

# Exploring the role for traditional leadership in upholding human rights in hydraulic fracturing.

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# Introduction

- ▶ Mining (including petroleum exploration and production) is a deprivation of private property rights.
- ▶ The sensitivity regarding the issue of land and natural resources cannot be ignored.
- ▶ The Constitutional Court highlighted the importance of the subject in *Daniels v Scribante and Another* 2017 ZACC 13 at para 1:
  - ▶ “The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it ... [I]n everything we do, we must remember that there is only one aim and one solution and that is the land, the soil our world.” (Madlanga J. citing Rugege “Land reform in South Africa: An Overview” 2004 *International Journal of Legal Information* 283 at 286).

# Current status of HF in South Africa

- ▶ Investigation commissioned by the DMR indicate there is an estimated 485 trillion cubic feet of shale gas in the Karoo region.
  - ▶ No guarantee that estimated quantity could be recovered.
  - ▶ Paucity of scientific knowledge on the geology, depth and cost of exploitation is a source of concern.
  - ▶ Karoo is not noted for intensive industrial activity or mining.
  - ▶ Potential impact on the environment and human health.
    - ▶ Use of toxic chemical additives may pollute land, atmospheric air and underground water, harming humans and livestock.
    - ▶ Peculiar 24hour operations is a potential source of nuisance, and infrastructure degradation.
    - ▶ Degeneration of the Karoo landscape and topography.
    - ▶ Intensive water requirement will likely stress other uses of water.
    - ▶ Risk of possible seismic movements, causing earthquakes.
    - ▶ Involuntary eviction of people from homes, and abandonment of trade, occupation or profession.
  - ▶ Calls for caution and/or outright ban.

## ...Current status of HF in South Africa

- ▶ The government issued notices of pending administrative decision in terms of the *Promotion of Administrative Justice* 3 of 2000 (PAJA)
  - ▶ In respect of applications for exploration rights for natural gas (shale gas) in the Western Cape, Eastern Cape and Northern Cape provinces.
    - ▶ GN 87 in PG 2195 of 11 July 2018.
    - ▶ PN 121 in PG 4080 of 11 July 2018.

# ...Current status of HF in South Africa

- ▶ MPRDA addresses challenges relating to community ownership of land and the empowerment of previously disadvantaged people.
- ▶ The MPRDA requires consultation, including with communities that may be affected.
  - ▶ See Sections 5(4)(c), 10, and 16(4)(b) of the MPRDA
  - ▶ Section 1 of MPRDA - Negotiations or consultations should include the members or part of the community directly affected by mining.
  - ▶ Section 23(2A) - The Minister may to promote the rights and interests of the community.
- ▶ Section 2(4)(f) of NEMA requires the participation of all interested, including the vulnerable and disadvantaged persons.
- ▶ S.6 of the MPRDA - Mining [including HF] must comply with the principles of administrative justice.
  - ▶ This is in line with the requirements of S.33 of the Constitution.
- ▶ The Constitution requires compliance with certain administrative actions:
  - ▶ S.24(b)(iii) - Use of natural resources to promote justifiable economic and social development."
  - ▶ S.25(4)-(7) – Equity in access to land and natural resources.
  - ▶ S.27 – Access to health care, food, water and social resources.

# Traditional leadership and HF

- ▶ In relation to development, the *Traditional Leadership and Governance Framework Act 41 of 2003* (TLGFA) places high premium on the role of traditional leadership.
- ▶ The statutory role should apply to the development of shale gas by HF.
- ▶ Section 4 provides for the functions of traditional councils, including:
  - d)** facilitating the involvement of the traditional community in development.
  - e)** recommending ... appropriate interventions to government that will contribute to development.
  - f)** participation in the development of policy and legislation at local level;
  - g)** participating in development programmes of municipalities and of the provincial and national spheres of government;
  - h)** promoting the ideals of ... integrative development planning, sustainable development and service delivery;
  - i)** promoting indigenous knowledge systems for sustainable development and disaster management.

# ... Traditional leadership and HF

- ▶ Section 20 of the TLGFA – Guiding principles for allocation of roles and functions
  - ▶ “1) National government or a provincial government **to provide a role for traditional councils or traditional leaders** in respect of-
    - i) economic development;
    - l) disaster management;
    - m) the management of natural resources;
    - n) the dissemination of information relating to government policies and programmes”.
  - ▶ See also para 3.2 of the *The White Paper on Traditional Leadership and Governance* 2003 on the roles of traditional leadership in governance and development.
- ▶ The *Interim Protection of Informal Land Rights Act* No 31 of 1996 defines ‘**informal right to land**’ to include “the use of, or access to land in terms of (i) any tribal, customary or indigenous law or practice of a tribe.”
  - ▶ Section 2(1)- Subject to a law “which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.”



## ... Traditional leadership and HF

- ▶ Do the acts requiring consultation/agreement/reference by public authorities with communities constitute administrative action?
- ▶ S. 1 of PAJA – Definition of ‘administrative action.’
- ▶ S.3 of PAJA requires that “administrative action which affects the rights or legitimate expectations of any person must be procedurally fair.”
- ▶ The identity of the maker of a decision is irrelevant, what is required is whether or not he (or it) was “exercising a public power or performing a public function?”
  - ▶ See *Mobile Telephones Networks (Pty) Ltd v SMI Trading CC* 2012 ZASCA 138.
  - ▶ *Calibre Clinical Consultants (Pty) Ltd and Anor v The National Bargaining Council for the Road Freight Industry and Anor* 2010 (5) SA 457 (SCA).

## ... Traditional leadership and HF

- ▶ The documentary film '*Unearthed- The Deeper the Dig, the Darker the Secrets,*' showed that there was no meaningful public engagement.
- ▶ Lack of required consultation in HF regarding an administrative action may justify its being set aside.
- ▶ There should be evidence that the procedure required in section 4(1) of PAJA is followed in arriving at a decision.
  - ▶ The complexity of HF requires that participation cannot be a one-off event because the potential dangers are yet to be fully comprehended.
  - ▶ The controversy surrounding HF and its potential impacts on human and the environment requires the procedure envisaged in terms of section 4(1)(c) of PAJA.
- ▶ Rather than meaningful consultation, some prospectors merely try to fulfil righteousness.
- ▶ The Constitution prohibits administrative action that is based on exclusionary processes.

## ... Traditional leadership and HF

- ▶ Powers exercised or performed on behalf of the community are subject to judicial review.
  - ▶ *Calibre Clinical Consultants (Pty) Ltd and Anor v The National Bargaining Council for the Road Freight Industry and Anor.*
- ▶ Nonconformity by public functionaries and private operators of HF creates opportunity to subject administrative action to a test of procedural requirements.
- ▶ Traditional leaders may apply the right to just administrative right to realise the rights of community members.

## ... Traditional leadership and HF

- ▶ Many of the issues in the HF process can be narrowed down to questions of administrative fairness.
- ▶ A potential non-compliance with the requirements of administrative justice in HF is a breach of right.
  - ▶ High cost or ignorance of rights may shut out potentially poor and vulnerable people who may be affected by HF from the courts.
- ▶ S. 38(c) of the Constitution gives standing to anyone “acting as a member of, or in the interest of, a group or class of persons” to seek appropriate relief in the courts for breach of rights.
- ▶ Traditional leaders are well positioned to stand in S.38(c) position to seek redress for breach of group rights.
  - ▶ Customary law focuses on the protection of individual rights exercised in the context of a group.
  - ▶ The traditional leader is the “... symbol of unity for his people. He was a religious leader, a guardian of the culture, customs, and values of his people, and their defender ...”

# Conclusion

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- ▶ In relation to development, the Constitution provides for:
  - ▶ A “secure[d] ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.” See section 24(b)(iii).
  - ▶ Economic and social development should not violate the right to equality.
    - ▶ Section 9(3) provides that “the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ...ethnic or social origin, ... culture...”
  - ▶ Section 10 provides that “everyone has inherent dignity and the right to have their dignity respected and protected.”

# ...Conclusion

- ▶ Institution of traditional leadership is protected by the Constitution and respected by local communities.
  - ▶ More in the rural communities than in the urban centres.
  - ▶ Level of trust in traditional authorities is higher than in local government in the Eastern and Northern Cape provinces, compared to the Western Cape and Gauteng Provinces.
- ▶ Structures of traditional leadership may be deeply rooted in the social fabric of African communities, they are not only resilient, they are also adaptive.
- ▶ There is potential for a constructive role for traditional leadership in promoting the buy-in of communities in land-use and development projects.
- ▶ In the event of non-compliance with statutory or procedural requirements, traditional leaders are in a position to seek redress for the community.
  - ▶ The constitutional provision for the right to just administrative action is a veritable tool for that purpose.