The Avatar syndrome: mining and communities

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Journal Paper

Synopsis

On 25 August 2011, Andrew Mitchell, Lucas Moalusi, and Matthew van der Want of Bell Dewar hosted a presentation on Mining and Communities in Mooinooi, in the North-West Province. The conference was attended by traditional leaders in the North-West Province, officials from the Department of Local Government and Traditional Affairs, and executives from the mining industry. The presentation concerned traditional governance in mining, communities' rights in terms of applicable legislation, and the corporatization of community affairs.

Keywords

land rights, consultation, MPRDA, community involvement, social and labour plans.

Introduction

James Cameron's 2009 epic Avatar was hailed as a technological leap into the future of film making. It is the film's storyline, however, which has particular significance to the South African mining industry. The film focuses on the relationship between human explorers who seek to enrich themselves with the mineral resources of the planet Pandora and the indigenous beings of that planet, the Na'vi, and allegorises a failure by mining companies to take into account the interests and concerns of the communities whose lives are affected by mining operations. It is a tale that parallels the history of mining in South Africa since its inception in the nineteenth century.

In order to explain the competing—yet interdependent—relationships between communities and mining companies, one must take into account the manner in which mines operate. Mining operations make use of partnerships. Various parties fulfil different roles in the technical, financial, and human resources areas of mining operations. Consultants are contracted for purposes of feasibility studies and environmental matters, while the actual operations will often have different entities engaged in mining, processing, and rehabilitation.

Historically, it was primarily these parties that participated in the negotiations for, and the use and benefits associated with, South Africa's mineral resources. The communities who lived on or owned the land where the operations took place, and who were mostly black and indigent, were limited by racially discriminatory laws to indirect involvement under a system of starkly unequal bargaining.

This situation changed with the entry into force of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which legislates the protection of community rights and interests in the mineral and petroleum industries. Furthermore, recent amendments to the MPRDA indicate an intention to pursue the protection afforded to communities with greater vigour.

This paper will examine the manner in which the MPRDA and associated legislation has transformed the historical relationship between mines and communities and the effect this has had on the upliftment of traditional communities in South Africa.

Communities and the history of South African mining

Land was one of the primary means by which black South Africans were oppressed. Statutes such as the Black Land Act 27 of 1913 and the Development Land and Trust Act 18 of 1936 deprived black people of their rights to own and administer their own land. Until relatively recently, communities were able to own land only through a trust-like arrangement with a government official and were limited to ownership within geographical areas defined by statute.[1]

[1]In this regard cf. D.L.C. Miller, Land Title in South Africa, Juta, 2000, pp. 1–42; P.J. Badenhorst *et al.*, Silberberg and Schoeman's The Law of Property, 5th edn, LexisNexis Butterworths, Durban, 2006, pp. 585–587, R. Hall, 'Reconciling the Past, Present, and Future' in C. Walker (ed.), Land, Memory, Reconstruction, and Justice, University of KwaZulu-Natal Press, 2010.

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These limitations on the land rights of black communities had profound consequences on the ownership of and access to mineral resources, since the common law position was that

> 'the owner of land is owner not only of the surface but of everything legally adherent thereto, and also of everything contained in the soil below the surface.'[2]

The trust arrangement described above had the result that communities were unable directly to administer the exploitation of the minerals under their land.[3] Inevitably, the minimal protection of the interests of such communities resulted in the exploitation of the communities' mineral resources by mining houses, with the communities receiving inadequate compensation for the exploitation of the rights to their mineral resources. Moreover, communities were denied the right to be adequately consulted with respect to transactions concerning their own land. This had significant implications in light of the fact that both the common law[4] and statute[5] recognized separation of mineral rights from the rights of ownership in the land. The indirect system of land ownership was also affected, as regards minerals, by the increased State interference with mineral rights up until 1991.[6]

The Minerals Act 50 of 1991 was 'arguably the biggest step towards a system of exclusive private mineral rights ownership'[7] and a retreat from State interference with such rights, a policy which was quite unique in the global context. Even though by 1991 many racially discriminatory laws had been abolished, the Minerals Act did not address the injustices and imbalances which had been created. In fact, the move toward the privatisation of mineral wealth occasioned by the Minerals Act in fact lead to increased monopolisation of the mineral wealth by the (predominantly white) mining companies. Black communities remained sources of labour in mining areas without seeing tangible, long term benefits.

The legal regime in the constitutional era

The democratic mandate given to the new government in 1994 afforded the State an opportunity to redress injustices perpetrated under the previous regime. The Constitution of the Republic of South Africa, 1996 specifically mandated such changes both in a general sense and under specific provisions. Generally, this transformative mandate is expressed in the Preamble, where the adoption of the Constitution aims to '*[i]mprove the quality of life of all citizens*', and by the inclusion of judicially enforceable socio-economic rights.

More specifically sections 25(5) to (9) of the Constitution provide that:

> '(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
>
> (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
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> (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
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> (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).
>
> (9) Parliament must enact the legislation referred to in subsection (6).'

These provisions recognize the unjust interference with the property rights of traditional communities and heralded an unequivocal call for the transformation of access to property. One of the statutes enacted in accordance with these subsections is the Restitution of Land Rights Act 22 of 1994 (the Restitution Act), which sought to redress the deprivation of land as a result of racially discriminatory laws between 1913 and 1998.

However, the Restitution Act did not address the denial of access to mineral rights, and it was against this backdrop that the MPRDA was passed. As stated in sections 2(c), (d) and (i), the MPRDA aims, *inter alia*, to promote equitable access to the nation's mineral resources and extend the benefits to be obtained from the exploitation of the nation's minerals to historically disadvantaged persons and the socio-economic development of areas in which these activities are undertaken.

Furthermore, the MPRDA, in section 3(1), states that

> 'Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.'

The MPRDA therefore places the ownership of South Africa's mineral wealth in the hands of all South Africans and the State merely regulates the exploitation thereof as a custodian and the democratically-elected representative of the South African people.

These provisions acknowledge the past effects of mining on traditional communities and mandate the Minister to play a corrective role in this regard. In accordance with this mandate, section 100(2) of the MPRDA requires the Minister to develop a Charter for the mining industry that sets targets and timetables for the participation in the mining industry of historically disadvantaged South Africans (HSDAs).

The MPRDA and communities

The MPRDA contains a number of specific provisions dealing with communities and, in fact, defines a 'community' as:

> '... a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law'.

This definition is broad and disputes regarding the application of the community measures under the MPRDA to a particular group, by reason of the relevant group falling in or outside the definition, are unlikely. There are several measures in the MPRDA which enable communities to protect their interests in land that is the subject of applications for

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[2] Union Government v Marais & Others 1920 AD 240 at 246.

[3] F.T. Cawood and R.C.A. Minnitt 'A historical perspective on the economics of the ownership of mineral rights ownership' *Journal of the South African Institute of Mining and Metallurgy* (November 1998) at 373.

[4] Nolte v Johannesburg Consolidated Investment Co Ltd 1943 AD 295 at 315.

[5] Deeds Registries Act 47 of 1937, ss 70–74.

[6] Primarily under the Mining Right Act 20 of 1967.

[7] Cawood and Minnit (supra) at 371.

rights under the MPRDA. These measures relate to consultation, social and labour plans, preferent rights afforded to communities, the continuation of royalty payments in certain circumstances, and black economic empowerment (BEE).

Consultation

Consultation is arguably the most important aspect of community involvement in mining operations. It is from this initial contact between the applicant for rights under the MPRDA and the community that the foundations may be laid for the achievement of the objects set out in the MPRDA. Consultation is a compulsory process under the MPRDA and is divided into two discrete phases.

First, section 5(4)(c) prohibits the commencement of mining or prospecting operations without notifying and consulting with the land owner or lawful occupier of the land in question. This section provides an obligation to consult before commencing operations and has been interpreted by the courts to be a separate obligation to the consultation requirements under sections 16 and 22 of the MPRDA. Consultation under section 5(4)(c) takes place after grant of a prospecting or mining right but before commencement of operations.[8] Right holders should be mindful of the fact that a contravention of section 5(4) is an offence in terms of section 98(a)(i) punishable by a fine not exceeding R100 000 or two years imprisonment or both.[9]

In addition to this obligation in the general prohibition clause, sections 16 (relating to prospecting right applications) and 22 (relating to mining right applications) both require that consultation with the land owner or lawful occupier or other interested and/or affected party occur after the relevant application has been lodged and accepted but before (and as a condition to) the grant of the relevant right.[10] These consultations afford a community the opportunity to negotiate compensation for use of the land in question and/or damage to it, to make representations regarding the obligations that the rights applicant will undertake in terms of its social and labour plan and, in some instances, to enter into a full partnership with the rights applicant as a Black Economic Empowerment partner.

Consultation accordingly provides a community with a weapon with which to safeguard their interests. The MPRDA allows a right holder to enter land for purposes of exercising its rights under the Act. The operations are inevitably disruptive to the community in many respects and the consultation process affords the community an opportunity to mitigate such disruptions by voicing its concerns and negotiating preventative or compensative measures. In this regard it is important to bear in mind that

> 'consultation cannot be a mere formal process. It has to be a genuine and effective engagement of minds between the consulting and the consulted parties. A mere formalistic attempt to consult does not constitute consultation.'[11]

Thus, mere notification by an applicant of its application will not be sufficient to meet the obligations of sections 5(4) and 16 or 22.

Courts have refrained from setting out exactly what constitutes consultation. In Maqoma v Sebe NO and Another[12] the court examined the basic definition of the word 'consultation' and noted that:

> 'The Concise Oxford Dictionary (New Edition) consulted, equates 'consultation with 'act of consulting'; deliberation; conference' stating that it is derived from the Latin consultatio. 'Deliberation' in turn is given as 'weighing in mind, careful consideration; discussion of reasons for and against, debate; care, avoidance of precipitancy; unhurriedness of movement.'

The court in Magoma stated further that:

> 'consultation in its normal sense, without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party (also indicative of the prefix 'con') in a situation of conferring with each other where minds are applied to weigh and consider together the pro's and cons of a matter by discussion or debate.'

From these extracts, it is clear that consultation is a two–way process and mere notification can never constitute consultation; more is needed to fulfil the obligations of section 5(4) and 16 or 22 of the MPRDA.

The criminal sanctions relating to consultation have already been mentioned, but it is the conditions for the grant of a prospecting or mining right under sections 17 and 23 which afford an aggrieved community tangible power where there has been a failure to consult or an inadequate consultation process. In this regard, sections 17(2)(a) and 23(3) direct the Minister to refuse a right if the application does not meet the requirements of sections 17(1) or 23(1) respectively. On the model of consultation developed in S v Smit, a failure to engage genuinely and effectively may result in a contravention of the MPRDA and the refusal of one's application for a right. Furthermore, communities with the requisite standing may approach a court to review and set aside a right if the Minister grants such right where the consultation process was flawed and hence in contravention of the MPRDA.[13]

Practically, a number of scenarios arise where consultation may be said not to be genuine or effective. The most obvious is where no consultation occurs at all. As proof of consultation is required in terms of sections 16(4)(b) and 22(4)(b), read with the relevant Regulations, such a situation will only arise where there is a fraudulent misrepresentation by the applicant or an irregularity on the part of the Regional Manager.

Flawed consultation in the context of traditional communities often involves a failure by the applicant to make use of the appropriate channels within the traditional leadership structure of a community. These structures, such as the position of Kgosi in Tswana communities and role of a traditional council, are recognized in the Traditional Leadership and Governance Framework Act 41, 2003 and decision-making within a community almost always occurs through this channel.

Traditional communities have already used consultation as a means of successfully promoting and protecting their interests. The courts recently ruled that the consultation process required by section 16(4)(b) of the MPRDA (discussed in greater detail in the Bengwenyama judgment, below) entails that the applicant must:

[8] Meepo v Kotze 2008 (1) SA 104 (NC) at para 16.v
[9] MPRDA, s 99(1)(a).
[10] MPRDA, ss 16(4)(b) and 22(4)(b). In section 22 this obligation in respect of 'interested and affected parties' and not just the land owner or lawful occupier.
[11] S v Smit 2008 (1) SA 135 at 153.
[12] Magoma v Sebe NO and Another 1987 (3) All Sa 414 (CK)
[13] Cf. discussion of Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (Bengwenyama-ye_Maswati Royal Council Intervening) 2011 (3) BCLR 229 (CC), below.

a) inform the landowner in writing that his application for prospecting rights on the owner's land has been accepted for consideration by the Regional Manager concerned;
b) inform the landowner in sufficient detail of what the prospecting operation will entail on the land, in order for the landowner to assess what impact the prospecting will have on the landowner's use of the land;
c) consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and
d) submit the result of the consultation process to the Regional Manager within 30 days of receiving notification to consult.

Finally, the trust-like arrangement of land ownership by traditional communities is still in effect today in several instances. In these circumstances it is important to remember the relevant functionary who acts as trustee when it comes to consultation; in most cases this will be the Minister of Land Reform and Rural Development.

Social and labour plans

Every applicant for a mining right must submit a social and labour plan.[14] Furthermore, every holder of a mining right must make provision for its obligations under the prescribed social and labour plan.[15] The social and labour plan is a device aimed at achieving the transformative and socio-economic objectives of the MPRDA, with a specific focus on community upliftment.[16]

Social and labour plans have three broad sections: a human resources development programme (HRDP), a local economic development programme (LEDP), and a section pertaining to the management of downscaling and retrenchment.[17] The HRDP and the LEDP provide communities with concrete points on which to negotiate with applicants for rights during the consultation process. These relate to, inter alia, skills development of mine employees (who are often from the surrounding community), infrastructure and poverty eradication projects.

In addition, the Department of Mineral Resources (DMR) has published the Social and Labour Plan Guidelines for the mining and production industries (Guidelines) providing further clarity as to what ought to be included in social and labour plans. Clause 3 of the Guidelines provides that the

> 'primary objective of local economic development (LED) programme is to ensure poverty eradication and community upliftment'.

Further guidance on the content of social and labour plans is provided in the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (the Charter) and its accompanying Scorecard (the Scorecard). These documents set out concrete targets and initiatives that mining companies should aim to achieve. For example, the Charter provides that mining companies should show co-operation 'in the formulation of integrated development plans'[18] and the implementation thereof. To name some specific examples, companies should show actual financial commitments to the establishment of infrastructure, health care, education and housing projects. The Charter is a form of quasi-legislation[19] and as such has legal effect to the extent that it is not *ultra vires* its empowering statute.

The social and labour plan undertakings attempt to provide communities, which tend to provide the labour on a mine, with an opportunity to benefit from the mining operations in the long term and thereby avoid the familiar 'ghost town' syndrome.

Ownership and joint ventures

The Charter also provides communities with an opportunity to participate in and benefit directly from proposed mining operations. Although not specifically aimed at communities, the Charter states that mining companies must achieve, by 2014, 26% ownership in the hands of HDSAs. Traditional communities, disadvantaged under the previous political and mining regime, would be categorised as HDSAs. There is accordingly scope for traditional communities to take advantage of the mineral resources in, on, or under their land and enter into partnerships or joint ventures with mining companies.

Preferent rights

Thus far the provisions of the MPRDA regarding communities have referred to communities as the suppliers of labour, the beneficiaries of socio-economic programmes, or as ownership participants. However, section 104 of the MPRDA affords communities a preferent right to apply for a prospecting or mining right ahead of other prospective applicants.[20] Section 104(2) attaches conditions to this preferential treatment aimed at the achievement of the socio-economic objectives of the Act. When applying for a right in terms of section 104, the community must prove that 'the right shall be used to contribute towards the development and the social upliftment of the community concerned'.[21]

The transitional provisions

A further provision relating to the protection of community interests in the MPRDA is found in the Act's transitional arrangements.[22] The measures relating to communities recognise that under the previous regime, many communities (through the designated trustee) entered into agreements with mining companies in terms of which the community received a consideration or royalty in exchange for the use of their land and/or mineral rights by mining companies.

Item 11 of Schedule II ensures that certain of these contractual arrangements continue into the new order, notwithstanding the expiry of the relevant old order right. In light of the transformative mandate underpinning the MPRDA, it could be argued that Item 11 falls short of the aims of the Act by merely maintaining, in some cases, the status quo with respect to royalty payments. Communities under the old regime were in very unequal bargaining positions. This may well have resulted in terms of royalty arrangements being biased in favour of the mining company rather than being a true reflection of the value due to the community.

[14]Mineral and Petroleum Resources Development Regulations GNR 527 GG 26275 of 23 April 2004, Reg 10(1)(g).
[15]MPRDA, s 23(1)(e)
[16]Regulation 41.
[17]Regulation 46(b), (c) and (d).
[18]Charter, clause 4.4.
[19]Dale et al South African Mineral and Petroleum Law (2009) at App-3.
[20]Ibid at 615.
[21]MPRDA, s 104(2)(a).
[22]Schedule II to the MPRDA.

The Bengwenyama judgment

In the matter of Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd[23] ('Bengwenyama'), the Constitutional Court had the opportunity to fully examine, inter alia, communities' rights to consultation and preferent rights vis-à-vis mining companies' rights applications. The Court chastised both Genorah Resources (the applicant) who had applied for a prospecting right, and the DMR for not properly consulting with the Community (Bengwenyama) during the process of Genorah's application for a prospecting right, if at all.

In respect of the importance of consultation, the Court reasoned that:

> 'The consultation process is an integral part of the fairness process because the decision [to grant the right] cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair.'

Thus the Court held that since there had not been proper consultation with the community by the applicant or the DMR, the decision to grant the prospecting right was reviewable.

The Court further held in respect of a community's preferent right in terms of section 104 of the MPRDA:

> 'It seems to me that these provisions of the [MPRDA] create a special category of rights for ... communities, in addition to their rights as owners of the land, namely to apply for a preferent right to prospect on their land. It is only where a prospecting right has already been granted on communal land that the preferent right may not be granted. It therefore appears to me that any application for a prospecting right under section 16 of the Act that might have the effect of disentitling a community of its right to apply for a preferent prospecting right under section 104 of the Act, materially and adversely affects that right of a community. Before a prospecting right in terms of section 16 may be granted under those circumstances, the community concerned should be informed by the Department [of Mineral Resources] of the application and its consequences and it should be given an opportunity to make representatives in regard thereto. *In an appropriate case that would include an opportunity to bring a community application under section 104 prior to a decision being made on the section 16 application.*' (Emphasis added)

The Constitutional Court upheld the community's rights in terms of the MPRDA to be properly consulted by both the applicant and the DMR and further, to be granted a preferent right where that community fulfils the requirements set out in section 104 of the MPRDA. The Court ultimately set aside the decision to grant the prospecting right to the applicant where the applicant and the DMR had not complied with the consultation process as envisioned by the MPRDA. Therefore, any failure to comply with these processes relating to preferent rights and consultation will be fatal to that application.

The Mineral and Petroleum Resources Development Amendment Act 49 of 2008

The present analysis of the provisions relating to communities started with a definition of 'community'. It is therefore useful to use this again as a point of departure when examining the provisions of the Amendment Act, which, although signed by the President, has yet to enter into force. The definition of 'community' is broadened to contain express reference to the requirement to consult.

Under the Amendment Act, the word 'community,' as amended, means:

> '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'.[24]

The objects of the MPRDA in section 2 have also been amended. The amended section 2(d) now provides that the MPRDA aims to:

> '(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women *and communities*, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources'[25]
> (emphasis added).

This objective is carried through to the substantive provisions of the MPRDA relating to the grant of prospecting and mining rights. Section 17 is amended by the insertion of subsection (4A) which provides that if an application relates to land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community'.[26]

This section relates to prospecting rights. A similar provision is added to section 23 in relation to mining rights.

The amended provisions grant the Minister what appear to be extensive powers with respect to the protection of community interests. It remains to be seen however, to what extent these powers will be used and whether there will be a shift in the terms and conditions upon which rights are granted. The difference may be found in the enforcement of the Charter. It is submitted that enforcement of the Charter currently requires the authorities to make a link between the provisions of the Charter, which are not being adhered to, and a consequent violation of one of the section 2 objectives. Under the Amendment Act the Minister may use her powers to directly enforce the requirements of the Charter as a condition 'necessary to promote the rights and interests of [a] community'.

Conclusion

The MPRDA constitutes a significant step towards redressing the harm caused to communities during the first 140 years of mining in South Africa. However, the provisions of the MPRDA have not always been successful in remedying the wrongs of the past and it is clear that the DMR will, through amendments to the MPRDA and other measures, seek to fortify the protections and benefits afforded to communities surrounding mining operations in the near future. ◆

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[23]Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (Bengwenyama-ye_Maswati Royal Council Intervening) 2011 (3) BCLR 229 (CC).
[24]Amendment Act, s1(c).
[25]Amendment Act, s 2.
[26]Amendment Act, s 13(f).