

Law protecting interests of South African communities in mining deals falls short

The impact of mining operations on rural communities is a contentious issue in South Africa. There is also concern about the manner in which communities are consulted about mining on their land.



The community of Xolobeni village, in the Eastern Cape, successfully challenged the mining of their land in the High Court in 2018. Rogan Ward © Sunday Times.

There is often tension between pursuing the economic benefits of mining, and protecting the socioeconomic and [cultural rights of people](#). Some communities rely on the land to sustain themselves through agriculture, and for some their cultural identity is [tied to the land](#).

South Africa has laws to safeguard the interests of communities in their dealings with mining companies. The [Interim Protection of Informal Land Rights Act](#) of 1996 requires that communities provide “consent” before mining operations can start. The [Mineral and Petroleum Resources Development Act](#) of 2002 stipulates that there must be “meaningful consultation” between mining companies and communities.

As my [research](#) on the case of the Xolobeni community in the Eastern Cape province shows, the Mineral and Petroleum Resources Development Act does not provide the necessary protection to communities in the awarding of licences to mine their land.

I noted that the new [Traditional and Khoi-San Leadership Act](#) might not provide more protection to communities either. And it could be open to abuse. If the basic level of trust between communities and traditional leaders is not present, then legislation will not remedy injustices that occur.

Challenges to community engagement

In November 2018, the [Xolobeni](#) community [successfully challenged](#) the awarding of a licence to an Australian mining company to mine for titanium on their land.

The case concerned the level of consent required to obtain a mining right over property held by a community with informal land tenure. In South Africa communal land is [collectively owned by the community](#) in terms of customary law and managed by the tribal authority.

The high court [ruled](#) that in the case of informal land right holders, consent by the community was a requirement for obtaining a mining licence. The court's decision followed a decade-long battle. It had pitted the community against the mining company and the traditional leaders.

My research, based on official documents and published accounts from the community, showed that traditional leaders or community representatives did not adequately represent the interests of the community in this case.

They did not consult properly with the affected members of the community, and thereby failed to adequately represent their interests.

Another problem is the potential for corruption. As a [report](#) by a legislative review panel chaired by former president Kgalema Motlanthe has found, there have been instances where leaders consented to mining in exchange for [certain advantages](#).

There is also no oversight measure to ensure that communities are actually consulted properly.

The Traditional and Khoi San Leadership Act

In a further attempt by the legislature to address the issue of community engagement, the [Traditional and Khoi San Leadership Act](#) was passed in 2019. Section 24 of the Act regulates the conclusion of agreements between a traditional council and private entities. It supersedes provisions of all the other laws.

A [traditional council](#) is a body that administers the affairs of a rural community. It is made up of elected members of the community or traditional leaders or both.

The new Act doesn't fix the problems that my research identified. Instead of placing the focus on community rights, the Act seems to reaffirm the absolute authority of traditional leaders over the community engagement process. The most affected voices within a community could once again be lost.

According to the Act, partnerships and agreements between mining companies and communities must benefit the communities and enjoy their majority support.

"Consent" by the entire community, as previously required by the Interim Protection of Informal Land Rights Act, is no longer required. The decision should merely be supported by the majority.

It could be difficult to determine whether there is in fact majority support for a mine. The legislation doesn't say how this majority will be determined.

[According](#) to legal scholars Janine Ubink and Joanna Pickering:

“ *Legislation regulating traditional leadership, for its part, centralises the powers of senior traditional leaders without incorporating crucial accountability mechanisms inherent in customary law.* ”

It is, therefore, necessary to find measures to ensure that the process of obtaining consent for mining operations is legitimate and fair.

For this to happen, the actions of mining companies should be monitored more effectively by independent third parties. This is to ensure that they do engage with affected community members in a manner that gives these people a voice.

Solving the problem

Government might have hoped to make the process of community engagement more transparent by regulating the way mining agreements should be reached in the Traditional and Khoi San Leadership Act. But it would be misguided to think that this will be possible.

The Act gives too much power to traditional leaders by giving them the right to control the engagement process and decide when a sufficient level of consent has been reached.

In order to resolve this problem, a few practical steps need to be taken by government, traditional leaders and mining companies. Firstly, communities need to be fully aware of their rights concerning community engagement and the process that has to be followed for companies to obtain consent to mine their lands.

Although there have been [initiatives](#) by civil society to inform communities of their rights, much work remains to be done in this regard. Community leaders and mining companies can also contribute to such advocacy efforts.

Secondly, government needs to address the matter of traditional leaders abusing their authority. If traditional leaders cannot effectively fulfil the role of intermediary between communities and mining companies, then that responsibility should be delegated. This could be done by appointing an impartial third party.

In general, there is a need for more transparency and accountability regarding the awarding of mining licences. This could prevent corruption and ensure the protection of communities' rights.

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