

CHARTING A WAY FOR SOUTH AFRICAN MINING TO BENEFIT COMMUNITIES

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EXECUTIVE SUMMARY

Mining, though contributing a declining share to the South African economy, is still a significant employer and earner of foreign exchange revenue. It has a troubled past and, for good reason, was one of the first targets of Black Economic Empowerment (BEE) at the dawn of South Africa's democratic dispensation. Twenty-three years later, animosity between the state and the mining industry is more pronounced than ever before. This is exemplified by the response of the public and investors to the latest iteration of the Mining Charter. One of the transformative goals that has proved elusive is the delivery of meaningful benefit to near-mine communities. Community trusts have traditionally been used as vehicles for the receipt of mine royalty payments. This has created intractable conflict within and between communities. This latest charter stipulates that a full 8% of a required 30% ownership stake by a black person must be given to communities in the form of community trusts. However, these trusts are now to be administered by a new agency that has yet to be created. The charter provides no detail as to how this agency will be constructed or governed, but it does provide for the means of funding it. Some commentators have already suggested that the proposed channels are illegal. This paper provides a brief overview of the mining sector's contradictory contribution to South Africa's development, which signals the imperative for reform. It then focuses specifically on past attempts to improve community welfare using tribal trusts (given that a large proportion of mining takes place on communal land in the former homelands). These cases provide an example of what is to be avoided in

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Since the initiation of diamond mining in 1867 and large-scale gold mining in 1896, South Africa's development trajectory has been characterised by the manipulation of political institutions to extract economic benefits for a small, predominantly white, elite minority

the governance of trusts. The paper concludes by posing questions for future research that will help move the industry towards a more stable equilibrium that can sustainably improve the welfare of the communities in which it operates.

INTRODUCTION

In both wealth and income terms, South Africa is one of the world's most unequal countries. Statistics South Africa measured the country's Gini coefficient (a measure of relative inequality) at 0.69 in 2014 on income data (where 1 is the most unequal and 0 is the most equal). This inequality is racialised as a function of South Africa's political history. Since the initiation of diamond mining in 1867, and later, large-scale gold mining in 1896, South Africa's development trajectory has been characterised by the manipulation of political institutions to extract economic benefits for a small, predominantly white, elite minority. This trajectory contributed to the country's industrialisation at the expense of broad-based growth, generating an oligarchic economic structure known as the minerals-energy complex.

After the transition to democratic rule in 1994, South Africa made significant economic progress until about 2009 in terms of growth and employment. Owing in part to global economic stagnation, but also to domestic constraints such as corruption, the economy entered a recession in June 2017.¹ Growth is projected at approximately 1% for the next two to three years. In the first six months of 2017, two of the world's three credit ratings agencies have downgraded South Africa's foreign-denominated debt to junk status, while keeping the outlook negative for rand-denominated debt. Most sovereign debt is denominated in the local currency. Junk status for rand bonds would therefore make the repayment of this debt extraordinarily expensive, eating into budget allocations that would otherwise have been directed towards areas such as healthcare and education. Perhaps the most underestimated impact of the downgrades is that rand-denominated bonds will automatically fall out of many of the world's major investment indices.²

Without economic growth and investment in the fixed capital formation necessary for creating jobs, unemployment has crept up to 27.7% (using the narrow definition that excludes discouraged workers), and youth unemployment hovers at 38.6%.³ The negative effects of economic stagnation affect the poor disproportionately. Poverty levels (at a purchasing power parity rate of \$1.90/day) have not changed much since 2008 when the World Bank estimated that at least 16.9% of South Africa's population lived in poverty.⁴

Within this context, the state has recently gazetted its latest iteration of the Mining Charter, which was initially gazetted for public comment in December 2015.⁵ The charter is a prominent governance tool that the state employs to redress past injustices in the mining industry. Among other things, the Charter envisages broad-based mine worker and community empowerment through the redistribution of ownership from its current narrow concentration, into the hands of previously disadvantaged South Africans. Historically, achieving mine worker and community empowerment has proved elusive. There is no consensus on what the optimal vehicles for achieving such empowerment might be. This paper attempts to fill some of these gaps by reviewing existing mechanisms and suggesting appropriate questions for future research.

The charter is a prominent governance tool that the state employs to redress past injustices in the mining industry

POLITICAL AND ECONOMIC CONTEXT

Racialised inequality, injected into the fibre of South Africa's economic trajectory through colonialism and apartheid, continues to undermine the prospects for black South Africans to escape poverty and build wealth. Combined with contemporary governance ineptitude, characterised by the acquisition of rents through state-owned entities and the distribution of those rents to politically-connected insiders, the prospects for most of the country's citizens are bleak.

Mining remains an important component of the economy, accounting for about 9% of gross domestic product directly, and about 18% indirectly. Mineral and ore exports constitute 24% of total merchandise exports, an important source of foreign exchange.

In development terms, mining continues to be a double-edged sword. Historically, through the imposition of a colour bar in the early 1900s, black workers were prevented from earning fair wages; well-paying job categories were preserved for whites. Interacting with unjust apartheid laws such as the pass laws and the Bantu Education Act No. 47 of 1953, migrant labour to the mines entrenched racial inequality at the same time as mining contributed to industrialising the country.⁶ The wealth created by artificially cheap black labour on the mines was used by the political and business elites to embed an oligarchic capitalism, the foundations of which have yet to be eroded. These historical adverse effects are hard to overstate, but have been perpetuated by the current ruling elite. There is a path-dependence at work in the institutional fabric – the costs of rent extraction remain relatively low for the current ruling coalition, just as they have been since the 1890s.⁷

To reverse this racialised inequality, most evidently embedded in mining, the ANC-led government introduced a complementary set of policies in the 1990s. Firstly, they replaced the private property-orientated Minerals Act No. 50 of 1991 with the Mineral and Petroleum Resources Development Act No. 28 of 2002 (MPRDA, 2002), which placed the ownership of the country's mineral wealth in the hands of the people, with the state as the custodian. Secondly, they adopted a policy of Black Economic Empowerment (BEE), which, among other things, sought to increase the black ownership and management share of the country's economic assets. Unfortunately, BEE has done relatively little to create the kind of broad-based economic empowerment the country requires. Traditionally white businesses used BEE as a means of forming systemic links with prominent ANC politicians and their relatives. The first-order effect of BEE was to greatly enrich the politically powerful new elite. The second-order effects have been limited, if disputed.⁸

Not only has redistribution been generally limited, but a new set of players with political connections to the ascendant faction of the ruling coalition has emerged to disrupt the equilibrium that existed before the onset of the Zuma presidency in 2009. This is most notable in the Gupta family's alleged success in appointing a compliant Minister of Mineral Resources, Mosebenzi Zwane, and using him to pressurise Glencore into selling its Optimum Coal Mine to Tegeta Exploration and Resources (Tegeta), a Gupta-owned business. [Amabhungane](#), an investigative journalism centre, revealed that Eskom (the state power utility) extended an advance of ZAR⁹ 587 million to Tegeta to extend their coal supply contract with Eskom's Arnot power station.¹⁰

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Notwithstanding evidence of BEE being manipulated for rent-seeking purposes¹¹, the policy ostensibly aims to use South Africa's wealth to empower a broad segment of the population. The Mining Charter, developed under section 100 of the MPRDA, 2002, was the first regulation to give expression to this policy intention. This was fitting, given the primacy of mining in setting South Africa's development path. The first two charters have yielded mixed results and much political controversy. The Chamber of Mines of South Africa and the Department of Mineral Resources continue to differ as to how much empowerment has been achieved in the sector to date.¹²

MINING CHARTER III

As an expression of the government's frustration, the latest [Reviewed Broad Based Black-Economic Empowerment Charter](#) for the South African Mining and Minerals Industry, 2016 (Mining Charter III) laments that:¹³

limited progress has been made in embracing the broad-based empowerment ownership in terms of meaningful economic participation of Black Persons ... The interests of mineworkers and communities are typically held in trusts, which constrain the flow of benefits to intended beneficiaries.

Section 2.1, the ownership section of the charter, states that a minimum target of 30% black ownership per mining right must be achieved. The charter goes on to stipulate that:¹⁴

The 30% Black Person shareholding must be distributed in the following manner:

- A minimum of 8% of the total issued shares of the Holder shall be issued to [Employee Share-Ownership Plans] ESOPs (or any similar employee scheme structure);
- A minimum of 8% of the total issued shares of the Holder shall be issued to Mine Communities (in the form of a community trust).

Most importantly, the community's 8% share must be held in 'a trust created and managed by the Mining Transformation and Development Agency, from a date to be published by the Minister'.¹⁵ This repeals [the draft version's](#) stipulation that the 'minimum community participation and workers' stake shall be held in Trusts created by the community and the workers respectively and registered with the Master of the High Court with jurisdiction'.¹⁶ In the draft version, trusts were to be constituted in terms of the Trust Property Control Act, No. 57 of 1988, as amended by the Justice Laws Rationalisation Act No. 18 of 1996.¹⁷ No reference to this act is made in the reviewed charter, which repeals both the 2004 and 2010 versions, and voids provisions that existed in the draft version.

The Mining Transformation and Development Agency is to be established by the minister during the period set out in paragraph 2.11 (a), which is 12 months from the date it was published (15 June 2017). The agency appears to be a vehicle through which the state can collect rents¹⁸, but no details are provided as to how this agency will be structured or governed. Under section 2.2, for instance, 'a Foreign Supplier must contribute a minimum of 1% of its annual turnover generated from local mining company/ies towards the Mining Transformation and Development Agency'.¹⁹ Right holders are also required to allocate nearly half of

their 5% turnover for skills development to the agency. The Chamber of Mines has questioned this levy, arguing instead that the Mining Qualifications Authority, which already exists with a governance structure, should be fixed instead.²⁰ The Chamber applied to the High Court for an [urgent interdict](#)²¹ to prevent the implementation of the charter, and will further request that the charter be reviewed in terms of the Promotion of Administrative Justice Act.²² In mid-July 2017, the minister of mineral resources agreed to suspend the implementation of the charter until after the High Court ruling.²³

A BRIEF HISTORY OF MINING-COMMUNITY RELATIONS AND TRUSTS

Both on paper and in public discourse all stakeholders appear to share the view that local near-mine communities should benefit directly from mining.²⁴ Yet, despite widespread claims by the mining industry that its responsibility towards communities is a core competence, some authors argue that the industry has not, on average, been able to integrate community relations and development functions into the core business model.²⁵ Companies have been accused of 'greenwashing'²⁶ – employing corporate social responsibility (CSR) spin in glossy brochures, focusing on hard infrastructure projects such as schools and clinics that can be politically sold to shareholders. This may come at the expense of building authentic relationships with community members and taking an integrated approach to development in partnership with local municipalities.

Dina Rajak, in an [ethnographic study](#) of Anglo-American's community engagement on the North West province's platinum belt, writes that 'while the company projects itself as a vehicle of empowerment through the market, CSR serves to reinscribe (rather than transform) old social hierarchies of power and dependence within Rustenburg'.²⁷ There are understandable difficulties with coordinating efforts that result in integrated regional development.²⁸ In South Africa an unfortunate geographic reality is that mining-dependent local municipalities are mainly concentrated in the country's peripheral and poor provinces. For a host of reasons, including confusion pertaining to communal land tenure (which is typically held in tribal trusts) in and around many of these mining-dependent municipalities, the legislative requirement to develop social and labour plans has produced limited development outcomes.²⁹

The difficulty associated with trusts as a vehicle for community empowerment stems from South Africa's complex history of land tenure. The existing trusteeship system for land ownership emerged in the late 1860s. The Bafokeng took unique advantage of this and this accounts, in large part, for their current position as the community with the most effective trust that benefits from mining royalties. In the late 1800s Lutheran missionaries helped the Bafokeng to purchase land by circumventing the restrictions on African land ownership. Christoph Penzhorn, the missionary who established the Saron Mission Station on the Beerfontein farm, purchased a few farms for the Bafokeng in his name, but held in trust for the tribe. At the beginning of the twentieth century they owned more than 20 farms through the trusteeship systems.³⁰ Historians uniformly note, however, that Kgosi (chief) August Mokgatle, in his 55-year reign from 1834 to 1891, played the most decisive role in ensuring a legacy for the Bafokeng that has not been squandered by subsequent generations.

In South Africa an unfortunate geographic reality is that mining-dependent local municipalities are mainly concentrated in the country's peripheral and poor provinces

The success of the Bafokeng aside, the trusteeship system, interacting with the apartheid government's policy of separate development for Bantustans – now referred to as former homelands – has created considerable toxicity. A large proportion of South Africa's mineral endowment is beneath land whose surface is governed under insecure communal tenure. Despite Section 25 of South Africa's 1996 [Constitution](#) insisting that security of tenure be accomplished in the former homelands, no legislation yet exists to give expression to this. The result is that some 17 million South Africans live on land that is still held in tribal trusts and allocated at the discretion of the ruling chiefs, many of whom colluded with the apartheid regime to establish these Bantustans.³¹

COMMUNITY OR CHIEFTAINCY EMPOWERMENT?

Land policy researchers Aninka Claassens and Brendan Boyle have observed that the effect of reinforcing the tribal boundaries ascribed by the Bantu Authorities Act No. 68 of 1951 was to consolidate the power of rural chiefs and 'to deny other rural South Africans the right to decide for themselves how to use and share the newly discovered mineral wealth of the land they have owned and occupied for centuries.'³² These chiefs have managed to survive by repositioning themselves in the post-apartheid order. A structural explanation for this is that the strategies of elites are path-dependent. Colonial and apartheid structures were difficult to dismantle and economic institutions were organised in a way that made it attractive for the new elite to extract rents in a similar way, using perversely similar political arrangements.³³ The ANC needed the chiefs to forge a coalition with former Bantustan elites and thereby secure the rural vote.³⁴

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Such a large degree of power bestowed in an essentially undemocratic office – the chieftaincy – does not bode well for ensuring that community trusts will deliver benefit to the communities they purport to be the custodians of. As Andrew Manson details, the Bafokeng have been a relatively positive exception although they have not been exempt from difficulty.

In an examination of three tribal trusts on the platinum belt, he notes that 'sharing the benefits of mining with local communities through their "traditional authorities"', through royalties, shares or employment, is at best precarious and at worst disastrous'.³⁵

Traditionally the trusteeship system involved the payment of royalties to the communities on whose land mining operations took place. In 2007, royalties from Impala Platinum were exchanged for 9.4 million shares (valued at about ZAR 10.6 billion at the time), which made Royal Bafokeng Holdings (RBH) the single largest shareholder in Impala Platinum. Over time, direct investment in business ventures has replaced the traditional royalty model. RBH has become a BEE partner of choice for an array of South African corporations from Vodacom to Thebe Investments (in which Chancellor House, the investment arm of the ANC, also has a stake). Complexities have arisen in the process of RBH and the Royal Bafokeng Administration (that manages the assets held by the Bafokeng) becoming corporate players – the Bafokeng have become a major corporate entity through securing mineral rights. Tensions have also arisen between some elements within Bafokeng society and the chieftaincy because of complex historical factors. Nonetheless,

these tensions have been managed with considerable skill and deft leadership – capacities that most communal institutions lack. Whether the community has benefited significantly is a subjective and relative matter, but the apparently strong governance of RBH does bode well for achieving inclusive objective benefit in the near to medium term future.

Contrary to the Bafokeng case, the Bakwena Ba Mogopa Traditional Community (Bakwena) has been considerably less successful and illustrates the structural problems inherent in managing community trusts. A 2005 joint-venture deal with African Platinum (Afplats) worth ZAR 1.9 billion created almost immediate acrimony. A faction of the Bakwena suspected that the North West provincial government was interfering in the chieftaincy. An acting regent, Emmanuel Segwagwa Mamogale, was replaced by Mothlalepule Mathibedi, who was then accused by another faction of being a proxy for Edna Molewa (then premier of the province, and now national Minister of Environment Affairs). When the community requested Molewa to reconsider the appointment she refused, the royal homestead was set alight and Mathibedi fled. Justice Mogoeng Mogoeng (then on the bench of the North West High Court and now Chief Justice of the Constitutional Court), ordered Mamogale to be reinstated as Molewa had failed to follow the Bophuthatswana Traditional Authorities Act No. 23 of 1978. As a result of these events, the Afplats deal could not be concluded because the company could not identify the legitimate representatives of the community. Subsequent deals were struck, with one deal with Xstrata being reported to be worth ZAR 467 million. It was endlessly delayed, however, as millions of rands were alleged to be missing from the traditional community's 'D account', on which Motheo Mamogale (the new regent and the one on whose behalf Emmanuel Mamogale had been acting) had signing powers. A 'D account' is a community trust account, with the letter 'D' representing 'development' because the money allocated into this account is designed to develop communities. The company wanted a clear contract with legitimate community leaders.³⁶ This points to a broader problem with community trusts in that the parameters by which the community is defined are bound to be contested. Moreover, clear rules for the acquisition and distribution of rents are similarly difficult to agree on, especially when the stakes are so high.

In the third case that Manson investigated, the Bapo Ba Mogale, a community that lives near Marikana in the North West province (the site of the 2012 massacre) has had a notarial mineral lease agreement with Lonmin since 1969. By 2011, the royalties paid to the Bapo Ba Mogale amounted to approximately ZAR 500 million. By 2013, Lonmin was paying an annual ZAR 40 million into a trust held for the tribe by the North West provincial government. The Traditional Leadership and Governance Framework Act No. 41 of 2003 gives the state the authority to act as a trustee in cases where there is evidence of maladministration by traditional authorities. In February of 2013, a lawyer for the Bapo Ba Mogale, Hugh Eiser, alleged that the premier of the North West province, the MEC for Local Government and Traditional Affairs and various officials, had done as they pleased with the community's money while keeping the community in the dark. Eiser then approached the Public Protector to investigate the missing funds.³⁷

The investigation into the missing money by Thuli Madonsela (the Public Protector at the time) revealed that in 1994, there was R721 000 in the D account. Over

the following 20 years, total funds into the account amounted to about ZAR 617 million. By 2014, the balance had dropped to R495 000. Despite a recent influx of some ZAR 80 million, a further ZAR 100 million had been borrowed from the Public Investment Corporation, essentially leaving the community indebted. A forensic report had further revealed that ZAR 80 million had been spent on the royal palace.³⁸ It is not clear who authorised the payment for a project that was initially tabled to cost ZAR 20 million, although it appears to have been a joint effort by the Department of Cooperative Governance and Traditional Affairs, and the Bapo Ba Mogale administration council. Madonsela revealed that R68 million had been spent on project consultants alone.³⁹ The [final report](#), released on Monday 19 June 2017 by the current Public Protector, Advocate Busiswe Mkhwebane, revealed that the final cost was ZAR 115 million.

Most work on community trusts has been focused on platinum, largely because of the accidental juncture of history and geology. Platinum deposits happen to be concentrated in the former homelands of Bophuthatswana and Lebowa. But the above reflection alone highlights the difficulties of finding the most appropriate vehicle for ensuring that near-mine communities benefit from the wealth beneath the soil.

Drawing on an extensive study of the Bakgatla area, Sonwabile Mswana summarises the problems well: the devolution of power to local institutions, such as the chieftaincy, enables chiefs and the state to suppress rural resistance, especially if land tenure is communal but insecure because the state favours the chief's discretionary authority.⁴⁰ Furthermore, the courts have interpreted 'custom' in overly narrow terms, which makes disputes about wealth distribution a zero-sum game – chiefs and ordinary villagers compete to present their respective interpretations of 'custom' as most legitimate to wrest exclusive control over communal property. Chiefs tend to win because of the way in which the courts interpret existing laws: 'Chiefly custodianship goes against the existing character of "communal" property rights. The state's empowerment of chiefs and the court's interpretation of custom tend to ignore the long local histories of resistance against tribal authorities' control over communal property.'⁴¹

STRUCTURING TRUSTS TO BENEFIT COMMUNITIES AND WORKERS

This paper has shown some of the complex challenges involved in managing wealth from mining royalty payments on behalf of near-mine communities. Defining exactly who constitutes a community is challenging even when the parameters of belonging are relatively clear (as in the case of the Bafokeng). Ascertaining a community's collective preferences in a coherent manner is difficult, as the person(s) purporting to speak on behalf of a community may not be its legitimate representative. Where boundaries of membership to a community are contested, or claims to rightful authority are historically unresolved, this problem is amplified.

Unfortunately, the new charter does not address these challenges. It offers no stipulations as to how community trusts are to be constituted. Instead, it decrees that they are to be held and managed by a new Mining Transformation and Development Agency. How this agency is to interact with existing tribal authorities and local municipality governance structures is unclear. However, as mentioned

above, the April 2016 draft of this charter called for trusts to be constituted in terms of the Trust Property Control Act No. 57 of 1998, as amended.

To benefit near-mine communities in a way that embraces the spirit of the [1955 Freedom Charter](#) – that the wealth beneath the soil belongs to all South Africans – a systematic research programme is necessary. Weighed against the impending High Court, and potential Constitutional Court rulings, such a research programme should aim to answer the following questions (if the main provisions of the charter remain in tact):

- What is the optimal suite of vehicles for opening a flow of just and equitable benefit to near-mine communities in terms of transferring the 8% portion of the required 30% ownership transfer to black persons?
- If trusts are the best vehicle for holding equity and distributing benefit, how should they be constructed to avoid exploitation by narrow, politically-connected interests? Does the amended Trust Property Control Act, No. 57 of 1988, provide some useful direction, or does this need to be modified and linked directly to the charter?
- If the Mining Transformation and Development Agency is to be the vehicle for administering community trusts, how can it be constructed to avoid the D account problems and other diversionary practices that have characterised trusts in the past?
- What can the state do to avoid mistakes and the often-violent contestation over resources at community level?

It would appear prudent to examine these questions within the theoretical framework of recent political settlements work.⁴² This framework treats the elite bargain that shapes how institutions are crafted to generate and distribute rents as central to understanding why particular sets of policies are chosen. To answer the questions posed above, a systematic review of all current community-trust arrangements needs to be undertaken. What works in one setting may not work at all in another context, but policymakers won't know this unless the ingredients for success and failure are more systematically understood. It is clear, for instance, that the relatively successful (but still contested) Bafokeng model would be difficult to replicate.

Finally, more research on this subject is imperative because every instance of mining on communal land has revealed general distrust between community members and chiefs, between communities and the relevant municipal state authority, and between mining companies and all other stakeholders (except sometimes for the chief, who may benefit at the expense of the community). Distrust arguably remains the single biggest hindrance to making the most of South Africa's abundant mineral resources for future development.

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ENDNOTES

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