godfreymunyai@yahoo.com

Kind regards

OBITER

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Articles/ Artikels

To Exempt or Not to Exempt – Some Lessons for Educators and Administrators *by Karthy Govender and Rowena Bernard* 1

The State is not Presumed to be Bound by Statute – A Constitutional and Jurisprudential Anachronism *by GE Devenish* 17

Revisiting the Public Disclosure of Private Facts in Cyberworld *by S Papadopoulos* 30

Cutting the Cane: A Comparative Analysis of the Struggle to Banish Corporal Punishment from Schools in Britain and South Africa (Part 1) *by Angela Crocker and Stephen Peté* 44

Dismissals within the Context of Collective Bargaining *by Thanduxolo Qotoyi and Adriaan van der Walt* 63

Notes/ Aantekeninge

Host Communities and Mining Projects in South Africa: Towards an Equitable Mineral Regulation *by Seth Nthai SC* 120

An Estate Agent's Duty to List and Market a Property at Market Value *by Henk Delport* 131

Contract and Agency Law and the 2008 Companies Bill *by JS McLennan* 144

Covenants in Restraint of Trade: A Synthesis of Traditional, Common Law and Constitutional Approaches *by C-J Pretorius* 154

The Existence and Proof of Customary Marriages for Purposes of Road Accident Fund Claims *by IP Maithufi and JC Bekker* 164

Cases/ Vonnisse

Ear Print Evidence – *R v Kempster (No 2)* [2008] 2 Cr. App. R. 19 (CA) *by Shannon Hoctor* 175

Cold Comfort for Parties to a Muslim Marriage – *Hassan v Jacobs NO* [2008] 4 All SA 350 (C) *by Razaana Denson and Glynis van der Walt* 188

NOTES / AANTEKENINGE

HOST COMMUNITIES AND MINING PROJECTS IN SOUTH AFRICA: TOWARDS AN EQUITABLE MINERAL REGULATION

1 Introduction

The issue of host communities in the context of mining projects has become the subject of increasing attention in recent years both in South Africa and internationally. This is as a direct result of host communities asserting their interests and rights more actively than in the past. This trend incorporates both traditional concerns such as employment but also new issues such as management of social change. Indeed, it has become much easier for previously isolated host communities to attract attention to their grievances, mobilise supporters and focus criticism on government and mining companies. Host communities have become more assertive and better informed and are able to articulate their interests and rights more clearly than before (Östensson "Players in the Mineral Industry" in Bastida *et al International and Comparative Mineral Law and Policy: Trends and Prospects* (2005) 439; and see Godden, Langton, Mazel and Tehan "Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability" March 2008 26(1) *Journal of Energy & Natural Resources Law* 1-30).

2 International trends

The exploitation of natural resources has led to a variety of problems within host communities. The examples are many, Irian Jaya in Indonesia, the Niger Delta in Nigeria, the Tanesserim populations in Burma, Ok tedi in Papua New Guinea and other indigenous communities.

As indicated above, the host communities now appreciate the magnitude of environmental and human rights impacts which natural resource exploitation could have on them. The dearth of adequate legal protection in international and domestic law adds to the risk to foreign investment in many countries. Even though in general there are known traditional risks to investments such as political instability, government acts such as expropriation and confiscation of the property of the foreign investment by the host States, the instability likely to be created by host populations has created or would create new sources of risk to the foreign mining investment. This new risk takes the form of actions and reactions by members of the host communities and their supporters to the operations of

foreign mining companies that adversely impact on their environment, human rights, and general social and cultural well-being. Such actions by members of the host community are independent of host State sovereign acts. In most cases the host communities in which mining projects are located take actions that adversely affect the foreign investment or the contractual and other rights of the foreign investor. The actions of the host communities may result in suspension of the operation of the investment or may make the operation of the investment difficult or impossible or may even result in the loss of the investment altogether.

The host communities' risk takes various forms, including but not limited to –

hostage-taking of the mining company workers;

forceful occupation of mining company installations / facilities / premises;

violent sabotage of mining company operations;

court actions against mining companies in both the home and host States; and

international pressure / campaigns against mining companies.

The end result is that the foreign investors incur losses. By way of an example, court actions have been instituted against mining companies like BHP by Papa New Guinea host populations in Australia. There are also pending court actions in English courts against Cape plc by South African host populations and staff of the company who were exposed to asbestos (see *Lubbe v Cape plc Africa SA* (2000) 2 (LLR) (Pt7) 383 House of Lords). Court actions have been brought in Indonesia, United States and other countries.

The actions of the host communities result in huge financial losses. Shell reported in its first quarter report 2001 a lost production of 6.56 million barrels of crude which it computed to amount to $164 million. The other major producers to suffer financial losses in Nigeria are Chevron Mobil and Texaco (Akpan "Host Community Hostility to Mining Projects: A New Generation of Risk?" in Bastida *et al International and Comparative Mineral Law and Policy: Trends and Prospects* (2005) 310-320).

3 South Africa

The host communities in South Africa have not reacted differently from other host communities worldwide. In recent times, South Africa has witnessed an emergence of a disturbing trend by host communities. They have embarked on activities which interfere with mining activities.

4 Relocation of communities

Most mining companies are now resorting to relocating communities to pave the way for open-cast mining activities. These relocations have been marred by controversy and instability in those communities. The situation is more complex in the sense that there are human rights lawyers who receive

funding from foreign donors, aimed specifically at initiating legal actions against mining companies and host States.

Anglo Platinum has been involved in a number of relocation projects, the most prominent being the Ga-Pila and Mothlotlo relocation projects. (The author has represented both communities in the relocation projects. Anglo Platinum has relocated 871 households and 54 churches, schools and businesses (Mothlotlo).) The Ga-Pila community's relocation process started in 1996 and had to be abandoned due to divisions within the community. The Ga-Pila community has been successfully relocated in 2001 at a cost of approximately R300 million. However, there are signs of discontent and instability within the community. This instability is also agitated by human rights lawyers, who, some of them, instigate communities to rise against mining companies.

In 2001 Anglo Platinum initiated the relocation of Mothlotlo communities comprising approximately 900 households. This relocation project has not escaped the negative publicity that has become the order of the day whenever mining companies relocate communities. The interference by non-governmental organisations in the Mothlotlo Relocation Project and divisions within the community have resulted in instability, destruction of property, attempts to interfere and stop mining operations, coupled with spurious and baseless court actions. (Thus far no fewer than 10 court actions have been brought. These actions were either abandoned or have been dismissed.)

The Benchmarks Foundation ("the foundation") has entered the fray. Reverend Seoka recently announced a plan by the foundation to start addressing the health and safety and community issues (2007-10-17 *Business Day*; and see also "Pondo Uprising" November 2007 *Noseweek* 26-27). Recently the South African Chamber of Mines organised a workshop on sustainable development. The workshop was disrupted when a protest broke out. A dozen people from Valley Environmental Justice Group and other protesters carried placards which read: "Stop turning our traditional leaders against their communities". (See "Protest at Mines Conference" 2007-10-18 *Citizen*; "Protesting Anglo Lease: Community Group want Better Terms" 2008-06-13 *Citizen*; "Villagers take on Anglo over Reburials" 2008-06-01 *City Press*; and "Mines 'Out for Fast Cash'" 2008-06-06 *Citizen*.) In March 2008, Actionaid released a report: "Precious Metals: The impact of Anglo Platinum on poor communities in Limpopo, South Africa". The report was highly critical of the way Anglo Platinum handled the relocation of Mothlotlo communities. The report alleged, *inter alia*, that certain human rights had been violated. This was followed by a detailed response by Anglo Platinum. (For Anglo Platinum's response to Actionaid allegations, see www.angloplatinum.com. The Actionaid response led to the investigation by the South African Human Rights Commission (SAHRC). At the time of writing this note, the SAHRC had not as yet issued its report. See "HRC to Probe Mines" 2008-03-28 *Mail & Guardian*; "Angloplat Denies Forced Removals" 2008-03-27 *The Times*; "Villagers Point Fingers at Miner" 2008-03-26 *The Times*; "Rural Poor Drill Mining Giant" 2008-03-30 *City Press*; and "Platinum Mining Giant Forces Communities into Destitution" April 2008 22(4) *Muslim Views*.)

The disputes are not only between the mining companies and host communities; in most instances members of the host communities are divided in their dealings with mining companies. At times, mining companies interact with the traditional leader concerned and reach agreements, only to be faced with a revolt from community members. Mining companies end up not knowing whom to deal with in negotiating access to surface rights, amongst others (Oomen *Chiefs in South Africa: Law Power and Culture in the Post-apartheid Era* (2005) 179).

An interesting development is that of the application of *Kadichuene Development Association v The Minister of Agriculture* (case no 26560/08 Transvaal Provincial Division):

The applicant is the Kadichuene Development Association, representing a rural community residing on the farm Klipplantdrift 787 LR in the District of Mokopane, Limpopo Province.

The respondents are the Ministers of Agriculture and Land Affairs and Minerals and Energy, African Red Granite (Pty) Ltd and Bestaf (Pty) Ltd.

The applicant has applied for an order in the following terms:

> "The First Respondent is directed to take all necessary steps to protect the health and well-being of members of the Applicant which steps includes their relocation to, and development of, alternative land in consultation with the Applicant.
>
> The First Respondent is directed within six (6) months of the granting of this Order, to present the Applicant with a detailed plan for total relocation of the members of the Applicant and that such plan be formulated in consultation with the Applicant.
>
> The Second Respondent in consultation with the First Respondent is directed to make funds available, in terms of her obligations under section 3(g) and (j) of Act 67 of 2000 as read together with Section 2(2) of the now repealed Lebowa Mineral Trust Act, from such monies in the account of the Lebowa Mineral Trust, (*Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T); and *LMT Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 33(T)) which now vest in the State, for the relocation of members of the Applicant to, and development of, alternative land as compensation for damages suffered as a result of the depletion and/or exhaustion of mineral deposits and damage caused to the environment by the mining activities conducted by the third and Fourth Respondents on the Farm."

The applicant alleges, *inter alia*, that as a result of the mining activities on the farm by the two mining companies, the surface of the land on the farm has degraded to such an extent that it has become hazardous for the community to reside on the farm and that the mining activities have constantly exposed the community to unacceptable levels of noise pollution and air pollution.

It remains to be seen how the court will respond to this unprecedented legal action. (The applicant is represented by the Legal Resources Centre. The author is representing the Ministers of Government.)

5 Tension between traditional and mineral laws

One of the contributing factors to the above state of affairs is the tension between traditional and mineral laws (Mineral and Petroleum Resources Development Act 28 of 2002). The problem is exacerbated by the interference by the colonial and apartheid regimes in customary law. It is important to trace the evolution of communal land tenure system as strengthened by the legislation and the Constitution to illustrate the likely impact on traditional communities. This, of course, impacts directly on the mining operations in South Africa.

In the past, a system of individual land tenure was never practised. It was accepted that the relevant traditional leader in consultation with his or her council will allocate portions of land to families for residential and cultivation purposes. Once the land is allocated to the family, the head of the family will not have the power to alienate such land. However, with the passage of time, it came to be accepted that the allocation of land would in the normal course be carried out by a representative of the traditional leader (headman). Even though the head of the family will exercise some measure of control over the land, it was always accepted that the land was "communal" in that the concept of ownership in the sense of western law was unknown. In *Omodu Tijani v Secretary, Southern Nigeria* ([1921] 2 AC 399 PC 404; and see also *Alexkor v The Richtersveld Community* 2004 5 SA 460 (CC) par 58) the Privy Council held that:

> "Land belongs to the community, the village or the family, never to the individual. All members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode or speech is sometimes called the owner."

In *Sobhuza II v Miller* ([1926] AC 518 PC 528), the Privy Council again emphasised the principle that individual ownership was foreign to customary law, because land belongs to the community. Now in this scheme of things, a question arises as to who had the power to terminate a right to land or alienate land. A traditional leader in terms of indigenous law had that power but he or she was required to consult with the council of elders, and later on there was also a need for a traditional leader to consult with the community. (*Mosii v Motsoeoakhumo* 1954 3 SA 191 (A) 931. The *dicta* indicates that the need for consultation with the community was part of custom.)

6 Legislation governing communal land tenure during the apartheid era

In the past, various Acts were promulgated that had an impact on communal land tenure. These were, amongst others, the Black Land Act (27 of 1913) and the Development Trust and Land Act (18 of 1936). These pieces of legislation had the effect of reserving certain land in rural areas for occupation by African people. All these Acts were repealed by the Abolition of Racially Based Land Measures Act (108 of 1991; and regarding earlier legislation, see also Saunders "Southern Africa in Need of Law Reform" 11-