



Traditional Communities and Mining

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ENVIRONMENT

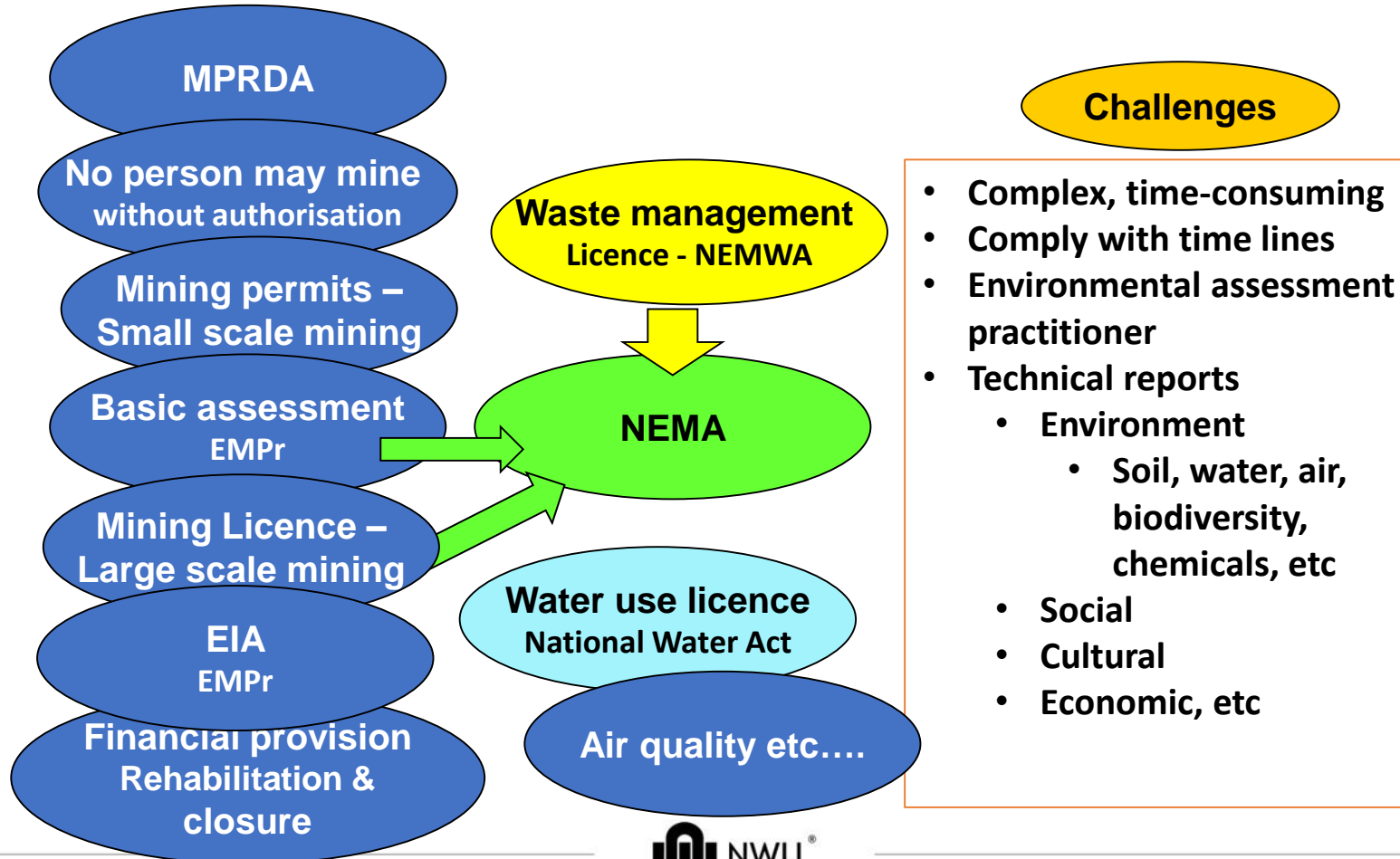
Traditional communities and mining

- Communities may mine themselves (as a business entity)
- As joint ventures with other mining companies (e.g. Royal Bafokeng Platinum)
- As BBBEE partners
- May mine communally
 - Formally
 - Informally / illegal



<http://www.theconmag.co.za/2016/11/10/zama-zamas-women-of-stone/>

Legal framework for mining



S 104 MPRDA creates preferential right

(1) Any community who wishes to obtain the preferential right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must in terms of section 16 or 22 lodge such application to the Minister.

(2) The Minister must grant such preferential right if the provisions of section 17 or 23 have been complied with: Provided that-

(a) the right shall be used to contribute towards the development and the social upliftment of the community;

(b) the community submits a development plan, indicating the manner in which such right is going to be exercised;

(c) the envisaged benefits of the prospecting or mining project will accrue to the community in question



Millions 'stolen' in illegal chrome rush

Sunday Times News by Lutho Mtongana,
Lucky Biyase and Sabelo Skiti,
2016-06-26

S 104 also raises concerns

- Manson

- the payment of royalties to traditional communities sometimes result in financial mismanagement,
- conflict amongst the community members (the elites amongst themselves as well as between the elites and the ordinary members of the community)
- “ineffectual government intervention”.

- Mnwana

- “difficult for ordinary villagers to hold the chief to account about communal resources ... marginalised rural residents are afraid of challenging their chiefs, and diffuses resistance to unaccountable traditional authorities.”



Two questions need to be addressed

- Who/what constitutes a community for purposes of the MPRDA?
- Is prior and informed consent of the community necessary?



<http://www.globaltimes.cn/content/932073.shtml>

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Community?



Community?

- The legislation defines the concept “community” differently.
- MPRDA
 - ‘ a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law:
 - Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community.’
- 'historically disadvantaged person' means-
 - any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;
 - any association, a majority of whose members are persons contemplated in paragraph (a);
 - a juristic person, other than an association
- To be read with definitions of BBBEE and the Mining Charter....

Community?

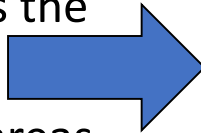
**Revised Mining Charter:
Possibility of facilitating the
ownership and management of
cooperatives by communities**

**“Community” is defined as
“coherent, social group of
Black persons”
Move away from definition in
MPRDA
Vague definition**

**Possible for DMR to
disregard traditional
communities
or
Benefit sectors of
traditional communities
only**

Bengwenyama-ya-Maswazi Community v Minister of Mineral Resources [2014] ZASCA 139; *Bengwenyama-ya-Maswazi Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2014] ZASCA 140

- The Supreme Court of Appeal had to interpret the concept of 'community' in relation to the MPRDA.
- The cases revolved around competing claims and the claims of the community are represented by different constituents.
- The SCA resolved the issue by asking who should represent the community and found that it was the traditional authority.
- BUT – boundaries of traditional areas – set pre-1994 RSA and traditional leaders appointed in pre-1994 era



Claassens states as follows:

Traditional council boundaries and chiefly version of customary law, are however, deeply disputed in many areas, especially in relation to the position of women, the imposition of tribal levies, the selling of land allocations and unilateral mining and investment deals.

Rural people are increasingly demanding a voice in the definition of custom at both the local level and in the parliamentary forums, where the boundaries are entrenched, and the meta-rules are set.

Department of Land Affairs, Popela Community v Goedgelegen Trust Fruits (Pty) Ltd 2007, CC

- Justice Moseneke formulated a two-prong test to determine in the case of land claims if the claim was a community claim:
 - (a) First establish whether the community retained much of their identity and cohesion as part of the original clan
 - (b) establish whether they derived their possession of land in question from shared rules.
- No need to indicate that they have a tribal identity or hierarchy
- Bonds of custom, culture and hierarchical loyalty – helps to determine a group's shared rules re access to and use of land
- However, not requirements in a legal sense of the word.

Complexities with determining who or what constitutes a community

- Communities are not cast in stone / are not everlasting
- They are formed and reformed and reshaped by political, social and economic factors
- May be three forms of communities, e.g. in land claims
 - The initial form of the community before dispossession took place
 - The community that existed or evolved after the restitution programme was embarked upon (i.e. mobilising and constituting the community for lodgment of the claim)
 - The reconstituted community in legal terms following the transfer of land.
- Many years may have passed since the claim was lodged – complex and challenging – class, clan and family conflicts may emerge
- More than legal issue – involves issues of politics, culture, space and identity

Dwesa-Cebe community claim

- Parties to the land claim agreed in restitution matter
- Community include:
 - Person affiliated with the community or tribal identity
 - Also persons with no cultural or biological ties
 - But linked to the particular land struggle in the area.



- Paterson warns against creating fictional communities “where there is a range of competing, overlapping and exceedingly diverse communities residing on or adjacent to the land to be included in a protected area”
- to give them access to natural resources and the benefits derived therefrom in the case of land restitution.
- The same could be said of mining. It is not always a homogeneous community that lives in the area of a mine or a homogeneous group involved in artisanal mining.
- Following Paterson’s argument, the following challenges may arise when constituting communities for purpose of mining



the new ‘community’ or entity may not be acceptable for the new group

it may be difficult to select someone to speak on behalf of the new group

**Group dynamics – groups change
Power struggles**

Administrative capacity

**Lack of access to
resources**

**Traditional authorities do not accept
authority of new entities – involving new people**

**Capacity to deal with 3rd
Parties in an equitable, legitimate
Open and accountable manner**

Concerns with the definition of 'communities'

- Humby and Paterson
 - Who should be included or excluded from the 'community';
 - the legitimacy of the community (need for a juristic person)
 - who will represent the community and
 - how the community will act to acquire the necessary rights?

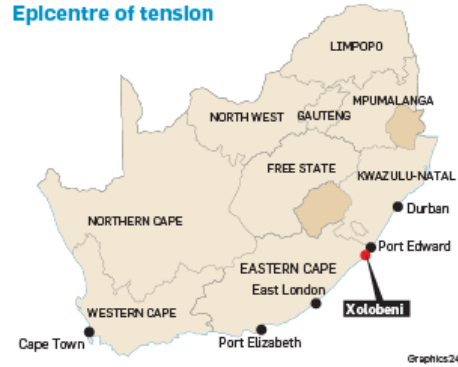


[Mining and Gender Report.indd - OECD Watch](#)

Prior and informed consent?



Xolobeni community – mining – to comment or consent?



BATTLEGROUND Mablasi Yalo (67) and her granddaughter, four-year-old Azola, walk along the red dunes in Xolobeni near Mbizana in the Eastern Cape. Picture: Leon Sadiki

Amadiba traditional
land

Maputaland-
Pondoland-Albany
Biodiversity Hotspot

29 March 2007:
Application mining right –
titanium and related
minerals

25 June 2007: AmaDiba
Crisis Committee –
defend cultural rights

Dec 2007: Final EMP

14 July 2008: DME
grant mining right

**2 September 2008: The
ACC submitted an
appeal against the
granting of the mining
right**

**Allege e.g.
EIA insufficient
Did not take into account**

- Reports
- Community concerns

6 June 2011: the
Minister uphold
the appeal

2011-2017:

- Crisis deepened
- Factions within the community – those in favour and those opposed to mining
- Leading to traditional leader disputes – between male incumbents and now male and female incumbent (pending CC decision)
- Current traditional leader is also director of the BBEE companies



2011-2017:

- 15 September 2016: Notice of intention to declare an 18-month moratorium on the TEM application at Xolobeni and against the lodging of any further prospecting or mining applications until such time as the moratorium is lifted - for comment (GN 1014 in GG 40277 of 15 September 2016)
- Violence and the death of one of the activists against mining in the area
- Mining company indicated it is selling its interests
- 9 June 2017: Declaration of 18-month moratorium on the TEM application at Xolobeni and against the lodging of any further prospecting or mining applications until such time as the moratorium is lifted (GN 546 in GG 40898 of 9 June 2017)



25-28 April 2018 new case in high court

- Case filed in 2016 *Baleni and Others v Minister of Mineral Resources and Others* (Gauteng High Court) – on-going

- Took a different approach away from EIA and environmental authorisations

- Communal or traditional rights protected in terms of the Rest of Land Rights Act – before the land can

- Need prior and informed consent of community – to mine / allocate before a mining right is allocated

- Legislation
- Based on customs and traditions (customary law)
- International law
- Foreign case law



Committee are opposing each other. Photo: Zoë Postman

GroundUp 24 April 2018

Conclusion

- Traditional communities may mine
- It becomes complex when the membership of the community is difficult to determine
- Or when the community or members of the community oppose mining
- Then the question arise who are the members of the community
- Who can consent to mining?
- How should mining be conducted?
- If informal/illegal mining occurs on traditional land – how should it be legalised?
- Can prior and informed consent, replace the decision of the authority?





**Thank you
Ke a leboga**

