political, social and economic contestations existing in three traditional communities affected by mining in North West, see Andrew Manson, Mining and 'traditional communities' in South Africa's 'platinum belt': contestations over land, leadership and assets in North-West Province c. 1996–2012, *Journal of Southern African Studies* 39(2) (2013), 409–423. See also Aninka Claassens and Boitumelo Matlala, Platinum, poverty and princes in post-apartheid South Africa: new laws, old repertoires, in Gilbert M Khadiagala et al (eds), *New South African review 4: a fragile democracy – twenty years on*, Johannesburg: Wits University Press, 2014.
- 15 TLGFA, Section 3(2)(c)(ii).
- 16 Ibid., Section 3(2)(c)(i).



- 17 Ibid.
- 18 Ibid., Section 3(2)(c)(i) and (ii).
- 19 Ibid., Section 3(2)(c)(i). The wording of this provision seems to suggest that the senior traditional leader may need to select more women to serve on the council than he or she ordinarily would have, depending on whether a sufficient number of women have already been elected to the council.
- 20 Section 6(2)(d) of the North West Traditional Leadership and Governance Act 2005 (Act 2 of 2005, or NWA), merely stipulates, as per the TLGFA, that the senior traditional leader of a traditional community will also be the chairperson of its traditional council.
- 21 This is implied in Section 6(1) of the NWA, which states that traditional communities must have traditional councils constituted in terms of the NWA 'as read with the Framework Act'.
- 22 North West has gone beyond the basic split to prescribe how the 60% portion of selected members should be divided further among royal family members, headmen and ordinary community members. See Premier: North West Provincial Government, Determination of the number of traditional councils in terms of section 6 of the North West Traditional Leadership and Governance Act, 2005, *Provincial Gazette* 6911 Notice No. 2, 12 July 2011; Acting MEC for Local Government and Traditional Affairs, Determination of the number of the members of traditional councils in terms of section 6(1) of the North West Traditional Leadership and Governance Act No. 2 of 2005, *Provincial Gazette* 7107 Notice No. 2, 30 April 2013.
- 23 Lisa Heeman, Confusion marks traditional council elections in North West, *Law, Custom & Rights* newsletter, August/September 2011, 5, [http://www.cls.uct.ac.za/usr/lrg/downloads/LRG\\_News\\_AUG\\_SEPT2011.pdf](http://www.cls.uct.ac.za/usr/lrg/downloads/LRG_News_AUG_SEPT2011.pdf) (accessed 17 July 2014).
- 24 Premier: North West Province, Reconstitution of traditional councils in accordance with the North West Traditional Leadership and Governance Act no. 2 of 2005, *Provincial Gazette Extraordinary* 6514 Notice No. 1, 15 July 2008. This notice was supplemented with another notice in 2009, after the first page of the Schedule to the 2008 notice was mistakenly omitted. See Erratum: Provincial Gazette No. 6514 of 15 July 2008, *Provincial Gazette Extraordinary* 6680 GN 258, 21 August 2009.
- 25 See Brendan Boyle's interview with Hugh Eiser in this publication.
- 26 The North West traditional council election process is also briefly discussed in Centre for Law and Society, Questioning the legal status of traditional councils.
- 27 Hugh Eiser, The North West Provincial Government, traditional communities and mining companies: the Bapo-ba-Mogale community, Lonmin, and the failings of the North West Provincial Government, paper presented at a seminar hosted by the Centre for Law and Society, University of Cape Town, 27 March 2014, 5. For more on traditional council elections in Bapo-ba-Mogale traditional community, see Brendan Boyle's interview with Hugh Eiser in this publication. The 'flawed' nature of these elections was corroborated in Heeman, Confusion marks traditional council elections in North West, 5.
- 28 North West Acting MEC: Local Government and Traditional Affairs, Notice of annulment of traditional council elections held on 28 September 2011, 2 November 2011 and 12 November 2011 and proclamation of date of reconstitution of traditional councils, *Provincial Gazette Extraordinary* 7107 Notice No. 3, 30 April 2013.
- 29 Ibid.
- 30 A press release reveals that the province was hoping that the Electoral Institute for Sustainable Democracy in Africa (EISA) would manage the 2011 elections. See North West Department of Local Government and Traditional Affairs, Plans in motion for election of new members of traditional councils, Press Release, 12 April 2011, <http://www.nwpg.gov.za/DDLG&TA/WhatsUp/Media%20Release/Tuesday12April.asp> (accessed 17 July 2014). However, it appears from EISA's website that it was not involved in the 2011 elections – see EISA, BES: Overview of activities 1996–2011, <http://www.content.eisa.org.za/old-page/bes-overview-activities-1996-2011> (accessed 17 July 2014).
- 31 Heeman, Confusion marks traditional council elections in North West, 5.
- 32 Ibid., 5–6.
- 33 Ibid., 6.
- 34 Ibid., 5.
- 35 Heidi Swart, Bapo-ba-Mogale community turns to public protector, *Mail & Guardian*, 14 September 2012, <http://mg.co.za/article/2012-09-13-bapo-community-turns-to-protector> (accessed 17 July 2014).
- 36 Ibid. This election took place in December 2009 after the resignation of previous traditional council members, but was never recognised by the North West provincial government – according to Eiser, The North West Provincial Government, traditional communities and mining companies, 6.
- 37 *Mogale v Maakane and Others* (1106/2010) [2010] ZANWHC 18 (29 July 2010), paras 96–7.
- 38 See also averments by the North West Premier in *Traditional Authority of the Bapo-ba-Mogale Community v Kenoshi and Another* (31876/10) [2010] ZAGPPHC 72 (29 July 2010), para 38.
- 39 See *Maakane and Others v Premier of the North West Province and Others* (2715/2010) [2011] ZANWHC 29 (23 June 2011), para 12.
- 40 Swart, Bapo-ba-Mogale community turns to public protector.
- 41 North West Department of Local Government and Traditional Affairs, Department signs MoU with IEC to reconstitute traditional councils, 26 April 2013, [www.info.gov.za/speech/DynamicAction?pageid=461&sid=36041&tid=105531](http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=36041&tid=105531) (accessed 23 August 2013).
- 42 Ibid.
- 43 North West Department of Local Government and Traditional Affairs, It's all systems go for upcoming traditional council elections, Press Release, 29 April 2013, <http://www.gov.za/speeches/view.php?sid=36101> (accessed 17 July 2014). In this press release the election process was described in the language of democracy and reference was again made to elections as a means to restore stability in communities that were experiencing unrest.
- 44 North West Acting MEC, Notice of annulment of traditional council elections, 2013. Note that this date contradicted a press release issued by North West just the day before.



- 45 North West Acting MEC: Local Government and Traditional Affairs, Notice of correction of the Extraordinary Provincial Gazette No. 7107 published 30 April 2013, *Provincial Gazette Extraordinary* 7110 Notice No. 4, 9 May 2013.
- 46 North West Department of Local Government and Traditional Affairs, Communities get last chance to register as voters in the upcoming elections of traditional councils, 30 May 2013, <http://www.gov.za/speeches/view.php?sid=36968> (accessed 17 July 2014). An earlier call for registration had been made on 17 May 2013 – see North West Local Government and Human Settlements, Voter registration for elections of traditional councils starts this weekend, 17 May 2013, <http://www.gov.za/speeches/view.php?sid=36567> (accessed 17 July 2014).
- 47 North West Acting MEC: Local Government and Traditional Affairs, Notice calling for the election of traditional councils in the North West, *Provincial Gazette Extraordinary* 7117 Notice No. 5, 4 June 2013.
- 48 North West Department of Local Government and Traditional Affairs, Postponement of traditional council elections 2013, Press Release, 5 July 2013, <http://www.gov.za/speeches/view.php?sid=37794> (accessed 17 July 2014). This press release stated that ‘the climate ... is not conducive for credible elections’. See also North West traditional council elections postponed, *SABC*, 7 July 2013, <http://www.sabc.co.za/news/a/6c6f700040433080a675e754d9bad304/North-West-traditional-council-elections-postponed> (accessed 17 July 2014).
- 49 North West Department, Postponement of traditional council elections, 2013. Months later, North West reduced these reasons to ‘low voter registration’, stating that poor turnout at registration was the main reason for postponing the elections in July 2013. See North West Department of Local Government and Traditional Affairs, It’s all systems go for the traditional council elections, 12 November 2013, <http://www.gov.za/speeches/view.php?sid=41599> (accessed 17 July 2014).
- 50 North West Department, It’s all systems go for the traditional council elections. Dates for voter registration were announced in North West Provincial Government, North West Premier Thandi Modise urges rural communities to register for traditional council elections, 23 November 2013, <http://www.gov.za/speeches/view.php?sid=41992> (accessed 17 July 2014); while candidate nomination forms were requested in North West Local Government and Human Settlements, North West traditional communities urged to return candidates traditional council nomination forms, 29 November 2013, <http://www.gov.za/speeches/view.php?sid=42234> (accessed 17 July 2014).
- 51 North West Department, It’s all systems go for the traditional council elections. See also EISA, Overview of activities.
- 52 North West Department, It’s all systems go for the traditional council elections. This was reiterated in a press release issued on the day before traditional council elections eventually took place. See North West Department of Local Government and Traditional Affairs, MEC Tilhabe urges communities to partake in traditional council elections, 24 January 2014, <http://www.gov.za/speeches/view.php?sid=43178> (accessed 17 July 2014).
- 53 North West MEC for Local Government and Traditional Affairs, Notice calling for the election of traditional councils in the North West, *Provincial Gazette Extraordinary* 7218 Notice No. 1, 22 January 2014. It should be noted that although only published three days before the elections, the notice had already been signed by the MEC on 14 January 2014, and had presumably also been communicated earlier to traditional communities in the province.
- 54 It seems that the impression was initially created (it is unclear how) within at least one traditional community that elections would take place on 18 January 2014. Instead, they took place a week later. See Eiser, The North West Provincial Government, traditional communities and mining companies, 8. In the words of a North West official: ‘It was not an easy exercise but ultimately we have [weathered] the storm’ – North West Local Government and Human Settlements, Department release results on traditional council elections, 25 March 2014, <http://www.gov.za/speeches/view.php?sid=44638> (accessed 17 July 2014).
- 55 Eiser, The North West Provincial Government, traditional communities and mining companies, 8. According to EISA, this was also the case in other traditional council areas – see Electoral Institute for Sustainable Democracy in Africa, Overview of activities. However, in late March 2014, the province announced that results would be released in traditional council areas only from that week onwards. Thereafter, senior traditional leaders would submit the names of selected members, and ‘proper’ traditional councils could then be gazetted. See North West Local Government and Human Settlements, Department release results on traditional council elections, 2014.
- 56 As at July 2014. As pointed out by Eiser, The North West Provincial Government, traditional communities and mining companies, 8, publication in the Gazette has not occurred despite this being a requirement in Section 6(3) of the NWA. According to Eiser, the official reason given for not having published the names was that some communities had not yet submitted the names of selected members to the government.
- 57 Peter Mashala, Councils: where is the democracy?, *Farmer’s Weekly*, 2 January 2014, <http://www.farmersweekly.co.za/article.aspx?id=51593&h=Councils:-where-is-the-democracy> (accessed 17 July 2014).
- 58 Ibid.
- 59 Aspects of these cases will be examined in more detail in later sections. See, for descriptions of events in the traditional community: *Mogale v Maakane*, para 50; *Traditional Authority of the Bapo-ba-Mogale Community v Kenoshi*, paras 53 and 61; Eiser, The North West Provincial Government, traditional communities and mining companies; Setumo Stone, Tribal landlord wants strike declared unlawful, *Business Day*, 10 June 2014, <http://www.bdlive.co.za/national/labour/2014/06/10/tribal-landlord-wants-strike-declared-unlawful> (accessed 17 July 2014); and Swart, Bapo-ba-Mogale community turns to public protector.
- 60 Mazibuko K Jara, Pending traditional council elections in KwaZulu-Natal and Limpopo, *Law, Custom & Rights* newsletter, August/September 2011, 7, [http://www.cls.uct.ac.za/usr/lrg/downloads/LRG\\_News\\_AUG\\_SEPT2011.pdf](http://www.cls.uct.ac.za/usr/lrg/downloads/LRG_News_AUG_SEPT2011.pdf) (accessed 17 July 2014).
- 61 As at July 2014. In April 2007, the Director-General of the then Department of Provincial and Local Government admitted that only KwaZulu-Natal, North West, Northern Cape and Gauteng could report having any reconstituted traditional councils in their provinces – see Gender

- composition of traditional leaders and traditional councils after the implementation of new legislation, Annexure LMN6 to Second Respondent's Answering Affidavit in *Tongoane and Others v National Minister of Agriculture and Land Affairs and Others* (Case no. 11678/06), Transvaal Provincial Provision, April 2007.
- 62 IFP leader goes to court to stop elections, *The Citizen*, 9 February 2012, <http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=257666&sn=Detail&pid=334&IFP-leader-goes-to-court-to-stop-elections> (accessed 13 February 2012); Sharika Regchand, Traditional elections to continue despite objection, *The Mercury*, 16 February 2012, [http://www.iol.co.za/news/politics/traditional-elections-to-continue-despite-objection-1.1235508?utm\\_medium=email&utm\\_campaign=Blacks+had+no+claim+to+4%E2%80%A6#.U8ejpfmSz94](http://www.iol.co.za/news/politics/traditional-elections-to-continue-despite-objection-1.1235508?utm_medium=email&utm_campaign=Blacks+had+no+claim+to+4%E2%80%A6#.U8ejpfmSz94) (accessed 17 July 2014).
- 63 Skhumbuzo Miya, Chaos at Sweetwaters poll: protesters block voting stations, *The Witness*, 20 February 2012, [http://www.witness.co.za/index.php?showcontent&global%5B\\_id%5D=76987](http://www.witness.co.za/index.php?showcontent&global%5B_id%5D=76987) (accessed 2 March 2012). An earlier traditional council election process in KwaZulu-Natal seems to have been equally flawed in respect of voter turnout, with no voters' roll and uncontested elections in many areas where all candidates who had been nominated filled the elected member spots on traditional councils – see Jean Redpath, Past KwaZulu Natal traditional council elections flawed, *Law, Custom & Rights* newsletter, August/September 2011, 3–4, [http://www.cls.uct.ac.za/user/lrg/downloads/LRG\\_News\\_AUG\\_SEPT2011.pdf](http://www.cls.uct.ac.za/user/lrg/downloads/LRG_News_AUG_SEPT2011.pdf) (accessed 17 July 2014).
- 64 TLGFA, Section 3(2)(b).
- 65 Preamble to the TLGFA. For an analysis of the extent to which the gender composition requirement can advance substantive gender equality, see Bennett and Murray, Traditional leaders, 26–22.
- 66 See NWA, Section 6(2)(c).
- 67 TLGFA, Section 3(2)(d). In order to make use of the procedure it would have to be proven to the Premier that 'an insufficient number of women are available to participate' in a particular traditional council.
- 68 See Gender composition of traditional leaders and traditional councils, 2007.
- 69 Ibid. The statistics further indicate that of the 29% women traditional council members in North West, about 82% of them had been elected by their traditional communities rather than selected by a senior traditional leader.
- 70 Premier, Reconstitution of traditional councils, 2008; Erratum, 2009. According to Judge Landman in *Mogale v Maakane*, para 102, if traditional councils as gazetted fail to meet the gender threshold, then the 'Premier's notice offends against the principle of legality' because it contradicts what is required by law.
- 71 TLGFA, Section 3(2)(a), as amended.
- 72 Ibid.
- 73 Ibid., Section 3(2)(a), prior to amendment. See amendment to this provision at Section 4 of the Traditional Leadership and Governance Framework Amendment Act 2009.
- 74 See NWA, Section 6(2)(b).
- 75 The NWA combined this 30-member limit with the requirement that the North West Premier determine how many members there should be per traditional council using a formula based on the traditional community's population size – even before the TLGFA was similarly amended in 2009. See NWA, Section 6 (2)(a).
- 76 Section 146(2)(b) of the Constitution of the Republic of South Africa, 1996, indicates that where there is a conflict between national and provincial legislation dealing with traditional leadership (a Schedule 4 functional area), the national legislation will prevail if it is trying to establish a framework for uniform regulation of an issue. On this, see Landman, *Mogale v Maakane*, paras 63–6, as well as Bennett and Murray, Traditional leaders, 26–31, who offer a different view.
- 77 Department of Traditional Affairs, Traditional Leadership and Governance Framework Act, 2003: Guidelines for determination of number of members of traditional councils, GG 34242 GN 354, 21 April 2011.
- 78 Premier, Determination of the number of traditional councils, 2011; North West Acting MEC, Determination of the number of the members of traditional councils, 2013.
- 79 Eiser, The North West Provincial Government, traditional communities and mining companies, 5.
- 80 Premier: North West Province, North West Traditional Leadership and Governance Act (2/2005): Commencement, *Provincial Gazette Extraordinary* 6390 Notice No. 1, 4 April 2007.
- 81 NWA, Section 43(3)(a).
- 82 In *Mogale v Maakane*, para 102, Landman states that the lateness of this notice (not only the publication thereof, but also the Premier's signing thereof) means that the Premier was acting without legal authority when attempting to disestablish the tribal authorities. Furthermore, the retrospective amendment of the TLGFA does not validate this unlawful action by the Premier (para 109). However, the Premier's notice was never set aside in Landman's ruling (see para 112).
- 83 Section 43(3)(b) of the NWA goes on to require that a notice disestablishing tribal authorities must also regulate how their staff and financial assets will be transferred and managed after the disestablishment. See also Eiser, The North West Provincial Government, traditional communities and mining companies, 2.
- 84 In *Traditional Authority of the Bapo-ba-Mogale Community v Kenoshi*, para 45, Judge Legodi held that the invalidity of the late 2008 reconstitution notice could not be remedied by the retrospective amendment of Section 28(4) of the TLGFA. Legodi notes in the same paragraph that the notice was an 'exercise in futility'.
- 85 See, for example, *Maakane v Premier of the North West Province*, paras 14–20 and Eiser, The North West Provincial Government, traditional communities and mining companies.
- 86 This is the argument of legal counsel for Bapo-ba-Mogale. See Eiser, The North West Provincial Government, traditional communities and mining companies, 8. See also Manson, Mining and 'traditional communities' in South Africa's 'platinum belt', 423.
- 87 See Bennett and Murray, Traditional leaders, 26–22 to 26–23, who note that possible consequences for failing to reconstitute could be the withdrawal of traditional community status, loss of governmental support or exclusion from service delivery agreements with municipalities, but that none of these is mentioned explicitly in the TLGFA.

- 88 This is one of at least two possible interpretations of the transitional provision identified in Centre for Law and Society, Questioning the legal status of traditional councils.
- 89 In terms of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) (28 May 2004), there may be an argument for the continued existence of traditional councils despite non-compliance with the reconstitution requirements until they have been declared invalid by a court. In other words, if the result of non-compliance is invalidity, this does not automatically take effect. Where persons belonging to a traditional community are contesting the status of that community's traditional council as a failed governance institution, this may place an unreasonable burden on ordinary people living in the former homelands to make an application for invalidity at court.
- 90 In respect of the disestablishment of regional authorities, for example, the TLGFA stipulates how the practical and financial consequences of doing away with the authority should be dealt with – see Section 28(6).
- 91 Section 2(2) of the NWA specifies that the NWA is 'subject to' the TLGFA.
- 92 Section 43(1) of the NWA, which states that: 'All tribal authorities established in terms of Act 23 of 1978 [the Bophuthatswana Traditional Authorities Act] shall continue until such time that it is substituted by the newly reconstituted traditional councils ...'.
- 93 This was an argument of Bapo-ba-Mogale traditional authority members in litigation considering the legal status of the authority – see *Mogale v Maakane*, para 32. The argument was upheld by Legodi – see *Traditional Authority of the Bapo-ba-Mogale Community v Kenoshi*, para 41.
- 94 NWA, Section 43(3).
- 95 Bennett and Murray, Traditional leaders, 26–31, suggests to the contrary that provincial traditional leadership Acts may be able to develop procedures for dealing with traditional leaders that differ from the TLGFA on the basis that if the TLGFA is framework legislation, it can only prevail over provincial legislation insofar as it sets framing guidelines.
- 96 Summaries of these judgements are included in Centre for Law and Society, Questioning the legal status of traditional councils.
- 97 *Mogale v Maakane*, para 8. This 'uncertainty' was in part due to the failure of an acting judge to make a ruling on similar questions that had been presented to the Court almost two years prior – see para 19.
- 98 Ibid., paras 41, 81, 89, 108 and 112.
- 99 Ibid., para 83.
- 100 Ibid., para 112.
- 101 Ibid., paras 84 and 93.
- 102 Ibid., para 92.
- 103 Ibid., paras 108 and 112.
- 104 For an account of the background to these two judgements, see Manson, Mining and 'traditional communities' in South Africa's 'platinum belt', 420; Claassens and Matlala, Platinum, poverty and princes in post-apartheid South Africa, 132–3.
- 105 *Traditional Authority of the Bapo-ba-Mogale Community v Kenoshi*, paras 39.3 and 44.
- 106 Ibid., paras 40–41 and 63. It should be noted that this approach seems to use as its starting point the NWA's provisions, rather than the TLGFA's provisions to which it is subject, and then ignores the one-year deadline placed on the disestablishment of old tribal authorities contained within the NWA itself.
- 107 *Maakane v Premier of the North West Province*, para 1.
- 108 Ibid., paras 12, 18 and 22.
- 109 Ibid., para 22.
- 110 *Pilane and Another v Pheto and Others* (582/2011) [2011] ZANWHC 63 (30 September 2011), paras 14, 18 and 19. Claassens and Matlala, Platinum, poverty and princes in post-apartheid South Africa, 128 and 131–2, explain the broader political implications of these contradictory judgements.
- 111 *Pilane v Pheto*, paras 16 and 18. It is stated in para 18 of the judgement that '[t]here can never be a lacuna in that no Traditional Council exists to run the affairs of the traditional community'.
- 112 North West Directorate: Traditional Affairs, Contracts/deals concluded post 24 September 2010: Traditional Councils, Circular Minute 03/2011 (11 April 2011), on file with the author. See also Centre for Law and Society, Questioning the legal status of traditional councils; Claassens and Matlala, Platinum, poverty and princes in post-apartheid South Africa, 132.
- 113 North West Directorate, Contracts/deals concluded post 24 September 2010.
- 114 Department of Traditional Affairs, Invitation to comment on the Traditional Affairs Bill, 2013, GG 36856 GN 947, 20 September 2013, at clause 69(4).
- 115 Ibid.
- 116 Ibid.
- 117 Premier, Reconstitution of traditional councils, 2008.
- 118 Department of Provincial and Local Government, The White Paper on Traditional Leadership and Governance, 4.1.
- 119 It should be noted that this tension, as well as that existing between Sections 3 and 28(4), is not alleviated by the new version of the transitional provision proposed in the draft Traditional Affairs Bill.
- 120 This is because provincial legislatures have to undertake their own law-making processes, including public participation processes, pursuant to the framework legislation once it has been promulgated.
- 121 Judge Landman in *Mogale v Maakane*, paras 92–3. See also Claassens and Matlala, Platinum, poverty and princes in post-apartheid South Africa, 128.
- 122 There is a further potential conflict between the two transitional provisions *within* the NWA – one of which extends the life of tribal authorities indefinitely (Section 43(1)), while the other requires them to be extinguished within one year of the Act's commencement (Section 43(3)).
- 123 As discussed earlier, these omissions include the split between elected and selected membership for traditional councils and the possibility of female membership that is less than one-third at the discretion of the Premier.
- 124 Redpath, Past KwaZulu Natal traditional council elections flawed, 4. See also Centre for Law and Society, Questioning the legal status of traditional councils.

- 125 A submission of the Department of Justice and Constitutional Development to the Select Committee on Security and Constitutional Development on the Traditional Courts Bill, 12 September 2012, <http://db3sqepoi5n3s.cloudfront.net/files/docs/120912scsecuritydevelopment.pdf> (accessed 17 July 2014).
- 126 Centre for Law and Society, Communal Land Tenure Policy (CLTP), fact sheet, September 2013, [http://www.cls.uct.ac.za/usr/lrg/downloads/CLS\\_CommunalLand\\_Factsheet\\_Sept2013.pdf](http://www.cls.uct.ac.za/usr/lrg/downloads/CLS_CommunalLand_Factsheet_Sept2013.pdf) (accessed 5 May 2014). It has already been reported in the media that restitution land worth R60 million was transferred to a traditional council in North West by the Premier – see Sapa, Modise returns R60m worth of ‘stolen’ land, *Mail & Guardian*, 26 August 2013, <http://mg.co.za/article/2013-08-26-modise-hands-over-r60m-worth-of-land-to-traditional-council> (accessed 17 July 2014). It was similarly proposed that traditional councils be land administration committees in the Communal Land Rights Act 2004 (Act 11 of 2004), which was subsequently declared unconstitutional – see Redpath, Past KwaZulu Natal traditional council elections flawed, 4.
- 127 See, for example, the handing over of 19 vehicles to traditional leaders and councils in North West – North West Local Government and Human Settlements, Government delivers on its commitment of improving the functioning of traditional councils, 9 May 2014, <http://www.gov.za/speeches/view.php?sid=45486> (accessed 17 July 2014).
- 128 Allocations to municipalities in the North West Province in terms of section 29 of the Division of Revenue Act 2010, Act 1 of 2010, *Provincial Gazette Extraordinary* 6784 Notice No. 163, 26 May 2010. This particular allocation was made by the North West Department of Local Government and Traditional Affairs.
- 129 Ibid.
- 130 Evidence of the magnitude of deals that mining companies are willing to make with traditional communities, through their representatives, can be seen in: Eiser, The North West Provincial Government, traditional communities and mining companies. On this point, Manson, Mining and ‘traditional communities’ in South Africa’s ‘platinum belt’, 422, notes that ‘sharing the benefits of mining with local communities through their “Traditional Authorities”, through royalties, shares or employment, is at best precarious and at worst disastrous’.
- 131 As evidenced by the experiences of Bapo-ba-Mogale – see Eiser, The North West Provincial Government, traditional communities and mining companies. Manson, Mining and ‘traditional communities’ in South Africa’s ‘platinum belt’, 417–19, describes the difficulty that mining companies had in trying to identify ‘legitimate’ leadership to act as representatives of the Bakwena ba Mogopa traditional community in mining deals. This difficulty arises because actors, as Bennett and Murray, Traditional leaders, 26–66 point out, ‘assume that consultation with traditional leaders is equivalent to consultation with the communities themselves’.
- 132 See Boitumelo Matlala ‘We want the bread, not the crumbs’, Engaging traditional authority and the state: the case of Bakgatla ba Kgafela, and Sonwabile Mrwana, The chief’s justice? Mining, accountability and the law in the Bakgatla-ba-Kgafela traditional authority area, North West Province – both in this publication. See also Manson, Mining and ‘traditional communities’ in South Africa’s ‘platinum belt’.
- 133 It is pointed out by Christian Lund and Catherine Boone, Introduction: land politics in Africa – constituting authority over territory, property and persons, *Africa* 83(1) (2013), 1 – 13, 2 that ‘[o]ften, processes of recognition become focal points of contestation among groups in society’. Further, that contestation is linked to resistance against monopolies of power and resources.
- 134 The ‘rule of law’ is included as a founding value at Section 1(c) of the Constitution.
- 135 On this issue, see Landman’s comments on the North West Premier’s conduct in *Mogale v Maakane*, para 102. For more on the principle of legality and the rule of law generally, see François du Bois (ed), *Wille’s principles of South African law*, 9<sup>th</sup> ed, Cape Town: Juta & Co., 2007, 18–19; Iain Currie and Johan de Waal, *The Bill of Rights handbook*, 5<sup>th</sup> ed, Cape Town: Juta & Co., 2006, 10–13.
- 136 In 2005 Bennett and Murray, Traditional leaders, 26–65 to 26–66, warned that instead of allowing for ‘gradual democratisation’ of customary practice, the TLGFA introduced a rigid framework with little incentive to transform for traditional leaders and councils.
- 137 *Pilane and Another v Pilane and Another* (CCT 46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC) (28 February 2013), para 44.
- 138 More specifically for the North West, are they not then merely the tribal authorities that existed in terms of Section 3 of the Bophuthatswana Traditional Authorities Act 1978 (Act 23 of 1978)?

# The chief is a chief through the people

Using Rule 7(1) to test the authority of a chief to litigate on behalf of his people

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*This note discusses the judgement handed down by the North West High Court in Mafikeng in an interlocutory application in the matter of the Royal Bafokeng Nation (RBN) vs the Minister of Rural Development and Land Affairs and Others. The application was brought by several 'sub'-communities under the jurisdiction of the RBN, challenging the latter's authority to litigate on their behalf. This application relates to a growing tension between the political authority of traditional leaders and the fundamental right of their 'subjects' to speak for themselves. It may be argued that the judgement represents an important step beyond the established frame of this discussion in the North West courts, namely which representative traditional structure is the proper one, to a question as to the duty upon those structures to comply with customary requirements of broad consultation and consent. In the event, it demonstrates the potential substantive significance of a procedural formality such as regulated by Rule 7(1).*

In April 2008, the kgosi<sup>1</sup> of the Royal Bafokeng Nation (RBN) brought an application against the Minister of Land Affairs (as he then was) and the Registrar of Deeds for a declaration that all land registered 'in trust' for the Bafokeng be registered in the name of the RBN. In its application, the RBN described itself as an 'association of persons forming an indigenous tribe under a kgosi or chief' and a *universitas personarum* also deemed to be a traditional community in terms of the Traditional Leadership Governance Framework Act 2003 (Act 41 of 2003, or the TLGFA).

The case discussed here concerns judgement handed down by the North West High Court in Mafikeng

on 12 December 2013, in an interim application challenging the RBN's authority to litigate this matter on behalf of the community it purports to represent. This issue, I will argue, addresses a growing tension between the political authority of traditional leaders and the fundamental right of their 'subjects' to speak for themselves. It may be argued that the Mafikeng judgement represents an important step beyond the established frame of this discussion in the North West courts, namely, which representative traditional structure is the proper one, to a question as to the duty upon those structures to comply with customary requirements of broad consultation and consent. In the event, it demonstrates the potential substantive significance of a procedural formality such as regulated by Rule 7(1).<sup>2</sup>

In this case note, I will first set out very briefly the history of land dispossession in pre-colonial, colonial

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and apartheid Transvaal as the context to the main application brought by the RBN. This history itself, however, is contested – as are the histories of countless ‘traditional communities’<sup>3</sup> across South Africa. In these circumstances, I argue, the singular and uncontested authority of the traditional leader to speak on behalf of those under his or her jurisdiction translates into a monopoly over history. This would not have mattered as much if the democratisation of traditional communities and their leadership structures had been a success. In other words, who wields power and over whom may arguably have been less important if that power was contained and accountable. Unfortunately, the current statutory framework of traditional leadership has failed in that democratisation project, leaving the courts as the site of endless traditional power struggles. I briefly describe this failure in the second section.

But why does it matter?

It matters, I argue, not only because history forms the basis not only of ownership of land and other resources, but also of authority. In the context of the latest commodity resource boom, which targets rural areas almost exclusively, it matters a great deal. To be recognised as the leader of a community is increasingly to be the one to decide over the fate of that community’s resources.<sup>4</sup> In the context of growing tensions in the North West Province platinum belt, any mechanism that might allow affected community members to raise their voices *effectively* through formal legal processes must surely reduce the frustration that has led to the instances of violent protest that have become associated with the area.

I then turn to a discussion of the main application of the RBN to have 61 farms transferred into its name, the opposition raised by several parties, and the interim Rule 7 application, which is the subject of this case note. I conclude by discussing the potential significance of the judgement for the issues set out here.

## **The relevant history of land dispossession in the Transvaal**

The history of land dispossession in South Africa, while culminating in the coherent project of placing the vast majority of land (and other resources) in

white hands, initially varied across provinces. I will only describe very briefly the origin of this project in the Transvaal, as it forms the context of the case under discussion, but the significance of a proper understanding of the history of dispossession – and of the formation of communities – echoes across the country.<sup>5</sup>

We recently marked the centenary of the Natives Land Act 1913, which prohibited Africans from owning or renting land outside marked areas that constitute 8% of the total area of South Africa. While this initiated formal segregation, dramatic land dispossession started much earlier.

The legal expropriation of land began in the western Transvaal the moment the Voortrekkers arrived in 1839.<sup>6</sup> A Volksraad Resolution of 1853, for example, noted that land could be granted to ‘natives’ on condition of obedient behaviour – which tenure would lapse as soon as the obedience came into question.<sup>7</sup> In 1855, Volksraad Besluit 159 held that ‘all coloured persons’ would be excluded from burgher rights and therefore from the possession of immovable property in freehold. In these circumstances, a form of land buying through informal trusteeship of white owners emerged in the 1860s, one that eventually saw many local missionaries buy and hold land on behalf of black land-buying groups.<sup>8</sup>

In 1877, Sir Theophilus Shepstone led the first British annexation of the Transvaal.<sup>9</sup> Shepstone, it will be recalled, was the pioneer of indirect rule in the British Natal Colony. He believed that the selective use of indigenous political structures and institutions was an important strategy to counter instability in the colonised territories – and imported the same ideas into the Transvaal.<sup>10</sup>

In line with this development, the Pretoria Convention of 1881 proclaimed that ‘all paramount chiefs, chiefs and natives of the Transvaal’ would be permitted to buy land. What this meant in practice was that blacks could only acquire title through a recognised chief who would act as ‘traditional custodian’ of the land. It further meant that a state authority, deemed appropriate, would in fact assume ‘trusteeship’ of the property on behalf of the African purchaser – the latter necessarily being a recognised chief.<sup>11</sup> Central to this regime was, on the one hand, the



racist notions of ownership as beyond the level of civilisation of black communities and, on the other, the entrenchment of recognised chiefs as key figures in the project of indirect rule.

## Who is the community?

The role of traditional leaders in the advancement of the project of indirect rule has been analysed and discussed by historians and anthropologists.<sup>12</sup> That discussion is beyond the parameters of this case note. My interest here is in the post-constitutional statutory framework of traditional leadership and, in particular, how the issues of community representation played out in the courts and the policy arena.

The increasing significance of who represents the community and how it ties up with property and power is perhaps nowhere better illustrated than in the 20-year life span of the Restitution of Land Rights Act.<sup>13</sup> When the Act first came into force in 1994, it made no reference to traditional leaders whatsoever. Rather, it recognised the fluid nature of community boundaries by including ‘part of a community’ in the definition of community as claimant and understanding customary ownership as deriving from shared rules rather than jurisdictional boundaries.

In 2014, when the Act was amended to re-open the land claims process,<sup>14</sup> the rhetoric had shifted dramatically. It was now seen by many as a means for the traditional leader to claim all land that may have been dispossessed from anyone under his/her jurisdiction – and the flurry of announcements from various traditional leaders of their intention to lodge massive land claims shortly after the re-opening thus came as no surprise. It had come to be accepted that all land under the jurisdiction of a traditional leader must be held by him (or, occasionally, her).<sup>15</sup> In fact, the North West legislature, in voting in favour of the amendment to the Act, noted as its sole reason for the vote ‘the importance of strengthening the institution of traditional leadership’. Gone was the notion of smaller groups within traditional communities having the right to choose whether to claim land as a family or a sub-group, or as a member of a greater traditional community. In its place we find the insistence that, as under colonial

rule, members of traditional communities only ‘exist’ – and can claim rights – through their traditional leaders.

The increase in power of the traditional leaders led naturally to increasing contestation over the incumbents to that power. The TLGFA created a scheme whereby the boundaries and leadership positions recognised by the Bantu Authorities Act 1951 would stay intact, but be ‘democratised’ and ‘restored to its pre-colonial dignity’ through two mechanisms: on the one hand tribal authorities would become 40% elected structures,<sup>16</sup> while, on the other, a commission would be set up to deal with any leadership disputes that arose after 1927, when successive colonial and apartheid governments manipulated traditional leadership recognition to further the segregationist project.<sup>17</sup> The Commission on Traditional Leadership: Disputes and Claims (also discussed in this issue of SACQ by Jeff Peires) was supposedly an attempt to clarify history once and for all and re-establish the leaders whose legitimacy is sourced from custom rather than past political favour. Unfortunately, the Commission was fraught with difficulties, with every one of the handful of decisions made public already, the subject of litigation. Alongside the rise of the recognised leaders, history remains a pawn to be manipulated by those in power.

In an illustration of the contestations over both the leadership and their areas of jurisdiction, the lodging of disputes picked up so much speed over the last decade that a series of provincial commissions were constituted – and inundated. In Limpopo alone, over 500 disputes were lodged by May 2012.<sup>18</sup> To date, none has been settled in that province.

While there are many reasons why these disputes are important, including the issues of chiefly and headmanship salaries, the fact that the traditional leaders are increasingly allowed to speak on behalf of their communities about those communities’ resources, without any effective statutory requirement of proper community participation and consultation, is a significant cause. This is clear from the cases that have reached the courts – the majority emanating from the resource rich North West.

The Bapo-ba-Mogale community, next door neighbours of the RBN and the authority presiding

over Marikana, has seen various disputes relating to the authority to represent the community end up in court. In 2010, the kgosi attempted unsuccessfully to interdict 26 community members from calling meetings of the community.<sup>19</sup> The Traditional Authority, in turn, successfully interdicted an individual who claimed to be the tribe's CEO from representing the community in a different court on the same day.<sup>20</sup> In 2011, the Traditional Authority unsuccessfully attempted to stop the election of a new representative structure.<sup>21</sup> In 2012, the issue of who represents the Bapo community at the Marikana Commission of Enquiry also reached the High Court.

The third North West neighbour of litigious significance has been the Bakgatla-ba-Kgafela. Kgosi Nyalala Pilane has obtained a number of interdicts against anyone in the community who seeks to call meetings of any inter-community structures without his consent. These judgements saw a growing tension between the High Court's acceptance of the notion that within a traditional community, only structures recognised in terms of statute may act, represent or call meetings – and the pushback from community members who insist on their right to discuss the governance of their communities outside these structures.<sup>22</sup> It was thus significant, when one of these matters reached the Constitutional Court in 2012 in *Pilane v Pilane*,<sup>23</sup> that the court set all three of the interdicts aside, although the minority dissent indicated a split in the court as to whether freedom of association and speech should outweigh the need to insulate the authority of traditional leadership. The majority insisted on the rights of community members and further indicated, quite significantly, that it believed the relationship of statutory traditional authority to customary leadership not recognised by legislation is 'far from clear'; but refrained from pronouncing on it.<sup>24</sup>

### ***Royal Bafokeng Nation v Minister of Land Affairs and Others: the main application***

In the main application launched in 2008, the RBN sought an order declaring it to be the owner of 61 properties in North West. It alleged that the land was bought by the traditional community today known as the RBN between 1869 and 1963. It describes the

land as the ancestral land of the RBN but ascribes the ownership thereof not 'merely by occupation of the land historically by the Applicant as an indigenous community', but to the acquisition of the land. All the relevant portions of land are currently still registered in the name of the government at the time of purchase. According to the title deeds, the government functionary holds the land 'in trust' for the chief acting on behalf of the Bafokeng Tribe.<sup>25</sup> This came about as a result of the systematic barring of 'natives' from owning land through a series of colonial and apartheid policies, as described above.

It should be noted that this application was brought in the context of the constitutional challenge launched against the Communal Land Rights Act 2006. That Act sought to transfer communal land held in trust by government functionaries back to communities, but was challenged by four communities on the very basis that it would weaken their tenure security by placing the authority over the land in the hands of traditional leaders. The Constitutional Court eventually scrapped the Act on procedural grounds in *Tongoane*,<sup>26</sup> thus not entertaining the substantive objections and leaving it up to the RBN to continue pursuing a similar property formulation.

The RBN sought this order on the grounds that the so-called trust regime created by the colonial and apartheid governments did not create a true trust relationship between the community and the government functionary and, in fact, the land is recognised as 'owned' by the community even if registered in terms of the old trust formula. If this is not the case and the land is, in fact, still held in trust by the government, then such a system is discriminatory and paternalistic and stands to be dismantled under a constitutional democracy.

At the time, the Minister requested the order sought to be published, to allow any interested parties to intervene. Subsequent to the publication, 13 parties, including families, communities and an association under the jurisdiction of the RBN, sought leave to intervene. Some opposed the relief sought in respect of specific properties to which they assert direct interest – alleging that the property was in fact bought by their ascendants and not by the 'tribe' – while others objected to the relief sought in respect of all

the affected properties. The RBN initially opposed the intervention, but it was eventually granted on an unopposed basis. The majority of the intervening parties were represented by the Legal Resources Centre and have come to be described in the papers as 'the LRC clients'.

After being admitted, the LRC clients filed their answering affidavits in the main application in April 2011. They did not dispute that the system of state trusteeship had colonial and racist origins and is wholly inappropriate within a non-racial and democratic South Africa. However, they disputed the version of history and custom presented by the RBN, which would entitle the chief to hold the land on behalf of the entire community. They disagreed with the RBN's contention that all the affected properties were purchased by the Bafokeng community and for the community, and alleged that, in fact, many of the properties were purchased by smaller syndicates for themselves and their children. They did not support an outcome that would see the kgosi having representative authority over their land and argued that, in the absence of a regulatory statutory framework for the governance of communal land, such a transfer would be premature. In any event, they argued that the Bafokeng kgosi and his council only have rights to the properties in terms of customary and common law in as far as the descendants of the original purchasers would consent thereto.

Closely related to that objection, the LRC clients raised the defence that the kgosi was not properly authorised by the community he purports to represent to bring the main application. The details of their objection are discussed below.

Instead of filing replying papers, the RBN applied for the matter to be referred to trial. It included the question as to whether it was authorised to institute the proceedings among a number of disputes of fact it identified.

The LRC clients then brought an application in terms of Rule 7 of the Uniform Rules of Court for an order granting them leave to dispute the RBN attorneys' authority to bring the main application, directing the RBN to prove its authority to bring that application and ordering that both the attorney and/or the

RBN may not act further in the main proceedings unless and until such time as both had established their authority to the satisfaction of the court. That application was heard on 31 October 2013.

## The Rule 7(1) judgement<sup>27</sup>

Rule 7(1) provides that 'the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such a person is so acting, or with the leave of the court on good cause shown at any time before judgement, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application'.

While the Rules formerly required the filing of a power of attorney in specific instances as a rule, the substituted Rule 7 has, since 1988, meant that authority need generally not be shown in actions or applications,<sup>28</sup> but may be challenged. While it was originally understood that Rule 7(1) only applies to the mandate given to attorneys,<sup>29</sup> the SCA held in 2005 that 'the remedy for a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in Rule 7(1)...'.<sup>30</sup>

The LRC clients first raised the opposition that the kgosi was not properly authorised by the Bafokeng traditional community in its answering affidavit in the main application. While the application was instituted in April 2008, the date of the resolution which the kgosi attached as authorisation was 22 September 2005. That resolution was allegedly taken by the RBN at a Supreme Council meeting. However, the LRC clients contended, under custom the Supreme Council does not have the power to make such a decision, in any event not without thorough and broad consultation within the traditional community it represents. No such consultations occurred prior or subsequent to the resolution. Moreover, even if the resolution was properly taken, the LRC clients contended, it was overturned by a *Kgotha-Kgothe*<sup>31</sup> meeting of 29 July 2006, where general opposition to the idea that land should be transferred to the RBN was voiced by those in attendance. According to the LRC clients, 'the Kgosi gave an undertaking at that

*pitso* that he would not pursue the matter before he had consulted further. He never consulted further in any meaningful way'.<sup>32</sup> In terms of custom, the LRC clients contended, the kgosi may not go against the decisions of the *Kgotha-Kgothe*. The latter is 'the highest ranking decision making body of the traditional community'.<sup>33</sup>

The LRC clients expected the RBN to respond to the allegations, but instead the RBN brought an application for the main application to be referred to trial. The RBN wanted the question of its authority to institute the proceedings to be dealt with as part of the main trial.

The LRC clients insisted that it had to be dealt with as a separate and preliminary issue. They contended that Rule 7, in the circumstances, protected other fundamental interests. In these circumstances, these interests include the importance of ensuring compliance with traditional governance structures and practices that, in terms of customary law, 'require widespread consultation, democratic decision making and full and thorough debate',<sup>34</sup> and the importance of avoiding situations where one part of the community with access to the financial resources of the community as a whole, litigates against another, less resourced part of the community.<sup>35</sup> In addition, the issues 'concern important questions of customary law that relate [to] governance systems and the ability of communities to hold their leaders [to] account'.<sup>36</sup>

The RBN, in response, argued that the resolution of 22 September 2005 authorised the kgosi to institute proceedings to ensure that the registration of ownership of the 61 farms in question would reflect the RBN as owners. It is thus, so the argument goes, not a resolution that has the effect of land being disposed or huge financial liability being incurred. 'It is a resolution which in customary law does not therefore require the consent or consultation of each and every member of the Royal Bafokeng.'

It may be noted as an aside that an interesting dispute over the content of custom with regard to decision-making – and who may claim to have knowledge of the custom – ensues on the papers. Mr Rapoo, a member of the RBN who deposes to an affidavit on behalf of the LRC clients, bases

his knowledge of the custom on his membership of the community. For the RBN, Mr van den Berg, their attorney, insists that he has knowledge of the requirements of the applicable customary law as he has had a long-standing professional relationship with the RBN.

In its assessment of the arguments, the court listed the following principles to be applicable 'where the authority of a signatory of an artificial legal person and its attorney is in dispute':<sup>37</sup>

- An artificial legal persona is obliged to prove that it is authorised to initiate the litigation in question
- Any challenge should be mounted in terms of Rule 7(1)
- Rule 7 can be invoked at any time before judgement
- While 'it is a practical rule which mostly turns out to be compliance with a procedural formality', it can, in some cases, impact substantively on the rights of litigants

On the issue of whether the LRC clients were able to show 'good cause', the court held that it included a 'satisfactory explanation for raising it at the time it is raised'; that prejudice to the other party must be taken into account; and that there must be the prospect for the objection to be a good one. Good cause would also require 'some indication that prejudice [to the party alleging lack of authorisation] will be averted'.

Assessing the arguments before it, the court found that the question of authority was of such importance that it had to be resolved sooner rather than later. The LRC clients had shown their challenge to be a serious one and the RBN had not disputed that the issue of authority was one that had to be decided. In the circumstances, the purpose of the rule – to avoid the cluttering of pleadings on the one hand, but provide a safeguard to prevent a person from denying his authority for issuing the process on the other<sup>38</sup> – would be served by granting the application.

The order granted refers three particular issues for oral evidence, namely:

- Did the Supreme Council of the RBN take a decision to authorise the bringing of this application on 22 September 2005?

- Does the Supreme Council have the power to take such a decision under customary law, and if so, is it necessary for it to consult broadly within the traditional community before taking such a decision?
- Was any such decision overturned or reversed by subsequent events, and more particularly by the *Kgotha-Kgothe* meetings of the traditional community held in 2006?

In the circumstances, 'the RBN and attorneys Fasken Martineau may not act further in the main application until the issue of their authorisation has been decided'.

## Conclusion

The LRC clients, like hundreds of members of traditional communities who have approached the Leadership Dispute Commissions, dispute the accepted version of history that contains them within a certain jurisdictional boundary and under specified leadership. That struggle will continue for these communities. The significance of the Mafikeng High Court judgement in the Rule 7(1) application, however, is that it may diminish the importance of those contested boundaries and leaders: if traditional leaders are bound by the democratic principles of custom that require them to seek consent of their communities before taking decisions that would have an impact upon those communities, then the position of leader becomes a side issue.

It is interesting to note that the question of whether, and to what extent, traditional leaders should seek consent from their communities prior to decision-making that would affect them, has a long history in pre-constitutional jurisprudence.<sup>39</sup> Those cases invariably benefitted a despotic leadership. In fact, in a case in 1908<sup>40</sup> concerning the right of the predecessor of the current RBN kgosi over land, J Bristowe held that 'it seems necessary, for that purpose [of self-preservation], that the chief should be an autocrat, that his will should be law ...'.

The Mafikeng High Court may well have taken the first step in breaking a new post-constitutional path.

## Notes

- 1 Chief or senior traditional leader in terms of the Traditional Leadership and Governance Framework 2003 (Act 41 of 2003), Pretoria: Government Printer.
- 2 See *North Global Properties (Pty) Ltd v Body Corporate of the Sunrise Beach Scheme* [2012] ZAKZDHC 47, para 6.
- 3 As defined in the TLGFA.
- 4 For an in-depth analysis of how power and land rights are tied up in the traditional leadership discourse, see A Claassens and B Cousins, *Land, power and custom*, Cape Town: Juta, 2008.
- 5 For further reading on this topic, see W Beinart, P Delius and S Trapido (eds), *Putting a plough to the ground: accumulation and dispossession in rural South Africa, 1850–1930*, Johannesburg: Ravan Press, 1986; C Bundy, *The rise and fall of the South African peasantry* (2<sup>nd</sup> ed), London: James Currey, 1988; A Claassens and B Cousins (eds), *Land, power and custom: controversies generated by South Africa's Communal Land Rights Act*, Cape Town: UCT Press, 2008.
- 6 Gavin James Capps, *Tribal-landed property: the political economy of the BaFokeng chieftancy, South Africa, 1837–1994*, London: London School of Economics, 2010.
- 7 *Royal Bafokeng Nation v Minister of Land Affairs and The Registrar of Deeds* North West High Court, Mafikeng Case nr 999/08. Founding Affidavit of Kgosi Leruo Tshekedi Molotlegi, para 32.
- 8 See S Trapido, *Landlord and tenant in a colonial economy: the Transvaal 1880–1910*, *Journal of Southern African Studies* 5(1) (1978), 26–58.
- 9 H Klug, *Defining the property rights of others: political power, indigenous tenure and the construction of customary land law*, *Journal of Legal Pluralism* 35(119) (1995), 128.
- 10 Capps, *Tribal-landed property*, 108, 171.
- 11 *Ibid.*, 173.
- 12 For further reading, see Claassens and Cousins (eds), *Land, power and custom*; also see the work of HWO Okoth-Ogendo, Peter Delius and Martin Chanock.
- 13 *Restitution of Land Rights Act 1994* (Act 22 of 1994), Pretoria: Government Printer.
- 14 *Restitution of Land Rights Amendment Act 2014* (Act 15 of 2014), Pretoria: Government Printer.
- 15 Traditional leaders lobbied strongly in favour of this notion on many fronts, but in particular in the National Reference Group on land reform (NAREG) working groups on land set up by the Minister of Rural Development and Land Reform. The traditional leaders in particular rejected the existence of Communal Property Associations (CPAs) holding land within their territories. As a result, the newly proposed Communal Land Tenure Policy proposes that CPAs will only exist outside the territory of traditional leaders.
- 16 Section 28(3) and (4).
- 17 Section 22 establishes a 'Commission on Traditional Leadership Disputes and Claims'.
- 18 Statement released by the Limpopo Department of Co-operative Governance, Human Settlements and Traditional Affairs, 18 May 2012.
- 19 *Mogale v Maakane and 27 Others* [2010] NWHC 1106.



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- 20 *The Traditional Authority of the Bapo-ba-Mogale Community v Kenosi and 1 Other* [2010] NGHC 31876.
- 21 *Maakane and Others v The Premier of the North West Province and Others* [2011] NWHC 2715.
- 22 In September 2011, he obtained such an interdict against a group who attempted to convene a meeting of the royal family. Leave to appeal was rejected.
- 23 *Pilane and Another v Pilane and Another* (CCT 46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC).
- 24 Para 44–45.
- 25 Since 1994, the RBN has purchased more land, which is registered directly in its name.
- 26 *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) SA 214; 2010 (8) BCLR 741 (CC).
- 27 *The Royal Bafokeng Nation v The Minister of Land Affairs and 15 Others* [2013] NWHC 999.
- 28 The Rule is subject to subsections (2) and (3) that provide that an attorney must file a power of attorney when prosecuting or defending an appeal to a division of the High Court against a magistrate's decision in a civil case.
- 29 AC Cilliers, C Loots and HC Nel, *The Civil Practice of the High Court and Supreme Court in South Africa Vol. 1*, 268.
- 30 *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA), para 14.
- 31 General community meeting.
- 32 Main Application Rapoo Answering Affidavit, para 186.
- 33 Rule 7(1) Founding Affidavit Para 26.
- 34 Para 33(m).
- 35 Ibid.
- 36 Ibid.
- 37 Para 38.
- 38 *North Global Properties (Pty) Ltd v body Corporate of the Sunrise Beach Scheme* [2012] ZAKZDHC 47, para 6.
- 39 See *Hermansberg Mission Society v The Commissioner for Native Affairs and Darius Mogale* 1906 TS 135; *Mogale v Engelbrecht and Others* 1907 TS 836; *Mathibe v Lieutenant-Governor* 1907 TS 557; *Khunou v Minister for Native Affairs and Mokhatle* 1908 TS 260; *Mathibe v Du Toit* 1926 TPD 126; *Matope v Day* 1923 AD 397; *Rathibe v Reid* 1927 AD 74; *Mossi v Motseoakhumo* 1954 (3) SA 919 (A); *Masanya v Seleka Tribal Authority and Another* 1981 (1) SA 522 (T).
- 40 *Petlele v Minister for Native Affairs and Mokhatle* 1908 TPD 260.



# On the record

with Hugh Eiser and  
Brendan Boyle

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*The provincial government of North West has consistently failed to protect the Bapo-ba-Mogale community in dealings with Lonmin Plc over the exploitation of the platinum reserves on the farms they call home. It is alleged that hundreds of millions of rand owed to these rural people may have been misspent or misappropriated, and more that should have been their due has never been paid out.*

*Johannesburg attorney Hugh Eiser has been fighting the Bapo community's case for more than a decade, tackling government and corporate authorities in a relentless effort to win a fair deal for people who have seen little benefit from the riches under their feet. Brendan Boyle, senior researcher at the Centre for Law and Society at the University of Cape Town, spoke to him about the Bapo story:*

**Brendan Boyle (BB):** Why the focus on this community?

**Hugh Eiser (HE):** The Bapo community of around 35 000 people live between Rustenburg and Brits at Marikana, the site of the tragic police massacre on 16 August 2012 of 34 Lonmin miners. They occupy several farms with rich platinum reserves, which are mined by Lonmin Plc under leases dating back in some cases to 1969. They earn valuable royalties from this mining. Right now, there is an effort underway to enforce an unlawful agreement between Lonmin and the Bapo-ba-Mogale community to convert their royalty rights into a Lonmin shareholding.

**BB:** Lonmin confirmed in a press release in August 2011 that it had up to that point paid royalties of about R500 million into the so-called 'D Account' held by the North West government on behalf of the Bapo-ba-Mogale, and that royalties continued to flow at a rate of around R40 million a year. Is this where the problem begins?

**HE:** The focus should be on the conduct of the North West government insofar as its dealings with the Bapo-ba-Mogale community are concerned. It must be on the wilful, consistent conduct of the North West government to prevent any lawful attempt to force it to account to the community for the management and use of its funds. The national Traditional Leadership and Governance Framework Act 41 of 2003, which came into force on 24 September 2004, continued the long-standing requirement that all revenues due to the community had to be paid into a special trust account managed on their behalf by the province. The same Act purported to convert pre-existing traditional authorities into traditional councils, but after a series of elections the status of the Bapo-ba-Mogale's traditional council remains uncertain. The Bapo community held its first election under the Act in October 2005, more than two weeks after the expiry of an initial one-year deadline. In addition, only seven, and not the required one-third or in this case 10, of the 30 members of the resultant council were women. The election process, organised by the North West government, was fatally flawed because it was held after the required date and because it did not meet the gender requirement.

Ever since then there has been utter chaos in the community's affairs. First it was caused by the Bapo leader or chief, Kgosi Bob Mogale, who together

\* Until recently Hugh Eiser was the attorney for the Bapo-ba-Mogale Traditional Council. This interview was conducted before the composition of the new traditional councils was announced in the North West on 8 August 2014.

with his associates tried to seize control of the community's substantial assets. He was rebuffed and in a judgement on 24 July 2008, Judge Sithole said only the traditional authority, to the specific exclusion of the Kgosi, should have power over the assets of the community. That judgement remains in full force and effect today.

**BB:** So who was running the affairs of the community?

**HE:** Responding to serial complaints since 2008 about the Kgosi, the North West premier appointed a series of external administrators. Makepe Jeremiah Kenoshi was the first of these. He managed to extend his one-year term of office by persuading the then still lawful Traditional Authority to employ him as chief executive officer, a position for which there was no precedent or statutory provision. Back in 2010, Kenoshi entered into an agreement to spend R486 million of the community's funds on a property development, which the community had directly rejected. The community was able to stop that and began a process to dismiss him. The North West government tried to intervene and stop his dismissal. They failed. An interdict was issued in June 2010 and confirmed a month later, preventing Kenoshi from taking any action or decision on behalf of the community. In addition to this attempt to endorse Kenoshi, the North West government had refused to recognise the election of new councillors in 2009, as it refuses even today to recognise the election of councillors chosen in an election in January.

**BB:** How were the community's funds being managed in this time?

**HE:** The North West government imposed a number of administrators on the community. But the worst of it was that in terms of the North West Traditional Leadership and Governance Framework Act of 2005 (TLGFA), which came into force on 20 March 2007, and the old Bophuthatswana Act, the funds of the community had to be invested in a trust account under the control firstly of the president of the old Bophuthatswana and then, after 1994, under the control of the premier of the North West. I want to emphasise the word 'trust' because that word appears in the legislation and that trust account had

to be audited annually. That has never ever been done.

**BB:** Was there any control over the funds?

**HE:** A private audit was undertaken by an administrator and an accountant, Abel Dlamini, which revealed that as at March 2009 there was R393 million in the account, under the control of the North West government. The position nearly three years later was that virtually none of that money was left. Thandi Modise, who was then premier of the North West, went on record on a number of occasions to say that it was not possible to audit the account.

**BB:** Do we know that the account exists?

**HE:** What has emerged is that not only was the account not audited, but contrary to the provincial legislation, a separate account was not opened for each community. With the exception of the Bafokeng, who had been exempted, all the money owed to all the communities of the North West went into one account from which withdrawals were made. The result is that it was very difficult to separate money deposited into the account for the various communities.

All attempts to date to have the accounts audited, including an approach by the Public Protector, with whom a complaint was lodged about the conduct of the premier of North West, have proved fruitless. In fact the North West government has not allowed the forensic auditors appointed by the Public Protector access to the records of the North West finance department, to whom the administration of the so-called D-account, the trust account, has been given.

The new premier of North West, Supra Mahumapelo, promised in July that he would investigate the fate of the Bapo-ba-Mogale's fortune and that he would cooperate with the Public Protector. So far, however, no specific action has been reported to act on this promise. In terms of the North West Act, it is incumbent on the North West premier to publish the names of the members of the Traditional Council in the provincial gazette. Only when that is done does the Council come into force and can it proceed to exercise the powers that are accorded to it in the Act. No such proclamation has been made at all since the latest election in January.

**BB:** Where has that left the Bapo-ba-Mogale community?

**HE:** The result of this administrative vacuum is that three people have seized control of the Bapo-ba-Mogale's assets. The MEC for Local Government and Traditional Affairs, in a letter dated 24 March 2014, gave the Rangwane<sup>1</sup> (Radikobonyana Emius Mogale, an uncle of the Kgosi and effective regent under customary law) power to authorise 'all necessary payments' out of the D-Account. This is contrary to the North West TLGFA because, although the premier has the power under section 10.2 and 10.3 of the Act to take the necessary steps to ensure the proper administration of the community, the steps must not be inconsistent with other provisions of the Act or of the national TLGFA. The premier can appoint an administrator, but cannot give someone only limited powers with no one else having the authority to administer the affairs of the community.

The Rangwane, Mogale, is under the complete control and influence of his son, Vladimir, who is a man interested only in feathering his own nest. He has an associate who is not even a member of the Bapo-ba-Mogale community, a man called Lehlohonolo Nthontho, who emerged as an advisor to Kgosi Mogale during the protracted platinum strike earlier this year.

**BB:** But there was an election for traditional councils throughout the province in January. The names of the new councillors are known and they meet regularly. Why can't they take charge of the situation?

**HE:** The Traditional Council has no standing until its membership is gazetted by the premier, which has not happened in the more than seven months since the vote. Nthontho and Vladimir Mogale have so completely taken control of the community that if any member of the Traditional Council does not do as they wish they exclude them from the deliberations of the group. Two elected members – Abbey Mafate and Tshepo Maakane – who have refused to condone the misconduct of the pair have been suspended, and are not allowed in the Council chamber.

All of this is being done with the knowledge and consent of the North West government. This is of course also a complete denial of democracy. We

have had the election, there is no reason at all – good, bad or indifferent – for the gazetting of the names not to have taken place. All that is happening is that the North West government is doing this to prevent the Bapo-ba-Mogale community from taking action against it to recover the hundreds of millions of rand that has been misspent – and worse – since March 2009.

I want to emphasise that in terms of legislation the North West government holds the purse strings, even when there is a council in place. Representatives of the community can requisition payments from its account, but it is up to the North West government to actually issue the cheque and therefore they have the final say.

They have grossly misspent money in various respects and a lot of money has been stolen, and they continue to this very day to prevent the coming into being of a proper Traditional Council with the necessary power to take steps to administer the community, which would include taking further action for an accounting of money that has been paid out and for the repayment of moneys that have been misspent.

**BB:** The Bapo have been trying since at least 2003 to get a decent stake in the Lonmin empowerment initiative. A deal, giving the community a package of shares and payments worth R664 million, was approved at a community meeting in July. What is the status of that deal now?

**HE:** One of the disastrous effects of the seizure of power by the Rangwane, his son and Nthontho is that they are trying to force through an agreement with Lonmin. It's a very poor deal, but it is also illegal because it is a contravention of the Restitution of Land Rights Act to transact on land that is under claim. There is a claim in place for Wonderkop, the Bapo farm with the richest platinum reserves.

People on the ground are totally ignorant of the facts, they have no financial or other useful training and their advisers from the banks have no idea what is going on in the community and what the implications of the deal are. So what is happening is that the North West government is an active participant in the

unlawful seizure of power by these three men to the very severe prejudice of the community.

**BB:** The MPRDA effectively severed mineral rights from land rights and vested them in the state. The only secured right is granted under item 11 of the transitional arrangements, which preserves any existing royalty. Do the Bapo have any right to a share in any of the operations on their land other than a royalty?

**HE:** The relationship between the community and Lonmin is based on a mineral lease dated 23 December 1969 and a new order mining rights granted to its two operating mining companies, Eastern Platinum Limited (EPL) and Western Platinum Limited (WPL) in terms of the Minerals and Petroleum Resources Development Act 28 of 2002. EPL mines wholly on community land. WPL mines the Bapo's Wonderkop farm, on whose surface the tragic events of 16 August 2012 occurred.

In 1998, Lonmin invited the community to begin negotiations to increase its royalty from the 10% of taxable profit set in the original lease. This was explored by the community, seeking expert advice at considerable cost, but talks were suspended when the South African government announced plans to impose a state royalty on mining. It was a condition of the agreement to suspend the negotiations that they would resume once the state royalty was finalised, and that any increase agreed would be backdated to 2000. When the State Royalty Bill was finalised, however, Lonmin refused to restart these negotiations. It is estimated the community has lost at least R150 million.

**BB:** Have the Bapo been paid what they have been owed so far in terms of the existing royalty agreements?

**HE:** There needs to be a thorough audit of the royalties paid by Lonmin. Working from an access shaft off the farm, Western Platinum secretly mined under Wonderkop for more than three years until its denials could no longer withstand scrutiny. WPL suddenly admitted this, and commenced paying royalties with interest to cover the arrear payments. If Lonmin had not been pushed, it is an open question

if it would have to this day paid any royalties to the community from Wonderkop.

In another betrayal of the community, Lonmin secretly changed the way the royalty from Eastern Platinum was calculated from October 2003, costing the community between 8% and 10% of the royalty, equal to R20 million to R30 million in short payments into the so-called 'D' account – the trust account held by the province on behalf of the community.

Western Platinum's extraction from the farm Wonderkop should be treated as a separate business entity from its mining of other properties. An audit needs to be conducted to see if this has been done, and on what basis. Given Lonmin's appalling track record in dealing with the community, it is expected that significant shortfalls in the calculation of the royalties will be found.

**BB:** Has Lonmin included the Bapo community in any of its black empowerment initiatives?

**HE:** Barely. The Bapo community was severely disadvantaged in transactions around the Lonmin broad-based black economic empowerment vehicle, Incwala Resources (Pty) Ltd. After being promised cornerstone investor status in 2003, the community was shut out of any participation in Incwala until just before the official launch, when Lonmin allowed it to buy a miserable 2,85% at the cost of R70 million. The cornerstone investor status was instead given to three politically well-connected groups, who had no association with or interest in the Bapo-ba-Mogale traditional community.

The structure Lonmin set up and imposed on the community, the Lonplats Bapo Trust, is under the sole control of Lonmin. In the Trust Deed, as originally approved by the community's attorneys and signed on 24 August 2004, the community had sole beneficial rights to the fruits of this trust. Without informing anyone, on the very day the whole suite of agreements which brought Incwala into existence was signed, namely 6 September 2004, Lonmin changed the game. Lonmin caused the trustees, who were all employees of their attorneys, to change the Trust Deed so as to include as beneficiaries 'any other person'. This could have been used to channel the royalties to an individual if that

became convenient, and was clearly a fraud on the community.

For the next five years, Lonmin cited the Bapo's Incwala holding as evidence of its empowerment efforts, but exercised the community's 2.85% voting right without consultation and without telling the Department of Minerals and Energy as it was then.

**BB:** Lonmin's performance and Incwala's with it plunged in the wake of the 2008 recession, which depressed platinum prices to the point that the empowerment partners demanded to be released from their Incwala investment. They demanded that Lonmin and the Industrial Development Corporation, each holders of 23,56% shares in Incwala, should arrange to buy out their 48,66% empowerment share. Did that give the Bapo a window?

**HE:** Citing a pre-emption clause in favour of existing historically disadvantaged shareholders, the community stepped forward in a detailed submission to take the place of the departing opportunists. As usual the community was treated with contempt by Lonmin, which even tried to undermine the detailed submissions made by it. Instead of discussing a deal with the community, Lonmin turned to Cyril Ramaphosa (currently deputy president of the ruling African National Congress and of the country), who was then head of the powerful BEE entity Shanduka Resources. In the words of the then CEO of Lonmin, Iain Farmer, they were looking for a value-adding partner. The community wrote to Lonmin and Shanduka to express their opposition to the deal and to demand the right to become the leading shareholder in Incwala, but was ignored.

It emerged much later that Shanduka had written to Lonmin's attorneys asking them to facilitate a meeting with the community. The letter was kept from the Bapo Community until after the deal was done between Lonmin and Shanduka.

One of the founding provisions when Incwala came into existence was a shareholders' agreement, which included the pre-emption clause. It is common cause that the shareholders' agreement was that if a historically disadvantaged shareholder wanted to sell his holdings, the pre-emptive right to buy could only be exercised by another HDSA (historically

disadvantaged South African) entity such as the Bapo-ba-Mogale community, or an HDSA-controlled company. It is also common cause that all the BEE shareholders, that is the 48.66 % you referred to, and the Masakhane Employees Trust and the South African Women in Mining Association (SAWIMA) insisted on selling. The community did not want to sell and could not be forced to do so.

What is important is that Shanduka recognised, and continues to recognise, that the community is a shareholder in Incwala. In his statement to the Marikana Commission of Enquiry, Ramaphosa expressly mentions the community being a shareholder. Thus the community, at that time through its 'indirectly controlled company' Mirror Ball Investments 0019 (Pty) Ltd, had the only pre-emptive right, as neither Lonmin nor the IDC was HDSAs.

On 10 May 2010 it was announced that Shanduka had acquired control of Incwala. Lonmin, it emerged, had used the Lonplats Bapo Trust, which it controlled, to waive part of the Mirror Ball pre-emption rights to the shares acquired by Shanduka. The Lonmin trustees did not, however, waive all of Mirror Ball's pre-emption rights. They allowed the community, through Mirror Ball, an opportunity to exercise its right to acquire the tiny 1,37% Masakhane and SAWIMA shares.

Lonmin loaned Shanduka the equivalent of R2,5 billion to buy the available Incwala shares, leaving Ramaphosa's company to fund R300 million. No similar support was offered to the Bapo Community. Nor were they given an opportunity to ask for it. Kenoshi, the now controversial CEO of the Bapo Tribal Authority, did try to buy the available shares for Mirror Ball for R200 million, but needed a relaxation of a court interdict barring him from spending any of their funds. As a result, the purchase of the remaining portion fell through and Shanduka, with a further R175 million Lonmin loan, added them to its own portfolio. Shanduka ended up with 50,02% of Incwala.

**BB:** Has Shanduka made much from its investment?

**HE:** The Shanduka purchase was punted as a contribution to the stability of the operation, but according to the *Mail & Guardian* of 7 December

2013 and Lonmin's 2013 Annual Report, Shanduka has not been able to service the debt, which has led to the debt to Lonmin increasing from the initial \$304 million to \$399 million. With Lonmin unable to pay the dividends originally earmarked to fund the interest on the loan, Shanduka may yet end up walking away from the deal and losing its R300 million, rather than having to repay the now over R4 billion and counting.

**BB:** Has Lonmin at least provided work for the community?

**HE:** Lonmin has for decades implemented a policy of discrimination against the Bapo in labour recruitment. As the host of EPL and the 'owner' of WPL, the community is entitled, as of right, to enjoy non-discriminatory labour recruitment from among its members. In fact, the reverse is the case. Since the establishment of WPL in the 1970s and EPL in the 1990s, Lonmin has employed as few members of the community as possible. While WPL was in production, considerably earlier than EPL, and except for Wonderkop which came into production in 2003, the community, which is on its doorstep, was ignored. Labour was sought mainly from the Eastern Cape and Lesotho, although there are employees from other areas of Southern Africa as well.

**BB:** So what is the way forward?

**HE:** Firstly the North West government must gazette the names so that the Traditional Council can work formally. You would then have a council in office that can take the necessary steps. The first step would be to send a letter to the premier giving the province two weeks to establish a separate trust account for the Bapo community, and to account to the community for all the money in that big pot.

If the premier does not establish that separate trust then the Traditional Council would need to go to court and get an order authorising the community to take control of its assets because the North West government is not acting in accordance with the prescriptions of the Act.

They would then need to proceed with the action against the provincial government for a proper accounting of the money spent, and for the return of money misappropriated.

This whole sorry story, which has been allowed to unfold at least in part because the province has failed to recognise and empower community structures, contradicts the Lonmin Charter, which says the company's commitment is to a 'value-based culture which is founded on ... community involvement'. The most important thing would be to stop this transaction with Lonmin and make sure there is a properly informed negotiation on a fair and sustainable transaction that benefits the community and not just an elite group with its hands on the levers of power.

## Note

- 1 Rangwane means 'uncle' in Setswana, but as a title refers to a father's younger brother, who stands in for an incapacitated kgosi.









## Previous issues

In this special edition of SACQ contributors assess the functioning of the criminal justice system over the past 20 years. Gail Super theorises about the consequences of locating crime combatting as a 'community' function. Julia Hornberger argues that the police need to change their approach to incidents of public violence. David Bruce assesses state responses to corruption, and suggests why these may be failing. Khalil Goga looks at the institutions to address organised crime. Lorraine Townsend and her colleagues assess court services to support child witnesses. Jean Redpath shows that punitive bail and sentencing practices underlie the persistent problem of prison overcrowding and Elrena Van der Spuy and Cloe McGrath assess the Judicial Inspectorate of Correctional Services.



Stacy Moreland analyses judgements in rape cases in the Western Cape, finding that patriarchal notions of gender still inform judgements in rape case. Heidi Barnes writes a case note on the Constitutional Court case *F v Minister of Safety and Security*. Alexander Hiriopoulos and Jeremy Porter demonstrate how Geographic Information Systems can be used, along with crime pattern theory, to analyse police crime data. Geoff Harris, Crispin Hemson & Sylvia Kaye report on a conference held in Durban in mid-2013 about measures to reduce violence in schools; and Hema Hargovan reviews the latest edition of *Victimology in South Africa* by Robert Peacock (ed).



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