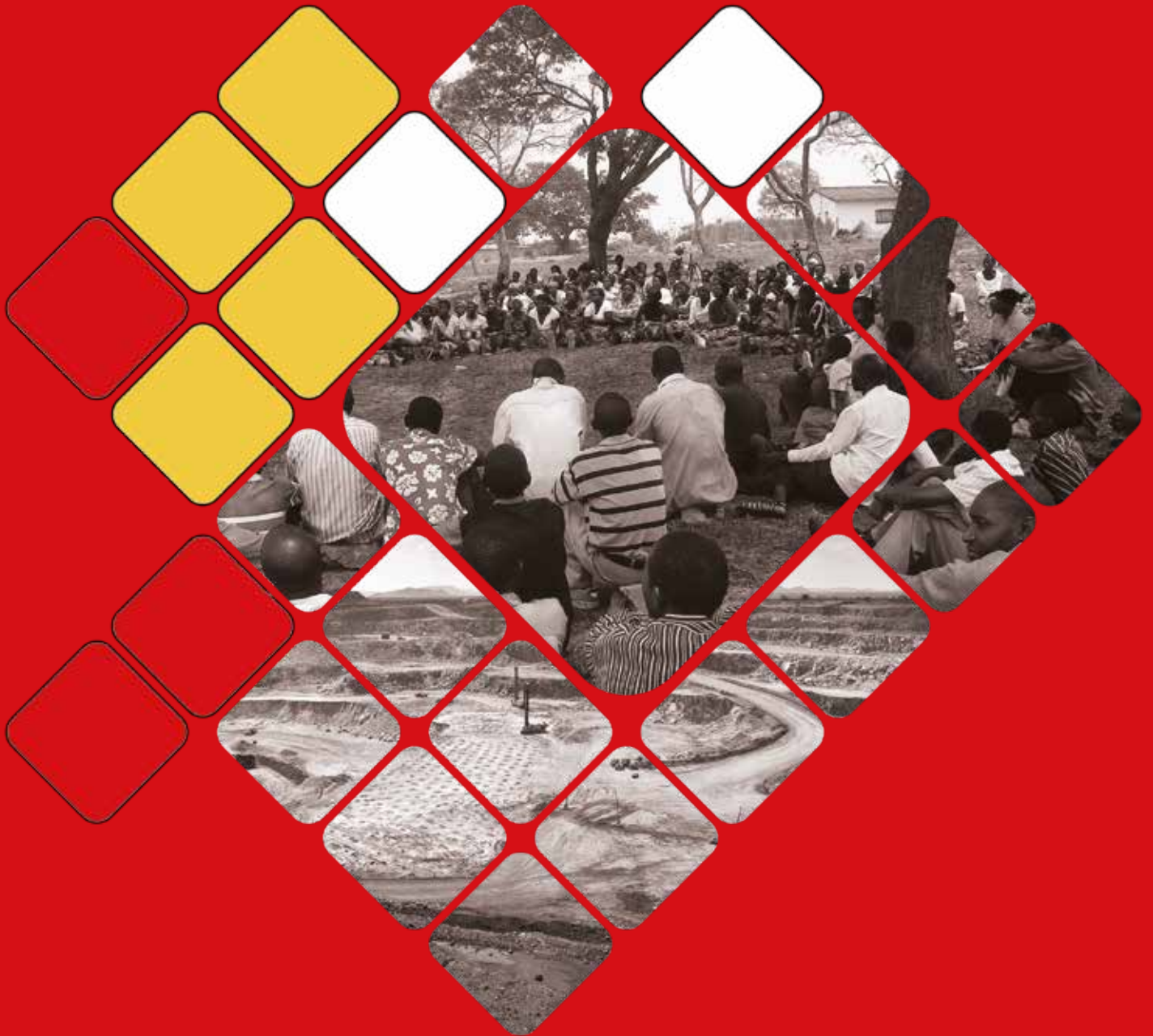


MINING ROYALTIES RESEARCH REPORT 2018



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INTRODUCTION

South Africa possesses enormous mineral riches. Consequently the country's mining sector has long been a source of both personal and national wealth, but also of controversy and pain, especially for those – mining-affected communities, for example – who are not part of the decision-making process.

As a country whose history and economy has been shaped largely by mining activities, South Africa has experienced both the good and the bad of this industry.

While mining has indisputably generated millions of jobs and contributed significantly to industrial development, it has also contributed to corruption, environmental harm and labour exploitation, while communities living on resource-rich land have been deprived of the benefits due to them.

This research report, funded by the Open Society Foundation (OSF) and undertaken over the course of a year by Corruption Watch (CW), aims to facilitate and improve transparency and accountability in the mining royalties system, with particular regard to monies that accrue to communities by virtue of having mining operations on community-owned land.

It explores and examines the evolution of South Africa's mining royalties system, while investigating how royalties are paid and how they are administered in specific mining-affected communities. In addition, the report analyses the main legislative and policy frameworks that exist to manage and administer the payment of community royalties, and establishes the veracity of the challenges experienced by communities in revenue management – this applies especially to traditional communities which also follow traditional laws and customs.

Our results and case studies, presented in

this report, detail some of the widespread abuse, corruption and unethical practices which have crept into the mining royalties system over the years.

Mining royalties paid to communities who own the land being mined are dispensed in one of two ways – either directly into a D-account or development account, or by the conversion of royalties into equity in the mining companies.

This report therefore focuses on two unique mining royalty systems; the former Lebowa Minerals Trust administration of monies in the traditional communities of Limpopo Province, and the management of D-accounts, or development accounts, for the traditional communities of the North West Province. It also discusses the growing trend of royalty to equity conversions across most traditional communities in South Africa.

Finally, after fitting more of the puzzle pieces together, we reveal a fuller picture as to why the royalties and benefit sharing system appears to be failing and most importantly, suggest interventions and reforms to pull back the system from a dysfunctional state.

Along with desktop research and expert interviews, the report includes community engagements and workshop group

meetings in parts of Limpopo and the North West provinces. In North West, CW focused on a number of the villages that make up the Setswana speaking Bakwena Ba Mogopa community that falls under the traditional authority and traditional rule of Kgosi Tebogo Motheo Mamogale and the royal family. The Bakwena ba Mogopa community – largely under the shadows of the neighbouring traditional communities of Bakgatla ba Kgafela, Bapo ba Mogale and Royal Bafokeng – enjoys incredible minerals wealth with platinum, vanadium and diamonds common extractives.

In Limpopo CW focused on the traditional mining-affected communities that surround some of the country's largest platinum mines. The Sepedi speaking communities include Magadimeng-Ntweng, Mampa Serole, Monametse/Mokgotho, Magobading Resettlement, Mokopane Platreef, and Ngwaabe Village. These communities house mining companies such as Bokoni Platinum Mine, Twickenham Platinum Mine and the Ivanhoe Mine; but the monies intended for their development and empowerment have not been realised.

Homing in on these communities allows a more granular picture to emerge about the realities and consequences of not being able to make the system of mining royalty pay-outs work. Some findings were plain to see for CW researchers, some probing ran into dead-ends; sometimes what was kept hidden or deliberately omitted became the telling of where and how corruption and a system of abuse and blame, with or without substantiation, is taking hold.

It has to be acknowledged that the challenges inherent in the mining royalties system are socio-historical and political in



their structural framing. At the same time they speak to greed, competition for a finite financial resource, deliberate exploitation, mismanagement of funds and resources, poor administrative oversight and a lack of will, accountability and commitment on various levels to repair and transform the pay-out of mining royalties.

This report concludes with recommendations and a call to action for government, mining companies, traditional authorities, consultants and the community themselves to act responsibly and to work to close loopholes for corruption and demand greater transparency, clarity and accountability. There is also scope for collaboration between civil society and activist groups to raise awareness and to empower community members themselves to hold each other and their traditional councils and leaders to account.

CW believes that this report only touches on the surface of deep problems that have long fermented in the mining industry. The organisation believes that while this report focuses on specific communities, corruption involving mining royalties is widespread and replicated throughout the country.



OVERVIEW

RELEVANT MINING LEGISLATION AND POLICY FRAMEWORKS

From its exponential growth in the 20th century, and its 21% contribution to GDP and employment peak in the 1970s and 80s¹, to today's far smaller contribution of 8% and a reduced workforce, the realities of the mining industry affect hundreds of thousands of mining employees and their dependants.

In South Africa, it is held at common law that 'the owner of the surface of the land is the owner of the whole land and the minerals underneath it'.² However, the law developed such that mineral rights ownership can be separated from the land and held under separate title.

Bilateral rights represent a parcel of rights including the rights to prospect and mine together with ancillary rights to do what is reasonably necessary in order to effectively carry on prospecting or mining operations.

MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT

Mining involves a complicated nexus of mineral rights, land rights and community governance structures. It is therefore vital to have strong legislation in place to regulate the industry.

Since 1994, mining policies in South Africa have been designed to benefit all South Africans. They have been embodied in the Mineral and Petroleum Resources Development Act No 28 of 2002 (MPRDA), which came into force in May 2004, and provides the regulatory framework for South Africa's mining and minerals industry.

The aim of the MPRDA is to redress past racial discrimination in respect of access to the mining industry, by calling for "provision for equitable access to and sustainable development of the nation's mineral and petroleum resources". It centres on mineral rights reverting to the State.

In addition, the Act makes provision for surface lease agreements between mines and mining communities. This usually takes the form of payment to owners or communities who are settled on the land.

The MPRDA requires the State to undertake to

transform the racial structure of mine ownership through preferential allocation of 'new order mining rights' to historically disadvantaged South Africans (HDSAs) and companies. This is in addition to requiring historically white-dominated mining houses to meet the existing target of a 26% BEE component set by the Mining Charter.

This shareholding target set in motion royalty agreements in the form of equity sharing, in addition to the MPRDA provision of royalties in the form of surface lease agreements. However, the MPRDA set out to limit royalty payments through D-accounts to improve the administration of these pay-outs.

The MPRDA recognises two forms of royalties: "State royalties" as the revenue share payable to the government and "contractual royalties" as a payment agreed to between mining companies and the owners of the land for the mining and production operation.

The MPRDA also provides for the State to have the powers to force a mineral rights holder to abandon development projects if the State is of the opinion that the project is not producing at the most efficient levels or is a threat to environmental sustainability or community health.



SOUTH AFRICAN MINING CHARTER

Under the South African Mining Charter of 2004 (Charter), companies are required to divest a portion of their investments to HDSAs, as a condition of the conversion of old-order mining rights to new-order mining rights.

In the Charter, mining company ownership targets for HDSAs are set at 15% during the first five years and 26% in 10 years. A special case was made for state-owned rights where no mining or prospecting operations had previously been conducted.

The focus of the Charter is on sustainable transformation of the mining industry. It seeks to achieve the following objectives:

- a) To promote equitable access to the nation's mineral resources to all the people of South Africa;
- b) To substantially and meaningfully expand opportunities for HDSAs to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources;
- c) To utilise and expand the existing skills base for the empowerment of HDSAs and to serve the community;
- d) To promote employment and advance the social and economic welfare of mine communities and major labour sending areas;
- e) To promote beneficiation of South Africa's mineral commodities; and
- f) To promote sustainable development and growth of the mining industry.

The legislation provides for mining of mineral rights and surface rights. A mining right is a new order right issued by MPRDA, valid for 30 years, with the possibility of extension periods.

The Department of Mineral Resources (DMR) retains oversight.

Importantly, these rights stipulate a prescribed social and labour plan focused

on employment of HDSAs and on economic growth and development.

With surface rights, a landowner retains the ultimate surface rights, but not the minerals ownership. Rights to prospect and mine are granted by the State. The owner of the land has to be consulted, following specific guidelines set out by the DMR, and the owner is entitled to compensation for losses and damages suffered or likely to be suffered as result of the proposed prospecting operation.

The 2018 iteration of the Mining Charter was gazetted in the middle of September 2018; it provides that the companies applying for new mining rights must have a 30% black shareholding, of which 5% should be held by a community trust.

This revised Charter has come under fire from the likes of Mining Affected Communities United in Action (MACUA), a body said to represent over 200 communities across the country's nine provinces. They have called the consultation processes with the DMR a farce and also outlined shortcomings in the Charter that don't allow communities to determine how benefits and development projects will be carried out.

Corruption Watch has monitored the development of the Mining Charter and has made submissions to the Mining Charter 2018. The key concerns are on limiting harm to vulnerable mining communities, ensuring that benefits reach the communities, and that mining licence application processes, payments of taxes, royalties, social and labour plans and environmental rehabilitation are transparent, effective and meet best practice guidelines.

In addition, CW supports amendments that simplify measures of accountability and creates legislative mechanisms for effective monitoring and transparency. It is also essential that new platforms for meaningful participation and consultation are created to make the sector more inclusive and supportive of transformation.



NORTH WEST TRADITIONAL LEADERSHIP AND GOVERNANCE ACT

Each province has its own provincial law relating to traditional leadership and governance. For the purposes of this report we will focus on the North West Traditional Leadership and Governance Act (NWTLGA). The North West province has for many decades been the source of great mineral riches for mining companies all over the world. Although pre-1994 the province was a 'country' under the Bophuthatswana administration governed by the bantustan legal framework,³ it is during this homeland period that the current D-account management and administrative framework of mining royalties was built.

The NWTLGA enables provincial government and the premier to have oversight of the management of traditional councils and the recognition of the royal family and the kgosi/kgosanna. The provincial government has significant discretion during the normal course of paying out mining royalties to the communities.

The act requires the premier and provincial government to ensure that transparency and accountability takes place in the administration of community funds and benefits through utilising legislated monitoring and enforcement powers.

NATIONAL ENVIRONMENTAL MANAGEMENT ACT (NEMA)

This act states that sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions, to ensure that development serves present and future generations.

NEMA also sets out the process for public participation to provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment.

TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT

This act was developed to provide a national framework for the definition of "the place and role of traditional leadership within the new system of democratic governance".

Under Section 20 of the act, chiefs and traditional councils administer and control communal land, economic development and natural resources, among other things.

Outcomes from the act include the recognition of "tribes" and "tribal authorities" created before 1994 as current-day "traditional communities" and "traditional councils", provided they comply with new composition requirements.

The DMR has produced a document titled *Guideline for Consultation with Communities and Interested and Affected Parties* ⁴.

It forms part of the requirements of the act and is intended to be a best practice guideline for community consultation. It sets out notification methods and timeframes for the applicant to meet with affected stakeholders.

Minutes of such meetings must be taken and a consultation report that clearly identifies the person who compiled the report must be produced for the regional manager.

The guideline document, however, is not without its shortcomings and has not been able to curb the abuse of power by traditional leaders or to improve the quality of meaningful consultation with affected communities.

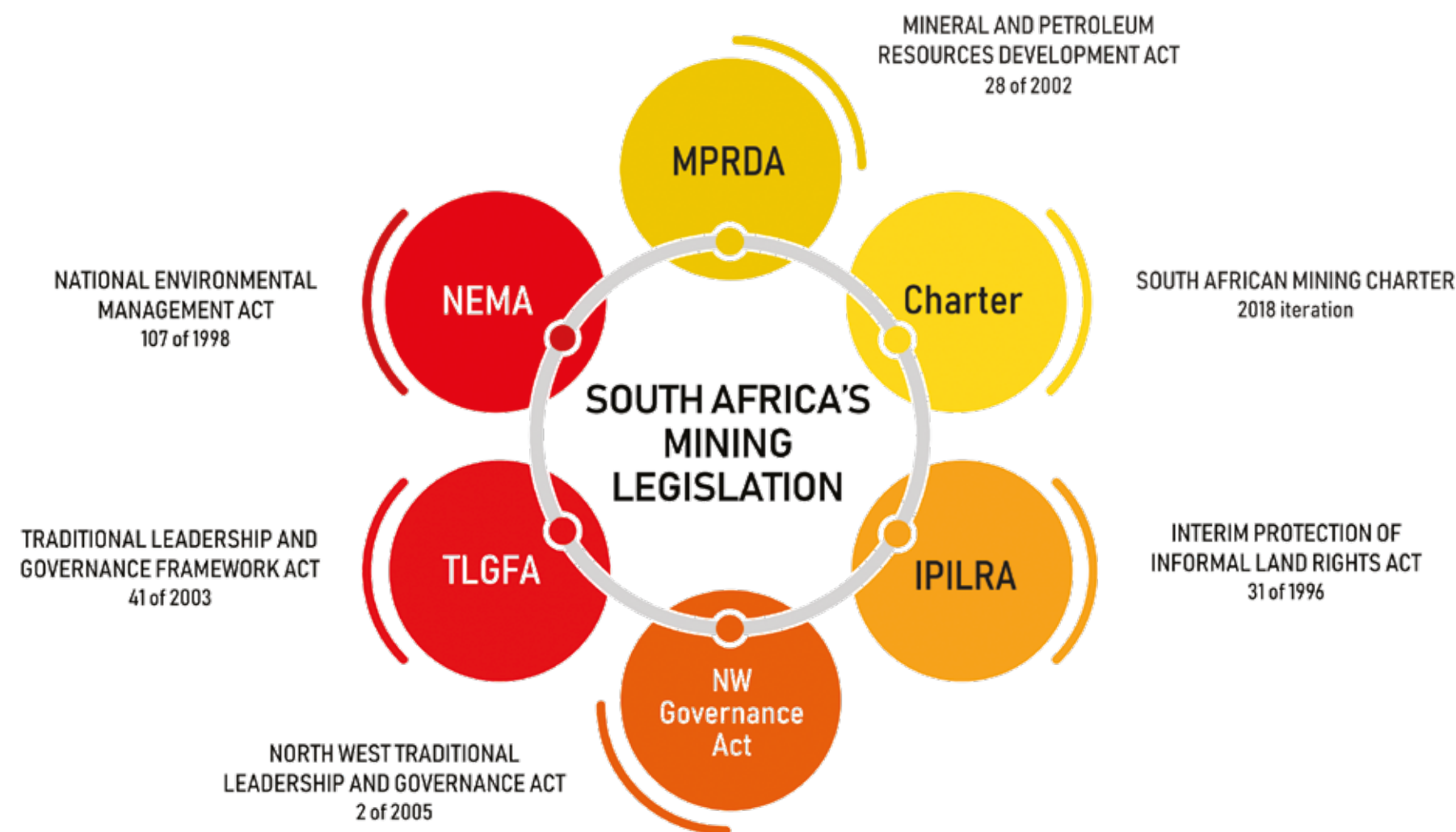
INTERIM PROTECTION OF INFORMAL LAND RIGHTS ACT

Under the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), no disposal or development that involves a deprivation of a land use right can take place without taking into account local custom and usage.

It also stipulates that any disposal must also involve a multi-stakeholder decision-making process with the State that must include community participation using the Free, Prior and Informed Consent (FPIC) guidelines.

For years it was held that IPILRA is overridden by the MPRDA, making it possible for mining to proceed without community consent, while State regulation of the negotiation process and assistance in dispute resolution is not required.

However the recent landmark Xolobeni judgment held that the "IPILRA *must* be read with the MPRDA",⁵ emphasising that community consent is a prerequisite to mineral right ownership.



THE COMMUNITIES, THE CASUALTIES

It is against the historical and legislative backdrop that, following whistleblower reports from community members, Corruption Watch has probed deeper into the effects of a flawed mining royalties system in communities in the North West and Limpopo provinces.

It is clear the pay-out of mining royalties has become distorted, unequal, and open to abuse and misuse. South Africa's mineral wealth should be a properly managed resource that offers opportunity for more people to better their lives while leaving a small footprint on the environment and stimulating sustainable economic growth beyond the life of a mine – it has fallen far from the mark.

Limpopo province. Image from Wikipedia.



LIMPOPO

Corruption Watch's Limpopo investigation took place over three months at the end of 2017. Along with desktop research, it also included engagements with the community, lawyers, NGOs, research centres, and lobby groups and activists committed to fighting for the rights of mining affected communities. Several local and provincial meetings and discussion workshops were also held during this period.

In Limpopo, the engagements centred on several different communities with five meetings held. There was engagement with representatives from the communities affected by the Bokoni Platinum Mine, Twickenham Platinum Mine and the Ivanhoe Mine as well as with a collective identified as the Ngwaabe Joint Community Forum and a group formed to challenge what they perceive to be collusion between traditional authorities and mining companies.

Corruption Watch worked with representatives of mining rights activist groups including MACUA, LAMOSA and MEJCON-SA to identify the communities that made up case studies in this area.

The Limpopo area is rich in platinum group metals. Before 1994, parts of these reserves fell into the Lebowa bantustan. Access to this giant resource base has since the apartheid era been in the hands of Anglo Platinum. Under a bantustan law (the Lebowa Minerals Trust Act 9 of 1987), the company had rights to 80% of the known platinum rights and mineral ownership.

Under the democratic dispensation a new act was passed, which saw the transfer of minerals rights held by the Lebowa government to a new structure called the Lebowa Minerals Trust (LMT). The LMT was defined as a corporate body possessing

mineral-rich property with authority to grant mineral rights to third parties to prospect and mine and to receive revenue from such operations.

In 2000, the LMT reportedly controlled 1 500 title deeds to mineral-rich farms. The total value of these assets was estimated to be in the region of R280 – R300-million, with the LMT receiving close to R20-million a year.

Through the LMT, Anglo Platinum was able to negotiate deals with the chiefs and minister who constituted Lebowa's bantustan elite. The deals allowed Anglo Platinum to essentially monopolise the entire eastern limb of the mineral-rich province.

Legal challenges through the 1990s and early 2000s concluded with Anglo Platinum relinquishing their previous LMT rights to the DMR, in exchange for security of tenure on existing mines, and a selected number of high potential deposits. Government also approved Anglo Platinum's application for six mining authorisations on condition they establish a 50/50 joint venture partnership with broad-based black empowerment consortiums in two of their projects in Ga-Phasha and Booyensdal.

The community engagements in this area were marked by a deep level of tension and threatening action and behaviour among community members. Many were frightened to go on record to speak about what they consider collusion between traditional authorities and mining companies. There was a general reluctance to take part in the research and a degree of hostility directed at researchers. Community members said they were frustrated and tired of taking part in forums and engagements with little benefit to them or little prospect of changing their current situation.

Researchers also noted an absence of documentation or financial records even when these were explicitly requested. Representatives from the focus group would agree and commit to producing financial paper trails but nothing would be forthcoming.

The communities here have established community trusts and Section 21 companies

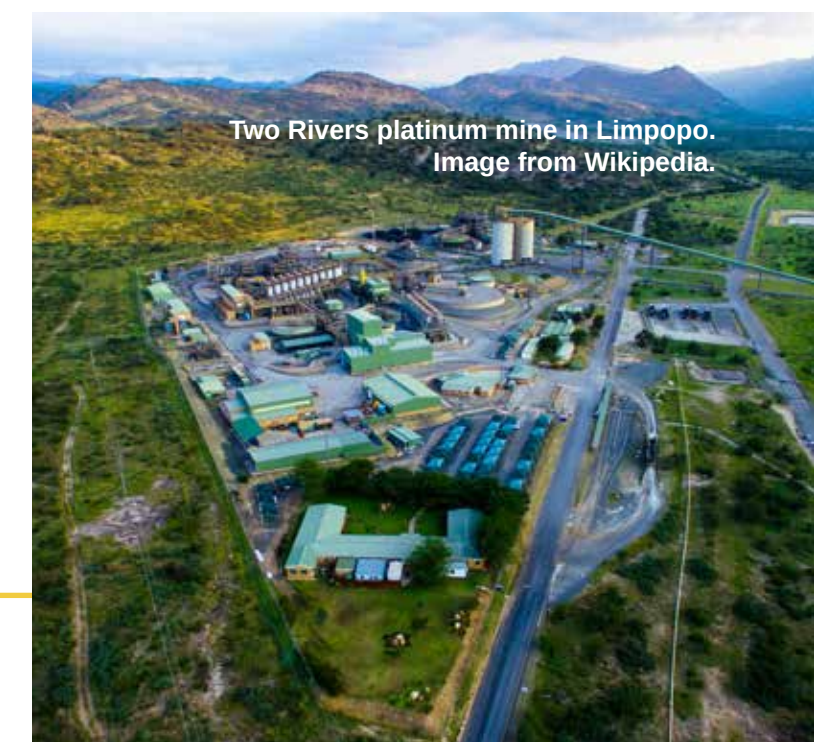
through which their royalty pay-outs are supposed to be made and can be managed by community consensus. They complain that these are poorly structured and that benefits do not filter down to them. There is centralised governance of the trusts and this, the community says, means that some communities simply fall through the administrative cracks.

Some community members also raised their concerns about blasting on the mines taking place without proper notice. It is potentially life-threatening and has left damage to their homes, yet they have no recourse to claim or complain. They also say they have to deal with pollution of water sources and air pollution that has led to death of livestock and loss of grazing and arable land.

There is widespread lack of accountability and effective community consultation. There are accusations from the communities of fraud, corruption, and misappropriation of funds and community assets by the leaders of traditional authorities and trustees.

SLPs are poorly implemented and communities complained that there were few procurement opportunities for local entrepreneurs, biased recruitment and little being done to build up a local skills base.

There also appears to be a total breakdown of trust between communities and the mining companies that operate on their land. It means that they keep on circling around the same issues without much changing.



Two Rivers platinum mine in Limpopo. Image from Wikipedia.

LIMPOPO COMMUNITY ENGAGEMENTS

BOKONI PLATINUM MINE COMMUNITIES

- The community welcomed engagement and the opportunity to address the issues that the community trust faces.
- A trust was established to undertake, fund and maintain community development activities for the benefit of the communities. However, the trust deed has not been made available to the community, making it difficult to confirm details of the provisions of the trust.
- Community members claim that their community trust account is worth R24-million in contributions from Bokoni Platinum Mine and is controlled by traditional leaders who, they say, fight among themselves. Corruption Watch requested that financial statements and other information relating to deals signed by the traditional leaders be made available but the traditional leaders have not been forthcoming.
- It is clear that little development has taken place in this community. The roads are in a bad condition, there are challenges in accessing clean drinking water, there is a lack of skills development and little food production. It raises questions about where and how the monies from royalties have been spent.
- The Monametsi community agreed to relocate to allow for the expansion of the Bokoni Platinum Mine in exchange for compensation and alternative housing. They say their new houses began to crack almost immediately from when they took occupation. Their case has been taken up by Richard Spoor Attorneys.

MAMPA SEROLE 'TRADITIONAL COMMUNITY

- There is a deep tension in this community, which the representatives at this meeting said was as a result of businessmen and politicians looking to benefit from the Sefatong Chrome mining operations, despite what they say is an illegally operated mine with which the community does not have a valid agreement.
- The mining takes place on the Mampa Serole traditional authorities' land as well as the neighbouring lands that belong to the Ga-Phasha traditional authority. Currently this community does not have a leader as their *kgosi* died in 2016. The subsequent fight for his position and title has resulted in the communities being blocked from accessing funds in their community trust accounts.
- The community members say the person that the mines have appointed to their board of directors to act on behalf of the communities has only acted to benefit himself and not the community. This has resulted in on-going protests in the area demanding his resignation.



'TWICKENHAM MINE COMMUNITIES

- The distrust in this community runs so deep that those who attended the Corruption Watch meeting refused to sign the attendance register. They felt that as they had attended numerous meetings before without resolution they were not prepared to sign.
- The traditional council here is made up of 11 members who are all men; most are pensioners and only three are literate. Those who were present are part of a faction that does not support the current traditional leader, the queen mother.
- There is deep distrust and division within this community with the traditional council split into two factions, trading accusations of misappropriation of funds, irregularities in lease payments from mining companies, and solicitation of bribes.
- The acting senior traditional leader of the Magadimane-Ntweng traditional council, Diphala Asnath Ntwampe, was implicated in a Chromex Mining Company report as asking the company to buy her a house and car. They settled on paying for the Ntwampe children's school fees.
- There are also on-going legal challenges and routine violent protests over the rightful successor to the head of the traditional council, despite a provincial government intervention declaring Ntwampe the recognised leader of the council.
- The community have concerns of mines operating too closely to their homes, causing damage and disruptions to their daily lives. There is air and noise pollution.
- They say the mines do not consult or communicate with them and they believe they are flouting their SLP and other environmental regulations.
- The various communities' royalty agreements with the three major mines allow for withdrawals of up to R10 000 to the trust; an annual payment of R1.2-million and a R50 000 per month payment. Ntwampe has oversight over all three payment agreements.



North West province. Image from Wikipedia.



THE NORTH WEST

The North West province is known as South Africa's Platinum Belt and boasts the largest share of the world's richest platinum reserves. In geological terms it falls into the Bushveld Igneous Complex, which comprises the Rustenburg Layered Suite, the Lebowa Granites and the Rooiberg Felsics.

Mining makes up a third of the province's GDP and beyond its platinum resources, it's also mined for diamonds, vanadium, and chrome among other precious metals. In addition to the vast amounts of quarries and sand resources in the area, the North West is truly an incredible source of mineral wealth.

This is the home of the Bakwena ba Mogopa community who are settled in about 20 villages dotted throughout the province, largely because of forced removals and displacement of communities. The administration of this community lies with the traditional council and royal king/ chief or queen. Currently the community recognises Kgosi Motheo Mamogale as

their leader, but various factions routinely dispute this.

The community's lands are rich in platinum, vanadium, diamonds, coal and granite, and it has experienced active mining on its land for generations. It is entitled by law to legally defined community benefits from mining companies and mining right holders operating on community owned land.

However, the community has faced enormous challenges relating to misappropriation of community funds and royalties due to them. Community members have no knowledge of how much money is in their D-account, which was last audited in 1992. They also complain that they have not been consulted on various equity conversion agreements with mining companies and do not even know which companies they hold equity in.

It has meant that their communities are marked by poor infrastructure development and little opportunity for employment or job creation.

Corruption Watch, as part of its engagement process in the province, held a series of

town hall meetings with community members in Bethanie, Jericho, Hebron, Makolokwe, Pachsdraai and Ventersdorp.

At Bethanie, a community from Uitvalgrond approached CW with their concerns and provided our researchers with documentation tracking the problems they've faced in receiving their royalty pay-outs.

These communities are all part of the Bakwena ba Mogopa.

A deeper look into the realities of two of the Bakwena ba Mogopa communities of Uitvalgrond and Ventersdorp follows on pages 16 to 21. These case studies highlight the complexities and very real consequences of mining royalty benefit schemes' impacts on communities.

A mining excavator. Image from Pixabay.



UITVALGROND

There is a long timeline of events that the Uitvalgrond community remembers all too well. It is a chronology of bad news that has followed them for generations.

The community members here are made up of 83 households of the original title deed holders who bought land here in the late 1800s and early 1900s. By the 1960s, their fortunes would change radically when government representatives are said to have come knocking, proposing deals that would let them mine community farms in exchange for compensation and profit sharing.

Many different mining companies have come and gone over the years and many different deals have been struck by the community in this time. They have emerged as losers each time.

Over the decades, the community has at different times tried to get civil society, the media and authorities to intervene. Corruption Watch is one of the organisations some members reached out to, and we have monitored their case closely over the last few years.



In particular, CW researchers heard about a deal signed between the Uitvalgrond community and the mining company Vametco in April 1992. This was one year after the community had set up its first community committee and employed auditors and lawyers to open bank accounts and to provide legal advice.

Eighteen months after the conclusion of the agreement, Vametco paid R5.5-million in mining royalties to the landowners of Uitvalgrond. Another R4.8-million was also meant to be paid to the community, but there is no trace of this payment having been made.

The community has tried to understand what happened to these funds and other payments over the years and still today have few answers. Huge bills to forensic auditors and lawyers have mounted up and there's still simmering tension and distrust in the community and little faith that authorities or civil society organisations can help.

CW reached out to Vametco for clarification, and received a detailed response, via its lawyers, setting out the timeline of payment of royalties to the community, as well as the amounts. Between 1992 and 2013 Vametco paid almost R155-million. Between June 2016 and December 2018, the company has additionally paid just over R24-million.

However, researchers heard from Uitvalgrond members how a R500 000 contract was paid to a private forensic auditing firm meant to follow the money trail of royalties, detailing exactly what Vametco had paid, who got to access the money and what they did with the money. The forensic firm was also expected to produce bank records to detail savings and investments with a view to rooting out maladministration and mismanagement and identifying the culprits implicated in scamming from the mining royalties scheme.

The community say they paid the forensic investigators but never received any reports in return. At that time – in 2001 – it caused clear divisions in the community and led to tensions that ended with government stepping in to intervene. Ultimately a new committee was elected, which caused further outrage and tension.

The community says 2001 was also the last time they received royalties from Vametco. Even now, members say they are unable to see what withdrawals were being made from their D-account, despite the help of their auditors, PricewaterhouseCoopers.

It took a subsequent court case to remove both warring interim committees. In January 2003, Vametco also announced that it would not pay royalties into the D-accounts but would instead be paying into the individual accounts of the 83 families that make up the Uitvalgrond community.

But more court cases would ensue, with Vametco then insisting that monies, if paid, would be paid into accounts overseen by members of an appointed joint committee of the two opposing committees.

It has resulted in the community remaining in limbo. It has also been established that since 2001 they have had no valid mining agreement in place with Vametco, and they also no longer have a committee representing them.

They have also been seemingly ill-advised, with many so-called consultants accepting the scope of work and the payment, but under-delivering.

Vametco informed CW that it does have a confirmed surface lease agreement with the community, which was finalised in December 2017, and since then it has discharged all its duties in terms of that agreement.

It also has a valid new order (NO) mining right which it obtained in 2013 under the terms of the MPRDA. The company told

CW that it has “concluded all necessary lawful agreements and is in possession of a valid NO mining right which authorises it to conduct its mining activities on the property.”

Between 2004 and 2014 the Uitvalgrond co-owners battled to have a constructive relationship with Vametco largely because the community could not speak with one voice. There is still no consensus among the community as to who sits on their executive committee. The ownership of the Uitvalgrond land remains contested.

Many parties were arriving at Vametco's offices, all claiming to be legitimate representatives of the Uitvalgrond community.

This led to a series of meetings among all stakeholders and, from that year until the present time, a series of court disputes that have not been resolved. The court requested a process of identifying the rightful owners to the land that has taken almost two years to complete.

Some of the court cases have been withdrawn while others have been dismissed with the instruction that the community must finally decide among themselves who they as a collective will elect and recognise as their representatives.

At the time of writing this report the community insiders confirmed that there is still no resolution to this matter. The community is still left writing letters and filing reports to everyone from Parliament and ministers, to the police and civil society groups like Corruption Watch.

All these years later they're still waiting for something to change for the better.



A RIGHT ROYAL TRAGEDY – A FAMILY'S STORY

When Samuel Mogase made an investment in the farm Uitvalgrond outside of Brits in 1894 he was buying a piece of land. He was also buying hope for his future.

Mogase was part of the Bakwena ba Mogopa community that had worked as labourers on farms in the Free State area for years.⁶ In the late 1800s and early 1900s they managed to pool together their savings to buy their own piece of land, Uitvalgrond 431 J Q, farm portion 1, in the North West province. These settlements fell under the authority of the 82 families living on Uitvalgrond, and that of their senior headman.

SAHA (the South African History Archive) points out that in the early 1900s, “This indigenous polity was organised along communal lines and headmen represented their family lines, or kgoros. There was not an overall chief in Mogopa, but rather a senior headman, as the paramount chief of the Bakwena people was in an area near Brits”.²

For Mogase and 82 other families, becoming landowners was something of a small victory in a time when black people were dispossessed of land and spatial segregation was long entrenched even before the coming of the Land Act of 1913.

With the purchase, Mogase had something he could call his own. He could leave his title deed to his children and hopefully, with it, change their fortunes. This is how the land passed to his son Simon Mogase in 1910.

Today Simon Mogase's daughter Elizabeth Rakgantsho owns the land. The 75-year-old grandmother tells Corruption Watch how the title deed has come to mean more heartache than hope.

It started when the piece of paper stopped being about the above ground value but rather about the mineral resources beneath her feet, and the ensuing scramble to get maximum profits from extraction with little regard for the environment or the families who lived on the land.

Rakgantsho has seen the community rip at each other trying to get to the trough of promised plenty.

But she's lived long enough now to see how little mining has actually benefited her family and neighbours. Her daughters are married and do not live in the Uitvalgrond area anymore, neither do her grandchildren – because there are no opportunities for them here.

“I want the government to come here to close this mine so we can start over,” Rakgantsho says.

‘Starting over’ is about undoing bad deal-making and the compensation pay-outs as they've been structured from as far back as 1946, she says. That is the year, Rakgantsho remembers, a government mining representative first came knocking on the community's door. The promises then were of jobs, infrastructure, and universal prosperity. They would come again in 1962 and the government of the day struck a deal to mine in Uitvalgrond until 1986.

In 1992, miners again approached the community. Rakgantsho says that since then the mining companies have changed and even the government officials and politicians have changed but there is no legal agreement in place that she knows of to protect and benefit the community.

Worse still, self-appointed community leaders speak on behalf of the families without permission. Rakgantsho is angered and frustrated that every few years new deals take place which she says are illegitimate.

These deals are struck whether community members like Rakgantsho like it or not – their consent seems to matter very little. For those who sign on behalf of the community, the deals always look too good to pass up. Each time the Uitvalgrond community says yes, they take a sip from the poisoned chalice.

The story of the Uitvalgrond community represents one of dozens of similar stories told over and over in the North West and Limpopo provinces where Corruption Watch conducted engagements and research for this report.

“The title deed has come to mean more heartache than hope.”

Photos of the Uitvalgrond community sourced from their website.

VENTERSDORP

Apartheid's dark story has played out in this community for many years. But since the dawn of democracy, the community has shown how decentralised decision-making may hold some answers to fixing the broken system of mining royalty pay-outs.

The community living in this area of the North West is also part of the Bakwena ba Mogopa people. They have lived and farmed here since the early 1900s.

In 1984, the community was forcibly removed and made to relocate 200km from their homes to an area called Pachsdraai. Once they were gone the apartheid authorities tore down their schools, churches and windmills. The forced removal split the community, with one group determined to return and the other prepared to try to pick up the pieces and restart their lives in Pachsdraai.

In 1989, some members did make it back to Ventersdorp but all they had were their ancestral graves. They had to make do with no services and lived in tin houses and shacks because their home had been reduced to rubble by then.

In 1996, another significant rift would occur as some in the community decided to separate from the tribal authority of the Bakwena ba Mogopa royal family and the paramount chief. Prior to this decision, mining operations were already taking place on their farms. Under the democratic dispensation, it meant they could mount legal challenges to regain ownership and subsequently won the title deeds of their properties. This also opened the way for mining royalties to be paid to them.

The Ventersdorp community set up their own administrative and governance structures in 1996. They registered a trust that they called

the Bakwena Ba Mogopa Trust with the aim of developing the two farms, Zwartrand 1451P and Hartebeeslaagte 1461P, for the benefit of the community. They would govern their affairs through a trust deed and their own constitution.

Opting out of the tribal authority does mean the community has the same legal status as that of the tribal authority and is bound by the same legal provisions.

The two farms are rich in diamond deposits. Consequently the trust has entered into numerous mining deals with various companies over the years. The trust also established a business arm called Mogopa Minerals (Pty) Ltd to handle these business affairs.

Corruption Watch found that Mogopa Minerals, acting on behalf of the community, has been successful in negotiating deals that makes the community a 26% equity partner in a deal with Blue Gum Diamonds (Pty) Ltd.

The trust consists of nine democratically elected community members, with each serving a four-year term. They hold annual general meetings and convene community meetings every three months – there is a quorum of at least 75 community members representing no fewer than 50 residential sites. According to their constitution, the executive committee must produce interim financial statements at these meetings.

The trust is far from perfect in that community members still complain about not enough transparency and communication from trustees. In particular community members disagreed with the processes of how trustees are nominated and elected.

In addition, the community criticise a loan that the business arm raised from the IDC for R26-million in order to hold equity in one of the mines that they had dealings with, linked to the Blue Gum project, a lucrative diamond development project on the rich Nooigedacht property. This property as well as the two Ventersdorp community owned farms fall into the area also known as the 'Ventersdorp Diamond District'. The Blue Gum project was aimed at having a consortium of diamond mines jointly operating on the property.

As interest on the loan mounts, the Ventersdorp community is concerned that it was a poorly advised move to acquire the loan in the first place as Mogopa Minerals (Pty) Ltd would have automatically qualified for equity as the 26% BEE component of business. As the IDC holds the equity as collateral it places the community in a vulnerable position.

However, the trust has shown that it has kept its administrative records up to date and has looked to develop initiatives to benefit the community, including seven co-operatives that were set up in 2016. In trying to set up these co-operatives, the trustees engaged with the Department of Trade and Industry. Unfortunately, this initiative did not take off, but they did show a willingness to explore opportunities and to try new ventures for community benefit.



NORTH WEST COMMUNITY ENGAGEMENTS

BETHANIE

- The two biggest mining companies here are Glencore Rhovan and Implats/Afplats, along with several smaller granite mines.
- The relationship with Glencore has broken down, with the result that payments into the two D-accounts are being withheld. According to Glencore this is because of divisions within the community that has made it difficult to know who are legitimate/ elected representatives or the recognised traditional council of the community.
- The community say the withheld monies amount to R30-million.
- The community say they have a good relationship with Impala Platinum mine and attribute this to implementation of a successful social labour plan (SLP).
- Both Impala Platinum and Glencore have converted D-account payments into equity sharing agreements under which royalty payments are channelled to the Bakwena ba Mogopa Community Trust.
- Traditional council staff members say their salaries have not been paid and blame this on maladministration of mining royalties.
- The general feeling in Bethanie is that community members have no faith in the traditional council, royal family and provincial government.
- The community says they have not been able to access information from the DMR. They feel authorities have ignored their pressing concerns, especially those regarding environmental degradation that is impacting on their health, safety and general wellbeing.
- Members of the community distrust each other.

PACHSDRAAI

- The community of Pachedraai were victims of forced removals during the apartheid era and are geographically secluded, being furthest away from the other Bakwena ba Mogopa villages.
- Prospectors are active in this area and the community believe they exploit their mineral exploration rights to mine outright.
- The community believe they are being deliberately kept in the dark about what minerals lay beneath their feet and what mining companies are doing. Royalties payments to this community are particularly complicated because those royalties are as a result of operations about 200km away in Ventersdorp – the area they were forcibly removed from during apartheid. The community members who resettled in Ventersdorp opted out of the Bakwena ba Mogopa traditional authority. The remaining royalties they should receive come from the D-account that is held by the Bakwena ba Mogopa administration. (See details in community engagement on Ventersdorp)
- The community is divided over the 60/40 representation percentage split in how their traditional council is made up. Currently the royal house makes up 60% of the council and 40% is elected from the community. It adds to the suspicion and accusations of corruption and maladministration of royalties by the leaders who have the majority representation.



JERICO

- The Afplats Leeuwkop Project and Glencore Rhovan operations were discussed but there was clear reluctance from the community members that had gathered for the meeting to engage. They felt uncomfortable speaking freely in the presence of the senior member of the royal family.
- Some of the community members are mineworkers and revealed that they have had no assistance from their unions in addressing issues that they, as a community, suffer in getting to the bottom of the corrupt dealings that are adding to the failures in the system of mining royalties paid to communities.
- The community is frustrated that there is no available accurate information about the financial state of affairs of the entire Bakwena ba Mogopa community.
- The community is divided and suspicious of each other. Different factions back different role players, while blaming others for what appears to be maladministration that has collapsed the system of mining royalties.



MAKOLOKWE

- Many community members here are employed at the mines in the area.
- The community has reported their allegations of corruption and maladministration against the *kgosi*, traditional council members and some community members to the local police. They feel that their concerns have not been taken seriously and they have few answers, recourse or resolution.
- Corruption Watch's scheduled engagement with the community was unexpectedly cancelled. The reason was that the necessary permission for use of the community hall had not been granted by the *kgosanna* and heads of the clan, despite the fact that the CW meeting had been arranged way beforehand through a member of the traditional council. This speaks to huge division and deep distrust among community members.
- Corruption Watch managed to speak to some members of the royal family. They expressed the desire to remove the *kgosi*, singling him out as the root cause of the overall maladministration and misappropriation of community funds.

HEBRON

- There are several mining operations in the area in addition to granite mines and sand mines.
- The community here is deeply divided. One faction advocates for the *kgosi* or chief to oversee all matters in the community. They believe that its traditional council is corrupt and is causing the maladministration of mining royalties. The community question the election process that was followed in forming the council that, despite opposition and outcry, was gazetted as the recognised authority.
- A second faction advocates for the traditional council to have full administrative powers and calls for the removal of the *kgosi* as well as some of his family members (who make up about 60% of the council). Even members within the royal family (the paternal aunts of the *kgosi*, called the *rakgadi*) are calling for the *kgosi* to be removed. They say he is the main conspirator in alleged corruption.
- The community is receptive to solutions proposed by Corruption Watch, but the huge divides within the community remain a significant stumbling block.

FINDINGS and RECOMMENDATIONS

A terrible web of multiple failings and a full cast of culprits and casualties sum up much of what the Corruption Watch teams found when examining the system of mining royalties in the affected communities.

To begin with, the arguably weak legal framework that has been outlined in this report is disconnected from the realities of divided and tense communities – despite the fact that in more recent iterations it has been designed to provide for rightful compensation to and stimulate sustainable economic development in affected communities.

This undesirable situation makes the ideals and management of royalty pay-outs a sham.

Furthermore, there is an inherited system of imbalance and disempowerment from apartheid-era spatial segregation, forced removals, and the incompetence and illegitimacy of former bantustan governments. The stated intention of empowering mining

communities through the establishment of development accounts (D-accounts) and a lifetime of compensation, has been betrayed by persistent failures in government and a complete disregard for the existing, albeit weak, legal framework. The legacy of apartheid is ever present and still sorely felt in many of these communities.

Added to this is the double-edged sword of failures in traditional leadership structures, customs and laws. On the one hand an entrenched system of traditional leadership, often of dubious legitimacy, is for the most part ill equipped to keep pace with rapidly evolving modern agendas. This is clearly evident in their dealings with business and government. On the other hand, provincial governments' failure to comply with their legislative mandate to regulate and empower traditional authorities in the governance of mining royalties, leaves affected communities exposed and vulnerable.

This web of failings is also evident in the form of the many so-called consultants, from forensic auditors and investigators to lawyers and accountants, who undertook work with huge promises and even larger fees but who delivered little or often nothing at all. Our researchers discovered cases where these professionals went so far as to withhold these desperately anticipated reports from communities over payment disputes with provincial governments, mining companies or traditional authorities.

Even with reports in hand, communities still have only a patchy knowledge of what has

happened to the royalties owed to them and who authorised withdrawals from accounts in which vast sums of money were held in trust. When CW received financial statements and audits for this report, these were, in most cases, out of date or had no context or details whatsoever. This is an indication that simple checks and balances have not been present in the administration of mining royalties. CW also found that huge factional divisions in many communities meant information, at times, was deliberately omitted, kept incomplete or simply not disclosed.

In terms of mining agreements, many mining companies are often complicit in entering into flawed and dubious deals with communities in circumstances where traditional leadership and authorities are often none-the-wiser. The companies will go through the consultation process, often knowing that they are not dealing with recognised traditional authorities, but overlooking this so they can obtain their mining licence. The consultation process, in these situations, are therefore treated as nothing more than a tick-box exercise. This state of affairs leaves mining communities vulnerable to corruption in the form of pay-offs and “handshakes” to a select few individuals in these communities to the severe detriment of the majority who remain living in a state of abject poverty and neglect.

Furthermore, partly following the flawed processes through which some mining licenses have been obtained, when the time comes to pay out royalties to the affected communities, many companies withhold payment. This practice is generally justified by claiming that the relevant traditional authority is either illegitimate and that they had initially believed that they were dealing with a recognised authority, or the authority is non-compliant with certain obligations imposed by the agreements entered into between the companies and the mining affected communities.

Some mining companies have over the years withheld payments of monies or have put these into holding accounts meant to

reserve the funds until communities are able to settle their differences. Although open to abuse and legally questionable, CW understands withholding funds in instances where the supposed custodians of these funds are illegitimate and where the community is riven by division, and where there is a strong likelihood that the funds will be misappropriated. However the perpetual withholding of these funds is completely untenable and opaque.

“It is like standing in the middle of a river and dying of thirst.”

The net result is that, seen through the lens of the affected communities in the North West and Limpopo provinces, there are limited, if any, benefits arising from the formal access to mining royalties. The CW teams arrived at communities that were in extremely poor shape, from bad roads to massive unemployment, and facilities that were built but not resourced or never used because somebody refused to hand over a key. There was a sad sense of little advancement taking place and few opportunities arising for members of these communities. As one of the members of the Bakwena ba Mogopa community poignantly put it, “it is like standing in the middle of a river and dying of thirst”.

It is clear that some individuals and families have unduly benefited from mining royalties and these are, for the most part, an elite collective of people ranging from corrupt government officials to members of the royal family and even to the trustees of trusts established to administer these mining royalties for the benefit of the community.

The Miners' Monument in Braamfontein, Johannesburg



This unequal distribution of benefits, and restricted access to accounts and funds has resulted in factions forming, tensions brewing, and disputes leading, in some cases, to violence and death in communities.

Furthermore, the payment of royalties and dividends through community trusts and Section 21 companies has not been effective, largely because of mismanagement and because they have been open to abuse and fraudulent practices.

Also evident is that in many cases traditional councils, chiefs and leaders do not enjoy wholesale support and their legitimacy to hold their positions is routinely challenged, through provincial authority interventions, other bodies such as the Public Protector's office, private forensic auditing investigations, and the courts. While this is often justified

by the gross maladministration of funds by these leaders, it gives rise to increasing instability in the proper running of traditional communities leaving even those well-intentioned leaders vulnerable to overthrow by those seeking access to these mining royalties for personal gain.

As alluded to above, previous interventions have ended up being nothing more than money-wasting exercises that have benefitted lawyers and forensic auditors, and have solved nothing for communities. As a result, the communities are increasingly frustrated and hostile, reluctant to engage with researchers, including those from CW.

There is a sense that they have told their stories over and over again to dozens of different people but remain in the paradoxical position of sitting atop significant mineral

wealth and yet impoverished, with little prospect of improving their economic situation and futures.

CW researchers were also frequently told differing versions of events. In some cases those who came forward as whistle-blowers were themselves found to be unreliable in their testimony. This is a reflection of just how rotten things have become and how desperation has caused community members to turn on each other.

While discerning the root causes of the problems in the mining royalties regime is relatively easy, the cures are complex and bedevilled by deep divisions in many communities, divisions which are largely the product of actual or perceived discriminatory access to mining royalties.

Provincial governments appear to have exacerbated the situation, rather

than eased it, by refusing to disclose information even when required to do so – and by failing to properly perform their legislatively mandated role to oversee the administration of mining royalties. These failings have even been recognised by the former public protector, when she concluded that there is a “veil of secrecy” in the manner in which the North West provincial government is handling the development accounts of many of these communities.

FINDINGS

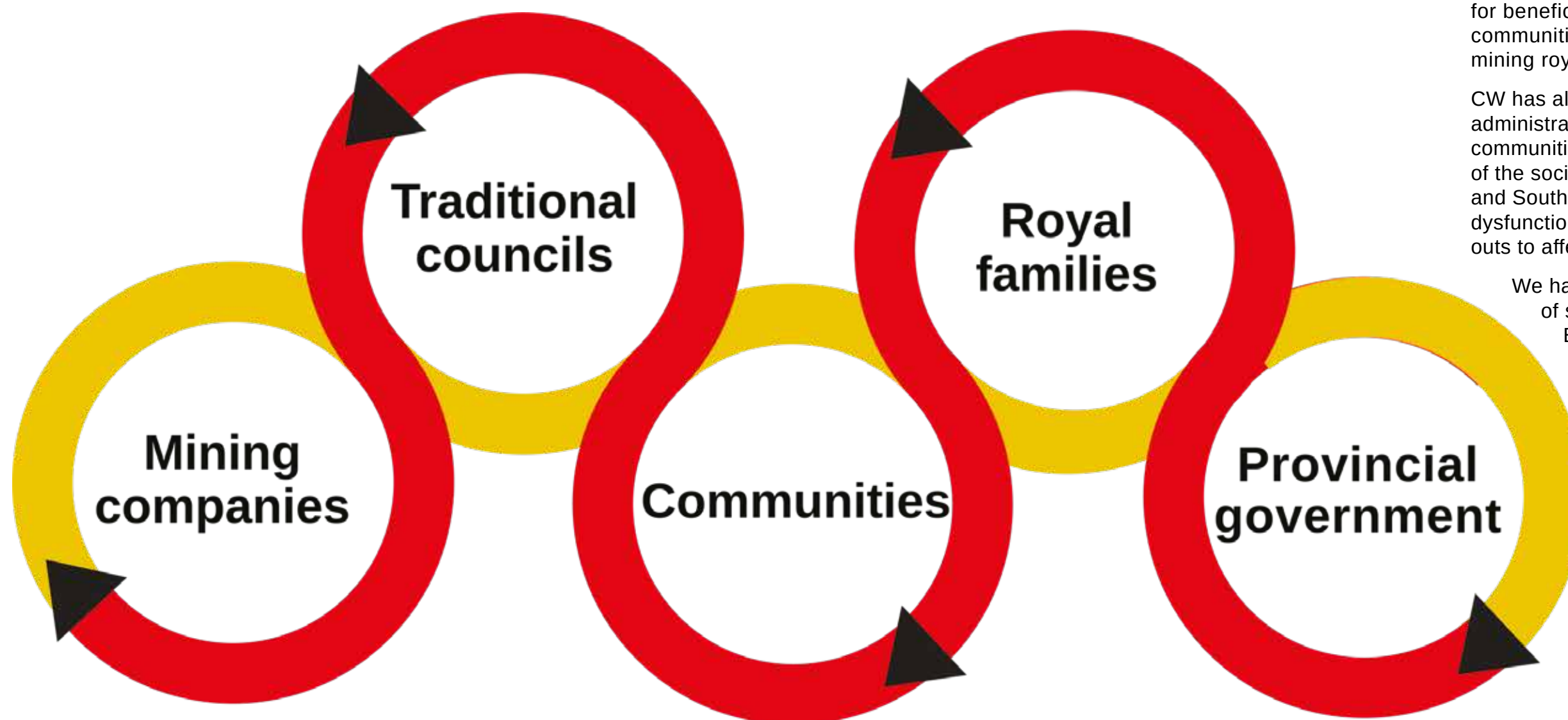
CW has found that there is a severe lack of transparency around the negotiation and conclusion of mining royalty agreements with mine affected communities, including the conversion of mining royalties arrangements from one form to another (such as the conversion from D-accounts for beneficiaries to equity sharing with communities), as well as the withholding of mining royalties by companies.

CW has also found that systemic and administrative challenges faced by mining communities are equally enormous; the worst of the socio-historical contexts of mining and South African politics is revealed in the dysfunctional system of mining royalty payouts to affected communities.

We have compiled a high-level summary of some of our findings of the Bakwena ba Mogopa community, presented according to the different actors implicated in the challenges affected communities face with regards to mining royalties.

These actors are:

- Mining companies
- Traditional council
- Communities
- Royal families
- Provincial government.



Mining companies

- In 2015 it was confirmed that Bakwena ba Mogopa has an estimated overall mineral worth of over R3-billion, and more than 100 000 hectares of rich agricultural land. The mineral wealth includes diamonds, vanadium, platinum, along with vast amounts of quarries and sand mines.
- The two big mining houses that operate on Bakwena ba Mogopa land are Glencore Rhovan and Afplat/Implats. The community has a special purpose vehicle (SPV) which comprises the Bakwena ba Mogopa Community Trust in respect of the Glencore Rhovan mine, in which Bakwena has a 26% interest. The Bakwena Platinum Trust under Ba Mogopa Platinum Investment is another such SPV which holds the community's 26% shares in the Afplats/Implats mine.

Glencore Rhovan (Glencore)

- Glencore Rhovan runs an open cast operation mining vanadium deposits on Bakwena ba Mogopa land. It is an integrated operation (both a mine and a plant), which has been operating and mining from 1989.
- Rhovan produces vanadium pentoxide and ferrovanadium for local and international markets.
- There are allegedly two D-accounts which reflect the surface and mineral agreements between the mine and Bakwena ba Mogopa.
- As surface land owners, the Bakwena ba Mogopa community entered into a pooling and sharing venture (PSV) in which they hold a 26% interest in Rhovan. The PSV means that the community and Rhovan have agreed to pool their assets for the purpose of mining, while keeping individual ownership. They will also share in the earnings of the operation. This transaction, with the R575-million BEE agreement relating to the vanadium facility also on the land, forms part of the funds deposited into the Bakwena ba Mogopa D-account held at Bethanie
- During our engagement with a Glencore official, it was stated that in 2007 the mining house stopped paying funds into the D-account, and from 2011 the company has been paying the funds into a trust account (controlled by the mining company) after the royalties had been converted into equity. Negotiations between the community and the mining house took place from 2007 to 2011. The negotiations concerned the community's lack of adequate administration and more specifically, an unstable traditional council.
- Glencore Rhovan has since withheld payment of community funds, which it alleges is largely as a result of the uncertainty with respect to the traditional council and the lack of access to any legally recognised traditional structure. A letter was addressed to the royal family as recently as February 2018, stating that the funds will continued to be withheld.

Afplats/Implats

- Impala is well known in the mining sector for its R4.2-billion acquisition of Afplats. What is most relevant about this transaction as far as our report is concerned, is that the money acquired from the transaction was used to fund Afplats' R1-billion commitment to the Leeuwkop Project in terms of the signed agreement with their new



Red crystals of the mineral vanadinite, one of the main industrial ores of the metal vanadium.

B-BBEE partners, the Bakwena Ba-Mogopa Traditional Community.

- The community, as per this agreement, holds 26% of the shares in the project which is set to produce 300 000 oz of platinum group metals each year. The Leeuwkop project is aimed at not only sharing the mining of platinum group metals but also starting a beneficiation process in the North West, where the whole village can benefit from the project.
- During the course of engagement with Afplat/Implats officials, it was held that a conversion had taken place with the community. Funds which reflect the community's 26% ownership of the project, would be deposited in the Ba Mogopa Platinum Trust.
- CW has found that although this trust holds 26% in the project, the trust appears to be in the sole control of the king. The issues arising from this will be discussed further below.



Communities

We presented our findings regarding communities and community engagement earlier in this publication.

Please refer back to pages 12 and 13 for outcomes of our Limpopo community engagements, and pages 22 and 23 for the outcomes of our discussions with North West communities.



Traditional councils

- The Bakwena ba Mogopa community's difficulties begin with the lack of clarity surrounding the legal standing of the traditional council. As a result, during all CW community engagements the common phrase regarding Bakwena ba Mogopa traditional council operations was "Ga re itsi", meaning "We don't know".
- According to the controversial transitional arrangements derived from the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA), the traditional council composition is a 40/60 ratio, where the 40% component is elected by the community through an IEC-regulated voting system. The 60% component are members of the royal family who sit on the traditional council by virtue of their royal lineage.
- Over the last few years this 40/60 ratio has become a stumbling block for Bakwena ba Mogopa. From the community engagements it was very clear that people are on opposite sides of the fence, with very different perspectives and approaches to the furtherance of the community.
- The elected 40% maintain that, because of this split, they will always be outnumbered, while the royal family's 60% insist that this legislative framework was established within the context of traditional norms and standards which recognise that members of the royal family are of a higher standing than that of the ordinary community member. The elected component argues that they are the most suitable representatives as they have been chosen by the community to serve on the council rather than being born into it.
- This divide, and to a certain extent the weighting of the overall council, has hindered ordinary traditional council activities. No meetings take place – neither with the community nor as council. There is insufficient knowledge of community funds, as well as an inability to consult with relevant stakeholders to authorise community acts. Very little to no communication takes place with mining houses.
- It's important to note that owing to the instability of the traditional council, there is no proper bookkeeping and auditing of financial books as per s31 of the North West Act. The traditional council members of Bakwena admitted that the last audit was in 1992 and the last known and verified information relating to mining royalties and community funds emanated from a 2010 financial report, in which it was stated that "serious gross violations in the procurement and usage of traditional communities' money had taken place.
- Another closely linked key finding is the question of the traditional council's legal standing. The council was gazetted on 28 March 2017 as prescribed. However, the two-month term attached to the most recently elected council has since expired. Although section 6(3) of the North West Act does not prescribe a term of office for traditional council members, the two-month term prescribed by the premier is grossly unreasonable. In addition, the TLGFA prescribes a five-year term to which the North West Act must comply.
- The questions surrounding the legitimacy of the council has caused divisions in the community over whether or not to acknowledge the last elected council. Moreover the two mining houses aver that one of their main challenges centres around the doubtful legal standing of the traditional council, hence their decision to withhold royalty payments.

Underground operations at the Royal Bafokeng Rasimone platinum mine.



Royal families

- Most, if not all the tribes, in the North West fall under the leadership of a king/queen, or in Setswana *kgosi/kgosanna*. The *kgosi* and his royal family are an important component in the administration of the community and its community monies.
- For many in Bakwena ba Mogopa, the issue of the royal bloodline is key and it forms their paradigm of authority and way of life. It is important to understand the weight and value the community places on the royal family and *kgosi*, and hence to understand why certain people of Bakwena ba Mogopa excuse the *kgosi* and the royal family for certain actions under the principle of “Kgosi ke Kgosi ka maadi a badimo”⁸.
- Equally important however is the principle of “Kgosi ke Kgosi ka Morafe” which, literally translated, means ‘the chief is the chief through the people of his tribe’. In other words the chief must act in a way that promotes the values and ethos of his people first.
- According to traditional customs, the royal family appoints and recognises the paramount chief and headmen. The provincial government oversees the exercise of this power by the royal family. For example, the appointment of the current *kgosi* of Bakwena ba Mogopa, Kgosi Tebogo Motheo Mamogale, was so heavily scrutinised that his recommendation for appointment by the royal family eventually became part of the investigative enquiry chaired by Judge Herbert Hendler which was established in 2007 by the provincial government⁹.
- The Hendler enquiry was established under the North West Commissions Act 18 of 1994. Judge Hendler was tasked with reporting to government on the legitimacy of the Bakwena ba Mogopa chieftaincy and to investigate the maladministration of community finances. It was stated in the report that Kgosi Motheo was rightfully appointed and that he is the rightful heir and should be allowed rule Bakwena ba Mogopa as the paramount chief.
- In the same way that the royal family appoints the *kgosi*, they also have the authority to remove the *kgosi* under the North West Act and TLGFA. The royal family of Bakwena ba Mogopa is greatly divided – some fully support Kgosi Motheo while others hold him accountable for the missing millions of community funds.

- A faction of the royal family wrote a letter to the North West premier, supplying extensive evidence and a detailed account of the *kgosi*’s transgressions. The letter gives details of:
 - o unprocedural appointments of attorneys, contractors, security companies and other service providers;
 - o unilateral management of community accounts and opening of bank accounts to use as new tribal accounts; and
 - o the failure to attend traditional council meetings, community meetings and meetings with mining companies.
- Key to this report are documents received which illustrate correspondence between the *kgosi* and an Implats official, in which the *kgosi* confirms the appointment of Mr. Stephen Phaladi and Mr. Tinti Rabotapi as directors in Ba-Mogopa Platinum Investments by the sole shareholder – Kgosi Motheo Mamogale. As a result of this change Ba-Mogopa Platinum Investments had opened a new bank account with Investec and requested Implats to pay all monies due to the company into the new bank account from May 2014 onwards. By July 2014 Implats concluded monthly payments of R1 875 000 into the new account – which was administered by the *kgosi* and the two directors of Ba-Mogopa Platinum Investments.
- During this period the royal family sent letters to the MEC for Culture, Arts and Traditional Affairs, requesting an urgent intervention. The department then held a series of meetings with the royal family, where it was suggested that Bakwena ba Mogopa be put under administration. However, disagreement with this approach and the continued challenges in the community led to the royal family requesting the removal of the *kgosi*.
- The current status of the removal process remains unclear although a royal family member confirms that they are following legal processes to ensure the *kgosi*’s proper removal.
- A criminal case has also been opened against the *kgosi* for theft of community monies and fraud. Attempts to engage with the investigative officer, however, have been fruitless. No response has been given and the status of the case remains unclear.

Photos of Corruption Watch’s engagements with the Bakwena ba Mogopa community



Provincial government

- The provincial government plays a significant role in the administration and governance of community royalties, over and above the administration of traditional communities. Provincial government derives this power from legislation governing traditional leadership and governance as far back as the Bophuthatswana era.
- The TLGFA gives the provincial government the power to authorise, appoint, establish, recognise, withdraw, support, partner with, remove, and administer all functions and operations of tribal authorities.
- As a starting point it is noted that the provincial government plays an oversight role in the management and use of community monies. It is alleged that the North West provincial government held more than 800 D-accounts, worth an estimated R950-million, including apartheid era accounts – in this regard the provincial government is responsible for governance and administration of community funds. Bakwena ba Mogopa had a reported R58-million in four D-accounts, all under the administration of the provincial government.
- The provincial legislature is clear. All community revenue to be paid into a tribal account is controlled by the premier and provincial government officials. The use of these monies must be in accordance with an annual budget constructed to support community development. Expenditure outside of the budget must be approved by the premier.
- In the normal course of events, for the community to make use of the funds, tribal councils would have to hold a community meeting where a resolution would be made indicating that the community agreed with the proposed expenditure. The funds are released only once these conditions are met.
- The former finance director-general of the North West provincial government, Mr Phineas Tije, who served between 1994 and 2005, stated that all records of flow of money from the D-account are kept with provincial government and that provincial treasury is therefore in a position to explain any transaction. All these monies, including those existing before D-accounts, when mining companies would issue royalties certificates, are recorded in provincial government records. Mr Tije added that, while it would be difficult for provincial treasury to monitor expenditure once funds are released, the community would still need to provide receipts indicating that money was appropriately spent, before a new transaction could be approved. The provincial government is therefore the first port of call when millions go missing from tribal accounts.
- The Bakwena ba Mogopa traditional council and royal family have written countless letters to all persons within provincial government requesting either an audit of their D-accounts or an intervention to ensure that the funds are utilised to support community development.
- These requests have not been addressed by government – rather, it has offered limited financial information relating to the community accounts. The traditional council



North West provincial coat of arms. Its motto *Kagiso le Tswelopele* means Peace and Prosperity.

would instead be given 'reconciliation of receipts and payments' statements on request – which effectively means the community would only know the opening balances, and would be completely in the dark regarding withdrawals, including for whom and why these withdrawals were made. If the traditional council demanded answers from provincial government, the response was unsatisfactory, leaving the community with more questions than answers.

- By 2016 the then-MEC China Dodovu and another official in the department of traditional affairs, Desia Manne, were signatories in Madibeng and had the power to authorise withdrawals of Bakwena ba Mogopa traditional monies. By that time the special-purpose vehicles – Bagopa Holdings, the Bakwena ba Mogopa Community Trust, Bakwena Platinum Trust, Bagopa Agriculture, Bagopa Property, Bagopa Procurement, and Bagopa Trust – were operational and held community funds to be administered by Dodovu and Manne. It is unclear how much of community funds are left in any of these trust accounts. An estimated R350-million has been spent, with none of the funds in these accounts and trusts being used to develop the community, contrary to what their names suggest.
- Even more concerning is that the provincial government's finance department stated that it allows its accounting officers to put surplus money from the D-account into 'short term investment vehicles'. They do this without consulting the affected communities. The then-finance MEC Paul Sebegoe further stated that the department would "invest surplus funds of the tribal accounts and distribute interest accordingly". This, although largely defended by the provincial government, is problematic for the community because no procedure exists for these short term investments, nor is the community consulted on the growth of funds that are purported to be in their interest.
- Another important role that the provincial government plays is in the administration of traditional communities. The North West Act and the TLGFA gives provincial government the power to control both the traditional council and the royal family. This dynamic was created so that the provincial government could play an oversight role in the operations of traditional authorities. However, as we have seen with Bakwena ba Mogopa, this control can easily be abused.
- As mentioned above, the uncertainty surrounding the legal standing of the Bakwena ba Mogopa traditional council, because it is not properly gazetted, can be taken as a clear instance of the provincial government's abuse of its power. The traditional council cannot function, and has no authority when it is not properly gazetted. Former North West premier Supra Mahumapelo gazetted the latest traditional council for a term of only two months, and the provincial government did not disclose reasons for the deviation from the legislative framework or for the short period.
- The same holds for the recognition of the *kgosi* and his removal. While the provincial government issues a certificate of recognition, it also has the power to remove a paramount *kgosi* by virtue of s14 of the North West Act and s10 of TLGFA. In the case of Bakwena ba Mogopa, the royal family addressed a letter to the MEC, premier and minister of Co-operative Governance and Traditional Affairs on 1 September 2016, requesting the removal of the current *kgosi*. The letter included evidence of the *kgosi*'s role in the mismanagement of community funds and his interference in community administration. The provincial government is yet to act decisively on this issue, although it was brought to its attention over three years ago.



BROAD RECOMMENDATIONS

The findings in this report paint a bleak picture of misappropriation and maladministration of mining royalties in affected mining communities. The challenges in these communities are real and undeniable, and are clearly reflected in the impoverished and neglected state that the affected communities find themselves perpetually living in.

It will take a multi-pronged approach to start overhauling the sector, and the changes need to be both tangible and internalised in order to achieve sustainability.

All stakeholders, including the communities themselves, need to take greater responsibility for their dealings with mine-affected communities, and the consequences thereof. The mining companies need to place greater emphasis on people and the environment, and not only on profits. Ethics and integrity when engaging with communities will rebuild their trust. Political will and leadership are also essential when implementing new strategies for improvement.

The findings of this report are clear evidence of the entrenched deviations from the mining royalties governance framework. It is clear that a ripe space for grand corruption and mass looting has been created that, although well known by all South Africans, continues to go unaddressed. The nature and the scale of corruption and maladministration that occurs in mine affected communities is truly an incredible miscarriage of the ethos of Ubuntu and Constitutional advancement to the benefit of vulnerable groups. Culprits include government, traditional leadership, royal family members, certain members of the community, and mining houses.

We therefore call for mechanisms to be put in place that bridge the current gap and that creates a platform for communities to enjoy the fruits of development and prosperity.

As a first point we call for transparency and a stronger more, enforceable form of accountability from mining companies with regards to the royalty agreements that they enter into with communities, and other aspects of their engagement with mine affected communities. This especially concerns withheld funds and includes, but is not limited to, record-keeping of the funds, access to information regarding the funds, community consultation on all relevant decisions on the funds held, requirements for the release of the funds, and assistance from the mining company in moving towards release of the funds.

This, we believe, will go a long way towards improving the relationship between communities and mining companies.

Of prime importance is our demand for traditional authorities and traditional councils to be empowered by the relevant bodies and equally scrutinised by community members, to ensure not only compliance

with legislative prescripts but enforcement of community resolutions. Like mining companies, traditional authorities must be required to present audited financial statements and reports on a regular basis to communities. These documents must be readily available for public scrutiny. Additionally, all serving council members and trustees should also be required to declare

their interests to ensure transparency is at the forefront of all mining royalty governance and administration.

It is very clear from our research that provincial officials and now more recently – largely because of equity conversion agreements – traditional councils and chiefs and royal family members deviate from laws, collectively creating a systematic form of grand scale corruption by having access to financial information and funds, and withholding information. As a result these players have all unlawfully benefited from mining royalties.

Provincial government in particular is equipped with the necessary mechanisms to ensure diligent monitoring and reporting take place, with severe consequences to be meted out to those not acting within legal frameworks or not acting timeously. It is up to civil society, community members and active citizenry to demand that these mechanisms are enhanced in order to fit more appropriately to the different cultural and traditional norms in the majority of mine-affected communities across South Africa.

We therefore call for the involvement of civil society and NGOs to further empower communities through the use of education, training and support that will develop trustees and representatives to be well equipped for ensuring better governance and oversight within trusts. The objective with these initiatives is to ensure that community leaders and members will always operate from a position of strength when negotiating with mining houses and government, so that communities will always benefit from mining operations taking place on their land.

There is a need to incorporate and lean on the wealth of knowledge from legal and auditing experts who are motivated to transform the system. This kind of expert intervention can help communities get their affairs in order in terms of better auditing and financial controls and developing a culture of good governance. As shown in the case of the Ventersdorp community, there is room

to build on the successes of decentralising traditional governance and administration and giving communities the choice of opting out of the traditional leadership system completely. Communities can be supported to set up these alternative structures and guided to negotiate on an equal footing with mines.

Traditional leaders, too, need to transform. One of the ways this can be achieved is by appointing more experienced and informed advisors, who will guide the traditional leaders to become more relevant and accountable in modern society, and act in the broader interests of the community. The powers of traditional leaders cannot be allowed to hinder sound decision-making around mining rights deals and benefit sharing. New guidelines should apply to subject them to more efficient monitoring and evaluation, financial controls, and mechanisms for dispute resolutions.

In this regard, new guidelines should consider provisions to balance the powers of traditional leaders and councils, on the one hand, and that of the community members, on the other hand. As stated in this report, a fairer split of 50/50 representation is recommended between community-elected representatives and those appointed by the traditional authorities.

CW believes that deeper, continued investigation is warranted to keep the spotlight on this issue. Tracking down the missing or absent financial statements is essential, as is digging deeper into the workings of trust accounts and Section 21 companies.

A next level of investigation into mining royalty pay-outs should aim to expose and bring to book the individuals, companies, officials and traditional and political leaders who are taking part in and enabling corruption and maladministration. The level of political interference in the administration of mining royalties is not to be underestimated and CW and other civil society organisations will continue to advocate for measures that adequately curb this undue interference by

encouraging through the lens of meaningful mining resource beneficiation; improvements in community consultation; monitoring of social labour plans; and better compliance monitoring of, and reporting from, companies that hold mining licences.

Mining in South Africa still dominates the socio-economic landscape. Industry, government and those communities directly affected by mining have a collective responsibility to urgently transform the sector. As partners in mineral wealth sharing, they must recognise that the imperative is to find ways to better manage a finite resource and ensure long-term benefit even beyond the life of a mine. Sustainable development will stimulate downstream operations, beneficiation and entrepreneurship. Any management plan must also tread sensitively on the environment so a mine's inevitable closure does not collapse local economies or leave an environmental nightmare that no one takes responsibility for.

Extraction of the country's mineral wealth should not be a get-rich-quick scheme that benefits just a few. It deserves mindful, forward-thinking management and we believe developing a best practice model that looks to address the key areas of mining royalties' administration is the first step towards achieving this.

The best practice model must be set against the current state of affairs in mine affected communities and seek to adequately address the challenges reflected in this report.

This model must be formulated on the basis of meaningful engagement with all relevant stakeholders, and all role players must have a seat at the table. We believe that a best practice model backed by the key stakeholders and supported by accessible data and information will enable greater stakeholder participation in the quest to support the development of impoverished communities living on top of great mineral wealth,

TRANSFORM NOW

A snapshot of CW key recommendations:

- Develop and adopt a mining royalties best practice guide.
- Implement a monitoring and reporting system with penalties for transgressors.
- Train and support communities to engage from a stronger position.
- Collaborate and network better with civil society and NGOs to build capacity, raise awareness and educate communities.
- Build long-term relationships between all stakeholders to rebuild trust.
- Develop new communication and consultation strategies that ensure people's voices are heard, processes are transparent, and dispute resolution mechanisms are in place.
- Develop mechanisms to compel traditional councils, community trusts and mining houses to present complete audited documents on a regular basis.
- Learn from mistakes and success stories – adapt for locally appropriate solutions.
- Change the governance and composition of traditional councils.
- Develop mechanisms to ensure easier public and researchers' access to scrutinise financial documents and other relevant information.
- Develop mechanisms to curb political interference.



Funders: Open Society Foundation.

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- Mashudu Masutha (legal researcher, extractives) - project co-ordinator and lead researcher.
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From Corruption Watch's communications team:

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- Elton Thobejane - research consultant, Limpopo).
- MEJCON-SA.
- Mr Johan Lorenzen, Richard Spoor Inc. Attorneys.
- North Office of the Public Protector.
- North West SCOPA.
- Minister of Mineral Resources' special advisors.

Communities:

- Community of Bakwena ba Mogopa and those that hosted us during our community engagements in Bethanie, Jericho, Makolokwe, Pachsdraai, Hebron, Ventersdorp/Ga-Mogopa and Uitvalgrond.
- Members of the Bakwena ba Mogopa royal family and traditional council members.
- Communities in Limpopo, Magadimeng-Ntweng, Mampa Serole, Monametse, Mokgotho, and the Magobading Resettlement (Mecklenburg Farm).

¹ Statistics South Africa <http://www.statssa.gov.za/?p=9720> (Page 6)

² Roman-Dutch principle of property law: "cuius est solum eius est usque ad caelum et ad inferos" which translates as "rights of the owner of immovable property extend up to the heavens and down to the centre of the earth." See Minister of Minerals and Energy v Agri South Africa (Centre for Applied Legal Studies as amicus curiae) [2012] 3 All SA 266 (SCA), para 32, 33. See also Hudson v Mann 1950 (4) SA 485 at 488 E-F "for as long as minerals remain in the ground they continue to be the property of the land owner, only when the holder of the land right severs them do they become moveables to him". (Page 6)

³ Natives Land Act of 1913. (Page 8)

⁴ *Guideline for Consultation with Communities and Interested and Affected Parties* available at http://www.dmr.gov.za/Portals/0/consultation_guideline.pdf. (Page 8)

⁵ Duduzile Baleni & Others v DMR and others 73768/2016. (Page 9)

⁶ South African History Archive - <http://www.saha.org.za/landact1913/mogopa.htm> (Page 18)

⁷ South African History Archive - <http://www.saha.org.za/landact1913/mogopa.htm> (Page 18)

⁸ "Kgosi ke kgosi ka maadi a badimo" - literally translated, it means that "the chief is the chief through the connection with the ancestral blood". In other words there is a strong connection between chieftainship and the ancestors. It can be understood as similar to the faith-based principle "let His will be done". Traditionally speaking, the chief is never questioned, and the older generation adhere closely to this principle. (Page 32)

⁹ Hendler report - <https://www.iol.co.za/business-report/economy/premier-recieves-royalties-report-1602605> (Page 32)



Cover

(Top) From the website of African Community Project <http://www.africancommunityproject.com/>

(Bottom) From the website of Anglo Platinum <https://www.angloplatinum.com/>

Pages 6 and 7

Uitvalgrond website <http://www.uitvalgrond.co.za/>

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Map of North West province location from Wikimedia Commons https://commons.wikimedia.org/wiki/File:North_West_in_South_Africa.svg

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Photo taken by Corruption Watch team

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Image from South African Tourism, via Wikipedia [https://af.m.wikipedia.org/wiki/L%C3%AAer:Ventersdorp,_North_West,_South_Africa_\(20539741091\).jpg](https://af.m.wikipedia.org/wiki/L%C3%AAer:Ventersdorp,_North_West,_South_Africa_(20539741091).jpg)

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Map of Limpopo province location from Wikimedia Commons https://commons.wikimedia.org/wiki/File:Limpopo_in_South_Africa.svg

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Image from Wikimedia Commons. Photo by Géry Parent. https://commons.wikimedia.org/wiki/File:Vanadinite_7.jpeg

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Image from the Royal Bafokeng Platinum website. <http://www.bafokengplatinum.co.za/index.php>

Page 32 and 33

Photos of community engagements taken by Corruption Watch team

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North West provincial coat of arms from North West provincial government

Page 45

Image from Wikimedia Commons. Photo by Ulf Seifert. <https://commons.wikimedia.org/wiki/File:Grubenlampe.jpg>

Page 46

Image from South African Tourism, via Flickr <https://www.flickr.com/photos/south-african-tourism/20498739145>

Other photos from Pixabay - www.pixabay.com

Other graphics by Janine Erasmus

Reporting Corruption – Corruption Watch:

<http://www.corruptionwatch.org.za/>

Department of Mineral Resources

(012) 444 - 3000

Enquiries related to prospecting or mining rights samradonline@dmr.gov.za

General enquiries enquiries@dmr.gov.za

From the mineral resources department's FAQ:

“9. The mine is not doing anything for the community. They do not provide housing, jobs ETC.

Contact our Regional Office in the province where the said mine is. Ask for the Social and Labour Plan Officer.”

Reporting fraud and corruption in the public service - The Public Service Commission' Hotline:

<https://www.publicservicecorruptionhotline.org.za/>

The Office of the Public Protector:

<http://www.pprotect.org/>

Advice on whistle-blowing – The Open Democracy Advice Centre:

<http://www.opendemocracy.org.za/>

The National Anti-Corruption Forum:

<http://www.nacf.org.za/>



APPENDIX

These are the various sources we used during our research phase, to prepare us for community consultations, and for writing the report.

Cases:

Hudson v Mann 1950 (4) SA 485 at 488 E-F “for as long as minerals remain in the ground, they continue to be the property of the landowner; only when the holder of the right to minerals severs them do they become movables owned by him”.

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<http://madibengtimes.co.za/2016/08/30/hundreds-of-millions-go-missing-ga-re-itsi-2/>

<http://madibengtimes.co.za/2016/10/19/the-battle-at-bakwena-ba-mogopa-never-ends/>

<http://madibengtimes.co.za/wp-content/uploads/2015/06/Issue-22.pdf> In 2011, the traditional council set up a meeting to enquire about certain acts committed in relation to the management of the Bakwena ba Mogopa D-account with the director of traditional affairs Mr. Simon Ruthoane. In response he stated that Bakwena indeed had two budgets approved and funds released but he didn’t authorise any one of the budgets.

<http://www.newsmonitor.co.za/newsmonitor/view/newsmonitor/en/page28457?oid=2634137&sn=Article%20Detail&pid=558&highlight>

<http://www.newsmonitor.co.za/newsmonitor/view/newsmonitor/en/page28457?oid=2634137&sn=Article%20Detail&pid=558&highlight>

http://www.setswana.co.za/history/bakwena_ba_mogopa.html

<https://city-press.news24.com/News/platinum-chief-dies-amid-protests-and-missing-millions-in-royalties-20170516>

<https://pmg.org.za/committee-meeting/452/>

https://repository.up.ac.za/bitstream/handle/2263/64598/sepeng_385_history_bakwena_mogopa_transcript_tn.pdf?sequence=2

<https://www.businesslive.co.za/bd/national/2013-11-26-details-vague-but-north-west-investment-of-surplus-defended/>

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Letter addressed to Chairperson of North West House of Traditional Leaders by Traditional Council, requesting intervention regarding the payment of salaries of Bakwena ba Mogopa staff, dated 13 June 2016 Letter by Mr. Stephen Wissie Phaladi addressed to Mr. Tebogo Liale confirming changes of the Ba-Mogopa Platinum Investments Propriety Limited, dated 22 May 2014.

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Mine lamp, made by VEB Grubenlampenwerk Zwickau, Germany



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Minerals Mining Act 19 of 1883.

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