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THE END OF DECENTRALIZED DESPOTISM?

The Implications of the Malendu Constitutional Court Judgement for the "Right to Say No" to Mining.

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The South African Constitutional Court delivered a ground-breaking judgment which will have wide-implications for mining affected communities and their "right to say no". By reaffirming the importance of informal land rights, the court has set a precedent that will change power dynamics between communities, traditional leaders and trans-national mining corporations.

Post 1994, the South African system of land governance at the community level has largely been characterized by a complex institutional background which poses a challenge for the attainment of security of tenure. As a consequence of racially discriminatory laws and practices by the colonial and Apartheid Government, Black communities have legally insecure land tenure (Cousins 1997, pp.61). Tenure insecurity of the former homelands has further been exacerbated by the resurgence of traditional leaders who are known for being corrupt and accountable to politicians. They have become infamous for dispossessing communities of their land for mining without obtaining prior consent or consultation from the "community" and thus concentrating power in the hands of unelected traditional leaders (Ntsebenza 2005, p.58). This is what Mamdani (1996, p.22) refers to as decentralized despotism.

Decentralized despotism is a diluted version of the role of chiefs as dictated by colonialism and Apartheid. The chieftaincy was seen as key by colonialists to maintain power in the former homelands. Power was centralized in the chieftaincy, community representatives were appointed by the state and were never democratically elected; and no term of office was specified (Ntsebenza 2005, p.61). There was also a disregard for the separation of powers. In essence, the chieftaincy was seen as a pivotal institution for maintaining an autocratic and racially discriminatory system.

The current situation on communal land is best described by Mamdani as decentralized despotism (1996 in Ntsebenza 2005, p.60). Post-Apartheid, it perfectly describes the continued and inherited hierarchical and exclusionary manner by which traditional leaders govern their "subjects" which is against what the constitution envisions (LiPuma & Koelble 2009, pp.210). The overall trend across traditional authorities indicates that community members are not consulted about decisions that affect their land.

Without romanticizing pre-colonial traditional institutions the current land governance system is a distorted version of customary land law which has colonial remnants (Ntsebenza 2005, p.58). Before colonialism, customary law required chiefdoms to derive their authority from the community. They were accountable to the community and not to politicians. In addition, communal land ownership structures under customary law were deeply layered and included individual and family "ownership" although distinguishable from "absolute" land ownership under statutory law (Akuffo 2009, p.66). This distortion has contributed greatly to the land tenure insecurity experienced in the former homelands.

The Case and a Ground-Breaking Judgment:

On the 25th of October, the Constitutional Court of the Republic of South Africa delivered a judgment in Grace Masele (Mpane) Maledu and Others v Itereleng Bakgatla Mineral Resources (Proprietary) Limited and Another [2018] ZACC 41 (Maledu Judgment). This unanimous judgment represents significant progress towards the attainment of the "Right to Say No" by reaffirming the importance of informal land rights through the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). The Constitutional Court confirmed that section 11(1) of the Mineral and Petroleum Resources Development Act, No 28 of 2002 (MPRDA), must be read concurrently with IPILRA. In practise, the Department of Mineral Resources (DMR) has been prioritising the MPRDA and dispossessing communities of their land by bypassing informal land right holders and relying on traditional leaders to obtain consent.

In the year 2004, Itereleng Bakgatla Mineral Resources (Proprietary) Limited (IBMR), a company registered and partly owned by the Traditional Council of the Bakgatla-Ba-Kgafela community, was granted an exploration right over Wildgespruit Farm in North West (Mabuza, 2018). In 2008, the Traditional Council signed a lease with IBMR after it held a Kgotha Kgothe (community meeting) that was open to the Bakgatla-Ba-Kgafela "community" (*Maledu and Others v Itereleng Bakgatla Mineral Resources*). In 2014, 13 families on the farm opposed the granting of the mining license and argued that their descendants purchased the farm. However, due to racially discriminatory land laws of the past, the land was registered in trust for then Minister of Rural Development and Land Reform. This land was held by the state under "trustee" status in attempt by the state to address systematic land tenure insecurity of Black South Africans caused by colonialism and Apartheid (ibid., p.61).

The Maledu judgement represents a shift of power away from unelected traditional leaders who enter into dubious mining ventures with private corporations. It highlights that consent must be acquired from informal land right holders who will be *directly* affected by mining and that without a majority vote of consent; mining cannot proceed (Land and Accountability Research Centre (LARC) 2018). In essence, this means that having a mining right does not extinguish the rights of those who occupy the land.

This judgment is a victory for communities like Xolobeni where mining has not yet started. Xolobeni is located in the Eastern Cape's Wild Coast. In the past 10 years there has been local resistance against an Australian mining company's attempt to open a mine in favour of eco-tourism and agriculture (Nicolson 2018). The Constitution of South Africa in section 25(6) provides, *"that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to tenure which is legally secure or to comparable redress"*.

Furthermore, it will also have major implications where mining is already taking place. The multi-billion deals signed by traditional leaders with mining companies are legally precarious and thus subject to legal scrutiny (LARC 2018). Therefore, affected groups all over South Africa have established social movements such as the Mining Affected Communities United in Action (MACUA) and Women Affected Communities United in Action (WAMUA) to challenge the common practise of traditional leaders making decisions in the name of "community" in courts. In their struggle against corporate impunity, IPILRA can be used to clarify colonial distortions of customary law in acknowledging informal land rights at the family and individual level on communal land. Decentralized despotism will not stand the test of time as traditional leaders, mining companies and the state will be forced to respect and recognise the land rights of the vulnerable.

In the former homelands, as in the case of the Bakgatla-Ba-Kgafela, communal tenure systems were subject to traditional leaders under customary law. However, traditional leadership which is subject to customary law has been widely criticized for its patriarchal values therefore leading to land tenure insecurity for women, farm workers, pastoralists and the youth (Cousins 1997, p.62). In an attempt to address this, the Traditional Leadership Governance Framework Act 41 of 2003 (TLGFA) which requires traditional councils to include 40% elected members and sets a minimum quota for one-third of women members was enacted (Fitzpatrick 2005, p.463). However, very few traditional councils have met these standards (Murray, 2000:15). Furthermore, traditional councils make it difficult to achieve deliberative democracy as required by the Constitution and the White Paper on Traditional Leadership and Governance 2003 (LiPuma & Koelble 2009, p.210). The White Paper requires decisions to made in a representative, accountable and transparent manner (ibid., p.210).

Traditional leaders rule over 40% of South Africa's population and 17% of its territory (Van Kessel & Oomen 1997, p.560). Increasingly, traditional leaders have enjoyed more power

through the establishment of a council of traditional leaders known as the Congress of Traditional Leaders in South Africa (CONTRALESA) and legislation such as the 2003 TLGFA (ibid., p.565). Traditional leaders are also recognized in section 211(1) of the South African Constitution which states that, *"the institution, status and role of traditional leadership, according to customary law is recognised but subject to the Constitution"*. This means that traditional laws and practices have to be in harmony with the Constitution (Dube 2018). However, the establishment of a National and Provincial House of Traditional Leaders and the implementation of policy at the local level has thus far exceeded the role for traditional leaders as granted by the constitution ((LiPuma & Koelble 2009, p.209).

Mining vs Land?

Additionally, the judgement is significant because the Constitutional Court reiterated that the MPRDA must be read concurrently with IPILRA. In an interview with Johan Lorenzen, an attorney from Richard Spoor Attorneys who intervened as amicus on behalf of the Xolobeni community in the Maledu case, it became clear that section 54 of the MPRDA is also relevant to understand the implications of the judgement. The Constitutional Court clarified that a company must follow the process set out in section 54 of the MPRDA which provides for the determination of how much compensation a mining company must pay the lawful occupiers of land before it can proceed to mine. Section 54 of the MPRDA only applies to owners and lawful occupiers and the court reiterated that informal land right holders are part of this category.

The Constitutional Court also questioned why mining companies have been allowed to start mining while they engage with communities regarding compensation. The court ruled that when a dispute is invoked under section 54, mining should not proceed as it currently has been practised. Indeed, although it may have been clear that the occupiers of Wilgespruit farm were protected by IPILRA, the other key question was whether the mining right granted to IBMR extinguished their informal rights. The court thus held that IBMR did not follow the processes required by IPILRA and therefore obtained no consent. In this case, the mining right did not extinguish the informal rights to the land.

The court further explained that section 54 provides that if relevant parties reach a deadlock during a negotiation, section 55 of the MPRDA which allows the DMR minister to expropriate the land applies (Cripps & Reid 2018). In this case, the court or arbitration will determine the level of compensation. However, as argued by Johan Lorenzen, the judgement is not clear about what happens to IPILRA rights if the court determines the level of compensation but consent is not yet given by informal land rights holders. In addition, Johan Lorenzen argues that although IPILRA should still apply, the Maledu judgement does not affirm the rule of this issue. Before the Maledu judgement, litigation against mining companies centred on environmental law. This case re-establishes the importance of informal land rights.

There is the risk of giving the minister wide discretionary powers to expropriate land under section 55 of the MPRDA and the potential to abuse such powers is a possibility. However, Johan Lorenzen argues that there has never been expropriation of communal land for mining in South Africa and that the political implications to do so can have negative consequences for the African National Congress (ANC). Furthermore, section 55 of the MPRDA is not purely discretionary expropriation. The minister has the responsibility to determine whether it is in the interest of transformation and economic development. Based on this criteria, it is possible to review and set aside a mining right that does not meet these standards. Moreover, the determination of compensation can be a very powerful tool that be can be used to stop mining since mining companies do not always have enough capital in advance to start mining and to compensate communities upfront. The power of compensation should therefore not be underestimated as a deterrent to begin mining operations.

However, Johan Lorenzen contends that this will depend on what an appropriate standard of compensation should be and currently there is no clear indication of what the standard of compensation for customary land should be by the DMR. While the current practice is to expropriate land informally, when section 55 of the MPRDA is applied formally, mining companies are more likely to shy away in fear of civil society and an international outcry. Johan Lorenzen recommends that communities should be trained on how to initiate section 54 of the MPRDA to continue the fight against corporate impunity.

Moreover, since there are mining companies who have precarious land rights to mine, Johan Lorenzen argues that section 54 of the MPRDA can also be used by communities to obtain compensation. An example of such a mine is the Petmin owned Tendedele Coal Mining in Somkhele, Kwazulu Natal. This open cast coal mine would not have been able to yield profits had compensation for land occurred prior to

mining. In future, public interest firms must be prepared to represent communities in determining the standards of compensation. It is important to therefore highlight that Section 54 of the MPRDA is for communities and land right holders to claim for compensation for damage that *will happen* and damage that has *already* occurred. Although it may be too late to save the land in most contexts, according to Johan Lorenzen, it is still possible to claim for "reparations".

Wider Implications

Parliament enacted IPILRA which provides that no one may make decisions that affect informal land right holders without the consent of the informal rights at issue (LARC 2018). Johan Lorenzen contends that informal rights of individuals and families are not always easy to determine and may be subject to contestation. For example, in the case of Xolobeni, four expert reports over a couple of months were used to verify what the customary land law entails. Furthermore, although the information at the communal level is ascertainable through interviews there are also cases whereby the responsibility of land allocation is seen as belonging to the chief or to husbands. In these cases, the informal land rights of women can be threatened.

In an interview with Meshack Mbangula and Nester Ndebele, the National Coordinators of MACUA and WAMUA respectively. Meshack Mbangula states that traditional leaders have become largely unaccountable to communities. Corruption also is rife as chiefs more often than not continue to make secret deals in exchange for bribes from mining companies. Furthermore, Nester Ndebele supports this assertion and states that those traditional leaders that are accountable to communities and who reject mining such as the legitimate Queen Mother of the Xolobeni community have their succession questioned in the interest of unelected and illegitimate ones. Meshack and Nester allege that government, mining companies and traditional leaders have forged a pact that is dedicated to dispossess communities of their land. The situation describes upward accountability to government by traditional leaders especially in a context where their legitimacy continues to decline (Murrary 2004, pp.10). Until now, their role in land administration has contributed to their survival (Mann 2000, pp.33). The Maledu judgment is significant because it also clarifies the roles and responsibilities of traditional leaders in relation to land administration and this will reduce their power over "subjects" which is undemocratic in nature. In time, this will contribute to the decline of decentralized despotism.

The Department of Mineral Resources (DMR) has also being accused of holding public hearings and only notifying community members at the last hour. In addition, traditional leaders allegedly use the register for community meetings as evidence of consent to mining companies. MACUA is now in the process of educating community members to not sign any register distributed during community meetings. Moreover, mining companies have also taken full advantage of the institutional complexity on communal land to obtain consent in unscrupulous ways to mine. However, according to LARC (2018) these mining deals are legally precarious.

Johan Lorenzen further highlights that land tenure insecurity is made worse by the fact that IPILRA was supposed to be a place holder. Parliament was supposed to later enact a more sophisticated legislation. Instead IPILRA has been subject to annual renewals and in some cases the reluctant minister has received threats to renew it. Kgalema Motlante's High Level Panel on Key Legislation and Acceleration of Fundamental Change recently tabled in parliament is looking into the development of a more sophisticated legislation that will improve tenure security for South Africans living under communal land (Ensor 2018).

The Maledu judgement is important because it highlights the processes that must take place in terms of IPILRA. First, a decision may be taken only in terms of the rights holder's customary law, whatever this may be; and through a minimum of a majority vote by the affected land right holders at meeting called for that specific purpose with sufficient advance notice and the opportunity (*Maledu and Others v Itereleng Bakgatla Mineral Resources*). Second, IPILRA requires consent to be obtained directly from land right holders who will be affected *directly* by mining and not on their behalf through traditional leaders as representatives of the "tribe" or "community". The words "tribe" and "community" reinforces a stereotype that sees all traditional communities as homogenous entities which can be represented by one person or institution (Oomen 2000, p.86; Claassens, 2014). As Meshack Mbangula contends, "with traditional leaders, it is easy to corrupt them because it is just an individual but with communities it is the masses and it is not easy to just corrupt them" (*sic*). The judgment reaffirms the importance of grassroots accountability, a concept not akin to a successfully implemented decentralized despotism.

Moreover, the judgment also sets a good precedent for the Traditional and Khoi San Leadership Bill (TKLB) that is tabled in parliament (LARC 2018). Clause 24 of the TKLB seeks to re-entrench the power of traditional leaders and sanction

traditional leaders to make deals on behalf of communities. By doing so, it will strengthen the legacy of colonialism and Apartheid by endorsing a version of customary law that does not reflect the lived reality on communal land. It will allocate traditional councils the sole decision making authority over communal land. The TKLB uses language such, "despite any other law," and according to Johan Lorenzen, this suggests that it has the potential to trump IPILRA. The bill will certainly also be under judicial scrutiny if it is passed (LARC 2018).

The "right to say no" to mining:

In conclusion, the reiteration of IPILRA by the Constitutional Court provides a foundation for the "right to say no". Traditional leaders are required to obtain consent from their "subjects" as provided for in the original conception of customary law and this will enable "subjects" to make decisions as fully empowered citizens. Companies will be required to obtain consent *directly* from land right holders that will be *directly* affected by mining where it has not yet started. This is made possible by the recognition of a layered conception of land rights under customary law including informal rights to land. The Maledu judgement thus sets a precedent to end decentralized despotism (Beall et al. 2005).

MACUA and WAMUA are still interested to work with traditional leaders and believe that through education and capacitation of local actors, including municipalities, corporate impunity by mining companies can be challenged.

The Constitutional Court highlighted the importance of the MPRDA and its processes. It clarified that the MPRDA does not trump IPILRA. Furthermore, it highlighted the processes to follow for when consent has not been obtained from informal land right holders.

The Xolobeni case is currently at the North Gauteng High Court and will be decided on the 22nd of November 2018. This case will determine the future of mining communities across South Africa in terms of their "right to say no" to mining.

The natural beauty of Xolobeni

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