

Dealing with the Tribe: The Politics of the Bapo/Lonmin Royalty-to-Equity Conversion

By Gavin Capps &
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About MARTISA

Mining and Rural Transformation in Southern Africa (MARTISA) is a comparative research project established by the Society Work and Development Institute (SWOP) to investigate the impact of new mining activity on evolving forms and relations of communal land, traditional authority and corporate community in mineral-rich rural areas of Southern Africa. In particular, it seeks to explore the interconnections between broader changes in the regional political economy of extraction, and the highly localised trajectories, patterns of differentiation and modes of contestation of these diverse configurations of rural property and power. MARTISA is thus concerned with the making and unmaking of rural social orders as mining capital expands out of its historic heartlands into the former homeland and labour-sending areas, which increasingly constitute the region's mineral-commodity frontiers and hence some of its most intensive sites of rural transformation and struggle.

As well as aiming to generate high quality research in its own right, MARTISA seeks to advance a pro-poor agenda by supporting local human-rights NGOs and community-based organisations active in these areas, and by building collaborative links with academic researchers and civil society organisations elsewhere in the Global South. The project is generously funded by the Human Rights and Governance Programme of the Ford Foundation.



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Acronyms & Abbreviations

Amplats	Anglo American Platinum
ANC	African National Congress
ARD	Anthropology and Research Directorate (North West Provincial Department for Local Government and Traditional Affairs)
BBMI	Bapo-ba-Mogale Investments
BEE	Black Economic Empowerment
BMTA	Bapo-ba-Mogale Tribal Authority
CEO	Chief Executive Officer
DMR	Department of Mineral Resources
EPL	Eastern Platinum Mines Ltd
GRC	General Royal Council
IDC	Industrial Development Corporation
IFM	International Ferro Metals Ltd
JSE	Johannesburg Stock Exchange
LBT	Lonplats Bapo Trust
Lonplats	Lonrho Platinum
MBAD	Minister of Bantu Administration and Development
MBI	Mirror Ball Investments 0019 (Pty) Ltd
MDB	Mineral Development Bill
MEC	Member of Executive Council North West Provincial Government)
MPRDA	Mineral and Petroleum Resources Development Act (No. 18 of 2002)
NGHC	North Gauteng High Court
NOMR	New Order Mining Right
NUM	National Union of Mineworkers
NWA	North West Traditional Leadership and Governance Act (No. 2 of 2005)
NWHC	North West High Court
NWPG	North West Provincial Government
PDF	Provincial Department of Finance (North West)
PDLGTA	Provincial Department for Local Government and Traditional Affairs (North West)
PGMs	Platinum Group Metals
PP	Public Protector
Scopa	Standing Committee on Public Accounts
SLP	Social Labour Plans
TLFGA	Traditional Leadership and Governance Framework Act (No. 41 of 2003)
ToRs	Terms of Reference
WPL	Western Platinum Mines Ltd

Introduction

On 30 June 2014, Lonmin announced a major new empowerment deal with the Bapo-ba-Mogale traditional community, near Rustenburg. A royalty previously paid to the community for mining platinum on its land, would be converted into a direct equity stake in the company, worth R564-million. In addition, the community would receive a 'deferred royalty payment' of R100-million to support its administration costs, and opportunities to bid for mine supply contracts valued at R200-million. This, said Lonmin, would enable the community to enjoy the full benefits of participation in the mining economy, and the company to meet the Black Economic Empowerment (BEE) requirements set by South African government. The deal was good news for everyone. And if there was ever a company that needed a good news story, it was Lonmin.

Less than two years earlier, Lonmin's corporate image had been shattered by the massacre of 34 striking mineworkers at its Marikana operation, located on Bapo land. In the Commission of Inquiry that followed, Lonmin's failure to meet its social obligations to the surrounding area - a condition of its licence to mine - would be laid bare. The spotlight would also fall on the dubious role played in the August 2012 events by Cyril Ramaphosa, a non-executive director on the board of Lonmin, and CEO of its main BEE partner, Shanduka. As was widely noted at the time, the fortunes made by these companies during the recent platinum boom contrasted sharply with the endemic poverty in the rural villages adjacent to the mines. But now, with this deal, there was a chance to put things right. The Bapo community could at last take its rightful place at the table, and a new relationship could be built with the beleaguered British multinational.

Within weeks, however, it had emerged that not everyone in the community was happy with the terms of the deal, or with the way it had been negotiated by their traditional leaders. One community member raised concerns about the transparency of the process, and said that legal action may be in the offing. Press reports also revealed that for many years the community had been divided by fierce leadership battles, with one side litigating against the other. These had effectively left it

without a functioning traditional authority, rendering it vulnerable to predatory forces, both within and without the community. A particular story was that millions of rand in mining royalties had mysteriously vanished from the community's account, which was managed on its behalf by the North West Provincial Government. The Public Protector had launched an inquiry, but was making little headway getting information from the Premier and relevant provincial officials. However, it did emerge that the community had been under their direct administration when the money disappeared.

In this working paper, we explore the complex and shifting relationship between the mining corporation, the Bapo community and the Provincial Government in the run-up to the June 2014 royalty-to-equity conversion deal. A particular focus is the multiple crises of legitimate community authority and representation, which have arisen from its internal strife, and how these have been connected both with Lonmin's interests, and the Provincial Government's interventions. This in turn raises larger questions about the legislative frameworks and assumptions that underpin these kinds of 'empowerment' transactions, and who really benefits from them - issues of growing concern as they are replicated across into the rural areas that encompass the South African platinum belt.

Our research for this working paper was conducted under the auspices of the MARTISA project at two complimentary levels. Between late February and mid-May 2014, Stanley Malindi engaged in intensive local-level fieldwork around the diverse settlements that make up the 40,000-strong Bapo community (see *Figure 1*). His work focussed on the popular political dynamics around community land claims and village-level authority, using a range of methods including interviews, participant observation in community meetings and other events, and documentary analysis. The full results of that work are set out in his masters-by-research thesis (*Malindi, 2016*). Meanwhile, and during the same period, Gavin Capps pursued research for the second phase of the Marikana Commission of Inquiry, focussing on the financial relationship between Lonmin, the Bapo traditional authority and the Provincial government. This provided access to a large archive of documents on the Bapo-Lonmin relationship, which had been submitted to the Commission, and also enabled him

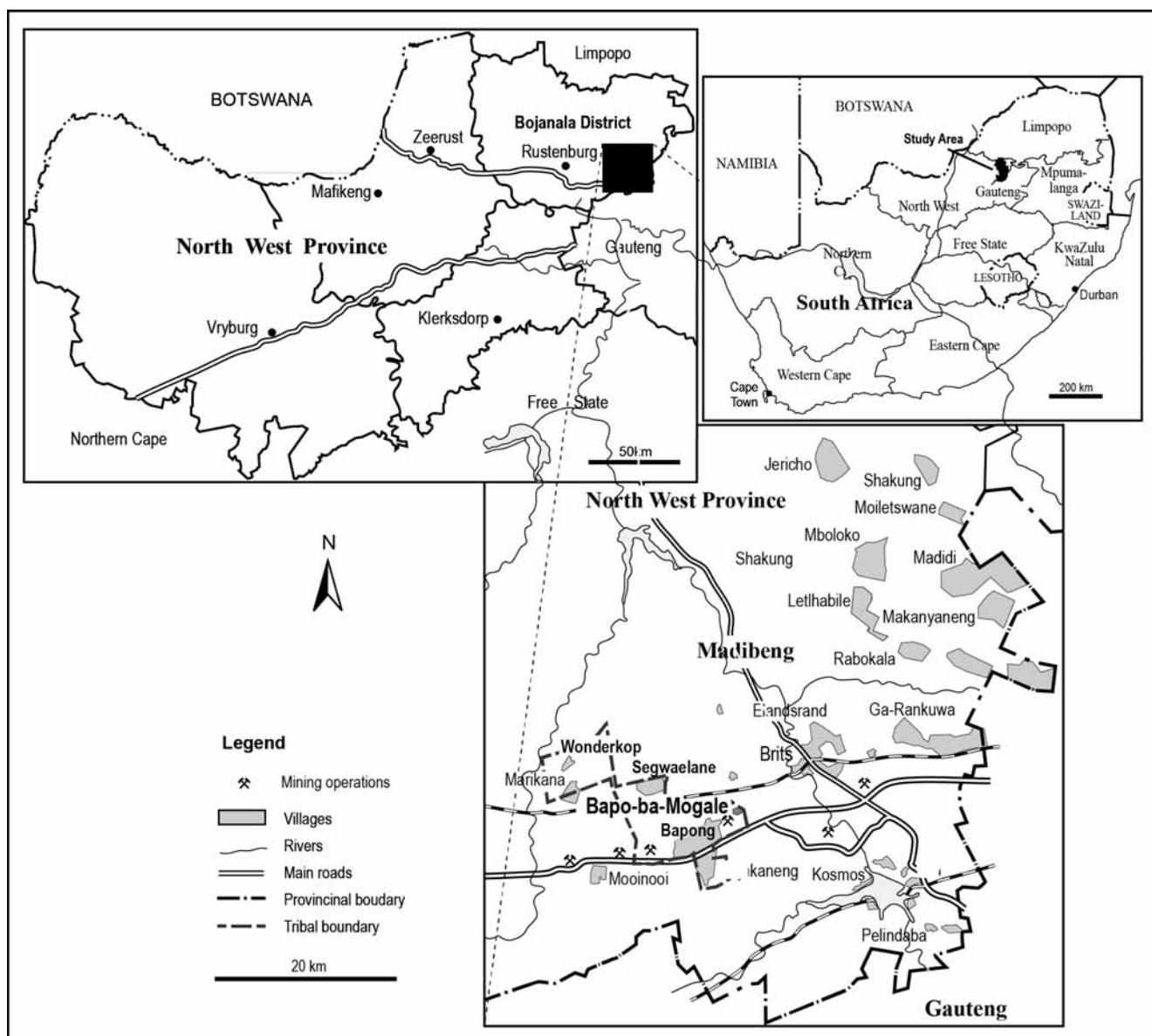


Figure 1: Map of the Bapo-ba-Mogale Traditional Authority Area

to interview leaders within the Bapo authority and some government officials. However, this work was bought to an abrupt end when President Zuma effectively wound up the second phase in May 2014. Nevertheless, it was possible to continue with aspects of the research after this date, while Stanley maintained close connections with the community, including through a number of follow-up visits.

The working paper is divided into three parts. Chapter two traces the changing relationship between the Lonmin and the Bapo-ba-Mogale Traditional Authority (BMTA) from the first mineral lease in 1969 to the eve of the royalty-to-equity deal in 2014. It establishes that over course of this period the Bapo chieftaincy would prove remarkably *ineffective* at pursuing the community's

economic interests *vis-à-vis* Lonmin, as both a private landlord and a potential 'black empowerment' partner. This was not only a consequence of the radical inequalities of power that structure relations between mining multinationals and rural communities across the platinum belt, but also a result of deep political divisions within the Bapo chieftaincy itself. These frequently undermined the BMTA's capacity to represent the tribe as a unified entity in its dealings with Lonmin – a weakness that at times frustrated the platinum producer, but which, some argued, could also work to its advantage. However, in order to meet the black empowerment targets prescribed by the state, Lonmin would come under increasing pressure to convert the Bapo royalty into a direct equity stake. And this would require that

a legally recognised and politically stable traditional authority was in place.

Chapter three shifts the focus to the relationship between the BMTA and those parts of the state charged with its regulation. From the mid-2000s, the powers, functions and responsibilities of each party were redefined by new national and provincial legislation. This set the terms on which apartheid-era tribal authorities were to be transformed into constitutional-era traditional councils, and hence retain the authority to enter into commercial transactions and court proceedings on behalf of traditional communities. However, within this new legislative framework, the North West Provincial Government (NWPG) would also retain effective control over tribal finances, while gaining the power to place 'dysfunctional' councils under administration. The chapter argues that endemic uncertainties around this legislation, would combine with intensifying factional struggles within the Bapo chieftaincy to create the conditions for the systematic looting of its mineral royalties, and with this, suspected some, a powerful set of interests to keep the community divided.

The final chapter follows the steps that were taken to get the Bapo authority out of administration and hence in a position to see through the equity conversion deal. A critical intervention on the part of the NWPG was to commission a study on the 'legitimate' composition of the Bapo Royal Family, with the aim of 'reconstituting' it as the core of a new Traditional Council. Inevitably, however, this would consolidate the power of one elite faction over the others, and hence continue in that long tradition of quasi-ethnographic administrative-interventions by the Apartheid and Homeland states. Nevertheless, this allowed the formal political conditions to be put in place to see through the transaction, but shortly after questions would again emerge about the legal validity of the deal and the popular authority of the new leadership that had steered it through. The chapter concludes that traditional authorities cannot simply be 'stabilised' for contractual purposes by reordering tribal elites, but rather that the tensions which re-emerged after the deal are indicative of deeper divisions over land ownership and political identity at the village-level.

Two

A Place at the Table? Between Landlordism and Empowerment

2.1 A troublesome tenant

In 1964, a small and relatively obscure mining company gained the mineral rights to a 6,791-hectare block of land partway between Rustenburg and Brits in the then Western Transvaal.¹ That company - Transvaal Jade - was soon renamed Western Platinum Limited (WPL), and would rapidly grow to become the primary platinum asset in the sprawling empire of the British multinational, Lonrho.² For its part, the land block was wholly comprised of the six farms that had been historically registered to the BMTA, and that would soon be formally defined as the entirety of its administrative territory.³ The fates of the small Tswana chiefdom and nascent mining giant would thus be inextricably entwined at the heart of the new platinum economy, as landlord and tenant respectively.

Five years and one prospecting contract later, the relationship was formally consummated by a notarial mineral lease that defined the rights and obligations of each party.⁴ However, rather than being directly negotiated between WPL and the BMTA, it was the Minister of Bantu Administration and Development who acted for the chiefdom in his capacity as its 'trustee'. This arrangement was a direct expression of the tenurial regime under which the Bapo farms were held during apartheid. These farms had all been purchased by African groups with mineral rights attached during the late-nineteenth and early twentieth centuries, and, as elsewhere in the Rustenburg region, registered to a state official 'in trust' for the Bapo chief and his tribe. The material consequences of this formulation were twofold. First, as the state trustee of all tribal title, the Minister mediated virtually every aspect of the relationship between landed tribes and mining corporations, with the power to unilaterally modify and consummate the requisite mineral and mining leases (Capps, 2012a). Second, the royalties these leases set were not paid directly to the tribe, but rather into a dedicated 'tribal trust account' again controlled by the

state. Crucially, as shall be seen in the next chapter, this method of administering tribal revenues - later known as the Development, or 'D', Accounts - would prove particularly controversial in the Bapo case. Of more immediate concern, however, is the way that the system of state trusteeship worked against the interests of the tribal landlord before mining had even commenced.

Running for 15 years, with WPL holding the option to renew for two successive 10-year periods, the 1969 lease stipulated that the BMTA would be entitled to a royalty rate of just 10% of taxable income.⁵ Moreover, as was the standard practice at the time (Manson and Mbenga, 2003:23), both current *and* future capital expenditure would be deducted from the mine's 'taxable income', meaning that the tribe would only receive a stipulated minimum of R2000 per annum until WPL declared itself fully operational. In return, WPL would not only be permitted to extract as much platinum from Bapo land as it deemed profitable, and put mining on hold when it deemed not, but also have unlimited access to the lease area - that is the entire Bapo territory - to develop whatever surface or underground infrastructure it considered 'necessary or desirable' to 'exploit and turn the properties to account'.⁶ Yet, worse for the BMTA, it would be a very long wait until mining on its land even got underway.

WPL had not only acquired the mineral lease to the Bapo territory, but had also purchased the rights to two 'white' properties - Middelkraal and Elandsdrift - immediately adjacent to the tribally-registered farm Wonderkop. And it was these that were prioritised for mine development. By 1971, production was underway on the 'white' portion of the WPL mining area, but exploration would not even begin on the Bapo farms for a further 14 years (Vermaak, 1995:67), and only then under the pressure of an unlikely source. In 1977, the BMTA area was absorbed into the new 'homeland' state of Bophuthatswana, which had gained its fictive independence from South Africa that September. Aiming to expand Bophuthatswana's tax-base in the name of 'national development', the new Minister of Economic Affairs informed WPL that its rights would be ceded to a rival if mining didn't soon commence in the Bapo lease area.⁷ Faced with perhaps one of the first cases of the 'use it or lose it' principle later enshrined in the ANC's new national minerals legislation (below), WPL

initiated a drilling programme on Bapo land in 1985. Just two years later, Lonrho announced the formation of an entirely new and separate company - Eastern Platinum Ltd (EPL) - for the explicit purpose of developing mining operations in the Bantustan. And in 1990 - boasting three incline shafts, a mill and concentrator - EPL went into production exclusively on the Bapo farms.

Up to this point, the only lease revenue paid into the BMTA trust account had been a paltry R34,000 - the sum total of 17 years of the guaranteed minimum royalty payment.⁸ However, when EPL came on the cards, a new agreement was reached with the President of Bophuthatswana - in his inherited capacity as state trustee of the Bapo tribe - that extended the lease by a further 50 years.⁹ While this marginally improved the position of the BMTA by raising the minimum royalty to R200,000 per annum, the royalty formula nevertheless remained set at 10% of taxable income (rising to 12% from 2004) and was still calculated less capital expenditure. Consequently, it would not be until 2000 that the BMTA received its first full royalty payment from EPL. As the BMTA's lawyers would later remark, this in effect would mean that the tribe had 'contributed approximately R60 million' to the start-up costs of the mining operation.¹⁰ However, the advent of the democratic dispensation appeared to bring the promise of a new relationship with its troublesome tenant.

On 27 October 1998, the BMTA received an offer to amend the EPL royalty formula 'in a manner that results in meaningful annual royalty payments' and 'aligns the motives of both stakeholders'.¹¹ While a tacit admission that their 'motives' may not have been so well aligned in the past, this was neither a benevolent gesture nor an act of contrition on the part of the platinum corporation. Two years earlier, the once mighty Lonrho had finally succumbed to global trends and been broken up ('unbundled') into smaller, more focussed and, hopefully, more competitive enterprises (Bowman, 2016:28). WPL and EPL now formed the core of a new London-listed mining house, Lonmin, which was gradually divested of its remaining gold and coal assets, to become a specialised platinum producer third only to Amplats and Impala. Held in South Africa via Lonrho Platinum (Lonplats), and with the 'national' borders of Bophuthatswana consigned to history, it now made sense to rationalise WPL and EPL into a single corporate entity. However, the consent of the BMTA was one of the 'conditions precedent' to the merger, while Lonmin had additional 'objectives' that would 'need to be met for a successful outcome to the proposed discussions'.¹² These included not only a further lease extension to

match the estimated life of the Bapo reserves, but also 'the Tribe to assist in procuring vacant occupation of the mining area for EPL (i.e. assistance in removal of persons not authorised by EPL to be on the area), and assistance in opposing any restitution or aboriginal claims by third parties'.¹³

In return for a revised royalty formula, the BMTA was thus to enable the consolidation of the mining corporation, 'clear' those settlements deemed obstacles to its productive expansion, police its operational areas against 'intruders', and help block the restoration of the land rights for the racially dispossessed now contemplated by the Constitution.¹⁴ Lonmin's approach, in turn, coincided with the onset of the global platinum boom (Capps, 2012a), adding further impetus to its attempt to secure unfettered access to the Bapo lease area. Equally keen to claim its rightful share of the platinum bonanza, the BMTA appointed new lawyers to represent its interests in the impending negotiations. Yet no sooner had they started than the rules of the game would change, dramatically imposing new imperatives on one of the players and opening-up new possibilities for the other.

2.2 To BEE, or not to BEE?

In October 2000, the ANC government released its draft Mineral Development Bill (MDB) for public comment. After two years of fierce back-and-forth with the mining corporations, this new legislative framework would be promulgated as the Minerals and Petroleum Resources Development Act (MPRDA - Act 18 of 2002) with effect from 1 May 2004. For present purposes, it had three key components. First, the state would assume 'custodianship' of all mineral resources in South Africa, abolishing mineral rights as a form of private property and replacing them with a centrally administered licence to prospect or mine. Second, the state would transform the racial structure of mine ownership, both through the preferential allocation of these 'new order mining rights' (NOMRs) to black-owned companies, and by requiring historically white mining corporations to meet a prescribed black shareholding target. Eventually set at 26% by an adjunct 'Mining Charter', this Black Economic Empowerment (BEE) component would now become a fundamental condition of attaining and retaining a NOMR. Finally, all mining companies would have to pay a standardised royalty to the state. However, rural communities that had previously been in receipt of royalties would be able to retain them subject to new forms of administrative regulation. But mining companies would also be 'encouraged' to convert these 'community royalties' into a direct equity stakes, thus

avoiding double royalty payments and moving closer to their black shareholding targets.¹⁵

The negotiations over the revised royalty formula between Lonmin and the BMTA unfolded against the backdrop of a wider struggle over the final detail of this new minerals legislation.¹⁶ During this time much was still fluid and uncertain. For Lonmin, it was clear from the MDB that a sizeable portion of its platinum operations would have to be 'black empowered' to qualify for a NOMR, but the precise targets would only be set at the end of 2002.¹⁷ Equally, while the principle of a universal state royalty had been articulated in the draft legislation, its level was yet to be determined. However, for its part, the BMTA's legal team was remarkably quick to see the possibilities in the MDB for a new kind of relationship with the platinum corporation, and wasted no time trying to recast the terms of the talks.

In a series of communications with Lonmin between February 2001 and March 2002, the Bapo lawyers set out the two key elements of their negotiating position. First, the 'extremely low' levels of the past royalty should be addressed through a new formula, based on a percentage of turnover rather than taxable income; and, second, once this new formula had been agreed, the future value of that royalty should be converted into a direct equity stake: first in EPL and then in Lonplats as a whole, along with a seat on its Board of Directors. This, they argued, would simultaneously reposition the tribe as an equal partner 'and not merely as a receiver of royalties from time to time', while going 'a long way to ensure continuity of [Lonmin's] current mining operations' on Bapo land.¹⁸ In response, Lonmin indicated that it was in principle open to exploring an equity conversion alongside the royalty formula, but then requested that the talks were put on hold until there was clarity on the level of the new state royalty, now to be determined by a separate piece of legislation. Yet long before these negotiations resumed, the platinum giant would demonstrate that greater considerations had come into play in its evolving BEE strategy, and exactly where its tribal landlord now stood in these calculations.

With its energies absorbed by the complexities of corporate restructuring, Lonmin had missed out on the earlier opportunities to form partnerships with emerging BEE and junior mining companies. However, over the course of 2003, it devised an ambitious plan to win significant empowerment credits by creating an entirely

new company - Incwala Resources - that would be transferred to black majority ownership to become the first major mining house of its kind. Masterminded by Brian Gilbertson and Arne Frandsen, this would be achieved in two steps.¹⁹ The first involved a complex series of transactions between Lonmin and Impala that, in brief, would release an 18% holding in Lonplats (and thus EPL and WPL) for acquisition by Incwala.²⁰ This would in turn be facilitated by Lonmin and the Industrial Development Corporation (IDC), who would both purchase a 23.65% stake in Incwala - sufficient to give each a place on the Board - leaving the remaining 52.7% open for acquisition by selected BEE investors. The second step was to determine who these black shareholders would be and how their stakes would be financed. The portents for the BMTA in this venture initially looked good.²¹ Between February and December 2003, the tribe's lawyers engaged in increasingly detailed discussions with Lonplats, who indicated that the BMTA would be offered 'cornerstone investor' status. Crucially, this was understood to be an entirely separate transaction from any potential royalty-to-equity conversion, which would remain on hold until the new state royalty bill was released. The BMTA would therefore have to raise the finance for its Incwala stake, and opened talks with Morgan Stanley and Nedbank, while investing R700,000 of tribal funds on due diligence.

However, by the end of 2003, Lonmin's enthusiasm was appearing to cool. And then, on 3 March 2004, the BMTA was informed that it would no longer be able to participate in the deal on the grounds that it had 'missed critical deadlines'. Rather, it transpired, the 52.7% empowerment stake in Incwala was to be split between three BEE entities that shared close ties with the Mbeki Presidency.²² The BMTA lawyers reacted to their client's exclusion by threatening to interdict the entire transaction unless it was offered similar terms to the other black investors. Lonmin's grudging response was to offer a minority 2.85% stake at an upfront cost of R70 million, which it would finance through a short-term loan at commercial rates. In this arrangement, the Bapo shares would serve as collateral and be housed in a special purpose vehicle, Mirror Ball Investments 0019 (MBI). MBI would in turn be placed under the temporary administration of a new 'Lonplats Bapo Trust' (LBT), with a view to transferring direct control over the shares to the tribe, at some future point. Yet, in the interim, not only were the LBT's trustees all selected by Lonmin, but on the day that Incwala itself was officially launched - 6 September 2004 - the LBT trust deed was reworded

to give these appointees the power to sell the shares without the BMTA's consent.²³ Thus, on top of the vicissitudes of the state trusteeship of tribal land and tribal finances, the BMTA would now also be subject to additional form of 'corporate trusteeship' in relation to its nominal Incwala stake. And this in turn posed the potentially explosive question of who really controlled the MBI shares: the BMTA or the trustees installed by Lonmin?

2.3 The Bapo royalty

From Lonmin's perspective, the Incwala strategy was vindicated when it became the first major platinum producer to be awarded a NOMR by the Department of Mineral Resources (DMR) in October 2006. Boasting a coterie of high-profile BEE partners, who bought with them the promise of political influence and cover, Incwala was lauded as an empowerment success and had trebled in value by 2007 (Steyn, 2012). However, despite its shabby treatment around the Incwala transaction, it seemed that the BMTA had not been entirely excised from Lonmin's BEE plans. Thus, when at the end of 2006 the new state royalty bill appeared imminent, arrangements were made to resume the separate royalty formula and equity conversion negotiations that had been put on hold in 2002.²⁴

Much had changed in the intervening years. When Lonmin first approached the BMTA in 1998, it had been under considerable pressure to secure the long-term future of its main mineral lease area in the rapidly changing and uncertain circumstances of the 'new' South Africa. But almost a decade later it now had the whip hand. With its NOMR in place and a major BEE transaction under its belt, Lonmin no longer needed the BMTA on side to safeguard its mineral rights. Yet this is not to say that it would be better to have its tribal landlord outside the empowerment tent than in. Good relations with the 'host community' would secure social stability around its operations and burnish its corporate image, while it would certainly be preferable to avoid double royalty payments, regardless of the level at which the state royalty was eventually set. But if Lonmin was hoping for a smooth ride with the revived talks, it was soon in for a rude awakening.

Perhaps drawing the lessons of the Incwala experience, the BMTA had beefed up the mining and legal expertise in its own negotiating team. This now included the advocate Hugh Eiser, who would soon take over as the tribe's main legal representative and adopt a more aggressive stance. As soon as negotiations resumed in early 2007, the Bapo team placed a number of grievances on the

table concerning past royalty payments and calculations. These could all have a material bearing on the evaluation of a future equity stake, and appeared to cast Lonmin's treatment of its tribal landlord in an even more unfavourable light.²⁵ These royalty issues have been reported at length elsewhere and are merely summarised in box 1.²⁶ Here two points will suffice. First, while conceding on some items,²⁷ Lonmin took an increasingly hard line on the revision of the old royalty formula, claiming that it had never in fact 'committed to raising the royalty', but had merely sought 'to even out the flow of payments'.²⁸ As such, the valuation of any equity stake would be based on the existing rate, which in 2004 had been marginally raised to 12% of taxable income.²⁹ Second, deadlock over this issue would lead the negotiations to go well beyond the agreed deadline of 30 September 2007. Then, midway through 2008, the talks collapsed altogether. This, however, was not the result of differences over mine economics, but rather the overspill of tribal politics.

Box 1: Royalty issues

Backdated royalty. When the original negotiations had been suspended on Lonmin's request in 2002, it had been agreed that any royalty increase in terms of the new formula would be backdated to October 2001. But Lonmin denied that it had made this commitment when the talks resumed in 2007;

Reduced royalty. In 2002, the mineral processing and marketing arrangements between EPL and WPL had been changed in such a way that EPL's taxable income was reduced by 8-10%. The value was retained within the Lonplats group, but reduced the royalty payable to the BMTA by an identical amount;

Secret mining. The tribal farm Wonderkop had been left outside of the original EPL mining area. From 2003, WPL had been 'secretly' mining it from the adjacent Middelkraal property through a 'tributing agreement' with EPL, but no royalty had been paid to the BMTA;

Data and modelling. To conduct meaningful negotiations, the BMTA required access to company data and sound modelling of future production and sales. The data invariably arrived late and incomplete, while the model generated for Wonderkop excluded 97% of its reserve, significantly reducing any future equity evaluation.



Lonmin operations near Segwaelane Village | Credit: Stanley Malindi & Katlego Ramantsima

As will be further seen in the next chapter, there is a long history of factional splits in the Bapo ruling lineage, and of struggles to control of the tribal authority and its resources. Matters came to a head in April 2008, when a group loosely organised around the chief - who had himself mentally ailed, and been kept at arms-length from the tribal offices from 1998 - attempted to seize control of community assets and dissolve the traditional council. Although the group was blocked by a court interdict, the BMTA was thrown into administrative chaos. This forced the legal team to request the suspension of the royalty-to-equity negotiations until the situation had stabilised. Yet, such was the political turbulence in Bapong that, by December 2008, the Premier of the North West Province had appointed an external Administrator to run the tribe's affairs. Four years and as many appointees later, the Bapo administration was still under direct Provincial control, leaving its legal status open to interpretation. The consequent ambiguities around the legitimate representation of the Bapo's economic interests would now prove central in the next phase of the BEE story.

2.4 Incwala meltdown

The world caught up with Incwala Resources in 2009. PGM prices had spectacularly collapsed in the wake of the 2008 global financial crisis, and many of the BEE deals previously constructed across the platinum belt were looking decidedly shaky (Bowman, 2016:12-13). Incwala was particularly exposed. Most of the other BEE

transactions had been vendor-financed, but Incwala's black investors relied on a mix of loans with a large portion drawn from private banks. Worse, these 'empowerment partners' now found themselves squeezed between Lonmin's bad business decisions. On the one side, they had been persuaded to buy a 26% stake in the ill-fated Akanani greenfield project in 2007, saddling Incwala with further debt.³⁰ And yet, on the other, Lonmin had fallen far short of the production targets on which their original repayment schedules had been based, largely because of a disastrous attempt to mechanise its shafts, abandoned by 2008.³¹ With a R1.5-billion debt due to mature in September 2009, but no dividends with which to service it, Incwala teetered on the brink of insolvency - and its politically-connected investors wanted out (Steyn, 2012).³² On 6 August, the DMR called an emergency meeting of all stakeholders to get a handle on the crisis. Here it was made clear that if Incwala collapsed, the state would be faced with no option but to cancel Lonmin's NOMR, or force through a radical restructure.³³ To inform its decision, all parties were requested to submit written statements to the DMR by the end of that month.³⁴ And this provided the opening for the Bapo lawyers to go on the offensive.

Now its main legal advisor, and working closely with the Administrator appointed by the NWPG, Hugh Eiser submitted an excoriating account of Lonmin's treatment of the community around the Incwala transaction, and the motives that lay behind it.³⁵

Although not using the terms, the crux of his argument was that MBI had in effect become a 'fronting' operation that enabled Lonmin to exercise indirect control over Incwala as a whole, via the 'corporate trusteeship' of the LBT.³⁶ Critical here was the way in which the original Incwala shareholder's agreement had structured the exercise of voting rights. Because MBI was controlled by the trustees of the LBT, who were all Lonmin placements, Lonmin could combine MBI's 2.85% shareholding with its 23.47% stake to attain the 25% required for the power of veto. Control of MBI also assisted Lonmin to push through decisions in conjunction with the IDC, which likewise held a 23.47% Incwala stake and invariably followed Lonmin's lead. The Akanani transaction in 2007 was a case in point. The Bapo legal team had made clear their opposition to Lonmin's proposal that Incwala buy the 26% BEE stake in the greenfield project, believing it to be grossly overvalued. Yet, it later transpired that the LBT trustees had still gone ahead and voted the MBI shares in favour of the acquisition without any consultation.³⁷ Equally telling was that Lonmin had initially resisted the Bapo team's suggestion that part of the tribal royalty could simply be exchanged for Lonmin's own shares in Incwala during the 2007 equity conversion negotiations.³⁸ The overarching impression was thus of Lonmin doing everything it could to maintain control of the BEE entity that it had created, with the MBI shares playing a pivotal role in that broader strategy.

But this in turn meant that Lonmin had to maintain control of MBI itself. And it was here that tribal politics entered the frame. As was seen, Lonmin's stated intention had always been to transfer direct control of the MBI stake to the Bapo community. The appointment of trustees to manage these shares in 2004 was, therefore, to be understood as no more than an interim measure. Yet, in the five years since, Lonmin had repeatedly claimed that the leadership struggles within the tribe meant that it 'could not put forward a legitimate authority' to assume control of the MBI holding.³⁹ Until the community's internal conflicts were resolved and a recognised administration was in place, Lonmin had no choice but to continue working with the LBT and, indeed, was legally obliged to do so. There can be little doubt that the protracted uncertainties around the Bapo leadership must have caused Lonmin considerable frustration when it needed to deal with the tribe on business matters. However, countered Eiser, a legally empowered tribal representative *had* been at the helm since December 2008 in the form of the provincially-appointed Administrator.⁴⁰ Moreover, any prior uncertainty over who was the recognised authority had not prevented Lonmin from entering into lengthy

negotiations over a much higher-value equity conversion, in the process divulging sensitive company information. And, further still it had surely not been beyond the ken of the mining multinational to set up a structure that could have overcome these problems of community governance. As such, Lonmin had simply been playing up the crisis of legitimate tribal representation to legitimate its own, continued control of the community's 2.85% Incwala stake.

In sum, concluded Eiser, it was evident that Incwala had never in fact been a genuinely independent BEE entity 'from its inception'. And since Lonmin's NOMR was fundamentally conditional on its empowerment status, its licence to mine was legally invalid. Stricken with debt and with its other BEE investors looking to exit, the only way forward was for Lonmin to finally allow the Bapo to enjoy the enhanced rights accorded to mine-hosting communities by 'the MPRDA, Mining Charter and other empowerment legislation', and take their place as the majority black shareholder in Incwala. Otherwise, were the truth of its empowerment status to enter the public domain, the consequences for Lonmin could be fatal.

This was an incendiary set of claims by any measure, but it seems the DMR was not prepared to consider them further.⁴¹ Rather, Lonmin appeared instead to get the green light to court other major BEE players who could rescue its ailing empowerment vehicle, including through acquisition of the MBI stake itself. On 20 November 2009, the Bapo team received a R38.2-million offer for these shares from Shanduka Resources, as part of a bigger play for the Incwala BEE holding.⁴² Headed by former General Secretary of the National Union of Mineworkers (NUM) and ANC luminary Cyril Ramaphosa, this was a serious proposition. In an urgent response, Eiser made clear that the sale of the MBI stake would not only exclude his client from any BEE benefits from mining on its own land, but that it was in fact legally entitled to be the lead shareholder in any future Incwala transaction - and would settle for nothing less.⁴³ If the other black shareholders accepted the Shanduka offer, the community would therefore have no choice but to apply for an interdict to prevent the DMR from sanctioning the deal, and 'for a declaration that the existing new order rights of Eastern and Western Platinum are invalid' as 'neither company was empowered'. Within two days Lonmin's lawyers had issued a warning that it could no longer be 'the target of wild and unsubstantiated allegations and veiled threats'.⁴⁴ Eiser's reply was that he was now proceeding to have Lonmin's NOMRs set aside.⁴⁵ Yet, for reasons that will shortly be seen, the threat of legal action had little effect on the process now in motion behind the scenes.

2.5 In walked Cyril

At the beginning of May 2010, it was announced that Shanduka had taken control of Incwala. This was through a record deal that involved R300-million of its own capital, plus a R2.5-billion loan from Lonmin to buy the original BEE investors out. As with the first Incwala transaction, the industry press wasted no time hailing Lonmin's masterstroke. The reasons were summed up by *Mining Weekly* when the story broke:

Lonmin, in restructuring its BEE partner, is avoiding the fragmented BEE ownership of the past that can lead to different parties wanting to take the company in different directions; is opting for simpler financing free of third-party debt, which the meltdown tested and found wanting; and is going all out to integrate historically disadvantaged shareholders into the business by having Ramaphosa on the board [of Lonmin, as a non-executive director].⁴⁶

Yet, the 'integration' of the politically-prized Ramaphosa had come at the expense of Lonmin's impoverished black landlord of some forty years standing. And, once again, it was the machinery of 'corporate trusteeship' that had been deployed to ensure the latter did not stand in the way of the former. According to Eiser, the Bapo were not only legally entitled to be the lead shareholder in the second Incwala transaction.⁴⁷ The original Incwala shareholder agreement also contained a clause giving its black investors the 'pre-emptive right' to buy the shares of any other BEE parties who wished to sell. Since all the major empowerment entities had wanted to exit when Incwala got into trouble, the Bapo were entitled to the first claim on their shares before Shanduka swept in. Moreover, if Lonmin had been genuinely committed to having the tribe as a meaningful empowerment partner it could have been afforded the same loan facility as Shanduka. Yet, it later emerged that Lonmin had used its control of the LBT to waive MBI's pre-emption rights to the 48.66% stake acquired by Shanduka that May. And while it did give the Bapo the chance to purchase the tiny sliver (1.37%) that remained,⁴⁸ there was still no offer of financial support. Indeed, on the contrary, when the community proved unable to raise the funds, these too went to Shanduka courtesy of another Lonmin loan, this time of R175-million. But this was not an arrangement without its own risks.

The Lonmin board had gambled heavily on securing Shanduka as its main BEE partner. The hope was that this would not only fireproof its NOMR, but also enable

it to reap the 'added value' that Ramaphosa's political connections would bring.⁴⁹ It had therefore decided to go all out with the May deal, financing the R2.5-billion Shanduka loan with a \$229-million rights issue and \$56-million of its own resources (Steyn, 2012). Yet, as well as being dilutive for its own shareholders, the terms of this facility would dangerously expose Lonmin in two key ways. First, the loan, which was extended for five-years at 5% interest, was to be redeemed through dividend payments to Incwala. As with the original transaction, Shanduka's ability to service its debt would thus be critically dependent on Lonmin's profit levels. Second, the loan was itself secured on Shanduka's Incwala stake. But this meant that if it were unable to meet its commitments, Shanduka could simply exit the deal at the comparatively low cost of its R300-million contribution, again jeopardising Lonmin's licence to mine. It was therefore imperative for the platinum giant to do all it could to keep the new BEE structure afloat and Ramaphosa on board. But, in just two years, events would conspire to exact a high price on its second roll of the BEE dice, in the process repositioning the Bapo in its empowerment calculus.

The August 2012 massacre of 34 striking mineworkers at Marikana cast a globally damning light on Lonmin's labour relations and practices. But in the Commission of Inquiry that followed, its empowerment strategy would also be subjected to increasingly critical scrutiny, revealing the exclusionary logic of the elite bargain that underpinned it.⁵⁰ Ramaphosa's infamous emails the day before the massacre - criminalising the labour dispute, and calling for 'concomitant action' - were a particularly graphic demonstration of his value to the British multinational as a means of pushing its agenda at the heart of the South African government, the ruling party and its allied unions.⁵¹ Yet, other evidence placed before the Commission would show the lengths to which Lonmin was prepared to go to protect its strategic investment, and at what cost to its other empowerment obligations.⁵²

In the three years leading to August 2012, the deepening platinum slump had led Lonmin to stop issuing ordinary dividends to its shareholders. In this situation, it could arguably have called on Shanduka to service its loan from its own resources. However, Lonmin instead paid Incwala some R116-million in 'advance dividends' over the course of this period to the ultimate benefit of its new majority shareholder (McKune, 2014). Meanwhile, Shanduka's own debt to Lonmin had continued to grow from the original \$304-million to \$381-million, with no indication of a repayment in sight (Steyn, 2012).⁵³ But

not only did Ramaphosa's company 'get something for nothing' as one newspaper editorial would put it, the Incwala transfusion placed 'other legitimate interests at a disadvantage' (MG, 2014). During the Commission, it also emerged that Lonmin had reneged on a pledge to build 5,500 houses for mineworkers and local villagers around its mining complex - a responsibility that now directly lay with Ramaphosa as chairperson of its 'transformation committee'.⁵⁴ Crucially, this R665-million commitment formed part of the Social and Labour Plan (SLP) that helped secure its NOMR in 2006, in conjunction with the BEE credits from the first Incwala transaction. Yet, by 2012, only three show homes had been constructed (Benchmarks, 2012; Hamman, 2012). This not only meant that Lonmin was technically in breach of its mining licence obligations (Chamberlain, 2014). It could also be taken as evidence that it had systematically prioritised its politically connected partner over the socio-economic development of its operational area, calculating - and not without good reason - that if the state were to enforce any aspect of its mine licence requirements it would be in respect of the former and not the latter. Then, in January 2014, Lonmin finally lost the 'value-adding' element of its BEE gambit altogether when the embattled Ramaphosa announced his resignation from the Shanduka and Lonmin boards to resume his political career as Deputy President of the ANC.

With its empowerment strategy again in tatters and its community relations under the spotlight, the paradoxical effect would be to increase the political pressure on Lonmin to see through the Bapo royalty-to-equity conversion. But this was not the only consideration. As Bowman (2016:13) notes, in 2009 the DMR had launched a review of its BEE policy, which concluded that the benefits of the empowerment deals to that point had accrued to 'a handful of black beneficiaries'. An amended Mining Charter was subsequently released in September 2010 with the aim of ensuring that future empowerment transactions were more 'broad based', not least by incorporating 'mine communities' as 'an integral part of mine development'. Moreover, mining companies were now obliged to achieve 'the minimum target of 26 percent [black] ownership' on which their licences depended by 2014'.⁵⁵ Having focussed virtually all its empowerment efforts on maintaining Incwala's 18% stake in its South African subsidiary, Lonmin still fell 8% short of the compliance target. And the clock was ticking ever more loudly. But if reviving the Bapo equity negotiations appeared to offer a particularly expedient part of the solution, this would also now necessitate dealing with the political instability within the tribe that

had previously worked both for and against Lonmin's interests. In the next chapter, the focus will thus shift from the 'tribe' as a relatively bounded corporate entity in its relations with Lonmin, to the factional divisions running through its chiefly authority and the political interventions to deal with them.

Three

A Legitimate Authority? Elite Competition and State Intervention

3.1 Who rules Bapong?

The BMTA entered the 'new' South Africa under the leadership of Bob Edward Mogale, its recognised Chief of eleven-years standing. However, in 1998, the Bapo *Kgosi* mysteriously ailed, and, despite specialist treatment, it was apparent that he no longer possessed the 'mental capacity to discharge his functions', as one court judgment would later put it.⁵⁶ With the support of the then Premier of the NWP, Popo Molefe, a decision was made in the Royal Family to reduce Bob Edward's role to 'ritual matters only', and to call Radikobo Emias Mogale - a senior uncle from the second house - back from his job in Johannesburg to 'assist' in running the tribe's affairs.⁵⁷

The *Rangwane*, or 'Uncle to the Chief', assumed effective control of the BMTA at a propitious moment. As was seen in section 2.1 above, 1998 was the year of Lonmin's approach about the proposed EPL/WPL merger, triggering the royalty formula negotiations, while from 2000 the first full EPL royalty - of R12.7m - was paid into the tribe's trust account, transforming its financial situation. Although by no means perfect, *Rangwane's* early tenure is consequently remembered as one of modest delivery and improved organisation, at least by his closer allies in the Royal Family.⁵⁸ But, despite the Premier's support, it seems that neither was *Rangwane's* role as 'Acting Chief' ever formally defined, nor was Bob Edward himself ever officially declared 'unfit to preside as *Kgosi* of the traditional community'.⁵⁹ The effect would be to create the conditions for two rival centres of power around the chiefship, with competing forces and projects potentially orientating on each. And the scope for factional division would only be widened with the promulgation of new national and provincial legislation, redefining the powers and functions of the institution as a whole.

On 24 September 2004, the Traditional Leadership and Governance Framework Act (Act 41 of 2003 - hereafter, 'TLGFA') came into force. This provided for the trans-

formation of apartheid-era 'tribal authorities' into constitutional-era 'traditional councils', setting the conditions under which they could continue to administer the resources of specified 'traditional communities', and retain the legal authority to enter into commercial contracts or court proceedings on their behalf. The Act's stated aim was to 'restore the legitimacy and integrity' of the institution of 'traditional leadership' in the democratic dispensation. But its principle effect was to reproduce the jurisdictions and structures of the tribal administrations that had first been established by the notorious 1951 Bantu Authorities Act, and reaffirmed by subsequent homeland legislation (Claassens, 2008; Jara, 2011). Nevertheless, it did introduce the quasi-democratic requirements that 40% of the membership of the new traditional councils would have to be elected,⁶⁰ and that a third of the total would have to be women. A traditional council would only receive official recognition when the names of these members had been gazetted, and each would serve a maximum five-year term. In the interim, stated the Act, pre-existing tribal authorities would be treated as traditional councils for the sake of administrative continuity, but would have to comply with its requirements within a year of its commencement to retain their legal validity.

Such was the principle, at least. But in practice, its implementation would be confused and chaotic, not least in the North West Province (NWP). Here, as de Souza (2014) has shown, the traditional council elections that should have marked the formal reconstitution of all tribal authorities were only held a fortnight after the cut-off date of 24 September 2005, and it was another three years before the results were actually gazetted. Moreover, in Bapong, only seven out of the 30 new council members were women, falling short of the one-third gender requirement. As elsewhere, this would leave the legal standing of the Bapo authority open to question, in turn casting doubt on the legitimacy of its business transactions and court actions. These uncertainties were further compounded by the promulgation of the North West Traditional Leadership and Governance Act (No. 2 of 2005, hereafter 'NWA'). Required to give effect to the national framework at the provincial-level, this specified precisely how the new traditional councils would be regulated by the NWPG. Yet, the NWA set

out *different* timescales for the first five-year terms of the new councils in the Province, while neglecting to provide guidelines for future council elections. With the manifold ambiguities around the chiefship now matched by those around its administrative status, the scene was set for the Bapo authority to be plunged into political turmoil, leading first to litigation and then direct state intervention.

Towards the end of March 2008, Bob Edward Mogale made a surprise appearance at a community meeting, called by the Traditional Council in Bapong.⁶¹ Brandishing legal papers, two of his associates then took to the stage, declaring the Bapo administration to be malfunctioning and corrupt. The *Kgosi*, they said, had therefore decided to dissolve the Traditional Council, all its members were dismissed forthwith, and the *Rangwane* was to cease acting in his place. Less than two weeks later, the Chief's supporters attempted to seize direct control of the Council premises themselves. In response, the BMTA applied to the North West High Court (NWHC) for an urgent interdict to declare his actions invalid, and for formal confirmation that it was the 'duly constituted' body charged with administering the community. The case would be heard over the next four months, but how had it come to this?

Since 2000, the inflow of mineral revenues and expansion of new mining activity had significantly increased the material stakes for the control of the Bapo administration and its resources between rival groupings within the tribal elite. According to leading members of the *Rangwane* faction, the 'mentally infirm' Chief had been captured by predatory elements in the wider Royal Family,⁶² who were using him as the gateway to the 'community's very large cash-holdings, its assets and its business relationships'.⁶³ This included potentially lucrative procurement contracts with Lonmin, and a major deal with Skychrome - a subsidiary of International Ferro Metals (IFM) - which was seeking to open a new open-cast chrome-mine on a site in Bapong, recently allocated by the Traditional Council for a Health Centre. With the sometimes hidden, and sometimes open, sponsorship of these mining companies, the Chief's associates were, they said, mobilising unemployed youth to divide the community and destabilise the administration, while at the same time manipulating him into signing business agreements, ostensibly on the tribe's behalf.

Whatever the veracity of these claims, they clearly made an impression on the Acting Judge in the NWHC case. Ruling on 24 July 2008, Justice Sithole declared the Chief's 'purported dissolution' of the Traditional Council

to be 'unlawful', banned him and his associates from entering the Council's premises, and ordered them to desist 'purporting to represent' the Bapo community in dealings with Skychrome/IFM, or any other commercial entity.⁶⁴ However, Sithole reserved judgment on the critical question of the legal validity of the Traditional Council as it was currently constituted. While the palace coup had been beaten back, temporarily at least, the continued uncertainty around its formal standing would open the way for a new and more powerful actor to enter the fray.

Under the new legislation, it fell to the Provincial Government to determine whether a traditional council had met the requirements for its official recognition as the administrative authority of a given traditional community. However, as the struggle for its control unfolded, the NWPG's position on the BMTA's formal status would prove far from uniform. In an affidavit filed in the NWHC case, the Provincial Traditional Affairs Directorate had initially stated that the Bapo authority and council were the only lawful bodies recognised by the State, and that the *Kgosi* had no power to dissolve them or to dismiss his Uncle.⁶⁵ Then, on 15 July, the Premier published a Notice in the Provincial Gazette formally announcing the 'reconstitution' of all the traditional councils in the NWP, including the one elected in Bapong in October 2005.⁶⁶ This, suggests de Souza (2014:43), was most likely a clumsy attempt to make good another missed deadline, but it seems reasonable to speculate that the issues raised by the Bapo case had further increased the urgency of securing its formal status, and that of others like it. Yet, past the Sithole ruling, the NWPG's position significantly changed. It would now argue that, in the absence of the anticipated court decision on its legal validity, the Bapo community remained *without* a recognised Traditional Council, effectively leaving 'Kgosi Bob Mogale as the decision maker'.⁶⁷ As the factional tensions continued in Bapong, it would then go a step further - with dramatic consequences.

3.2 The Kenoshi Affair

In addition to its mandatory role in the recognition of traditional councils in the province, the 2005 NWA charged the NWPG with the responsibility for ensuring that they discharged their statutory functions in a manner 'conducive to good governance and administration', and empowered the Premier to take appropriate steps where they did not. In particular, Section 10(3) provided for the appointment of a suitably qualified person to 'assist' a struggling council meet its obligations. This would be on 'the recommendation' of its 'Royal Family',

and subject to a review 'after a period of 180 days'. On 12 December 2008, such an 'administrator' - Abel Dlamini - was deployed to Bapong by the Provincial Department for Local Government and Traditional Affairs (PDLGTA).

By most accounts, this would prove an initially positive move.⁶⁸ An accountant by training, Dlamini brought a professional office staff with him, and quickly established a constructive working relationship with both the *Rangwane*-faction in the BMTA, and their legal representative, Hugh Eiser - particularly around the tribe's mining interests in the turbulent period following the collapse of Incwala (section 2.4). Over the course of his tenure, eventually extended to a full year, Dlamini also made a concerted effort to establish sustainable administrative systems, remained reasonably accountable both to the tribe and to the state, and, on the surface at least, helped stabilise the political situation. But his services did not come for free. By the end of his term in December 2009, a total of R18-million had been paid from tribal coffers to Dlamini's consulting company.⁶⁹ Worse yet, the governance structures he had put in place would rapidly disintegrate within weeks of his departure.

The Administrator had made two major moves to secure the longer-term future of the BMTA during his last month. First, he had helped organise a second traditional council election, in the hope of ending the 'crippling uncertainty' over its legal status.⁷⁰ However, the NWPG refused to recognise the result on the grounds that the 'dissolved council' could not be 'replaced' until the NWHC 'had pronounced' on the 2008 case 'for fear that we may potentially have two gazetted traditional councils'.⁷¹ As such the Bapo authority, would remain in a legal vacuum. Second, was Dlamini's attempt to professionalise the BMTA by creating a post for a fulltime Chief Executive Officer (CEO). While this institutional innovation may have made sense in theory, problems would soon arise with Dlamini's choice of CEO.

Makepe Jerimiah Kenoshi was appointed to the position towards the end of October 2009. But he seemingly wasted little time forging an alliance with Chief Bob Mogale and the nefarious aristocratic forces that still swirled around him. By January, the new CEO had allegedly already begun 'to arrogate powers to himself that he did not have' and stopped communicating with the BMTA and its attorney.⁷² Then, in February 2010, it was 'resolved' at a 'community meeting' to terminate Eiser's mandate altogether.⁷³ Later affirmed by the Chief in writing, the significance of this 'decision' cannot be overestimated. Whether by accident or design, it came at the exact moment that Eiser was gearing up to challenge Lonmin's choice of Shanduka as its BEE partner,

and have its NOMRs set aside (2.4, above). But Lonmin's lawyers would now be able to argue that Eiser no longer had the *locus standi* to bring a case for the tribe, as indeed would any government department or official that the BMTA now tried to hold to account through its preferred advocate. But were that not enough, the perennial question of the BMTA's own legal standing would again be thrown back to the courts by Kenoshi's next move.

In March 2010, it came to light that the Bapo CEO was preparing to 'invest' R234-million of the tribe's funds in a property development in the Hartebeesport Dam area.⁷⁴ On hearing the news, the BMTA opened disciplinary proceedings against Kenoshi, arguing that he did not have the legal authority to sign over the tribe's money. But the NWPG intervened, demanding they were suspended on the extraordinary grounds that it 'had to ensure the proper administration' of the traditional community. With the BMTA refusing to back down, the Bapo Chief then himself obtained an interim order (*Rule Nisi*) in the NWHC against 26 of its members, which not only banned them from the community offices, but also held that the BMTA did not itself have the *locus standi* to institute proceedings against the CEO. In turn, the BMTA filed a counter application in the NWHC, and applied for its own interdict against Kenoshi in the North Gauteng High Court (NGHC). Remarkably, both the counter- and interdict- applications were heard in the two courts on the same day: 29 July 2010.

Each hearing turned on the key questions of whether the BMTA had been properly reconstituted as a traditional council, in line with the requirements and timelines of the TLGFA and NWA, and, if not, whether it still at least remained the lawful governing body of the traditional community with the power to manage its own affairs and bring cases. The judgements were unanimous on the first question, but significantly diverged on the second. In the NWHC, Justice Landman found that BMTA had not met the requirements for reconstitution, both with respect to the timeframes set by the Acts and its gender composition,⁷⁵ as did Justice Legodi in the NGHC.⁷⁶ However, where for Landman this meant that BMTA did not have the *locus standi* to administer the tribe, and hence institute proceedings against Kenoshi, for Legodi the BMTA not only continued to exist as a legitimate administrative authority under the NWA, but, regardless, the tribe had a sufficient material interest to warrant *locus standi* in the Kenoshi matter. Indeed, for Legodi, the *locus standi* argument was 'nothing else than a smokescreen' to avoid the substantive issues raised by Kenoshi's conduct.⁷⁷

The Legodi judgement proved sufficient for the BMTA to dismiss its dodgy CEO. But, although both rulings were scathing of the NWPG's attempt to retrospectively reconstitute the traditional councils under its jurisdiction in July 2008, and then intervene in the Kenoshi matter in the way that it did - the first 'an exercise in futility', and the second 'motivated by panic', as Legodi put it⁷⁸ - their differences over the current status of the BMTA would allow the Provincial Government to cling to its position that the tribe remained without a valid governing authority, and hence would need to stay under administration until such time as new elections had put a properly constituted traditional council in its place. Yet, as we shall now see, the combination of the BMTA's continued administration and its inability to hold the NWPG to account, would create the conditions for the wholesale looting of the substantial mineral revenues that had now accrued in its name - and with it a powerful set of interests to ensure that this was the way things stayed.

3.3 A Provincial account

The 2005 NWA in many respects merely replicated the old Bophuthatswana Traditional Authorities Act (23 of 1978), which still held sway over the province until the new legislation commenced. Nowhere was this regulatory continuity more apparent than in the realm of tribal finance. While the NWA bestowed the power on recognised traditional councils to manage and administer the funds of 'their' traditional communities, section 30 also held that the Premier would 'cause' a 'trust account' to be opened for each council, into which all the revenues and proceeds benefitting that community would be paid, mining royalties included. Moreover, it would fall to the Premier 'to approve estimates of revenue and expenditure' from these community trust accounts, 'and monitor whether actual expenditure' corresponded 'to these estimates', explicitly authorising larger payments where they did not. As such, section 30 simply reproduced the old 'tribal trust-' or 'D-' account system, and, with it, the Provincial Government's ultimate control of tribal revenues in the North West, as custodian of the community' interest. There was, however, an important proviso, aimed at holding the trustee state to account. Section 31 provided that the 'books and accounts' of every traditional community would have to be annually 'audited by the Auditor-General', and the results reported to both the Premier and that traditional council. Yet, as shall shortly be seen, not a single trust account in the province would be audited after 1994, rendering all traditional authorities vulnerable to abuse by incompetent or corrupt officials, and particularly those unfor-

tunate enough to be under administration.

During his term as Administrator, and in the absence of any other information, Abel Dlamini had commissioned an audit of the Bapo deposits in the D-account by a private accountancy firm. This found that, as of March 2009, there was R393-million to the tribe's name, which he duly reported to the community at large. However, whatever the intention, the effect would be open a Pandora's box. Dlamini, we were told, had inadvertently 'allowed everyone to see how much money we had', but 'everyone was hungry for the money then, and everybody wanted that money'.⁷⁹ Hungry indeed. Within three years almost the entire amount had 'disappeared' from the D-account, and no one seemed to know where. With the 'Kenoshi affair' now reduced to little more than an opening act, leading figures in the BMTA appealed to the Office of the Public Protector (PP) to lead the hunt for the 'missing millions' vested under the custodianship of the NWPG.

Advocate Thuli Madonsela would take up the Bapo case in January 2012, and first report to the community that September (Swart, 2012a). For reasons to be seen, it would be almost another four years before she returned to share the preliminary findings of a forensic investigation she had commissioned the following January. But the headline figures were no less explosive for the delay. When the Auditor General last audited the D-account in 1994, the community was found to have R721,000 to its name (PP, 2016). But, as the mining royalties rolled in, a total of more than R617-million - comprised of R392-million in deposits and R224-million in interest earned - would accrue to the tribe over the next two decades. Yet, by 2014, only R495,000 of this remained. With the PP's investigation still in progress at the time of writing, there is yet to be a decisive determination on the fate of that staggering R500.2-million sum. Nevertheless, it is possible to identify some of the key mechanisms at work, beginning with what is currently known about the mismanagement of the D-account at the provincial level, and then how this meshed with the vicissitudes of continued administration in Bapong, from our own research.

When the new Provincial Government came to power in 1994, it inherited a D-account from the Bophuthatswana regime reportedly comprised of some 800 sub-accounts, 101 of which were for traditional authorities (Stone, 2013b).⁸⁰ As we have seen, these should have been separated after the NWA came into force, but they remained bundled together. This not only placed the NWPG in contravention of the Act, but meant that all the incomes of traditional communities continued to

be administered at the D-account level, making it virtually impossible to separate their individual funds. Worse yet, the myriad sub-accounts that formed the collective D-account had multiple signatories (Stone, 2014b). The NWPG would also fail to produce the books of account now annually required by the Auditor General, meaning that there was no external scrutiny of how much was in them, or how it had been spent, since the last D-account audit in 1994 (Boyle, 2016a). The lines of accountability were further blurred within the NWPG itself by the delegation of the Premier's fiduciary responsibility over D-account first, in 2009, to the PLGTA, and later to the Provincial Department of Finance (PDF), 'creating confusion all over' as current Premier Supra Mahumapelo has put it (cited Stone 2014a). Yet, as Hugh Eiser would also remark, it was in the NWPG's 'interest to keep the account lumped up and ostensibly in a mess' (cited Stone 2013b), as becomes apparent when we turn to consider where the growing sums cascading through it were actually used.

During the homeland period, a 1989 amendment to the Traditional Authorities Act had permitted the President to invest 'surplus' D-account funds in short-term deposit accounts, 'with the consent of the tribal authority concerned'. But it also seems that the Mangope regime was not adverse to dipping into the account for its own purposes, with no tribal consent or reporting (Stone, 2014a). Yet, despite the fact that the 2005 NWA no longer contained that provision, the PDF continued to effectively use the D-account as a private investment fund, putting its money into high-interest short-term accounts and other speculative ventures (Stone 2013c). Moreover, as under Bop, it did so without the permission of the traditional authorities concerned, and, when combined with the multiple governance failures within and between the responsible departments, this again created the conditions for massive financial mismanagement.

Allegations are consequently rife that the D-account has not only acted as giant 'slush fund' for senior ANC politicians and officials since 1994 (Stone 2013c), but that it had also been systematically looted, 'with millions spent without approval and more taken into private accounts abroad', according to government sources, including a senior Treasury official (Boyle, 2016b). Little wonder, then, that two years into her investigation the PP would state that she sensed a 'cover up' (Stone 2014a). Indeed, both her inquiry and a parallel operation by the North-West Standing Committee on Public Accounts (Scopa) would be stymied at every turn by the intransigence of the NW Premier and her officials,⁸¹

leading the exasperated chair of the latter, Hlomane Chauke, to remark that 'we are not dealing with people who are fair and honest ... some of them belong to jail and not in government' (Stone, 2013a). The Scopa inquiry would subsequently collapse, while five years on the PP's is ostensibly ongoing.⁸² But if these are the dynamics of provincial malfeasance as they are currently known, what then of where it all started, in the dusty villages of Bapong?

3.4 The Nkandla of the North West

Not long into her D-account investigation, Thuli Mandonisela would be immortalised for facing down President Jacob Zuma in the corruption scandal around his Nkandla mansion. But this was not the only dodgy construction project on the PP's mind. At some point after the tribe had come under administration, a decision was made to build a fitting new residence for its *Kgosi*, with an adjacent office block and debating chamber for his council. Majestically perched on a Magaliesberg hillside with commanding views of the Bapo valley, the budget for the 'Royal Palace', as it became known, was originally set at R20-million (PP, 2016). However, by the time the PP's forensic investigation had got underway in 2013, the cost had risen to R50-million, and had past R80-million by 2016 - and was still rising. Of this, some R68-million was paid to consultants alone, along with a further R2.8-million on décor (Tau, 2016). And it did not end there. The PP's preliminary findings also revealed that R13-million had been paid for a community hall that was never built, and R10-million to a construction company with no record of what the payment was for or who had authorised it (Boyle, 2016b). Sizeable sums were also paid to administrators, tribal councillors and Royal Family members, as well as to suppliers for services such as catering and security, and to universities and colleges as bursaries (PP, 2016). It remains to be seen how far this might account for the 'missing' R500-million. But it is clear from our interviews that the administrators appointed by the NWPG played a pivotal role in this enormous outflow of tribal funds.

As we have seen, the NWPG decided to place the BMTA back under administration after Kenoshi judgements had been handed down in July 2010. By 2014, four different people had filled the position, typically on contracts of around six months with varying breaks between them.⁸³ Though all men, there were significant differences in their professional backgrounds, skill-sets and community connections. Moreover, at least two had been appointed on the request of the



R80-million and rising: The Royal Palace in April 2014 | Credit Gavin Capps

Royal Family, to fill the administrative vacuum left by continued infighting and the failure to constitute a Traditional Council, suggesting a more complex relationship than a simple imposition. Nevertheless, to varying degrees, they were all subject to virtually the same complaints by our interviewees in the *Rangwane*-faction,⁸⁴ many of which were supported - albeit more reticently - by a former administrator in a separate interview.⁸⁵

The foundational issue was the extraordinary range of discretionary powers afforded to the administrators by their Terms of Reference (ToRs). Determined by the PDLGTA, these varied with each appointment, but typically included powers to authorise projects, appoint contractors, sign-off payments, hire and fire administrative staff, and represent the tribe in commercial negotiations and legal processes. As noted above, section 10(3) of the NWA stated that the role of the administrator was to 'assist' a traditional council discharge its statutory functions. But, when combined with the factional divisions running through the organs of tribal governance, these powers invariably led successive administrators to *substitute* for them. Complaints about unilateral decision-making and lack of accountability were consequently rife, and it was widely held that most tribal projects had been initiated without community

resolutions, or reports on expenditure or progress.⁸⁶ The Royal Palace was a case in point. No-one could say who had authorised it or why it was needed; rather, its real purpose was to 'provide a legal way for people to come and chow our money'.

At the same time, NWPG officials had, at best failed in their oversight functions, and, at worst, actively colluded with administrators to siphon-off tribal funds. In terms of the NWA, contracts and payments could only be authorised by the relevant provincial officers, were paid directly to suppliers, and would have to be in line with a budget co-determined with the traditional council at the beginning of each year.⁸⁷ Yet,

When the provincial budgets are drawn up we don't even get to see the documents. They have been drawing up budgets without reference to the community since we came under administration in 2009. There are a lot of things that are done when you are under administration and the only person who has access to that information is the administrator ... the traditional leadership has never [seen] it.

Not only was the tribe seemingly kept in the dark about the plans that had been cooked up to spend its money on things it did not want, but it appears that expenditures

over and above those budgeted amounts were just waved through. How else, for example, to account for the escalating payments to the plethora of consultants, building suppliers and security companies ostensibly contracted to design, construct and protect a palace-cum-office complex that, in the words of the Scopa Inquiry Chair in September 2013, was 'becoming derelict before anybody had occupied it, and before it is even complete'?⁸⁸ Nor did there seem to be any effective checks on what, or whether, these contractors had actually delivered. The administrators were supposed to submit monthly progress reports to the NWPG, but these would often be perfunctory, if delivered at all.⁸⁹ Meanwhile, when audits were conducted, the results were kept hidden from the community. Little surprise, then, that the overriding suspicion was that, as provincial appointees, successive administrators would not only owe their loyalty upwards and be treated leniently, but be on the look-out for money-making opportunities around the tribe's project 'needs' or commercial negotiations for their political patrons: 'the provincial government and administrators are in the same bloc, they have hidden interests in the financial problems of the Bapo-ba-Mogale'.

As well as bestowing wide-ranging but poorly regulated powers, the ToRs outlined the administrator's functions and responsibilities. By far the most significant of these involved reconciling the warring factions within the tribal elite, and capacitating the administration to run its own affairs, independently of the NWPG. 'The whole point', as Mandonsela would put it on her first visit to Bapong in 2012, 'is that the administrator puts a governing system in place and then leaves' (cited Swart, 2012a). But it seems successive administrators struggled with establishing such systems, effectively keeping the tribe in a state of perpetual administration. When the PP's forensic investigators came calling the following year, 300 to 400 unorganised files of financial records were found scattered around the tribal offices (Boyle, 2016a). Meanwhile, according to the *Rangwane*-faction, 'after five years, there is not even a single policy', because the administrators 'know that if I am capacitating the council then it means I am losing my job'. But the stakes were even higher for the administrators and their patrons than simply doing themselves out of work, and the opportunities for graft that might come with it: 'if we can take one administrator to court this is going to unearth all the issues and the possible links'. In other words, so long as the Bapo authority remained without a recognised traditional council, it would not have the

locus standi to recover its 'missing millions' and hold the perpetrators to account - 'so government is making sure that there is no traditional council here'.

Yet, while there may have been powerful interests in parts of the NWPG to keep the Bapo authority in a legal vacuum - both to continue the pillaging, and to hold-off the day of reckoning - there were equally powerful forces pushing the other way. And none was more powerful - or with better connections in the ANC's upper echelons - than Lonmin. As was seen in chapter 1, 2010 was not only the year the platinum multinational secured Ramaphosa's Shanduka as its main BEE partner. It was also when the pressures mounted to meet the remainder of its 26% empowerment target by diversifying the social profile of its black shareholders, with the release of the Amended Mining Charter. And these pressures would only intensify with the public relations disaster and subsequent exit of its BEE-figurehead that, for Lonmin, was Marikana. But, as we have also seen, it would only be possible to convert the Bapo royalty into an equity stake if there was a legally recognised authority in place to formally negotiate and sign-off the deal. As if to make the point, and following the expiry of their five-year term of office some seven months earlier, the PDLGTA issued a circular in April 2011 warning traditional councils across the Province not to undertake commercial transactions until they were 'duly reconstituted' through new elections, explaining that if they 'lacked legal standing at the time the said contracts/deals were concluded', they 'might be of no force and effect' (cited *de Souza*, 2014:48).

For other parts of the NWPG, then, the imperative was precisely to establish the conditions for the successful reconstitution of the Bapo traditional council, both as an administrative end-in-itself, and as a prerequisite for the Lonmin equity conversion. But these 'conditions' were not merely technical, they were eminently political. Elections for a new traditional council could only be meaningfully organised and recognised when the historic infighting between different factions of the ruling lineage had ceased. Yet, paradoxically, the chosen 'solution' to this deeply political problem would be a thoroughly legalistic one - and with its own troubled history, as we shall now see.

To the Victor the Spoils? The Conditions and Consequences of Conversion

4.1 Fixing the family

Around the time that the PDLGTA placed the BMTA back under administration, it launched a parallel 'process of mediation and restoration of order and harmony among the royal elites of the Bapo community' (*Khunou, 2014b:2*). This flowed from its identification of the root cause of the endemic political conflict plaguing Bapong: an 'overpopulated' Royal Family, whose sprawling and fractious branches had been engaged in an almost perpetual struggle for the chiefship for over a century. This was all the more problematic given that, under the 2005 NWA, it continued to fall to the Royal Family not only to advise and guide a *Kgosi* on all political matters, but to determine who should follow him in terms of the 'customary rules of succession'. The politico-administrative imperative was thus to 'restructure' the institution in a way that was amenable both to its constituent lineages and the NWA, and thereby secure the foundation for a stable and functioning Traditional Council.

It seems that the PDLGTA's initial approach was to create the conditions for the Royal Family to 'reconcile and reconstitute' itself. In February 2011, a three-day 'retreat' was organised by the Department, but while this was reportedly 'a success, there remained conflicts and instability in the Royal Family'.⁹⁰ The Department now switched to a more interventionist approach. During April, one of its own legal advisors - Thabo Lerefolo - was seconded to act as what would now be the Bapo's third Administrator. That month, Lerefolo in turn appointed a Senior Law Lecturer from the University of the North West, Professor Freddie Khunou, to conduct an extensive 'review and validation of traditional structures and succession patterns' of the Bapo chieftaincy, and determine whether the 'current structure' of the Royal Family was 'the one envisaged' by the NWA (*Khunou, 2014b:1-2*). Khunou's subsequent investigation would prove central to the Bapo story,

but first it is useful to consider its wider context and significance. Here, two framing points may be made.⁹¹

The first concerns the nature of the exercise itself. In effect, Khunou was being called on to play the same role as the professional ethnographers who had been deployed by the apartheid and homeland states, to determine the outcomes of the chieftaincy disputes that perennially threatened to destabilise the administration of the black countryside through tribal authorities. As John Comaroff (1974:46) pointed out in a pioneering analysis, the 'usual procedure' was for these ethnologists 'to consult the genealogies' which had 'been collected for each ruling dynasty and decide, in terms of the formal rules of succession, who the rightful office-holder should be'. Yet, argued Comaroff, this misunderstood 'the very essence of Tswana politics', in which 'internal competitive processes' were in fact 'ordered by the manipulation of genealogies and legitimized by exploitation of rules'. Indigenous political dynamics thus tended to be suppressed in favour of the continued ascendancy of favoured ruling groups, whose recorded genealogies were now treated as an infallible guide to their 'legitimate' incumbency, and hence state support.

It was, moreover, precisely such interventions that had contributed to the long history of political turmoil in Bapong itself.⁹² Beginning with a protracted struggle over Darius Mogale's chiefship in 1908, government officials would back one candidate over another for reasons of administrative expediency and/or state control. But these decisions were often so devoid of popular legitimacy that they laid the ground for further succession challenges by agnatic rivals. Set in this historical perspective, the Khunou inquiry would therefore merely be the latest in a long - and largely counterproductive - line of attempts to square the complex dynamics of Tswana politics with the instrumental goals of the state. But whereas in the past these goals were mainly orientated on administrative concerns, the interests and objectives of a major mining multinational had now also entered the frame.

Second, is the choice of Khunou himself. Ordinarily such investigations would have been handled by the Anthropology and Research Directorate (ARD) within the

PDLGTA. The immediate successor of the ethnological section of the old Bophuthatswana administration, and with many of the same personnel, we were told that there was a history of animosity between its Director and the *Rangwane*-faction, around the relative status of the three major branches of the Royal Family - Mogale, Moerane and Maimane - that were now in contention.⁹³ Involving at least one Commission of Inquiry during the homeland period, it seems that the Director was willing to consider the claims of all three, whereas the objective of the *Rangwane*-faction was to narrow the field to the Mogale line, from which it was predominantly drawn. While it could be argued that the Director's intrinsic 'bias' would have prevented an 'objective' assessment, bypassing the ARD in favour of an outside consultant could only boost the *Rangwane*-faction's cause. Yet, as shall be seen, this decision would also come back to haunt the process at a later stage.

With regard to the consultant himself, it's notable that Khunou's academic and professional training was not in Anthropology, but Law. Admitted as an advocate to the NWHC later in 2011, he nevertheless had a strong record of involvement in these kinds of questions, though from a particular perspective. According to his self-penned 'Profile' (2014c:3-4), Khunou had 'contributed immensely' to the White Paper on which the 2003 TLGFA was based, developed policy documents and manuals on its implications for the National House of Traditional Leaders, and the Department of Co-operative Governance and Traditional Leaders, and elsewhere argued (with Seth Nthai) that the new traditional councils it brought to life represented a genuinely democratic transformation of what had existed before (see *Jara, 2011*).⁹⁴

Given this background and his terms of reference, it should come as no surprise that Khunou's (2014a) primary concern would be to determine the 'membership and composition of the Royal Family in line with the legislative imperatives and customary law'. Critically, however, his ensuing research to 'validate the genealogical trends' of the Bapo chiefs would be conducted with exclusive reference to documentary sources, rather than through oral interviews. This, argued Khunou (2014b:3), would ensure that his 'objectivity was not clouded with the views of the warring factions and those individuals who might have vested interests' in the outcomes of his investigation. Whatever the merits of this approach, it would nevertheless seemingly place him in that tradition of state-sponsored ethnological research had taken the written record at its word, rather than problematised it as the power-laden product of the unequal encounters

between colonial officialdom and the competing local elites on whose knowledge and opinions it invariably drew.

This literal approach was even more apparent in the way that Khunou adjudicated his findings from the standpoint of the 2005 NWA. The Act defined the Royal Family as 'the core customary institution or structure consisting of *immediate* relatives of the ruling family', which could also include 'other family members who are *close relatives*'. Since, reasoned Khunou, the documentary record had 'shown' that the Moerane and Maimane families were 'offshoots' of the Mogale family, the only relevant 'question' would be whether the former could be considered 'immediate' or 'close relatives' of the latter. And, because careful examination of the genealogical tables revealed they could not, it was thus 'established that the Moerane and the Maimane do not qualify to be the members of the Royal Family in terms of the relevant legislation' (2014a:33).

From this, three key recommendations followed (Khunou, 2014a:31-37). First, the membership of the Royal Family should be restricted to the Mogale lineage, further filtered in terms of 'the principle of genealogical seniority'. Second, in the interests of 'peace and reconciliation', a second forum - the General Royal Council (GRC) - should be established to accommodate the members of what were now termed the 'extended royal families', i.e. the Moeranes and Maimanes. Membership should again only be open to those of suitable genealogical rank, but, since the institution was not recognised by the relevant legislation, its 'functions and responsibilities should be strictly limited to traditional matters' (2014a:33). Finally, the other key institutional structures that had collapsed under the weight of internecine strife - the Office of the *Kgosi*, Council of Headmen, and Customary Court - should be revived in order to manage future disputes and 'rehabilitate' the traditional life of the community.

4.2 The politics of implementation

Seen from the perspective of the *Rangwane*-faction, this was an elegant and just solution.⁹⁵ The 'rightful' seniority of the Mogale lineage had now been decisively institutionalised, but in a way that still recognised the blood-status of its erstwhile rivals. Magnanimously housed in the GRC, these could still act as a consultative body for the 'legitimate' Royal Family, but it would now hold the primary power to determine the composition of all other tribal organs in conjunction with the ailing *Kgosi*. The position of the *Rangwane*-faction would only be further strengthened by the way in which

Khunou's recommendations were implemented - though not, as it turned out, in the way planned.

Noting that 'the process of reconstruction cannot unfold itself', Khunou (2014a:36) had also recommended that the 'Administrator and relevant government officials' should 'oversee, monitor and implement the process of reconstitution of the Royal Family'. This was no small matter since the principle of 'genealogical seniority' still left open significant room for interpretation and dispute about who 'rightfully' belonged in each institution.⁹⁶ However, the 'relevant government official' tasked to work with the Administrator on this knotty problem would again be the Director of the ARD. Yet, not only had his unit been bypassed in favour of Khunou, they had disagreed over the 'approach and principles' of his investigation.⁹⁷ Meanwhile, other members of the Royal Family 'still wanted [the Director] to have an input on [the reconstitution] process'. The result was a protracted standoff, though some suspected that the paralysis around implementation was also in the interests of those parts of the NWPG that had a vested-interest in ensuring that the traditional authority remained divided, and hence administration. The standoff was finally ended when a new MEC permitted the implementation process to be outsourced to another consultancy, but this would also inadvertently provide the entry point for another dubious character who, as we shall later see, would loom ever-larger in the Bapo story.

Perhaps in January 2013 - though some put the date later - an organisation called Nthontho Business Solutions was appointed to provide 'strategic advice' to Chief Bob Mogale.⁹⁸ Consisting largely, if not entirely, of its founding CEO, Lehlohonolo Nthontho, this consultancy would now play a significant role in the 'strategic turnaround, restructuring and reconstitution of the Bapo Royal Family'.⁹⁹ Nthontho's qualifications for this critical and politically sensitive task are unknown, as are the precise details of his recruitment.¹⁰⁰ Nevertheless, it is widely held that the Chief's new 'advisor' would forge an increasingly close alliance with the *Rangwane* and his son, Vladimir Mogale, who would also soon emerge as the 'spokesperson' of the revamped Office of the *Kgosi*. Whatever the processes at work, the final determination of the 'reconstituted' Royal Family and GRC had been made by January 2014, and the requisite 60% of appointees to the Traditional Council identified, with the formal blessing of the Chief.¹⁰¹ All that remained was for the rest of the Traditional Council to be elected by the community. After a number of delays, these were held across the Province at the end of that month, and, for the first time in Bapong, the elected 40% would

met the one-third gender requirement.

Things were now moving rapidly. In February, a meeting of Bapo community structures was convened with the Administrator, to formally 'introduce' the 'legally reconstituted' Royal Family and General Royal Council, and to 'apply' for the 'community to go out of administration'.¹⁰² That request was officially granted by the relevant MEC on 24 March, who noted her satisfaction that, 'as a result of Professor Khunou's involvement' there 'is stability in the Royal Family', allowing the community, after five long years, 'to manage its own affairs'.¹⁰³ Noting that the Traditional Council elections had been finalized but were yet to be gazetted, she added that *Rangwane* would continue to 'deal with and approve all necessary payments' in the interim. Finally, between 9-12 April, a 'policy conference' was convened at the Royal Palace 'to draft and ratify the new governance structures and policies' of the Bapo community.¹⁰⁴ At last, everything was in place to see through the royalty-to-equity conversion with Lonmin, and crucially just in time for the December 2014 empowerment-target deadline. But, despite the careful political choreography, a familiar set of problems would soon return to cast the outcomes of that process in doubt, as we shall see.

4.3 The conversion

The re-imposition of administration in late 2010 by the NWPG had allowed a further process to get underway. The year before, Lonmin had placed a concrete proposal for an equity conversion on the table (Stone, 2013d).¹⁰⁵ However, its Shanduka play had seemingly blown any hopes of further negotiations out of the water. Nevertheless, with Hugh Eiser's mandate now formally revoked - a decision further 'confirmed' by the incoming (second) Administrator, Julius Moloto - the main obstacle to resuming that process had seemingly been removed. To this end, Moloto bought in a new 'advisory team' of Basic Point Capital, Nedbank and the legal firm, Bell Dewar. The latter was of particular significance as it had represented the neighbouring Bafokeng chieftaincy in its business and other dealings for many years. Moreover, the *Rangwane*-faction had itself long-admired the 'corporatisation' model pioneered by the Bafokeng, in which all the tribe's assets were placed separate holding company, regulated by company law. Not only would this provide a vehicle to house any future equity stake, but it would also allow the BMTA to exploit a clause in the 2005 NWA and, like the Bafokeng before it, get out of the D-account system altogether.

However, while Bell Dewar was uniquely well-placed to advise on this corporatisation strategy, our interviewees



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OFFICIAL NOTICE

To consult and inform Bapo Ba Mogale Community of the Lonmin Equity Transaction.

The Bapo Ba Mogale Traditional Community intends to enter into agreement with Lonmin that will see the community royalty interest being swapped for equity (Shares) in Lonmin Plc based in London Stock Exchange. The negotiations started in 2011 and are dictated by the mining charter that by end of 2014, mining companies should have increased their BBEE shareholding to 26%. Negotiations thus far headed by the Traditional Council and technical valuations were done by Nedbank (for Bapo) and Standard Bank (Lonmin).

Transaction Details:

1. Total Future Royalties being swapped for Equity and Cash R643m is including R20m cash to be paid annually for 5 years.
2. R5m to be paid annually to Local Economic Development Trust.
3. Procurement and Value Chain Business participation of Bapo Ba Mogale Traditional Community owned entities of a minimum of R200m on finalization of the agreement. With the maximum to be determined by capacity of the community to progress in business.
4. Labour Recruitment desk to be based in the Bapo Ba Mogale Administration Office.

Benefits.

1. The community will generate more income for development as opposed to current royalties stream of a minimum of R494, 000.00 per annum.
2. The community will be able to participate in business and employ community members to a minimum of at least 300 permanent jobs by June 2015.
3. The community will be more stable with commercial interests being centralized.
4. There will be more robust and radical management of financial resources of the community.
5. The same model to be rolled out in negotiations with Sky Chrome and Samancor.

In the next two months the community will own a company in Mining, Construction, Transport, Property Development, Agriculture and Hospitality. If all this is implemented properly, Bapo could end up being a major contractor at Lonmin participating in business of over R3 Billion P/A in the next 5 years.

From

Communications and Royal Affairs Department
Office of Kgosi
Bapo Ba Mogale Traditional Community

Figure 2: Community Consultation fact sheet | Credit: Stanley Malindi Collection

in the *Rangwane*-faction seemed to feel the firm had been imposed on them.¹⁰⁶ At one point, they described Bell Dewar as an 'unwelcome visitor', making plans on their behalf, with very little if any consultation. And then, even more dramatically claimed that after a long period of start-stop - caused by the constant turnover of administrators - Lonmin had insisted that Bell Dewar be bought back in to negotiations: 'it was like they were putting up a team for this transaction, they were doing it for themselves'. Finally, still unsure whether the equity conversion would be in their best interests, or at least in the current economic climate, the *Rangwane*-faction had asked their last administrator to remove Bell Dewar (now absorbed into the larger firm, Fasken Martineau) from the negotiations altogether. But they were told R3-million of the community's funds had already been paid to the firm, and the process was now too far down the road.¹⁰⁷ Thus, in November 2013, and whatever the reservations, the Chief's council was informed that the 'talks are almost 95% complete' and a conversion deal was immanent (Stone, 2013d).

As late as March 2014, it seems the *Rangwane*-faction was still not entirely convinced about the deal. A critical concern was the parlous financial state of Lonmin, and whether 'we will be dragged down with it'.¹⁰⁸ However, by June there appears to have been a change - or, at least, a steeling - of the heart. With the requisite Traditional Council now seemingly in place, and administration consigned to the past, the new Office of the *Kgosi* launched a mass campaign to mobilise the necessary consent for the deal within the tribe at large. That month, around a thousand unemployed-youth were deployed on a 'community consultation' exercise, at a reported cost of R1.2-million (Boyle, 2014b). Dubbed the 'Ambassadors', and said to have knocked on 15, 000 doors, they carried two documents with them. First, a fact sheet on the deal from the 'Communications and Royal Affairs Department' - now headed by Vladimir Mogale; and second, a 'community consultation process form', asking whether the Bapo should 'continue with' or 'leave this equity transaction'. As can be seen from *Figure 2*, the fact sheet was strong on the 'details' and 'benefits of the deal', but provided no information about the possible downsides and risks. Moreover, it was subsequently reported that the Ambassadors 'knew little about the transaction and focussed instead on the infrastructural needs of the community' during their house-calls (Boyle, 2014b). This may go some way to explaining why the Office of the *Kgosi* would later be able to claim that 99% of the completed 'consultation process forms' had been in favour of pressing ahead.

The scene was now set for the final act. On 29 July, a *Kgotha Kgothe* - or 'general meeting' - was convened in the Segwaelane Village Community Hall, to secure the requisite community resolution that would enable the Traditional Council to enter into a binding agreement with Lonmin.¹⁰⁹ The hall was filled to its 400-capacity, with 200-300 more following proceedings outside. Villagers, observers, journalists, lawyers and even the odd banker crammed together to hear the meeting open with prayers and a sermon - 'The Storm is Over' (Proverbs 10:25-32) - and a welcome from *Rangwane*. Then MEC Neo Moerane and Lehlohonolo Nthontho, whose role as the Chief's 'strategic advisor' had clearly widened, started presenting the terms and benefits of the deal. Two hours of questions and answers followed. A representative from Nedbank, which had been tasked with producing the valuation, spoke in strong support, brandishing a copy of the 50-page report. But Nthontho declined requests from the floor to see it, or the great bundle of other documents that made up the agreement. As *Rangwane* bought the meeting to a close, community members signed the resolution and filled in the voting slips, which required their names and ID numbers. The reported tally was 779 in favour and 51 against. The Chief was notable throughout by his absence.

Early the following morning, Lonmin CEO Ben Magara signed the deal with *Rangwane* and two other community representatives. Immediately, a 'regulatory release' was issued to the London Stock Exchange (where Lonmin is listed) and the Minister of Mineral Resources put out a statement 'welcoming the agreement'.¹¹⁰ The deal was in the bag. But who had got what? According to Lonmin's regulatory release, there were three major elements to the agreement. First, the Bapo would waive their statutory right to receive royalties from EPL and WPL in exchange for a R564-million lump sum, which would be used to buy shares in the parent company - later valued at 2.25% of Lonmin's issued equity. Second, and in addition, the Bapo would receive a 'deferred royalty payment' of R20-million, for five consecutive years to be used for its 'administration costs'; a new 'community development trust' would be (indefinitely) funded with a minimum of R5-million annually; and Bapo companies would be given preferential opportunities to bid for an estimated R200-million-worth of Lonmin tenders, for an eighteen-month period. Finally, however, the Bapo would agree to a ten-year embargo on the sale of their Lonmin shares, which could also not be used as a collateral during that decade. They would also transfer their 7.5% stake in the neighbouring Pandora



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BAP BA MOGALE KGOHA KGOHE!!!

DATE: 29 JULY 2014

VENUE: SEGWAELANE COMMUNITY HALL

TIME: 12H00 am

Rangwane Radikobonyane Eminus Mogale on behalf of Kgosi Bob Edward Mogale o bitsa kopano ya morafe wa Bapo Ba Mogale ka kakaretso.

AGENDA

- **OPENING**
- **PRAYER AND WELCOME**
- **PURPOSE OF THE MEETING**
 - **COMMUNITY RESOLUTION: BAPO BA MOGALE & LONMIN ROYALTY AND EQUITY SWAP TRANSACTION**
 - **CONVERSION OF FUTURE ROYALTIES INTO SHARES AND CASH**
- **ANNOUNCEMENT**
- **CLOSURE.**

NB. TRANSPORT WILL BE AVAILABLE IN ALL SECTIONS FROM 10H00am.

NOTICE ISSUED DATE: 08 JULY 2014

PILEDIWA YA LWELWA!!!!

joint-venture to Lonmin, and lease the surface area of their mineral-bearing farms to Lonmin at no extra cost, decisively ending some 45-years of rentier landlordism.

Such were the known details of the agreement, but much remained outside the public domain. There was no information about how the valuation had been reached, nor precisely how the different elements of the deal would be managed. Mining analysts canvassed by the *Mail and Guardian* at the time also questioned the wisdom of surrendering a guaranteed royalty stream for more risky dividend payments in a deeply depressed and highly volatile global platinum market.¹¹¹ Nevertheless, the Office of the Kgosi wasted little-time in setting up a new corporate structure to house its Lonmin shares, and to administer its anticipated procurement bonanza. Launched on 1 September 2014, the new Bapo-ba-Mogale Investments (BBMI) company thus realised the *Rangwane*-faction's long-held 'corporatisation' ambitions, and finally bought it out of the D-account system. The tribe would now have complete control over its finances for the first time in its history, though in an ominous portent of things to come, it was the ubiquitous Nthontho that was appointed as CEO of BBMI - the holding company that would manage them. For its part, Lonmin's new, 'locked-in' BEE-partner bought the mining multinational a precious 2.25% closer to realising its empowerment target, and, ten days after the BBMI launch, the agreement was 'duly approved' at General Meeting of its shareholders in London.¹¹² It was now 16 years since Lonmin had first approached the BMTA with a proposal to reconfigure its royalty formula, triggering the long and fraught journey that had finally ended in that transaction. Whatever problems may have been encountered along the way, a settlement had now been reached to the apparent benefit of both parties. Asked whether he expected any opposition, a buoyant Head of Lonmin's Legal Affairs Department told the press in August 'it's a done deal... the community has spoken, it's a bit late for anyone to launch a legal challenge'.¹¹³ But no sooner had the Lonmin shareholders cast their deciding vote the following month, than the political ground on which the whole transaction had been founded would again start to shift and crack, revealing the faultlines that still ran deep beneath.

4.4 A done deal?

Politics would reassert itself in Bapong on three related registers. In each case, the processes are still unfolding, and here the most perfunctory summaries will have to suffice.

First, that September, two community groups - 'The Liaison Committee of the Bapo-ba-Mogale Community' and '*Serodumo Sa Rona*' - gave notice of their intention to apply for a judicial review of the July agreement.¹¹⁴ It was, they said, unlawful on a number of counts. The July *Kgotha Kgothe* had neither been representative of the community at large - only 1.9% of the 40,000-strong tribe had actually been present - nor had the procedure followed customary processes of decision-making. Moreover, although the resolution implied that those present had made an informed decision, none of the detail of the transaction had been circulated. But the most significant charge from the perspective this paper concerned the question of whether *Rangwane* and the other two community members who had signed the agreement in fact had the authority to do so.

It will be recalled from section 3.3 that the MEC's letter of March 2014, which had formally ended administration, permitted *Rangwane* to continue dealing with all necessary tribal payments 'as was previously the practice' until the new Traditional Council was formally gazetted. Yet, it transpired that the membership of the new Traditional Council was only published in the Provincial Gazette on 08 August 2014 - a full week after the transaction had been signed off. And, argued the community groups, the wording of the MEC's letter clearly restricted *Rangwane's* temporary powers to routine administration - and it certainly did not extend as far signing over the tribe's statutory royalty, and other rights and assets. Despite the careful political management in the lead-up to the deal, the question of *locus standi* had thus again emerged to challenge the objectives and actions of the *Rangwane*-faction, and once more it was the NWPG that, through its negligence or otherwise, had contributed to the problem. The review application was filed on June 2015 and is still in progress.

Second, are the internal dynamics of the new governance structures that rose off the back of the Khunou report.¹¹⁵ On 11 August 2014, Abbey Mafate, a newly elected member of the Traditional Council was suspended without pay and called to a disciplinary hearing by the General Royal Council (GRC). The letter was issued by *Rangwane*, 'on behalf of Kgosi Mogale', and listed a number of charges, including participation in 'illegal meetings' with a grouping in Wonderkop village, which 'destabilizes traditional authority governance'. Around the same time, a colleague on the Traditional Council, Tshepo Maakane, was suspended in a similar manner, this time on charges that included 'insulting the chief'. However, both Mafate and Maakane had, from an early

stage, been vocal in their criticism of the impending conversion deal, going so far as to write to the Premier, the local police and the Office of the *Kgosi* in an effort to stop the July *Kgotha Kgothe* from happening altogether. Again, their argument had been that the Traditional Council did not have the legal authority to call the meeting, as it had not yet been gazetted.

Seen from this perspective, then, the charges looked more like an attempt to silence dissenting voices within the Traditional Council. But worse, they were bought by an informal institution (the GRC) with no legal recognition that, by definition, had no authority to take disciplinary action against the members of that statutory body. This was certainly one of a number of lines taken by a lawyer now acting for Mafate and Maakane, who was eventually forced to take the case to the NHWC. Papers were served in May 2015, and, the following September, a judgement found the councillor's suspension 'irrational and procedurally unfair', and ordered their reinstatement. However, it has since been reported that, on arriving at their first Traditional Council meeting since August 2014, Mafate and Maakane were handed letters placing them on 'special leave', pending further, unspecified disciplinary charges (Bloom, 2016). Again, these were signed by *Rangwane*, and again the Councillors suspected that the aim was to get them out of the way: 'there are important council decisions which need to be taken very soon and we are seen as being people who will disturb the process' (cited Boyle, 2016b).

A final set of issues concerns the new Bapo holding company, BBMI. In the wake of the July agreements, Lonmin's own Head of Business Development had admitted that the equity swap was not the strongest element of the deal; rather, the 'real prize' was the R200-million in business opportunities afforded by the eighteen-month preferential procurement window with Lonmin.¹¹⁶ To this end, Lonmin gave the BBMI a start-up sum of R40-million in two tranches over 2015-2016 to help it tender for, and manage, its supply contracts. But it seems not everything worked out as both parties hoped. In June 2016, it was reported that *Rangwane* had accused Lonmin of continuing with a 'divide and rule strategy' in its dealings with the Bapo. The key issue was that a R120-million busing contract, and a R100-million protective-equipment contract had been awarded to other suppliers. Moreover, in a powerful echo of the 'fronting' claims around MBI (explored in section 2.4, above), *Rangwane* revealed that Lonmin's own Chief Financial Officer had recently been appointed to the BBMI board, leading to 'a conflict of interest that takes away the autonomy of the community'.¹¹⁷ Then,

in October, it emerged that BBMI's Logistics Division was being sued for R30-million for failing to pay one ore-transport contractor for nine months, while two others claimed they were likewise owed considerable sums.¹¹⁸ That month, the Public Protector also reported that BBMI as a whole was deep in debt, despite having borrowed R100-million from the Public Investment Corporation, and an undisclosed sum from FNB (Tau, 2016).

Meanwhile, BBMI's management team was not only accused of being unaccountable to the community in whose name it operates, but its CEO of unleashing political violence against his opponents.¹¹⁹ In July 2016, a crowd of 150 people, led by the 'Ambassadors' - the unemployed Bapo youth first mobilised to secure consent for the 2014 deal - stormed the *Madibeng FM* radio station, forcing it to cancel a planned interview with critics of Nthontho.¹²⁰ The presenter of the show subsequently received death threats. Then, in September, five Bapo activists, were attacked at a community meeting convened to discuss Nthontho's removal, again by the Ambassadors. One of these activists - Kgomotso Morare - needed 13 stitches in his head after being dragged from his car and struck repeatedly by a panga. Yet, after being briefly arrested, the assailant - Hilton 'Dibaba' Mokubung - was seated among members of the Traditional Council when the two suspended councillors, Mafate and Maakane, attempted resume their positions on 19 October. 'Do not make us angry', warned Mokubung, before they were summarily dismissed. Such, then, are the fruits of the Bapo-Lonmin royalty-to-equity conversion, and the political foundations on which it had been built.

4.5 Towards a Conclusion

Writing in *Mining Weekly* in 2011, Martin Creamer noted that:

[There are] a growing number of South African rural communities who stand to benefit from mining. In several instances, the community are invited to become shareholders in the mining companies that are developing mining prospects. But while the country may be familiar with private ownership, there are instances of acrimonious community ownership Exactly who represents the community and who shares the benefits of resource ownership has been found to be hazy (MW14/01/11).

In this paper, we have shown how this question of legitimate community representation has been at the

heart of the Bapo-Lonmin story, from the first minerals lease in 1969 to the conversion deal of 2014. For long periods, the tribe has been without a functioning and legally recognised administrative authority, in large part due to the internecine conflicts within its ruling elite. This, some have argued, has at times actually worked in the interests of both the mining company and elements within the NWPG, which was entrusted with the fiduciary control of its finances through the D-account system. The situation has been further compounded by endemic uncertainties in the new legislation governing traditional authorities, and, especially, by the haphazard manner of its implementation. A consequence has been almost ceaseless litigation around the question of the legal standing of different parties claiming to act on the tribe's behalf in commercial transactions and court proceedings. But, as we have also shown, the mounting pressures to see through the royalty-to-equity conversion - and hence reconstitute the community as a shareholder in Lonmin - also contributed to a political process of getting a legally recognised traditional authority in place. A crucial part of this was the 'reconstitution' of the Royal Family, as a means of reducing the scope for debilitating political competition, and hence securing a stable foundation on which a new Traditional Council could be built. However, this intervention inevitably favoured one faction over the others, and the equity conversion story is also in part the tale of its rise to power.

Yet, no sooner was the deal complete, and its position seemingly secured, than the familiar questions of legitimate authority would return, including in the courts. This may in part be rooted in continuing struggles between different factions of the tribal elite, and certainly the direct control of the community's finances and heightened business opportunities afforded by the conversion deal have further raised the stakes. However, this is not only the dynamic work.

One of the charges levelled against the suspended councillor, Abbey Mafate, was his alleged involvement in 'illegal' village meetings aimed at 'destabilizing' the (new) traditional authority. But, during our research, we found that there were a plethora of such groups at the village-level who are clear that the infighting within the tribal elite has both paralysed service delivery, and undermined governance structures on the ground. They were, we were told, therefore 'organizing ourselves to ensure that we can do things for ourselves'.¹²¹ But, in addition, they have also doubled up as groups pursuing claims over the mineral-rich land that is currently registered to the tribe, but which, they say, does not

rightfully belong in its hands. This may then go some way to explain the activism of community members like Mafate, and why they believe their interests are not adequately represented in or by the political centre. But it also points to the limitations of focussing exclusively on the tribal elite, whether in terms of administrative interventions or academic explanations. The analysis cannot, therefore, be complete unless the views and struggles from below are taken into account, and it is evident that these are in complex ways rooted in the politics of land. This, however, will have to be the subject of another working paper.

Endnotes

- 1 Notarial Deed of Cession of Mineral Rights between Fritz Ferdinand Jooste and Isaac Meyer Roup (for Transvaal Jade Pty Ltd), 17 January 1964. [PNA: BAO, 52/1093/15/2]
- 2 Founded in 1909 as the London and Rhodesian Mining and Land Company, Lonrho diversified its interests out of mining into a growing range of activities - including newspapers, hotels, distribution and textiles - during the 1960s, under its controversial CEO, Tiny Rowlands. Later described by British Prime Minister Edward Heath as 'the unacceptable face of capitalism', and despite its global reach, the bulk of the conglomerate's profits were still derived from its African assets, with Southern Africa accounting for almost a third in the early 1990s (Vermaak, 1995:66).
- 3 Government Notice 1659 of 1968. These farms, with year of their registration to the Bapo tribe, were: Boschfontein JQ458 (1906), Modderspruit JQ461 (1926), Turffontein JQ462 (1926), Kareepoort JQ407 (1925), Kafferskraal JQ460 (1878), and Wonderkop JQ400 (1927).
- 4 Notarial Lease of Mineral Rights between Minister of Bantu Administration and Development and Transvaal Jade (Pty) Ltd, 23 December 1969. [PNA: BAO, 52/1093/15/2].
- 5 Notarial Lease of Mineral Rights, 23/12/69, above. In addition, the tribe would receive a surface rent of R1000 per month. This had originally been set at R200 per month in terms of a separate surface lease with Transvaal Jade, but was raised in 1968. See: Tribal Resolution of the Ba Po Tribe, 23 July 1968. [PNA: BAO, 52/1093/15/2].
- 6 Notarial Lease of Mineral Rights, 23/12/69, above.
- 7 In addition, the homeland minister also apparently demanded that WPL construct a new mineral processing plant in the Bapo area. See: Bloch, Gross and Associates to the Chief-Mogale, 26/04/99: 'Memorandum: Short discussion with Mr Tony Reilly, Group Legal Advisor, Lonrho South Africa, on 08/04/99'. [Hugh Eiser Submission to the Marikana Commission of Inquiry - hereafter, HES - 513].
- 8 Melman Rosenberg to Tony Reilly, 13/03/02: 'Proposal to amend the royalty formula and related matters in the mineral lease agreement between the Trustee of Bapo-ba-Mogale Tribe and Eastern Platinum Ltd'. [HES 534].
- 9 Notarial Variation of Mineral Lease by Lucas Manyane Mangope in Favour of Western Platinum Limited, 5 March 1987. [HES 'B'].
- 10 Melman Rosenberg to Tony Reilly, 13/03/02, above.
- 11 I.P. Famer to Bloch, Gross and Associates, 27/10/98: 'Re: Eastern Platinum Ltd royalty arrangements with the trustee of the Bapo ba Mogale tribe'. [HES 510].
- 12 Bloch, Gross and Associates to the Chief-Mogale, 26/04/99, above; Lonrho Platinum to Bloch, Gross and Associates, 27/10/98, above.
- 13 *Ibid.*
- 14 It is not known to the authors whether the BMTA explicitly queried or rejected any of these 'objectives', but given that they were presented as conditions for successful negotiations, which soon got underway, it seems to reasonable assume that it acquiesced.
- 15 See for example 'Speech by the Minister of Finance on the Mineral and Petroleum Resources Royalty Bills of 2008', 21 August 2008.
- 16 For a detailed account of this struggle and its outcomes, see Capps (2012b); the track record of BEE in the platinum industry in the years since 2002 is judiciously summarised by Bowman (2016:10-15).
- 17 Work did not begin on the Broad-Based Socio-Economic Empowerment Charter for the Mining Industry ('Mining Charter') until June 2002, and after considerable conflict with the mining industry, its final level of 26% black ownership was not finalised until it was signed off by the President alongside the MPRDA five months later.
- 18 Melman Rosenberg to Mr T. Reilly, Lonmin Plats, 14/02/01: 'Overview of the current status of negotiations between Lonmin Plats and the Bapo ba Mogale Tribe'. [HES 523]; Melman Rosenberg to Tony Reilly, 13/03/02, above.
- 19 Gilbertson was a long-term player in the South African mining industry, while Frandsen was a former J P Morgan executive. They would go on to establish the Pallinghurst/Platmin venture in the Bakgatla-ba-Kgafela traditional authority area. For the track record of its 'community relations', see Mnwana and Capps (2015).
- 20 This was from a 27% stake that Impala had gained in Lonplats in 1989 in exchange for two prime properties - Karee and a further portion of Middelkraal - that it had previously acquired immediately adjacent to the WPL mining area in what was then white South Africa (Vermaak, 1995:67). As part of the Incwala transaction, Lonmin would also buy back the other 9% of Impala's stake in Lonplats, thus becoming fully independent of it, while Impala would gain BEE credits for co-facilitating the new black mining venture.
- 21 The following is a very brief summary, drawing on two primary sources: (i) Melman Rosenberg to A. Jamison, Incwala Resources, 08/03/04: 'Proposed investment

by the Bapo ba Mogale community in Incwala Resources Ltd' [HES 223]; (ii) Eiser and Kantor Attorneys, 30/08/09: 'Bapo-ba-Mogale Community submissions to the Department of Mineral Resources Regarding Incwala Resources Ltd, Incwala Platinum Ltd, and Lonmin PLC, Western Platinum PLC, Eastern Platinum PLC' [HES 334]. For accessible secondary accounts, see also Boyle (2014a) and Swart (2012a).

22 As Swart (2012a) reports, these were: (i) *Andisa Capital*, headed by Ronnie Ntuli, who later founded the Thelo group and became chairperson of the National Empowerment Fund; (ii) *Dema Capital*, a women's empowerment group headed by Zanele Mbatha, and later Incwala CEO; and (iii) *Vantage Capital*, headed by Mutle Mogase. Each was allotted a 16.22% stake in Incwala, while the remaining shares were allocated to the South African Women in Mining Association (0.27%) and the Lonmin Employees Masakhane Trust (1.1%).

23 According to Swart (2012c), all four of the LBT trustees were attorneys from Cliffe Dekker Hofmeyer, which was contracted to Lonmin. On the rewording of the LBT trust deed see Boyle (2014a:68-69) and Swart (2012a).

24 Minutes of the meeting between Bapo ba Mogale tribe and Western Platinum Ltd and Eastern Platinum Ltd held at 11h00 on 22 November 2006 in the Boardroom, Northdowns, 17 Georgian Crescent, Bryanston, Johannesburg. 22/11/06. [HES 540].

25 T.P. Moerane to B. Mills, 27/04/07, above.

26 See in particular Boyle (2014a:68) and Swart (2012d) who are drawn on here.

27 The most significant of these concessions was the 'secret mining' of the tribal farm Wonderkop. Lonmin not only commenced paying royalties on this portion of the Bapo reserve, but issued an R18-million cheque for the portion it had already extracted.

28 A. Ross to P. Moerane and H. Eiser, 02/03/07: 'Action items arising from meeting held on Tuesday 27 February 2007'. [HES 564].

29 This was in terms of the 1987 agreement, see section 2.1 above.

30 Located on the northern bushveld, the bulk of the Akanani exploration project was acquired from the Canadian junior AfriOre by Lonmin in November 2006, with Incwala later buying out AfriOre's BEE partner as part of a larger recapitalisation project. According to Creamer (2008), Incwala's original US\$250-million debt had been reduced to \$100-million prior to the transaction, but it would now be forced to borrow heavily to acquire the 26% stake. Moreover, although Akanani had been projected to come on stream in 2013/2014 and eventually double Lonmin's platinum output, a combination of financial, technical and other challenges would mean that the project remained undeveloped by 2016, at a considerable loss (Bowman, 2016:31).

31 Lonmin's mechanisation programme was driven by CEO Brad Mills, who targeted 50% mechanised production by 2010 (Bowman 2016:26). However, by 2008, the costs at the first shafts that had been

mechanised were double those using conventional methods and output growth was reversed. Mills was ousted by the board in 2008 and the mechanised shafts were converted back to mixed methods.

32 Indeed, so perilous was Incwala's financial position with the repayment deadline looming, that Lonmin was forced to warn its shareholders that it could be called on to pay R930-million in loan guarantees to its third-party funders (Reuters, 2009).

33 Memo from H. Eiser to A. Dlamini and P. Moerane, 06/08/09: 'Incwala'. [HES 412].

34 J. Rocha to Eiser and Kantor Attorneys, 18/09/09: 'Inspection conducted in respect of the Incwala transaction'. [HES 413].

35 Eiser and Kantor Attorneys, 30/08/09: 'Bapo-ba-Mogale Community submissions to the Department of Mineral Resources Regarding Incwala Resources Ltd, Incwala Platinum Ltd, and Lonmin PLC, Western Platinum PLC, Eastern Platinum PLC' [HES 334].

36 'Fronting' refers to the practice whereby white corporations appoint black figureheads or proxies to meet the government's BEE requirements.

37 See paras 7 and 8, Eiser and Kantor Attorneys, 30/08/09, 'submissions', above.

38 Eiser and Kantor Attorneys, 30/08/09, 'submissions', above, pp.14-15.

39 See in particular para 9, Eiser and Kantor Attorneys, 30/08/09, 'submissions', above. The quotation is from Lonmin's Human Capital and External Affairs Executive, Barnard Mokwena, in Swart (2012a), who reports a similar line from other Lonmin representatives.

40 *Ibid*; see also: H. Eiser to P. Bhagatjee, 27/10/09: 'Offer by LEM Trust to Mirror Ball Investments 0019 (Pty) Ltd in terms of the shareholder's agreement in Incwala Resources (Pty) Ltd: Our client the Administrator of the Bapo ba Mogale Traditional Authority'. [HES 437].

41 This may, at least in part, have been the result of the LBT attempting to cast aspersions on the authenticity of Eiser's submission - another seeming example of the apparatus of 'corporate trusteeship' in action. See: J. Rocha to H. Eiser, 02/09/09: 'Acknowledgement of documents received'. [HES 420]; and H. Eiser to J. Rocha, 02/09/09: 'Re: Investigation into Incwala Resources (Pty) Ltd and Incwala Platinum (Pty) Ltd'. [HES 423].

42 This followed an earlier approach from Optimum Coal in September that had quickly fallen through. On the Shanduka offer see: R. Smith to C. Ewing, 20/11/09: 'Indicative non-binding offer to acquire 100% of the issued share capital of Mirror Ball Investments and related shareholder loans and claims, from the shareholders of Mirror Ball Investments'. [HES 478]

43 H. Eiser to the Managing Director, Shanduka Resources (Pty) Ltd, 02/12/09: 'Our client the Bapo ba Mogale community: In re Incwala Resources (Pty) Ltd'. [HES 484].

44 A. Reid to Eiser and Kantor Attorneys, 04/12/09: 'Lonmin Plc / Bapo ba Mogale community'. [HES 04/12/09].

- 45 Eiser and Kantor to A. Reid, 08/12/09: 'Our client the administrator of and the Bapo ba Mogale community: Your client Lonmin Plc'. [HES 491].
- 46 Creamer, M. (2010) 'Lonmin Restructures BEE Partnership to make it Bullet Proof', *Mining Weekly*, 10/05/10. www.miningweekly.com/article/lonmin-platinum-shares-rise-on-earnings-bee-partnership-firmed-up-2010-05-10/rep_id:3650
- 47 The following draws on Eiser, H. (nd) 'Annexure to submission made by the leadership of the Bapo ba Mogale community to the commissioners of the Marikana Commission of Enquiry, to cross-examine Mr M. C. Ramaphosa during phase 1', paras 4.6 - 6.4. See also Boyle (2014a:69-70).
- 48 There were the minority stakes of the South African Women in Mining Association (0.27%) and the Lonmin Employees Masakhane Trust (1.1%).
- 49 The phrase 'value adding partner' was Iain Farmer's, then Lonmin CEO, see Creamer (2010) above.
- 50 On the Marikana Commission of Inquiry, see the critical reflection of its Senior Researcher: Kally Forest (2015) 'Marikana Commission: unearthing the truth or burying it?' *SWOP Working Paper No. 5*, Society, Work and Development Institute (SWOP), University of the Witwatersrand. http://www.raith.org.za/docs/KallyForrest_SWOP-Forrest-Report-FINAL.pdf.
- 51 Released to the Marikana Commission by advocate Dali Mpofu in October 2012, Ramaphosa's emails to various Lonmin executives on 15 August 2012 revealed how just far he was intervening on behalf of the mining company with senior ANC figures, in the state and the party, the National Union of Mineworkers and the Chamber of Mines. These included Police Minister Nathi Mthethwa, who he urged to come down hard on the strikers, and Mineral Resources Minister, Susan Shabangu, whose 'silence and inaction' were, he told her, 'bad for her and government'. This, argued Mpofu, on behalf of the injured and arrested mineworkers, was evidence of Ramaphosa's pivotal role in facilitating the 'toxic collusion' between Lonmin and the state security apparatus that not only led directly to the massacre, but was 'near as one will get to state-sanctioned murder'. For a concise summary, from which these quotations are taken, see: Hosken, G. (2012) 'Marikana inquiry shown Ramaphosa emails', *The Times*, 24/10/12: <http://www.sowetanlive.co.za/news/2012/10/24/mar-ikana-inquiry-shown-ramaphosa-emails>. Peter Alexander (2016) presents a more detailed account in 'Marikana Commission of Inquiry: From Narratives Towards History', *Journal of Southern African Studies*, 42:5, pp. 815-839.
- 52 Eiser himself appealed to the Marikana Commission on behalf of the Bapo-ba-Mogale for the opportunity to cross examine Ramaphosa during Phase 1 of the inquiry. The main issue raised by his submission was the 'unlawful' waiving of the Bapo's pre-emptive rights to the majority BEE Incwala stake in favour of Shanduka, paving the way for the May 2010 deal. However, after an exchange of emails, this was rejected by the Commission in June 2013 on the grounds that it was 'not relevant in respect of any of the topics' to be covered in Phase 1 in June 2013. See: <http://sa-airports.co.za/bapo-accuses-ramaphosa-over-marikana-bee-deal/>
- 53 And nor did one come. By the repayment deadline of December 2015, Shanduka had still failed to clear its Lonmin debt, which now reportedly stood at R5.5-billion due to the rand's depreciation and interest - and this despite the receipt of ordinary dividends, advance dividends and a preference share subscription. Consequently, some \$297-million of the loan was written off that financial year, leaving an outstanding amount of \$102-million. Such was the financial cost of its Shanduka gamble. Khuzwayo, W. (2016) 'How ailing Lonmin lost billions to Shanduka', *Business Report*, 03/03/16. <http://www.iol.co.za/business/companies/how-lonmin-lost-billions-to-shanduka-1992607>.
- 54 On this, and Ramaphosa's role in the Marikana massacre itself, see: Alexander, P. (2016) 'Cyril Ramaphosa's Marikana massacre "apology" is disingenuous and dishonest'. *The Conversation*. 11/05/2017. <https://theconversation.com/cyril-ramaphosas-marikana-massacre-apology-is-disingenuous-and-dishonest-77485>.
- 55 Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (September 2010).
- 56 Landman J 2010, *Mogale v Maakane and Others*, North West High Court (Mafikeng) Case No. 1106/2010, para 29.
- 57 INT30: Interview with Vladimir Mogale, conducted by Gavin Capps, Bapong, 21/03/2014; INT31: Group interview with Royal Family, conducted by Gavin Capps, 22/03/2014; Landman J 2010, para 29.
- 58 INT30; INT31.
- 59 Landman J 2010, para 31.
- 60 The remaining 60% would be appointed by the 'senior traditional leader' (chief), who would also automatically chair the traditional council.
- 61 INT30, INT31.
- 62 'Captured' quite literally, in fact: 'Kgosi Bob was taken out of his home [by one of the main perpetrators], very far away where nobody knew and stayed there for something like four weeks or two months ... [in fact] the people were very happy to see the Kgosi coming in [to the community meeting] since we had just reported that we didn't know where [he] was'. But 'he was influenced by the wrong people who forced him to sign those papers, he was pushed' (INT31). The Chief's principle 'associates' are named as the second to fifth respondents in *Sithole AJ 2008, The Bapo ba Mogale Traditional Authority v Mogale and Others*, North West High Court (Mafikeng) Case No. 800/2008.
- 63 Legodi J 2010, *The Traditional Authority of the Bapo ba Mogale Community v Kenoshi and Others*, North

Gauteng High Court Case No. 31876/2010, para 53.1, referring to the 2008 NHWC case.

Sithole AJ, 2008.

Report to the Traditional Council of the Bapo-ba-Mogale, Wednesday 18 June 2008, p. 9.

Premier's Notice No.1, signed by the Premier on the 20 May 2008 and published in the Provincial Gazette No. 6514 on 15 July 2008, 'Reconstitution of Traditional Councils in Accordance with the North West Traditional Leadership and Governance Act No. 2 of 2005'. This listed the 30 members of the Bapo Traditional Council put forward in October 2005, only seven of which were women and hence, as noted above, three short of the one-third gender representation requirement.

Chief State Law Advisor in the Office of the Premier to Lingfelder and Baloyi Inc, 09 June 2010.

The following draws on INT30, INT31 and INT32: Interview with former Administrator conducted by Gavin Capps, Johannesburg, 03/042014.

This R18-m figure has been verified by a forensic audit of the Bapo D-Account (see Boyle, 2016b), of which more below.

The phrase is Judge Landman's, cited in de Souza (2014:47).

Chief State Law Advisor in the Office of the Premier to Lingfelder and Baloyi Inc, 09 June 2010.

Legodi J 2010, para 9.

PDLGTA (2012) 'Department Sets the Record Straight on Bapo ba Mogale', press release by the North West Provincial Department of Traditional Affairs, 28 February 2012.

The events that followed have been well rehearsed by Manson (2013), Claassens and Matlala (2014), and de Souza (2014), on who we draw here. However, it should be noted that Manson (2013) - and, following him, Claassens and Matlala (2014) - mistakenly claim that Kenoshi was the first Administrator deployed by the NWPG, who then reinvented himself as the CEO of BMTA. That this was not the case is made clear by Legodi J 2010, para 7 - a judgment both sets of authors cite.

Landman J 2010, para 20.

Legodi J 2010, para 44.

Legodi J 2010, para 39.3.4. For an elaboration of this point, see Claassens and Matlala (2014:133).

Legodi J 2010, paras 45 and 53.

INT31.

Unfortunately, efforts to secure interviews with the relevant officials in the NWPG, both current and former, though Capps' work for the Marikana Commission of Inquiry proved unsuccessful, forcing a reliance on the available secondary sources, which are drawn on here.

The NWPG repeatedly failed to respond to document requests by the PP, and would not allow forensic investigators to access financial records. By 2014, Mandonsela had been forced to issue subpoenas,

but halted the legal process when the incoming Premier, Supra Mahumapelo, pledged full support after the May elections (Stone 2014a). Yet, this was not forthcoming (Claassens, 2016), and she continued to battle to get information from the NWPG all the way up to the release of her preliminary findings in July 2016 (PP, 2016). Madonsela's efforts to widen the investigation to cover the D-account *tout court* fared even worse. This was emphatically rejected as beyond her mandate by then Premier Thandi Modise, and although the incoming Mahumapelo again pledged his help, the national Treasury refused her request for additional financial support. With regard to Scopa, Modise would go so far as to question the need for the inquiry altogether, on the grounds that she was initiating her own investigation - at a budgeted cost of R60-m for the national fiscus - but a year on it would emerge there had been no probe at all (Stone 2014b). When she eventually did appear at a Scopa hearing in September 2013, Modise could not explain how D-account worked, while the PDF would only provide financial records for 2010-2011, rather than the full nineteen-year period under investigation (Stone 2013b). Our thanks to Gregory Maxaulane who attended the Scopa hearings in Brits with Stanley Malindi for MARTISA.

At the time of writing, the new Public Protector - Advocate Busisiwe Mkhwebane, who took over from Mandonsela in October 2016 - has yet to deliver the final report to the community, which her predecessor had promised for that December. However, it is reported that, on visiting Bapong in March 2017, Mkhwebane promised it would be released the following month. This has not happened. Nevertheless, according to *Business Day* 'it is now expected to be released in June' (BD12/05/2017).

These four were, by year of appointment: Julius Moloto (2010), Thabo Lerefolo (2011), Oupa Monamodi (2012), and Elias Mdaka (2013). So, five administrators in total when Dlamini (2009) is included.

INT30, INT31 - written from their perspective, the following primarily draws on these interviews, and all in-text quotations are taken from them, unless otherwise indicated.

INT32.

A point strongly supported by the former Administrator we interviewed, at least with respect to his predecessors (INT32): 'When it comes to contracts, the administrators use their discretion ... They have the power to appoint the contractor, who emails the invoice and contract. The administrator then authorises the payment ... The previous administrators made decisions without letting the community have a say. They implemented projects without proper decisions, that's why we have the issue with D-account'.

INT32, see also PP (2016).

MARTISA project field-report on second Scopa hearing in Brits 26 September 2013, Stanley Malindi and Gregory Maxaulane.

A problem again highlighted by the former

- Administrator (INT32).
- 90 See: http://www.bapo.co.za/royal_family.html.
- 91 The following draws on a much fuller account and contextualisation set out in Chapter 4 of Malindi (2016).
- 92 This history, and the role of government officials in it, is detailed in Chapter 4 of Malindi (2016).
- 93 INT31; INT32; A request to interview the Director through Capps' work for the Marikana Commission of Inquiry was declined.
- 94 In addition, said his Profile, Khunou had acted as an expert witness for the State in one of the pivotal cases - *Tongoane and Others v Department of Agriculture and Land Affairs and Others* (Cases No.s 11678/06 and CCT.100/2099) - in the community-led Constitutional Court challenge to the Communal Land Rights Act (11 of 2004); and provided research support to the Bakgatla Chieftaincy on the ownership and administration of 'its' tribal property, again a subject of contest by community groups. For more detail of Khunou's involvement in *Tongoane* and what was at stake, see Weeks and Claassens (2012); and for the community struggles around tribally-registered land in Bakgatla, Mswana and Capps (2015).
- 95 INT30; INT31.
- 96 Indeed, as one community member put it to us in a group interview, it seemed incredulous to believe that 'a conflict such as the one within the Royal Family can be resolved by further dividing them through recommendations that are using a particular version of custom and tradition to favour one group over another' (INT24: Fieldwork interview conducted by Stanley Malindi, Wonderkop Village, 08/04/2014).
- 97 INT32.
- 98 The January 2013 start date is taken from Nthontho's online profile:
<http://www.bapo.co.za/BBMI/board.html>.
- 99 http://www.bapo.co.za/royal_family.html.
- 100 Apparently of Mosotho origin, and allegedly of questionable immigration status, Nthontho's professional background was in Finance and Accounting; and, if he had a prior Bapo connection, most of our informants were unaware of it. Vladimir Mogale would, however, later state that he had been 'headhunted', presumably for the 'strategic adviser' role. On this and Nthontho's reported relationship with Mogale and his father see: Timse (2016), and also Bloom (2016) and Boyle (2014a:67).
- 101 INT31.
- 102 Meeting Notice and Agenda, issued by the Office of the Kgosi, Bapong, 21 February 2014.
- 103 M. Thlape, MEC for Local Government and Traditional Affairs to Kgosi B.E. Mogale, 'Re: Bapo ba Mogale Community Administration: Section 10 of the North West Traditional Leadership Act No. 2 of 2005', 24 March 2014.
- 104 See: <http://www.bapo.co.za/governance.html>.
- 105 Also confirmed by INT32.
- 106 INT30 and INT31 - unless otherwise indicated, all quotations that follow are taken from these interviews.
- 107 This was also confirmed by the Administrator that we interviewed, INT32.
- 108 INT30.
- 109 The following draws on separate reports by Stanley Malindi and Brendan Boyle, who both attended meeting.
- 110 Lonmin Regulatory Release: 'Acquisition and Proposed Issue of Equity', 30 July 2014; DMR Media Statement: 'Minister Ramatlhodi Welcomes Lonmin-Bapo ba Mogale Agreement', 30 July 2014.
- 111 Steyn, L. (2014) 'Lonmin Inks New Deal with Bapo', 08 August 2014: <https://mg.co.za/article/2014-08-08-lonmin-inks-new-deal-with-bapo>.
- 112 McKay, D. (2010) 'Lonmin Nudges BEE to 21.3% in Bapo Deal', *MiningMX*, 30 July 2014: <http://www.miningmx.com/news/platinum/10894-lonmin-nudges-bee-to-21-3-in-bapo-deal/>; Lonmin: 'Result of General Meeting', 11 September 2014.
- 113 Steyn, L. (2014) 'Lonmin Inks New Deal with Bapo', 08 August 2014: <https://mg.co.za/article/2014-08-08-lonmin-inks-new-deal-with-bapo>.
- 114 The following draws on two reports by Natalie Greve in *Mining Weekly*, on 17 March and 11 June 2015; an interview with the spokesperson of Serodumo Sa Rona in the *Madibeng Times*, 23 September 2015, and our own conversations with him; and internal documents provided the Legal Resources Centre, which is representing the Community groups in the review application - this, however, is our own interpretation.
- 115 Unless otherwise indicated, full references for the following can be found in Chapter Four of Malindi (2016).
- 116 Steyn, L. (2014) 'Lonmin Inks New Deal with Bapo', 08 August 2014: <https://mg.co.za/article/2014-08-08-lonmin-inks-new-deal-with-bapo>.
- 117 Faku, D. (2016) 'Sparks Fly Over Lonmin's BEE Deal', *Business Report*, 04 August 2016.
- 118 Timse, T (2016) 'Lonmin's 'Bapo Deal' in Crisis', *Mail and Guardian*, 19 October 2016.
- 119 The following draws on Bloom (2016) and Boyle (2016bs).
- 120 Further details of the incident can be found in a statement released by the campaigning public-information NGO Right to Know: <http://www.r2k.org.za/2016/07/23/r2k-alarmed-at-threats-to-madibeng-fm-staff/>. Our thanks to Micah Reddy for drawing our attention to this.
- 119 INT20: Fieldwork interview conducted by Stanley Malindi, Segwaelane Village, 04/04/2014.

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