

Legal mechanisms for holding traditional authorities accountable for administering mining royalties in South Africa

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Mini dissertation accepted in partial fulfilment of the requirements for the degree *Master of Laws in Environmental Law and Governance* at the North-West University

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Graduation: April 2024
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Dedication

To my lovely parents, **Keikanetswe Maria Monchwe, Thebeemodimo David Monchwe**, and the rest of the family.

Acknowledgements

The Almighty God: Primarily, I thank the only omnipotent and omnipresent God for giving me the strength to complete this mini dissertation. For he did more than I could ever achieve or imagine on my own. He has been so faithful to me.

My supervisor: I am profoundly indebted to you **Prof Willemien Du Plessis** for your dedication and guidance, which have been instrumental in shaping this academic milestone. Thank you for guiding my thoughts, scrutinizing every word meticulously and for your unwavering support and patience with me.

North West University Law Faculty and Financial Aid Office: This study could not have been possible without the financial assistance from both the Law faculty as well as the NWU Financial Aid Office. Thank you so much for sponsoring my studies.

My Parents and family: I am because of you people. Thank you so much for believing in me when I did not. Your patience and persistence on me has been immensely instrumental in this academic journey. I thank God for you every day.

Segopotso Faith Gaobuse: Thank you so much darling for all your emotional support and encouragement. Words fail me. You are my source of inspiration. I love you.

My friends: I would be remiss in not mentioning my friends, **Phenyo Kuntwane, Phenyo Papathi** and **Osman Bantu Faku**, for their belief in me has kept my spirits and motivation high during this process. *Kea Leboga Bafethu.*

Abstract

The aim of the study was to analyse the additional legal mechanisms that traditional communities can use to hold traditional authorities accountable for the administration of mining royalties. Mining activities poses severe social, environmental and health impacts on the lives of surrounding communities. In order to mitigate these severe impacts, mining royalties were introduced to improve the lives of those affected by mining activities and uplift their social life. The *Traditional and Khoi-San Leadership Act* empowers traditional councils to enter into agreement or partnership with anyone, including mining companies subject to a prior and informed consultation with the relevant community that they represent. The majority of the community members who attend the meeting must approve the agreement or partnership. The agreement or partnership must furthermore be based on good governance principles.

Traditional authorities are often regarded by outsiders as the 'custodians of communities' and they are thus consulted. This is based on a misconception that they are the owner of the land that falls within their jurisdiction and therefore consent from the affected communities is not needed. Based on this misconception, mining lease agreements are negotiated and concluded. Proceeds flowing from these lease agreements in the form of royalties sometimes falls in the hands of these traditional authorities without the knowledge of the traditional communities.

Accountability pertaining to the administration of mining royalties has been compounded by the conduct of some traditional authorities, underlying tensions and flaws in the legislation as well as lack of uniformity in the provinces pertaining to the regulation of traditional authorities. There have been several cases where mining royalties have been mismanaged and relevant traditional communities have not had any legal mechanism that they could use as a vehicle to hold their traditional authorities accountable. It is against this backdrop that this study sought to analyse mechanisms such as the Public Protector, Auditor General and The Special Investigating Unit as additional mechanisms that traditional communities can use to

bring traditional authorities to account for the administration of mining royalties.

Keywords: Administering mining royalties, traditional authorities, accountability, legal mechanism, South Africa

List of abbreviations

APDPR	Africa's Public Delivery and Performance Review
BJJ	Bangladesh e-Journal of Sociology
BAA	Black Authorities Act
CoGTA	Department of Cooperative Governance and Traditional Affairs
EJDR	European Journal of Development Research
LPG	Limpopo Provincial Government
JSAS	Journal of Southern African Studies
LIMPOPO ACT	Limpopo Traditional Leadership and Institutions Act
MPRDA	Mineral and Petroleum Resources Development Act
NWPG	North West Provincial Government
NCOP	National Council of Provinces
NA	National Assembly
NORTH WEST ACT	North West Traditional Leadership and Governance Act
PL	Provincial Legislature
PELJ	Potchefstroom Electronic Law Journal
ROAPE	Review of African Political Economy
TLGFA	Traditional Leadership and Governance Framework Act

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Chapter 1: Introduction

1.1 Problem statement

Traditional communities and their authorities have existed in Africa since times immemorial.¹ Although traditional communities and their leaders received some attention during the pre-1910 period, their recognition was formalised in the post-1910 period. The *Black Administration Act*² also instituted the Office of the Governor-General (and later the State President) as the supreme chief and the highest sphere of authority over Black people in South Africa.³ This right was later extended to the homelands.⁴ The recognition of traditional communities was dealt with in terms of chapter 2 of the Act. Commissioners were appointed to deal with the administration of the traditional areas.⁵ A traditional leader could only conclude a contract, incur liability from such a contract and if the relevant Minister approved the contract and the majority of the male members of the community agreed to such contract during a meeting convened for this purpose.⁶

During the apartheid period, the then national government introduced several laws to allow traditional authorities and their councils to ally with political authorities. One of the key statutes that empowered traditional authorities to have power over their land was the *Black Authorities Act* (hereinafter the BAA) which repealed the chapters regulating the recognition of traditional authorities in the *Black Administration Act*.⁸ Government had control and power over the appointment and

¹ Khunou 2023 *Matatu* 293-320.

² 38 of 1927.

³ Section 1 of the *Black Administration Act*. Also see Claassens and Matlala "Platinum, Poverty and princes in Post South Africa: New Laws, Old Repertoires" 66.

⁴ Bophutatswana, Ciskei, Transkei and Venda as "independent states" and Gazankulu, Lebowa, QwaQwa, KwaZulu, KwaNdebele and KaNgwane as self-governing territories.

⁵ Section 2 of the *Black Administration Act* 38 of 1927.

⁶ Section 3 of the *Black Administration Act* 38 of 1927.

⁷ 68 of 1968.

⁸ *Black Administration Act* 38 of 1927.

removal of traditional authorities in local communities.⁹ This right was later extended to the leaders of the so-called homelands.¹⁰

Whereas, the BAA was the primary legislation intended to allow traditional authorities to ally with the apartheid government, the post-1994 *Traditional Leadership and Governance Framework Act*¹¹ (TLGFA) similarly granted traditional leaders and their councils the power over their administration, “communal land, natural resources, economic development, health and welfare and to administer justice”.¹² The TLGFA repealed the BAA.¹³

The TLGFA followed sections 211 and 212 of the *Constitution of the Republic of South Africa, 1996* (the Constitution) that provide that the institutions, status and role of traditional leadership are recognised, subject to the *Constitution*.¹⁴ Provinces enacted their own legislation to regulate the recognition of traditional authorities, and to describe the role of local and national governments in communities that fall within the purview of rules and structures of traditional authorities.¹⁵

Subsequently a new traditional leadership Act was enacted in 2019 to replace the TLGFA, namely the *Traditional and Khoi-San Leadership Act*.¹⁶ This Act seems to be riddled with vague provisions on the powers of the traditional authorities and does not refer to the governance of minerals or natural resources on the land.¹⁷ The Act was declared unconstitutional in 2023 but the Act will remain in place for another 24 months, and will be referred to as the current legislation recognising traditional

⁹ Section 2 of the BAA.

¹⁰ See Khunou 2023 *Matatu* 293-320.

¹¹ Traditional Leadership and Governance Framework Act 41 of 2003.

¹² Section 20 of the TLGFA.

¹³ See the Preamble of the TLGFA.

¹⁴ Section 211(1) of the *Constitution*.

¹⁵ See for example the *North West Traditional Leadership and Governance Act* 2 of 2005 and *Limpopo Traditional Leadership and Institutions Act* 6 of 2005. See also section 104(1) of the *Constitution* read with Schedule 4, which confers concurrent powers to national and provincial legislatures to pass legislation on traditional leadership.

¹⁶ Traditional and Khoi-San Leadership Act 3 of 2019.

¹⁷ See section 15 of the *Traditional and Khoi-San Leadership Act* 3 of 2019 for the functions of the traditional and Khoi-San leaders and Section 20 of the *Traditional and Khoi-San Leadership Act* 3 of 2019 for the functions of the traditional and Khoi-San councils.

leaders and their councils.¹⁸

Section 24 of the *Traditional and Khoi-San Leadership Act* empowers traditional leaders to enter into partnership and agreements with 'any person, body or institution'.¹⁹ However, an agreement or partnership within the prescripts of this Act must be beneficial to the community being represented by the same traditional council²⁰ and the relevant community being represented must be consulted before the agreement is entered.²¹ Various developments occur in traditional areas, of which mining is one such activity.

In terms of section 10 of the *Mineral and Petroleum Resources Development Act*²² (hereinafter MPRDA) holders of mining rights are required to enter into negotiations with landowners and occupiers about accessing their land.²³ However, the negotiations do not require ultimate agreement.²⁴ Regarding communal land, it will be the traditional leaders and their councils that enter into agreements on behalf of the community. It is important to be mindful that the land does not belong to the traditional leader or its council, but is the communal land of the relevant traditional community (or sometimes it is registered as state land).²⁵ However, in the recent case of *Baleni*²⁶ the court showed that the community members must also give prior and informed consent before any mining can take place on their land.²⁷

¹⁸ See *Mogale and Others v Speaker of the National Assembly and Others* 2023 (9) BCLR 1099 (CC) para 87.

¹⁹ Section 24(2)(c) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

²⁰ Section 24(3)(a) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

²¹ Section 24(3)(c)(i) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

²² *Mineral and Petroleum Resources Development Act* 28 of 2002.

²³ Section 10 of the *MPRDA*.

²⁴ See *Bengwenyama Minerals & Others v Genorah Resources & Others* 2011 (3) BCLR 229 (CC) and *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (3491/2021) [2022] ZAECMKHC 55.

²⁵ *Maledu and others v Itereleng Bakgatla Mineral Resources Pty Limited and another (Dlamini and Land Access Movement of South Africa as Amici Curiae)* 2019 (2) SA 1 (CC) para 97. See also *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (3491/2021) [2022] ZAECMKHC 55 para 93.

²⁶ *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP).

²⁷ *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP). Also see Meyer 2020 *PER/PELJ* 1-18.

Royalties are to be paid if mining occurs on traditional land or for existing operations on the land before the commencement of the MPRDA.²⁸ Before 1996 some communities, for example, the Royal Bafokeng nation had to fight for the minerals on their land.²⁹ The proceeds are mostly used to benefit the community and develop their own area.³⁰

Generally, the notion behind implementing the MPRDA was to redress the injustices of the past regarding access to mining. The legislation intends to achieve equitable access to mineral and petroleum resources.³¹ Section 104 of the MPRDA provides that any community may apply to the Minister for a preferent right to prospect or mine on land that is registered in the name of the community or will in future be registered as such.³² The Minister may only grant such a right if Sections 17 or 23³³ have been complied with and such right will be used to “contribute towards the development and social upliftment of the community”,³⁴

Section 12 of the MPRDA further provides that the Minister may assist any historically disadvantaged persons in conducting prospecting or mining operations,³⁵ subject to their terms and conditions.³⁶ The Minister must consider factors such as the need for the promotion of equitable access to the nation’s mineral resources “and the need to transform the ownership structure of the minerals and mining industry”.³⁷

South African legislation is vague on the role and powers of traditional authorities

²⁸ In terms of Schedule II, Item 11(1) of the MPRDA.

²⁹ In the case of *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (BH), the applicants applied to the North West High Court because they were not satisfied with how their village affairs were administered by the officials within the Traditional Community.

³⁰ Royal Bafokeng Nation <http://www.bafokeng.com/organisation/entities/infrastructure>; Cook 2013 *JSAIMM* 61-66.

³¹ Preamble of the MPRDA.

³² Section 104(1) of the MPRDA.

³³ Section 17 deals with granting and duration of prospecting right while section 23 deals with Granting and duration of mining right.

³⁴ Section 104(2) of the MPRDA.

³⁵ Section 12(1) of the MPRDA.

³⁶ Section 12(2) of the MPRDA.

³⁷ Section 12(3) of the MPRDA.

and traditional councils concerning mining and mining royalties; accordingly accountability continues to be a contentious issue.³⁸ Although the *Traditional and Khoi-San Leadership Act*, confers powers and functions to traditional authorities to preside over matters provided for in terms of the customary law of that community, it does not make specific mention of the administration of income such as mining royalties. In addition to the auditing measures in the Act,³⁹ there are other mechanisms in place that can be used to hold the traditional leaders or the traditional authorities accountable in the case of alleged maladministration, corruption and mismanagement of mining royalties.⁴⁰ "Accountability means that the responsible person must be able to account for the outcomes irrespective of whether they are negative or positive, for the portion of work that is directly under their control".⁴¹

Accountability would occur when a traditional leader and traditional council of a particular traditional community is held responsible for their actions, omissions, decisions and expenditures of the mining royalties. Moreover, accountability would occur when the traditional leaders and its council give transparent feedback on how the traditional community's mining royalties were administered to the concerned traditional community through community forums. The Act prescribes a code of conduct in Schedule 1, which states that no member of a traditional council may personally benefit from any income or receive a gift to influence the council.

There are mechanisms that could be used to ensure the accountability of traditional

³⁸ Capps 2012 *ROAPE* 63-84. See also section 19 of the *Traditional and Khoi-San Leadership Act* 3 of 2019 as to the functions of the kingship or queenship council and principal traditional council as well as Section 20 of the *Traditional and Khoi-San Leadership Act* 3 of 2019 as to the functions of the traditional council, traditional sub-council, Khoi-San council and branch.

³⁹ Sections 19(2) and 20(2).

⁴⁰ Smith 2019 <https://mg.co.za/article/2019-09-27-00-kgosis-role-in-vanishing-billions/>. See also *Pilane and Another v S* (CA 59/2009) [2010] ZANWHC 25 wherein the first appellant and his two co-accused appeared before the Mogwase Regional Court on various counts of fraud, theft and corruption relating to the community's coffers. It follows that the appellants through misrepresentation made payments to their personal accounts from the community's coffers and they did not follow the dictates of section 11 of the *Bophuthatswana Traditional Authorities Act* 23 of 1978.

⁴¹ Smith *Management Principles: A Contemporary for Africa* 192.

councils for the administration of mining royalties. For example, a community could approach the Chapter 9 institutions, such as the Public Protector and the Office of the Auditor General.⁴² According to the Department of Mineral Resources and Energy, its enforcement and compliance directorate is responsible for monitoring and enforcing compliance with the MPRDA and has the authority to investigate and prosecute any violations of the Act, including any misuse of mining royalties by traditional authorities.⁴³

There are examples where mining royalties were mismanaged, for example in the case of Bakgatla-Ba-Kgafela situated in the Rustenburg area.⁴⁴ Matlala⁴⁵ contends that disputes and contentions on the management of royalties are a sign that there is lack of accountability by the traditional authority. The Bapo Ba Mogale case in the North West depicts a clear state of mismanagement of mining royalties. The Bapo Ba Mogale traditional community saw an administrator appointed by the North West provincial government entering into agreements with a third party company concerning the sale of a land that was underlain with platinum, granite and chrome without consulting with the community members, thereby arrogating powers he did not have, building a Royal Palace for the Kgosi using mining royalties. Similarly, in Limpopo Province, disputes on mining royalties in the Mampa Serole Traditional Community caught media attention.⁴⁶

It therefore seems that there is a need to determine to what extent the law provides for measures of accountability measures in the administration of mining royalties by traditional authorities.

⁴² Ka Mdumbe *The Meaning of 'Organ of State' in South African Law* 7

⁴³ Department of Mineral Resources and Energy <https://www.dmr.gov.za/mineral-regulation/overview>.

⁴⁴ Molopyane 2012 *The New Age* 25. See also *Pilane and Another v Pilane and Another* (CCT 46/12) [2013] ZACC 3 (28 February 2013). In this case, the Bakgatla-Ba-Kgafela did not succeed to hold their traditional leader, Nyalala Pilane, accountable for his actions.

⁴⁵ Matlala 2014 *SA Crime Quarterly* 31-40.

⁴⁶ Ryan 2019 <https://www.news24.com/fin24/companies/billions-in-mining-royalties-intended-for-the-poor-squandered-stolen-or-diverted-20190702>.

1.2 Research question

In light of the foregoing, the overarching research question of this study is: Which legal mechanisms exist to hold traditional authorities accountable for administering mining royalties in South Africa?

1.3 Research aims and objectives

The primary aim of the research is to investigate legal mechanisms for holding traditional authorities accountable for administering mining royalties in South Africa. In support of the primary aim, the following sub-objectives are stated.

- i. To provide a brief background on the relationship between mining companies that conduct mining activities on traditional land and traditional authorities in South Africa;
- ii. To analyse the legal framework regulating mining law and the mining royalty systems in South Africa, in pursuit of which it discusses two case examples to illustrate how traditional authorities administered mining royalties;
- iii. To analyse legal mechanisms that can be used to ensure accountability in the administration of mining royalties; and
- iv. To recommend possible legal mechanisms that could be employed to foster transparency and ensure accountability in the administration of mining royalties by traditional authorities.

1.4 Research method

This dissertation is desktop-based and entails the study of primary sources such as the *Constitution*, legislation, case law and international guidelines as well as secondary sources such as literature, journals, books and internet sources.⁴⁷ The research will first discuss the historical development of the accountability of traditional authorities using legislation, which at a specific time recognised traditional leadership. This historical analysis will be supported by secondary

⁴⁷ Cresswell *Qualitative, Quatitative and Mixed Methods Research* 12.

sources (Chapter 2). To determine the legal framework that recognises the powers of traditional authorities and their access to mining or mining royalties, legislation and case law will be used (Chapter 3). Two case examples of the management of royalties in certain communities will also be provided. In this regard the researcher used the Bapo Ba Mogale community in the North West and the Mampa Serole community in Limpopo for this purpose. Chapter 4 analyses legal mechanisms that can be used to hold traditional authorities accountable for administering mining royalties in South Africa, based on an analysis of legislation. The study concludes with findings and recommendations on the discussion in Chapters 2 to 4 (Chapter 5).

Chapter 2:

Historical development of the accountability of traditional authorities in South Africa

2.1 Introduction

During the discussions to restructure and transform the South African constitutional dispensation, there were strong arguments that the institution of traditional leadership and traditional law should be included and protected.⁴⁸ To this extent, both the interim and the final Constitution of 1996 have set the tone for traditional leaders' recognition and role.⁴⁹

This chapter discusses the historical development of the concept of accountability for traditional authorities.⁵⁰ The chapter commences with a discussion of the accountability of traditional authorities during the colonial era. For purpose of this study, the colonial era is regarded as the period from 1910 until 1994. The chapter then discusses the accountability of traditional authorities in the pre-democratic era through the Interim Constitution and legislation enacted thereafter.

2.2. The historical context of the traditional authority's institution and accountability prior to 1994

During the pre-colonial era (i.e. before 1652), traditional authorities traditional authorities were regarded as sacred and the overseers of traditional customs.⁵¹ One

⁴⁸ *Ex Parte Chairperson of the Constitutional Assembly in Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC). See also Traditional Authorities Research Group 199 Koers 295-324.

⁴⁹ See Chapter 11 of the *Constitution of the Republic of South Africa Act* 200 of 1993 and section 211 and 212 of the *Constitution*.

⁵⁰ It is not possible to give an extensive exposition of the history of traditional leadership in South Africa due to the scope and the limitation of a mini dissertation. The overview serves as background to understand the current position of traditional leadership in South Africa.

⁵¹ Khunou 2009 *PELJ* 80-122.

of the most essential roles of traditional authorities was administrating their area and the lives of the traditional community.⁵² The proper functioning of the traditional community was a great responsibility of traditional authorities, and the bond between their traditional communities was crucial.⁵³ During this era, the institutions of traditional leadership were accountable to the community and traditional authorities were required to act in the best interest of their own people.⁵⁴

During the colonial period of 1652 to 1910, traditional leaders and their authorities received some attention and were informally recognised (with some legislation issued in the Boer Republics and Natal), but it was only after 1910 that specific legislation that interfered with traditional governance was introduced. As the Constitutional Court states in the *Certification* case: "The Administration of African tribal territories through vassal 'traditional authorities' passed smoothly from British colonial rule to the new government, which continued its predecessor's policy".⁵⁵

2.2.1 Black Administration Act 38 of 1927

In 1927 the Union of South Africa promulgated the *Black Administration Act*.⁵⁶ This Act was introduced as a stepping stone of the Union's programme to reestablish traditional authorities in South Africa.⁵⁷ One feature of the Act was the uniformity in the recognition of customary law in the then-four provinces of the Union of South Africa.⁵⁸ The main feature of the Act were that it recognised the Governor General (and later then the State President) as the supreme chief of all four provinces and allocated the powers to appoint traditional leaders to the Governor General.⁵⁹

⁵² Khunou *The Legal History of Traditional Leaders in South Africa, Botswana and Lesotho* 17.
⁵³ *Shilubana and Others V Nwamitwa* 2008 (9) BCLR 914 (CC) para 72.

⁵⁴ Khunou *The Legal History of Traditional Leaders in South Africa, Botswana and Lesotho* 17.
⁵⁵ *Ex Parte Chairperson of the Constitutional Assembly in Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC).

⁵⁶ 38 of 1927.

⁵⁷ Brian *Traditional Leadership in South Africa: A Critical Evaluation of the Constitutional Recognition of Customary Law and Traditional Leadership* 16.

⁵⁸ Brian *Traditional Leadership in South Africa: A Critical Evaluation of the Constitutional Recognition of Customary Law and Traditional Leadership* 16. The four provinces under the Union of South Africa were the Transvaal, Natal, Orange Free State as well as the Cape Province.

⁵⁹ Rautenbach *Introduction to legal pluralism* 211.

In terms of a proclamation passed in terms of this Act, the functions and duties of chiefs and headmen (as they were known according to the Act) were to “further the interests of the community, develop and improve the territory” and maintain law and order in the society.⁶⁰ Although the Act recognised traditional authorities in the Union, the idea was that traditional authorities should maintain law and order in their areas. The Act recognised traditional courts and granted traditional leaders’ additional powers to try offences listed in the Schedule to the Act. It further regulated succession and customary marriages, amongst other things.⁶¹

In 1948, the National Party won the elections and embarked on the introduction of what is today known as apartheid. They also introduce legislation that interfered with traditional communities and traditional leadership.⁶²

2.2.1 Black Authorities Act 68 of 1951

Three years into power, the National Party introduced the BAA.⁶³ The purpose of the BAA was to provide for the recognition of traditional leaders and their communities and establish certain traditional authorities and define their functions.⁶⁴ Holomisa posits that the apartheid government embarked on a different tactic in endeavouring to conquer and subdue the black land owners who were land-hungry and thirsty for freedom.⁶⁵

Section 2 of the BAA provided for the establishment of tribal, regional and territorial authorities and that the then State President could, having paid due regard to the law and custom, establish a tribal authority over a tribe, establish a community authority over a community or two or more tribes or communities jointly or one or

⁶⁰ Proc 110 of 1957 in GG 5854 of 18 April 1957.

⁶¹ See Chapter IV and V of the *Black Administration Act* 38 of 1927.

⁶² See Posel *The Making of Apartheid 1948-1961: Conflict and Compromise*, OSAA.

⁶³ Repealed by the *Black Authorities Act Repeal Act* 13 of 2010

⁶⁴ Preamble of the BAA.

⁶⁵ Holomisa NSP *A Double-Edged Sword* 80, see also Khunou *The legal history of traditional leaders in South Africa, Botswana and Lesotho* 29.

more tribes as well as one or more such communities jointly.⁶⁶ A tribal authority is the lowest ladder of the hierarchy, and it is composed of two or more tribes or communities jointly.⁶⁷ A regional authority is on the middle rung of the hierarchy, and it is composed of two or more tribal authorities jointly.⁶⁸ The territorial authority is the highest rung and it is composed of two or more regional authorities jointly.⁶⁹

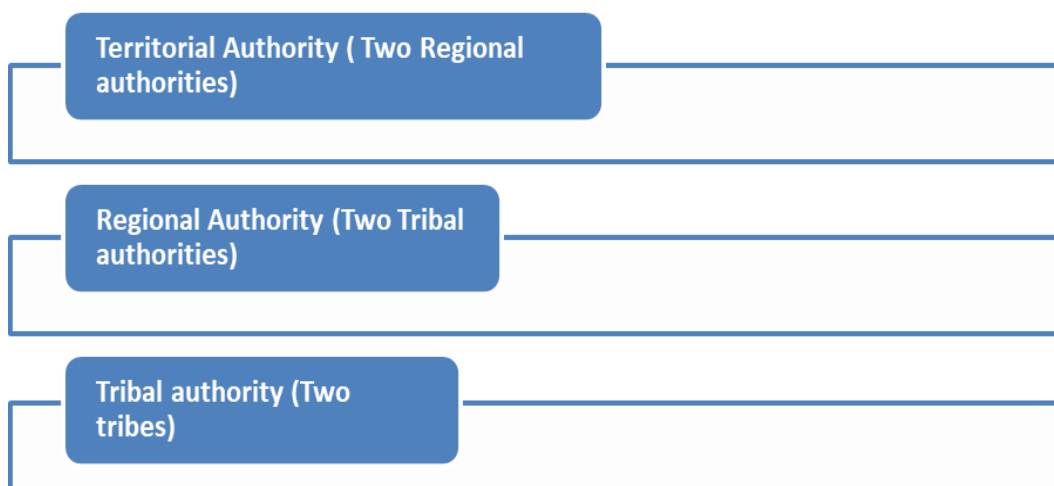


Figure 2.2.1.1 Hierarchy of tribal, regional and territorial authorities

In particular, Section 4 of the BAA contained the powers, functions and duties of the tribal authorities.⁷⁰ The Act provided that the duties, functions and powers of tribal authorities are to *inter alia*, administer the affairs of the tribes and communities over which it has been established.⁷¹ Moreover, the tribal authorities had a duty to give guidance to the chief and headmen on the performance of its functions and equally exercise the same powers and perform the same duties to the inclusion of the powers, functions and duties of its chiefs or headmen as conferred

⁶⁶ Section 2(1) of the BAA.

⁶⁷ Section 2(1)(a) of the BAA.

⁶⁸ Section 2(1)(b) of the BAA.

⁶⁹ Section 2(1)(c) of the BAA. See also Bennet and Murray "Traditional Leaders" para 26.3.

⁷⁰ The Act refers to tribal authorities, chiefs and headmen and these terms will be used in their historical context. Post 1994, reference is made to traditional authorities and more recently to traditional councils and traditional leaders.

⁷¹ Section 4(1)(a) of the BAA.

by any law, regulations or customs that apply to and required for them.⁷²

Of great importance and relevance for this study is Section 8, which provided for the “auditing of books and accounts of tribal, regional and territorial authorities”. The Act provided that the Minister had to establish a treasury under his⁷³ control for every tribal, regional or territorial authority. Amounts specified in section 9,⁷⁴ had to be paid into the treasury fund⁷⁵ and from this any expenditure that the tribal authority incurred in connection with any matter that fell within the purview of the concerned authority had to be met.⁷⁶ Additionally, the Minister could transfer the treasury under their control or any portion thereof, as he may deem fit, to the authority concerned.⁷⁷

Section 9 of the Act provided for the amounts to be paid into the treasury. It included that all the fees and charges, which according to the recognised customs of any tribe or community over which such an authority has been established, are payable to benefit such a community or tribe, as well as all other amounts coming from any other source intended to benefit the tribe or community.⁷⁸

The Act made did not mention of what the community could have done in cases where the tribal authority misused the money in the treasury account. One might argue that mining royalties from mining companies might fall within the category of a source intended to benefit the tribe or community and thus payable to the treasury established by Section 8.

The Governor General had sweeping powers as he centralised all the powers of

⁷² Section 4(1)(b) of the BAA.

⁷³ Ministers at this time were all males and the female pronoun is therefore not used.

⁷⁴ Examples of monies that are listed in section 9 includes “any fees and charges in terms of recognised customs, all fines and fees collected by the chief, the proceeds of any levy, any money derived from property owned by the tribe, any monies assigned to the tribe by the Minister and any amounts from any source for the benefit of the tribe”.

⁷⁵ Established in terms of section 8.

⁷⁶ Section 8(1) of the BAA.

⁷⁷ Section 8(2) of the BAA.

⁷⁸ Section 9(1)(g) BAA.

traditional authorities and made them accountable to the government and not to their community.⁷⁹ The tribe or community in that era had no provision or law (except their own customs and traditions) that they could enforce to hold traditional authorities accountable for the mismanagement of mining royalties as payable to the treasury in terms of section 9.

The creation of artificial homelands underpinned the apartheid system. The underlying basis of these homelands was the language and culture of ethnic group. The National Party extended its political powers by assuming the control of traditional authorities and its jurisdiction by passing legislation.⁸⁰ Consequently, with the formation of TBVC states and the self-governing states, this idea was transferred to the leaders of these states.⁸¹ The homeland's traditional authorities were no longer accountable to their communities but to their predominant apartheid system that included the traditional leaders appointed by homeland leaders.⁸²

The institution of traditional authorities came to the fore when the *Interim Constitution (Constitution of the Republic of South Africa Act, 200 of 1993)* was drafted.⁸³ The *Interim Constitution* further provided a role for traditional leaders in local government, in that they could be *ex officio* members of local government. In subsequent legislation the number of traditional leaders were limited and those elected, have to represent all traditional communities in the local council. He or she shall equally be eligible to be elected to be an office bearer of any office of the same local government.⁸⁴ Albeit the constitutional recognition and protection, the roles and powers of traditional authorities concerning their traditional communities were not immediately clear and have resulted in conflicts between traditional authorities

⁷⁹ See Chapter III of the *Black Administration Act* 38 of 1927.

⁸⁰ See also Bekker 1990 *SA Public Law* 1-17.

⁸¹ Transkei, Venda, Bophuthatswana and Ciskei. The *Self-Governing Constitution Act* 21 of 1971 was used to create six self-governing territories, namely Gazankulu, Lebowa, QwaQwa, KwaZulu, KwaNdebele and KaNgwane. Also see Khunou 2009 *PELJ* 80-122.

⁸² Khunou 2009 *PELJ* 80-122.

⁸³ Certification of the Constitution of the Republic of South Africa, 1996 4 SA 744 (CC), 1996 (10) BCLR 1253 paras 189-197.

⁸⁴ Section 81 *Local Government: Municipal Structures Act* 117 of 1998.

and government at a local level.⁸⁵ The BAA further remained in force. Principle XIII of the *Interim Constitution* determined that traditional authorities should be recognised in the final Constitution.⁸⁶

2.3. The institution of Traditional authorities and accountability post 1994

This section of the study discusses the position and functioning of the institutions of traditional authorities in the democratic dispensation (i.e., post-1994). The recognition of the institutions of traditional authorities in terms of the 1996 Constitution is discussed first, where the new legislation that was passed to give recognition to traditional authorities is discussed as well as the roles and functions of traditional authorities.

2.3.1 Constitution of the Republic of South Africa, 1996

Sekgala states that “the role of traditional leadership has been a hot potato since the dawn of democracy”.⁸⁷ South Africa, it is true, is one of the many countries worldwide with a history of discriminatory practices and inequalities. The advent of the *Interim Constitution* in 1994 sculptured and shaped the legal system of the country and thus made it inclusive to all persons. At its core, the 1996 *Constitution* enjoys the supremacy status in the Republic, and any law or conduct that is against its provisions is invalid.⁸⁸

The institution of traditional leadership and its status and roles must be confined within the limits of the *Constitution*.⁸⁹ The *Constitution* therefore guarantees the

⁸⁵ See the case of *African National Congress and Another v Minister of Local Government and Housing KZN* 1998 (3) SA 1 (CC) paras 17, 18 and 19. See also section 181 of the *Interim Constitution*.

⁸⁶ Principle XIII read: “The institution, status and role of traditional leadership according to indigenous law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith”. Also see Bennett and Murray “Traditional leaders” para 26.4 for a history of the negotiation process and the eventual certification of the Constitution.

⁸⁷ Sekgala 2018 *BJS* 80-92.

⁸⁸ Section 2 of the *Constitution*.

⁸⁹ Section 211 of the *Constitution*.

functioning of traditional authorities and customary law systems subject to applicable laws and customs. Parliament may pass national legislation to provide for traditional leaders' roles and matters that directly affect their communities.⁹⁰

In the *Ex Parte Chairperson of the Constitutional Assembly in Re Certification of the Constitution of the Republic of South Africa*,⁹¹ the court reaffirmed this position as it held that the roles of traditional leaders are not inclusive of the governmental role that they played under the operation of the BAA.⁹² The Court further stressed that the recognition of traditional leaders by the *Constitution* is limited to their residual, customary roles excluding governmental or developmental roles or powers.⁹³

Ntsebeza posits that both the *Interim Constitution* and the 1996 *Constitution* does not mention of the roles, functions, and powers of traditional leaders regarding the allocation and administration of land, amongst others.⁹⁴ The *Constitution* left the prescription of the roles and functions of traditional authorities to the national legislation. In terms of customary laws, one of the primary responsibilities of traditional authorities is to act as custodians of the land. In that regard, I argue that the administration of mining royalties is incidental to the administration of land.

2.3.2. *Traditional Leadership and Governance Framework Act 41 of 2003*

The TLGFA was enacted to give effect to the Constitution.⁹⁵ Key aspects of this Act include, providing a comprehensive statutory framework for the recognition of traditional communities, establishment, and recognition of traditional councils and

⁹⁰ Section 211(1) of the *Constitution*. Legislation such as the *Traditional and Leadership Governance Framework Act 41 of 2003*, the *Communal Land Rights Act 11 of 2004* as well as the *Traditional and Khoi-San Leadership Act 4 of 2019* are examples of such legislation.

⁹¹ *Ex Parte Chairperson of the Constitutional Assembly in Re Certification of the Constitution of the Republic of South Africa 1996 4 SA 744 (CC)*.

⁹² The court held that it was the intention of the drafters of the Constitution to give traditional leaders "government powers and functions para 191.

⁹³ *Ex Parte Chairperson of the Constitutional Assembly in Re Certification of the Constitution of the Republic of South Africa 1996 4 SA 744 (CC) paras 190-194.*

⁹⁴ Ntsebeza 2004 *EJDR* 66-68.

⁹⁵ See the preamble of the TLGFA.

for their roles and functions on a national and provincial level.⁹⁶

The roles and functions included the administration of land, the administration of justice, economic development and, most importantly, the management of natural resources.⁹⁷ Be that as it may, the Act, just like any other legislation in the country, had to be consistent with the *Constitution* and all the powers and functions of traditional leaders should not have been against public policy considerations.⁹⁸

Contrary to what was intended in the Act, which is the transformation of traditional structures that existed before the advent of the Constitutional democracy, the Act permitted structures that were established during the apartheid era to remain in power subject to certain conditions being met.⁹⁹ Thus, the unaccountable (only accountable to the government) and sometimes autocratic traditional authorities that were established under the BAA were allowed to continue under a different name (traditional authorities) in terms of the TLGFA.¹⁰⁰ In *Tongoane and Others v Minister of Agriculture and Land Affairs and Others*,¹⁰¹ the court held that:

“It is these tribal authorities that have now been transformed into traditional councils for the purposes of section 28(4) of the *Traditional Leadership and Governance Framework Act*”.

The Minister of Cooperative Governance and Traditional Affairs could make regulations requiring the traditional council to keep proper records, have the council’s statements audited, disclose the gifts received by the council and adhere to the code of conduct.¹⁰² A traditional council was required to conduct a meeting once annually with its traditional community to give account of the activities and

⁹⁶ Preamble of the TLGFA. See also *Maakane and Others v Premier of the North-West Province and Others* (2715/2010) [2011] ZANWHC 29 para 4.

⁹⁷ Section 20 of the TLGFA.

⁹⁸ As per section 2 of the *Constitution*.

⁹⁹ Section 28(4) of the TLGFA.

¹⁰⁰ Section 28(4) of the TLGFA.

¹⁰¹ *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 6 SA 214 (CC) para 25.

¹⁰² Section 4(2) (a-d) of the TLGFA.

finances of the council and the levies that the council received.¹⁰³

To a certain extent, one might argue that the Act provided for a mechanism that traditional communities could use to hold traditional councils accountable. This was done through conduct meetings annual to account for the activities and finances of the council. However, some traditional authorities rarely conducted these meetings to account for their finances.¹⁰⁴ The Act must again be praised for endorsing the auditing of books of traditional councils, however, the question of who should audit the books was left open in the Act. The researcher argues that this question is perhaps answered by provincial legislation. Each province has the power to regulate how a traditional council must perform its functions.¹⁰⁵

¹⁰³ Section 4(3) of the TLGFA.

¹⁰⁴ Author's observation.

¹⁰⁵ Schedule 4 of the Constitution. Also see the *North West Traditional Leadership and Framework Act 2* of 2005 as well as the *Limpopo Traditional Leadership and Institutions Act 6* of 2005.

2.4 Conclusion

This chapter provided a brief overview of the historical development of traditional authorities and their accountability in terms of customs and legislation. The institution of traditional authorities has been part of South African society since time immemorial. Traditional authority was premised on the governance of the people and thus the traditional authorities were accountable to the traditional community as their subjects, as it is said, *Kgosi ke Kgosi ka batho* (a traditional leader is only a leader through his people).¹⁰⁶ I argue that the land belongs to the people and that the traditional leader is only the custodian thereof.

With the advent of the apartheid regime, the apartheid system interfered with the functioning of the institutions of traditional authorities by enacting the *Black Administration Act* and the BAA. The effect of these laws was that they stripped traditional authorities of the powers and privileges held within their territories. The powers of traditional leaders were previously vested in the Governor-General and later in the Minister. Traditional authorities became accountable to government and not their communities.

South Africa finally entered a new Constitutional dispensation in 1994. The institution of traditional leadership was recognised, and national legislation had to be passed to that effect. The TLGFA was passed to provide for the roles and functions of traditional authorities. Accountability continued to be a point of contention in that the roles and powers of traditional authorities were not clearly provided for, and the institutions remained accountable to the premier. The TLGFA made provision for traditional authorities' accountability in terms of the administration of their funds, as Bennett and Murray state:¹⁰⁷

These provisions on their own, however cannot establish a relationship of accountability between traditional leaders and the community as they give the community no method of holding leaders to account for unsatisfactory performance. This lacuna is most

¹⁰⁶ See Wicomb 2014 *SA Crime Quarterly* 57-64.

¹⁰⁷ Bennett and Murray "Traditional leaders" para 26.4 (c)(iii).

striking in the provisions of the Act dealing with the removal of traditional leaders; no mention is made of a failure to govern in an accountable and responsive way as a ground of removal. In short, a key component of accountability is missing; the power of the person or body to whom account is given to act in case of improper government.

The TLGFA was subsequently repealed by the *Traditional and Khoi-San Leadership Act* which will be discussed in the next chapter.

Chapter 3

Legal frameworks regulating mining law and mining royalty systems in South Africa

3.1 Introduction

The previous chapter revealed that traditional authorities have been recognised pre and post constitutional democracy. Regarding the legislation introduced post-1910; traditional authorities were accountable to specific national Minister regarding how they should exercise all their financial obligations, with mining royalties being a good example.

The aim of this chapter is to analyse the current legal framework regulating mining law and the mining royalty systems in South Africa and discuss two examples to illustrate how traditional authorities administered mining royalties. The chapter commences with a brief overview of the legal framework. The chapter will also examine case law and provincial laws to illustrate how mining royalty funds were mismanaged in two provinces, namely Limpopo and the North West.

3.2 Constitutional and legislative frameworks

The MPRDA envisaged addressing the inequalities brought about by discriminatory practices upon which land and mineral law were developed.¹⁰⁸ This section discusses the current legal framework that aims to transform mineral law insofar as it relates to traditional authorities.

3.2.1 Constitution of the Republic of South Africa, 1996

Section 44(1)(a)(ii) of the *Constitution* confers on the National Assembly the power to pass legislation regarding any matter to the inclusion of a matter within a functional area listed in Schedule 4, excluding, subject to Subsection (2), a matter

¹⁰⁸ See the preamble of the MPRDA.

that falls within the functional area listed in schedule 5.¹⁰⁹ Traditional leadership is listed in Schedule 4, conferring concurrent powers to the national and provincial legislatures to pass legislation in this regard. The *Constitution* further authorises reforms to improve access to all natural resources.¹¹⁰ Van der Walt posits that this authorisation finds extension to the mineral and resources of South Africa.¹¹¹ Consequently, MPRDA was enacted with the aim of, *inter alia*, giving effect to the *Constitution* as well as the “common law heritage of all the people of South Africa and the State is the custodian therefore”.¹¹²

3.2.2 Mineral and Petroleum Resources Development Act 28 of 2002

The preamble of MPRDA explains the circumstances and reasons that brought about its enactment.¹¹³ In terms of the preamble, recognition is given to the fact that minerals and petroleum are non-renewable natural resources and that the state plays the custodianship role.¹¹⁴ The preamble further reaffirms the obligation of the state to ensure ecologically sustainable development of these natural resources, promote economic and social development,¹¹⁵ and achieve equitable access to mineral and petroleum resources. Most importantly, it recognises the need for promotion of development and social upliftment of communities affected by communities.¹¹⁶

Lastly, the preamble highlights the state’s commitment and obligation to eradicate discriminatory practices through enactment of law and other avenues to achieve this.¹¹⁷

¹⁰⁹ Section 44(1)(a)(ii) of the *Constitution*.

¹¹⁰ See section 25(8) of the *Constitution* which provides that “No provision of this section may impede the state from taking legislative as well as other measures to achieve land and water and related reform, in order to redress the results of past discrimination, provided that any departure from the provision of this section is in accordance with the provisions of section 36(1)”.

¹¹¹ Van der Walt *Constitutional Property Law* 370.

¹¹² Section 3 of the MPRDA read with *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 CC para 3.

¹¹³ Mostert *Mineral Law: Principles and Policies in Perspective* 78.

¹¹⁴ Preamble of the MPRDA. See also section 2(b) of the MPRDA.

¹¹⁵ See section 2(c) and (h) of the MPRDA.

¹¹⁶ Section 2(d) of the MPRDA.

¹¹⁷ Preamble of the MPRDA. See also section 2(f) of the MPRDA.

Section 5 of the MPRDA provides for the legal nature of a prospecting right, mining right, exploration right or production right as well as the rights of the holders thereof.¹¹⁸ In terms of section 5(3)(a), a holder of a prospecting right, a mining right, exploration right or production right is authorised to enter the land to which they have rights over. Such a holder is authorised to bring onto that land any plant, machinery or equipment for purposes of building or construction related to prospecting or mining.¹¹⁹

This right, however, is not an absolute right and is therefore subject to the law. Section 5A of the Act prohibits any person to “prospect or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral and petroleum or commence with any work incidental thereto” on any area in the absence of an environmental and mining authorisation.¹²⁰ The mining authorisation can be granted to any person or community that applies for it.¹²¹

The MPRDA recognises two forms of royalties, namely the state royalties which refers to the revenue share payable to government and contractual royalties, which are payments by the mining companies to owners of the land for the mines to operate on their land.¹²²

The transitional arrangements of the MPRDA are found in Schedule II of the Act. Item 11 of Schedule II permits royalties that were payable to communities before

¹¹⁸ Mostert describes the term “mineral right” as dead. According to her, with the advent of the MPRDA, the term was phased out and subsequently replaced with terms such as “mining right” and prospecting right”. She further posits that all the rights in the MPRDA are collectively referred to as rights in minerals for purposes of discerning them from the mineral right common law concept. See also the case of *Agri South Africa v Minister of Minerals and Energy and Another* 2013 (4) SA 1 (CC).

¹¹⁹ Section 5(3)-(a) of the MPRDA.

¹²⁰ Section 5A(a) of the MPRDA.

¹²¹ Section 104 of the MPRDA.

¹²² See chapter 1 of the MPRDA.

the commencement of the MPRDA to continue to accrue to the same community.¹²³ These communities are required to submit to the Minister particulars that reflect the usage and disbursement of the royalties paid.¹²⁴ The Act further requires the communities that continue receiving royalties to keep prescribed records for inspection by the Auditor General and to submit annual audited financial statements to the Minister.¹²⁵

Item 11(7) poses certain conditions that must be met in order for the continuation of royalty payments. Among others, they include an undertaking that royalties will be used to benefit all members of the community and “the manner in which the royalties will be used will promote rural, regional and local economic development” and socially uplift the community. A trust must be established to administer the funds and the Board of Directors, trustees of an Executive Committee of the trust must represent the affected community.¹²⁶

In the case of new mining operations, communities may be granted a preferential prospecting or mining right on their land (either registered or to be registered in their name) in terms of section 104 of the MPRDA.¹²⁷ They must apply to the Minister for such right if it is clear that the proceeds will be used for the benefit and social upliftment of the community. The community must comply with the Act’s requirements and may receive assistance from the Department to do so. The provisions of the MPRDA needs to be read with the *Traditional and Khoi-San Leadership Act*.

3.2.3. Traditional Leadership and Khoi-San Leadership Act 3 of 2019

As indicated before, the *Traditional and Khoi-San Leadership Act* repealed the

¹²³ Item 11(1) of schedule II of the MPRDA.

¹²⁴ Item 11(2) of schedule II of the MPRDA.

¹²⁵ Item 11(6) of schedule II of the MPRDA.

¹²⁶ Item 11(7) of schedule II of the MPRDA.

¹²⁷ Section 1 of the MPRDA provides a definition of communities. Also see Du Plessis and Pienaar 2010 *Fundamina* 73-90.

TLGFA.¹²⁸ The repeal emanated from various traditional communities that felt that the consensual nature of the relationship between the traditional authorities as well as the people they serve, was ignored in the Act.¹²⁹ They further alluded that the Act removed the accountability of the traditional authorities to their people. This is a result of government remunerating traditional leaders, and therefore, they become accountable to the government rather than the people they serve.¹³⁰

The *Traditional and Khoi-San Leadership Act* was signed into law in 2019 and among others, it aims “to provide for the recognition of traditional and Khoi-San communities, and leadership positions and for the withdrawal of such recognition, to provide for the functions and roles of traditional and Khoi-San leaders” as well as the regulatory powers of the Ministers and Premiers.¹³¹

In the case of *Constance Mogale and Others v Speaker of the National Assembly and Others*,¹³² the applicants applied to the Constitutional Court seeking an order to declare the *Traditional and Khoi-San Leadership Act* unconstitutional and invalid. Among the grounds advanced relates to the invalidity and unconstitutionality of the Act. The applicants submitted that the National Assembly (NA), the National Council of Provinces (NCOP) as well as the nine provincial legislatures (PLs hereinafter) failed to facilitate public participation reasonably in the legislative process.¹³³

Moreover, the applicants further submitted that the Act substantially impacts traditional communities as it fails to address what they consider multiple defects in the current legislative framework; prejudices (prospectively) the community, individual and household land rights, thwarts communities from deciding what they opine is in the best interests of their land unless and until the Premier signs off; and

¹²⁸ TLGFA.

¹²⁹ Legal Resources Centre “Stop the Bantustans Campaign taking the Traditional and Khoi-San Leadership Act 3 of 2019 Court” 2-9.

¹³⁰ Anonymous *Custom Contested* 2015 <https://www.customcontested.co.za/notes-on-the-traditional-and-khoi-san-leadership-bill-b-23-2015-october-2015/>

¹³¹ Preamble of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

¹³² *Mogale and Others v Speaker of the National Assembly and Others* [2023] ZACC 14.

¹³³ Founding Affidavit para 3.

lastly, they argued that the Act eases and effectively ensures that community funds are mismanaged.¹³⁴

Likewise, the applicants submitted that the *Traditional and Khoi-San Leadership Act* mirrors the TLGFA in that it replicates the apartheid-era legislation.¹³⁵ The applicants submitted that the Act “reduces mechanisms of transparency and accountability of traditional leadership” and inaugurates “state-controlled banking for traditional communities” whose experience and history have proven to be a gateway for corruption and abuse.¹³⁶

In 2023, the Constitutional Court held that there were numerous and material deficiencies in and during different phases of the public participation process,¹³⁷ including a wide ranging and substantial failure to facilitate public participation, as per Parliament and the legislature’s constitutional obligation in this regard. This failure renders the Act unconstitutional and invalid.¹³⁸ The court ruled that the invalidity declaration is suspended for 24 months, thus allowing Parliament an opportunity to re-enact the *Traditional and Khoi-San Leadership Act* in a constitutional manner or enact another legislation.¹³⁹ The court decided the case on procedural issues and the material arguments, for example; regarding accountability was not discussed.

In terms of the *Traditional Leadership and Khoi-San Leadership Act*, traditional councils are allowed to enter into agreements and partnerships with anyone, including mining companies.¹⁴⁰ At first glance, it seems that they may enter into mining lease agreements or mining partnerships without the consent of their communities. According to Mtshali, this section creates the impression that

¹³⁴ Founding Affidavit para 17.

¹³⁵ Founding Affidavit para 78.1.

¹³⁶ Founding Affidavit para 98.

¹³⁷ Para 82

¹³⁸ Para 83.

¹³⁹ Para 87.

¹⁴⁰ Section 24(2) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

traditional authorities are the sole owners of the land.¹⁴¹ However, Section 20 clearly states that the traditional councils should act on behalf of the community and should do so in their best interest. The traditional council must further introduce proper record-keeping, and submit their financial statements for auditing to a registered auditor and the province's Premier. The Act does not refer to the Auditor General in this regard.¹⁴² Furthermore they must adhere to a code of conduct.¹⁴³ However, Section 19(3) of the Act states that if the Auditor General audit a traditional council's funds, they may review the appointed auditor's findings.¹⁴⁴

Furthermore, Section 24(3) of the Act requires that any agreement entered into be reduced in writing subject to the conditions listed in the Act. The conditions include that the agreement or partnership must benefit the community, amongst others.¹⁴⁵ Such an agreement may only be concluded if the community is consulted prior to the conclusion of such agreement or partnership. A meeting must be convened and the majority of the community members must be present, and agree to the agreement or partnership. There should be written proof of the meeting and the resolution taken at the meeting.¹⁴⁶

The relevant premier must further ratify the partnership or agreement before it is valid. The agreement or partnership only binds the partners to the agreement or partnership and not the government.¹⁴⁷ The fact that the premier must ratify the agreement or partnership, again indicates that traditional councils are still subject to government regulation and control, similar to the position pre and post-1994.¹⁴⁸

¹⁴¹ Mtshali *iAfrica* 1.

¹⁴² Also see the discussion in this regard during the parliamentary process- Anonymous 2021 <https://pmg.gov.za/committee-meeting/32701>.

¹⁴³ Section 20(3) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

¹⁴⁴ Section 19(3) of the *Traditional Leadership and Khoi-San Act* 3 of 2019.

¹⁴⁵ Section 24(3)(a) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

¹⁴⁶ Section 24(2)(b)(i) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

¹⁴⁷ Section 1 and 24(2)(d)-(e) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

¹⁴⁸ See chapter 2.

It is submitted that following the *Maledu*¹⁴⁹ judgement, section 24(3) was added to the *Traditional Khoi-San and Leadership Bill*¹⁵⁰ (as it still was) to cater for consultation with the community.¹⁵¹ The court introduced the concept of prior and informed consent using the provisions of section 2(1) of the *Interim Protection of Informal Land Rights Act*.¹⁵² Over and above the consultation required in terms of the Traditional and Khoi-San Leadership Act, traditional councils (and their proposed partners) must ensure that the community is fully informed about the nature, consequences, challenges and benefits that may flow from the proposed agreement or partnership.¹⁵³ In the case of mining, the community therefore will have to understand what the mining process will entail, what the environmental challenges may be, and how their access to their land will be affected, amongst others. They cannot merely be informed of the proposed agreement or partnership followed by a vote.

The Act does not provide that a community equally can hold the council accountable if they opine that the traditional council's performance of a financial obligation was not in the community's best interest. Thus, the Act deprives the community of such a privilege. The building of a royal palace for the *Bapo Ba Mogale Kgosi* using traditional community funds, as shown below,¹⁵⁴ serves as an example of the performance of a financial obligation that is not in the community's best interests. The researcher argues that the traditional authority must be able to answer to the community as to who authorised a transaction or who was consulted, if there is suspicion of misuse of funding.

¹⁴⁹ *Maledu and Others vs Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41. Briefly, this case involved an appeal against a High Court decision and alluded that the community members were the rightful owners of the land and were not duly consulted before a mining surface lease agreement was signed off by their traditional councils. The applicants were informal landowners protected in terms of the *Interim Protection of Informal Land Rights Act* 31 of 1996.

¹⁵⁰ *Traditional and Khoi-San Leadership Bill* 23 of 2015.

¹⁵¹ Claassens 2021 *JSAS* 174-209.

¹⁵² Section 2(1) of the *Interim Protection of Informal Land Rights Act* 31 of 1996 reads that "no person may be deprived of any informal right to land without his or her consent subject to the provisions of subsection (4) and the provisions of the *Expropriation Act* 63 of 1975, or any other law which provides for the expropriation of land or rights".

¹⁵³ Also see Mukhwevho 2023 *SAJHR* 144-162; Mensi 2022 *AFRY* 375-394.

¹⁵⁴ See para 3.2.2.

The Act grants the Premier additional authority to, after consulting the appropriate Provincial Treasury and subject to relevant legislation and measures, initiate the establishment of a dedicated account for each traditional council. This account will receive any funds due to the council as outlined in the agreement or partnership executed under Section 24 of the Act.¹⁵⁵ The Act mentions that this is subject to the legislative or other measures but fails to mention what those measures could be.

With regards to the management of the monies paid into the traditional councils accounts, the Act provides that the Premier may determine the financial system and control of those accounts,¹⁵⁶ the purpose for which those monies can be used by the relevant council¹⁵⁷ and any other measure which the Premier may deem necessary to ensure the effective and efficient management of such account.¹⁵⁸ As far as can be ascertained, no Premier that has made regulations regarding the financial system and control for the monies to be paid in terms of Section 24.

Additionally, through legislative or other measures, the Act empowers a national or provincial department to allocate additional roles to a traditional council or leader, with a limitation that such an exercise of power does not include decision-making.¹⁵⁹ Indeed, the *Constitution*, in order to provide for governance accountability, provides that only democratically elected government structures can hold and exercise government powers.¹⁶⁰

Mazibuko posits that the effect of Section 25(1) of the *Traditional and Khoi-San Leadership Act* is that traditional councils are allowed to operate as a fourth “tier of government, which the *Constitution* does not provide”.¹⁶¹ However, in a case

¹⁵⁵ Section 23(3)(a)(iv) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

¹⁵⁶ Section 23(b)(i) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

¹⁵⁷ Section 23(b)(v) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

¹⁵⁸ Section 23(b)(viii) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

¹⁵⁹ Section 25(1) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

¹⁶⁰ Section 1(d) of the *Constitution*.

¹⁶¹ Mazibuko “Traditional Leadership in South Africa: Facing the Contradictions and Embracing the Realities” 8-10.

whereby a traditional council or leader abuses a power that has been extended to them by Section 25(1), the Act makes no provision that traditional communities may hold their traditional councils accountable for abuse of powers and mismanagement of funds because the traditional council remains an unelected sphere of government.

In the next paragraphs, case examples will be discussed to illustrate the mismanagement of funds within the North West and Limpopo provinces.

3.3 North West Traditional Authority Case Example

In order to illustrate how mining royalties were mismanaged in the North West Province, this section commences with a discussion of the *North West Traditional Leadership and Governance Framework Act 2* of 2005 which is relevant to the example discussed.

3.3.1 North West Traditional Leadership and Framework Act 2 of 2005

As stated before, the repealed *Traditional Leadership and Governance Framework Act* empowered provincial legislatures to pass their own legislation for the recognition and regulation of traditional authorities.¹⁶² In the case of *Tauetsile v Premier of the North West Province and Others*¹⁶³ it was emphasised that the *North West Traditional Leadership and Framework Act (North West Act)* is a culmination of section 211 of the *Constitution* as well as the *Traditional Leadership and Governance Framework Act*.¹⁶⁴

The *North West Act* aims to, among others, provide for mechanisms for dispute resolution, the regulation of the administration of traditional institutions and any matter that may be incidental thereto.¹⁶⁵ The following paragraph discusses the role and functions of traditional leaders in terms of the *North West Act*.

¹⁶² Section 2(2)(b)(i) of the TLGFA.

¹⁶³ *Tauetsile v Premier of the North West Province and Others* (M 123/2017) [2023] ZANWHC 7.

¹⁶⁴ *Tauetsile v Premier of the North West Province and Others* (M 123/2017) [2023] ZANWHC 7 para 6.

¹⁶⁵ See the foreword of the *North West Act*.

3.2.1.3 Roles and Functions of Traditional Leaders

Section 18 of the *North West Act* provides that a Kgosi /Kgosigadi that is recognised in terms of Section 8, is responsible for *inter alia*, the administration of the affairs of the traditional community,¹⁶⁶ the maintenance of peace within the traditional authority through mediation and conciliation of disputes,¹⁶⁷ and the convening and attending the meetings of traditional communities where the affairs of the traditional community are discussed. Such meetings must be convened once every six months and members of the traditional community must attend.¹⁶⁸

The Kgosi / Kgosigadi must also take note of any grievance, matter or problem that is brought forth by a community member and take reasonable steps to resolve the same.¹⁶⁹ The *Kgosi / Kgosigadi* must look after the welfare of their community and act in the interest of the community.¹⁷⁰

3.2.1.2 Financial matters of the Traditional Authorities

Chapter 5 of the *North West Act* is of great importance and relevance to this mini-dissertation as it addresses the financial matters of traditional authorities. Section 31 provides that every traditional authority recognised in terms of Section 3 of the Act, must have their books and accounts audited by the Auditor General.¹⁷¹ The Act further requires the Auditor General to soon thereafter make available copies of their report on the books and accounts of the traditional community to the Premier of North West and the concerned traditional community. The Auditor General may make available a special report on any matter connected to his or her powers and duties as empowered by this Act to the Premier of the traditional community.¹⁷² This could, for example, include any mismanagement of funds.

¹⁶⁶ Section 18(1)(c)(a) of the *North West Act*.

¹⁶⁷ Section 18(1)(c)(b) of the *North West Act*.

¹⁶⁸ Section 18(1)(c)(g) of the *North West Act*.

¹⁶⁹ Section 18(1)(c)(h) of the *North West Act*.

¹⁷⁰ Section 18(1)(c)(i) of the *North West Act*.

¹⁷¹ Section 31(1) of the *North West Act*.

¹⁷² Section 31(2) of the *North West Act*.

The Act further provides that section 188 of the *Constitution* and Section 3 of the *Auditor General Act* 12 of 1995 apply when the Auditor General executes their audit.¹⁷³ The traditional council must consider the report and if needed, comment thereon and then forward the report with the comments.¹⁷⁴

Additionally, the *North West Act* empowers the Premier to establish a commission to probe into whether any person that has been recognised as kgosi / kgosigadi or confirmed as kgosana has committed or is guilty of fraud or gross irregularity in the administration of the affairs of a traditional community or otherwise maladministered the affairs of the community. The commission must send its findings to the office of the Premier.¹⁷⁵

This section has discussed all the Sections of the *North West Act* that are pertinent to the administration of mining royalty funds, particularly in the North West communities in a bid to fathom the position and process that the *North West Act* has adopted in an attempt to provide for a "reasonably adequate consultation with concerned community". However, I argue that this process is not 'reasonably adequate' for consultation with concerned communities, particularly because the process is not efficient in holding traditional authorities accountable for maladministration and misappropriation of mining royalties. Moreover, at the heart of the administration of the affairs of the traditional communities and authorities that operates within the jurisdiction of the North West province, particularly the financial administration, traditional leaders and their council accounts to the Premier of the North West as well as the North West Provincial, therefore placing both the Premier and the NWPG at a higher status than their people. The Act appears to centralise the concept of accountability around the provincial government instead of the people. The BaPo Ba Mogale is used as an example that illustrates this argument.

¹⁷³ Section 31(3) of the *North West Act*.

¹⁷⁴ Section 31(4) of the *North West Act*.

¹⁷⁵ Section 38(1) (b)(iv) of the *North West Act*.

3.3.2 BaPo Ba Mogale *Traditional Authority*

The Bapo Ba Mogale Traditional Authority is located in the Marikana district, approximately 120 kilometres from Rustenburg and comprises of seven villages. The community is located on a rich platinum deposit. In 1969, the Bapo Ba Mogale Traditional Authority entered into a notarial mineral agreement with Lonmin, currently Sibanye Stillwater, wherein the former would pay annual royalties of R2000. Even so, history informs us that issues of to the lack of consultation with traditional communities were always present.¹⁷⁶

At the time when the Bophuthatswana government was in control, it followed a 'top-down' approach without consultation with the communities. The mining companies engaged only the traditional leaders and their councils regarding the compensation agreements.¹⁷⁷ Masutha writes that this is contrary to the MPRDA, which requires that traditional communities be consulted as the directly affected parties.¹⁷⁸

Mbenga and Manson indicate that the payment of mining royalties to the Bapo Ba Mogale traditional authorities dates back to the time of Bophuthatswana when Kgosi Lucas Manyane Mangope was the president. During his reign, President Mangope established a 'D-account' and inaugurated himself as the trustee of the chieftdom and thus fiddling with the internal affairs of the Bapo Ba Mogale community.¹⁷⁹

During this period, details about the lease agreement with Lonmin could not be accessed by the public, but the mining royalties paid to the Bapo Ba Mogale were estimated to be approximately R500 million by 2011, and Lonmin continues to pay annual mining royalties amounting to R40 million. This money is still held in the trust by the North West Provincial government.¹⁸⁰ Mbenga posits that this is

¹⁷⁶ Masutha 2021 <https://www.corruptionwatch.org.za/bapo-ba-mogales-traditional-governance-political-interference-woes/>.

¹⁷⁷ Masutha M 2021 <https://www.corruptionwatch.org.za/bapo-ba-mogales-traditional-governance-political-interference-woes/>

¹⁷⁸ Masutha M 2021 <https://www.corruptionwatch.org.za/bapo-ba-mogales-traditional-governance-political-interference-woes/>

¹⁷⁹ Andrew *Land Chiefs Mining* 146.

¹⁸⁰ Andrew *Land Chiefs Mining* 146.

exacerbated by the then *Traditional Leadership and Governance Framework Act*, which extends powers to the provincial government to take decisions where it had been proven that traditional authorities maladministered the funds.¹⁸¹

In 2008 incidences of unrests broke out in the Bapo Ba Mogale traditional community. The community opposed the actions of the *Kgosi* Edward who was appointed by President Mangope shortly after the death of the regent, Fred Mogale. The North West Provincial Government (NWPG) appointed an administrator.¹⁸² The administrator appointed Makepe Jeremiah Kenoshi as a financial advisor for the traditional authority shortly after the departure of Fred Mogale.¹⁸³ The appointment of Kenoshi was not well received by the Traditional Authority causing an unstable working relationship. The Traditional Authorities later on accused Kenoshi as acting *ultra vires* and in contrast to the Bapo Ba Mogale traditional customs.¹⁸⁴ Irrespective of the accusations, Kenoshi, without the council's approval, entered into an agreement with a company for a property development project. The project was estimated to have costed the traditional community approximate R 326 million.¹⁸⁵

The Traditional Authority instituted a disciplinary hearing against Kenoshi, in which the North West provincial government intervened and demanded the suspension of the traditional council. In her justification of the action, the then North West Premier stated that "it was not her intention to loot the wealth of a traditional community to enrich herself" but it is the responsibility of the province to ensure that the traditional council administer their affairs properly.¹⁸⁶ This led to divisions in that the traditional council legally challenged the *Kgosi's* actions, decisions and *locus standi* in the North West High Court.¹⁸⁷ Subsequently the traditional council released Kenoshi from his

¹⁸¹ Andrew *Land Chiefs Mining* 146. See also section 10(3) of the TLGFA.

¹⁸² Andrew *Land Chiefs Mining* 146.

¹⁸³ Andrew *Land Chiefs Mining* 146.

¹⁸⁴ *Traditional Authority of the Bapo Ba Mogale Community v Kenoshi and Another* (31876/10) [2010] ZAGPPHC 72 (29 July 2010) para 9.

¹⁸⁵ Andrew *Land Chiefs Mining* 147. See also *Traditional Authority of the Bapo Ba Mogale Community v Kenoshi and Another* (31876/10) [2010] ZAGPPHC 72 (29 July 2010) para 10.

¹⁸⁶ South African Government 2010 <https://www.gov.za/speaking-notes-north-west-premier-modiselle-media-briefing-10am-held-mafikeng-today>

¹⁸⁷ Andrew *Land Chiefs Mining* 147.

duties.¹⁸⁸

The North West provincial government reacted and imposed another administrator, Thabo Lerefolo, on the Traditional Authority. The administrator had to improve the administrative systems of the Bapo Ba Mogale. However, the Traditional Authority complained that they had limited control over their assets. The NWPG appointed a third administrator government and Bob Mogale, an uncle of the then president Mangope whom he appointed as the Kgosi. The Traditional Authority submitted that all three administrators managed the traditional community's interests without consulting them.¹⁸⁹

In February 2012, the then-Public Protector, Advocate Thuli Madonsela was approached to probe into the intervention of the NWPG on the ground that the money that belonged to the community was being misappropriated without the involvement of the said traditional community.¹⁹⁰ The investigations began in mid-2013 and it was revealed that approximately R400 million had been deposited by various mining companies into the D-account and the same amount had been siphoned off.¹⁹¹ It was further revealed that an approximately R80 million was used to build the royal palace which was not authorised by the community.¹⁹² Moreover, it came to light that the D-account had never been audited as stipulated in the North West Act.¹⁹³ The then Premier of North West, Thandi Modise justified the spending by stating that the NWPG was auditing the D-account.¹⁹⁴ The matter was left unresolved until late 2013.

¹⁸⁸ Capps *Dealing with the Tribe: The politics of the Bapo/Lonmin Royalty-to-Equity Conversion* 14-15.

¹⁸⁹ Andrew *Land Chiefs Mining* 148.

¹⁹⁰ Anonymous *News* 24.

¹⁹¹ "Public Protector Report 5 of 2017/2018". Also see Capps *Dealing with the Tribe: The politics of the Bapo/Lonmin Royalty-to-Equity Conversion* 18-19.

¹⁹² Capps *Dealing with the Tribe: The politics of the Bapo/Lonmin Royalty-to-Equity Conversion* 17.

¹⁹³ Situmo *Business Day* 1.

¹⁹⁴ Beishem 2013 <https://www.ofm.co.za/article/local-news/135876/madonsela-threatens-court-action-over-d-account>.

This case example clearly illustrates that the administration of mining royalties by the NWPG and the appointed administrators has always been motivated by nefarious political interference and possible self-enrichment without any due regard to the TLGFA and the *North West Act*. The NWPG and the Traditional leader of the Bapo Ba Mogale disregarded the provisions of the *North West Act*, which required the auditing of the books and financial records of the traditional communities. The justifications of the then Premier point to the fact that she was aware of the fact that the national and provincial requires of them to exercise oversight over the administration of mining royalties in the province but nevertheless neglected or omitted that ethical duty from her office.

Another illustration of the misuse of funds is the example of the Bakgatla Ba Kgafela. Corruption Watch conducted research into the former traditional leader, Kgosi Pilane, indicating corrupt activities and maladministration of mining royalties.¹⁹⁵ Residents in local communities instigated protest.¹⁹⁶ In *Pilane v Pilane and Another*, briefly and pertinent to this mini dissertation, the applicants alleged that the resources that were amassed from the area's economic activity in platinum mining had been mismanaged for years under the leadership of the respondents (traditional leader and his council).

The applicants expressed their dissatisfaction as emanating from the alleged misallocation of resources amongst the villages that comprises of the traditional community. The resources that are misallocated includes those that are derived from platinum mining and the Sun City Resort. The applicants alluded that these resources did not reach the villagers but Traditional Councils and the Kgosi utilised them for their own benefit.¹⁹⁷ The applicants further applied to interdict the respondents from acting contrary to the relevant statute and customary law and

¹⁹⁵ Mnwana 2014 *SA Crime Quarterly* 21-29.

¹⁹⁶ *Pilane and Another v Pilane and Another* (CCT 46/12) [2013] ZACC 3 (28 February 2013).

¹⁹⁷ *Pilane and Another v Pilane and Another* (CCT 46/12) [2013] ZACC 3 (28 February 2013) para 6.

convening meetings under certain auspices.¹⁹⁸

The Constitutional Court upheld all the interdicts initially granted at the North West High Court on the basis that the applicants failed to prove a clear right on the first interdict,¹⁹⁹ the second interdict lacked specificity and was broad,²⁰⁰ and the third on the ground that effectively prevented the applicants from calling themselves with a terminology that describes their identity,²⁰¹ and the applicants were granted an appeal and overturned the order of the High Court.²⁰² Although the legal issue in this case is mainly interdicts, it highlights the disputes and divisions arises within traditional communities due to the mismanagement of mining royalties by traditional authorities.

3.4 Limpopo Province Case Example

This section of the study illustrates how mining royalties were mismanaged in the Limpopo Province. The section first discusses the *Limpopo Traditional Leadership and Institutions Act* 6 of 2005 which is relevant to the case example. Thereafter the case example is.

3.4.1 Limpopo Traditional Leadership and Institutions Act 6 of 2005

The *Limpopo Traditional Leadership and Institutions Act* (*Limpopo Act*) was also passed under the auspices of the *Traditional Leadership and Governance Framework Act*.²⁰³ The Act commenced on 1 April 2005, aiming at providing for the recognition and regulation of traditional authorities, traditional communities and traditional councils as well as their roles and functions, and most importantly provides for the funds of the traditional council as well as their management within the boundaries of the Limpopo Province.²⁰⁴

¹⁹⁸ Para 11.

¹⁹⁹ Para 40.

²⁰⁰ Para 63.

²⁰¹ Para 67.

²⁰² Para 121.

²⁰³ Section 2(2)(b)(i) of the *Traditional Leadership and Governance Framework Act* 41 of 2003. See also section 2(1) of the *Limpopo Act*.

²⁰⁴ Preamble of the *Limpopo Act*.

3.4.1.1. Roles and functions of the Traditional Leadership

Section 18 of the *Limpopo Act* provides that a traditional leader may perform any function provided for in terms of customary law or assigned to them by any law subject to section 20 of the *Traditional Leadership and Governance Framework Act*. The Act further provides that the traditional leader is empowered to perform, after consultation with the traditional council certain functions that includes among others, the promotion of the interests of the concerned traditional community”,²⁰⁵ work *in tandem* “with relevant municipalities and state departments to assist in the administration of the traditional community,²⁰⁶ and to “participate in the development of the area in their traditional community”.²⁰⁷

Moreover, in terms of the Act it is the responsibility of a traditional council to report to the Premier of Limpopo regarding how their powers are exercised and their functions are performed. They further have to report to a relevant organ of state if that has allocated them a function as provided for in Section 44 of the *Constitution*.²⁰⁸

3.4.1.2 Financial Matters of the Traditional Council

Chapter 7 of the *Limpopo Act* addresses the financial matters of a traditional council. Section 24 describes what is regarded as funds of a traditional council and provides that the funds of a traditional council consist of, among others, the monies which according to “customary laws of the traditional community, are payable to the traditional council”,²⁰⁹ all the monies that are derived from the property that is in possession of the traditional council,²¹⁰ the donations that may be made by any person to benefit the traditional community to the extent that the grant or donation, subject the applicable law of government policy, has a condition that it must be

²⁰⁵ Section 18(1)(a) of the *Limpopo Act*.

²⁰⁶ Section 18(1)(b) of the *Limpopo Act*.

²⁰⁷ Section 18(1)(c) of the *Limpopo Act*.

²⁰⁸ Section 18(3) of the *Limpopo Act*.

²⁰⁹ Section 24(a) of the *Limpopo Act*.

²¹⁰ Section 24(c) of the *Limpopo Act*.

administered in terms of,²¹¹ and any money that is paid to the traditional council in terms of any law.²¹² Mining royalties are not itemised as falling under the funds of a traditional council in explicit terms; however the researcher argues that this is implied in that mining royalties fall under the fifth class, namely any money that is payable to the traditional council under any law.

Section 26 of the Act provides that the Premier shall cause to be opened an account into which all the monies payable to the traditional council in terms of Section 24 shall be paid and from which all the expenditures incurred in connection with any matter that is within the powers of the traditional council must be met.²¹³ The Act further provides that control of the account vests in the Premier. The said Premier is further authorised, provided that he deems fit, to delegate any power pertaining to the account to the traditional council concerned.²¹⁴

Similar to the *North West Act*, the *Limpopo Act* provides that a comprehensive report reflecting traditional council's incomes and expenditures should be submitted to the Director General 15 days after the end of each quarter and annually after the end of the financial year.²¹⁵ Moreover, all financial records must be audited and the traditional council must keep proper records of all its incomes and expenditures and have the same available to be audited by the Auditor General.²¹⁶

It seems that the *Limpopo Act* does not provide for a process that is reasonably adequate for consultation with the concerned traditional community to enable them to hold the council accountable for financial matters. The Act vests control of the account in the Premier of Limpopo and a report of all the traditional council's income and expenditures must be submitted to the Director General. The Act does not mention of any form of accountability mechanism for the affected traditional

²¹¹ Section 24(d) of the *Limpopo Act*.

²¹² Section 24(e) of the *Limpopo Act*.

²¹³ Section 26(1) of the *Limpopo Act*.

²¹⁴ Section 26(2) of the *Limpopo Act*.

²¹⁵ Section 28 of the *Limpopo Act*.

²¹⁶ Section 29(1) and (2) of the *Limpopo Act*.

community who are the intended beneficiaries of, for example, mining royalties. Due to this lack of accountability mechanism in the Act disputes emanated from mismanagement and misappropriation of mining royalties, of which the Mampa Serole Traditional Authority is an example.

3.4.2 Mampa Serole Traditional Authority

In its 2018 report, Corruption Watch reports about the state of affairs in the Mampa Serole Traditional Authority situated in the Platinum-rich group metal area of Limpopo. Prior to 1994, a portion of these areas fell in the former self-governing territory, Lebowa. Advent to the apartheid system, access to these resources has been in the hands of Anglo Platinum. During the Lebowa era, Anglo Platinum acquired almost 80% of these platinum rights.²¹⁷

In 1991 all mineral rights “held by the Lebowa government were transferred to a new structure, the Lebowa Minerals Trust (LMT)”.²¹⁸ By 2000, the new structure was in control of nearly 1500 title deeds to farms with an asset value of approximately R280 to R300 million and continued to receive an amount of R20 million annually. The LMT enabled Anglo Platinum to enter into lease agreements with local traditional leaders in Limpopo.²¹⁹

The Limpopo province noted that the lease agreements caused tensions and threatening actions amongst members of various communities, including the Mampa

²¹⁷ Mining Royalties Research Report 2018 available at <https://www.corruptionwatch.org.za/wp-content/uploads/2019/03/Mining-royalties-research-report-final1.pdf>.

²¹⁸ During a Minerals and Energy Affairs Portfolio Committee Meeting on the *Abolition of Lebowa Minerals Trust Bill* [54-2000] on 12 September 2000, the minutes of the meeting reflected the following: “LMT was established in 1991 to privately hold all the mineral rights transferred to the government of the former Lebowa. In 1998 there was a ministerial investigation into the future of LMT and on Jan 19, 2000 the cabinet approved the abolition bill for introduction into Parliament. Reasons for abolition include that the mandate of LMT is limited to a territory which is no longer recognised by the *Constitution*. The constitution also does not recognize mineral matters as a function beyond the bounds of national jurisdiction. The constitution seeks to establish a coherent nation-wide approach to mineral development for the benefit of the entire population – a goal that is circumvented by the existence of the LMT. Additionally, the inconsistency in state’s approach to governance may be confusing to potential investors”.

²¹⁹ Mining Royalties Research Report 2018 <https://www.corruptionwatch.org.za/wp-content/uploads/2019/03/Mining-royalties-research-report-final1.pdf>

Serole community. Members of the Mampa Serole Traditional Community expressed their frustrations and complained that their partaking in various forums and engagements benefitted them little and it had minimal prospect of changing their social status.²²⁰ The community indicated that they do not receive any documentation or financial documents even upon request. The Traditional Authority of the community promised to make the documents and financial paper trails available but never delivered.²²¹

Traditional authority of Mampa Serole established a community trust wherein their mining royalties were paid and managed as per the consensus of the community. However, the traditional authority still governed these trusts. The community of Mampa Serole further alluded that there is no accountability and effective consultation and that corruption, fraud and misappropriation of mining royalties' funds and community assets by the leaders of traditional authority and trusts were very common.²²²

At the time of writing this mini-dissertation, the disputes were still on-going over the same issues. Moreover, in a more recently decided case of *Mohlaba and Other v Minister of Cooperative Governance and Traditional Affairs*,²²³ the applicants brought a case before the Limpopo High Court, albeit on different grounds, but with accountability of funds as another point of contention. The salient facts of the case were that the applicant sought to declare invalid and unconstitutional section 25 of the *Limpopo Act*, which permits traditional leadership structures impose and collect levies on community members only upon consultation with the community regarding the purpose and need.²²⁴

The applicants further alluded that failure to pay the imposed levies, they were

²²⁰ Muzhambi *The Global Geographies of Mining and Local Expectations: The case Study of a New Coal Mine Project in Makhado, Limpopo* 19.

²²¹ Ledwaba Mail & Guardian 4.

²²² Ryan *Times Live* 1.

²²³ *Mohlaba and Others v Minister of Cooperative Governance and Traditional Affairs and Others* (2885/2016) [2023] ZALMPPHC 103 (1 November 2023).

²²⁴ Paras 5.1-5.12.

barred from receiving certain services including but not limited to proof of residence for opening bank accounts and a graveside to bury any deceased family member. One applicant further stated that they were required to pay levies for the purchasing of a car for the traditional leader and for him to consult a traditional healer and although levies are announced at community meetings, no discussions as to what they are used for are allowed.²²⁵

In justifying the order, the court stated that the withholding of services by traditional authorities is enough to prove that it enforces payment of levies. The court acknowledged that it has a duty to apply customary law where applicable and in this case customary law and the *Constitution* do permit the imposition of compulsory levies by traditional authorities. The Court subsequently handed an order to the extent that Section 25 of the *Limpopo Act* is invalid and unconstitutional from the date of judgement and that customary law only permits the imposition of levies voluntarily and after consultation with the community.²²⁶

This case example illustrates how traditional authorities use the law to break the law. Their conduct points out how they are applying the laws selectively to benefit them at the expense of community members.

3.5 Emerging Trends and Causes

This section analyses the different trends in the two provinces with regard to traditional authorities and their management of finances.

3.5.1 Divisions within traditional authorities

It seems that the representatives of the communities create conflict by advancing their individual interests instead of the broader community's objectives that advocate for the development of the community. These divisions hinder the ordinary traditional council activities such as the convening of meetings with the community.

²²⁵ Paras 5.1-5.12.

²²⁶ Para 34.

Thus there is no consultation with relevant stakeholders to authorise the transactions from the traditional community account. The divisions also hinder proper keeping of records and the auditing of financial books as per the *North West Act* and *Limpopo Act*.²²⁷

3.5.2 Centralisation of financial administration to the Premier

It has been demonstrated that both the *North West Act* and the *Limpopo Act* centralised the administration the financial matters of the traditional councils in the Premier. The Premier (without knowing what the community members would want) has to determine what is in the community's best interest, what would constitute a fruitless expenditure and what would not. The Premier also approves the expenditures in terms of the budget and after the funds are spent, the financial reports should be submitted to the concerned Premier. This in itself demonstrates how accountability is centralised to the Provincial governments with no control for the communities.

3.5.3 Ineffective role of provincial governments

The mismanagement of the mining royalties is attributable to the inefficiency of provincial government officials in exercising their watchdog role over traditional authorities.²²⁸ Provincial governments are empowered to oversee the administration of traditional community funds. In terms of the legislation, all the community revenue has to be paid into an account under the Premier's control.²²⁹ Under normal circumstances, for the community to access the funds, a community meeting needs to be convened in terms of which majority of the people that attended reach. An approval from the Premier would be needed when the expenditure is not part of what has been budgeted for. Therefore, as a watchdog, the provincial government should be the first 'port' to be examined when the royalties are mismanaged or misappropriated. Provincial governments are also adamant about the auditing of

²²⁷ See para 3.3 and 3.4.

²²⁸ See para 3.3.

²²⁹ See para 3.3.

financial records and books.

3.5.4. Lack of community control

Trusts and D-accounts are established to safe-keep monies for the community. More often than not, these trusts and D-accounts are under the control of provincial governments and traditional authorities rather than under the control of community members. This also diminishes accountability in that if community members are not in control of the trust means that they do not know how much is held in the trust and therefore cannot hold those in control of the trusts accountable.²³⁰

3.5.5 Ineffective role of the Auditor General

In terms of the case examples discussed, the trends are also associated with the inefficiency of the Auditor General. Despite the national legislation and legislation at provincial levels providing for the auditing of books and financial reports by the Office of the Auditor General, this duty to audit is still being neglected.

3.5.5 Comparing the national and provincial legislation

It has already been said that all the provincial laws have been enacted within the auspices of the national legislation which was later repealed by the *Traditional and Khoi-San Leadership Act* (now declared invalid and unconstitutional). Therefore, all provincial laws are basically a mirror of national legislation. All these laws depict some flaws. Firstly, by granting excessive powers for the administration of traditional communities' financial matters to provincial governments as well as traditional authorities without providing any mechanism for checks and balances or accountability. This centralisation of excessive powers stripped away the room for accountability.

²³⁰ See para 3.3 and 3.4.

3.6. Conclusion

The current chapter investigated how mining royalties are administered in concerning the legal framework for mining law and traditional authorities in South Africa. It also reflected on the procedures for accounting how traditional authorities' financial matters and mining royalties are administered. The discussion was designed in a manner that answers the question of whether the current legislative framework introduces measures to hold the traditional authorities accountable to its own people for the maladministration and misappropriation of mining royalties.

The chapter commenced with a general discussion of the legal framework regulating mining law in South Africa, the current legal framework regulating traditional authorities in South Africa, and the laws regulating traditional authorities at a provincial level in North West and Limpopo. The provincial laws imitate what is encapsulated in the empowering national legislation. They give recognition to traditional authority's institutions, provides for the roles and functions of traditional authorities and vests the financial administration and accountability.

Secondly, cases examples were discussed: the BaPo Ba Mogale Traditional Authority in the North West and the case of Pilane, as well as the Mampa Serole traditional authority in the Limpopo Province. The discussion of these examples aimed to indicate how the financial administration of royalties happened in practice. The discussion also illustrated that communities are frustrated and that they do not trust the fact that mining companies only negotiates agreements with Traditional Authorities. It further seems that the funds are not always used to improve the livelihoods of the community members and only a few benefit from the funds. The communities also do not have access to the financial records despite requests.

Lastly, the chapter examined the common emerging trends flowing from the two examples. The trends include divisions between traditional authorities and traditional communities, the centralisation of the financial administration and accountability in the provincial government (Premier), the provincial governments

acting contrary to the provincial legislation as well as the lack of auditing by the Auditor General. The next chapter explores additional legal mechanisms that can be utilised to hold traditional authorities accountable for the administration of mining royalties in South Africa.

Chapter 4

Additional legal mechanisms for holding traditional authorities accountable for administration of mining royalties

4.1. Introduction

The previous chapter analysed the legal framework regulating mining law in South Africa in the context of mining royalties to determine if they provide for mechanism to hold traditional authorities accountable in South Africa. It referred to two traditional authorities as case examples to illustrate how they administer their mining royalties.

This chapter evaluates other legal mechanisms that traditional communities can explore to hold traditional authorities accountable for administering mining royalties. In this chapter traditional authorities as organs of state are discussed, thereafter various legal mechanisms such as the Chapter 9 institutions, namely the Public Protector as well as the Auditor General, the right to a just administrative action in terms of the *Promotion of Administrative Justice Act* 3 of 2000, the Directorate for Priority Crime Investigation as well as the Special Investigating Unit are discussed.

4.2 Traditional Authorities as organs of state

The *Constitution* defines 'organs of state' as:

- any department of state or administration in the national, provincial or local sphere of government, or
- (a) any other functionary or institution
- (i) exercising a power or performing a function in terms of the Constitution or provincial constitution, or
- (ii) exercising a public power or performing a function in terms of any legislation, but does not include a court or a judicial officer.

Subparagraph (b)(i) indicates that any institution or body that exercises a power or performs a function in terms of the Constitution or a provincial constitution is an organ of state.²³¹ Mdumbe argues that these bodies and institutions namely the

²³¹ Section 239(b)(i) of the *Constitution*.

national, provincial and local spheres of government; are easily identifiable. It also includes the Chapter 9 institutions that supports constitutional democracy in South Africa, namely, the Public Protector, the Auditor General as well as the Human Rights Commission, to name a few.²³² Although this subsection does not include traditional authorities, they are recognised in terms of the *Constitution*.²³³

Subparagraph (b)(ii) refers to any other functionary or institution that exercises a public power or performs a public function in terms of legislation.²³⁴ To determine whether a functionary or institution is an organ of state as per Subparagraph (b)(ii), a two-stage inquiry comes into play. The first stage asks whether the function performed or power the exercised is of a public nature. An affirmative answer to this does not readily conclude the enquiry. The second stage of inquiry asks the question of whether there is a statutory authority in terms of which the concerned power is exercised, or the function is performed. It is only when both questions can be answered in the affirmative that a body or institution can be regarded as an organ of state.

Based on the Subparagraph (b)(ii) definition, traditional authorities fall within the ambit of organs of state when they exercise their powers or perform a function.²³⁵ The *Traditional and Khoi-San Leadership Act* provides for the recognition of traditional and Khoi-San leadership and communities. It also recognises the functions and roles of traditional and Khoi-San leaders.²³⁶ Being an organ of state, as revealed herein, means that traditional institutions are subject to the functioning of Chapter 9 institutions and the potential roles that these institutions may play in relation to the subject matter are explored herein.

4.3 Chapter 9 Institutions

In Chapter 9, the *Constitution* establishes six independent state institutions that

²³² Ka Mdumbe *The Meaning of 'Organ of State' in South African Law* 7.

²³³ My own emphasis.

²³⁴ Section 239(b)(ii) of the *Constitution*.

²³⁵ Burns *Administrative Law* 167.

²³⁶ Burns *Administrative Law* 167.

support constitutional democracy. Section 181(2) of the Constitution asserts the independence of these six institutions in strong terms as it provides that:

(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and must perform their powers without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures must assist and protect these institutions to ensure the independence, impartiality, dignity, and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.²³⁷

Murray posits that Chapter 9 institutions are intermediary institutions in that they provide a different opportunity for public participation in public life compared to one provided by political processes.²³⁸ She further states that Chapter 9 institutions provides a platform whereby the needs of the people can be illuminated outside the environment of political party politics.²³⁹ These institutions can fulfil dual roles of ensuring accountability and contributing to the transformation programme as envisaged by the *Constitution*.²⁴⁰

It is without a doubt that democratic government requires public accountability.²⁴¹ Section 195(1)(f) of the *Constitution* cements this and provides that public administration must be accountable.²⁴² Section 195(1)(f) states that public administrative activities ought to be exercised in the manner that reasons can be provided for any inaction or action.²⁴³ One way in which accountability can be reinforced is through the use of a multi-agency approach that has been adopted by South Africa.²⁴⁴

The Constitutional court emphasised this in *Hugh Glenister v President of the*

²³⁷ Section 181(2) of the *Constitution*.

²³⁸ Murray 2006 *PER* 1.

²³⁹ Murray 2006 *PER* 1.

²⁴⁰ Murray 2006 *PER* 1.

²⁴¹ Thornhill 2011 *AJPA* 79-87.

²⁴² Section 195(1)(f) of the *Constitution*.

²⁴³ Thornhill 2011 *AJPA* 79-87.

²⁴⁴ Mathiba *The Role of the Auditor-General in the Promotion of Efficient Financial Management in Municipalities: A Case Study of the North West Province* 48.

Republic of South Africa,²⁴⁵ wherein it was held “that the effective implementation of anti-corruption strategies” in the “public sector depends largely on having strong and independent expert and forensic investigation agencies”.²⁴⁶ In this section, attention is devoted to the role that Chapter 9 institutions may play in ensuring that traditional institutions account to the people they serve regarding the administration of mining royalties.

4.3.1 Public Protector

The Public Protector is established in terms of section 182(1) of the *Constitution* as well as other related legislation.²⁴⁷ In terms of this section, the functions and powers of the Public Protector include the investigation of “any conduct in state affairs or in the public administration in any sphere of government, which is alleged or suspected to be improper or to result in any impropriety or prejudice”.²⁴⁸ The Public Protector also has the powers to report on that conduct,²⁴⁹ and take any appropriate remedial action.²⁵⁰ The remedial actions that the Public Protector takes in terms of section 182(1)(c) have a binding effect and are enforceable unless a competent court of law successfully reviews it and set it aside.²⁵¹

The constitutional court confirmed this in the case of *Economic Freedom Fighter v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*,²⁵² wherein the court held that the rule of law requires of citizens to comply with decisions from those who has the authority to make them. If they are not satisfied, they can approach the courts to set those decisions aside. Section

²⁴⁵ *Hugh Glenister v President of the Republic of South Africa and Others* 2011 (7) BCLR 651.

²⁴⁶ *Hugh Glenister v President of the Republic of South Africa and Others* 2011 (7) BCLR 651 paras 117-120.

²⁴⁷ *Public Protector Act* 23 of 1994.

²⁴⁸ Section 182(1)(a) of the *Constitution*.

²⁴⁹ Section 182(1)(b) of the *Constitution*.

²⁵⁰ Section 182(1)(c) of the *Constitution*.

²⁵¹ Mbiada 2017 *PER* 2-34. The Public Protector is empowered by section 8(1) of the *Public Protector Act* to make findings, point of view or recommendations over a matter that they are investigating.

²⁵² *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 5 BCLR 618 (CC).

182(4) provides that the Public Protector should be accessible to everyone.²⁵³

The *Public Protector Act* sets out the functions of the Public Protector, including that he/she may “protect the public against matters such as maladministration in connection with the affairs of government, improper conduct by a person performing a public function, improper acts with respect to public money and the improper or unlawful enrichment of a person performing a public function”.²⁵⁴ Section 6 allows anyone to submit a complaint to the Public Protector through a written or oral declaration under oath or by way of an affirmation. The declaration should specify the nature of the matter in question,²⁵⁵ the grounds upon which the call for investigation is based,²⁵⁶ and all the other available information.²⁵⁷ A person is permitted to use any other means, which the Public Protector may allow as a view of making her office accessible.²⁵⁸ Section 6(4)-(5) provides for additional powers allowing the Public Protector to initiate investigations on allegations.

As previously indicated in Chapter 3, the Public Protector was approached to investigate the alleged maladministration in the Bapo Ba Mogale Community.²⁵⁹ The specific allegations included, among others that there were misuse of funds from the D-account,²⁶⁰ the improper conduct and misappropriation of funds for the building of the Royal Palace, a lack of transparency regarding the mining lease agreements and the community’s stake and that Lonmin pays millions of royalties into the community coffers but that it is not known what happens to these funds.²⁶¹

In addressing the issue of jurisdiction, the Public Protector wrote that it has jurisdiction over the investigation in terms of section 182(2). The Public Protector

²⁵³ Section 182(4) of the *Public Protector Act* 23 of 1994.
²⁵⁴ The preamble of the *Public Protector Act* 23 of 1994.
²⁵⁵ Section 6(1)(a)(i) of the *Public Protector Act* 23 of 1994.
²⁵⁶ Section 6(1)(a)(ii) of the *Public Protector Act* 23 of 1994.
²⁵⁷ Section 6(1)(a)(iii) of the *Public Protector Act* 23 of 1994.
²⁵⁸ Section 6(1)(b) of the *Public Protector Act* 23 of 1994.
²⁵⁹ See paragraph 2.2 of the Public Protector Report No. 5 of 2018/2018.
²⁶⁰ Development account.
²⁶¹ See paragraph 2.2.10 of the Public Protector Report No. 5 of 2017/2018.

further based her jurisdiction on section 6(5)(a) of the *Public Protector Act*.²⁶² The Public Protector further argued that the Department and the Bapo Ba Mogale are organs of state and therefore their conduct is equivalent to conduct in state affairs. By virtue of that, the matter at hand fell in the jurisdiction of the mandate of the Public Protector.²⁶³

The office of the Public Protector therefore has jurisdiction over traditional authorities, in fact it is mandated by the *Constitution* as well as “the *Public Protector Act* to investigate and redress maladministration and improprieties in the conduct of their affairs”. Traditional communities can thus follow the appropriate process of lodging a complaint against traditional authorities for the maladministration and misappropriation of mining royalties and corruption with any nearby satellite office of the Public Protector. The community members reporting or writing to the Public Protector must ensure to provide the office with the nature of the problem, background and history of the complaint as well as any step that they have taken to resolve the problem prior.

4.3.2 Auditor General

The Office of the Auditor General is established in terms of Section 188 of the *Constitution* as one of the institutions supporting constitutional democracy.²⁶⁴ The Auditor General is mandated by the Constitution to audit and report on the accounts, financial statements, and financial management of all the national and provincial state departments and their administration, all municipalities as well as any other “institution or accounting entity required by the national or principal legislation to be audited by the Auditor General”.²⁶⁵ Section 188(2) of the *Constitution* provides

²⁶² Section 4(a)(i) to (iii) of the *Public Protector Act* briefly provides that “the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of the state affairs”. See also para 3.5 of the Public Protector Report No. 5 of 2017/2018.

²⁶³ See para 3.6 of the Public Protector Report No. 5 of 2017/2018. Also see para 3.2.2 above for the Public Protector’s findings in respect of this matter.

²⁶⁴ Auditor General <https://www.agsa.co.za/AboutUs/Legislation.aspx>

²⁶⁵ Section 188(1) of the *Constitution*. See also section 4(1) of the *Public Audit Act* 25 of 2004. This was also emphasized in the case of *Auditor-General of SA v MEC for Economic Opportunities, Western Cape and Another* (Case no 671/2020) [2021] ZASCA 133 para 2.

additional powers to the Auditor General and provides that the Auditor General may audit and report on the account, financial statement and “financial management of any institution funded by the National Revenue Fund or a Provincial Revenue Fund or by a municipality,²⁶⁶ or any institution that is authorised in terms of any law to receive money for a public purpose”.²⁶⁷ As indicated above, traditional authorities’ finances are to be audited by the Auditor General or if registered auditor conducted the audit, the Auditor General may review the report.²⁶⁸

Essentially, the purpose of conducting the audits is to strengthen the country’s democracy by enabling oversight, accountability, and governance within the public sector so that confidence can be built within the public. The Auditor General achieves this by scrutinising the books and accounts of, among others, the national and provincial state departments and any other institution or accounting entity required by provincial or national legislation. The Auditor General scrutinises the books and accounts to ensure that there are no unauthorised expenditures, irregular expenditures or fruitless and wasteful expenditures.²⁶⁹

The *Public Audit Act* further regulates the Auditor General.²⁷⁰ The Auditor General has to ensure that those occupying public offices follow the correct accounting procedures and standards regarding the expenditures and revenue reported.²⁷¹ Section 4(3) of the *Public Audit Act* provides that the Auditor General may audit and report on the accounts and financial management of any public entity not “listed in the *Public Finance Management Act*,²⁷² any other institution not mentioned in Subsection (1) and which is funded from the National Revenue Fund or a Provincial

²⁶⁶ Section 188(2)(a) of the *Constitution*.

²⁶⁷ Section 188(2)(b) of the *Constitution*.

²⁶⁸ Section 28 of the *Public Audit Act* 25 of 2004.

²⁶⁹ Anonymous <https://www.agsa.co.za/Portals/0/Role%20of%20AGSA%20Booklet%20-%20Inside.pdf>

²⁷⁰ *Public Audit Act* 25 of 2004.

²⁷¹ Nzewi 2014 *APDPR* 36-53.

²⁷² *Public Finance Management Act* 1 of 1999. Section 3 of the *Public Finance Management Act* lists the public entities that are referred to in section 4(3) of the *Public Audit Act*; Schedules 2 and 3 of the *Public Finance Management Act* also sets out the entities that are subject to the Act itself. Traditional authorities are however, not listed as such.

Revenue Fund or by a municipality, or authorised in terms of any legislation to receive money for a public purpose".²⁷³ This will include traditional authorities, as also indicated in the *Traditional and Khoi-San Leadership Act*.

The audits are conducted in terms of Section 11 of the Act.²⁷⁴ After an audit is conducted, the Auditor General is compelled by Section 20(1) to prepare an audit report. The audit report must indicate whether the financial statements comply with the "applicable financial reporting framework and legislation", the institutions' compliance with any applicable legislation pertaining to the financial matters, financial management and any incidental matter thereto, as well as the reported performance of the auditee against its objectives as predetermined.²⁷⁵

Once the report is made available, Section 5A of the *Public Audit Act* requires the Auditor General to, within a reasonable timeframe after issuing the Section 20 report, make a follow-up to establish if the accounting officer or authority has implemented the recommendations as per the audit report concerning any material irregularity within the timeframe as set out in the report.²⁷⁶ This will similarly apply to the Premier or traditional authorities receiving their audit report. Traditional communities may equally approach the Auditor General of South to conduct a special investigation in cases where they suspect misappropriation, maladministration as well as corruption regarding the administration of mining royalties. This action will call for a special investigation from the Auditor General to conduct an audit on performance information and issue a special report thereof.

4.3.3. Just Administrative Action

The *Constitution* provides for just administrative action.²⁷⁷ "Anyone whose rights

²⁷³ Section 4(3) of the *Public Audit Act* 25 of 2004.

²⁷⁴ Section 11 of the *Public Audit Act* 25 of 2004 provides that "the Act applies to all audits of auditees which the Auditor General must perform in terms of section 4(1) or (2); or opts to perform in terms of section 4(3)."

²⁷⁵ Section 20(2) of the *Public Audit Act* 25 of 2004.

²⁷⁶ Section 5A(1) of the *Public Audit Act* 25 of 2004.

²⁷⁷ Section 33(1) of the *Constitution* provides that "everyone has the right to an administrative action that is lawful, reasonable, and procedurally fair".

have been adversely affected by administrative action has the right to be” provided with written reasons.²⁷⁸ The *Constitution* places an obligation on Parliament to pass national “legislation to give effect to these rights,²⁷⁹ and must provide for the review of administrative action by a court, or where it is appropriate, an independent and impartial tribunal”.²⁸⁰

Parliament enacted the *Promotion of Administrative Justice Act* to promote just administrative action to create a culture of accountability, openness, and transparency.²⁸¹ The Act spells out the scope, content and the application of the rights and duties that are contained in Section 33 of the *Constitution*.²⁸²

The courts and administrators use the Act to determine the rights and the legal obligations concerning the exercise of administrative action.²⁸³ The Act further spells out the procedures that administrators must follow when they perform their duties, daily functions, and most notably and very relevant to this chapter, the provision of reasons for an administrative action.²⁸⁴

This implies that traditional councils are organs of state by virtue of them being a functionary or institution that exercise a public power or perform their function in terms of an empowering provision, traditional institutions are therefore subject to the principles of *Promotion of Administrative Justice Act* and every decision of the institution constitute administrative action and are therefore subject to a just administrative action.²⁸⁵ Therefore, communities may approach a court of law to review any decision that has been made by a traditional authority on the grounds

²⁷⁸ Section 33(1) of the *Constitution*.

²⁷⁹ Section 33(2) of the *Constitution*.

²⁸⁰ Section 33(3)(a) of the *Constitution*.

²⁸¹ Burns *Administrative Law* 26.

²⁸² Burns *Administrative Law* 26.

²⁸³ Burns *Administrative Law* 26. See also the case of *Sasol Oil (Pty) Limited v Meltcafe NO 2004 (5) SA 161 (W)* para 7.

²⁸⁴ Burns *Administrative Law* 26.

²⁸⁵ Own emphasis.

that it was not fairly taken, unlawful or was irrational.²⁸⁶

4.3.4 Hawks-Directorate for Priority Crime Investigation

Another option for communities to follow is to make use of the Directorate for Priority Crime Investigation, a unit of the South African Police Service, that was established in terms of Section 17C of the *South African Police Amendment Act*.²⁸⁷ The Directorate aims to “combat, investigate and prevent national priority crimes such as the serious organised crimes, commercial crimes”, fraud, and corruption as well as misappropriation of large amounts of public funds.²⁸⁸

The Act was amended in 2012 to introduce the reporting procedures that are provided in Section 34(1) of the *Prevention and Combating of Corrupt Activities Act*.²⁸⁹ This section provides the types of crimes that must be reported,²⁹⁰ who has the duty to report,²⁹¹ and an indication of where to report.²⁹² As previously indicated by the two case examples, the funds or mining royalties that have been reported to be misappropriated constitutes misappropriation of public funds and thus falls within the investigative jurisdiction of the Hawks.

4.3.5 The Special Investigating Unit

The *Special Investigating Unit and Special Tribunals Act*²⁹³ establishes a special investigation unit. This Unit must investigate serious allegation of corruption and maladministration, amongst others, in the “administration of state institutions, state

²⁸⁶ See the grounds of review as provided for in the *Promotion of Administrative Justice Act* 3 of 2000.

²⁸⁷ Section 17C of the *South African Police Service Amendment Act* 57 of 2008.

²⁸⁸ Berning 2014 *Crime Quarterly* 3-10.

²⁸⁹ *Prevention and Combating of Corrupt Activities Act* 12 of 2004.

²⁹⁰ See section 34(2) of *Prevention and Combating of Corrupt Activities Act* 12 of 2004.

²⁹¹ According to section 34(1) of the Act, “any person who holds a position of authority (defined in section 34(4) of the Act), who knows or ought reasonably to have known or suspected that any other person has committed an offence (of corruption) in terms of sections 3 to 16 or 20 to 21 of the Act or theft, fraud, extortion, forgery or uttering of a forged document involving an amount of R100 000,00 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official”.

²⁹² Section 34(1) of the *Prevention and Combating of Corrupt Activities Act* 12 of 2004 states that reports should be made to a police official in the Directorate.

²⁹³ *Special Investigating Unit and Special Tribunals Act* 74 of 1996.

assets and public money as well as any conduct, which may seriously harm the interest of the public” with instituting civil claims to “recover any financial losses suffered” as the end goal.²⁹⁴

The Unit has a whistleblower hotline, which can be used to give information to the Unit.²⁹⁵ When conducting their investigations, the Special Investigating Unit has the powers to subpoena witnesses, access “bank statements and cellphone records, search and seize evidence and interrogate witnesses under oath”.²⁹⁶ The Special Investigating Unit may further refer evidence, which constitutes an offence to the National Prosecuting Authority.²⁹⁷

Traditional communities are close-knit communities. It is sometimes difficult to come into the open and pose allegations to the traditional councils, if there is mistrust within a community, a member of the concerned community will therefore be able to take this route if they are concerned about the misappropriation or administration of the funds and do not want to be known or if they fear retaliation.

²⁹⁴ The preamble of the *Special Investigating Unit and Special Tribunals Act 74 of 1996*. See also section 4(1) of the *Special Investigating Unit and Special Tribunals Act 74 of 1996*.

²⁹⁵ Special Investigating Unit <https://www.siu.org.za/about-us/>

²⁹⁶ Section 5 of the *Special Investigating Unit and Special Tribunals Act 74 of 1996*.

²⁹⁷ Section 4(1)(d) of the *Special Investigating Unit and Special Tribunals Act 74 of 1996*.

4.4 Conclusion

Based on the discussion and challenges identified in Chapter 3, this chapter has evaluated other legal mechanisms that can be utilised to hold traditional authorities accountable for administering mining royalties. It was found that traditional authorities are organs of state in terms of section 239 of the *Constitution*. This means that they can be scrutinised by Chapter 9 institutions, such as the Public Protector as well as the Auditor General, amongst others.

The mandate of these institutions includes jurisdiction over traditional authorities and therefore they can enforce accountability of traditional councils. All financial statements of the traditional councils and the handling of mining royalties could also be audited and scrutinised by the Auditor General.

As an organ of state, traditional leaders and traditional councils are subject to the principles of just administrative action. Any decision they take may be subject to a review in terms of the prescripts of the *Promotion of Administrative Justice Act*. It would be possible to apply for a review of their actions. This is because organs of state must give reasons for their decisions, including the use of funding that should benefit the community.

In addition to these measures, it was also found that the Directorate of Priority Crime Investigation, a unit of the South African Police Service, may also have a mandate to investigate alleged corruption and misappropriation of public funds. Similarly, the Special Investigating Unit, an independent public entity that operates as one of the key law enforcement agencies, will be able to investigate the misappropriation of mining royalties. Whistleblowers can approach them anonymously. The next chapter concludes the study and makes some recommendations to answer the research question.

Chapter 5

Conclusion and Recommendations

5.1 Introduction

The study sought to appraise the legal mechanisms for holding traditional authorities accountable for the administration of mining royalties in South Africa.²⁹⁸

Chapter 2 discussed the historical development of the accountability of traditional authorities in South Africa, while Chapter 3 of the study analysed the legal position concerning communities and mining royalties and also discussed the current traditional authority legislation with reference to case examples. Chapter 4 evaluates how the other identified legal mechanisms could be used to ensure financial accountability concerning mining royalties

The institutions of traditional leaders and their councils existed and still exist today.²⁹⁹ Pre 1910, traditional authorities received some attention and it was only after 1927 that the government formerly recognised these institutions and prescribed their functions concerning governance.³⁰⁰ Currently traditional leaders and their councils are recognised in terms of the *Constitution* and *Traditional and Khoi-San Leadership Act* that was declared unconstitutional in May 2023 but will remain in operation for 24 months. The *Traditional and Khoi-San Leadership Act* repealed the TLGFA.

The *Traditional and Khoi-San Leadership Act* governs traditional authorities in South Africa, but the function is a joint function of both the national and provincial governments. Subsequent to this Act's predecessor, the TLGFA, provinces enacted their own legislation in this regard, for example, the *North West Act* and *Limpopo*

²⁹⁸ See para 1.1.

²⁹⁹ See paras 1.1 and 2.2.

³⁰⁰ See para 2.2.1.

Act. The TLGFA allows traditional councils to conclude agreements and partnerships with persons other than the government.³⁰¹ There are specific requirements to ensure that these agreements are concluded with the consent of the community members. The Act refers to a majority of community members attending the meeting and not all community members. However, recent case law dictates that where communities hold informal rights, there is a need to give prior and informed consent for any development taking place on their land, including mining.³⁰²

Mining takes place on traditional land and it is well known that mining activities have severe impacts on the economic, social and health issues of those around it. To harmonise and mitigate all these factors, mining royalties were introduced to benefit communities on whose land mining activities take place, as well as to contribute to the development of the communities' economy and social upliftment.³⁰³ The MPRDA, as the main law regulating mining in South Africa provides for lease agreements between the mining companies and landholders.³⁰⁴ Traditional authorities, as leaders of these communities are often seen as the 'representatives' of these communities in terms of the negotiations.³⁰⁵

Traditional leaders and their councils are involved in the negotiations of lease agreements with mining companies or they conclude partnerships with mining companies to mine.³⁰⁶ The MPRDA provides that communities may receive mining royalties if mining takes place on their land and provision is made that traditional communities may mine the area themselves.³⁰⁷

The accountability of traditional leaders and their councils in relation for administrating mining royalties is not always clear.³⁰⁸ As "representatives", of their

³⁰¹ See section 24 of the TLGFA.

³⁰² See *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP).

³⁰³ See paras 1.3 and 3.2.2.

³⁰⁴ See paras 1.3, 3.3 and 3.2.2.

³⁰⁵ See paras 1.3 and 3.2.2.

³⁰⁶ See paras 1.3 and 3.2.3.

³⁰⁷ See para 3.2.2.

³⁰⁸ See para 3.3 and 3.4.

communities, traditional authorities or councils are usually responsible for the administration of the mining royalties from mining companies. Transparency as a form of accountability is sometimes a point of contention between the communities and traditional authorities.³⁰⁹

The *North West Act* and *Limpopo Act* allow traditional authorities to enter into agreements with mining companies.³¹⁰ It seems that their communities are not always aware of what these agreements entail and what is done with the mining royalties. The legislation further centralises the financial administration of mining royalties to provincial governments.³¹¹ In cases where the financial powers are extended to traditional authorities, they must account to the provincial government as to how those funds were administered.³¹² Unfortunately this does not happen.

In the North West case of the *Traditional Authority of the Babo Ba Mogale Community v Kenoshi and Another* the court declared that the conclusion of an agreement was *ultra vires* as the community was not consulted.³¹³ The court ordered the Kgosi and the NWPG to comply with its functions, roles and obligations as per Sections 9 and 10 of the *North West Act*.³¹⁴ In the Limpopo case of *Mohlaba and Other v Minister of Cooperative Governance and Traditional Affairs* the court ruled that section 25 of the *Limpopo Act* is unconstitutional and therefore invalid to the extent that it contravenes both the Constitution as well as customary law. The court further held that customary law only permits imposition of levies voluntarily and after consultation with the community whereby they are provided with reasons as to the purpose of the levies as well as the need for it.³¹⁵

³⁰⁹ See paras 1.3 and 2.2.

³¹⁰ See paras 3.3.1 and 3.4.1.

³¹¹ See paras 3.3.1 and 3.4.1.

³¹² See paras 3.3.1 and 3.4.1.

³¹³ *Traditional Authority of the Babo Ba Mogale v Kenoshi and Another* (31876/10) [2010] ZAGPPHC (29 July 2010) para 47.

³¹⁴ *Traditional Authority of the Babo Ba Mogale v Kenoshi and Another* (31876/10) [2010] ZAGPPHC (29 July 2010) paras 66.1-66.8.

³¹⁵ *Mohlaba and Others v Minister of Cooperative Governance and Traditional Affairs and Others* (2885/2016) [2023] ZALMPPHC 103 (1 November 2023) para 34.

The discussion of the case examples revealed that proper record keeping of the funds, accessing the information regarding how mining royalties were administered and decision-making relating to the funds received are creating challenges in these communities. The reason for this is seemingly the lack of mechanisms that compel traditional authorities to present audited documents, the inactiveness or exclusivity of community members who negotiate for lease agreements, the lack of policies to guide traditional authorities and provincial governments on how to best optimise financial management of mining royalties.

5.2. Findings

Accountability is an important principle of good governance in South Africa, and institutions such as traditional authorities need to be accountable for how they administer mining royalties.

The governance of mining royalties is vested in the Premiers and, in some instances, the community.³¹⁶

It seems that there is mismanagement of the royalty funds.

The governance of these royalties brings strife amongst communities as it is not transparent and communities are not able to hold traditional leaders and authorities accountable for the mismanagement of funds.

Although the reports are to be made available to the Premier and traditional councils, they are not always provided to the community members.³¹⁷

Despite the legislation being in place to ensure auditing, it does not always take place.³¹⁸

³¹⁶ See para 3.2.3.

³¹⁷ See para 3.2.3.

³¹⁸ See para 3.2.3.

In cases of failure, the people as their subjects must be able to employ other legal mechanisms that are available and accessible to them to hold the traditional councils and Premiers to account.³¹⁹

5.3. Recommendations

For purposes of addressing the findings identified in the study, the following recommendations are made:

- When the *Traditional and Khoi-San Leadership Act* is amended, it should include the following:
 - I. A provision that compels traditional councils to report to the community all the financial matters and audits. This provision will enable the Auditor General to conduct audits on institutions of traditional authorities as organs of state, the report issued thereof will be then be made available to the concerned traditional communities.
 - II. The reporting should be undertaken annually and should indicate how the mining royalties benefitted traditional communities.
 - III. There should be an oversight institution including officials from the Department of Cooperative Governance and Traditional Affairs, the relevant provincial department, delegated members of the community, a member of the mining company as well as an auditing officer from the Office of the Auditor General or any appointed auditing company.
 - IV. When agreements or partnerships are negotiated, elected members of the community should be present.
 - V. All community members should have an opportunity to give prior and informed consent for any development taking place on their land.
 - VI. All community members should be consulted during a meeting specifically constituted for this purpose, to decide on how the mining royalties should benefit the community.

³¹⁹ See para 1.1.

- Developing and adopting a mining royalties best practice guide will be prudent to ensure transparency regarding how mining royalties should be administered. The guide will serve as a framework for provincial governments and traditional authorities. This will ensure that all the stakeholders (community/traditional authorities and provincial governments) works efficiently towards optimising the benefits flowing from mining activities.
- The provincial governments and the national department (CoGTA) should develop and adopt a financial monitoring and reporting system, which imposes a duty on the provincial government and elected members of the community to monitor and report irregularities and transgressions.
- The office of the Auditor General should be provided with a more prominent role in auditing the administration of mining royalties.
- The reports (transgressions) should be directed to stakeholders such as the Directorate for Priority Crime Investigation and the Special Investigating Unit.
- Implementing a monitoring and reporting system will assist in ensuring accountability for the administration of mining royalties.
- It should be clear that non-compliance is an offence followed by a penalty.
- Community awareness should be raised regarding mining royalties, their purpose and the accountability of traditional councils in this regard.
- Communities should also be made aware of alternative avenues to hold traditional councils accountable, namely to report the matter to the Directorate for Priority Crime Investigation and the Special Investigating Unit, that also allow for anonymity.

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