

# The chief, the mines and the lost Bakgatla billions

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After two years of investigations of the flow of billions of rands into and out of the Bakgatla ba Kgafela community, the work of the Baloyi Commission of Inquiry may come to nothing. Since the report of the commission was released at the end of August, showing how Chief Nyalala Pilane presided over the mismanagement of the community's considerable wealth, the chief has apparently re-positioned himself in a newly created communal property association that is now asserting control over the Bakgatla villages.



An estimated R5bn in income to the Bakgatla community cannot be accounted for. Archive photo: Ashraf Hendricks

Evidence before the Baloyi Commission revealed that members of the Bakgatla Ba Kgafela traditional community, of Moruleng near Rustenburg in the North West Province, knew for almost two decades that their platinum-rich land was creating immense wealth. What they didn't know, they told the commission, was how much, for whom and where it went. They could see Chief Pilane shaking the hands of important men from Anglo American Corporation and from the ANC, and once a year vague references to spectacular mining deals and unfathomable wealth coming into the community coffers were made at the kgotha kgothe (community meeting). A World Cup soccer stadium was built, as was a shopping mall and huge boulevards leading up to the Chief's palace. But as the owners of that land, community members had no insight into how decisions were made or profits spent.

At the commission, Chief Pilane denied allegations that he ran the community's affairs alone and without accountability. Instead, he described selfless service to the community and significant mining deals struck on behalf of the Bakgatla. The commission, in its report, accepted his part in creating the enormous wealth, but found he had evaded all accountability. Indeed, evidence presented showed how Chief Pilane used the community's wealth (R47m in legal costs in one year) to recruit the best legal representation to get every legal challenge by community members kicked out of court, and how he obtained interdicts against those attempting to organise resistance.

It was only when three of the matters reached the Constitutional Court, that Chief Pilane met his match. On all three occasions, the highest court in the land found for community members against their leader. But the government departments tasked with ensuring that the community's resources are governed in their best interests, could not be moved to act against him despite community members' pleas to them, to the public protector and to the police.

But when a commission of inquiry into traditional leadership disputes in the North West found, in 2016, that Chief Pilane was not the rightful leader of the Bakgatla ba Kgafela, the premier finally decided to intervene. However, instead of

implementing that commission's findings, which would have meant Chief Pilane would lose his grip over the massive wealth of the community, the premier instituted yet another commission of inquiry to investigate how the rightful leader of the community should be determined.

## Baloyi Commission

But the terms of reference of the new commission, chaired by Senior Counsel Sesi Baloyi, included an investigation into the flow of money in and out of the community coffers. Over almost two years, members of the Bakgatla ba Kgafela community flocked day after day to hearings of the Baloyi Commission held at the Rustenburg Civic Centre, listening to expert forensic evidence on flows of money, and seeing their leaders being cross-examined about how they were – or were not - accountable to their constituency.

The Mineral Resources Development Act of 2002 required mining companies to have at least 26% black ownership by 2014. Chief Pilane exercised control over the land atop platinum assets that Anglo coveted. What is more, he had received legal advice that the Anglo mining already taking place on some Bakgatla land, was illegal. He had a powerful bargaining tool. As a result, Anglo Platinum formed a strategic black economic empowerment partnership with the Bakgatla ba Kgafela through a series of joint venture agreements. “The transactions yielded”, the Baloyi Commission found, “a gross income of well over R3bn” between 2006 and 2015. The total income of the community over this period is estimated to be close to R5bn.

But by December 2016, the community was all but bankrupt.

The Baloyi Commission was at pains to uncover how this happened. However, as its report noted, “due to the absence of complete audited accounts and financial statements and proper and complete records”, the commission was unable to determine precisely where the money went.

“[O]ur investigation was hampered by the failure and a perceived reluctance of Nyalala Pilane to fully disclose relevant documents [...] We cannot over-emphasise that this conduct will only serve to feed continuing suspicion about the administration of the financial affairs of the community and is most unsatisfactory for persons who control the assets of the community in a fiduciary capacity.”

Two key questions the commission needed to answer were: Where did the estimated R5bn go? And how could it have happened within a legal framework designed to protect the assets of the community?

The commission found that hundreds of millions of rands were lost through “loans” to companies controlled by relatives and close associates of the Chief. Unsurprisingly, the loans were never repaid. Other major beneficiaries of the money were “consultants”, including unregistered “financial advisors” who earned nearly R1bn in total for undefined services. Projects like the World Cup stadium and shopping centre also cost a lot of money, without raising any significant income.

Evidence before the commission also suggested that the mining deals brokered by Chief Pilane were not nearly as lucrative

as advertised. The deals were routinely structured in such a way that much of the income went into repaying loans that had facilitated the deal in the first place.

An amount of more than R2bn remained unaccounted for, even after two years of Commission investigations, and the Baloyi report urges further investigation into these amounts.

So how could this have happened in a constitutional democracy?

## **Accountability**

Evidence before the commission showed that Chief Pilane effectively managed to evade legal accountability managing to place himself, and one or two close family relatives, in all key positions. He was at the same time leader of the community, chairperson of the traditional council, member of the board of the community companies, and the community representative on companies in which the community had shares. So, if the community entered into a deal with one of these companies, he was both the person agreeing to it on behalf of the community and the one pushing for the deal on behalf of the relevant company. While he denied before the commission that this created any conflict and claimed that he stepped into all these roles because no-one else wanted the responsibility, he obviously had the opportunity to facilitate any deal he wished, and was accountable only to himself.

As chair of the traditional council, the structure mandated by law to “administer the affairs of the community in terms of customary law”, he ensured that members of the council never had enough information to ask real questions about the flow of the money and even went as far as requiring members of the council to sign non-disclosure agreements barring them from discussing what they heard at the council with anyone – including with the community members they were meant to represent.

This meant that, whether as community members or as shareholders in the community companies, Bakgatla people had no way of knowing what decisions were made over their resources. The commission found that Chief Pilane never “sought to involve other members of the traditional council or to empower them with information to effectively oversee and discharge their fiduciary duties as custodians of the assets of the community. Only he has knowledge of the activities of the companies. However, he does not account or report to the traditional council about the activities or cause the persons responsible for the companies to report to the traditional council and to the community”.

Even more serious was the collective failure of government structures to protect the community’s wealth. Twenty-five years into democracy, there is still no legislation to replace the colonial and Bantustan model of communally-owned land held in trust by the government. That model places a duty on the minister of rural development and land reform to ensure that any decision that impacts on the land rights of community members, is taken with their consent. In that duty, the minister failed dismally. In 2018, Groundup reported that the Constitutional Court found in favour of one group of Bakgatla land rights holders who challenged such a decision because it did not include their consent.

At the same time, the old Bantustan model which requires communities to deposit all their income into an account controlled and regulated by government, persists. The North West provincial government is now in charge of that account. Chief Pilane, however, moved all significant income from that account, and most of the money was held in trust accounts run by well known South African law firms. That Chief Pilane had done so was public knowledge. Yet the Department of Traditional Affairs, the premier, and the auditor-general legally required to audit the books of traditional communities, did nothing to stop it. Complaint after complaint from community members went nowhere. As for the law firms, most seem to have turned a blind eye, although the Baloyi report does refer to a letter from Werksmans attorneys to Chief Pilane in 2008 recording that he had “instructed” the law firm that it was “lawful” for them to issue payments on behalf of the community rather than depositing the money into the government-regulated account as is legally required.

As for the mining companies and financiers who entered into deals with Chief Pilane and the Bakgatla, they were at best guilty of ignoring major red flags.

Sadly, it appears that history is about to repeat itself. Community members report that a newly constituted communal property association, with Kgosi Pilane as an ex officio member, has taken control of the villages and their assets. Early in October, the acting CEO of the Pilanesberg Global Resort, Gill Maleka, confirmed this and told ENCA of new plans to implement Chief Pilane's "Master Plan" to turn Moruleng into a post-apartheid world-class city. Asked about the corruption and mismanagement of the Bakgatla's funds by Chief Pilane, Maleka said: "Everyone has their own perceptions. There is not one person on this earth without an error. Some will overemphasise the error, others will overemphasise the positive ...".

## ABOUT THE AUTHOR

Willem Wicomb was on the Legal Resources Centre's legal team that represented the Land Access Movement of South Africa (LAMOSA) as an amicus at the commission.

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