

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

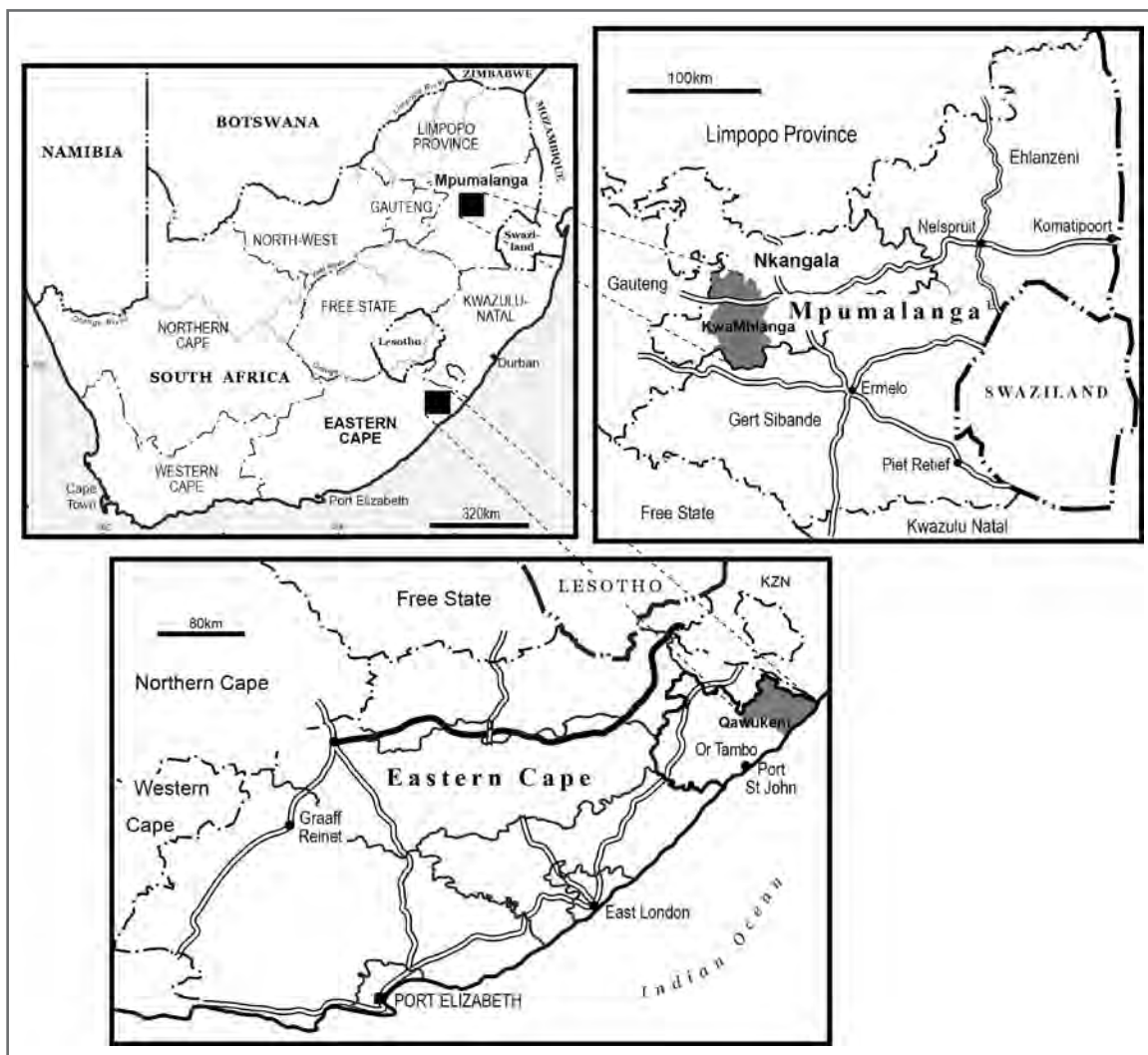
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