

IMPROVING

TRANSPARENCY

AND ACCOUNTABILITY

IN THE FLOW OF BENEFITS TO MINING COMMUNITIES

corruption
watch



TABLE OF CONTENTS

1	Executive Summary	4
2	Introduction	5
2.1	Project focus.....	5
2.2	Background reports.....	5
2.2.1	The Baloyi Commission.....	5
2.2.2	The Public Protector’s Report on maladministration by Bapo ba Mogale, 2017/2018.....	5
2.2.3	South African Human Rights Commission (SAHRC): National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa (SAHRC Report on Mining).....	5
2.2.4	Action Aid reports	6
2.2.5	Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, November 2017 (High Level Panel Report).....	6
2.2.6	The Destruction of the Highveld, The groundWork Reports 2016 and 2017.....	6
2.2.7	Centre of Applied Legal Studies (CALS) research on Social and Labour Plans (SLPs).....	6
3	Methodology	6
3.1	Interviews.....	6
3.2	Access to primary legal documents.....	7
3.3	Desktop review.....	7
4	Mining-related legislation	7
4.1	MPRDA.....	7
4.2	What the MPRDA says.....	8
4.3	Mining Charter.....	8
4.3.1	What the Mining Charter says.....	8
4.3.2	Evaluation of Mining Charter.....	10
5	Determining who are most affected and deserving of benefit from mining	10
5.1	Mining-Affected Community.....	11
5.2	Engendering community conflict.....	12
5.3	Traditional leaders are not mining-affected communities.....	13
5.4	The Traditional and Khoi-San Leadership Act (TKLA).....	15
6	International best practice	15
6.1	Free, prior informed consent (FPIC).....	15
6.1.1	The United Nations Declaration on Rights of Indigenous Peoples (UNDRIP).....	15
6.1.2	United Nations Office of the High Commissioner for Human Rights (OHCHR).....	15
6.1.3	The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas..	16
6.2	The Resettlement of Indigenous Peoples and Affected Communities.....	16
6.2.1	The IFC Performance standard 5: Land Acquisition and Involuntary Resettlement provides that:.....	17
7	What types of benefits might accrue?	17
7.1	Compensation.....	17
7.2	Social and Labour Plans (SLP).....	17
7.3	Surface leases/rental agreements.....	18
7.4	Local procurement.....	18
7.5	Compensation to individuals.....	18
7.6	Relocation costs.....	18
7.7	New housing.....	18
7.8	Equity in the mine.....	20
8	Legal vehicles	20
8.1	Community Trust Regulation.....	21
8.2	The Trust Property Control Act 57 of 1988.....	21
8.3	Mining Charter stipulations on Trusts.....	21
8.4	Mining Charter Implementation Guidelines on host community equity.....	22
8.4.1	Table (C) of Implementation Guidelines.....	22
8.5	Broad-Based Black Economic Empowerment Commission (B-BBEE) rules on trusts as vehicles for channeling benefits – General Notice 1019 (DTI Codes of Good Practice).....	22
8.6	DTI 2021 Practice Note.....	23
8.7	Trusts in practice.....	23
8.8	Companies.....	24
8.8.1	Non-profit companies (NPC).....	24
8.8.2	The advantages and disadvantages of NPCs as recipients of equity and/or compensation for mining-affected communities.....	24
8.9	For-profit companies.....	25
8.9.1	The value of for-profit companies in mining transactions.....	25
8.10	Communal Property Associations.....	25
8.11	Less formal structures.....	25
9	Case Studies	27
9.1	Wilgerspruit.....	27
9.2	Mogalakwena Platinum Mine – Anglo.....	29
9.2.1	The trust.....	29
9.2.2	The traditional authority.....	30
9.3	Kumba.....	30
10	Recommendations: Ensuring legal vehicles used for compensation work for communities	31
10.1	Who are the beneficiaries?.....	31
10.2	Clear definition of entitlement.....	31
10.3	Clearly stated objects.....	31
10.4	Who are the representatives?.....	31
10.5	How should trustees be selected/elected?.....	32
10.6	Amendment of instrument.....	32
10.7	Term of office.....	32
10.8	Democratic decision-making.....	32
10.9	Management of the trust.....	32
10.10	Transparency and information.....	33
10.11	Distribution and expenditure.....	33
10.12	Diversification.....	33
10.13	Accessibility.....	33
10.14	Conflict resolution.....	33
10.15	Ombud.....	33
10.16	Capacity.....	33
10.17	Other elements to include in the trust deed.....	33
11	Important points of law	35
11.1	Regulations in regard to trusts and other legal vehicles in the mining sector.....	35
12	Sources	36
12.1	Articles/Submissions.....	36
12.2	Legislation and policy.....	36
12.3	Cases.....	37
12.4	Interviews conducted.....	37
13	Acknowledgements	38



1

EXECUTIVE

SUMMARY

This report seeks to investigate and propose mechanisms that can be used to improve the flow of benefits to mining-affected communities. Following on from an earlier investigation by Corruption Watch that exposed extensive corruption and fraudulent practice in the flow of equity and other compensation to mining communities, the report delves more deeply into this issue. It seeks to find ways to address the problem identified by Corruption Watch, which is that those most affected by mining activity continue to live in poverty and hardship without having benefited from mining operations in their areas.

The problem of the flow of benefits to those most directly affected by mining operations has been identified repeatedly over past decades in numerous research studies, government reports, commissions of inquiry, and submissions. This is well documented and a few cases are summarised briefly in the report.

An initial area of clarification required in this study is to delineate who the people are that should benefit from mining operations. The recipients are not traditional authorities, government officials, consultants, mine company employees and others that have historically, in so many cases, reaped the financial advantages of mining operations – at the expense of the rightful beneficiaries, the households immediately affected and the surrounding communities who, while not directly impacted, do bear negative consequences of mining operations.

Countless submissions and reports have documented the role that mines have played in negotiating deals with traditional authorities rather than the people directly affected. Trusts and D accounts have been set up, money has flowed, but yet the households living on the land where mining takes place see no improvement in their conditions. Indeed, their situation deteriorates rapidly as they are relocated, much like their forefathers were during apartheid, frequently against their will and to inferior areas.

The report clarifies and distinguishes between compensation and equity, the latter being the share in the mining operations that the Mining Charter requires mining rights holders to pass on to communities affected by mining. The current legal framework is set out which requires the mine to pay 5% free equity to mining communities through community trusts or other similar legal vehicles.

In the decades since the Broad-Based Black Economic Empowerment Act (B-BBEE) was passed, the Department of Trade and Industry became concerned that community trusts, which were meant to be vehicles used to enable the flow of money to impoverished communities, were not fulfilling this function. Codes of Good Practice were published and the B-BBEE Commission published guidelines. The 2018 Mining Charter followed suit, as the countless examples of community trusts being captured by unscrupulous traditional authorities and others required a response. Certain protections in the Codes of Good Practice, the Mining Charter, and the Mining Charter Implementation Guidelines are considered in the report.

The report sets out what requirements should be met for a community trust (or similar legal vehicle) to offer protection of trust assets. It sets out recommendations on the manner in which the legal document should be crafted to protect communities, and proposes that the time is ripe for regulation and clarity.

The manner in which mining deals are finalised cannot be left to chance any longer. Legal documents are prepared by consultants and mining lawyers rather than professionals with the interests of the community at heart. The rare exceptions show the way in which protection can be given, and it is now time for the law to reflect this.

2 INTRODUCTION

2.1 Project Focus

Despite the new mining dispensation brought about by the Minerals and Petroleum Resources Act (MPRDA)¹ and the Mining Charter², mining communities have remained impoverished, vulnerable and robbed of their livelihoods. In 2018, Corruption Watch (CW) published its Mining Royalties Research Report³ that looked at equity benefits and compensation flowing from mining, and whether these were reaching mining-affected communities. It concluded that widespread corruption was evident and that, overall, the communities most affected by mining were not benefiting, but continued to live in conditions of poverty.

This report seeks to understand how best to intervene in shaping the mechanisms used to funnel benefits to communities, to improve the situation and root out the corruption and fraud that has characterised the industry. In particular it has set out the following points to research, interrogate, review and analyse:

- The financial vehicles established for mining-affected communities by industry and the subsequent level of financial mobility thereof.

- The participation rights for mining-affected communities in community trusts and SLPs.
- The current legal and policy framework that informs interested groups and individuals on proposed developments and compensation structures.
- The various forms of economic mobility within mining-affected communities.
- The vulnerabilities currently associated with administration and management of community royalties.
- Comparative analysis on compensation structures designed for mining-affected communities established in mineral-rich jurisdiction.

The report will also provide recommendations on the application of policy and legislation and best practice on financial transparency in this space. On the basis of this research, CW wishes to develop a toolkit for use by communities to guard against the maladministration, mismanagement, corruption and fraud that has been so heavily entrenched in the manner in which benefits from mining have been handled. It will give perspective on potential solutions that might empower communities to protect their interests and the assets flowing from mining.

2.2 Background Reports

Various reports, investigations and commissions indicate the manner in which communities have been denied their rights to share in the benefits of mining. They demonstrate starkly an unacceptably high level of corruption, mismanagement and maladministration. Some of these are listed below:

2.2.1 The Baloyi Commission

The Baloyi Commission investigated the mismanagement of compensation to the Bakgatla ba Kgafela from Moruleng, North West, where platinum is mined. The commission found that Chief Nyalala Pilane, and certain members of the Bakgatla ba Kgafela Traditional Council, acted on their own, without accountability to the community. The terms of reference of the commission included an investigation into the flow of money into and out of community coffers. It was found that much of the wealth generated by the mining operations and meant to benefit the communities affected was used to enrich offshore companies, the chief and a few selected local individuals.⁴

2.2.2 The Public Protector's Report on maladministration by Bapo ba Mogale, 2017/2018

The Public Protector published a report in 2018 on the maladministration of the Bapo ba Mogale's funds and gross misuse of the benefits derived from mining. The Public Protector investigated the looting of the community's collective resources, in particular, funds in the D account. It looked at where money paid into the account from 1994 had gone and what it had been spent on. In 1994, the community had R721 000 in its name, but by 2014 the balance was R495 000.

In the period under consideration the North West government spent R617-million, part of which went to the building of a palace at the cost of R115-million. The Public Protector raised concerns that there had been no oversight structure to look after the resources of the community.⁵

2.2.3 South African Human Rights Commission (SAHRC): National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa (SAHRC Report on Mining)

In 2016, the SAHRC published a report titled National Hearings on Underlying Socio-economic Challenges of Mining-affected Communities in South Africa. It was concerned that the benefits of mining were not reaching communities most affected and that poverty continues to prevail despite the legislative framework being aimed at enabling communities to benefit from mining. The SAHRC made a number of findings based on the underlying issues that contribute to the socio-economic challenges experienced by mining-affected communities. Some of them showed irregularities in compensation of communities in relation to relocations.

¹Act 28 of 2002.

²Broad-Based Socio-Economic Empowerment Charter for the Mining and Mineral Industry, 2018, Government Gazette 41934, 27 September 2018.

³<https://www.corruptionwatch.org.za/cw-report-highlights-flaws-in-the-mining-royalties-system/>.

⁴Commission into Traditional Succession Disputes and Claims: Bakgatla Ba Kgafela Traditional Community, 2019.

⁵<https://www.gov.za/speeches/public-protector-thuli-madonsela-updates-bapo-ba-mogale-her-investigation-alleged-looting#>

2.2.4 Action Aid reports

Action Aid undertook two comprehensive studies on the impact of mining in Limpopo. The first, *Precious Metal: The Impact of Anglo Platinum on poor communities in Limpopo, South Africa* was published in 2008 and the second, *Precious Metals II: A Systemic Inequality*, in 2015. These two reports provide detailed and rich material on the impact of Anglo's platinum mines on various communities and give a range of far-reaching recommendations.

2.2.5 Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, November 2017 (High Level Panel Report)

This report recommended that the MPRDA be amended to address some of the negative effects of mining, such as land dispossession and loss of livelihoods, experienced by affected communities. It states that there have been no real benefits for mine-hosting communities and that hundreds of millions of rands paid to traditional councils by mining houses have not been accounted for.⁶

2.2.6 The Destruction of the Highveld, The groundWork Reports 2016 and 2017

These two books focus on coal mining's devastating effect on the environment and the communities living in coal mining

areas. Not only has the environment been degraded, but coal mining has failed to pull people out of poverty. These reports displayed evidence that illustrate the shocking health consequences of air pollution, soil contamination and water source destruction caused by coal mining. Here, communities have suffered from illnesses and new poverty on a massive scale, seeing scarcely any benefits from mining.

2.2.7 Centre of Applied Legal Studies (CALs) research on Social and Labour Plans (SLPs)

CALS published two reports that focused on the effectiveness of SLPs in uplifting mining-affected communities and improving living conditions (referred to in paragraph 6.2).⁷ The key findings indicated that the design of the SLP system does not contribute to the relevant objectives of the MPRDA. These include promoting the social and economic welfare of all South Africans, contributing to the transformation of the mining industry, and ensuring that mining right holders contribute to the social and economic development of areas in which they mine.

3

METHODOLOGY

The study was conducted by analysing pertinent legislation, case law, and legal and other reports. Primary research was also done in the form of interviews and the consideration of primary legal documents such as trusts, that were made available to us. A few selected cases are presented.

3.1 Interviews

Twenty-one interviews were conducted with industry representatives, mining companies, community members, attorneys, academics and representatives of civil society organisations. This provided rich information on mining-affected communities and the challenges they face, some more valuable than others. Some interviewees responded to questions put to them in writing.

It was a challenge that certain key people approached for interviews did not respond at all and others responded but cancelled at the last minute. However, sufficient material was obtained from the 21 interviewees and desktop material and as a result such non-involvement had negligible impact. Some people responded after the report was written so their information was hard to integrate into the arguments that had already been developed.

3.2 Access to Primary Legal Documents

The research focused primarily on community trusts that had been set up for payment of equity, to ascertain if the drafting could be improved. However, because of attorney-client privilege it was difficult to obtain final trust deeds from people interviewed. Fortunately, there was some access, but it would be ideal to have a range of trust instruments to consider in detail, clause by clause, in order to establish what protective measures work best. This might be an area where further research would be appropriate.

3.3 Desktop Review

There is a wealth of information on mining-affected communities in research done by academia, NGOs and research institutes. The task was to be selective and focus on key studies relating to the question at hand. Submissions on the Mining Charter and reports on SLPs were useful. Many of them shed light on key challenges experienced by communities in trying to access mining benefits. Not much has been written on the legal problems with trust instruments as legal vehicles for accessing equity in the mining sector. However, this has been a concern of the B-BBEE Commission in relation to measured entities. Accessing this information and the debates that have been taking place in relation to trusts in the B-BBEE space was informative.



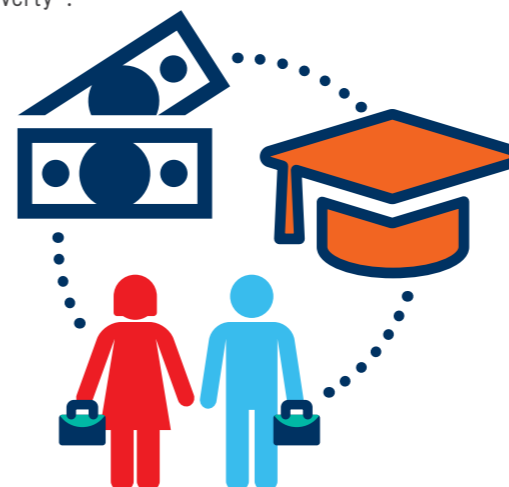
4 MINING-RELATED LEGISLATION

4.1 MPRDA

The MPRDA shifted the mining landscape by vesting ownership of the minerals in the people of South Africa, with the state as custodian, thus ending private ownership of unmined minerals. In addition, the MPRDA removed the right of common law owners to say 'no' to mining. This was replaced with the right to prior consultation under section 10 and 23 of the MPRDA, and the right to compensation under section 54. The shift results in the state managing the distribution of minerals with the aim of creating increased tax revenue for the general fiscus.

4.2 What the MPRDA says

The MPRDA explicitly commits itself to take positive measures to effect transformation. What is more, the Constitutional Court found, in the *Agri SA* case, that the MPRDA represents "legislative measures [...] taken to facilitate equitable access to opportunities in the mining industry", because black South Africans "were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty".⁸



In defining broad-based economic empowerment, the MPRDA makes it clear that the minerals and petroleum industry needs to be transformed to enable previously disadvantaged people to benefit. In addition, the Act seeks to "assist in, provide for, initiate or facilitate ... the socio-economic development of communities immediately hosting, affected by supplying labour to operations, and the socio-economic development of all historically disadvantaged South Africans from the proceeds or activities of such operations".⁹

The Act enables the Department of Mineral Resources (DMR) to confer rights on applicants. Four types of rights can be conferred: prospecting rights, mining rights, exploration rights or production rights. These are defined as limited real rights to the minerals and the land to which the rights relate. The holders of these rights are entitled to enter land to which the right relates, bring on any plant, machinery or equipment and build, construct or land down any surface, underground ... infrastructure which may be required for the purpose of mining. The right holder may use water from any natural spring, lake, river or stream situated on, or flowing through, such land.

"assist in, provide for, initiate or facilitate ... the socio-economic development of communities immediately hosting, affected by supplying labour to operations, and the socio-economic development of all historically disadvantaged South Africans from the proceeds or activities of such operations"

4.3 Mining Charter

The 2018 Mining Charter attempts to address some of the shortcomings in compensation by providing for the distribution of benefits more evenly to historically disadvantaged investors, workers, and communities, and makes certain key changes.

4.3.1 What the Mining Charter Says

The Preamble to the 2018 Charter states that: “The majority of mining communities continue to live in abject poverty despite the State being the custodian of the Country’s mineral wealth on behalf of the nation”.¹⁰ Further, it says that limited progress has been made in broad-based empowerment ownership effectively achieving meaningful economic participation of black South Africans. In particular:

“The trickle flow of benefits; which sought to service debt and to provide cash-flow directly to BEE partners, is wholly inadequate; and

As a result of inefficient administration, trusts holding the interest of mine employees and communities constrained the flow of benefits to their intended beneficiaries.”¹¹

The Mining Charter includes a number of stipulations regarding trusts, which are set out below in paragraph 7.3.

4.3.2 Evaluation of Mining Charter

In its comments on the draft 2018 Charter published in June 2018, CALS highlighted the following pertinent points:

- The Charter does not adequately recognise the costs which are born by mining-affected communities such as displacement from homes and land, blasting damage, and loss of access to water and food security. “These impacts should not be solely seen as biophysical environmental impacts, but also directly impacting on communities’ ability to develop economically.”¹²
- The BEE share of 30% should be divided equally between host communities and employees. “The Constitutional imperative of transformation is about the achievement of substantive equality, which involves the redistribution of wealth and power to the victims of colonialism and apartheid so as to enable social and economic equality. Communities and employees represent the broadest categories of persons impacted by mining. Inherently, they are the same people who historically and presently bear the economic, social and environmental costs of mining. As a result, they live in poverty amidst the wealth of a minority. Black capitalists have been empowered through the prior iterations of the Mining Charter. Going forward, entrepreneurs outside the community should be required to purchase shares.”¹³

The Land and Accountability Research Centre (LARC) made submissions on the Mining Charter, and among other things they noted that frequently, entities that hold equity are either established by traditional councils, or traditional councils have representation and control over such entities. Households and groups who are directly impacted by mining are less involved.¹⁴



MINING-RELATED LEGISLATION



LEGISLATION BEFORE



Private ownership of unmined minerals.



Common law property owners had the right to say ‘no’ to mining.



There were shortcomings & distribution of compensation was unfair.



LEGISLATION AFTER



Ownership of unmined minerals belong to the people of SA with the State as custodian.



Common law owners have the right to prior consultation and compensation.



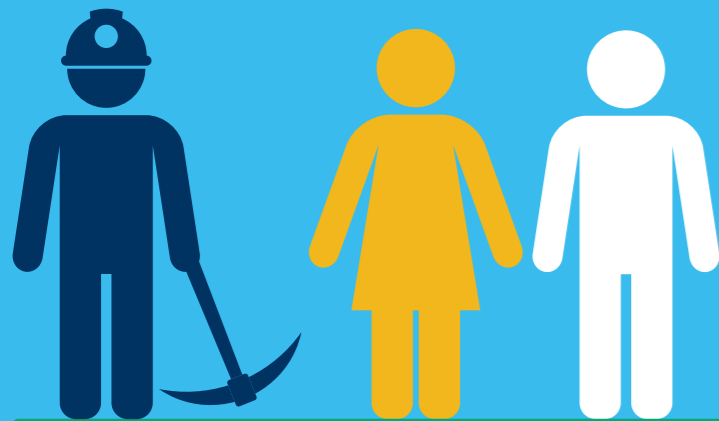
Compensation is more evenly distributed.

5 DETERMINING WHO ARE MOST AFFECTED AND DESERVING OF BENEFITS FROM MINING

5.1 Mining-Affected Community

Identifying the communities who are most impacted by mining operations and who deserve to be the recipients of benefits, is critical. Doing so is complex and contentious, as there are layers of people affected. The MPRDA defines community as:

“a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affected by mining on land occupied by such members or part of the community”.¹⁵



Identifying the communities who are most impacted by mining operations and who deserve to be the recipients of benefits, is critical.



The mining-affected community becomes a key actor in negotiations with a mining company, either as an entire community living in a communal area, or the part of that community directly affected by the mining. The presence of options is problematic. It allows mining companies to choose the easier option, which they frequently do, and negotiate exclusively with traditional authorities rather than the households that live closest to the mining operations.

CALS draws attention to shortcomings of the Charter and MPRDA in regard to defining the community that should benefit from mining. Their report suggests a better way of defining the community:

- “First there are communities who reside in the mining area and for whom the fullest range of environmental, social and economic impacts of mining are experienced directly on a daily basis. In other words, people, who see, hear and breathe in the mining operation on a daily basis.
- Second, there are ... communities who may live somewhat further from the mine but still fall within a local economy,

society and physical environment significantly shaped by mining operations. For this broader community, the use of markers such as the municipality is more appropriate.

- Finally, as is already distinguished in the draft 2018 Mining Charter, there are the communities from where mining operations source or have sourced the majority of its employees”.¹⁶

In her submission on behalf of LARC to the High Level Panel report, Aninka Claassens made a critical point that the people directly affected by mining are never whole ‘tribes’ but always families and sub-groups whose homes, fields and grazing land are targeted for mining activities.¹⁷ This was confirmed by many informants interviewed who believe that the community is frequently a very clearly identifiable set of households that will be directly affected by mining. These are the people whose homes may need to be demolished, they might need to be relocated, their ancestral graves might have to be moved and their farmlands replaced. Communities are not one huge conglomerate, but people that live in households, as well as the individuals within these households.

In the Maledu case¹⁸, the CEO of Sedibelo Platinum believed that when the company started negotiations with the community, they presumed that all the boxes were ticked. They had communicated with the traditional authority of the Bakgatla ba Kgafela who were the registered owners of the land. They believed that they received the required permissions. The Constitutional Court decided differently, holding that the people dwelling on and working the land were the ones that should have been consulted. “The court required the engagement to happen at a more local level, with the actual people who find themselves on the land. This is a real gamechanger. If you’re in a complex where you own a house and you find out that there’s something valuable underneath the complex and all of a sudden people want to come and break down your house to look for the value. So, they cannot just speak to the body corporate and take your house away. They actually have to come to speak to you as the owner/occupier”.¹⁹

He acknowledged that the mine needs to approach negotiations with communities as equals and should not adopt a master/servant approach.

The Mining Charter uses the term ‘host community’ – which is a community adjacent to a mining area, ‘as defined in the MPRDA’. This raises the question as to whether it refers to the community closest to the mining area, or whether it includes the broader community of disadvantaged people in a wider area. In the Maledu case, the Constitutional Court held that mining companies can no longer rely just on their mining rights and an agreement with the traditional authority to remove a host community from the

land on which they wish to mine. Instead, the mine is obliged to engage the host community in negotiating a fair settlement.

In its submission on the Mining Charter, LARC argued that the definition ‘host community’ should be amended to specifically reference householders directly affected by mining. Others further afield might also be affected – for example by blasting, air pollution or water deterioration. Such effects should be broken down proportionally, as those directly impacted should have greater rights to compensation than those further afield.²⁰ Mining has regional consequences and socio-economic and environmental impacts that must also be recognized, although to do so effectively is very difficult.

“It is critical that mining-affected communities are carefully defined in the Mining Charter and other legislation and policy instruments in order to ensure that the beneficiaries of programmes are the same people who experience the most direct negative impacts of mining”.²¹

Any legal vehicle established to be a recipient of benefits should represent the correct people as beneficiaries. Part of knowing how to do so involves first adequately defining the community, then deciding if all the elements of a community should benefit, or if some should benefit more than others, or some in different ways than others.



5.2 Engendering Community Conflict

It is absolutely unacceptable for mining companies to play on or enhance divisions in communities in order to finalise the deal. A study by Prof. Jacklyn Cock refers to several informants emphasising how mining corporations damage social cohesion in the community.

Speaking of Somkhele,²² an informant said, “They look for fault lines in the community and then fill them with money and shatter the cohesion of the community ... promises were made to the locals for jobs and contracts, promises which created tension and conflicts ...”²³

The division sown is evidenced by the assassination of Fikile Ntshangase on 15 October 2020. As the deputy chairperson of the Mfolozi Community Environmental Justice Organisation (MCEJO) she was fiercely opposed to the expansion of the Tendele Coal Mine, and was part of a group of 19 who refused to make way for the mine’s expansion. Fikile was gunned down at her home in Ophondweni Village, and her death was not the only act of violence in the area. In April 2020 Tholakele Mthethwa, another anti-mining activist, was subjected to a hail of bullets, but fortunately not harmed. The mine is known to have tried to bribe families to accept the expansion.

In a *Daily Maverick* interview Kirsten Youens, an attorney acting for certain members of the community, said, in regard to Tendele’s strategies: “Sadly typical of many companies operating in impoverished rural communities... you offer them incentives, and the ‘usual’ fallout follows, stirring deep community divisions, which almost always leads to violence and deaths.”²⁴

¹⁵ Section 1 of the MPRDA.

¹⁶ CALS Submission, para 18.

¹⁷ High Level Panel Recommendations for Mineral Resources, Dr Claassens briefing: <https://pmg.org.za/committee-meeting/27462/>

¹⁸ Maledu and Others v Ilereleng Bakgatla Mineral Resources (Pty) Limited and Another (CCT265/17) [2018] ZACC 41; 2019 (1) BCLR 53 (CC); 19 (2) SA 1 (CC) (25 October 2018) (Maledu case) <http://www.saflii.org/za/cases/ZACC/2018/41.html>.

¹⁹ Eric Clarke interview, CEO of Sedibelo Platinum.

²⁰ Interview with Robert Krause and Louis Snyman of CALS (CALS interview).

²¹ CALS Submission, p 6.



5.3 Traditional Leaders Are Not Mining-Affected Communities

There is broad agreement in the literature, reports and from interviews that mining companies and government must engage with the different sectors and interest groups that exist in communities, and not focus on traditional leaders exclusively. Failure to do so creates conflict, with traditional leadership being inequitably empowered and thereby pitted against communities.

CALS, in a discussion on community participation elements of the Mining Charter, reported that the organisations representing mining-affected communities reject the practice adopted by many mining companies, of negotiating and giving benefits to traditional leaders. “They argue that under African Customary Law, authority resides in the people as a whole and traditional leaders are merely custodians.”²⁵ The mention of traditional authorities, they believe, elevates them above the heads of communities who are the source of their authority.

In the Maledu case the court found that the mine only conferred with the broad traditional council of the area, and not the owners of the land, who claimed to be the people with whom the mine should have conferred.

“As to their claimed ownership of the farm, the applicants argued that as descendants of the original purchasers of the farm who were the true owners despite the fact that the farm was registered in the name of the Minister, they are the only legitimate group of persons who should have been consulted and not the entire Bakgatla-Ba-Kgafela Community. In

elaboration, they submitted that the fact that the farm is not registered in their names (and had never been registered in the names of the original purchasers) does not detract from the fact that they are the true owners. This is so because – as the argument went – the South African land registration system is by its very nature neither absolutely positive nor negative”.²⁶

The LARC submission to the High Level Panel said that currently, the real challenge is the “practice of equity being held by entities established by traditional councils, represented and controlled by traditional leaders, rather than households and groups who are directly impacted by mining”. This results in benefits not reaching those most impacted.²⁷ LARC makes a crucial point:

“Issues of scale are crucial here. The Mapela traditional council in Limpopo has jurisdiction over 42 far-flung villages. The Bakgatla ba Kgafela traditional council has jurisdiction over 32 villages. Mining shafts typically impact directly on the land of one or two villages, as opposed to that of the entire ‘tribe’. Traditional council members may come from villages that are over 50km from where the mining takes place. When the traditional council authorises mining deals that generate revenue for the council, there is no direct equivalence between the council that reaps the benefits and the people whose rural livelihoods are destroyed by mining (Mnwana & Capps, 2015)”.²⁸

The High Level Panel report recognises the problem of mining companies entering into agreements with traditional leaders. At its hearings, examples were given of mining deals enriching a select few, and being entered into with traditional leaders in the erroneous belief that they have the sole authority to sign agreements with investors in respect of communal land.²⁹

5.4 The Traditional and Khoi-San Leadership Act³⁰ (TKLA)

This Act replaces the Traditional Leadership and Governance Framework Act 41 of 2003 and like the North West Traditional Leadership and Governance Act 2 of 2005, provides for a special account (which in North West is commonly referred to as a D-account) to be opened “to support and strengthen the capacity of ... traditional councils”.³¹ This account is set up in terms of section 23 of the Act, by the premier of the province in which the traditional authority is situated.

It is mandatory for such an account to be opened if money is paid to the traditional authority. Money can flow from:

- Voluntary contributions made by members of the relevant communities;
- Money derived from property owned or managed by the traditional council;
- Donations; and
- Money payable in accordance with a partnership or agreement by a third party with the traditional council.

Section 24 of the Act provides that traditional councils may enter into partnerships and agreements. This would cover agreements reached between traditional councils and mining companies, since any other “person, body or institution” may enter an agreement with a traditional authority. The premier must ratify the agreement. LARC’s submission on the Mining Charter was made prior to the TKLA being passed but addresses the problematic nature of the bill, saying that “revenue from mining will continue to be deposited into tribal accounts, rather than compensation being paid to those directly affected”. It added:

“The law governing trust property in South Africa, the Trust Property Council Act of 1988, was not designed for trusts with hundreds and thousands of beneficiaries, and the complex interface with laws such as the TLGFA. It is notorious in failing to include effective oversight, and mechanisms to address breaches and internal disputes”.³²

More importantly, the SAHRC recognises that mining companies believe that they cannot enter agreements with mining affected communities directly. Frequently, they have the impression that they have to make agreements with traditional authorities on behalf of the mining-affected community.

In fact, that manner in which the TKLA is framed makes it mandatory for a premier to open a special account if money is paid to the traditional authority. But it does not make it mandatory that money that flows to a specific set of households within a traditional authority area, must flow through that account. Mining companies need to be aware of this.

The SAHRC report states:

“Traditional Councils often present themselves as ‘custodians of communities’, and Traditional Councils are thus consulted. Throughout the proceedings, the Commission noted the consistent misconception that land under the jurisdiction of traditional authorities is owned by Traditional Councils. This misconception leads to the belief that consent for land use must be sought from Traditional Councils, and not from the State or from affected communities (our emphasis). Lease agreements are therefore negotiated and concluded with Traditional Councils while excluding other relevant parties. During its National Hearing, the Commission noted several examples of cases where resolutions for the sale or lease of land – or, in some cases, lease agreements themselves – appear to have been signed by Traditional Councils. This has even occurred where a dispute around the legitimacy of Traditional Leaders is explicitly acknowledged”.³³

The same point could be made for agreements relating to mining compensation and equity. When the traditional council presents itself as the custodian of communities, and when mining companies consult and contract with them, there is a high likelihood that those most affected will not have a voice and neither will they benefit from the proceeds of what is agreed to.



²⁵ The Somkhele open cast coal mine is situated on the KwaZulu Natal coast, on the border of Hluhluwe-Imfolozi Game Park.

²⁶ Cock, J Resistance to Coal and the Possibilities of a Just Transition in South Africa, October 2020, unpublished, p 3 (Cock unpublished study).

²⁷ CALS Submission, p 17.

²⁸ Maledu case, para 65.

²⁹ Daily Maverick, 3 January 2021.

³⁰ LARC submission to High Level Panel, paragraph 15.

³¹ LARC submission to High Level Panel, paragraph 17.

³² High Level Panel Report, p 203.

³³ Act 3 of 2019.

³⁴ Section 23 (1) (a) of the TKLA Act.

³⁵ LARC Submission on Mining Charter, paragraph 29.

³⁶ SAHRC Report on Mining p 62.

DETERMINING WHO ARE MOST AFFECTED AND DESERVING OF BENEFIT FROM MINING



6 INTERNATIONAL BEST PRACTICE

6.1 Free, Prior Informed Consent (FPIC)

6.1.1 The United Nations Declaration on Rights of Indigenous Peoples (UNDRIP)

The United Nations' Declaration of Rights of Indigenous Peoples was adopted on 13 September 2007.

This protocol provides for FPIC.

- Article 8(2) provides that states shall provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of dispossessing indigenous people of their lands, territories or resources and any form of forced population transfer which has the aim or effect of violating or undermining any of their rights.
- In terms of Article 10 indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the FPIC of indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
- Article 26 provides that unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories, and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
- Article 32(2) provides that "States shall consult and co-operate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their FPIC prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

6.1.2 United Nations Office of the High Commissioner for Human Rights (OHCHR)

In the explanatory opinion piece on FPIC³⁴, the OHCHR provides that:

- Free implies that there is no coercion, intimidation or manipulation.
- Prior implies that consent is to be sought sufficiently in advance of any authorisation or commencement of activities.
- Informed implies that information is provided on all important aspects of the projects.
- The consent of indigenous peoples should be determined in accordance with their customary laws and practices. However, this does not mean that every single person must agree but the consent process must have been undertaken through procedures and institutions determined by Indigenous peoples themselves.

6.1.3 The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas

This protocol has relevance in the mining context as it imposes a duty on the state to consult, engage and co-operate with peasants when decisions are made that might affect them, ensuring their meaningful and informed participation.

- This declaration seeks to protect and provides for rights of persons and peasants working in rural areas. It sets the standard of treatment of peasants and provides for remedial actions that can be undertaken in protecting the enshrined rights.
- Article 1(2) provides that the declaration applies to anyone who is engaged in artisanal or small-scale agriculture, crop planting, livestock raising, pastoralism, fishing, forestry, hunting or gathering, and handicrafts related to agriculture or a related occupation in a rural area, and the family members dependant on peasants.
- Furthermore Article 1(4) provides that the declaration applies to all hired workers, including all migrant workers regardless of their migration status, and seasonal workers on plantations, agricultural farms, forests, and farms in aquaculture and in agro-industrial enterprises.
- In terms of article 2(3) "States shall consult and co-operate in good faith with peasants and other people working in rural areas through their own representative institutions, engaging with and seeking the support of peasants and other people working in rural areas who could be affected by decisions before those decisions are made, and responding to their contributions, taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes".



The United Nations' Declaration of Rights of Indigenous Peoples adopted was adopted on 13 September 2007.

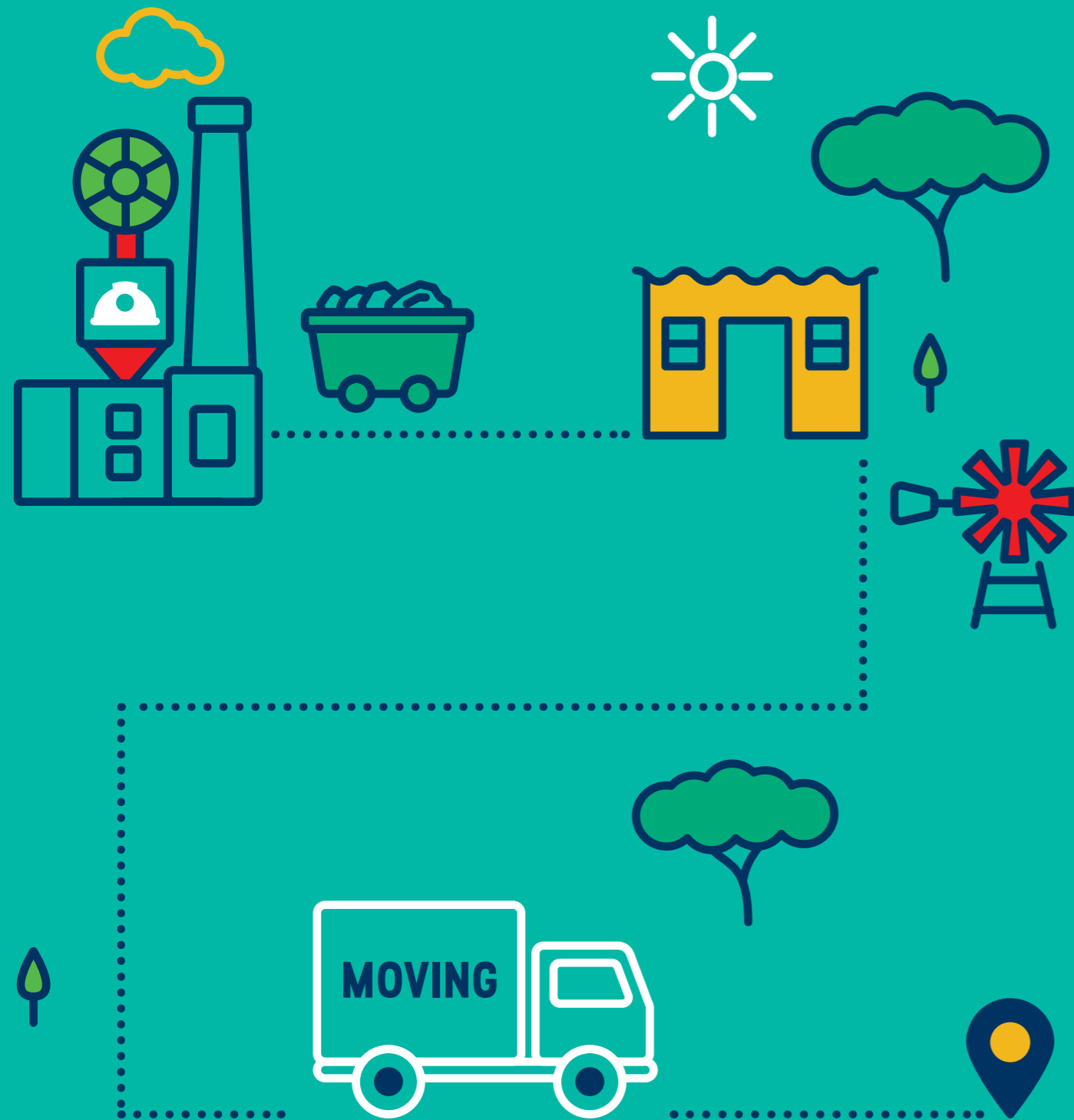
³⁴ United Nations Human Rights "Free, prior and informed consent of Indigenous Peoples" September 2012. Accessed on 01 March 2021. <https://www.ohchr.org/Documents/Issues/peoples/freepriorandinformedsent.pdf>

6.2 The Resettlement of Indigenous Peoples and Affected Communities

6.2.1 The IFC Performance Standard 5: Land Acquisition and Involuntary Resettlement Provides That:

- Involuntary resettlement refers both to physical displacement (relocation or loss of shelter) and to economic displacement (loss of assets or access to assets that leads to loss of income sources or other means of livelihood) as a result of project-related land acquisition.
- Clients are required to take steps outlined in the standard when considering resettlement of indigenous peoples and affected communities.

If the community development programme required by the Mining Charter to be prepared annually is like the Resettlement Action Plan or Livelihood Restoration Plan it would be compliant with this IFC Performance Standard.



7 WHAT TYPES OF BENEFITS

MIGHT ACCRUE?

This section sets out all the different kinds of financial and other benefits that mining companies pay out to communities, and the different legal vehicles and mechanisms through which they flow. Essentially, there are two ways communities receive funds, the first through compensation and the second through owning shares/equity in the mine.



7.1 Compensation

Different benefits need to flow to the differently affected people, and to this end, guidelines need to be established to enable this. For example:

- The host community, or directly affected households on the land, should benefit from resettlement compensation and surface leases. They should also be compensated for grave relocation. Their farmlands should be replaced with new land, and their livelihoods secured in the new place.
- The wider radiating community should benefit from social and labour plans and preferential procurement agreements.

Below is a list of the different types of compensation that communities may receive.

7.2 Social and Labour Plans (SLP)

To be eligible for a mining right, mining companies are required to submit an SLP, developed in consultation with affected communities and containing commitments, to the Department of Mineral Resources (DMR) in respect of human resources and local economic development. This is then a legally binding plan that requires a mining company to undertake certain actions to benefit the community.

Interviewees commented that SLPs are almost without exception ineffective and have played no significant role in benefiting mining communities. A key problem identified by some sources

is that SLPs are essentially plans that require high levels of local authority involvement. Frequently they involve plans that require municipal approvals and sometimes co-financing or ongoing maintenance funds from the municipality. The involvement of municipalities in formulating and assisting in the implementation of SLPs is not happening to the degree that it should. Recent changes in legislation that make it compulsory for mining companies to disclose SLPs publicly might have the effect of enabling communities to take a more active position on ensuring that the projects proposed in SLPs are implemented.

7.3 Surface Leases/Rental Agreements

A surface lease defines the terms upon which a mine may exercise its right under section 5 of the MPRDA to prospect for minerals or to access minerals to which it has secured a right. Such a lease may involve compensation or a payment to owners or occupiers of the land. A problem identified in regard to surface leases, is that going back to practices introduced by the Department of Agriculture, Rural Development and Land Reform (DARDLR), compensation for land formerly owned by the state in the ex-Bantustan areas, is based on market value. The trend is to have market-based valuations undertaken and market-based leases entered into on mining land. But this land traditionally occupied by black people does not have significant market value, and further, "even inflated market value is not going to truly reflect the intense economic, social and cultural impacts that come with mining getting started."³⁵

³⁵ Lorenzen interview.

7.4 Local Procurement

In a context of high levels of unemployment, using labour from mining-affected communities is very important to the communities. The CEO of Sedibelo Platinum believes that the radius for local procurement should be 50 – 100 kilometres from the mine. However, he added that the challenge he believed might crop up was that skills and experience may not exist within this area.³⁶

7.5 Compensation to Individuals

The payment of funds to individuals has been seen in certain cases. For example, in the Dingleton case, the community was moved to Siyathemba, people received an ‘inconvenience’ allowance of R15 000 each, and a pay-out of R100 000 in late 2017. In the Mogalakwena case, households received R60 000. In one case, an inconvenience allowance of between R2 000 and R10 000 per household was paid, much lower than actual impact, which is the problem with compensation.³⁷

7.6 Relocation Costs

Cock’s study of the Somkhele coal mine indicated that most of those who received financial compensation for the loss of their homes felt the amounts were unjust, especially as Petmin, Tendele’s holding company, reported profits of R217-million (2014/15) and R230-million (2015/16), and an increase of 7% in the share price (Young, 2018:3).³⁸

The SAHRC Report on Mining found that mining companies were restricting compensation to physical structures on the land, offering below appropriate amounts, causing systematic economic displacement and impoverishment within mining-affected communities. It believes there should be formal guidelines regarding the calculation of compensation. “In order for compensation to be meaningful, it should account for, inter alia, loss of life, loss related to communal and individually held tenure or titles, as well as loss incurred for production value gained from the land, whether that production value is linked to traditional ways of life or more commercial enterprises”.³⁹ It found that there are no guidelines on compensation or oversight. Both should be in place.

To the extent that communities should benefit, their royalties should be in the form of shares or equity. The aim would be a greater integration into the mining economy.

7.7 New Housing

In some cases, new housing is provided, frequently in some form of a consolidated township-type setting, maybe with access to land, but frequently without such access. In the Dingleton case, households all received a house which was equal in size to their original home. In addition, the mine agreed to subsidise rates and taxes for 20 years as the area to which people were moved was more expensive.

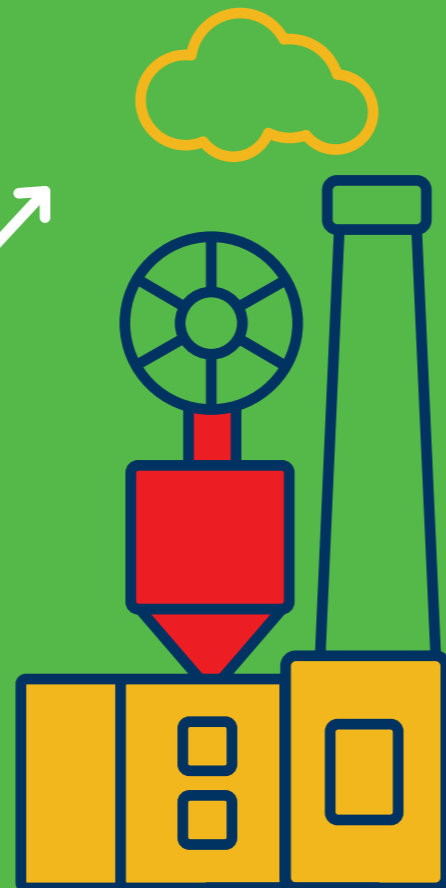
7.8 Equity in the Mine

The MPRDA moved away from royalties, and the new dispensation is that royalties should go to the state as taxes. To the extent that communities should benefit, their royalties should be in the form of shares or equity. The aim would be a greater integration into the mining economy.

The Mining Charter, as discussed above, sets out the percentage equity required.

Representatives of Mining Affected Communities United in Action (MACUA), WAMUA, MEJON and others have identified principles that should be included in the charter as the elements that should be included in financial vehicles. These are:

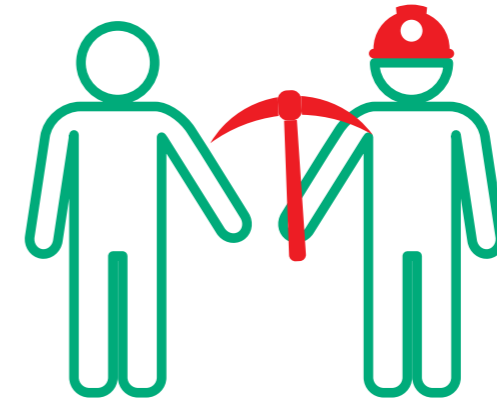
- Community control over equity.
- Decisions to be driven by community mandate.
- Regular elections of members to the structure.
- Regular access to auditing and financial reports.
- Regular public meetings – no closed-door meetings for elites.
- Complete transparency and dissemination of information to community.⁴⁰



WHAT TYPES OF BENEFITS MIGHT ACCRUE?



COMPENSATION



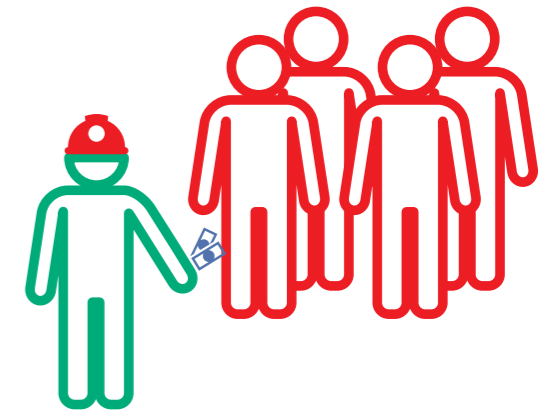
SOCIAL AND LABOUR PLANS



SURFACE LEASES



LOCAL PROCUREMENT



COMPENSATION TO INDIVIDUALS



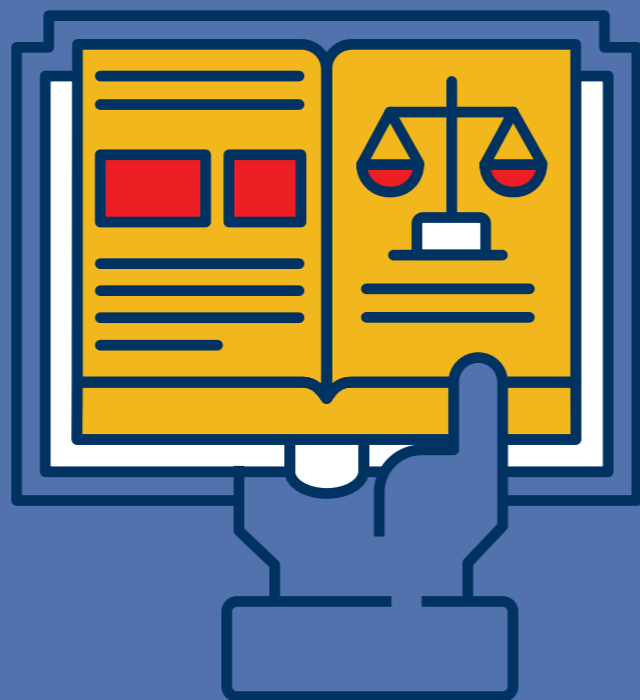
RELOCATION COSTS



NEW HOUSING



EQUITY IN THE MINE



Some key points need to be highlighted in regard to legal vehicles that are used to direct benefits, in the form of compensation or equity, to communities. On the assumption that the correct beneficiaries are identified, and that the benefits that accrue are funnelled to them, this section considers some of the legal bodies that might be used.

8.1 Community Trust Regulation

The community trust has been the main legal entity used by the mining industry as the recipient of equity and other compensation for communities. Over the years, trusts set up for the benefit of communities have been recklessly managed and ‘captured’ by unscrupulous operators, corrupt traditional authorities, and others that have climbed onto the bandwagon to extract as many benefits as possible from mining operations. Impoverished communities have repeatedly been bypassed and frequently not benefited from mining operations, despite the fact that in many cases mining has taken place in the very spot where they live and make a livelihood.

For this reason, it is important to investigate why community trusts are failing to protect communities. There is some history to trust regulation, starting with the Trust Property Control Act 57 of 1988 which sets a broad legal framework for trusts. In essence it creates the legal triad of the founder, the fiduciary, and the beneficiary, and puts in place the responsibilities of the trustees (the fiduciaries) to look after the trust assets on behalf of the beneficiaries.

After the Broad-Based Black Economic Empowerment Act 53 (B-BBEE Act) was passed in 2003, community trusts were frequently set up as the legal instruments to funnel benefits to communities. Owing to the problem of fronting and other forms of corruption, in 2013 the DTI published Codes of Good Practice in regard to broad-based empowerment schemes and trusts.⁴¹

The Codes of Good Practice set out requirements that trusts and broad-based ownership schemes would need to meet. The B-BBEE Commission issued guidelines on how to interpret the Codes of Good Practice. These were not uniformly accepted and there was controversy surrounding certain guidelines that rendered some B-BBEE legal vehicles non-compliant, despite them furthering the aims of the B-BBEE Act. For this reason, the minister of trade and industry published a new practice note in May 2021.⁴²

The Mining Charter of 2018 contained a number of provisions on trusts and other legal vehicles that are the recipients of equity for communities in mining transactions, and these were supplemented by provisions contained in the Mining Charter Implementation Guidelines published in December 2018.⁴³

These various regulatory stipulations are summarised below.

8.2 The Trust Property Control Act 57 of 1988

A trust is defined in the Act as “an arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed –

(a) to another person, the trustee, in whole or in part, to be administered for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or

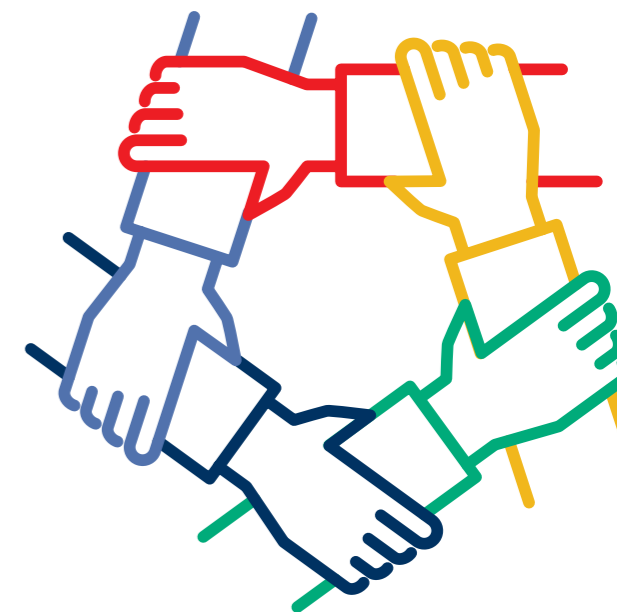
(b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument for the achievement of the object stated in the trust instrument”.⁴⁴

Trust instruments, which are the written agreements that create trusts, must be lodged with the Master of the High Court in whose area of jurisdiction the greatest portion of the trust assets is situated. Once lodged, the nominated trustees must be issued with letters of authority to act. Currently there are Masters’ offices in Bloemfontein, Bisho, Cape Town, Durban, Grahamstown, Johannesburg, Kimberley, Mafikeng, Mthatha, Nelspruit, Pietermaritzburg, Polokwane, Port Elizabeth, Pretoria, and Thohoyandou. When a trust instrument is amended, the amendment must be submitted to the relevant Master’s office.

The Act has two clauses dealing with the standards expected from trustees, providing that a trustee must perform their duty with “the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another”. And further, a trustee cannot be exempt from breach of trust if they fail to show the care, diligence and skill required.⁴⁵

Money received by a trust must be deposited into a special trust account created for that purpose. Further, any trust assets or property must be clearly distinguishable as belonging to the trust and not form part of the personal estate of a trustee unless they are a beneficiary as well as a trustee and entitled to trust property.⁴⁶

A trustee or a person with an interest in the trust property may apply to court if they believe the trust instrument has provisions that might hamper the achievements of its objects, prejudice beneficiaries, or is conflict with the public interest. The court has wide powers to alter a trust, or if need be, to terminate the trust.



8.3 Mining Charter Stipulations on Trusts

- Trusts (or similar vehicles) must be established for the duration of the mining right.
- Trusts must comprise representatives of communities, including community-based organisations, traditional authorities, and mining companies.
- Community development needs must be identified.
- The trust (or similar vehicle) is responsible for developing a host community development programme, fund distributions, and for the governance of the equity equivalent benefit.
- Administrative costs, project management and consultation fees of the trust (or similar vehicle) may not exceed 8% of the total budget.
- An approved host development programme must be published in at least two languages commonly used within the host community.
- An approved host community development programme does not replace the SLP.

Trust instruments, which are the written agreements that create trusts, must be lodged with the Master of the High Court in whose area of jurisdiction the greatest portion of the trust assets is situated.



⁴⁴Section 1 of the Trust Property Control Act.

⁴⁵Section 9(1) and (12) of the Trust Property Control Act.

⁴⁶Section 11 and 12 of the Trust Property Control Act.

8.4 Mining Charter Implementation Guidelines on Host Community Equity

Mining rights holders must submit the following documents to the DMR annually:

- Copy of host community trust deed or other appropriate vehicle founding document.
- Host community development programme.
- Implementation and progress report.
- Consultation report with host community/ies and related parties.

8.4.1 Table (C) of Implementation Guidelines

Table (C) must be completed by mining right holders and submitted annually. The table requires information on:

- Type of benefit: Shares of equity,
- Value in rands (5%),
- Dividends declared,
- Dividend paid to host community trust or equivalent vehicle,
- Benefiting host community/ies,
- Duration of project (start and end date),
- Work done to date against planned projects,
- Total budget amount for year,
- Total amount spent for year, and
- Capped project management and consultancy fee.



8.5 Broad-Based Black Economic Empowerment Commission (B-BBEE) Rules on Trusts as Vehicles for Channeling Benefits – General Notice 1019 (DTI Codes of Good Practice)⁴⁷

The B-BBEE Act seeks to promote the participation of black people in the economy. Prescribed stipulations regarding trusts related to B-BBEE compliance are set out in General Notice 1019, of 11 October 2013 issued by the Department of Trade and Industry (DTI Notice). The notice is entitled “Broad-Based Black Economic Empowerment Act: Issue of Codes of Good Practice”.

The Mining Charter stipulations and guidelines on trusts apply to the mining industry, but the DTI’s good practice codes on trusts are informative and complement the Mining Charter’s provisions. The DTI Codes of Good Practice prescribe the manner in which black people may participate in the ownership of business entities and how their participation must be measured. Paragraph 3.1.1 of the Code says that black people may hold their rights of ownership in a measured entity “as direct participants or as participants through some form of entity” such as a trust or a broad-based ownership scheme.

In regard to broad-based ownership schemes there are a number of requirements that have to be met, set out in Annexe 100 (B) and in regard to trusts there are requirements set out in Rules for Trusts in Annexe 100 (D) of the DTI Code of Good Practice and supplemented by the guidelines issued by the B-BBEE Commission.⁴⁸ The trustees have an oversight role over financial reports of the trust and have a duty to report annually at AGMs.

8.6 DTI 2021 Practice Note⁴⁹

There has been some opposition to the B-BBEE Commission’s interpretation of the DTI Codes of Good Practice, resulting in the DTI issuing a practice note at the time of writing to clarify the position.

The practice note does not dramatically change what was originally published in the Codes of Good Practice. For example, it spells out that entities can provide benefits to named individuals from a class of defined beneficiaries, for example for bursaries, which was not clear in the past.

- The constitution of the trust (or similar instrument) must define the participants and the proportion of their claim to receive distributions. A ‘defined class of natural person’ satisfies the requirement for identification.
- The defined class of natural persons has a vested right against the income and capital of the scheme.
- Fiduciaries have no discretion in relation to defining the proportion of the claim of beneficiaries to receive distributions. The Mining Charter stipulates the proportion as 5%, and also stipulates that the participants are the host communities.
- Where there is a formula to determine the proportion of claims to a defined class of persons, fiduciaries cannot deviate from the formula.
- Distributions may be in cash or kind.
- Distributions do not have to be made every year, but any earnings retained and not distributed vest in the defined class of persons entitled to the benefit.

8.7 Trusts in Practice

Administration and oversight. Masters’ offices have been problematic as they generally don’t have the capacity to administer trusts effectively and have been involved in corruption scandals over the years. For instance, in February 2020, all Masters’ offices across the country were closed for a day while the Special Investigating Unit conducted a search-and-seizure operation after massive maladministration and corruption was reported. In Mpumalanga an official in the Masters’ office amassed R1.7-million through fraud. One of the problems with Masters’ offices is their focus on deceased estates and management of funds for minors in terms of the Guardian Fund, to the detriment of community trusts.

Community involvement. CALS is of the view that very few of the trusts they have ever come across are legitimate community trusts. The trusts they see are either mining company trusts or traditional authority trusts.⁵⁰

“We’ve seen lots of examples where lawyers are prime drivers and instigators of the formation of trusts and the election of trustees. A trust can perform the function you need it to. The driver is important. Mines either run the trusts or put them in the hands of traditional authorities. Trusts are incredibly untransparent and secretive which allows mines to model the way things develop. Generally, the driver is always the mine, unless the traditional authority has significant leverage to dictate e.g. the Bakgatla

experience. But where you have greenfield trusts, where the traditional authority doesn’t understand regulatory stuff, then the mines do what they want.”

Trustees are able to leverage themselves into positions where they become community liaison people or acquire other benefits. It is not simply a situation of abuse of trust funds. They are also able to capture other processes. You see instances where trustees become contractors of SLP infrastructure projects. So, the impact is not simply about the use or misuse of a community equity trust fund, but it goes beyond that.⁵¹

Anglo American Platinum (Amplats) sets up community development trusts for the purpose of community upliftment and it has set up trusts for the receipt of equity.⁵² A prime example is Lefa La Rona, an equity trust that distributes proceeds to community development trusts. It holds 6.2-million ordinary shares in Amplats that were funded by Amplats and encumbered by means of a notional vendor financing (NVF) scheme for nine years. When the NVF scheme comes to an end, 40% of the shares can be distributed in the post NVF period – after December 2021 – to community trusts based on their participation interest. The Lefa La Rona Trust is to hold 60% for the duration of the operational period which is the next 20 years.

Amplats identifies a few problems with its community trusts. The first is that trusts reside in the Master’s office. Here the weakness appears to be the slow and bureaucratic nature of this office which makes it difficult to register trusts, amend them or obtain letters of authority.

When setting up trusts Amplats tries to obtain community involvement in defining the objectives of the trust. It believes induction and training should be provided so that the community members understand their role. Amplats attempts to ensure good governance provisions are included in trust deeds.

Regarding community involvement, the company appoints community trustees to these trusts, but says that they often face accusations of mistrust from their own communities because programmes are slow.

Amplats says that its community trustees are selected by an independent election process. It follows an approach that promotes change over time in the makeup of trustees. In its Alchemy community development trusts (these are compensation rather than equity trusts) it started with five trustees (two founder and three independent trustees) in the foundation phase. This was changed in the consolidation phases to eight trustees (two founder, one independent and five community trustees). In the operational phase it moved to 13 trustees of which eight are community trustees, two founder and three independents.⁵³



⁴⁷ Broad-Based Black Economic Empowerment Act: Issue of Codes of Good Practice, General Notice 1019, Government Gazette No 36928, 11 October 2013.

⁴⁸ https://www.bbbee.commission.co.za/wp-content/uploads/2019/04/Final-brochure-on-Trusts-29Nov18_1.pdf

⁴⁹ Practice Note in terms of B-BBEE Act, 2003: Rules for Discretionary Collective Enterprises, Government Gazette No. 44592, 18 May 2021.

⁵⁰ R. Krause and L. Snyman interview, CALS.

⁵¹ Ibid.

⁵² Information on Anglo American Platinum trusts came from an interview with Lindo Khuzwayo and Tebogo Makhubedu. In addition, written questions sent to Amplats were responded to in nine pages of notes sent to the authors. A request to see a few redacted trust deeds was turned down and a request to see some case studies on trusts was not responded to.

⁵³ Without the benefit of interviewing the community trustees and members of the beneficiary communities, it is difficult to assess whether these trusts have improved the living conditions of the affected communities. This study was unable to ascertain whether the AAP trusts were making a marked difference to the economic plight of the mining communities directly affected by platinum and related mining, mostly in North West and Limpopo.

8.8 Companies

8.8.1 Non-Profit Companies (NPC)

An NPC is a company incorporated in terms of the Companies Act and registered with the Companies and Intellectual Property Commission, that has an object that relates to cultural or social activities, or activities that relate to the best interests of the group it is benefiting or the cause it is promoting. It might be structured as a having a public benefit object, in which case it might be able to obtain tax-exempt status through the South African Revenue Service. In order to obtain such status:

- The object of an NPC must be contained in its memorandum of incorporation (MOI) and be either a public benefit object, or an object relating to one or more cultural or social activities, or communal or group interests.
- Income and property of an NPC may not be distributable to directors or members (although an NPC can pay reasonable remuneration to the directors including reasonable reimbursement for expenses).
- Distribution to members or directors in the event of winding-up of the NPC is prohibited and there must be a directive in a company's MOI containing such clause.

8.8.2 The Advantages and Disadvantages of NPC's as Recipients of Equity and/or Compensation for Mining-Affected Communities

Because NPCs are not-for-profit companies, and might even be tax exempt, there are restrictions on what they can do and what is and is not permitted. For example, it is not permissible to carry out any business undertaking or trading activities other than permitted by section 30 of the Income Tax Act if it is a tax-exempt NPC.

An NPC that is not tax exempt can carry on any business activity, and can invest in investment vehicles, stocks and bonds, and grow the assets of the company. However, because an NPC cannot distribute its income and property to its members, directors or incorporators, members of a mining-affected community would not be able to benefit directly. All the equity an NPC makes must be used to further its objectives. For example, an NPC might be set up to use the proceeds of equity payable to the community to build a clinic, or a school, or set up a skills development project, but not to pay dividends to members.

An NPC can be structured with or without members. If there are members, they have rights to access company documents, appoint the directors, attend the AGM, and play an active role in the company. An NPC without members is one that is governed by a board of directors that ensures that the objects of the company are realised, and who manage the affairs of the company as fiduciaries without any need to report or respond to members.

The advantage of setting up an NPC with objectives that are clearly linked to benefits for a mining-affected community, is that there are certain oversight mechanisms inherent in the Companies Act that can be advantageous, and possibly prevent corruption.

For example, a director is liable for any loss, damage or costs sustained by the company if they carry on the company's business recklessly or fraudulently. Or certain acts cannot be taken without a special resolution which requires 75% of the directors/members to vote in favour. If the company is set up as an NPC with members, the MOI can provide that members must be required to approve certain transactions.



8.9 For-Profit Companies

A for-profit company is essentially the same as an NPC besides that it has shareholders who may be the recipients of the property and assets of the company. Shareholders have extensive rights including a say in company investment policies and accountability. Dividends are payable to shareholders when declared.

8.9.1 The Value of For-Profit Companies in Mining Transactions

A for-profit company is an appropriate legal vehicle for growing its asset base and paying dividends and equities to shareholders. It is structured to enable this to happen, under the control and guidance of a board of directors. It is a vehicle that should and could be considered in situations where each beneficiary to a transaction can be identified and named, and thereby can be made a shareholder.

8.10 Communal Property Associations

A Communal Property Association (CPA) is a financial vehicle designed for land reform beneficiaries who want to acquire, hold, and manage land as a group to facilitate landholding. The registration and operations of CPAs is governed by the Communal Property Associations Act 28 of 1996, which provides for a government registry of CPAs and oversight to enforce the rights of CPA members.

The following description of CPAs aims to demonstrate their attributes and describe the legal framework that governs them. They are created as mechanisms to hold land communally and are structured to protect the broad interests of the community that hold land. Understanding the mechanisms that have been developed in the Act to protect communities is instructive and many of the processes could be very well adapted into the legal vehicles set up to receive benefits in mining affected communities.

The Act covers communities where there has been a Land Claims Court order for restitution under the Restitution of Land Rights Act 22 of 1994, where a community is entitled to receive property or other assistance from the state which makes such receipt conditional on a CPA being formed, where the DARDLR minister approves a disadvantaged community to be the recipient of property or land. The main object of a CPA must be that it holds property in common. Property includes movable and immovable property and any right or interest in and to moveable or immovable property.

The community wishing to register a CPA must apply to the director-general (DG) of DARDLR. This department plays an important role in the oversight and registration of CPAs. Various documents must be submitted in order for registration to be approved, including a list of members, or if not members then the principles to be used to identify members and a procedure to follow to resolve disputes as to who should be members. Names must be submitted of members of a democratically elected interim committee that represents the CPA pending registration, and an undertaking that they will comply with the process. The DG, if satisfied, must give consent for provisional registration of the CPA.

⁵⁴ Section 7 of the CPA Act.

The provisionally registered CPA must prepare a constitution; the DG may assist. Once ready, the community must adopt the constitution at a meeting, witnessed by an official from the department. The official must check if the proper notice of this meeting was given to the community, must ensure that there are enough members at the meeting, and whether various interest groups are present. They must check the number that vote in favour or against adoption of the constitution, whether the view of anyone is likely to be adversely affected by the adoption of the constitution, and the views of dissenting persons. Any person excluded from this process or who believes it was not fair may lodge a complaint with the DG, who can refuse to register the CPA until the issue is resolved.⁵⁴

The CPA is registered once the meeting has been held, if a substantial number of the community attended the meeting and the majority were in favour of the constitution. The DG can register a CPA if there has been substantial compliance and the process has been substantially fair.

A register is kept of all CPAs. A CPA is a juristic person that can sue and be sued in its own name, can acquire rights and obligations, can acquire and dispose of immovable property, can encumber immovable property, and has perpetual succession.

The DG is tasked with monitoring compliance with the constitution of the CPA and the CPA Act and can inspect the affairs of a CPA. There is a detailed oversight role given to the DG in the case of a dispute within a CPA, including referral to conciliation.

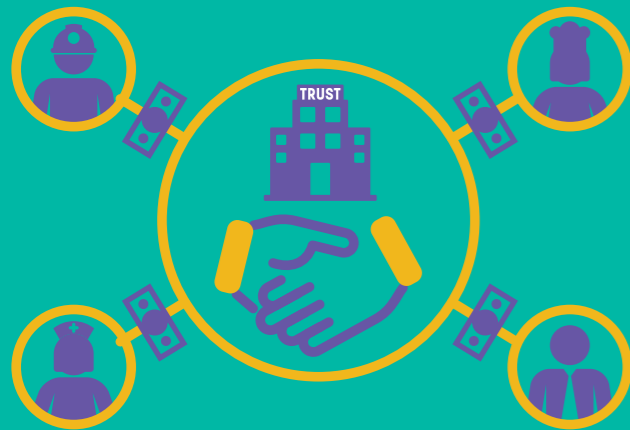
The Act circumscribes the powers of a CPA by stating that immovable property cannot be encumbered without the majority of members giving approval at a general meeting. It further creates a number of criminal offences including -

- Giving someone rights to property of a CPA,
- Being in breach of a fiduciary duty, and
- Abusing power.

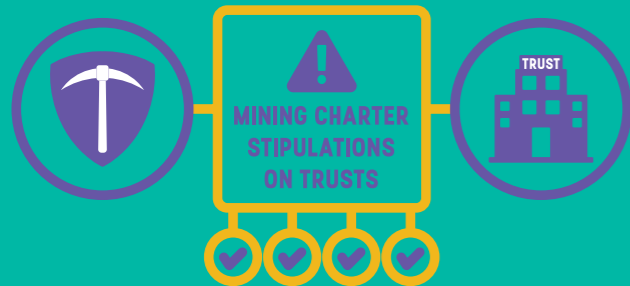
8.11 Less Formal Structures

In the Wilgerspruit case (see below) an informal association was set up, made up of interested parties. It was constituted in such a manner to enable all interests to be tabled and to ensure that no one group dominated the others. The aim was to develop communication channels between the mine and community. It is not a decision-making structure, but is meant to meet regularly, receive progress reports, and check on compliance. Such a structure could be useful insofar as it could monitor the trust or similar legal entity that is established to manage equity and/or compensation.

LEGAL VEHICLES



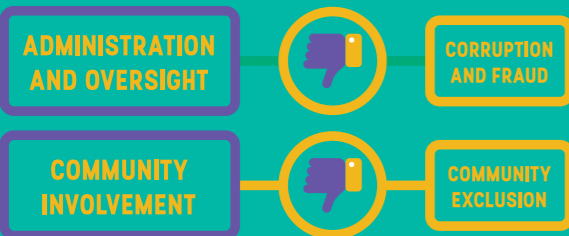
COMMUNITY TRUST REGULATION



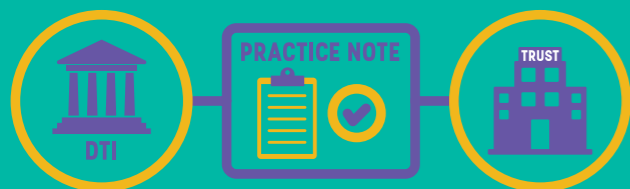
MINING CHARTER STIPULATIONS ON TRUSTS



B-BBEE RULES ON TRUSTS



TRUSTS IN PRACTICE



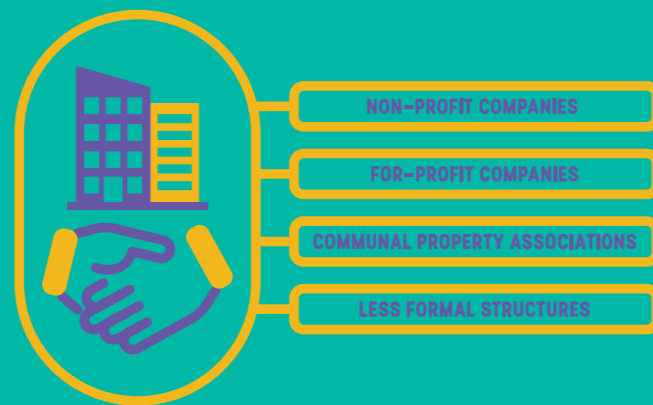
DTI 2021 PRACTICE NOTE



THE TRUST PROPERTY CONTROL ACT 57 OF 1988



MINING CHARTER IMPLEMENTATION GUIDELINES



COMPANIES

9

CASE STUDIES

9.1 Wilgerspruit

In October 2018, a rural community made legal history when the Constitutional Court set aside an eviction order obtained by Pilanesberg Platinum Mines (PPM) and Itereleng Bakgatla Mineral Resources (IBMR) against 13 families living on the farm Wilgerspruit in North West. In essence, the court ruled that a mining right does not trump the rights of the occupiers of the land. The court further held that the mining right holder must exhaust all procedures contained in the MPRDA before resorting to an interdict to restrain interference with its mining activities.

In 1919, the land on which mining operations were to take place was bought by the Lesetlheng village community, in North West. It was specifically bought by 13 families and was clearly demarcated, with a distribution known to everyone. The land was distributed according to how much a family had contributed. The arrangement was well documented.

At the time that the land was purchased, black people were not allowed to own land, so the land was not transferred to the buyers but was put in trust in the name of the then Minister of Bantu Administration and Development⁵⁵ who under the title deed owns it in “trust for the Bakgatla ba Kgafela community”. The people living on the land are informal rights holders in terms of the Interim Protection of Informal Land Rights Act 31 of 1996, by virtue of being the descendants of the people that originally purchased the farm through the trust arrangement.

One of the problems that arose was that despite the land having been purchased by members of the Lesetlheng community, the title deed reflected that the minister held it in trust on behalf of the entire Bakgatla ba Kgafela (BBK) community, a much bigger community living in a far greater area. The community believes it was well understood that only the Lesetlheng community had an interest in the land, they having purchased it.

Around 2002/2003 some mining exploration took place on the land, but the people who owned the land were not consulted. “These companies didn’t want to acknowledge that people had bought the land and they were therefore not consulted, to enable companies to thrive without responsibility”.⁵⁶ Because the land was registered “in trust for the Bakgatla community”, the mining company, Sedibelo Platinum, assumed they should consult with the chief and they further assumed that the chief would consult the affected people who occupied the land and get their consent.



“The chief did not consult the affected people who occupied land. This was due to political reasons as there was already a ‘storm’ concerning leadership. The chief had objections with the affected communities which meant that it was difficult for him to approach the affected people. Instead, he went through other means and deliberately excluded the affected villages. He tried to get a consent in the form of a ‘consultation’. But he failed to talk to the directly affected people. When they realised, they started to object as they weren’t consulted. The chief then began to be aggressive towards the community”.⁵⁷

In June 2008 the situation deteriorated and objectors to the mining operations were arrested. In their absence the chief gave the mining company the go-ahead to mine. He organised 32 villages to consent to the mine on behalf of BBK. An agreement was concluded between the mine and the chief. The community were not given sight of the agreement, although they subsequently learned that the chief was paid close to R900-million for giving the mining rights to the mine.

According to the community, the mine and the BBK chief worked together to obtain regulatory approval from the DMR and initiated eviction proceedings against the community, who consulted Lawyers for Human Rights. Their legal representation successfully obtained an interdict from the Mafikeng High Court against PPM, preventing it from continuing with mining operations on the Wilgerspruit farm. Notwithstanding successful appeals by PPM in both the High Court and the Supreme Court of Appeal, the Constitutional Court, on 24 October 2018, overturned the High Court eviction order that had been awarded to PPM. The apex court held that mines can no longer rely only on their mining right to displace any person or community from their land and, in essence, directed PPM and the Lesetlheng community to engage and negotiate a settlement.

After more than a year of intense negotiations, the community and PPM entered into a comprehensive settlement agreement that included significant monetary compensation to the community as well as a procurement model that favours the mining-affected communities, and a progressive SLP. In terms of compensation, the agreement provided for:

- Damages for the loss of traditional farming lands after 100 years of occupation.
- Compensation for the inconvenience of having to move to alternative land to continue the traditional occupation of farming the land.
- A surface lease agreement, including retrospective rental, relates to the historical use of the land from 2012 (R2.2-million) as well as rent for future use of the land (R720 732).
- Alternative farmland for the use of the beneficiaries.

⁵⁵The Bantu Trust and Land Act 18 of 1936, Native Trust and Land Act, 1936.

⁵⁶Interview with Donny Matshego, Wilgerspruit community member.

⁵⁷Interview with Donny Matshego, Wilgerspruit community member.

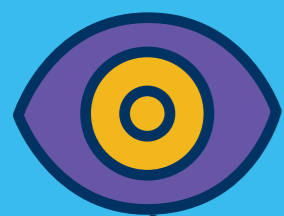
The settlement not only provides for the preferential allocation of employment and procurement in favour of the Lesetlheng community, but it also prescribes a transparent and fair process of:

- Identifying aspirant suppliers of goods and services from the Lesetlheng community,
- Ensuring that these aspirant suppliers are suitably qualified and equipped to submit competent and reasonable proposals,
- Increasing the level of contracting with members of the Lesetlheng community,
- Establishing a fair, unbiased and transparent process whereby these tenders are adjudicated, and
- Creating channels of communication to the Lesetlheng suppliers of goods and services as to the awarding of these contracts.

The settlement has created an innovative oversight mechanism, which brings together community representatives and mine management, to monitor the mining company's compliance with its procurement policy and the SLP on a regular basis (as mentioned above). This is an informal structure that offers another layer of community participation and oversight over the benefits and compensation offered in terms of the settlement agreement.

During the period of negotiations, a split emerged in the community, which led to its separation into two groups, each with its own legal representatives. The difference was centred on the applicable legal regime that ought to determine the decision-making process within the community as well as the manner in which the compensation was to be distributed among the clans. In practical terms, the opposing views regarding the methods of distribution of the compensation can be summarised as follows:

- One group (Lesetlheng Land Committee) believes that the compensation amount should be a communal benefit (i.e., funds be paid to a trust and administered for the benefit of the 13 clans, in accordance with the terms of a trust deed).
- The other group, made up of three of the Wilgerspruit clans, feel strongly that each of the 13 clans, through a financial vehicle of their choice, should receive its pro rata portion of the compensation amount. The remaining members of the 13 clans who wish to pool resources should be at liberty to do so. However, no clan (or member) should be forced into a "communal" ownership model.



The settlement not only provides for the preferential allocation of employment and procurement in favour of the Lesetlheng community, but it also prescribes a transparent and fair process.

The community groups and PPM agreed to have this dispute resolved through arbitration and PPM agreed to pay for the costs of arbitration. Pending the outcome of the arbitration, the compensation amount will be held in an escrow account, to be administered by PPM's attorneys.

The parties agreed to set up a trust, the Wilgerspruit Community Development Trust, to hold the new farm that is to be purchased by PPM. The board will include trustees nominated by PPM, IBMR, each of the community groups, and an independent trustee. The agreement also makes clear that, no matter the outcome of the arbitration process, PPM will have no discretion, interest or influence in the distribution of the proceeds of the compensation it awarded to the 13 Clans. According to PPM's CEO, the mine should remain active and involved in the financial vehicles to ensure that the benefits flowing from the deal go to the community and not to individuals trying to look for benefits for themselves.⁵⁸

However, whether the considerable compensation amount will be paid into the Wilgerspruit Community Development Trust or into separate trusts created for individual or smaller groups of clans, is still to be determined through the arbitration process.

The main objection to the idea of a larger overarching trust is seated in individual clans' fear that their participation rights and access to the compensation will be diluted and placed at risk in the larger trust. According to Donny Matshego, one of the clan leaders, their objective as individual clans was to ensure that compensation would be paid as quickly as possible to the beneficiaries to allow them maximum control and access over their portion of the compensation. He feels strongly that community trusts in this environment are beset by governance problems and inefficiencies. As a result, they hardly ever live up to their potential. He thinks that big trusts often create unnecessary divisions and conflict in communities and should therefore be avoided, if possible, rather having smaller and more accountable legal vehicles to assist individual clans to receive and distribute the proceeds from the mine.

On the positive side, the Wilgerspruit case study highlights the potential benefits for all stakeholders in being part of a fair and robust negotiation process, prior to mining operations. It also shows how affected communities can achieve a bigger stake in the oversight and enjoyment of the economic benefits that mining operations can provide. This case study also shows how mining communities are grappling with the form of financial vehicle relevant to their circumstances.

⁵⁸ Interview with Eric Clarke, CEO of Sedibelo Platinum.

9.2 Mogalakwena Platinum Mine – Anglo⁵⁹

This case concerns the Mahlohlo community under the broad Mapela traditional authority, and later, households in the Sekhalolela village. Residents had been relocated and Richard Spoor Attorneys was representing a general category of clients known as the 'bitter einders'. A settlement agreement was signed in 2012 which the firm considers an example of decent compensation and to some extent is a best-case scenario. Some of the elements of the agreement are set out as follows:

- It provided for the replacement of the community's land. The mine bought land of a much higher quality than the land where the communities lived before, which had been on a white-owned farm.
- High-quality housing standards were agreed to, to be overseen and built by an independent project manager, award-winning architect Peter Rich, who built community-sensitive housing for six households.
- The mine set up a community trust with around R12.5-million to spend on the community and credible trustees.
- A minimum number of jobs were guaranteed, initially 15, rising to 32.
- There was a sensitive process around grave relocation.
- A cash payment of R60 000 was made to each household.
- Food vouchers were given for a year after the resettlement.
- For six months after resettlement R1 500 per month compensation per household was given.
- The community was given a 26% stake in a company⁶⁰ which is a service provider to the mine. The company was given a three-year renewable contract with the mine that generates R100-million revenue per year and about a 20% profit margin that allows for quick debt servicing. The structuring allows for a trickle dividend which means that half of the dividend goes to the community and half to debt servicing.
- A shareholder's agreement is being finalised, but so far it has been agreed that the 62 households will all be individual shareholders in the entity that holds the 26% stake. So rather than having an alienated trust relationship there is a direct shareholder relationship where there are clear rights, and it is not possible to hide under the pretence that there is going to be a community development enterprise. This is a conventional shareholding exercise which seeks to have dividends paid out in cash to households.
- School fees are to be paid for between 15 and 25 years.
- Twenty years of rates and taxes are being paid
- Full individual title to each house is being granted.
- A community centre is to be built, one half of which is for a creche that will be owned by the trust, and one half of which will be an innovatively designed hall that can be subdivided into individual classrooms, so that it is multipurpose and doesn't get abandoned as many structures do.

⁵⁹ The source for this case study was attorney Johan Lorenzen who made available the settlement agreement, trust deed and various legal documents and reports.

⁶⁰ Name of company could not be confirmed and verified before release of the report.

⁶¹ Lorenzen interview.

9.2.1 The Trust

The case is also a good one to cover in this report because it involved setting up a community trust through an **iterative** and participatory process. There was an agreement that a community development trust would be established via a clause in the relocation agreement. It was further agreed that the terms of the trust deed were to be in the communities' discretion.

In the negotiations with the mine there was agreement in advance regarding the trustees. Importantly the chairperson was independent and the majority of trustees are from the community. They have three-year terms of office and must present all reports annually. Trustees can be removed by the beneficiaries, and not the other trustees. The mine, Amplats, has two trustees. This was debated by the law firm, but there seemed to be a view that it was a good idea to have a few mine trustees as long as they don't constitute a majority, because this gives opportunities to link up with other programmes the mine is running and to find connections and synergies. It isn't viewed as a cession of community control but rather seen as a way of ensuring a degree of continued buy-in and a continued relationship with the mine. The conventional way mines work is to relocate the community and withdraw completely, only re-appearing when crises emerge. This is a discussion to be had and there does not seem to be a clear position on this.⁶¹

An issue highlighted by the law firm was in regard to the appropriate role it should play, as a legal advisor and also, the role commercial advisors should play. Richard Spoor associate Johan Lorenzen made the point that lawyers acting for communities are "creatures of instruction" and act on behalf of clients. "It's not our job to do what we think is best."

Giving instructions to communities on complex transactions is difficult and often the weight on the legal and commercial advisors is much higher than in a normal client/attorney relationship. The finalised trust deed is geared towards development activities, but the main focus is on capitalising the farm to create jobs and investment opportunities, and to support business enterprises. There is also the opportunity of adding cash dividends. However, there was also a challenge drafting the trust deed so as to ensure that the trust could acquire public benefit organisation status as a tax-exempt institution. Amplats lawyers were helpful in getting the tax compliance correct.

The firm insisted on a trust administrator being put in place (based on its observation in other communities of money going missing). It negotiated that Amplats would pay R150 000 a year for five years for trust administration. The important point from a governance point of view is to separate the board from the administration and make sure that executive functions and administrative functions are handled professionally. Having this in place means that the trustees don't have to make the hard call of whether to pay money to the beneficiaries or incur what they might think of as fairly expensive costs of accountants, and possibly lawyers. The law firm hopes that a culture of accountability will be inculcated over the five years.

9.2.2 The Traditional Authority.

The case also throws up various issues relating to the traditional authority. The community felt betrayed by the traditional authority and were of the view that the traditional council negotiated away their rights without adequately protecting them. Owing to this, the current deal does not include the traditional council. The community wanted a full relocation out of the entire traditional community area and while links still exist, they have used the awarded resources to apply for rights in other villages. Members of the community are maintaining some ties, but there are no formal linkages between the trust and the traditional authority.

9.3 Kumba

This is quite an innovative case and there have been many articles and reports written about it. It concerns the relocation of a community by Anglo American's Kumba Iron Ore from the town of Dingleton (formerly Sishen) to Siyathemba, a suburb of Kathu, all in the Northern Cape. Households were given new housing equal in size and quality to their Dingleton homes (70% chose this option), or they could choose a payout, at replacement value. In addition, each household received a curtain allowance of R20 000, an inconvenience allowance of R15 000 and in late 2017, a R100 000 lump sum. The mine also committed to subsidise rates and taxes for 20 years. Further, community halls, schools and seven churches were rebuilt at Siyathemba. A skills development programme assisted locals to participate in the project. By 2019, 98% of the homeowners had moved.

However, the remaining 25 families, the bitter einders, refused to move and had a different perspective on the settlement.

It is of interest as a case study demonstrating that compensation is not necessarily a long-term option for poor communities, as opposed to having share/dividend rights in the mining operations that secure long-term monetary benefits.



10 RECOMMENDATIONS:

ENSURING LEGAL VEHICLES

USED FOR COMPENSATION

WORK FOR COMMUNITIES

There are key elements of what is required of any legal vehicle used in the context of mining benefits to ensure that the interests of the community are protected. This is because these benefits are highly vulnerable to unscrupulous and corrupt interests. Every effort should be made by all parties to create a manner of operation that is inclusive, transparent, and based on a commitment to ensuring that mining benefits flow to where they must.

10.1 Who Are the Beneficiaries?

This starts with clear, sufficiently objective, measurable criteria as to who the beneficiaries are. It must be possible to apply an objective test to determine who qualifies to be a beneficiary. We see that in a for-profit company the shareholders are the beneficiaries, while in an NPC with members, the members are. And in an NPC without members the directors act in terms of an object. A CPA has clearly defined members, determined through an independent verification process.

10.4 Who Are the Representatives?

A trust is based on trustees being entrusted with assets to use for the benefit of the beneficiaries or to make distributions to beneficiaries. An executive committee member of a CPA must look after the interests of the community of land holders, and directors of companies have a fiduciary duty to shareholders. It is critical that those who hold power, be they the trustees, the directors or the executive of a CPA, are obliged to act in the interest of their beneficiaries.

10.2 Clear Definition of Entitlement

The DTI Codes of Good Practice requires a written record of fixed percentages of entitlement or the use of a formula for calculating entitlement. The percentages are highlighted in the Codes.

Community trusts are often dominated by traditional leaders, and include local government representatives, staff members of mines, and any number of self-interested people and consultants. A key to ensuring trustees are accountable is the presence on trusts of people either closely connected to the community in that they come from the same area and have a historic and/or familial interest in the community benefiting from the mine, or members of civil society or equivalent organisations that have a commitment to the broader goals of poverty alleviation and equity.

10.3 Clearly Stated Objects

- As the directly affected households and people in clearly defined geographical areas near the mine, the community that has the right to benefit from the equity from the mine must decide on the objects of the trust.
- For this reason, prior to a trust being set up, a process needs to be embarked on with this community, to establish what it would like the trust objects to be. These should be broad enough not to require repeated amendment, but specific enough to satisfy particular needs of the community.
- The Mining Charter provides that a community development programme be prepared and published. This must be updated annually and there must be monitoring as to whether the programme is being implemented or not.

It is not only important who sits on a trust, but that the community's direct interest carries the most weight. The weighting must acknowledge that they are the primary beneficiaries, and benefits that should accrue can be set out in the trust deed. They then have a vested interest in the proceeds of the trust. The current Anglo American model is that over time its own role as founder of community trusts must be reduced and the number of community trustees must be increased.

It is important to have specific skills in a board of trustees, such as financial management or business and investment skills. The DTI Codes of Good Practice stipulate that 50% of trustees must be independent.

The balance between these independent trustees, founder trustees, and community trustees is important, but all trustees must have the defined community's interest at the forefront of their decision-making. The number of trustees should not exceed 13, but seven is considered to be enough. Consideration should be given to proposing a minimum and maximum number of trustees in the trust instrument.

The Mining Charter requires representation of traditional authorities. A trustee can only be drawn from a traditional authority when there has been no conflict between the traditional authority and community in the past, and there may be many trusts where a representative of the traditional authority cannot be included because of past conflict. MACUA recommends that when representatives of traditional authorities act as trustees it should exclude the chief whose presence may unduly impact equitable decision-making.

10.5 How Should Trustees Be Selected/Elected?

Both companies and CPA's have mechanisms that describe the manner in which directors and executive members are selected. The CPA mechanism is useful as it involves a detailed community-based democratic process, which could be reproduced in a trust deed. This would ensure another layer of beneficiary participation in the trust. Term limits and the manner of election of trustees open up the possibility of accountability, particularly if trustees are not performing. The trust deed needs to stipulate that community trustees must be appointed in a manner that ensures they are true representatives, and could spell out a process.



10.6 Amendment of Instrument

It is important that trustees are not empowered to amend the trust deed on a whim, as this could lead to fraudulent and unaccountable action being taken. The CPA model is useful, as amendments to the constitution can only take place if the executive goes back to the community. Company MOI's provide various restrictions on amending the MOI, such as the requirement of a special resolution. Shareholders in for-profit companies can be given additional weighting and controls over amendments.

A trust deed should control the manner in which amendments are made. For example, provision could be included that amendments be ratified by a majority vote of the beneficiaries if they are a reasonably defined group. Or it could be provided that amendments can only be made if approval from some mutually accepted independent body is obtained.

10.7 Term of Office

Many community trusts don't specify a term of office for trustees, and this is problematic. A fixed term should be set because it acknowledges the need for – and ensures – innovation, fresh ideas and diversity. It creates an imperative for trustees to perform. One can provide for re-election of trustees to ensure continuity and to keep effective trustees in place for longer. But setting the term means that this is not a given and that trustees are expected to perform.

10.8 Democratic Decision-Making

Decision-making has to be in the interests of the beneficiary community. This requires a level of community participation in the affairs of the trust – for instance, as mentioned, in being involved in amendments that have to be made to the trust deed, or when trustees are appointed. The trust deed must clearly state which acts require higher levels of agreement by beneficiaries than others. For instance, in the Companies Act there are certain decisions that can only be made by means of special resolution, and similarly with CPA's. A trust deed would need to add these.

10.9 Management of the Trust

The DTI Notice requires that trusts have operational capacity, which must be in the form of skilled staff and/or part-time advisors, if the trust is small. If the trust does not have major assets, an office and premises may not be practical. But separation of the role of trustee from that of staff is key to good governance and the trust deed should provide for this.

10.10 Transparency and Information

The DTI Codes of Good Practice require that in regard to a broad-based ownership scheme, the statutory document must be available on request to any participant in the language with which they are familiar. The scheme's financial reports must be presented to the participants at an AGM.

These could be supplemented by further requirements to ensure that beneficiaries are fully apprised at all times of the affairs of the trust, particularly the financial situation. The trust deed could, for example, provide for quarterly reports to the community. When a trust is hijacked, these meetings don't take place. Having a clause like this that is subsequently ignored, makes it easier to act against the fraudulent trustees, as evidence of this failure is easy to see.

10.11 Distribution and Expenditure

The trust deed should define the minimum contributions that beneficiaries must receive annually and should make it mandatory for a minimum value to be dispersed annually. This will eliminate the problem of trustees sitting year after year earning fees, and not dispersing benefits. The trust deed should be very clear as to what projects will qualify for benefits.

10.12 Diversification

A point made by an informant that specialises in community trusts is that in the mining context, there must be a diversity of income streams. The trust must not be restricted to only mining equity or income from the mine. When mining goes through boom times, there are dividends and income. But there are times where there is not much income. In order to meet community expectations, other investments must be made in, for example, solar projects, farming initiatives, etc.

10.13 Accessibility

An ongoing theme that emerges when communities are consulted, is their exclusion through an inability to access information about what is going on. When money is paid into community trust funds, the SAHRC notes that this is even more problematic. "(The process is) often riddled with complexities and a lack of transparency."⁶²

10.14 Conflict Resolution

Proper functioning of community trusts is often undermined by internal conflicts in the community. Mechanisms to resolve conflicts in trusts are often not available. The MACUA interviewee was of the view that this could be an area where a chief could play a role. They have much more to offer when they are at arm's length from a trust. In many traditional communities, chiefs and traditional leaders have been seen as mediators when conflicts occur.

Other mechanisms could be considered, but having a conflict resolution mechanism spelt out in a trust deed is paramount. It could be a mediation clause with the option of arbitration if mediation fails. Mediators could be specified in the trust deed, possibly people from the community or a local magistrate. Every effort should be made in a trust deed to include provisions that reduce the likelihood of communities having to go to court to resolve disputes, which is expensive and time-consuming. The CPA model is instructive in this regard as it provides for a conflict resolution process that involves the DG or an appointed conciliator.

10.15 Ombud

There is repeated evidence that the DMR and the Master of the High Court do not play an oversight or monitoring role in regard to trusts set up for mining-affected communities and the benefits that accrue to them, or not. It is critical to have oversight and monitoring after agreements are reached. Masters' offices are generally under-capacitated and mostly focused on testamentary trusts and disputes among heirs regarding family trusts. Their capacity to monitor the performance of community trusts is limited.

An ombudsman is generally an independent non-partisan person who deals with complaints from the public on administrative injustice and maladministration. Such an office could act as an oversight office in regard to the DMR's role in monitoring compliance with the MPRDA. Aninka Claassens proposed that the MPRDA must be amended to establish a mechanism to independently investigate and advise on community grievances in an efficient, democratic, and transparent fashion. An ombud could fulfil this role.

10.16 Capacity

Communities require capacity to be actively involved in the management of trust assets. One way to do this is to formulate a plan with community buy-in and involvement that informs the projects and activities of the trust. The Mining Charter Implementation Guidelines refer to a development programme that must be developed, submitted annually, and monitored, in order to be compliant. This is where active community participation is critical. Civil society and community-based organisations are often best placed to play the role of community capacitation. Rights holders should fund these activities.

10.17 Other Elements to Include in the Trust Deed

- Provisions stating that proper books of account should be kept and that there be independent auditors that report annually.
- Provision regarding remuneration of trustees. It is good practice to not remunerate trustees, but to pay a set stipend to cover their costs.
- A requirement that the trustees prepare the host community development programme within a set time frame and that it has time frames for implementation.

RECOMMENDATIONS: ENSURING LEGAL VEHICLES USED FOR COMPENSATION WORK FOR COMMUNITIES



11 IMPORTANT POINTS OF LAW

Although many of the points below have been referred to above, these key points need to be considered when trying to create the conditions for mining-affected communities to be properly compensated. These are summarised here.

- Mining companies are not obliged to negotiate agreements through traditional authorities. If a traditional authority enters an agreement or partnership with a third party that results in income being paid to the traditional authority, it is obliged to open an account to be managed by the premier – the reverse is not the case. In other words, a mining company can enter into an agreement or partnership with a mining-affected community directly, and because the proceeds do not flow into the traditional authority's account, no account under the control of the premier is required. It is very important that this is clear, as it appears that mining companies erroneously believe they are compelled to work through traditional authorities.
- Trusts are not designed to cover thousands of beneficiaries and are most suitable to be used in relation to relatively contained and circumscribed numbers of beneficiaries, where the criteria for their status as beneficiaries is very clearly defined.
- The mechanisms that The Communal Property Association Act introduces to ensure community representation should be included as far as possible in trust instruments to ensure the protections required.
- The protections in the Companies Act, where certain acts require special resolutions by shareholders, should be introduced into trust deeds.
- Trust deeds should include dispute resolution mechanisms to ensure that communities do not have to resort to expensive court proceedings.
- There is nothing in any of the available instruments in the law to protect communities, so the drafting of the trust deed or other legal instrument must be done with the community's interests in mind, and an understanding of the pitfalls of failing to make these paramount.
- The DTI Codes of Practice on B-BBEE, the Mining Charter sections on trusts (or similar legal vehicles), and the Mining Charter Implementation Guidelines are all useful as guidelines on what should be included in trust documents. These need to be consolidated into a set of binding regulations for all trusts (or similar legal vehicles) set up in the mining industry for receipt of equity.

11.1 Regulations in Regard to Trusts and Other Legal Vehicles in the Mining Sector

An opening exists for the DMR minister to publish regulations that carry more weight than guidelines on community trusts in the mining sector.

Furthermore, consideration should be given to the setting out, in one place, of all appropriate stipulations in regard to trusts (or equivalent legal vehicles) that are recipients of equity and/or compensation, so that communities that need information on the law relating to mining host community trusts are empowered to access it easily.

- Instead of mining rights holders reporting annually to the department on community trusts as required in the Implementation Guidelines, the trustees should have that obligation. This provides a layer of oversight of trustees.
- Funds should be allocated to educate communities on these trusts.
- It should be a requirement that trust deeds contain dispute resolution mechanisms to deal with disputes arising over the distribution of equity or other key issues.



12.1 Articles/Submissions

- Action Aid, Precious Metal: The Impact of Anglo Platinum on poor communities in Limpopo, South Africa, Joint publication of Action Aid and the Netherlands Institute for Southern Africa, 2008
- Action Aid, Precious Metals II: A Systemic Inequality, unpublished
- Action Aid, Mining in South Africa 2018, Whose Benefit and Whose Burden?
- Anglo Platinum Anglo Platinum's response to ActionAid allegations, second edition
- Bowman A, Dilemmas of distribution: Financialisation, boom and bust in the post-apartheid platinum industry, Society, Work & Development Institute, July 2016
- DO SOCIAL AND LABOUR PLANS BELONG TO COMMUNITIES? By Louis Snyman and Robert Krause as printed in the OSF document titled Mining in Good Company
- CALS Comments regarding the Draft Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry, 29 August 2018
- CALS Community Engagement Policy, April 2014
- Capps G, Victim of its own success? The platinum mining industry and the apartheid mineral property system in the South African's political transition", in Review of African Political Economy, 39:131, 63-84, <https://doi.org/10.1080/03056244.2012.659006>
- Claassens A and Matlatla B, Platinum, poverty and princes in post-apartheid South Africa: new laws, old repertoires, New South Africa Review 4
- Centre of Law and Society, The Official Recognition of Traditional Councils and the Legal Standing of Community Members, February 2015
- Claassens, An Input on HLP recommendation affecting mining, 7 November 2017
- Cock J, Resistance to Coal and the Possibilities of a Just Transition in South Africa, October 2020, unpublished
- Du Plessis E, An Overview of land use management in terms of SPLUMA, unpublished
- Farrell L, Hamman R and Mackres E A clash of cultures (and lawyers): Anglo Platinum and mine-affected communities in Limpopo Province, South Africa, https://www.researchgate.net/publication/251560708_A_clash_of_cultures_and_lawyers_Anglo_Platinum_and_mine-affected_communities_in_Limpopo_Province_South_Africa
- High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, November 2017
- Land & Accountability Research Centre (LARC), Written Representations on the draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018, 31 August 2018
- Mswana S, Democracy, development and chieftaincy along South Africa's 'Platinum Highway': Some emerging issues, Journal of Contemporary African Studies, 33:4, 510-529., DOI: 10.1080/02589001.2015.1117730

- Parliamentary portfolio committee hearings:
 - ULTRA <https://pmg.org.za/committee-meeting/30857/>
 - MaleduConstitutionalCourtJudgmentandotherlitigation; lessons learned: <https://pmg.org.za/committee-meeting/27527/>
 - HighLevelPanelRecommendationsforMineralResources, Dr Claassens briefing: <https://pmg.org.za/committee-meeting/27462/>
 - Mining Charter Consultative Review: <https://pmg.org.za/committee-meeting/26634/>
 - Mine Closure and Rehabilitation: Centre for Environmental Rights Briefing: <https://pmg.org.za/committee-meeting/25316/>
 - Social and Labour Plans: CALS briefing: <https://pmg.org.za/committee-meeting/23775/>
- South African Human Rights Commission, National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa, Sept 2016
- Wicomb W, The in-between World of Kgosi Nyalala Pilane: (Mis) Appropriation and Accountability among the Bakgatla-Ba-Kgafela in 21st Century South Africa, unpublished, 2020
- Xaba C, Complexities of Land Dispossession: Challenges of land Reform in South Africa with Particular Reference to KwaZulu-Natal, Land Tenure Summit, 2014

12.2 Legislation and policy

- Broad-Based Black Economic Empowerment Act 53 of 2003
- Codes of Good Practice under Section 9(1) of the Broad-Based Socio-Economic Empowerment Act, Government Gazette No. 36928, 11 October 2013 (on trusts)
- Guideline for Consultation with Communities and Interested and Affected Parties, as required in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the Mineral and Petroleum Resources Development Act, the Department of Mineral Resources, undated
- Implementation Guidelines for the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, Government Gazette No. 42122, 19 December 2018, Department of Mineral Resources
- Interim Protection of Informal Rights Act 31 of 1996
- KwaZulu-Natal Ingonyama Trust Act 3 of 1994
- Limpopo Traditional Leadership and Institutions Act 6 of 2005
- Mineral and Petroleum Resources Development Act 28 of 2002
- Mining Charter, 2018, Government Gazette No. 41714, 15 June 2018
- Native Trust and Land Act, 1936.
- North West Traditional Leaderships and Governance Act 2 of 2005
- Publication of Amendments to the Mineral and Petroleum Resources Development Regulations for Implementation, Government Gazette 43172, 27 March 2020
- State Land Lease and Disposal Policy, Department of Rural Development and Land Reform, 2013

- The Bantu Trust and Land Act 18 of 1936
- The National Housing Code, Rural Interventions, Communal Land Rights
- The People's Mining Charter, June 2016
- Traditional and Khoi-San Leadership Act 3 of 2019
- Traditional Leaders Governance Framework Act
- Trust Property Control Act 57 of 1998
- White Paper, A Minerals and Mining Policy for South Africa in October 1998 <http://www.dmr.gov.za/publications/summary/125-white-papers/335-white-paper-minerals-and-mining-policy-for-sa-1998.html>

12.3 Cases

- Alexkor LTD and Another v Richtersveld Community and Others (CCT 19/03 [2003] ZACC 18 (14 October 2003))
- Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC) (30 November 2010) <http://www.saflii.org/za/cases/ZACC/2010/26.html>
- Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018) <http://www.saflii.org/za/cases/ZAGPPHC/2018/829.html>
- Chamber of Mines of South Africa v Minister of Mineral Resources and Director-General, Department of Mineral Resources [case no.41661/2015]
- Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another (CCT265/17) [2018] ZACC 41; 2019 (1) BCLR 53 (CC); 2019 (2) SA 1 (CC) (25 October 2018) <http://www.saflii.org/za/cases/ZACC/2018/41.html>
- Pilane and Another v Pilane and Another (CCT 46/12) [2013] ZACC 3 (28 February 2013)
- Minerals Council South Africa v Minister of Mineral Resources and Another (20341/19) [2020] ZAGPJHC 171 (30 June 2020)

12.4 Interviews conducted

The following people were interviewed:

- Janine Espin, managing director of Economic Development Solutions, a company that offers development services and customised solutions to the renewable energy, mining, government, and corporate sectors
- Alan Fine, R&A Strategic Communications, ex Minerals Council
- Jacklyn Cock, SWOP, University of Witwatersrand
- Louis Snyman, CALS
- Robert Krause, CALS
- Louise du Plessis, attorney for Wilgerspruit community
- Michael Clements, acting director Lawyers for Human Rights
- Wilmien Wicomb, attorney Legal Resources Centre
- Johan Lorenzen, attorney Richard Spoor

- Eric Clarke, CEO of Sedibelo Platinum Mines
- Rudi Hillerman, KwaZulu-Natal land surveyor
- Janet Bellamy, attorney LARC
- Prof Elmien du Plessis, North-West University, expert on mining and land issues
- Hermien Botes, Anglo American
- Simon Ruthoane, COGTA, North West
- Tendani Nelwamondo, previously with the IDC
- Ajay Lalu, Black Lite Consulting
- Lindo Khuzwayo, Strategic Engagement Principal: Anglo American Platinum
- Tebogo Makhubedu, Anglo American Platinum

Community

- Donny Matshego, Wilgerspruit
- Elton Thobejane, chairperson of the MEJCON

ACKNOWLEDGEMENTS

Corruption Watch would like to give a special thanks to all the external stakeholders that took the time to contribute to our research.

A notable and special thanks to Jacob van Garderen and Erica Emdon, directors of Public Interest Practice and the lead researchers and authors of this research report.

Further thanks to Tafadzwa Linda Kuvheya of www.writecue.com who provided copy edits of this report.

Special thanks to all on the Corruption Watch team who contributed to the success of this report. A notable thanks to the Head of Communications Moira Campbell and her communications team for all their hard work, and the Head of Legal and Investigation Karam Singh, and Mashudu Masutha, the extractives projects legal researcher.

