



IN GOOD COMPANY?

2ND
EDITION

CONVERSATIONS AROUND TRANSPARENCY
AND ACCOUNTABILITY IN SOUTH AFRICA'S
EXTRACTIVE SECTOR

IN GOOD COMPANY? 2ND EDITION

CONVERSATIONS AROUND TRANSPARENCY
AND ACCOUNTABILITY IN SOUTH AFRICA'S
EXTRACTIVE SECTOR

Published by the Open Society Foundation for South Africa
2nd Floor, Lobby 2, Park Lane, c/o Park and Alexandra Roads, Pinelands, 7405, Cape Town, South Africa
www.osf.org.za

© Open Society Foundation for South Africa
First published 2017
All rights reserved.

ISBN 978-1-928332-14-5

Picture credits: © Adobe Stock: cover image, p. IV, p. VI, p. 4, p. 110 and p. 118; © Gallo Images/Peter Chadwick: p. X; © Oupa Nkosi: p. 8, p. 52, p. 90 and p. 114; © Gallo Images/Getty Images/Kevin Sutherland images: p. 26 and 108; © Centre for Environmental Rights (CER) p. 36; © Gallo Images/AFP/Mujahid Safodien images: p. 64, p. 72, and p. 76; © Gallo Images/Getty Images/Waldo Swiegers: p. 102.

Copy-edited by John Henderson
Conceptualised, designed and produced by COMPRESS.dsl | www.compressdsl.com

CONTRIBUTORS

Fola Adeleke, Senior Researcher, Mandela Institute, University of the Witwatersrand

Glenn Ashton, University of Stellenbosch

Saliem Fakir, Head: Policy and Futures Unit, WWF

Catherine Horsfield, Programme Head: Mining, Centre for Environmental Rights

Tracy Humby, Associate Professor, School of Law, University of the Witwatersrand

Robert D Krause, Researcher, Centre for Applied Legal Studies,
University of the Witwatersrand

Hanri Mostert, Department of Private Law, University of Cape Town

Tholakele Nene, Associate, Oxpeckers Investigative Environmental Journalism

Thelma Nkosi, Mining and Environmental Justice Community Network of South Africa

Thabiso Nyapisi, Researcher, Land and Accountability Research Centre,
University of Cape Town

Joanna Pickering, Researcher, Land and Accountability Research Centre,
University of Cape Town

Suzanne Powell, Attorney, Centre for Environmental Rights

Saul Roux, Legal Campaigner, Centre for Environmental Rights

Masiwa Rusare, Grassroots Programme Specialist, African Monitor

Louis Snyman, Attorney, Mining and Environmental Justice Programme,
Centre for Applied Legal Studies, University of the Witwatersrand

Cheri Young, Department of Private Law, University of Cape Town



CONTENTS

Abbreviations and acronyms	vi
Introduction	1
Mining, sustainability and waste: Lessons from the past	5
Hanri Mostert and Cheri Young	
An example of the impacts of adopting the 'One Environmental System' of mining governance: Some lessons in environmental governance from MRC's Tormin Mine	15
Glenn Ashton	
A community left in the dark: The case of Mapela	
Struggles for transparency and accountability in South Africa's platinum belt	27
Joanna Pickering and Thabiso Nyapisi	
Why no-go areas for mining are in everybody's interest: Learnings from Zero Hour	
Poor governance of mining and the violation of environmental rights in Mpumalanga	37
Suzanne Powell, Saul Roux and Catherine Horsfield	
Roles and responsibilities in the mineral social benefit system: Genuine confusion or passing the buck?	53
Louis Snyman	
Authors: The silent actors in the social and labour plan system	65
Robert D Krause	
The future of mining in South Africa: From labour intensity to machine intensity	77
Saliem Fakir	
Access-to-information challenges in the Department of Mineral Resources	91
Tholakele Nene	
Understanding and preventing illicit financial flows in South Africa: How far have we come, and what lies on the road ahead?	103
African Monitor	
Can ownership, operational and financial transparency enhance sustainable mineral development in South Africa?	111
Tracy Humby and Fola Adeleke	
Investing in African Mining Indaba: Reflection piece 1	119
Suzanne Powell	
Investing in African Mining Indaba: Reflection piece 2	123
Thelma Nkosi	

ABBREVIATIONS AND ACRONYMS



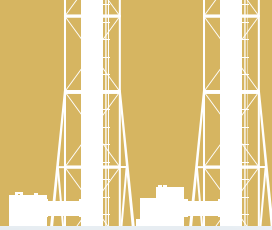
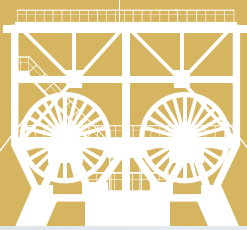


ACC	Amadiba Crisis Committee
AFU	Asset Forfeiture Unit
AMD	acid mine drainage
ANC	African National Congress
API	Application Program Interface
ASX	Australian Stock Exchange
AWARD	Association for Water and Rural Development
BBBEE	broad-based black economic empowerment
BEE	black economic empowerment
BEPS	base erosion and profit shifting
BFAP	Bureau for Food and Agricultural Production
BRICS	Brazil, Russia, India, China, South Africa
CALS	Centre for Applied Legal Studies
CCRI	Community Conservation Resilience Initiative
CEO	chief executive officer
CER	Centre for Environmental Rights
CIO	chief information officer
CME	compliance monitoring and enforcement
ComSA	Chamber of Mines of South Africa
CSIR	Council for Scientific and Industrial Research
CSO	civil society organisation
CSR	corporate social responsibility
DDG	deputy director general
DEA	Department of Environmental Affairs
DEA&DP	Department of Environmental Affairs and Development Planning (provincial)
DMR	Department of Mineral Resources
DWS	Department of Water and Sanitation
EAP	environmental assessment practitioner
EIA	environmental impact assessment
EIR	environmental impact assessment report
EMP	environmental management programme
EPCM	engineering, procurement, construction and management
EU	European Union
FAISA	Financial Advisory and Intermediary Services Act
FIC	Financial Intelligence Centre
FICA	Financial Intelligence Centre Act
FSB	Financial Services Board

ABBREVIATIONS AND ACRONYMS/CONTINUED

GDP	gross domestic product
GHG	greenhouse gas
HDP	historically disadvantaged person
HEJN	Highveld Environmental Justice Network
I&Aps	interested and affected parties
ICMA	Integrated Coastal Management Act
IDC	Industrial Development Corporation
IDP	integrated development plan
IFF	illicit financial flow
IPLRA	Interim Protection of Informal Land Rights Act
IRFA	Intergovernmental Relations Framework Act
JSE	Johannesburg Stock Exchange
LED	local economic development
MACUA	Mining Affected Communities United in Action
MD	managing director
MEC	minerals-energy complex
MEJCON-SA	Mining and Environmental Justice Community Network of South Africa
MLDPG	Mpumalanga Lake District Protection Group
MNC	multinational corporation
MPRDA	Mineral and Petroleum Resources Development Act
MRC	Mineral Resources Commodities
MSA	Municipal Systems Act
MTPA	Mpumalanga Tourism and Parks Authority
MWP	mine works programme
NAP	National Action Plan
NDP	National Development Plan
NEMA	National Environmental Management Act
NEM: AQA	National Environmental Management: Air Quality Act
NEM: BA	National Environmental Management: Biodiversity Act
NEM: ICMA	National Environmental Management: Integrated Coastal Management Act
NEM: PAA	National Environmental Management: Protected Areas Act
NEM: WA	National Environmental Management: Waste Act
NPO	non-profit organisation
NSFAS	National Student Financial Aid Scheme
NWA	National Water Act
OEM	original equipment manufacturer
OGP	Open Governance Partnership

OSF-SA	Open Society Foundation for South Africa
PA	professional assistant
PAIA	Promotion of Access to Information Act
PAR	participatory action research
PAs	protected areas
PE	protected environment
PGM	platinum-group metal
R&D	research and development
RBH	Royal Bafokeng Holdings
RBN	Royal Bafokeng Nation
SAMBF	South African Mining and Biodiversity Forum
SAMRAD	South African Mineral Resources Administration System
SANBI	South African National Biodiversity Institute
SAPS	South African Police Service
SARS	South African Revenue Service
SDF	spatial development framework
SIA	social impact assessment
SIMS Report	State Intervention in the Minerals Sector Report
SLP	social and labour plan
SPLUMA	Spatial Planning and Land Use Management Act
SSA	sub-Saharan Africa
TKLB	Traditional and Khoi-San Leadership Bill
TLGFA	Traditional Leadership and Governance Framework Act
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UN	United Nations
US	United States of America
USD	US dollars
VAT	value-added tax
WEF	World Economic Forum
WTO	World Trade Organization
WUL	water use licence
WWF-SA	World Wide Fund for Nature South Africa





IN GOOD COMPANY? 2ND EDITION CONVERSATIONS AROUND TRANSPARENCY AND ACCOUNTABILITY IN SOUTH AFRICA'S EXTRACTIVE SECTOR



Introduction

In early 2016, well-known community activist and chairperson of the Amadiba Crisis Committee (ACC) in the Eastern Cape, Sakhosphi 'Bazooka' Rhadebe, was horrifically murdered. His killers remain unknown and his family still has not had closure.

Bazooka and the ACC have for over a decade been engaged in a battle to prevent a controversial titanium mining project by an Australian mining company, in the Xolobeni community, calling instead for the revival of a sustainable eco-tourism venture that supports communities. This struggle by communities to have a greater say over decisions by government and the private sector around where and when to mine, is evident elsewhere in the world too, including in Brazil, Peru, the Philippines, Ghana and elsewhere.

Community opposition to multinational or local-led mining projects is perhaps as old as mining itself. Ecological degradation, air and water pollution, a decimation of cultural heritage, impact on agricultural production, resource looting, physical displacement and land loss are often some of the reasons for opposition to mining activities.

Globally, the extractive sector is increasingly under pressure to minimise negative environmental and social impacts and contribute to the sustainable development of communities most affected by mining operations. This is also true in South Africa, where many mine-affected communities often face violent protest, high levels of unemployment, worsening crime, poor service delivery and negative environmental impact due to mineral extraction. While the extractive sector has historically contributed significantly to economic development, negative social and environmental impacts of such operations are now emerging through documented evidence.

As with the first edition of *In Good Company?* published in 2015, our second edition is again a platform for sharing varied perspectives on South Africa's extractive sector, particularly mining. In this edition of the publication, we benefit from the insights of



**AS PART OF OUR PORTFOLIO
ON THE EXTRACTIVE SECTOR,
THIS YEAR OSF-SA WILL BE
SUPPORTING 'MINING DIALOGUES'
INTENDED TO OPEN A SPACE FOR
CONSTRUCTIVE ENGAGEMENT
AMONG STAKEHOLDERS ON
VARIOUS TOPICS RELATED TO
MINERAL GOVERNANCE.**

ECOLOGICAL
DEGRADATION,
AIR AND WATER
POLLUTION, A
DECIMATION OF
CULTURAL HERITAGE,
IMPACT ON
AGRICULTURAL
PRODUCTION,
RESOURCE LOOTING,
PHYSICAL DISPLACE-
MENT AND LAND
LOSS ARE OFTEN
SOME OF THE REASONS
FOR OPPOSITION TO
MINING ACTIVITIES.

highly regarded authors who, over decades, have worked on issues related to mining sustainability and governance.

The articles cover several issues, including the externalisation of environmental costs, waste management, systematic exclusion of affected communities from decision-making processes related to mining projects, the role of mining in local economic development and challenges with the social and labour plan system, access to information, and how mechanisation will impact the industry.

Some of the questions that we have been grappling with are:

1. How much longer can the world continue to rely on mining as a driver for economic development?
2. How best do we support mine-affected communities in South Africa to effectively participate in mineral governance and to have a say in mining projects that may affect them?
3. To what extent has mining meaningfully contributed to better living standards?
4. Is the notion of 'sustainable mining' inherently contradictory?
5. How do we support sustainability in the context of mining?

As part of our portfolio on the extractive sector, this year OSF-SA will be supporting 'mining dialogues' intended to open a space for constructive engagement among stakeholders on various topics related to mineral governance. While we know that this in and of itself will not solve the grave sustainability challenges outlined in this publication, we believe that open dialogue is a good starting point.

A lot of people made this publication possible: Our thanks go to the authors for their excellent inputs, and to COMPRESS.dsl for the publication design.

We hope that this work will go some way in contributing to a solid body of knowledge regarding the management of the extractive sector in South Africa, and assist the government and communities in their quest for sustainable extraction for the benefit of the country, as envisaged in the Mineral and Petroleum Resources Development Act.

Fatima Hassan
Executive Director, OSF-SA

Ichumile Gqada
Senior Researcher, OSF-SA





MINING, SUSTAINABILITY AND WASTE: LESSONS FROM THE PAST

Hanri Mostert and Cheri Young



Introduction

It is said that ‘sustainable mining’ is an oxymoron: extraction of natural resources necessarily involves destructive and potentially harmful activity that creates more waste¹ than wealth – not to mention other external harms of social and/or environmental concern. In striving towards sustainability, the mining sector is made out to be a villain, a perpetrator of grand proportions.

When trying to assess the true costs of mineral extraction over the past 150 years, it is indeed clear that even quantification itself is difficult, because damage becomes apparent so very long after actual extraction. Quantification is furthermore difficult because the nature and extent of the environmental damage over many decades is still uncertain. The present can only give us a glimpse into the disastrous situation awaiting us in the future.

Take acid mine drainage (AMD) for instance, arguably one of the most insidious environmental consequences of South Africa being a high mining-dependency country. When sulphuric acid is released from pyrite and other mined minerals, and then exposed to oxygenated water,² complex bacterial and other microbial processes are triggered. This causes sulphuric acid (amongst other things) to be dissolved into groundwater, rivers and streams,³ making AMD one of the leading causes of water pollution in South Africa.⁴ The problem is ongoing: as long as rainwater seeps through mine dumps, and into our groundwater table, the AMD process will continue to poison our water resources.⁵

Another example is silicosis, an incurable lung disease that frequents our mining communities specifically, and to such an extent that, in South Africa, this illness is classified as a public health issue. It is estimated that one out of every two gold miners may have contracted the disease,⁶ which is caused by the inhalation of silica dust.

Both AMD and silicosis represent the consequences of mining’s biggest by-product, namely waste. Waste can be understood broadly as that which we find valueless and discardable in the course of going about our lives. But even though the by-products of

our activities may have no positive value for us, they may hold significant negative value for others and indeed for society at large. This begs the question of who must bear the cost of waste-producing mining activity.

Who bears the cost?

If mining is so disastrous to our lives and our world, why is it such a supremely viable commercial enterprise? It is because society has internalised the actual costs of the sector, including the costs to the environment, communities and society more generally. The interests of promoting society, preserving nature and boosting the economy will always be at odds with one another. These interests cannot be simultaneously maximised and reconciled. Parts of the environment are – and will continue to be – destroyed in order to promote economic and social development. The corollary is also true: absolute preservation of the environment will negatively impede development, both societal and economic. The trick is to find the sweet spot between optimised benefits and reduced harm in respect of competing interests.

The conversation about sustainability is always going to be one about choices and consequences – and about which members of society should bear the consequences of internalised costs. While known consequences can be traced back to those contributing to problems around health and well-being, in many instances the price of future attenuation must be borne by society more generally, or rather the taxpaying members of society.

In the case of silicosis, for instance, the South African government's action plan is to eliminate cases of silicosis as a result of work-related dust by 2030. The cost of these measures is to be borne by state coffers. As regards those who have already contracted the disease, Anglo American South Africa and AngloGold Ashanti agreed to settle the silicosis claims of some 4 400 mine workers, to the value of USD30 million, without admitting liability.⁷ Outside the settlement, however, thousands of miners are seeking to recover damages from 82 mines. A full bench of the High Court has confirmed that a class action against these mines may proceed, though this decision has been appealed.⁸ Here, the estimated damages could reach hundreds of millions of dollars.⁹ These delayed social costs of mining activities would have been impossible to quantify at the outset. In the interim, society ultimately bears the cost of these ills. The medical cost of treatment is likely to be borne by the state, funded by the taxpayer. The social costs go far beyond the illness itself: loss of breadwinners and livelihoods exacerbates the vicious cycle of poverty and unavailability of resources that would allow an escape therefrom.

The relations between the taxpayer, the state, communities bearing the cost, and the companies involved in mining are also apparent in the proposed modus operandi for addressing the growing AMD problem: to combat it, the state has initiated phase 2 of a project that aims to pump this polluted water from underground and treat it. The project is currently expected to cost in the region of R12 million. It will have to continue indefinitely.¹⁰ Similarly, the state – funded of course by the taxpayer – will bear some of the cost of setting up these treatment plants, with proposals to hold mining companies responsible for two-thirds of the costs.¹¹

Attempting to achieve the optimal sustainability balance

Sustainability is about balance: obtaining the most from our natural resources whilst limiting the cost of such activity to what is absolutely necessary. The enormity of the

BUT EVEN THOUGH THE BY-PRODUCTS OF OUR ACTIVITIES MAY HAVE NO POSITIVE VALUE FOR US, THEY MAY HOLD SIGNIFICANT NEGATIVE VALUE FOR OTHERS AND INDEED FOR SOCIETY AT LARGE.

WE CAN MAKE FORECASTS ABOUT THE FUTURE, BUT WE CANNOT PREDICT WITH ANY CERTAINTY THE EXTENT OF THE ENVIRONMENTAL AND SOCIAL DAMAGE.

task of balancing these interests, constantly in tension with one another, makes the term 'sustainability' seem like mere rhetoric. Still, it is readily accepted that sustainable use of our natural resources is the only way to ensure the longevity and prosperity of the human race. Where once sustainability featured predominantly in academic parlance, its appearance in legal frameworks has catapulted the term 'sustainable development' and its myriad variations into mainstream thinking, including business strategies. As a phrase in fashion, however, it can hide all manner of evils. Frequent talk of sustainability, particularly in the business sector, where sustainability is now *en vogue*, may feed the belief that the tenets of sustainability are being practically realised. They are not.

What happens where an optimal balance is not obtained? As with AMD, the real effect may remain obscure – not immediately observable – for a long time. In the case of AMD, degradation of the environment occurs so slowly that the truly disastrous effects are only realised decades after the initial catalysts for AMD occurred, when those who created the problem are long gone. Similarly, in cases of chronic silicosis, the disease may manifest up to 30 years after the initial exposure.¹²

Regulatory frameworks, it seems, must take into account that environmental and social harms may only reveal themselves long after mining operations have ceased. We can make forecasts about the future, but we cannot predict with any certainty the extent of the environmental and social damage. Some may think that sacrificing health or livelihoods is a fair price to pay in relation to the gains of extraction; but society at large generally bears the long-term costs of not realising the optimal sustainability balance.

For example, damage to the environment as a result of mining activities in remote areas with low population density, such as the Karoo, may appear to carry a low environmental cost relative to the kinds of environmental harm generally incurred in mining processes for those with no physical or sentimental connection to the area. The economic value of mining this harsh terrain may seem to justify the inevitable harm to the few who will be directly affected, especially where they will be compensated. These may be the motivations for using hydraulic fracturing to extract natural gas in the Karoo, despite the fact that this water-intensive, water-polluting process will be undertaken in an area typified by extreme water shortages.¹³

AMD resulted because the long-term effects of pyrite oxidation had not been foreseen and addressed timeously and appropriately. The long-term environmental consequences of hydraulic fracturing, however, are well known. This process of extracting natural gas has been around for a while, and past experience suggests that damage and groundwater pollution are inevitable. Not to address these issues pertinently would be reckless.

Given the vague nature of the criteria that inform sustainability, how can an optimal balance be achieved? Without hard data evidencing the financial costs relative to the social and environmental harms, the information underlying decision-making will have little bearing on reality. Sustainability indicators are not useful if the actual costs cannot be quantified relative to the commercial gains. The nature of the mining industry – indeed most commercial endeavours – is such that the economic benefits are extensively investigated prior to any venture being undertaken. Projected costs and profits are analysed relative to the anticipated risks of the venture. Though the extent of profits can never be absolutely certain, reasonably accurate projections can inform the likelihood of success. Similar, detailed projections cannot be made when it comes to quantifying the costs to society and the environment. It is in the nature of these harms to be uncertain, unpredictable and unquantifiable.





Even so, checks and balances must be built into any mechanism purporting to hold mining enterprises accountable for the true costs of their operations. For example, to obtain a prospecting permit,¹⁴ mining right,¹⁵ mining permit,¹⁶ reconnaissance permit,¹⁷ or exploration right,¹⁸ an environmental authorisation must be obtained in terms of section 24 of the National Environmental Management Act 107 of 1998. Prior to the award of the requisite environmental authorisation, financial provision must be made such that sufficient funds are available should remediation and rehabilitation of the environment be required.¹⁹ This includes remediation and rehabilitation both in terms of adverse impacts that occur during the life cycle of the mine, as well as latent environmental issues that become apparent at some unknown point in the future.²⁰ The amount that must be paid can take the form of insurance, bank guarantee, trust fund or cash.²¹ This amount must be re-evaluated annually, and an independent, audited report must be submitted to the Minister of Mineral Resources evidencing the sufficiency of the guaranteed funds.²²

The optimal balance between extractive activity and the need for sustainability cannot be achieved only by regulating liability for (social or environmental) harm or potential harm. Finding this balance also requires exploring new ways to deal with the known risks and consequences of extractive activity. One such consequence is waste.

Mine waste and sustainability

Increased attention is being paid to 'waste' in the context of mining, particularly since the amount of waste discarded often exceeds the extracted product.²³ Typically, mine waste is treated in one of two ways:

- 1) It is stabilised and rendered 'physically, geographically, chemically, and radiologically inert'; or
- 2) Where it is impossible to achieve this inertia, the waste must be isolated from the ecosystem.²⁴

Sustainable use of natural resources not only requires resources to be optimally obtained, given the relative costs thereof, but also that the least amount of waste is discarded in consequence. There are thus two stages to waste reduction:

- 1) The implementation of efficient methods such that the least amount of waste is generated during mining processes; and
- 2) The reuse and repurposing of waste to extract the maximum value from mine waste.

Repurposing waste

Some of the waste that is produced in the context of mining is legally referred to as 'residue deposits' or 'residue stockpiles'.²⁵ In terms of the National Environmental Management: Waste Act 59 of 2008, this waste must be managed in accordance with the environmental management plan or programme.²⁶ As part of the application for an environmental authorisation, information must be submitted regarding the anticipated impact of waste, including the risks and effects thereof.²⁷ Waste must also be characterised, which requires a description of its physical characteristics, such as size and permeability,²⁸ its chemical characteristics, such as toxicity, pH and stability,²⁹ as well as its mineral content.³⁰

For sustainability, utilising all elements and products that are acquired as a result of mining activities is the imperative. This is not a new practice. As technological advancements

are made, so new purposes for what was traditionally conceived of as 'waste' are discovered. As a result, previously discarded waste can, over time, be repurposed as a valuable by-product of the extractive process. For example, waste rock may be used to construct roads, produce building material and fill excavated mining cavities.³¹ In other instances, by-products may be increasingly in demand as technology evolves, converting a by-product into a primarily mined product. For example, cadmium, gallium, germanium, indium, selenium and tellurium are minerals that are required for the production of thin-film photovoltaic cells, which are used to convert sunlight into solar power.³² These minerals are, however, typically the by-products of other primary minerals such as aluminium, coal, copper and zinc.³³ These products are increasingly in demand as solar energy replaces other non-renewable forms of energy production.³⁴

Extraction itself is not necessarily the culprit in the production of waste. When it comes to coal, for example, the production phase produces most waste, that is, when the raw coal undergoes a number of processes, the end result of which, on the 'waste' side, is 'slurry'.³⁵ Slurry could be reprocessed if the economic cost of doing so allows.³⁶ But even so, there may be further cost to the environment when such 'waste' material is reprocessed.³⁷ In the absence of regulatory requirements, however, ecologically friendly reprocessing methods will not be voluntarily adopted where economic feasibility does not allow for such adoption.³⁸

While utilising all mined elements may promote long-term sustainability goals by increasing the efficient use of natural resources, certain preconditions are required to incentivise these practices. For the mining sector to implement methods that, first and foremost, produce the least amount of waste, and, secondly, extract value from waste, there are three requirements:

- 1) The technology must exist;
- 2) Efficient production and waste-extraction methods must be economically viable; and
- 3) The regulatory framework must allow for, and encourage, such practices.

However, where the technology does exist, it is possible to make waste-reduction practices mandatory. Again, the trick is to achieve a balance: where the obligations incumbent on the mining sector become too onerous, investors will be disincentivised.

Where mine waste is to be re-mined, it is relevant to know whether the mining permit or right exists and applies to such re-mining.³⁹ Where it has expired, it is arguable that a new environmental authorisation should be obtained to continue with the process.

Regulating pollution-causing waste

In respect of waste causing water pollution, the financial provision made by mining companies at the outset of their mining activities could be utilised to ensure that water resources are rehabilitated.⁴⁰ The track record in respect of mining and water pollution, however, speaks for itself, and the state has yet to utilise properly the financial guarantees to remedy contamination of water resources. An additional problem is that mining companies withdraw before they reach the end of the mining right or the stage in the life-of-mine at which rehabilitation measures must be implemented. Mines become orphaned, operated by illegal miners, or get sold to smaller companies which are unable to bear the costs of rehabilitation. In this way, problems do not get addressed properly, even if they were foreseeable at the time when the environmental impact assessment had to be considered as part of the application for the mining right.

IN THE ABSENCE OF REGULATORY REQUIREMENTS, HOWEVER, ECOLOGICALLY FRIENDLY REPROCESSING METHODS WILL NOT BE VOLUNTARILY ADOPTED WHERE ECONOMIC FEASIBILITY DOES NOT ALLOW FOR SUCH ADOPTION.

MINES BECOME ORPHANED, OPERATED BY ILLEGAL MINERS, OR GET SOLD TO SMALLER COMPANIES WHICH ARE UNABLE TO BEAR THE COSTS OF REHABILITATION.

The financial guarantee pertains only to remedial damage and managing the impact of activities on the environment. The control of dust would arguably fall within the ambit of this provision, particularly since mining is recognised as an emission-source group.⁴¹ The creation and control of dust are already regulated.⁴² For example, when the operator of an ore-mining operation contemplates cessation of the activity, it must show that sufficient measures will be implemented to prevent the pollution of the atmosphere with dust.⁴³ Large volumes of air pollution, including dust, plague substantial areas of the Gauteng province, within the Vaal Triangle. Consequently, an action plan was introduced to minimise the 'fugitive dust' through mechanisms which include the extensive use of water sprayers and the installation of dust hoods.⁴⁴ The trade-off here is that large volumes of water are required to keep these sprayers running 24 hours a day in regions that are experiencing crippling droughts.⁴⁵

Outside of these authorisations, the legislative framework already provides the standards to limit air pollution, as well as the requirements for monitoring and reporting.⁴⁶ The holder of a mining right or permit, for example, must submit an emissions report to the relevant air quality officer.⁴⁷ The legislation also provides for the offences and penalties to be implemented should a violation of these requirements occur, up to a maximum of R5 million or five years' imprisonment.⁴⁸

The dustfall rate, which is the acceptable amount of dustfall per square metre per day, is determined according to whether the site is deemed to be a non-residential or residential area.⁴⁹ In respect of communities sited close to mining activities in rural areas, the acceptable dustfall rate is up to twice that of areas deemed as residential areas, that is, subject to 'residential use in terms of the local town planning scheme'.⁵⁰ One way to protect vulnerable communities residing close to mines is to amend the definitions contained within the legislative framework, such that the limitations on dust pollution are decreased in these areas.

Thinking sustainably about mine waste

As stated above, sustainability is about balance: obtaining the most from our natural resources whilst imposing the lowest cost to society and the environment. Nowhere is the discussion on sustainability, or the lack thereof, more relevant than in the context of the mining sector in South Africa. Mining activities have certainly contributed to the growth of the South African economy, but this growth has come at a cost to the environment and society.

Examples such as the silicosis crisis and the AMD problem in South Africa demonstrate that the externalisation of the costs of mining by society over many decades has in itself become an unsustainable approach. It is no longer sufficient to expect others – future taxpayers and mining companies – to bear the costs of our current lifestyle choices. As a society, we may begin thinking about changing those choices: we may choose to incentivise the reuse and repurposing of mine waste. We may even make such behaviour compulsory through regulatory intervention.

If we are truly committed to sustainable use of natural resources, then minimal waste must be the ultimate goal, or, rather, the means to achieving optimal sustainability. The legislation governing waste management in South Africa already calls for such an approach. But still, the risk to the environment and society must be taken into account. Two of the largest environmental impacts on local communities surrounding mines is the contamination of their water resources, and air pollution in the form of dust. These communities are already subjected to a higher risk than elsewhere in the country, but, if

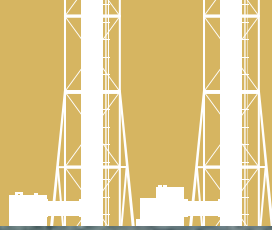
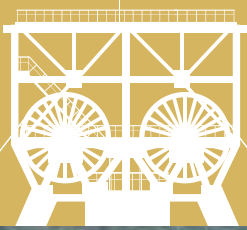
the waste by-product is then subjected to further processing, these communities' burdens are increased further.

Though some may question the possibility of sustainability being practically realisable, the impetus to use our natural resources more carefully can only do more good than harm. How we achieve optimal sustainability is dependent on the variables of the time, and thus our approach to sustainability needs to be adaptive. This is what the legislation already envisages. What we cannot do, however, in the process of using our natural resources more efficiently, is to do harm to communities in the process. These hidden costs must be anticipated and addressed; herein lies the task ahead.

ENDNOTES

- 1 WJ Rankin (2011), *Mining, Minerals and Sustainability*, CSIRO, 2.
- 2 TS McCarthy (2011), The Impact of Acid Mine Drainage in South Africa, *South African Journal of Science*, 107(5/6):1.
- 3 JA Jacobs & SM Testa (2014), *Acid Mine Drainage, Rock Drainage, and Acid Sulfate Soils: Causes, Assessment, Prediction, Prevention, and Remediation*, TS McCarthy (n 2 above), 1.
- 4 TS McCarthy (n 2 above), 1.
- 5 Ibid. at 2.
- 6 Author unknown (13 May 2016), Landmark Silicosis Ruling Allows Class Action against Gold Firms, *Mail @ Guardian*. Available at: <http://mg.co.za/article/2016-05-13-landmark-silicosis-ruling-allows-class-action-against-gold-firms> [accessed 20 May 2016].
- 7 Anglo American (4 March 2016), Anglo American South Africa and AngloGold Ashanti Agree Settlement of Stand-Alone Silicosis Claims. Available at: <http://www.angloamerican.com/media/press-releases/2016/04-03-2016> [accessed 20 May 2016].
- 8 *Nkala and Others v Harmony Gold Mining Company Limited and Others* (13 May 2016) (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) [2016] ZAGP]HC 97; E Mabuza (13 May 2016), Silicosis Judgment May Not Be Good News for Miners" *Business Day*. Available at: <http://www.bdlive.co.za/business/mining/2016/05/13/silicosis-judgment-may-not-be-good-news-for-miners> [accessed 20 May 2016].
- 9 Author unknown (n 6 above).
- 10 K Singh (19 May 2016), Proposed 'Water Tax' Unfair – Ratepayers' Association, *News 24*. Available at: <http://m.news24.com/news24/SouthAfrica/News/proposed-water-tax-unfair-ratepayers-association-20160519> [accessed 20 May 2016].
- 11 Ibid.
- 12 See <http://www.lung.org/lung-health-and-diseases/lung-disease-lookup/> [accessed 23 May 2016].
- 13 J Glazewski (forthcoming 2016), *Fracking*, 1.
- 14 Section 16(1) read with section 17(1)(c) of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).
- 15 Section 22(1) read with section 23(1)(d) of the MPRDA.
- 16 Section 27(2) of the MPRDA.
- 17 Section 75(1)(c) of the MPRDA.
- 18 Section 80(1)(c) of the MPRDA.
- 19 Granted in terms of section 24 of the National Environmental Management Act 107 of 1998 (NEMA).
- 20 Section 1 of the NEMA.
- 21 Ibid.
- 22 Section 24P of the NEMA.
- 23 WJ Rankin (n 1 above), 2.

- 24 Z Bian, X Miao, S Lei, S Chen, W Wang & S Struthers (2102), The Challenges of Reusing Mining and Mineral-Processing Wastes, Vol 337 *Science*, 703.
- 25 Section 1 of the MPRDA.
- 26 Section 43A.
- 27 Regulation 3 of the Regulations Regarding the Planning and Management of Residue Stockpiles and Residue Deposits, 2015.
- 28 Regulation 4(2)(a) of the Regulations Regarding the Planning and Management of Residue Stockpiles and Residue Deposits, 2015.
- 29 Regulation 4(2)(b) of the Regulations Regarding the Planning and Management of Residue Stockpiles and Residue Deposits, 2015.
- 30 Regulation 4(2)(c) of the Regulations Regarding the Planning and Management of Residue Stockpiles and Residue Deposits, 2015.
- 31 Z Bian, X Miao, S Lei, S Chen, W Wang & S Struthers (n 24 above), 702.
- 32 DI Bleiwas (2010), Byproduct Mineral Commodities Used for the Production of Photovoltaic Cells, *U.S. Geological Survey*, Reston, Virginia.
- 33 Ibid. at 3.
- 34 Ibid.
- 35 Z Bian, X Miao, S Lei, S Chen, W Wang & S Struthers (n 24 above), 702.
- 36 Ibid.
- 37 Ibid.
- 38 Ibid.
- 39 H van Niekerk (26 May 2016), Mining Mine Dumps in South Africa: The Interests of Mining Companies That Create Dumps. Available at: <http://www.mlia.uct.ac.za/news/mining-mine-dumps-south-africa-interests-mining-companies-create-dumps#sthash.cGA8u7QN.dpuf>.
- 40 Section 1 read with section 24P of the NEMA.
- 41 GNR. 283 of 2 April 2015: National Atmospheric Emission Reporting Regulations (*Government Gazette* No. 38633).
- 42 Regulation 11 of GNR. 632 of 24 July 2015: Regulations Regarding the Planning and Management of Residue Stockpiles and Residue Deposits from a Prospecting, Mining, Exploration or Production Operation (*Government Gazette* No. 39020) and Regulation 128 of GNR. 527 of 23 April 2004: Mineral and Petroleum Resources Development Regulations read with National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) and the National Dust Control Regulations published in *Government Gazette* No. 36974, Government Notice No. R.827 of 1 November 2013, as well as National Environmental Management: Air Quality Act 39 of 2004.
- 43 Section 33 of the National Environmental Management: Air Quality Act 39 of 2004.
- 44 GNR 613 of 28 May 2009: Vaal Triangle Air-Shed Priority Area Air Quality Management Plan (*Government Gazette* No. 32263).
- 45 M Kekana (17 March 2016), Govt in Talks to Declare Gauteng Drought Disaster Area. Available at: <http://ewn.co.za/2016/03/17/Govt-in-talks-to-declare-Gauteng-drought-disaster-area> [accessed 25 May 2016].
- 46 Regulations 3 to 5 of the GNR. 827 of 1 November 2013: National Dust Control Regulations, 2013 (*Government Gazette* No. 36974).
- 47 Annexure 1 read with Regulations 3 and 4 of the GNR. 283 of 2 April 2015: National Atmospheric Emission Reporting Regulations (*Government Gazette* No. 38633).
- 48 Regulations 8 to 9 of the GNR. 827 of 1 November 2013: National Dust Control Regulations, 2013 (*Government Gazette* No. 36974).
- 49 Regulation 3 of the GNR. 827 of 1 November 2013: National Dust Control Regulations, 2013 (*Government Gazette* No. 36974).
- 50 Regulation 1 of the GNR. 827 of 1 November 2013: National Dust Control Regulations, 2013 (*Government Gazette* No. 36974).





AN EXAMPLE OF THE IMPACTS OF ADOPTING THE 'ONE ENVIRONMENTAL SYSTEM' OF MINING GOVERNANCE: SOME LESSONS IN ENVIRONMENTAL GOVERNANCE FROM MRC'S TORMIN MINE

Glenn Ashton



Introduction

Mineral Resources Commodities (MRC), an Australian mining company, successfully gained the right to exploit mineral sands on the West Coast of South Africa after more than 18 years of attempting to gain a foothold in the country. It began operating its Tormin Mine, located some 350 km north of Cape Town, in early 2014. The closing of the deal to mine the valuable minerals from the sands of the famous pink beaches of the West Coast was the first success for this Australian company in South Africa.

This, then, is the story of Tormin, examined primarily from an environmental-governance perspective.

MRC and the operations of associated companies in the Western Pacific

By conventional standards, MRC is a small Australian mining company, yet its listing on the Australian Stock Exchange (ASX) requires it to comply with basic levels of corporate governance. In the light of this, the record that associated companies established in the Western Pacific, through various subsidiaries, specifically Allied Gold in the Solomon Islands and Papua New Guinea, was questionable. These ventures became deeply controversial, with allegations of, in particular, social dislocation¹ and ongoing environmental impacts.^{2,3} In most cases, the assets were sold off, leaving communities burdened by negative long-term social and environmental consequences.

These examples provide salutary lessons regarding a failure to implement sufficiently robust corporate-governance principles and structures to protect social and environmental rights from the outset. Such shortcomings forewarned of similar problems that have emerged around the operation of Tormin in South Africa.

Given MRC's track record, South African mining authorities ought to have been forewarned when MRC set up shop locally. However, there has been a failure to apply fundamental

levels of due diligence or background checks with regard to investors, such as those required in developed countries. There certainly has been a failure to consider the hard lessons of MRC's forays into the Western Pacific where a broad range of commentators, from parliamentarians in the Solomon Islands⁴ to Australian media and researchers,⁵ have raised concerns publicly about the impacts of mining companies linked to MRC.

Setting up Tormin

With this history, it is worthwhile to consider the establishment and operation of MRC's heavy mineral sands Tormin Mine. The mine lies to the north of the Olifants River mouth, about 350 km north of Cape Town. The entire mineral extraction area is the famous pink beaches within what is termed the coastal zone,⁶ adjacent to the farm known as Geelwal Karoo, upon which the processing plant was constructed.

MRC's holding company for Tormin, MSR (Mineral Sands Resources), failed to secure the requisite permits to bring Tormin to fruition. Initial applications were lodged in 2004. Various later iterations were lodged from then until 2007. A mining right was eventually granted for zircon, ilmenite, garnet, rutile and leucoxene in 2008. The mine was, however, strongly opposed by the Western Cape Department of Mineral Resources (DMR), the Department responsible for the mining licence and management of the mine site, because of practical concerns about the proposed mining site, which essentially comprises an extremely narrow beach backed by unstable sea cliffs.

The legislative logjam was eventually broken in 2010 with the redrafting and submission of the extensive environmental impact assessment (EIA). Because the mine is located in one of the most isolated parts of the country, limited local comment and feedback were received. Some input was provided by the municipality, neighbouring farmers, a few specialists, and concerned residents in the area.

The environmental scoping process was eventually completed and the provincial Department of Environmental Affairs and Development Planning (DEA&DP) granted environmental authorisation in July 2012.⁷ This allowed MRC to proceed with construction of the necessary plant and infrastructure in order to mine some 15 km of beach.

Tormin and the One Environmental System permit process

It is noteworthy that this authorisation was one of the last 'old-format' mine authorisations granted in this region. Under this system, both the DEA&DP, the provincial branch of the national Department of Environmental Affairs (DEA), and the DMR provided separate consent for various aspects of mining, respectively those related to environmental and mine management. While the environmental authorisation, with its own strict conditions, was granted by the DEA&DP in July 2012, the environmental management programme (EMP) was issued by the DMR prior to that, in June 2011, illustrating the tensions already at play between these departments.

These two departments carry rather different political weight and power. It is the role of the DMR 'to promote and regulate ... minerals and mining for transformation, growth, development'. This policy emphasises the maximisation of development through mineral-resource exploitation while remaining largely silent on issues of environmental sustainability. The DMR's perspective of 'sustainable benefits' emphasises economic rather than environmental sustainability, which are often diametrically opposed versions of sustainability. The DMR is situated within the economic cluster of government, along

THE ENTIRE MINERAL
EXTRACTION AREA
IS THE FAMOUS PINK
BEACHES WITHIN
WHAT IS TERMED
THE COASTAL ZONE.

with Trade and Industry and Finance. This allies it to powerful corporate and political currents.

On the other hand, the DEA is specifically responsible for all aspects of environmental management, fulfilling our constitutional obligation⁸ for environmentally sustainable development with justifiable economic and social benefits, the so-called 'triple bottom line'. Yet this variety of sustainable development is often portrayed by the economic cluster, corporate interests and free-market supporters as a brake on economic growth. This has created distinct tensions between the economic cluster, the DMR and the DEA, tensions that have led to the DEA essentially standing as an orphan department, lacking similar access to the economic or political clout of the DMR. Consequently, some of the excellent policies set out in the National Environmental Management Act (NEMA)⁹ and its numerous subsidiary Acts¹⁰ have been strategically eroded through legislative amendments and regulatory reform over many years.

These departmental tensions, which have direct relevance to this case study, led government to introduce what is known as the 'One Environmental System',^{11,12} that is, the system in which all mining authorisations, including environmental oversight, are managed by the DMR. While this change was ostensibly to streamline the regulation of mining, it was primarily driven by pressure from powerful economic players in the mining and energy cluster to overcome what were portrayed as unreasonable delays in respect of projects as a result of objections lodged through NEMA. The One Environmental System eventually came into effect in December 2014, a year after Tormin became operational.

This legislative realignment means that the DMR assumes responsibility for not only the Mineral and Petroleum Resources Development Act (MPRDA),¹³ but also NEMA and its subsidiary acts such as the Waste Act, which has long been a thorn in the side of mining, as the industry is the biggest national generator of waste material. Concerns have been raised regarding the lack of capacity within the DMR to provide meaningful and transparent oversight of environmental legislation.¹⁴ It is notable that the Department advertised for new staff to manage environmental oversight in mid-2106, 18 months after the implementation of the One Environmental System.

From a practical perspective, and as will become clear from this analysis, there have been real negative consequences of the One Environmental System for mining regulation. While the original environmental authorisations for Tormin, such as the EMP, involved the participation of the DEA&DP, the mine works programme (MWP) was authorised by the DMR. Under the One Environmental System, all aspects are now effectively overseen by the DMR. The only way to involve the DEA or the DEA&DP is to appeal a decision made by the DMR relevant to environmental governance or management¹⁵ where the DMR can be shown to have failed to act in the interest of good environmental governance.

Has the One Environmental System eroded good governance at Tormin?

This analysis provides some disturbing insights into just how things can go wrong, and have gone wrong, in the changeover to the One Environmental System, for the Tormin case highlights the incapacity on the part of the authorities to oversee, manage and regulate environmental governance in order to ensure sustainable development. This is, unfortunately, a story of regulatory failure writ large.

After gaining regulatory clearance in 2012, things moved quickly at Tormin and operations started in early 2014. The mine initially presented a model of rectitude: only

15% of staff were white, management was 60% black, women made up 60% of the workforce, and 50% of staff were new work entrants. Pundits promised that the mine would inject a billion rand into the local economy annually.^{16,17} The EMP was considered to represent best practice and the MWP appeared robust.

However, this rosy picture soon faded. From the outset, Tormin changed its mining methodology from what was laid out in the MWP by relocating the primary concentrators from the beach to the main mine processing zone, situated about 100 m behind the cliffs above the beach. This was supposedly because of a risk to the primary beach concentrator from big seas running up the beach, but this move additionally served to streamline run-of-mine efficiency.

But this had serious consequences, as the mine had to truck all of the beach sand to the mine, not just a fraction of the already concentrated sand. This required heavy articulated vehicles with significantly higher impacts on the beach, on haul roads and on mine emissions. Another result was that the designated 2.6-ha processing area proved far too small to accommodate the altered plant layout, which included primary as well as secondary processing. Each of these changes was in conflict with the EMP conditions.

Consequently, the processing-zone footprint soon spread beyond the stipulated boundary. This automatically triggered the need to apply for changes to the EMP and MWP, respectively via a NEMA section 24 rectification and a section 102 application in terms of the MPRDA. Strictly speaking, the mine ought to have ceased operations until these operational changes had been permitted. However, no action was taken and operations continued.

The land Tormin operates on was originally leased from a well-established mineral sands extraction business, the South African-owned and listed Tronox, which runs the neighbouring Namaqua Sands project to the north. This landowner noted the changes to operating procedure and creep beyond the designated plant area and therefore felt obliged to inform the DMR in order to protect its own interests in the area. The provincial DMR director visited Tormin in April 2014 and issued a section 93 (of the MPRDA) directive to halt work and rectify and address the evident transgressions. Tormin immediately reacted and, through its legal representative, apparently contacted the DMR and promised that rectification would take place. The directive was lifted within four days, an unusually short time frame, yet the DMR was only provided with details regarding the amendment process later that year in August and September 2014.

The process of implementing the MPRDA section 102 and NEMA section 24 amendment applications in order to address the changes in mining practice and also to expand the mine-plant footprint by a further 3 ha so as to extract the garnet and ilmenite fractions from the beach sand commenced only in late 2014. Public notices were issued in October 2014 by the environmental consulting firm, GCS Water and Environmental Consultants, the same company that managed the original environmental assessment for MRC and Tormin. A public meeting was held in November and comment was invited from December 2014 until January 2015. This was irregular, as this time frame fell into the festive-season break, which is not considered as 'working days'.¹⁸ However, this process took place simultaneously with the introduction of the One Environmental System, which was initiated on 8 December 2014. Needless to say, objections to the time frame were not taken into account.

After the comment period, the public-participation process appeared to disappear into a bureaucratic black hole. Enquiries regarding the outcomes of this process were not

THE MINE INITIALLY PRESENTED A MODEL OF RECTITUDE: 15% OF STAFF WERE WHITE, MANAGEMENT WAS 60% BLACK, WOMEN MADE UP 60% OF THE WORKFORCE, AND 50% OF STAFF WERE NEW WORK ENTRANTS.

THESE FAILURES TO RESPOND SUGGEST EITHER IGNORANCE OF THE LAW OR A RELUCTANCE TO ENGAGE IN TRANSPARENT GOVERNANCE BY THE MINE AND BY ITS APPOINTED CONSULTANTS.

responded to, despite repeated attempts made by registered interested and affected parties to both the DEA&DP and the DMR. The appointed consultants, GCS, were replaced, and the replacement environmental practitioner failed to provide a response, denying that he had a legal obligation to do so. MRC also refused to provide clarification, with Tormin stating that third parties did not legally need to be informed of the outcome of decisions regarding Tormin,¹⁹ nor did the revised EMP need to be shared. The fact that EMPs are designated as public information and can be shared with any interested and affected party seems to have escaped all of these parties. These failures to respond suggest either ignorance of the law or a reluctance to engage in transparent governance by the mine and by its appointed consultants. This was the first of several flaws that appeared after the adoption of the One Environmental System.

Unexpected revelations

The outcome of this process was subsequently revealed in a court case between MRC and a former managing director (MD) of Tormin. While this is not the forum to provide details of the legal case, access was provided by documents that entered the public domain through the court records in mid-2015. Included were the response²⁰ to the section 102 MPRDA and section 24 NEMA rectifications that arose out of the MPRDA section 96 notice that had been issued.

These documents make for unsettling reading. Firstly, the DMR did indeed issue permission, to Tormin, to rectify and amend the EMP in April 2015. Besides dealing with issues of uncontrolled run-off (covered below), the authorisation essentially permitted mining to continue as before, with any alterations to the EMP to simply be submitted to the DMR. The approval clearly reiterated the requirement to honour the 10-m buffer zone, which MSR has repeatedly failed to observe, as illustrated in various photographs. The approval nowhere specifically cited requirements to comply with NEMA or the Integrated Coastal Management Act (ICMA), rather couching compliance in broader terms of the MPRDA, Water Act and Mine Safety Act.

The aforementioned legal case revealed a further failure of transparent environmental governance with an authorisation²¹ sent by the DMR to the company in May 2015, a month after the revised EMP was issued and a day after the mine was apparently inspected by the issuer of the authorisation. In this document, the DMR, in terms of its powers under the One Environmental System, granted MSR permission to construct an illegal jetty and to expand the processing plant by up to 20 ha, effectively sanctioning illegal activities well after they had occurred. This letter directly contradicted the permission for the amended EMP issued a month before and granted permission with no attempt to engage in public participation or consultation.

This flies in the face of due and proper environmental governance. In an email distancing itself from this authorisation, the DEA&DP²² clearly stated that it had neither granted permission for the expansion of the plant nor given its permission for the illegal jetty. It further indicated that such permissions had never been applied for, despite it informing the applicant that such permission was in fact required. It is unknown why the DEA&DP was not properly consulted in this matter.²³ The DEA&DP evidently has extensive files on MRC, but it appears that the Department may have been reluctant to press the matter, possibly because of pending changes to mining regulations that might render a legal challenge moot.

While the MPRDA section 102 rectification requested a 3-ha expansion of the mining-plant footprint, Google Earth images show that the site has expanded significantly

beyond this, to over 12 ha by February 2016. This indicates that Tormin appears to have acted upon the permission granted by the DMR in May 2015 in engaging in this expansion. Various objectors raised concerns with the DEA concerning the expansion of the mining-plant zone and other breaches of the EMP. After lengthy correspondence, complaints and pressure by various organisations, including the Centre for Environmental Rights (CER), the DEA undertook an inspection of Tormin in September 2016. The outcome of the inspection by the DEA is awaited with interest. In October 2016, the holding company, MRC, took the DEA to court for what it claimed was an illegal raid due to a 'flawed search warrant'.²⁴ The question however arises as to why a search warrant was necessary at all. What about transparent, cooperative corporate governance as set out in King III and other corporate responsibility programmes?

Tormin and the current regulations

So what have been the consequences of the approach precipitated by the DMR's administration of the One Environmental System?

While Tormin was awarded the mineral rights for a number of minerals – zircon, ilmenite, garnet, rutile and leucoxene – the EIA and MWP only addressed the extraction of the zircon/rutile components. These minerals represent between 2 and 5% of the beach sand profile. However, if the garnet and ilmenite fractions are included, this percentage increases significantly.

MRC's 2015 annual statement²⁵ shows extraction records of 4.4% zircon/rutile, 16.15% ilmenite and 28.9% garnet from 1.624 million tonnes of sand mined. This means that nearly 49% of the beach sand is being removed as mineral content, nearly ten times more than the maximum 5% extraction envisaged in the EIA, EMP and MWP. Mining engineers state that these changes have significant implications for the beach profile and the stability of the beach, and furthermore impact on the unstable sea cliffs. What is more, this significant and material change in extraction is compounded by other changes to the run-of-mine procedures.

The MWP states that mining is to be managed sequentially, starting from the south of the mining zone, shifting northward, using an incremental mining methodology. However, this stipulation appears not to have been complied with by MSR. Mining now occurs on a non-sequential basis. This has been further aggravated by the beach not being mined once, but successively, with the sand removed from the same area up to five times, as explained by MRC in its operational reports.

As wave action deposits new material onto the beach, this is then removed and processed. Examination of sequential Google Earth images shows that the beach has apparently undergone significant changes to its profile, with erosion clearly evident at the cliff base in several locations. However, these impacts are not properly quantifiable unless proper inspections occur and oversight is exercised. At the very least, these changes ought to be addressed through a full and proper environmental reassessment of the mining methodology. The findings should then be analysed and the impacts mitigated through updated, modified EMPs and MWPs.

The aforementioned changes to mining methodology also carry serious risks for the marine coastal biota. Were the beach to be mined sequentially, from south to north, the biota would be able to repopulate adjacent zones in turn. However, the largely random, non-sequential and repetitive mining of the beach zone changes the sand profile. This carries real risks for the beach biota. While the beaches may not have been pristine prior

THIS MEANS THAT NEARLY 49% OF THE BEACH SAND IS BEING REMOVED AS MINERAL CONTENT, NEARLY TEN TIMES MORE THAN THE MAXIMUM 5% EXTRACTION ENVISAGED IN THE EIA, EMP AND MWP.

to mining, the scoping process clearly recognised and mitigated the risks to the beach biota by imposing a planned, sequential mining programme.²⁶

In this regard, there are several endangered species found in the area, such as the highly endangered *Cryptochloris zyl* (Van Zyl's golden mole) and the near-threatened *Cordylus macropholus* (girdled lizard). These were both noted in the foredune zones that were set aside as conservation zones. It is unknown what impacts the alleged mining activity has had on these zones. Despite an extensive request being made in terms of the Promotion of Access to Information Act (PAIA), scant information was provided and no details were given regarding illegal activity in the exclusion zones as alleged.

One issue that all environmental authorisations have been crystal clear about, and which has already been touched on above, is not only that no mining activity is permitted within 10 m of the foot of the cliffs, but also that this area is totally out of bounds. The original 2011 EMP states:

A buffer to establish an ecological setback of at least 10 m from surveyed areas on [the] foredune[,] and 10 m from the foot of the cliffs of slopes without foredunes, must be left as a [no-go] area. No human or machine activity is allowed in this zone. (emphasis mine)

This unambiguous stipulation has, however, not been complied with.

Most of the area presently being mined has no foredune, only cliffs. This makes it easy to note the delineation between the beach and cliff, as well as to calculate what distance from the cliff mining has taken place. Photographs obtained, along with images from Google Earth, provide clear evidence of activities and of disturbance of this zone, with excavation extending right to the toe of the cliffs over extended periods of time. Allegations have been made that this has occurred since mining operations began. Despite several notifications being sent to the DMR setting out these failures to abide by the stipulations of the EMP, no confirmed action appears to have been taken and the activities apparently continue unabated. In fact, activities at the foot of the cliffs have increased over time. The most recent Google Earth images (February 2016) show significant excavation and vehicular activity directly adjacent to the cliff toe.

These two issues – extracting excessive beach materials and unauthorised activity at the cliff toe – may also be connected to a massive cliff collapse directly below the processing plant. However, there are potentially other factors at play regarding this significant environmental impact. The first is the issue of the lining that was installed beneath strategic zones within the processing plant to prevent any ingress of mine processing water into the aquifer. Various sources have indicated that this lining was damaged early in the mine's operation, thereby compromising its integrity. This is further alluded to in instructions given to MSR, via a letter to its representative, by the Chief Director: Mineral Regulation and Administration in April 2015, within the authorisation for an amended EMP, which details instances of run-off water that require attention.²⁷ Prior to this authorisation – and the collapse – the processing of mined sand was taking place at a plant designed only to accommodate secondary processing. As a result, water use and general activity were significantly higher than the operational design allowed for, placing site drainage and the two small seawater handling ponds under pressure. Photographs of the site show extensive water present in processing zones and significant related erosion from the site, along with run-off onto the beach. Water infiltration was visible in photographs of the cliff face taken prior to the collapse. The extent of the cliff collapse is easily ascertained from Google Earth sequences. Originally, the plant

boundary was 55 m from the cliff edge; post collapse, the edge retreated to within 38 m from the plant, meaning that 17 m of cliff collapsed onto the beach below.

Despite this collapse being brought to the attention of the DMR and DEA&DP, no action has as yet been taken. The CEO claimed in a statement that the cliff was undermined by wave action. If this was so, the increased proportions of material being extracted from the beach and lower beach profile might well have been factors, as the cliff would have been undermined. It is possible that the cliff collapse might have been caused by a combination of these issues: overextraction from the beach, mining activity too close to the cliff face, and the introduction of water into the aquifer.

The most recent Google Earth images of the mine (dated 16 February 2016) show that the cliff collapse has been backfilled and 'repaired' with what appears to be mine tailings, an entirely inappropriate remedy. It is unknown whether this 'repair' was undertaken after consultation with any authority, whether experts were engaged or whether the necessary environmental authorisations were obtained, as should be obligatory in this matter. Again, despite the writer gaining limited information through a PAIA request, this failed to cast further light on the matter.

It is important to note that the entire mining area, including the cliffs and mine zone, falls within the coastal zone stipulated in the ICMA, in which extremely strict management criteria apply. Beside this, these 'repairs' also cover the 10-m buffer strip. Any such rectification legally requires consultation and, again at the very least, an amendment of the EMP and MWP by providing details as to how repairs are to proceed. Again, no response has been provided by either the DEA&DP or the DMR indicating whether this has occurred. If these repairs were unilaterally undertaken by the mine, a NEMA section 24(g)²⁸ rectification, possibly accompanied by a significant fine, would appear to be in order.

Despite the best efforts of a number of people, it has been impossible to establish the facts surrounding these serious breaches of the EMP and MWP. Despite the clear legal right of the DMR and DEA officials, as well as municipal officials, to enter the property in order to fulfil their duties,²⁹ visits have only been allowed by prior arrangement.

This renders surprise inspections and revelations of active transgressions extremely difficult. Municipal officials have been refused entry, despite various concerns about contraventions of municipal zoning regulations. DEA&DP officials have been informed that they could not visit or demands have been made for the reasons for their visits. These events illustrate not only non-compliance with various regulatory obligations, but, more worryingly, indicate an apparently uncooperative attitude that discourages transparent oversight.

A further serious transgression involves the unlawful construction of significant infrastructure on the beach, between the high- and low-water marks, again including extensive interference within the designated 10-m buffer strip. This construction appears to be an attempt to build a jetty or breakwater using huge boulders brought in from off the site. Despite the construction being permitted by the DMR in May 2015,³⁰ such construction constitutes a transgression of Chapter 7 of the ICMA and is also a notifiable event as per NEMA Regulations 544, 545 and 546.³¹ Again, no action has apparently been taken to investigate or sanction this unlawful construction. It is therefore hoped that the DEA inspection of September 2016 will shed further light on this breach.

ENVIRONMENTAL
SUSTAINABILITY
DOES NOT STAND
IN ISOLATION;
RATHER, IT IS
INEXTRICABLY
BOUND TO THE
SOCIAL AND
ECONOMIC MATRIX.

Another breach of authorisation conditions is the routing of pipelines in order both to gain access to seawater for processing of the minerals and to return the mine overburden to the beach. The original authorisation clearly stated that pipelines were to be laid in gullies alongside existing vehicular access routes and covered. However, pipelines were simply laid directly across the land above the cliffs, down the sea cliffs and onto the beach using the most direct but highest-impact route. The EMP also stipulated that overburden must be returned to the same area from which it was removed. Yet photographs show pipes returning overburden to a single location, adjacent to the cliff collapse, instead of along the entire 15 km stretch of beach. This further encourages erosion of beaches that are remote from the discharge.

A useful photographic record of the mine site has been compiled by a local pilot who shared numerous photographs with concerned parties. These photographs, together with images from Google Earth, provide a revealing record of mine activities, illustrating the extent to which modern technology combined with civic oversight can improve environmental governance.

Externalising impacts and straining the social fabric

Environmental sustainability does not stand in isolation; rather, it is inextricably bound to the social and economic matrix. Therefore, it is enlightening to examine other concerns that indicate a lack of legal and best practice management obligations.

First of all, repeated allegations have been made that sewage from the Tormin plant is improperly disposed of in the sea³² and not treated at a registered sewage works as stipulated. Along with other allegations of poor waste management, the broader social, economic and environmental impacts are equally remarkable.

An issue which has given rise to local and regional concern involves the transport of the mineral sands from Tormin to the Cape Town and Saldanha ports. The Western Cape Department of Transport originally set strict criteria concerning stipulated routes for transport of extracted minerals.³³ Two options were given: either to use rail, as initially happened for a few months, or to use the established and suitable tarred roads to the N7 to the Saldanha and Cape Town ports. The highly efficient rail options were abandoned due to cost considerations. Articulated 35-tonne trucks and trailers were then contracted to haul the materials. These vehicles do not use the stipulated N7 route at all, but instead travel on unsurfaced minor back roads to the ports, at the same time avoiding all weighbridges.

The original permits granted by the Western Cape Department of Transport and the local authorities' report estimated that four trucks per day were required to transport the zircon/rutile. Because of far higher extraction of the ilmenite and garnet sand fractions, residents of towns like Dwarskersbos have reported over 107 trucks passing through this small village, even over weekends. This matter has been raised with the traffic authorities and has been taken right up to the provincial premier, but no action has been taken.³⁴ The roads, which were never designed for such heavy traffic, are breaking up and are under constant repair, at vast cost, by the financially stressed Berg River and Cederberg municipalities. This non-compliance with transport conditions constitutes a direct externalisation of costs by the mine by displacing costs onto local communities in two ways. Firstly, local residents' vehicles experience far higher wear and tear on these damaged roads, and, secondly, their scarce rates and taxes are used to repair these local road networks. Even if the provincial government steps in to assist,

the fact remains that costs are being externalised and that the original transport stipulations are not being implemented.

The lessons to be learnt

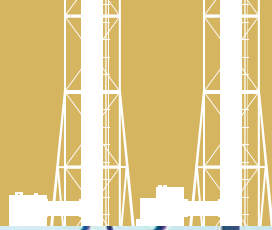
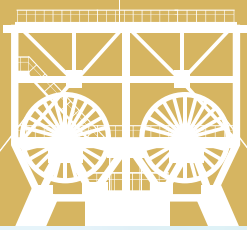
The environmental damage, the externalisation of costs and impacts, the erosion of resilience, and the negation of hard-fought social rights and environmental governance all combine to provide a number of lessons regarding environmental management. The first is that environmental regulation needs, by its very nature, to remain open to interrogation and transparent oversight.³⁵ Following on from this is the critical requirement to ensure that environmental regulation is not compromised or trumped by economic interests, especially under the illusory prerogative of unbridled growth, which, especially in the case of mining, often means resources and profits are shipped offshore without beneficiation or transparent oversight.

THIS NON-COMPLIANCE WITH TRANSPORT CONDITIONS CONSTITUTES A DIRECT EXTERNALISATION OF COSTS BY THE MINE.

ENDNOTES

- 1 A Sasako (17 July 2012), Gold Ridge: A Saviour or Nightmare? *Papua New Guinea Mine Watch*. Available at: <https://ramumine.wordpress.com/2012/07/17/gold-ridge-a-saviour-or-nightmare/>.
- 2 A Morton (26 August 2015), Claim of '\$40m Eco Disaster'. *Sunday Age*. Available at: <http://www.solomonstarnews.com/news/national/8190-claim-of-40m-eco-disaster>.
- 3 *Earthworks @ Mining Watch* (2012), Troubled Waters – Simberi Mine, 15. Available at: https://www.earthworksaction.org/files/publications/Troubled-Waters_FINAL.pdf & <https://ramumine.wordpress.com/2012/11/18/troubled-waters-simberi-mine/>.
- 4 *Solomon Star* (7 October 2014), GP Leader on Wale Issue. Available at: <http://www.solomonstarnews.com/news/national/4393-Gp-Leader-On-Wale-Issue>.
- 5 *Solomon Star* (18 August 2015), Corruption Taints Us with Bad Image. Available at: <http://www.Solomonstarnews.Com/News/National/8035-Corruption-Taints-Us-With-Bad-Image>.
- 6 The coastal zone is defined and protected under National Environmental Management: Integrated Coastal Management Act (NEM: ICMA) 24 of 2008.
- 7 DEA&DP (25 July 2012), Granting of Environmental Authorisation.
- 8 Section 24 of the Constitution (Bill of Rights), 1996.
- 9 Act 107 of 1998 as amended from 28 February 2014.
- 10 These include the National Environmental Management: Waste Act (NEM: WA), the National Environmental Management: Air Quality Act (NEM: AQA), the NEM: ICMA, the National Environmental Management: Biodiversity Act (NEM: BA), and the National Environmental Management: Protected Areas Act (NEM: PAA) which, together, provide a suite for some of the most comprehensive environmental management in the world.
- 11 South Africa (8 December 2014), Government on Rollout of One Environmental System. Available at: <http://www.gov.za/government%E2%80%99s-one-environmental-system-ready-commence-8th-december-2014> [accessed on 8 May 2016].
- 12 TL Humby (2015), One Environmental System: Aligning the Laws on the Environmental Management of Mining in South Africa, *Journal of Energy @ Natural Resources Law*, 33(2):110–130.
- 13 Act 28 of 2002, as amended from 31 May 2013.
- 14 C Horsfield, M Theart, A Motala, M Kapa & M Fourie (2015), How Mining Authorities' Failure to Invest in Environmental Compliance Monitoring and Enforcement Capacity Violates Fundamental Rights, *In Good Company? Conversations around Transparency and Accountability in South Africa's Extractive Sector*, Open Society Foundation for South Africa.

- 15 CER, Applications for Rectification of Unlawful Commencement or Continuation of Listed Activities under NEMA and the Waste Act. Available at: <http://cer.org.za/hot-topics/section-24g> [accessed on 10 May 2016].
- 16 K Cloete (6 February 2014), Tormin Mineral Sands Project Kicks off, to Inject R1bn a Year, *Mining Weekly*. Available at: <http://www.miningweekly.com/article/tormin-mineral-sands-project-kicks-off-to-inject-r1bn-a-year-2014-02-06/> [accessed on 4 May 2016].
- 17 E du Preez (6 February 2014), Western Cape to Get R5bn Mining Boost, *Fin24*. <http://www.fin24.com/Companies/Mining/Western-Cape-to-get-R5bn-mining-boost-20140206>.
- 18 Regulation 982, NEMA 107 of 1998, Chapter 2, section 3(2).
- 19 Email from MRC ERC Sibonelo Mkhize, 24 August 2015 at 16:59:06 SAST.
- 20 DMR (14 April 2015), Chief Director: Mineral Regulation and Administration, T Monyal, approval of amended EMP.
- 21 DMR (21 May 2015), DS Kunene, Regional Director, Response to [Query] re Expansion and Jetty.
- 22 DEA&DP (2 July 2015 at 3:17:20 p.m. SAST), Tormin Mineral Sands – Response to Ms Ann Crotty, Ministerial Reference No. 3/5/R.
- 23 M-A Gontsana (14 December 2015), State Accused of Letting Tormin Damage West Coast, *Mail @ Guardian*. Available at: <http://mg.co.za/article/2015-12-14-00-state-accused-of-letting-tormin-damage-west-coast/>.
- 24 Le Cordeur (12 October 2016), Australian Mine Takes Legal Action after SA Site Raid, *Fin24*. Available at: <http://www.fin24.com/Companies/Mining/exclusive-australian-mine-takes-legal-action-after-sa-raids-site-20161012>.
- 25 See <http://www.asx.com.au/asx/statistics/displayAnnouncement.do?display=pdf&idsId=01733714>, 5.
- 26 DEA&DP (25 July 2012), Granting of Environmental Authorisation.
- 27 DMR (14 April 2014), Approval of Amended EMP, Tormin.
- 28 CER, Applications for Rectification of Unlawful Commencement or Continuation of Listed Activities under NEMA and the Waste Act. Available at: <http://cer.org.za/hot-topics/section-24g> [accessed on 10 May 2016].
- 29 Sections 91, 92, 93 and 94 of the MPRDA; Chapter 7, Part 2 of NEMA.
- 30 DMR (n 28 above).
- 31 These regulations stipulate categories of activity requiring permits and set out the actions needed for rectification.
- 32 M-A Gontsana (9 October 2015), West Coast Mine Workers in Court, *Groundup*. Available at: http://www.groundup.org.za/article/west-coast-mine-workers-court_3377/ [accessed on 8 May 2016].
- 33 Western Cape Government, Department of Transport and Public Works (9 July 2014).
- 34 Confidential letter to Premier Zille by resident of Dwarskersbos (September 2015).
- 35 LF Chien & T Davies (2015), How Increased Transparency in the Mining Sector Would Facilitate the Realisation of Environmental Rights, *In Good Company? Conversations around Transparency and Accountability in South Africa's Extractive Sector*, Open Society Foundation for South Africa.





A COMMUNITY LEFT IN THE DARK: THE CASE OF **MAPELA**

Struggles for transparency and accountability in South Africa's Platinum Belt

Joanna Pickering and Thabiso Nyapisi



Introduction

From the 1960s onwards, large deposits of valuable minerals such as platinum, chrome, titanium and coal were discovered in vast areas of the former homelands of South Africa, that is, in what is now the Limpopo, North West, Mpumalanga, Eastern Cape and KwaZulu-Natal provinces. A new mining boom erupted and powerful mining companies charged into these areas to set up shop, each scrambling to claim a share. Today, some of the most profitable South African mines are therefore situated on land in the former homelands that is occupied by traditional communities and is governed in terms of customary law.

These areas, underdeveloped as they are on the surface, are rich in mineral wealth. Although these mines have proved highly profitable in many instances, the communities have largely suffered the disruption without the reward. South African mine-hosting communities, far from benefiting from these lucrative mining deals, experience high levels of poverty and unemployment and receive poor basic services. Moreover, communities are frequently left in the dark as to the lucrative mining deals taking place on their mineral-rich land.

South Africa's Platinum Belt provides many examples of a systemic lack of accountability and transparency by traditional leaders and mining companies towards ordinary rural citizens. In violation of customary law, traditional leaders frequently purport to be the sole community representatives in negotiation processes with mining companies. Mining companies, for their part, often claim excessive secrecy over the terms of agreements entered into with mining communities, often refusing to allow individuals access to information except through their traditional leader. This has led to regular explosions of anger and frustration by local people 'excluded from, and unable to get information about, the lucrative mining deals taking place on their mineral-rich land'.¹

This widespread lack of transparency is due to a number of factors. Firstly, it arises from a push by government to advance distorted colonial versions of the power of chiefs that

vest sole decision-making authority in traditional leaders to the exclusion of the people living on the land, thereby undermining the real customary-law structures on the ground that promote participatory decision-making, inclusion and transparency. Secondly, the lack of transparency is exacerbated by weaknesses in the regulatory framework with respect to ensuring consultation, consent, and downward accountability in mining communities. Thirdly, the problems are intensified by the failure to uphold the constitutionally protected, informal land rights of local people, leaving them vulnerable to exploitation by traditional leaders and mining companies.

Ultimately, this opacity in dealings with ordinary community members leads to deep divisions within communities and to heightened tensions and frustration, as rural citizens are unable to get basic information about the decisions made in their name. Traditional leaders frequently enter into mining deals that are not good for the broader community, at least partly because they are not required to consult with, or account to, community members. Sustainable mining cannot be achieved in this context.

We illustrate the gravity of these problems through the example of the Mapela community, a Limpopo mine-hosting community on South Africa's Platinum Belt. Here, a lack of transparency and accountability has had devastating consequences for the community and risks making mining unsustainable in the area.

Traditional leadership and customary law in South Africa

The view that traditional leaders historically held ultimate decision-making power in South African traditional communities has been shown to be erroneous.² This understanding is a distortion of the nature of the power of chiefs used to further the processes of 'indirect rule', in terms of which the institution of chieftaincy was controlled and manipulated by colonial and, later, apartheid authorities to further their own causes.³

In fact, in precolonial chieftaincies, the general availability of land meant that members were able to 'break ranks and strike out on their own' if they felt that their chief was acting improperly or inadequately.⁴ Given the advantages of social accumulation through a large following, the possibility of members deserting a chief created a check on his power and an incentive to remain accountable to, and transparent with, his community.

In post-apartheid South Africa, the Constitution recognises traditional leadership institutions 'according to customary law' and subject to the Constitution.⁵ The content of customary law thus determines both the scope of the chief's power and the customary entitlements vesting in ordinary people in respect of both procedural rights (e.g. in decision-making processes) and substantive rights (such as land rights).

There has been much litigation about the nature and content of customary law in the Constitutional Court over the last 15 years. In judgments such as *Alexkor*,⁶ *Bhe*,⁷ *Shilubana*,⁸ *Gumede*,⁹ *Pilane*¹⁰ and *Bakgatla-Ba-Kgafela Communal Property Association*,¹¹ the court warned of the dangers of adopting at face value the distorted version of autocratic customary law inherited from colonialism and apartheid and directed us instead to an examination of the changing 'living law' which existed, and exists, in practice on the ground.¹²

The court has handed down far-reaching judgments concerning the nature of indigenous ownership of land, inheritance rights for women, accession to traditional leadership positions, rights to freedom of association and expression, and choice of landholding entities in customary communities. These judgments have repealed and amended

THESE JUDGMENTS
HAVE REPEALED
AND AMENDED
EXISTING LAWS
AND STRONGLY
CRITICISED
RESTRICTIONS
IMPOSED ON
THE RIGHTS AND
FREEDOMS OF RURAL
PEOPLE IN THE
INTERESTS OF
AUTHORITARIAN
INTERPRETATIONS
OF THE POWER
OF CHIEFS.

existing laws and strongly criticised restrictions imposed on the rights and freedoms of rural people in the interests of authoritarian interpretations of the power of chiefs. Moreover, these judgments are evidence that the nature of customary law is largely inclusionary, participatory and transparent.

Despite these pronouncements, however, there is nevertheless a push by government to propose bills and policies¹³ that strengthen the powers of traditional leaders at the expense of the customary rights of ordinary community members. This is particularly problematic in mining communities where lucrative deals with mining companies are at stake. Ordinary local people become vulnerable in these circumstances, given that, 'when there are opportunities for capital accumulation, some traditional leaders abuse their power to advance the interest of business while compromising the livelihoods of community inhabitants'.¹⁴

This has been exacerbated by the perceived success of corporate models of holding money and assets belonging to the community which place traditional leaders at the centre of decision-making roles while ordinary community members are given little to no say in the decisions regarding their own assets. Perhaps the best known of these 'corporatisation' models is that of the Royal Bafokeng Nation (RBN) whose assets were corporatised (in other words, to preserve, and make decisions about, communal assets through a corporate vehicle) in Royal Bafokeng Holdings (RBH).

While RBH has built up a valuable portfolio, its corporate ownership structure is designed to consolidate decision-making and is therefore very closely controlled by the chief. Community members are not the owners of RBH and have, at best, only an indirect influence on the use of dividends and almost no say in the governance of the corporation. An individual community member cannot, for example, sell a share of his or her collective holding in RBH. Accordingly, the nation's great wealth does not meaningfully benefit individual community members and it is perhaps for this reason that the RBN is said to be a 'rich nation of poor people' by some of its residents.¹⁵

The RBN model has been described as 'melding corporatisation with traditional governance'.¹⁶ The Comaroffs have captured why this is so problematic and why it has not received overwhelming support in the Bafokeng community:

But the quiet skepticism among Bafokeng about the wealth of their ethno-nation ... is not confined simply to the specter of royal riches. It also extends to the Geist of the morafe [nation]: 'Not all Bafokeng approve of the trend towards positioning their king as a CEO, redefining them as shareholders, and running the community like a company,' note Cook and Harding (n.d.:23). Of these clauses, the first, the 'king as CEO,' is especially likely to be troubling. It raises the possibility of a species of executive privilege quite foreign to the Tswana ideal of bogosi yo bontle ('good government'), an ideal captured in idioms of accountability: Kgosi ke kgosi ka morafe [- as] all Tswana are fond of saying, 'a king is king by grace of the people.' Company executives, by contrast, are governed less by accountability than by accountancy, less by the sociomoral needs of a nation than by the amoral imperatives of profit.¹⁷

There is an obvious disjuncture between elevating traditional leaders on the basis of their customary authority and imposing profit-sharing structures and models that bear no resemblance to the customary nature and identity of the group concerned. The RBN remains locked in recurrent litigation with community members and land-buying syndicates whose argument is that the RBN brand sells itself as customary and

consultative, yet fails to consult in practice. These groups claim that land-buying syndicates and subgroups own much of the land on which mining is taking place, land that the RBN is seeking to have transferred to itself.

Moreover, some critics have argued that the wealth has not 'trickled down' to the broader community and that most members of the community 'do not understand the complex financial and business deals the Royal Bafokeng Administration engages in, thus creating an "information gap" between it and the local people'.¹⁸

It is clear, then, that the RBN model, though perceived as a phenomenal success because of its ability to generate enormous profits, in reality fails to achieve transparency and accountability. As a result, equitable distribution of community wealth does not occur. Rather than achieving sustainability, it deepens inequality in a context of already extreme poverty.

Regulatory context

Weaknesses in the legislative framework intensify the problems of opacity and secrecy around decisions regarding communal property such as land and mining revenue.

Laws that enhance the power of traditional leadership such as the Traditional Leadership and Governance Framework Act (TLGFA) 41 of 2003 and the Communal Land Rights Act 11 of 2004¹⁹ have rightly been criticised for 'fortifying the powers of local chiefs and tribal councils over communal property, particularly land and mining revenues, and making downward accountability impossible to realise'.²⁰

Disquietingly, the South African government is proposing further bills and policies that will legitimise the erroneous notion of centralised power of chiefs. The Traditional and Khoi-San Leadership Bill (TKLB), which is currently before Parliament, is intended to replace the TLGFA. The TKLB will further strengthen the powers of traditional leaders to act on behalf of their communities, without provision for community participation and consent on matters affecting community members. This will surely cause transparency and accountability issues to worsen.

Furthermore, the Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002 has helped to facilitate the central role played by traditional leaders in negotiating mining deals with mining companies. The MPRDA and related legislation has sought to redress past injustices by adopting a range of measures aimed at the transformation of the mining industry, such as black economic empowerment (BEE) and mine-community partnerships. The state has also encouraged mine-hosting communities that previously received royalty payments for the exploitation of their mineral resources to convert these into equity stakes in the mining companies.²¹

As Mnwana and Capps explain:

*The combined effect of these laws is that chiefs are increasingly controlling the interactions between mining corporations and the 'traditional communities' they formally represent. It is far easier for mining companies to talk to a single chief than the thousands of rural people who are affected by each mining development. As the presumed custodians of communal land, chiefs thus enter into mining contracts and receive mineral revenues on behalf of their rural subjects. With the state's support, traditional leaders have become powerful intermediaries of mining deals and mineralised development in the former homelands.*²²

DISQUIETINGLY, THE SOUTH AFRICAN GOVERNMENT IS PROPOSING FURTHER BILLS AND POLICIES THAT WILL LEGITIMISE THE ERRONEOUS NOTION OF CENTRALISED POWER OF CHIEFS.

MANY RESIDENTS OF MAPELA HAVE LOST PLOUGHING OR GRAZING LAND TO THE MINE, AND, IN SOME CASES, ENTIRE VILLAGES HAVE BEEN RELOCATED TO MAKE WAY FOR THE EXTENSION OF THE MINE'S OPERATIONS.

The MPRDA also lacks adequate provisions relating to consultation with, and consent of, mine-hosting communities. Moreover, existing rights of communities are frequently ignored. For example, the Interim Protection of Informal Land Rights Act (IPILRA) 31 of 1996 was passed by Parliament to provide protection for people living in the former homelands and in informal settlements.²³ The IPILRA provides that nobody may be deprived of their informal rights to land without their consent. Informal land rights include the right to use, live on or access land. This implies that the IPILRA protects people's rights to their household fields and common natural resources such as grazing and ploughing fields.²⁴ However, the IPILRA has frequently been ignored or has been inadequately applied in the context of mining. This is also due in part to the lack of agreement over whether the mining rights issued to mining companies under the MPRDA are subject to the IPILRA.²⁵

The case of Mapela

The Mapela Traditional Community²⁶ is located about 30km north of Mokopane in Limpopo. The community is made up of 42 villages and surrounds Anglo American Platinum's Mogalakwena mine, the largest opencast platinum mine in the world.

Mining operations commenced at the mine in 1993 after Anglo American Platinum, through its subsidiary, Potgietersrus Platinum Limited, secured mining rights and a surface lease agreement over several farms in the area. Mining had taken place on and off in the area since 1926, but only boomed in the 1990s. The effects of the mine on villages within Mapela have been extensive. Villages located close to the mine suffer the severe effects of frequent rock blasting, dust, and other environmental hazards such as water contamination. Many residents of Mapela have lost ploughing or grazing land to the mine, and, in some cases, entire villages have been relocated to make way for the extension of the mine's operations.²⁷

People in Mapela have suffered the disruption of these mining operations with limited and inadequate compensation that has often been mismanaged, and without a significant share in the profits. This is due in part to the long history of unaccountable traditional governance in the area. The chief (or Kgoshi), David Langa, has repeatedly failed to account to villagers about the mining revenue due to them. It has also emerged that he has not been transparent, in that that he has been benefiting personally from contracts with the mine. Kgoshi Langa's mother, who preceded him as Kgoshigadi, entered into surface lease agreements in the past without the consent of the community members affected. Moreover, it seems that she never accounted for the rental payments paid in terms of these lease agreements. This history has led to high levels of frustration.

Tensions came to a head dramatically in September 2015 when violent and widespread protests broke out amid local residents' growing frustrations at what they saw as a lack of transparency, accountability, and inclusion in decision-making processes.

The protests drew participation from members of villages all over Mapela, each having suffered their own frustrations at the hands of the mine and the Kgoshi. For example, the catalyst for the village of Skimming, which is located close to mining operations, was the mine's announcement that it would be relocating the village's Seritarita Secondary School to another venue 12 km away. The Seritarita Secondary School had been built in the apartheid era from the community's own scarce funds. The relocation of the school, it was explained to the villagers, was so that the mine could use the land as a waste-dumping site. Villagers of Skimming told researchers that they were neither informed nor consulted when it was agreed that the school would be relocated. When engagements

between affected village members and the local and provincial education government did not bear any fruit, Skimming village joined the rest of Mapela in the community protests.

The protests caused significant disruption to mining operations for almost two weeks, as protestors blockaded roads to the mine and many contractors and employees were unable to enter. Violent clashes between police and protestors led to injuries, the destruction of infrastructure, and the arrest of 36 community activists.

The protests led to an intervention by the Minister of Mineral Resources and the South African Human Rights Commission. Through their interventions, a 'Task Team' was established to resolve conflicts in the area. However, the Task Team did not resolve the issues of transparency and accountability in the community. Instead, it was perceived as exclusionary by its failure to include local representative groups, some of which existed long before the establishment of the Task Team. Many members of representative community groups felt sidelined by their exclusion from Task Team processes. Mapela community members were in any event wary of this intervention, given that similar interventions in 2008/2009 and in 2012 had failed to adequately address fundamental problems, which, at base, all derive from inadequate engagement with the people directly affected by mining.²⁸ It appears that the Task Team has played only a limited role in representing the broader community's interests and concerns around mining-related issues. Far from unifying the Mapela community, it seems that the Task Team has had a divisive effect.

The fact that community members' frustrations have not been resolved is evidenced by continued protests in the area. For example, operations at the mine were again disrupted on 5 September 2016 (with some reports claiming that it was in fact forced to shut down)²⁹ when protestors blockaded roads to the mine, frustrated that mine management had, in their view, negotiated in bad faith, manipulated community structures, and used payments to the tribal authority to sow division in the community.³⁰

The problems around transparency and accountability in Mapela are recurrent and systemic. In fact, the Mapela community continues to struggle to achieve transparency regarding deals entered into between Kgoshi Langa, ostensibly on their behalf, and Anglo American Platinum. Some of these struggles are highlighted through the engagements between the mine and Kgoshi Langa around a particular agreement between the mine and the 'community'.

One of Mapela's representative bodies, the Mapela Executive Committee, had been trying to arrange meetings with the Kgoshi during 2015 and early 2016 to talk about their grievances relating to the lack of financial accountability around income generated by mining in the area, but without much success. Kgoshi Langa finally agreed to meet with the Committee in early 2016. It was during their meeting that members of the Committee heard for the first time about a 'settlement agreement' that was being negotiated between Anglo American Platinum and Kgoshi Langa, ostensibly on behalf of the community. The settlement agreement had purportedly been negotiated to resolve certain 'legacy issues' between the mine and the community, although the full purpose of the agreement, as well as its terms, remained opaque to virtually everybody but the Kgoshi.

The Committee managed to convince the Kgoshi to provide its members with a copy of the agreement, still in draft form. The agreement provided that Anglo American Platinum would pay an amount of R175 million to the community in settlement of certain legacy

THE PROTESTS LED TO AN INTERVENTION BY THE MINISTER OF MINERAL RESOURCES AND THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION. HOWEVER, THE TASK TEAM DID NOT RESOLVE THE ISSUES OF TRANSPARENCY AND ACCOUNTABILITY IN THE COMMUNITY.

issues. After studying the agreement, members of the Committee were uncomfortable with many of its terms, including the fact that, according to the agreement, the R175 million would be paid into a trust of which the Kgoshi would be the chairman. The trust's purpose was to hold the R175 million and to enable the 'corporatisation' of community assets. No provision was made for community participation in the trust's decision-making.

Alarmed by these provisions, the Committee wrote a letter to the Kgoshi asking that he hold off on signing the agreement until he had consulted adequately, as required by customary law, and asking that he provide the final version of the agreement including its annexures. However, in a letter to the Committee in March 2016, these requests were refused.

The Committee and others later became aware that the agreement had in fact been signed, this after Anglo American Platinum had published press statements in which the agreement was hailed as resembling the corporatisation model adopted by the RBN.

Given that, in the past, many of the frustrations in Mapela have arisen from inadequate consultation on decisions affecting the community, it was unfortunate that community members were denied information that they were in fact entitled to in terms of customary law. The knowledge that the Kgoshi had signed the agreement despite clear requests to the contrary caused considerable frustration. A group of community members instructed attorneys to prepare court papers to review the decision to enter into the agreement without consulting the community. This litigation is on hold pending an attempt by the parties to try to resolve the conflict.

The above description is intended to illustrate the extent to which the lack of transparency, inclusion and accountability has caused recurrent problems in the area. Community members are routinely left out of the process of making crucial decisions concerning their communal assets, such as land and mining revenue. The chief purports to be the sole decision-maker on issues affecting the community and fails to consult in the manner required by customary law. Anglo American Platinum, from its side, should do more to ensure that decision-making processes are inclusive. These problems frequently result in explosions of anger on the part of frustrated community members - and will continue to do so until structural problems in the legal and political context are resolved.

Conclusion

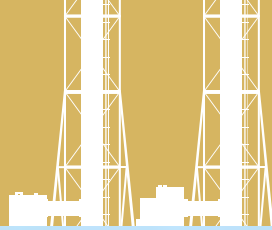
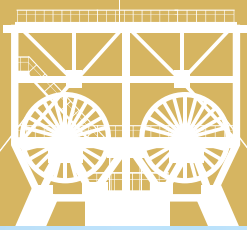
The problems illustrated by the case of Mapela are symptomatic of the failures of the broader legal and political context in which mining communities find themselves. The lack of transparency and accountability in Mapela arises out of, among other things, an inadequate legislative framework and the increasing abuse of power by the chief. Until these issues are properly addressed by the state, we can expect frustrations in mining communities to continue to grow, making sustainable mining impossible to achieve.

ENDNOTES

- 1 A Claassens & B Matlala (2014), *Platinum, Poverty and Princes in Post-Apartheid South Africa: New Laws, Old Repertoires*, in D Pillay, G Khadiagala, P Naidoo & R Southall (eds), *New South African Review 4: A Fragile Democracy – Twenty Years On*, Wits University Press, Johannesburg, 118.
- 2 M Buthelezi & S Yeni (2016), *Traditional Leadership in Democratic South Africa: Pitfalls*

- and Prospects. Paper presented at a Symposium On Land, Law And Traditional Leadership hosted by the Nelson Mandela Foundation and the Council for the Advancement of the South African Constitution, Johannesburg, 4.
- 3 JC Myers (2008), *Indirect Rule in South Africa: Tradition, Modernity and the Costuming of Political Power*, University of Rochester Press, Rochester, 2.
 - 4 Ibid. at 4.
 - 5 Section 211(1).
 - 6 *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).
 - 7 *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC).
 - 8 *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC).
 - 9 *Gumede (born Shange) v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC).
 - 10 *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC).
 - 11 *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* 2015 (6) SA 32 (CC).
 - 12 A Claassens & G Budlender (2016), Transformative Constitutionalism and Customary Law, *Constitutional Court Review*, 75-104.
 - 13 See the section 'Regulatory context' below.
 - 14 Buthelezi & Yeni (n 2 above), 7.
 - 15 I Kriel (2007), A Rich Nation of Poor People: Land and Ethnicity in a Village of the Royal Bafokeng Nation. Paper presented to the AEGIS Conference, Leiden.
 - 16 S Cook (2005), Chiefs, Kings, Corporatization and Democracy: A South African Case Study, *Brown Journal of World Affairs*, 12(1):136.
 - 17 J Comaroff & J Comaroff (2009), *Ethnicity Inc*, The University of Chicago Press, Chicago, 110.
 - 18 A Manson & BK Mbenga (2014), *Land, Chiefs, Mining: South Africa's North West Province since 1840*, Wits University Press, Johannesburg, 144).
 - 19 The Communal Land Rights Act, which would have given traditional leaders the power to represent communities, was struck down by the Constitutional Court in 2010 in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) as a result of concerted civil society opposition.
 - 20 S Mswana (2015), Mining and 'Community' Struggles on the Platinum Belt: A Case of Sefikile Village in the North West Province, South Africa, *The Extractives Industries and Society*, 1(1):501.
 - 21 These deals have in many instances been highly contested. In 2012, members of the Bapo ba Mogale community in North West province launched an application in the North Gauteng High Court to review and set aside a controversial 2014 deal between Lonmin plc and the Bapo ba Mogale Traditional Council to swap their statutory right to royalties, as well as rights in land, for cash and equity controlled by the disputed leader of the community and his supporters. This litigation is ongoing. Also see S Mswana & G Capps (2015), 'No Chief Ever Bought a Piece of Land!' Struggles over Property, Community and Mining in the Bakgatla-ba-Kgafela Traditional Authority Area, Working Paper: 3. Society, Work and Development Institute, University of the Witwatersrand, 6.
 - 22 Mswana & Capps (n 21 above), 6.
 - 23 This statute gives effect to section 25(6) of the Constitution, which provides that: 'A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.' While intended to be interim legislation, the IPILRA has been renewed each year, given that the replacement Communal Land Rights Act of 2004, which would have given traditional leaders the power to represent communities, was struck down by the Constitutional Court in 2010 in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC).
 - 24 Buthelezi & Yeni (n 2 above), 8.

- 25 Members of the Xolobeni community in the Eastern Cape recently launched litigation in the North Gauteng High Court to seek a declaratory order to the effect that the Minister of Mineral Resources may not grant a mining right in terms of the MPRDA unless the provisions of the IPILRA relating to community consent have been complied with, on the basis that section 25(2)(f) of the MPRDA provides that the holder of a mining right must comply with the relevant provisions of any other relevant law.
- 26 The TLGFA replaces the word 'tribe' with 'traditional community' and retains the disputed tribal boundaries created in terms of the 1951 Bantu Authorities Act.
- 27 See ActionAid's report, *Precious Metal: The Impact of Anglo Platinum on Poor Communities in Limpopo*, South Africa, published in 2008, and the follow-up report *Precious Metals II: A Systemic Inequality*, published in 2016.
- 28 See ActionAid (2016), *Precious Metals II: A Systemic Inequality*, 50–51.
- 29 See, for example, Labour reporter (5 September 2016), Amplats Mine Shut Down, *Independent Online*. Available at: <http://www.iol.co.za/business/companies/amplats-mine-shut-down-2064572>.
- 30 Ibid.





WHY NO-GO AREAS FOR MINING ARE IN EVERYBODY'S INTEREST: LEARNINGS FROM ZERO HOUR

Poor governance of mining and the violation of environmental rights in Mpumalanga¹

Suzanne Powell, Saul Roux and Catherine Horsfield
(acknowledging also the authors and contributors to Zero Hour)



Introduction

Different areas of land are suited to different land uses. An area of land may have an abundance of fresh water, may have significant biological resources or biodiversity, may have high-yield soils and be especially suited to cultivation, may have particular cultural, historical or aesthetic value to people, and/or may have an abundant, accessible endowment of mineral resources. Furthermore, land exists in a context. That context might be an area of poor air quality due to excessive air pollution, or there may be extensive pollution of existing water resources. The area may be one where people have lived for generations, subsisting off the natural attributes of the area. The region in which the land is situated may be one in which water is scarce and ecosystems and food security are threatened. All of this must be carefully considered when we humans – frequently not local to the area – seek to determine the best use of the land in the interests of the people of South Africa as a whole. Additionally, when development of land is proposed, how that development might contribute to climate change must necessarily be a central consideration – again, in the interests of the people of South Africa, and also the world over.

Evidence of decisions to authorise mining in Mpumalanga shows that rational consideration of such aspects has not been applied to these decisions. The consequences of this poor and inappropriate decision-making are devastating and enduring. Mining crowds out other present uses of land. Additionally, more often than not, it destroys or frustrates other future land uses. The legacy of mining in Mpumalanga is one of devastating pollution of strategic water resources; permanent habitat loss coupled with the loss of associated species; the destruction of huge quantities of high-yield soils in areas of critical agricultural importance; air quality that is among the worst in the world; social disruption due to forced relocations, increased crime and other sociodemographic changes; irreversible impacts on human (especially child) health; and the loss of livelihoods due to the exhaustive grip of mining – a notoriously inequitable development path – over the land.

Mining expansion in Mpumalanga shows that the current method of discrete decision-making (in respect of individual applications for licences to mine) is not adequately safeguarding environmentally sensitive, vulnerable and important areas. The responsible regulatory authorities frequently authorise mining in environmentally sensitive, vulnerable and important areas, and purport to safeguard the water, air and other biological resources by prescribing conditions relating to their use or damage by the authorised mining company. This ties the regulatory authorities into monitoring compliance and taking enforcement actions in respect of non-compliance with these conditions (compliance monitoring and enforcement or CME). The unacceptable environmental degradation and pollution caused by mining in Mpumalanga reveal this method to be wholly ineffective in adequately safeguarding water, air and biological resources – and people’s health or well-being – against the impacts of mining.

This paper details the ineffectiveness of such approach and argues that it is inappropriate for mining to be authorised in environmentally sensitive, vulnerable and important areas. It further argues that there is an urgent need for the implementation of no-go areas for mining, in other words the proactive prohibition of mining in these areas, thereby removing them from the purview of potential mining interests and the hazards of the ineffective approach to environmental governance in mining described above.

The paper draws on the Centre for Environmental Rights’ (CER) report, Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga (May 2016) (Zero Hour). While the province of Mpumalanga was used as a case study in Zero Hour, the arguments advanced in this paper are also true for other provinces in South Africa where mining is threatening environmentally sensitive, vulnerable and important areas.

Mining is an exclusive – excluding – land use

Mpumalanga is characterised by diverse and mineral-rich geological formations. Accordingly, mining – for gold, chromium, iron, platinum-group metals, coal and granite – is a major land use, and has been since the late 1800s.² The current scale of mining expansion is evident from the results of the Mpumalanga Tourism and Parks Authority (MTPA) investigation of historic trends in land-use patterns in Mpumalanga by mapping all land-use applications received for comment by the MTPA over the 14-year period from 2000 to 2014. The results show that in the last 14 years the greatest pressure for land-use change has come from prospecting (54.2% of the land surface area of Mpumalanga) and mining (24.5% of the land surface area), together accounting for 61.3% of the surface area of the province (due to some overlapping), with the balance of applications related to built infrastructure (9%), residential development (4.3%) and cultivation (0.7%).³

But Mpumalanga is also rich in high-potential soils for cultivation, strategic and critical water resources, and an abundant diversity of species and habitats, all providing vital ecosystem services for sustaining human activities and livelihoods.⁴ The *Mpumalanga Biodiversity Sector Plan Handbook*, a land-use planning tool compiled by the MTPA’s Scientific Services, calls ecological infrastructure and ecosystem services ‘the foundations of a sustainable future’. It further states:

Ecological infrastructure is the nature-based equivalent of hard infrastructure, such as roads, bridges and water pipelines, and is just as important for providing the vital services that underpin social development and economic activity. It is the

THIS PAPER DETAILS THE INEFFECTIVENESS OF SUCH APPROACH AND ARGUES THAT IT IS INAPPROPRIATE FOR MINING TO BE AUTHORISED IN ENVIRONMENTALLY SENSITIVE, VULNERABLE AND IMPORTANT AREAS.

stock of functioning ecosystems that provides a flow of essential ecosystem services to human communities – services such as the provision of fresh water, rangelands for grazing, climate regulation and soil formation.

Ecological infrastructure includes features such as healthy mountain catchments, rivers, wetlands, and patches and corridors of intact natural habitat, which together form a network of interconnected structural elements within the landscape. If this ecological infrastructure is degraded or lost, the flow of ecosystem services diminishes and ecosystems, and the people who depend on them, become increasingly vulnerable to shocks and disturbances, such as the impacts of climate change or natural disasters like floods and droughts. When ecological infrastructure becomes degraded or fails, the direct monetary cost to society and government is often very high.

Ecological infrastructure becomes degraded if the species composition or structure of ecosystems, or the ecological processes that maintain these, are disrupted.⁵

Having endured approximately 150 years of mining, Mpumalanga is an ideal case study of the impacts of mining on biodiversity, water, soil and air quality – and the consequent effects on human health and well-being as well as climate change. What follows is a discussion of such impacts.

Mining and biodiversity

Although Mpumalanga occupies only 6% of South Africa's land surface, it accounts for approximately 21% of its plant species diversity.⁶ However, half of Mpumalanga's natural habitat has already been irreversibly modified, mostly through mining, large-scale agriculture and plantation forestry.⁷ Furthermore, 20% of the vegetation types in Mpumalanga are nationally gazetted as threatened. This means that these ecosystems have lost, or are at risk of losing, vital aspects of their structure, function or composition, and have been classified as vulnerable, endangered or critically endangered.⁸

Mining destroys biodiversity through vegetation clearing (e.g. for infrastructure development), alteration of the composition and layout of the ground (including the soil), the discharge of pollution (into the air, water and soil) and overuse of water resources – all of which significantly alter ecological processes and therefore nature's ability to perpetuate itself.

Mining and water

In South Africa, our water resources are extremely limited – South Africa is one of the driest countries in the world⁹ – but the country also has a growing water-quality problem. South Africa's National Water Resource Strategy¹⁰ states the following about our water quality:

South Africa's water ecosystems are not in a healthy state. Of the 223 river ecosystem types, 60% are threatened, with 25% of these critically endangered. Less than 15% of river ecosystems are located within protected areas, many of which are threatened and degraded by upstream human activities. Of 792 wetland ecosystems, 65% have been identified as threatened and 48% as critically endangered. Acid mine drainage (AMD) has also been reported from a number of areas in South Africa, including the Witwatersrand Gold Fields, the Mpumalanga and KwaZulu-Natal Coal Fields and the O'Kiep Copper District.

Housing over 4000 wetlands and five major catchment areas,¹¹ including the headwaters of the Vaal, Olifants, Nkomati, Crocodile and Usuthu rivers, Mpumalanga is strategically and indeed critically important for regional and international water security.¹²

In 2013, the World Wide Fund for Nature South Africa (WWF-SA) and the Council for Scientific and Industrial Research (CSIR) mapped out South Africa's strategic water-source areas. These constitute the 8% of the land area across South Africa, Lesotho and Swaziland that provides 50% of the fresh-water runoff in these countries. Our strategic water-source areas are sometimes referred to as natural 'water factories' because they support downstream ecosystems, as well as growth and development needs that are often far away – all of which can suffer disproportionately large negative effects if water quality and quantity deteriorate.¹³ Both the Enkangala Drakensberg Water Source Area (which straddles several provinces, including Mpumalanga) and the Mpumalanga Drakensberg Water Source Area are threatened by coal mining. Alarming, the study also found that, although less than 1% of these water-source areas are mined nationally, in Mpumalanga a staggering 70% of these areas that are of 'high importance for water run-off'¹⁴ are the subject of mining-related development applications¹⁵ (17.3% are mining applications, while 53.9% are prospecting applications).¹⁶

The most common impacts of mining on river and wetland systems are the destruction of the water table through alteration of the ground layout, toxic groundwater discharge and acid mine drainage (AMD).¹⁷ AMD occurs when polluted water decants from mines and flows over pyrite, which is commonly known as 'fool's gold'. When pyrite is exposed to oxygen and water, a reaction takes place between the sulphides in the ore rock and sulphuric acid is formed. This water is very acidic and high in salts, and also contains dangerous heavy metals. When AMD is released into the environment, it can pollute both groundwater and surface water. Its effects are devastating, as it leaches into aquifers or flows into rivers and streams. It sterilises soils and contaminates food crops, puts fauna and flora at risk, and is dangerous to human health.¹⁸

The Olifants River, which flows through Mpumalanga's coal-mining region, is evidence of the destructive impact of mining on water. The Olifants River Catchment has been mined for more than 120 years and by 2004 an estimated 50 000 m³ of polluted mine water was being released into the Olifants River per day. An additional 64 000 m³ courses into it from old abandoned mines.¹⁹ A 2011 study by the Department of Water Affairs found that

*mining, predominantly for coal, and other industrial activities around the Wilge, Bronkhorstspuit, Klein Olifants and Olifants Rivers are the main contributors to poor in-stream and riparian habitat conditions where acid leachate from mines is a primary contributor to poor water quality and instream conditions.*²⁰

Furthermore, according to the CSIR, 'mining-related disturbances are the main cause of impairment of river health' in the upper parts of the catchment.²¹

Mining and soil

A mere 1.5% of South Africa's soils are considered high-potential for cultivation, and nearly half (46.6%) of these soils are found in Mpumalanga.²² Mpumalanga produces a significant proportion of South Africa's staple foods, such as soya beans, maize and dry beans.

A MERE 1.5% OF SOUTH AFRICA'S SOILS ARE CONSIDERED HIGH-POTENTIAL FOR CULTIVATION, AND NEARLY HALF (46.6%) OF THESE SOILS ARE FOUND IN MPUMALANGA.

Soil degradation as a result of mining is unavoidable, particularly because mining requires the removal of huge quantities of topsoil essential for cultivation. In addition, soil can lose its fertility and become sterile because of acidification. Moreover, heavy machinery and the movement of wet soil cause its compaction, in consequence of which the soil becomes insufficiently aerated and plants' access to water is compromised. Subsidence is another soil-related impact of mining. All underground mines eventually collapse, causing the surface area to sink in or subside. Subsidence is also a common problem with opencast mining where rehabilitation has not been properly carried out and insufficient and poor quality backfilling of the opencast pit has taken place. Over time, the material used to backfill the pit compacts and sinks, causing the land to subside. One of the main consequences of subsidence, even mild subsidence, is ingress of water. Surface-water pools in the subsided areas and the higher-lying areas dry out, frustrating attempts to revegetate.²³ Mining is so destructive that soils can never be rehabilitated back to their full potential after they have been mined.²⁴

In 2012, the Maize Trust commissioned a study about the impact of mining on agriculture, choosing Mpumalanga's Delmas, Ogies and Leandra districts as its focus areas because of their high soil potential and maize-production yields.²⁵ The researchers calculated that in 2007, 993 301 ha of the study areas were cultivated. They then created a map overlay of mining areas and found that 326 000 ha of cultivated land would be lost to mining. A further 439 000 ha were also under prospecting at the time, which would mean further losses over the course of time. In total, 765 599 ha of cultivated land would be transformed into mining areas.

Mining and air quality

Air pollution from mining can be caused by particle emissions, known as fugitive dust, from activities such as processing, blasting, wind erosion of mine overburdens, ore and overburden handling, crushing and screening of ore, wind entrainment (suspended dust particles) from mine stockpiles, and particulate entrainment from haul trucks.²⁶

On the Mpumalanga Highveld, air quality is among the worst in the world. In recognition of this, the Highveld Air Pollution Priority Area was declared in 2007 by the then Minister of Environmental Affairs and Tourism in terms of the National Environmental Management: Air Quality Act of 2004. A priority area can be declared when ambient air quality exceeds minimum ambient air-quality standards, or when a situation exists that may have a significant impact on air quality.

According to the Highveld Priority Area Air Quality Management Plan, dust particulate entrainment from *mine haul roads* contributed *half (49%)* of annual emission sources of fine particulate matter in the Highveld Air Pollution Priority Area.²⁷ The declaration of the Highveld Air Pollution Priority Area means that poor air quality in the area – from multiple sources, including mining – requires urgent air-quality management to prevent harm to human health.

Mining and human health and well-being

The health and well-being of communities living in close proximity to mines are enormously compromised by the mine's presence. Communities' water supplies run dry due to the mine's overuse of the resource, or are polluted by toxic discharge from the mine. Vegetation clearing for mine infrastructure eliminates grazing land for livestock. Soil and water pollution are fatal for agrarian communities. Communities' exposure to water, soil, noise and dust pollution causes ill health.

Mining and climate change

Ecosystem resilience is fundamental to our natural world's ability to adapt to the impacts of climate change, such as increased rainfall variability, and mitigate the effects of climate change by continuing to capture and store carbon. Resilient ecosystems are those that are maintained in a natural or near-natural state.²⁸ Accordingly, mining's cumulative impacts ultimately exacerbate climate change and climate-change impacts.

In addition, mining contributes to greenhouse gas (GHG) emissions, the increased atmospheric concentrations of which are causing climate change. In South Africa, mining consumes 15% of South Africa's electricity and also utilises a significant amount of coal (7% of national consumption) and petroleum products (3.5% of national consumption) to generate energy utilised during its operations.²⁹ Approximately 88% of South Africa's electricity is generated from coal-fired power stations.³⁰ Mining's coal-fired electricity consumption and coal- and petroleum-powered energy consumption generate substantial GHG emissions. This becomes evident if one considers that the energy sector as a whole (including mining's sizable consumptive share of it) alone contributes approximately 78% of the total GHG emissions in South Africa.

In addition to GHG emissions through energy consumption, coal mining in particular contributes approximately 0.5% of the total GHG emissions in South Africa through fugitive emissions of GHGs.³¹ 'Fugitive emissions' refers to the intentional and unintentional release of GHGs that occur during the extraction, processing and handling/storage of coal.³² An example is the GHGs that naturally occur underground in the locality of coal beds, which gases are released during – and for many years after – the disturbance of the ground through mining.³³ Methane is the major GHG emitted from coal mining, processing and handling/storage.³⁴ This is particularly troubling, because methane is estimated to have a global-warming potential 23 times higher than that of carbon dioxide.³⁵

Environmental governance of mining is ineffective

The state holds the environment and our water resources in public trust for the people of South Africa and is the custodian of our mineral resources for the benefit of all South Africans.³⁶ Its overarching constitutional obligations are to respect, protect and promote our rights to an environment that is not harmful to our health or well-being, our right to have the environment protected for present and future generations, as well as our rights to have access to sufficient food and water.³⁷ In Mpumalanga, the state departments tasked with the environmental governance of mining – namely the Department of Mineral Resources (DMR) and the Department of Water and Sanitation (DWS) – are facilitating the destruction of environmentally sensitive, vulnerable and important areas through poor and inappropriate decision-making and a failure to ensure compliance with environmental laws and licence conditions by way of proper monitoring and enforcement at mining operations.

Evidence of poor and inappropriate decisions to authorise mining in Mpumalanga

Between 2004 and 2010, the DMR granted 4 700 prospecting and mining rights in Mpumalanga, accounting for the highest number of authorisations granted nationwide.³⁸ The CER's analysis of evidence of mining in Mpumalanga paints a sad picture of poor and inappropriate decisions to authorise mining in the province. The DMR grants mining and prospecting rights in environmentally sensitive and legally protected areas without having regard to cumulative impacts of mining on water resources, biodiversity,

IN MPUMALANGA, THE STATE DEPARTMENTS TASKED WITH THE ENVIRONMENTAL GOVERNANCE OF MINING ARE FACILITATING THE DESTRUCTION OF ENVIRONMENTALLY SENSITIVE, VULNERABLE AND IMPORTANT AREAS THROUGH POOR AND INAPPROPRIATE DECISION-MAKING.

ambient air quality and food security, and to companies already in violation of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA).³⁹ The DWS has allowed many mines in Mpumalanga to use water and to discharge polluted water without water-use licences (WULs) and grants poor-quality WULs.⁴⁰

The DMR grants rights in environmentally sensitive and legally protected areas

In February 2011, the then Minister of Mineral Resources told a media briefing that the biggest challenge in Mpumalanga was environmental matters. 'You will find sensitive areas where rights have been granted,' she said. 'We intend to address that matter... . Unfortunately rights were granted, but we'll have to address those issues.'⁴¹ At the 2011 Mining Indaba, the DMR again announced it would not be issuing prospecting or mining rights in areas that are hydrologically sensitive or of critical biodiversity value.⁴² Furthermore, the DMR's Annual Report for 2011/2012, speaking of a moratorium on accepting new prospecting rights applications in Mpumalanga, which was initially imposed between 1 September 2010 and 31 March 2011 but was then extended until 30 September 2011, stated:

*The previous extension of the moratorium in Mpumalanga was due to the complex nature of environmental challenges in that province. It culminated in over 41 rights that are located in Wakkerstroom and Chrissiesmeer being identified as those belonging to the category of environmentally sensitive areas and **consequently action has been taken to prohibit mining within those areas.** (emphasis ours)*

Despite the DMR's recognition of the need to prohibit mining in environmentally sensitive, vulnerable and important areas, it is still granting prospecting and mining rights in these areas. Moreover, some environmentally sensitive and hydrologically important areas already enjoy some legal protection through declarations of protected areas (PAs), including protected environments (PEs), under the National Environmental Management: Protected Areas Act of 2003 (NEM:PAA). Commercial prospecting and mining are prohibited in PAs, but are permissible in PEs with the written permission of both the Minister of Mineral Resources and Minister of Environmental Affairs.⁴³ Despite this, in November 2014, the DMR reported to the Select Committee on Land and Mineral Resources that, in Mpumalanga, 220 mining and prospecting rights applications had been received that 'related to protected areas', of which 26 were accepted for consideration by the DMR, and, of these accepted applications, 20 rights had been granted/issued.⁴⁴

The DMR grants rights without having regard to cumulative impacts

The Mining and Biodiversity Guideline was published in 2013 by the Department of Environmental Affairs (DEA), the DMR, the Chamber of Mines, the South African Mining and Biodiversity Forum (SAMBF) and the South African National Biodiversity Institute (SANBI).⁴⁵ This key document was therefore co-launched and endorsed by government and industry to be used as a tool to find a 'balance between economic growth and environmental sustainability'.⁴⁶

The Guideline defines cumulative impacts as

those impacts from [a] project combined with the impacts from past, existing and reasonably foreseeable future projects that would affect the same biodiversity or natural resources (e.g. a number of mines in the same catchment or ecosystem type collectively affecting water quality or flow, or impacting the same local

endemic species). Impacts may endure in the short term (e.g. during construction only), or may last for decades or centuries, and may effectively be irreversible.⁴⁷

It furthermore confirms that 'areas where mines are interconnected or their impacts are integrated to such an extent that the interconnection results in cumulative impact should be identified by DEA in consultation with DMR' and that 'cumulative impacts have to be taken into account'.⁴⁸

Cumulative impacts should be considered by the DMR, specifically in Mpumalanga, given the extremely high number of mines already in the province, as well as the extent of their environmental impacts. However, holistic analyses of cumulative impacts in the environmental impact assessments commissioned by mines – and utilised by the DMR in making decisions to grant or refuse licences to mine – are rare. For example, in June 2006, the DMR granted a coal-mining right to Black Gold Coal Estates (Pty) Ltd in respect of land that falls within the Chrissiesmeer Biodiversity Site, despite objections from the Mpumalanga Lake District Protection Group (MLDPG), landowners and other interested and affected parties. The MLDPG and two landowners consequently launched a judicial-review application in the High Court for an order setting that decision aside. One of the bases for review was that the DMR did not consider the cumulative impacts of Black Gold Coal's proposed coal-mining operation in Chrissiesmeer. The applicants provided maps depicting the numerous prospecting- and mining-right applications and prospecting and mining operations in the areas surrounding the proposed mining site. These were not included in Black Gold Coal's environmental impact assessment report, as required in terms of Regulation 50(a) of the MPRDA Regulations of 2004, and were not considered by the DMR when it took its decision to grant a mining right to Black Gold Coal.⁴⁹

The DMR grants rights to mining companies already in violation of the MPRDA

The MPRDA sets out the conditions under which, and reasons why, the Minister of Mineral Resources (or a delegate of the Minister) may grant or must refuse a prospecting or mining right.⁵⁰ The Act prescribes that the Minister or his/her delegate may not grant a right to an applicant that is in contravention of any of the provisions of the MPRDA.⁵¹ In practice, however, this is disregarded by the DMR. For example, when mining companies have illegally commenced their activities before having been granted the necessary rights to do so – which is a clear contravention of sections 5(3)(d) and 5(4) (a) and (b) of the MPRDA – they have nevertheless been granted rights by the DMR, as was the situation in the *Mashala Resources* case.⁵² Another example is the grant of a prospecting right to Cousins Coal (Pty) Ltd on a portion of land owned by Samson Sibande. Sibande appealed this decision. His main argument was that the DMR should not have granted the right because the company had previously held a mining right over his property, but had failed to rehabilitate the area after its earlier operations – and therefore was in contravention of the MPRDA.^{53, 54}

The DWS has allowed many mines in Mpumalanga to use water and discharge polluted water without water use licences (WULs)

Before mining companies may 'use' water as defined in the National Water Act of 1998 (NWA), they must first apply for and be issued with a WUL under the NWA. Using water as defined in the NWA without the required WUL is against the law, but in practice many mines operate without them.⁵⁵ According to the DWS, there were 104 mines operating without WULs in South Africa in 2009. By 2015, there were still 96 mines operating without WULs nationwide. In Mpumalanga the statistics are as follows:

WHILE THE DMR HAS THE LEGAL AUTHORITY – AND THE OBLIGATION – TO STOP MINES USING WATER WITHOUT A WUL, THE DWS CAN ISSUE DIRECTIVES TO STOP ALL ILLEGAL WATER USE.

2009 – 13 mines; June 2010 – 54 mines; February 2011 – 41 mines; October 2011 – 24 mines; March 2012 – 17 mines; and July 2014 – 16 mines.⁵⁶

While the DMR has the legal authority – and the obligation⁵⁷ – to stop mines using water without a WUL, the DWS can issue directives to stop all illegal water use. It can also arrest and prosecute anyone using water without a WUL. Both departments therefore have powers to stop contravening mines. However, in our casework many mines have been found to be operating without the required licences, but have faced no legal sanction for doing so. It seems as though this illegal activity goes unchecked in part because of an internal backlog in the DWS’s processing of WUL applications, and in part because the DWS – and the DMR – lack the necessary capacity or will to enforce the law.⁵⁸

The DWS grants poor-quality WULs

WULs are regulatory tools provided for by the NWA to ensure that water use and discharge take place in a way that promotes the objectives of the NWA. The NWA recognises water as a scarce resource and, to adequately govern and protect South Africa’s water resources, licences must comply with the law. However, WULs are often of an exceptionally poor quality.

WUL compliance audits conducted at 14 facilities in 2013 and 2014, including two gold mines and six coal mines, highlight that WULs are often not of a sufficient standard to adequately protect South Africa’s water resources.⁵⁹ Under normal circumstances, the WUL conditions themselves would have been used as the criteria for the audits. However, in conducting such audits, it was found that the WUL conditions first needed to be audited, as they were often scientifically or technically incorrect or not applicable to the site-specific conditions and therefore could not be used as audit criteria.⁶⁰ Prior to auditing compliance of the activities of the mine against the conditions of the WUL, it thus became necessary to first determine whether all water uses that required authorisation by means of a WUL were included and correctly described in the WUL, and whether or not the conditions in the WUL were legally correct (and based on empowering provisions in the NWA), or whether they were based on an error in law.⁶¹

Some of the main findings of the above WUL compliance audits were, among others, that water uses requiring authorisation were not correctly identified in the WUL, and that the properties on which water uses were to take place were incorrectly described. In addition, some water uses that needed to be licensed were not included in the WUL. Moreover, only approximately 60 out of an average of 300 conditions set out in WULs (around 20%) were legally and technically correct and could be used as valid audit criteria.

Compliance monitoring and enforcement (CME) in Mpumalanga

Strong CME is vital to ensuring that the obligations of mining companies, in terms of environmental law and licence conditions, are met. Under South African law, the DMR and DWS are mandated to ensure environmental compliance by mining operations.

To achieve this legislative imperative, adequate numbers of experienced and qualified officials are needed to administer, consider and make recommendations on applications for environmental licences, like prospecting and mining rights, environmental authorisations and WULs. Suitably qualified officials are furthermore required to monitor compliance and to take predictable and appropriate administrative and criminal enforcement action against transgressors when environmental laws and licence conditions are violated.

From the little information that is made public about the monitoring and enforcement of compliance with environmental laws in the mining sector, it appears that the capacity and performance of the DMR and DWS are woefully inadequate – and nowhere more so than in Mpumalanga.

There are 239 authorised mines in Mpumalanga,⁶² and an unknown number of unauthorised mines. Add to this the 788 derelict and ownerless mines in Mpumalanga,⁶³ and you have a very large number of operations that need licences. These licences then need to be monitored for compliance. They may also need to be renewed or amended (particularly the environmental management programmes (EMPrs) which form part thereof) and would require criminal or administrative enforcement action when violations are detected.

In 2009, the Minister of Mineral Resources told Parliament that the DMR had 78 officials 'dedicated to environmental protection and monitoring' nationally. While the details are not clear, this presumably included the processing of EMPrs, the approval of financial-provision assessments, as well as compliance monitoring and compliance enforcement. In addition, there were 13 vacancies.⁶⁴ Alarmingly, it was also reported that the DMR had no dedicated budget for environmental protection and monitoring.⁶⁵

By October 2012, the DMR told the Portfolio Committee on Mineral Resources that its national enforcement and compliance structure of 114 staff members remained 'entirely unfunded'.⁶⁶ Nationally, the number of DMR staff members responsible for assessing compliance with EMPrs was 71 in the 2013/2014 financial year and 106 in the 2014/2015 financial year.⁶⁷ The number of staff members responsible for enforcement action for failures to comply with EMPrs was 71 in the 2013/2014 financial year and 115 in the 2014/2015 financial year.⁶⁸

In respect of the DWS, when in November 2015 the Minister of Water and Sanitation was asked how many Blue Scorpion (i.e. CME) posts were in her CME department, as well as how many were filled and what the qualifications of the officials in those posts were, she indicated that the Department had a total of 177 CME positions, namely:

- 42 within the national Chief Directorate: Compliance Monitoring;
- 42 within the national Chief Directorate: Enforcement;
- 22 dedicated to compliance monitoring in the provincial operations;
- 14 dedicated to enforcement in the provincial operations; and
- 57 performing dual functions (compliance and enforcement) in the provincial operations.⁶⁹

Only half of these positions were filled (89 out of 177 posts). In Mpumalanga, there were a total of two filled posts performing both compliance monitoring and enforcement functions.

The significant institutional incapacity of the DMR and the DWS, nationally and in Mpumalanga, is a clear indication that the DMR and DWS lack the capacity to properly administer applications for environmental licences and to conduct the environmental CME that is sorely needed to prevent the environmental degradation of environmentally sensitive, vulnerable and important areas.

The declaration of no-go areas for mining

It has been argued above that it is wholly inappropriate for mining to be conducted in

IT IS WHOLLY INAPPROPRIATE FOR MINING TO BE CONDUCTED IN ENVIRONMENTALLY SENSITIVE, VULNERABLE AND IMPORTANT AREAS, AND THAT THE CURRENT SYSTEM OF MINING ENVIRONMENTAL GOVERNANCE IS NOT ADEQUATELY SAFEGUARDING – BUT RATHER FACILITATING THE DESTRUCTION OF – ENVIRONMENTALLY SENSITIVE, VULNERABLE AND IMPORTANT AREAS.

environmentally sensitive, vulnerable and important areas, and that the current system of mining environmental governance is not adequately safeguarding – but rather facilitating the destruction of – environmentally sensitive, vulnerable and important areas. Accordingly, there is an urgent need for the implementation of no-go areas for mining, that is, areas where mining is prohibited. As it stands, the law *includes* mechanisms to prohibit mining on specified areas of land in the interests of the protection of the environment, the conservation of a resource, the national interest or sustainable development. The particulars of these legal mechanisms are as follows:

Section 49(1)(a) of the MPRDA authorises the Minister of Mineral Resources to prohibit the granting of mining or prospecting rights in respect of land identified by him/her, having regard to the need to promote the sustainable development of the nation's mineral resources in the national interest. Section 24(2A) of the National Environmental Management Act of 1998 (NEMA) empowers the Minister of Environmental Affairs to prohibit the granting of environmental authorisations in geographical areas identified by him/her if it is necessary to ensure the protection of the environment, the conservation of resources or sustainable development. (In terms of the MPRDA, an environmental authorisation under NEMA is a requirement for undertaking mining or prospecting operations, in addition to a mining or prospecting right under the MPRDA.⁷⁰) These mechanisms should be utilised to prohibit mining on land with significant water or biological value, or which exists in a context of sensitive or vulnerable air, water or biological resources. In essence, these mechanisms mean that the DMR would have to refuse to accept applications for prospecting and mining rights (and associated environmental authorisations) in declared no-go areas.

Undertaking comprehensive analyses with a view to the declaration of no-go areas for mining is more likely to result in appropriate land-use decisions – that take into account the complex environmental, social and governance considerations described above – than decisions by regulatory authorities in respect of individual applications for licences to mine which are, in practice, frequently made in a vacuum. Furthermore, proactively preventing the DMR from accepting prospecting- or mining-right applications and associated applications for environmental authorisations in environmentally sensitive, vulnerable and important areas would avoid investment by mining companies in such applications. It would also obviate the need for costly and time-consuming comments and objections on applications for prospecting and mining rights and environmental authorisations, as well as internal appeals and court applications to overturn prospecting or mining rights and environmental authorisations that should never have been considered, let alone granted. The burden of this resistance currently falls on the shoulders of other national and provincial State departments and agencies (in terms of their cooperative governance rights and responsibilities) and on civil society.

For many years, civil society organisations have been calling on government to declare critical biodiversity and hydrological areas as no-go areas under section 49 of the MPRDA (section 24(2A) only came into effect on 8 December 2014, while section 49 has been operative since 1 May 2004).

In September 2010, government concluded the Outcome 10 Delivery Agreement (Outcome 10) which included a commitment to manage 'environmental impacts from mining and related activities' through 'areas identified for restricted mineral development'.⁷¹ Outcome 10 is an environmentally focused negotiated agreement between various departments of government and public entities, including the DEA, the DMR and the DWS. Outcome 10 acknowledged that:

the inability of the current spatial planning and land use management system to integrate mineral development has resulted in the latter occurring in areas where it permanently sterilised areas of high agricultural potential or impacted severely on sensitive and prioritised ecosystems. Mineral development priority areas should with equal standing 'compete' in a spatial planning and land use management system with other policy imperatives such as biodiversity protection, food security, water security, etc. The inclusion of mineral development in the spatial planning and land use management system and identification of agreed 'mining restriction areas' is accordingly an important step in doing things differently towards achieving the desired outcome.⁷²

Outcome 10 set specific targets for the declaration of no-go areas.⁷³ One of these commitments was to negotiate and publish national areas identified for restricted mineral development by 2015.⁷⁴ This included a comparison of 'environmentally sensitive areas' and 'mineral development priority areas' by December 2012. It also included public and stakeholder consultation by June 2013, and the gazetting of 'restricted mineral development areas in terms of s. 49 of the MPRDA by April 2014'.

Unfortunately, however, the Minister of Mineral Resources, who is empowered to utilise the mechanism in section 49 of the MPRDA, has not yet done so. Save for a short-lived national prohibition on accepting new prospecting rights applications between 1 September 2010 and 31 March 2011 (30 September 2011 in Mpumalanga), no formal declaration of no-go areas for mining (using section 49 of the MPRDA or any other provision) has been made by government. The Outcome 10 targets have therefore never been met. The power of the Minister of Environmental Affairs to utilise the 'no-go' mechanism in section 24(2A) of NEMA is comparatively new. It only came into existence in December 2014.

On 19 August 2015, in response to a request for access to information addressed to the Department of Performance Monitoring and Evaluation – responsible for monitoring Outcome 10 – the CER received an updated Outcome 10 progress report. From this it appears that, while the DEA had submitted specific lists and information to the DMR, most categories in the progress report show that the DEA was still 'awaiting information from the DMR', or that the DMR was yet to 'advise on progress'. It therefore appears that, while the DEA is intent on giving legal protection to environmentally sensitive, vulnerable and important areas, the DMR has made no progress concerning its obligations under Outcome 10.

This lack of progress reflects a disregard for the shared intention of Outcome 10. But worse than this, such lack of progress is hampering South Africans' efforts to ensure our and future generations' survival. Mining and the conservation of environmentally sensitive, vulnerable and important areas – fundamental to our ability to survive – cannot coexist on the same areas of land. The declaration of no-go areas for mining is nothing more than the strategic prioritisation of land-use in the interests of human health and well-being: some land is more important to our survival than other land, and, accordingly, we should protect it. Moreover, people ascribe cultural, historical and aesthetic value to land – which is deserving of respect. Although this paper focuses on environmental and socio-environmental arguments for the declaration of no-go areas, it is undeniable that mining is socially disruptive and undermines cultural, historical and aesthetic values.

Therefore, the Ministers of Mineral Resources and Environmental Affairs have constitutional obligations to use their statutory powers to prohibit prospecting and mining in environmentally sensitive, vulnerable and important areas. This is a plea for us to recognise

the significance of our water, biological, soil and air resources, and their intimate relationship to our basic health and well-being, or, put more simply, our ability to survive. It is also a plea for us to respect and protect the environmental embeddedness and biological needs of all those living in South Africa, and others who may be affected by our climate-change impacts, now and in the future.

ENDNOTES

- 1 CER (May 2016). Available at: <http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf>.
- 2 MTPA (2014), *Mpumalanga Biodiversity Sector Plan Handbook*, Mbombela (Nelspruit), 25; CER (n 1 above), IX.
- 3 MTPA (n 2 above), 25.
- 4 CER (n 1 above), IX, X.
- 5 MTPA (n 2 above), 2.
- 6 Ibid. at 21.
- 7 Ibid. at 25.
- 8 Ibid. at 17.
- 9 WWF-SA (2011), *Coal and Water Futures in South Africa*. Available at: http://awsassets.wwf.org.za/downloads/wwf_coal_water_report_2011_web.pdf [accessed 15 August 2016]; Institute for Security Studies (September 2014), *Parched Prospects*. Available at: https://www.issafrica.org/uploads/AF11_15Sep2014.pdf [accessed 15 August 2016], 2.
- 10 Available at: <https://www.dwa.gov.za/nwrs/LinkClick.aspx?fileticket=ClwWyptzLRk%3D&tabid=91&mid=496> [accessed 15 August 2016].
- 11 MTPA (n 2 above), 19.
- 12 Ibid. at 14.
- 13 WWF-SA (2014), *An Introduction to South Africa's Water Source Areas*. Available at: http://awsassets.wwf.org.za/downloads/wwf_sa_watersource_area10_lo.pdf [accessed 15 August 2016].
- 14 Mari Roleen la Grange (2011), *The Rate and Projected Impact of Development, with Emphasis on Mining, on Biodiversity in the Mpumalanga Province, South Africa*. Submitted in partial fulfilment of the requirements for the BSc (Hons) degree in the Department of Plant Science, University of Pretoria.
- 15 WWF-SA (n 13 above).
- 16 Mari Roleen la Grange (n 14 above).
- 17 MTPA (n 2 above), 68.
- 18 CER (n 1 above), 4.
- 19 WWF-SA (n 9 above), 47.
- 20 DWA (December 2011), *Development of a Reconciliation Strategy for the Olifants River Water Supply: Water Quality Report*. Available at: <https://www.dwa.gov.za/Projects/OlifantsRecon/Documents/Supporting%20Reports/ORRS%20Water%20Quality%20Report.pdf> [accessed 15 August 2016].
- 21 CSIR, *State of Rivers Report: Crocodile, Sabie-Sand and Olifants Rivers* – see www.csir.co.za.
- 22 Bureau for Food and Agricultural Production (BFAP) (2012), *Evaluating the Impact of Coal Mining on Agriculture in the Delmas, Ogies and Leandra Districts – with a Specific Focus on Maize Production*. Available at: [http://www.bfap.co.za/documents/research%20reports/The%20impact%20of%20coal%20mining%20on%20agriculture%20-%20a%20Pilot%20study%20focus,%20based%20on%20maize%20production%20\(2012\).pdf](http://www.bfap.co.za/documents/research%20reports/The%20impact%20of%20coal%20mining%20on%20agriculture%20-%20a%20Pilot%20study%20focus,%20based%20on%20maize%20production%20(2012).pdf) [accessed 15 August 2016].

- 23 CER (n 1 above), 7.
- 24 BFAP (n 22 above).
- 25 Ibid.
- 26 CER (n 1 above), 5, 6.
- 27 Highveld Priority Area Air Quality Management Plan, 2011 – see Table 1E, 19.
- 28 MTPA (n 2 above), 4.
- 29 Department of Energy (2009), Digest of South African Energy Statistics 2009. Available at: <http://www.energy.gov.za/files/media/explained/2009%20Digest%20PDF%20version.pdf> [accessed on 7 October 2016], 14, 15.
- 30 Department of Environmental Affairs (November 2014), National Greenhouse Gas (GHG) Inventory for South Africa 2000 – 2010. Available at: https://www.environment.gov.za/sites/default/files/docs/greenhousegas_inventorysouthafrica.pdf [accessed 7 October 2016], 72.
- 31 Ibid. at 76.
- 32 Ibid. at 113, 114.
- 33 Ibid. at 114.
- 34 Ibid.
- 35 Center for Climate and Energy Solutions, Environmental Impact of Coal. Available at: www.czes.org/energy/source/coal [accessed 7 October 2016]; and Greenpeace, About Coal Mining Impacts. Available at: <http://www.greenpeace.org/international/en/campaigns/climate-change/coal/Coal-mining-impacts/> [accessed 7 October 2016].
- 36 NEMA and the NWA provide that the state holds water resources and the environment in public trust for the people. The MPRDA provides that mineral and petroleum resources are the common heritage of all the people of South Africa and that the state is the custodian thereof for the benefit of all South Africans.
- 37 Sections 24 and 27 of the Constitution of the Republic of South Africa, 1996.
- 38 See <https://pmg.org.za/committee-meeting/11369>.
- 39 CER (n 1 above), 16.
- 40 CER (n 1 above), 35–40.
- 41 IOL (8 February 2011), Mine Rights Moratorium to be Lifted. Available at: <http://www.iol.co.za/business/news/mine-rights-moratorium-to-be-lifted-1.1023216> [accessed 15 August 2016].
- 42 Natasha Odendaal (18 March 2011), Despite Declaration of Sensitive Lands, Challenges Remain, *Mining Weekly*. Available at: <http://www.miningweekly.com/article/the-declaration-of-sensitive-lands-can-ease-challenges-2011-03-18> [accessed 15 August 2016].
- 43 See section 48(1) of NEM:PAA.
- 44 See <https://pmg.org.za/committee-meeting/17920/>.
- 45 DEA, DMR, Chamber of Mines, SAMBF and SANBI (2013), *Mining and Biodiversity Guideline: Mainstreaming Biodiversity into the Mining Sector*, Pretoria.
- 46 Ibid.
- 47 Ibid.
- 48 Ibid.
- 49 CER (n 1 above), 31.
- 50 Section 17(1), read with section 17(2), and section 23(1) and (2), read with section 23(3).
- 51 Sections 17(1)(e) and 23(1)(g).
- 52 CER (n 1 above), 32.
- 53 Ibid.
- 54 Sibande's appeal was deemed to have been dismissed and he has accordingly launched proceedings in the High Court to review that dismissal and the granting of the prospecting right.

- 55 *CER Mining & Litigation Review*: T Humby.
- 56 CER (n 1 above), p 35.
- 57 Sections 23(6) and 25(1)(d) of the MPRDA prescribe that a mining right is subject to any relevant law. Non-compliance with the NWA constitutes non-compliance with these sections of the MPRDA and is arguably grounds for suspension of the mining right.
- 58 *CER Mining & Litigation Review*: T Humby.
- 59 CER (n 1 above), 39.
- 60 Ibid.
- 61 Ibid.
- 62 2016 DMR spreadsheet supplied by the DMR: D1 2016.
- 63 Briefing of the Parliamentary Portfolio Committee on Mineral Resources: Progress in Dealing with Derelict and Ownerless Mines (November 2014). Available at: <https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&cad=rja&uact=8&ved=0ahUKEwj7qp3yqavJAhWJ7xQKHfG8AbwQFghCMAc&url=http%3A%2F%2Fpmg-assets.s3-website-eu-west-1.amazonaws.com%2F141112derelict.ppt&usq=AFQjCNFR2n5FnkQgn-pf5M1dBZiXicdY14Q&sig2=B5q3B-C1jLMySsw3C54Ogw&bvm=bv.108194040,bs.1,d.ZWU> [accessed 15 August 2016].
- 64 National Assembly Question No. 1797, Internal Question Paper Number 22, 16 October 2009.
- 65 Portfolio Committee submission (September 2013), *Environment Authorities Are More Appropriately Placed to Consider, Issue and Ensure Compliance with Environmental Authorisations for Mining Activities*.
- 66 DMR's 2011/2012 Annual Report, 17 October 2012; CER submission to Portfolio Committee, 4.
- 67 MF email to James Lorimer: 20 July 2015.
- 68 Ibid.
- 69 National Assembly, Question No. 4253. Date of publication in internal question paper: 30 November 2015 (Internal Question Paper No. 51).
- 70 Section 5A(a) of the MPRDA.
- 71 Sub-output 3.4.2 of Outcome 10.
- 72 Output 3: Sub-output 4.
- 73 Outcome 10 Delivery Agreement. Available at: <http://www.dpme.gov.za/publications/Outcomes%20Delivery%20Agreements/Outcome%2010%20Environment.pdf> [accessed 15 August 2016].
- 74 Sub-output 3.4.





ROLES AND RESPONSIBILITIES IN THE MINERAL SOCIAL BENEFIT SYSTEM: GENUINE CONFUSION OR PASSING THE BUCK?

Louis Snyman



Introduction

The social and labour plan (SLP) system and the Broad-Based Socio-Economic Empowerment Charter¹ (Mining Charter) have been selected by the state as the vehicles to achieve social benefit and transformation within the South African mineral sector. The SLP system is the instrument used for the practical attainment of social benefit, fulfilling many of the principles set out in the Mining Charter.² SLPs are designed to ensure that workers and mine-affected communities share in the developmental benefits of mining by requiring the distribution of resources and the allocation of particular developmental actions. There are numerous actors, with often overlapping constitutional mandates and conflicting perspectives, whose involvement is critical to the realisation of SLP commitments. SLPs require that the responsibility of certain local infrastructure programmes be assumed by mining companies, shifting developmental obligations commonly associated with government into private hands. Given this partial transfer of responsibility, cooperation between stakeholders becomes critical, making clear and understandable parameters seminal for the ultimate achievement of social advancement in mine-affected areas.

Communities and workers are filled with hope and expectation during the initial engagements with the state and companies, yet, if developmental promises are unfulfilled, the beneficiaries are left angry, frustrated and disillusioned. A failure to lay out and follow a clear operational framework results in the confusion of roles and the shifting of responsibilities. This failure ultimately fatally impacts the completion of projects and programmes designed to uplift and empower local communities.

The aim of this paper is to identify the roles and responsibilities of the various actors, uncovering the misalignments of mandate and unearthing the issues and obstacles present within the practical application of the SLP system. It is hoped that this paper will add to the conversation for a better and more integrated social developmental planning framework for the mining sector.

Background and context

Introduction

During the apartheid era, the mining industry served as the central driver of the South African economy. Mineral benefits were held by the elite minority, and mine workers were left poorly paid and mine-affected communities marginalised, disenfranchised and economically undeveloped. The mining industry was identified as a priority sector for development by the new democratically elected government, serving as a catalyst for the empowerment of historically disadvantaged persons. In 2002, the Mineral and Petroleum Resources Development Act (MPRDA) was passed, handing the administration of mineral rights to the state in order to progress transformation and improve the lives of workers and communities. The private sector was directed to be a key role player in addressing the social challenges facing mine-affected areas, assuming legally binding, positive developmental responsibilities in impacted areas.

Mineral and developmental framework

The MPRDA and its associated Regulations³ set out the hard-law basis for SLP formation, execution and closure.⁴ The actual operation and process in respect of SLPs are set out by the Revised Social and Labour Plan Guidelines of 2010 (2010 SLP Guidelines). These soft-law guidelines contain considerably more specifics than the MPRDA Regulations regarding the form and process of SLPs.⁵ The companies, as the main duty bearers, must satisfy certain requirements before the Department of Mineral Resources (DMR)⁶ approves the SLP and issues the mining right. The DMR must be satisfied that the applicant can make a meaningful, positive socio-economic impact in the affected area, providing adequate commitments and funding for the furtherance of the developmental objectives. Once approved, the SLP is valid for a five-year cycle, with compliance being judged annually before a renewal can be agreed to.

One of the central features of an SLP is the local economic development (LED) chapter. The LED commitment is facilitated and managed by the companies and is designed to ensure that mining wealth is converted into socio-economic development for communities through the building of basic service infrastructure and the stimulation of the local economy. The legislative framework⁷ provides for two categories of programmes: infra-structural programmes that focus on basic services and infrastructure; and income-generating projects supporting or creating local businesses or cooperatives. In terms of the MPRDA Regulations and the 2010 SLP Guidelines, the LED section must demonstrate how the mine will support and contribute to the socio-economic development of mining communities⁸ aligned to the relevant municipal integrated development plan (IDP).⁹ It should facilitate development of economic linkages to sectors other than mining to ensure that there are other sources of employment and business opportunities during and after mining operations.

Due to the SLPs' strong developmental focus, the plans must be considered within the context of developmental planning of all spheres of government. Of particular importance are the national government's National Development Plan (NDP)¹⁰ and the IDPs of provinces and municipalities. The focus is on local economic development by virtue of the original constitutionally mandated powers held by municipalities regarding local social and economic development. This is especially true in the case of extractives where mining has a regional impact and therefore a corresponding social obligation.¹¹ Municipalities have an original source of developmental power derived from the Constitution, and a secondary source of power assigned by national or provincial

DUE TO THE SLPs' STRONG DEVELOPMENTAL FOCUS, THE PLANS MUST BE CONSIDERED WITHIN THE CONTEXT OF DEVELOPMENTAL PLANNING OF ALL SPHERES OF GOVERNMENT.

legislation. The Municipal Systems Act (MSA) 32 of 2000¹² and the Municipal Structures Act 117 of 1998¹³ form the basis of the secondary power, establishing the form and function of the management and drivers of local government.¹⁴ IDPs are the vehicles that house the integrated LED planning commitments made by provinces and municipalities as mandated by the constitutional allocation of functions and powers. SLPs are required to be aligned with local development planning instruments like IDPs in order to form a congruent and pragmatic planning framework. These legislative instruments strive to redress the uneven allocation of resources in order to realise development priorities and achieve equitable spatial development.¹⁵

Role players

Introduction

The SLP system is designed to achieve a positive social impact through mandating the allocation of resources and requiring particular actions by role players that are internal and external to government.¹⁶ There are a variety of primary, secondary and tertiary role players that are active in the SLP system. The multitude of role players present is due to the intersectional nature of planning, mining and social development. However, here the primary role players in local economic development will be dealt with, namely local government, mining companies, the DMR, communities and, lastly, traditional authorities.

Local government

The powers of municipalities are under constant challenge from both private and public actors, even though these powers are confirmed in the Constitution and realised in the MSA. The MSA defines the legal nature and powers of municipalities, establishing a framework for strategic municipal planning and the use of resources on a local level. The MSA requires each municipality to develop individual IDPs¹⁷ and to include spatial development frameworks (SDFs)¹⁸ to guide the management of land use, expenditure and growth in the municipality, as well as integrating and coordinating intradepartmental and extradepartmental development plans.¹⁹ Municipal IDPs contain the growth priorities and strategic developmental direction of the municipality and are therefore crucial to the realisation of SLP commitments. Local and district municipalities have a central role to play in the implementation of the SLP system, as these developmental programmes must align with IDPs in order to be an efficient response to the socio-economic needs of the area and effectively manage the collective resources of the duty-bearing stakeholders. Importantly, IDPs must be informed by consultation with communities and business in order to reflect and manage their priority needs, ideas and resources. Owing to their local knowledge and historical relationships in the area, local government is rightly placed to drive the implementation of local economic development in mine-affected communities.

Mining companies

Mining companies are the main duty bearers under the SLP system. Companies are required to design, implement and report on programmes and projects to ensure that workers and communities obtain developmental benefits from mining. In order for the mining-right holder to deliver on each of the undertakings contained in the approved SLP, there must be appropriate funds allocated for the programmes and projects to be completed. The commitments have the legal force of licence conditions and are legally binding. The fulfilment of these commitments goes to the very core of the companies'

social licence to operate, attempting to redress some of the negative impacts emanating from the mining operation. The ultimate goal is to create a sustainable economy in and around the mining area so that, when the inevitable closure ensues, the community is able to prosper without the mine being the lynchpin of the local economy. In theory, this apportionment of developmental responsibility may seem simple enough, yet in practice the process is complicated by various role players with often conflicting perspectives that emerge. One must also question the intentions of a role player that benefits from such confusion.

The Department of Mineral Resources

As the competent authority for administration of the MPRDA, the DMR has the most significant role among national government departments with regard to mineral-related regulation. The DMR's role is central throughout the SLP life cycle, managing the mining-right application process, ensuring public participation, and monitoring compliance with, and enforcing, regulatory requirements, including the approved SLP. This requires 'receiving, reviewing and approving Annual SLP Implementation Plans' and the annual reports on SLP compliance submitted by mining companies. On-site inspections are vital to verify compliance. In addition, the DMR must use its powers of enforcement, including remedial actions, notices and, where necessary, the suspension or revocation of the mining right. The DMR will need to collaborate with stakeholders to ensure that SLPs are implemented. The regulation of the mineral sector is crucial to its success, yet the DMR has a difficult balancing act to perform. On the one hand, the DMR must promote mineral extraction and job creation. On the other, the department must ensure that compliance by using the threat of suspending or cancelling the mining right due to non-compliance, thereby risking the job security of thousands of mine workers. All things considered, the people directly impacted and the surrounding environment must be the foremost concern of this regulatory body, which, unfortunately, cannot be said to be the current position.

Communities

Communities in mine-affected areas bear the brunt of the social, environmental and economic impacts of mining. Local mining communities and labour-sending areas must therefore be the main recipients of benefits that flow from the economic value derived from the mining operation, ultimately deriving a net socio-economic benefit. The needs and priorities of the people that are directly affected must be reflected in the developmental planning projects that are contained in the SLP and corresponding IDP.

Participation is needed (yet not legally required)²⁰ in the compilation, implementation, monitoring and amendment of the SLPs.²¹ The exclusivity of the consultation process is evidenced through the limited number of groups of commonly engaged stakeholders, which include the company, the regulator, and mostly traditional authorities where communal areas are concerned. Worryingly, there have been numerous complaints from community members and organisations that they have not seen, or been informed of, the SLP, even where the mine has been operating for many years. It is fundamental that communities are capacitated with knowledge of their rights under the MPRDA and the SLP system in order that they are able to understand the impacts and ask questions that further allow them to meaningfully participate in the process. Understandably, communities are often fragmented, as groups are heterogeneous and often have conflicting perspectives and expectations of development. This challenge is by no means an excuse not to meaningfully engage with communities but rather requires commitment and careful handling of the process.

IT IS FUNDAMENTAL THAT COMMUNITIES ARE CAPACITATED WITH KNOWLEDGE OF THEIR RIGHTS UNDER THE MPRDA AND THE SLP SYSTEM IN ORDER THAT THEY ARE ABLE TO UNDERSTAND THE IMPACTS AND ASK QUESTIONS THAT FURTHER ALLOW THEM TO MEANINGFULLY PARTICIPATE IN THE PROCESS.

TRADITIONAL
AUTHORITIES
COMMAND
ENORMOUS POWER
WHEN IT COMES TO
THE ALLOCATION
AND DISTRIBUTION
OF LAND IN AREAS
UNDER TRADITIONAL
POWER.

Traditional authorities

The role of traditional authorities is critical when mining occurs in areas in which the land is subject to communal ownership. Traditional authorities command enormous power when it comes to the allocation and distribution of land in areas under traditional power. Although traditional authorities must work with the municipalities, there are often conflicts that emerge when customary powers and the law governing the tiers of government work in parallel. Traditional authorities often act as the gatekeepers to communities, making royal approval a prerequisite to enter and engage with community members. The trusts that are formed by companies to benefit a community are often managed by traditional authorities. This gives great power to these authorities and often influences the power balance in mine-affected areas. The role of traditional authorities is seen as contentious in many areas owing to the perceived role authorities play in speaking on behalf of communities.²² Traditional authorities are generally undemocratically elected, which has the potential to cause rifts in already politically contended areas.

Challenges of developmental responsibility in mining areas

Introduction

From a developmental perspective, the state has the chief obligation to drive economic opportunities as well as facilitate and finalise infrastructure-building plans and eradicate poverty. Cooperation can be challenging, yet is critical, for components of SLPs and infrastructural LED programmes in particular involve the company in assuming developmental responsibilities associated with government responsibility. This confusion often leads to the failure of proposed projects, resulting in lost social benefit. Frustration on the part of communities is often then voiced through disputes during public-participation processes, litigation and protests.

Confusion over mandate

The Constitution recognises local government as a distinctive, interdependent and interrelated sphere of government with original powers. Local government is assigned the competency of municipal planning, yet provincial and national interference is commonplace.²³ The confusion regarding mandate stems from the Constitution conferring the right to administer planning more generally on all spheres of government.²⁴ Competencies amongst the various spheres of government are interconnected and development often falls into more than one functional area. Jafta J in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) notably confirmed the interconnected nature of developmental responsibilities of the various spheres of government by stating that they are not contained in 'hermetically sealed compartments'.²⁵ The nature of these closely related functions confuses the delineation of responsibilities and boundaries between the functional areas, often causing 'turf wars' with regard to local development.²⁶

Clarity on the roles and responsibilities of local government

While municipalities have the core obligation to undertake LED planning and the delivery of basic services in mining areas, mining companies assist with local economic development in areas in which they operate. Roles and responsibilities are not clearly delineated in legislation and guidelines; therefore, thorough engagement is required to build relationships between municipalities and mining companies in order to identify obligations. This cooperation is especially critical to the success of mining-run LED

projects, an example being that where a school built in terms of an SLP will not be viable, because the company has not consulted the Department of Education about whether or not teachers are available to fill vacancies or has not engaged with the municipality on the provision of basic services such as water and electricity.²⁷

Mining in local municipalities occurs in a very misaligned manner, with the DMR regional authority having the responsibility to monitor compliance and regulate the mine directly, while the local municipality is left out of the monitoring process. This has the effect of delocalising the mining-run LED processes. This seems like an opportunity lost, as local government is aware of the history and issues pertaining to the specific area. The contracting out of state responsibility can therefore further add confusion to an already complex area. A further reason is that municipalities, especially in isolated rural areas, are more conscious of developmental non-compliance than regional DMR offices found in provincial capitals.

Contracting out of state responsibility

The extractive sector, unlike most other sectors, assumes obligations for local economic development in mine-affected areas upon a mineral right being granted. Before mining companies submit their SLPs as part of their mining-right application, they have to engage with local government in order to understand their projects and align them with the overall developmental objectives.²⁸ An agreement is undertaken between the mining companies and the municipality, which agreement is then approved by the DMR.

Often, the companies assume responsibility for already-listed IDP programmes/projects. However, this is contentious, since it is submitted that these SLP commitments are not meant to assume the nature of existing IDP projects, but rather that developmental projects are supposed to add socio-economic value over and above already established and budgeted municipal responsibility. The source of the confusion can be linked to the distinct lack of clarity in the legal framework as to whether developmental additionality is a requirement.²⁹ The 'contracting out' of state responsibility complicates developmental responsibility in mine-affected areas and requires a clear delineation of how each entity must discharge its duties. This additional role player within the local economic development sphere adds to an already confusing area of coordinating intergovernmental role players, often leading to incomplete projects.

An additional issue arises when these projects are completed. Once these LED projects are fully developed, the ownership and management of these are mostly handed over to the municipality concerned. Often, the municipality does not have the resources or skills to manage and maintain the LED initiative. As a result of this 'contracting out' of state responsibility, sustainable and socially impactful outcomes are often absent.

A further issue related to the social responsibility of a private company is the nature and duality of this developmental responsibility. The duality referred to concerns the differentiation between voluntary corporate social responsibility (CSR) and legally obligatory SLPs. In the experience of the writer, these two types of commitments are often conflated and misrepresented where convenient for annual social-development reporting, shareholder feedback or media releases. The critical difference between the two is that SLPs are legally binding commitments that are a prerequisite condition for the fulfilment of a licence application and retention, whereas CSR comprises all commitments over and above this legal threshold which are initiated to improve the company's reputation and social identity. The result of the conflation is that the overall intended impact is lost due to the failure to fulfil legally mandated obligations. Moreover,

A FURTHER ISSUE RELATED TO THE SOCIAL RESPONSIBILITY OF A PRIVATE COMPANY IS THE NATURE AND DUALITY OF THIS DEVELOPMENTAL RESPONSIBILITY.

CSR commitments are at times even portrayed as SLP commitments in order to fulfil reporting requirements.

Cooperative governance

Cooperative governance is the principle that guides various departments through the difficulties and conflicts associated with overlapping mandates and confusing responsibilities. The three spheres of government are required to observe, and adhere to, the principles of cooperative governance and must conduct their activities within the constraints of these principles³⁰ in terms of the Intergovernmental Relations Framework Act 13 of 2005 (IRFA).³¹ Cooperation and understanding each stakeholder's role ultimately impacts the ability of the project to deliver the intended benefit and ultimate empowerment. Problems of cooperation that lead to project failure are the consequences of poor communication and demarcation of roles between the company and government. While there is a constitutional and statutory framework for inter-governmental cooperative governance, there is no equivalent cooperative framework for the state with regard to private conflict in the local development arena.

Alignment with government programmes

Within a local developmental framework, there exist various policies, plans and priorities. SLPs must align with these legislative instruments and complement the objectives of the local growth path. In order for an SLP to operate successfully, it needs to be directly integrated with municipal and provincial land-use spatial planning instruments, such as IDPs and SDFs.³² If initiatives are not clearly identified and aligned with these predetermined pathways, then regulatory approvals become a challenge. Failure to closely regulate the interface between SLPs and IDPs risks allowing the more powerful mining companies to override the priorities of the lesser-resourced municipalities. The IDP process presents an opportunity to clarify and identify roles and responsibilities, thereby providing clarity regarding the integration of SLPs into the IDP process.

Local government IDP LED projects and SLP LED projects need to be selected after considering the wants, needs and priorities of impacted communities. This cannot occur without rigorous consultation. It has been the experience of the writer that meaningful participation is often not completed during the SLP phase due to the expectation that this would have been done during the IDP consultative phase. It is therefore critical that SLPs, and the IDPs that provide the developmental priorities, are based on the actual expressed needs and priorities of communities. This can only be ensured if the plans and processes of both are aligned and it becomes a hard-law principle, and not purely a guideline requirement, that companies must undertake SLP consultations.

The added developmental tier of traditional authority

As mining often occurs in rural areas that are subject to traditional authorities, an added tier of authority then emerges. There is often tension between elected municipal structures and traditional authorities over the exercise of government functions.³³ A growing contestation in rural South Africa exists over the extent to which traditional authorities are accountable to the traditional community in the exercise of their traditional authority. There are contestations between interpretations of customary law that favour royal prerogative and ones that emphasise an active role by community members in decision-making regarding communal land.³⁴ In these areas, traditional authorities have far-reaching powers when it comes to land allocation, which becomes important when mines need to purchase and lease land for their operations. The

communities are often displaced through this process, frequently with very little compensation. Developmental benefits are also often contained in community trusts which are either run by the traditional authority or have significant tribal authority representation on the board. This creates a system of privilege where often undemocratically elected authorities are in control of not only land allocation, but also the direct financial benefits emanating from the extraction of minerals in the areas.

Challenges faced by local government

When faced with failing SLP programmes, mining companies often assert that the municipality's failure is the root cause of the non-completion of projects. Frequently, the capacity, integrity and political tension in the local sphere are issues that are seen as particularly problematic. Municipalities are constantly confronted with budgetary constraints which make it difficult for them to fulfil their mandate.³⁵ Connected to this is the presence of unethical practices within these municipalities. Also, owing to the increase in corruption, communities are less trusting of municipalities and their ability to fulfil their needs.³⁶ These challenges are present within the institutional framework of local government and relate to the size of the municipality, lack of clarity regarding the inter-governmental framework, and the impact of political instability within municipalities.³⁷

Municipalities are constantly losing skills to the private sector, pulling such skills away from rural nodes and posing serious consequences for the concept of developmental local government. Smaller municipalities do not have the resources required to obtain outside skills for the purpose of developing LED. There is also minimal supervision over the qualitative aspects of LED plans and therefore insufficient feedback for local municipalities, which consequently often produce poor-quality IDPs. Once the IDP has been completed, municipalities often lack the capacity to implement developmental strategies and policies.³⁸

Rural-urban divide

Prospecting and mining applications are almost exclusively limited to rural and rural-urban transition areas. The 'rural-urban divide' refers to the increasing disparities that are becoming ever more present between quality of life and the lived realities of rural and urban economies. This is clear when assessing the larger metropolitan areas, as they seem to be benefiting more from well-designed LED policies and strategies, in addition to being better equipped in terms of access to better skills, resources and more funding for LED initiatives.³⁹ Smaller municipalities seem not to place the same emphasis on LED planning and execution, often not even having dedicated personnel to carry out such tasks. Moreover, predominantly smaller municipalities have implemented an 'ad hoc project-based approach rather than developing a comprehensive, integrated strategy embedded in a structured implementation programme'.⁴⁰ This 'divide' is exacerbated when municipalities get further away from city centres and service providers. The isolation in smaller, less-developed areas makes LED planning and cooperation difficult between companies and municipalities, as an imbalance with respect to power and resources favours the mining companies' prerogative.

Conclusion

This begs the question of whether there is genuine confusion in relation to the roles and responsibilities, or does no one really want to accept responsibility for meaningful LED? Firstly, for there to be sustainability in mining areas, there needs to be a clear and understandable framework that allocates roles and responsibility to the stakeholders in

MUNICIPALITIES ARE CONSTANTLY LOSING SKILLS TO THE PRIVATE SECTOR, PULLING SUCH SKILLS AWAY FROM RURAL NODES AND POSING SERIOUS CONSEQUENCES FOR THE CONCEPT OF DEVELOPMENTAL LOCAL GOVERNMENT.

local economic development. Cooperation between companies, local government, provincial government and the DMR is critical, yet the current landscape does not afford appropriate guidance in this regard. Secondly, the plans of mining companies, the local economic development policy contained in the applicable IDPs, and the needs and priorities of communities need to be properly aligned in order to ensure the efficient use of available resources, particularly in rural areas where municipalities are in need of assistance. Thirdly, mining companies often believe that they are established to mine and not to drive local economic development, something which, in their opinion, is the state's responsibility. If we had stronger and more resourced municipalities, mines could arguably keep to the business of mining and only provide local governments with the funds to assist them in fulfilling their mandate. This, however, is not the South African reality. The truth of the matter is that local economic development is a responsibility of all those private and public actors that operate in and shape communities, without which the promises made concerning development will in all likelihood fail. Cooperation is therefore a prerequisite to success, and therefore more guidance on roles, responsibilities and dispute resolution is required in order to make companies and the state accountable in areas where they operate.

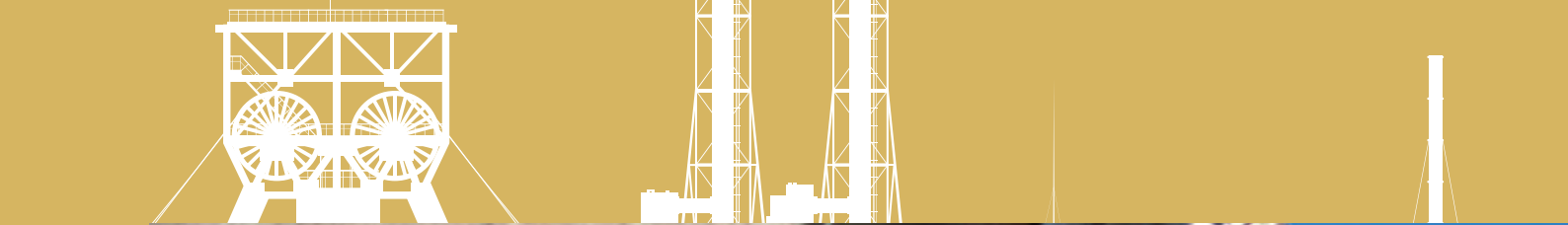
Finally, the writer is equally under no illusions that this perceived confusion of developmental obligation greatly benefits mining companies in evading social responsibility. One might even go as far as to say that, in certain mining areas, this evasion can be seen to deliberately masquerade as confusion. One thing is certain and that is that, without clear regulation directing responsibility and effective policing to ensure compliance, this unfortunate status quo will remain and continue to directly undermine the sustainability of the mining industry, and, more importantly, the deserved and legally required socio-economic development of mine-affected communities.

ENDNOTES

- 1 The Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, September 2010.
- 2 The Mining Charter has numerous principles related to an SLP, including those concerning employment equity, human-resource development, mine-community development, and housing and living conditions.
- 3 MPRDA Regulations 40–46.
- 4 The SLP system cannot be viewed outside the context of the laws and policies enacted to economically promote historically disadvantaged persons (HDPs), e.g. the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act) and the Mining Charter.
- 5 For example, with regard to content, the 2010 SLP Guidelines list an extensive range of indicators that should be included in the social and economic background section for local economic development (LED).
- 6 The minister is the competent authority, but this is normally delegated to regional officials within the SLP department.
- 7 The MPRDA, MPRDA Regulations and the 2010 SLP Guidelines.
- 8 Both host communities and other labour-sending communities fall under this definition of communities.
- 9 Regulation 46(c) of the MPRDA Regulations.
- 10 The NDP is government's overarching strategic development agenda that aims to eliminate poverty and reduce inequality by 2030 through economic growth, job creation, and investing in education and skills.

- 11 Section 156(1)(a) of the Constitution confers on local governments the right to administer matters listed in Part B of Schedules 4 and 5. The schedules are regarded as the primary source of power for local governments.
- 12 The MSA was enacted with the purpose of providing the core principles and mechanisms required to allow municipalities to advance the social and economic development of local communities, as well as enable access to affordable essential services.
- 13 The Municipal Structures Act provides the legal framework for the creation of local-government institutions.
- 14 Section 8(1) of the Municipal Systems Act confirms that municipalities derive their powers as assigned by section 35 of the Constitution, which powers must be exercised within the bounds of Chapter 5 of the MSA.
- 15 The newly enacted Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) provides the overarching legislative framework for spatial planning in South Africa, with the aim of aligning spatial planning to constitutional development imperatives, redressing imbalances caused through the apartheid system, and ensuring equity in the treatment of spatial-development planning and land-use management. Development principles include the principle of spatial justice, spatial sustainability, efficiency, and spatial resilience.
- 16 The Social and Labour Plan Series, Phase 1: System design, Trends Analysis Report. The Centre for Applied Legal Studies, March 2016 at 33.
- 17 Section 25(1)(e) of the MSA.
- 18 SDFs represent the spatial-planning policy of the municipality, informing the determination-of-developmental proposal.
- 19 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2008 (11) BCLR 1123 (CC), para 136.
- 20 Consultation with communities is required by the 2010 SLP Guidelines, yet these are 'soft-law' principles. The MPRDA and its associated Regulations contain no detail on SLP consultation.
- 21 The main applicable framework for consulting mine-affected communities is provided by the Guideline for Consultation with Communities and Interested and Affected Parties (DMR Consultation Guidelines), but these guidelines do not speak to when and how participation must take place in relation to SLPs specifically.
- 22 This includes concluding deals, agreements and contracts on behalf of communities that could prove detrimental to their well-being.
- 23 In 2010, the Constitutional Court (in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC)) held that 'municipal planning' had a specific meaning that included establishing townships. The *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* (9645/14) [2015] ZAKZPHC 42 (3 June 2015) judgment repeats this, stating that it is the exclusive power of municipalities to make land-use planning decisions.
- 24 J van Wyk (2012), Planning in All Its (Dis)guises: Spheres of Government, Functional Areas and Authority, *PER* 53.
- 25 *City of Johannesburg Metropolitan Municipality* (n 23 above) at para 55.
- 26 Van Wyk (n 24 above), 5. The Constitution confers the activity of 'planning' on all spheres of government by allocating 'regional planning and development' concurrently to the national and provincial spheres, 'provincial planning' exclusively to the provincial sphere, and the right to administer 'municipal planning' to the local sphere.
- 27 This example, provided in the expert affidavit submitted to the Marikana Commission of Inquiry, further illustrates the point. See The Problems of the Social and Labour Plan (SLP) 'System' within the Mining Sector in South Africa: Managing Transformation Solutions (Pty) Ltd (MTS), affidavit submitted to Marikana Commission of Inquiry, 9.
- 28 2010 SLP Guidelines.
- 29 Developmental additionality can be explained as the need of mining companies to propose, commence and complete programmes or projects that have not already been catered for by state actors (e.g. municipalities as part of the IDP), but are rather additional and create an additional and separate yet integrated impact.
- 30 Section 40(2) of the Constitution. S Woolman & M Bishop, Co-operative Government and Intergovernmental Relations in T Roux (ed), *Constitutional Law of South Africa*, 14–13.

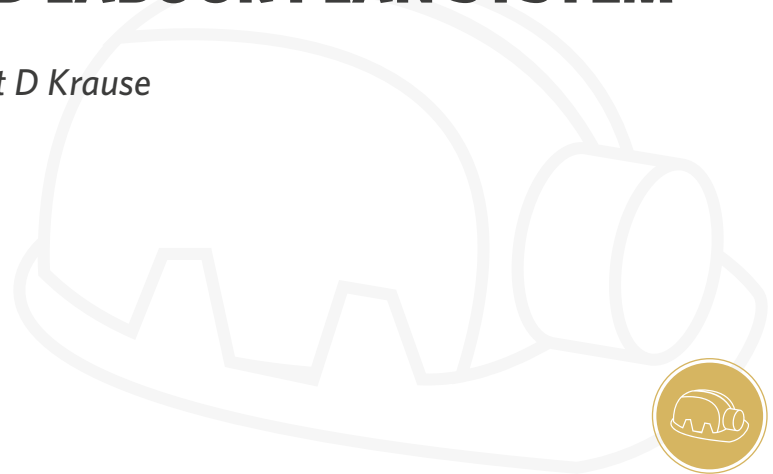
- 31 Preamble to the Intergovernmental Relations Framework Act 13 of 2005.
- 32 It was found that, while the vast majority of SLPs (88%) identified the applicable IDPs, far fewer (20%) identified other critical planning instruments – see Centre for Applied Legal Studies (March 2016), *The Social and Labour Plan Series, Phase 1: System Design Trends Analysis Report*.
- 33 Traditional authorities often assume control over ownership schemes and make decisions in a far less open way when such decisions relate to mining on communal land. A volatile situation can arise when communities living in poverty see wealth flowing to traditional authorities and not to the community members more broadly.
- 34 See both *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* 2015 (6) SA 32 (CC) and the *Premier of the Eastern Cape and others v Ntamo and Others* 2015 (4) All SA 107 (ECB). These two judgments in 2015 supported accountability to the community over royal prerogative.
- 35 N Steytler (2005), *Local Government in South Africa: Entrenching Decentralised Government*, Konrad Adenauer Stiftung, Johannesburg.
- 36 P Reddy (2010), Democratic Decentralisation and Local Democracy in South Africa Re-examined: Quo Vadis?, *Politeia*, Issue 3:66–87.
- 37 J de Visser, Developmental Local Government in South Africa: Institutional Fault Lines, *Commonwealth Journal for Local Governance*, Issue 2:7–25.
- 38 S Sibisi (March 2010), Brushing against the Grains of History: Making Local Economic Development Work in South Africa. Development Planning Division, Working Paper Series no. 5, DBSA, Midrand, 7.
- 39 O Mahlawe (March 2010), SALGA-Led Position Paper: Key Issues in Local Economic Development in South Africa and a Potential Role for SALGA.
- 40 Ibid.





AUTHORS: THE SILENT ACTORS IN THE SOCIAL AND LABOUR PLAN SYSTEM

Robert D Krause



Introduction

The least-discussed role players in the social and labour plan (SLP) system for ensuring that communities and workers derive social benefits from mining are probably those who author the documents themselves. While the law is unambiguous that mining companies are responsible for compiling SLPs as part of the mining-right application process, less is known publicly about the identities and roles of the people who are invested by companies with the task of ensuring that this legal requirement is met. In fact, one of the findings of the Centre for Applied Legal Studies' (CALs) research on SLPs was that none of the SLPs constituting the study sample provided complete information on who was responsible for both the individual sections and the document as a whole.¹ Authorship is a critical issue, as the development of a workable plan for local economic development (LED) requires people with the appropriate expertise, practical experience, and knowledge of the area. Further, for SLPs to address the needs of communities and workers, authors need to be responsive and accountable to the intended beneficiaries. The lack of transparency about authorship contributes to an accountability deficit.

Questions regarding authorship also arise from some of the deficiencies CALs has detected amongst the SLPs in its study sample. These include a lack of information on community consultation in the design process,² the failure to disclose plans for community consultation throughout the SLP life cycle,³ the absence of an acknowledgement of negative impacts of mining in the majority of SLPs,⁴ and the lack of reference to feasibility studies in many of the LED programmes.⁵

If the system for designing SLPs does not foster the accountability and responsiveness of the drafters of SLPs to communities and workers, the SLP system, and the mining system more broadly, will continue to lack credibility and legitimacy in the eyes of communities and workers. Further, the underlying patterns of dispossession and unequal benefits will be less likely to be meaningfully addressed. This status quo is neither sustainable morally or in practice. As the Commission of Inquiry investigating

the Marikana massacre acknowledged, the persistence of these dynamics produces frustration, conflict, and continued potential for instability.

Purpose of this paper

The purpose of this paper is to present a number of themes and issues regarding the designers of SLPs that have arisen both out of the findings of our first SLP report and our conversations to date with people who have played a role in the development of SLPs for companies. These issues are organised around the themes of roles and responsibilities, skills, accountability to communities, and accountability to peers.

Rather than presenting definitive findings, the paper is exploratory in nature. This is largely because the identities and roles of persons tasked with producing SLPs constitute an area which has not been specifically discussed or researched. Many of these issues, such as the skills required for SLPs (and LED planning), require detailed and specific contributions by researchers in other disciplines such as sociology, anthropology and economics (especially development economics) and, in particular, the input of people currently involved in compiling SLPs. This is also a function of the stage of CALS' research on SLPs. At the time of writing, while the desktop analysis of SLPs has been completed, the bulk of the empirical research on the experiences of role players in the system, using semi-structured interviews as the main technique, is still to be conducted. These interviews will include interviews with people who have been tasked with producing SLPs.

SLP regulatory framework: A short introduction

In order to understand the roles involved in the drawing up of SLPs, this paper will provide a brief introduction to the regulatory system which shapes what needs to go into an SLP.

Democratic South Africa inherited a profoundly unequal mining sector premised on the exploitation of the low-wage migrant labour of black South Africans.⁶ Eight years into South Africa's democratic dispensation, South Africa's legislature passed the Mineral and Petroleum Resources Development Act (MPRDA), which created two key mechanisms for the transformation of the mining sector. These are the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (Mining Charter), and social and labour plans (SLPs).⁷ The former contains a number of targets pertaining to the transformation of the sector, including participation by black people in the industry, the advancement of black people and women in mine management, the improvement in housing and living conditions of workers, and procurement from black economic empowerment (BEE) entities. The latter contain more detailed programmes to meet the targets in the Mining Charter and have a particular focus on skills development and LED for workers and communities, respectively.

While the MPRDA is the source of the SLP system, the content of the SLP objectives, obligations and processes is largely set out in Regulations 40 to 46 of the Mineral and Petroleum Resources Development Regulations (MPRDA Regulations) and the Department of Mineral Resources' (DMR) Revised Social and Labour Plan Guidelines of October 2010 (2010 SLP Guidelines).⁸ The 2010 SLP Guidelines contain significantly more detail than the MPRDA Regulations regarding the content and form of SLPs.⁹

As this paper focuses on issues of community benefit, the LED component forms the backdrop to understanding the role of practitioners. For this reason, instead of going

DEMOCRATIC SOUTH AFRICA INHERITED A PROFOUNDLY UNEQUAL MINING SECTOR PREMISED ON THE EXPLOITATION OF THE LOW-WAGE MIGRANT LABOUR OF BLACK SOUTH AFRICANS.

through the content of the whole SLP, subsections of the LED section which have particularly important implications with regard to SLP authors will be considered.

A very important component of the LED section is the social and economic background. This section contains human-development indices in the major labour-sending areas, which include levels of education and access to basic services. In this regard, a number of questions arise regarding the expected role of SLP authors. One of these concerns the source of information in SLPs. Are practitioners meant to conduct primary research or, owing to time and capacity constraints, is it appropriate for them to rely solely on publicly available information for the area contained in Statistics South Africa censuses and in the integrated development plans (IDPs) of municipalities? Another question concerns whether they are only expected to present quantitative information or are required to provide a qualitative analysis of social systems in the area. If the latter pertains, social-science skills become critical.

The 2010 SLP Guidelines require that both the negative and the positive impacts of the mining operation be identified, but CALS has observed that discussion of the negative impacts is relatively rare. This raises questions about the relative independence of specialists from the project proponents they design the SLP for.

At the core of the LED component are the LED programmes themselves, which are divided into, firstly, programmes designed to provide or upgrade infrastructure and basic services and, secondly, income-generating projects, which refer to projects directed at either local business with existing capacity or setting up new businesses to be handed over to community members.

A critical omission in the legislative framework is its failure to require that SLPs include information on the compilers of SLPs, their skill levels, and their duties. This is in contrast to the Regulations governing environmental impact assessments (EIAs), which require that environmental impact assessment reports (EIRs) and environmental management programmes (EMPs) include the details of the environmental assessment practitioner (EAP) compiling the document and his/her qualifications.¹⁰

In addition to the required content of SLPs, another crucial aspect of the regulatory framework for understanding the role of the compilers of SLPs is the relationship between SLPs and municipalities' plans in fulfilment of their original constitutional powers over LED, namely IDPs.¹¹ The Regulations expressly state that SLP obligations are required to be aligned with the contents of IDPs. Alignment between SLP initiatives and government plans and priorities is clearly vital for ensuring that initiatives are consistent with a broader development plan. However, there are questions regarding the manner of alignment that is envisaged. For example, should SLPs involve the assumption by the mining company of initiatives envisaged to be carried out by local government in the IDP, or should SLPs rather add additional *initiatives* to those already contained in the IDP that assist in realising the *needs and priorities* identified in the SLP? Should SLPs entail primary research on the social and economic baseline, or should they merely draw on research already conducted by the municipality for its IDP? The answers to these questions will shape the extent to which the people tasked by companies with compiling SLPs play a substantive role in generating background research and designing the content of programmes, and hence the appropriate skills and experience.

Roles of SLP authors

Introduction

A significant shortfall of the present SLP regulatory system is that it allows very wide discretion concerning the process by which SLPs are compiled, including the question of who is to perform this work. This also renders the authorship of SLPs an opaque process. As is indicated by the discussion of the contents of an SLP, the phrase 'compile an SLP', like 'conduct a social impact assessment' (SIA), actually conceals several, albeit inter-related, roles. In this regard, Wong and Ho's conceptualisation of the multiple roles of social impact practitioners is useful.¹² The roles they identify include, amongst others, social researcher,¹³ project manager¹⁴ and public-involvement specialist.¹⁵

Social researcher

For the social and economic background section, the SLP designer will play the role of a social researcher, a role that has a number of facets. Firstly, there is the role of compiling and presenting quantitative data on the area. The 2010 SLP Guidelines provide a fairly extensive list of the information which should be included in the social and economic background of SLPs. Examples include population size, education levels, income distribution, access to housing, access to water and sanitation, and access to electricity.¹⁶ In addition, the Guidelines provide for an economic profile of the leading sectors in the local economy by contribution to gross domestic product (GDP) and to local employment.¹⁷ Another critical dimension to the role of social researcher is the ability to apply qualitative analysis of the dynamics in the area, such as the distribution of different forms of power, leadership structures, and cleavages within the area. This is especially important given that SLPs are intended to be instruments of greater social and economic equality. Modes of analysis from social sciences such as sociology and anthropology are critical here. Further, for a system that is intended to be a vehicle for social transformation, it is important that research methodologies that empower communities as knowledge creators, rather than viewing them as passive subjects, should be employed. An example of such a methodology is the participatory action research (PAR) model employed by the Bench Marks Foundation in its research.¹⁸ It is vital that, in the event that a standardised syllabus for SLP authors and/or LED practitioners is developed, an extensive review of the literature on participatory research mechanisms is undertaken to ensure that appropriate research methodologies are taught.

In the SLP study sample, qualitative social analysis was notably absent. For example, the SLPs were characterised by an absence of gender analysis. This would include the baseline regarding the gendered division of labour in the economy, the projected impact of mining (where the mining operation is a new one), and the impacts that have occurred (where the SLP is for a going concern). There has been an increase both in organisation at a grassroots level and research on the gendered impacts of mining and the environment.¹⁹ As mining increasingly occurs in rural areas, there are a range of frequently occurring dynamics that exacerbate gender inequality.²⁰ The dispossession of communal arable land, to be used for mining, in addition to reducing the food security/self-sufficiency of inhabitants, also has the effect of depriving women of an integral economic role in many communities.²¹ This must be viewed in the light of women's less secure tenure rights over communal land, which means they are likely to be disproportionately negatively impacted by agreements for the sale of land for mining.²² Mining uses considerable amounts of water and also frequently results in water pollution, including acid mine drainage. The result can be an increase in the distance travelled to access

A SIGNIFICANT SHORTFALL OF THE PRESENT SLP REGULATORY SYSTEM IS THAT IT ALLOWS VERY WIDE DISCRETION CONCERNING THE PROCESS BY WHICH SLPs ARE COMPILED.

THE FACILITATOR SHOULD PROMOTE DISCUSSION BY COMMUNITY MEMBERS ON THEIR NEEDS AND PRIORITIES RATHER THAN SIMPLY PRESENTING THE COMPANY'S PROPOSALS AS A FAIT ACCOMPLI.

safe water. Women are typically assigned the roles of domestic work and caregiving. Water is essential for carrying these out; hence impaired access to water increases the burden of these roles, resulting in less time and capacity to enter the labour market.²³ Further, in most circumstances, mines disproportionately employ men.²⁴ None of the SLPs we have examined acknowledge these impacts nor expressly propose measures to address them.

The pattern amongst the SLPs constituting our sample was for the social research to be based on a desktop study that was largely confined to information available from Statistics South Africa's census data and from research contained in a municipality's IDP.²⁵ Based upon the interviews we have conducted for the forthcoming report, this seems to be an approach that is in some cases consciously followed by mining companies. The assumption seems to be that the substantive research (and decisions on priorities and projects) is to derive information from the municipality's development of its IDP. The advantage of this approach is that SLPs, to be effective and not piecemeal efforts, need to align with government development strategy for the area. At the same time, this makes the quality of SLPs subject to that of the IDP. In our interviews to date, some companies have expressed misgivings regarding the quality of some IDPs.

Public-involvement specialist

The next role is that of public-involvement specialist. Public participation by communities goes to the core of the legitimacy of SLPs, for, to achieve the objective of advancing development for beneficiaries, it is critical that beneficiaries play a role in defining the benefits. The manner in which public-participation processes are undertaken has a great bearing on whether such processes enable a substantive role by affected communities in shaping the SLP. Notice must be sufficient to have a real likelihood of reaching a broad cross section of the local population. This includes the language of the notice (i.e. it must be in the language(s) of communities), the location of the notices (to ensure targeted people are likely to encounter the notice), and the media of the notices (e.g. the use of media such as local radio stations where a significant part of the population is non-literate). The facilitator should promote discussion by community members on their needs and priorities rather than simply presenting the company's proposals as a fait accompli. The plans of the mining company and the extent of the budget available for SLP initiatives should be communicated in clear language. The comments made at meetings must be accurately recorded and the SLP should indicate where programmes were shaped by priorities voiced at these meetings.

Project manager

The final role is that of project manager. Wong and Ho conceive of this role in relation to undertaking the SIA project itself. In relation to SLPs, however, project-management skills, including project planning, are particularly significant in relation to the development of programmes pertaining to infrastructure and to income-generating projects. Needs and priorities expressed by communities and contained in the municipal IDP must be converted into workable programmes with clear indicators of success, milestones, and appropriate budgetary allocations.

For income-generating projects in particular, feasibility studies should be conducted. These studies should include the market for the product/service to be produced, the costs of running the business as opposed to the likely income, and the nature and duration of training which may be necessary to run the business envisaged.

For infrastructural programmes such as the upgrading of roads or the provision of water and electricity, which involve government functions, it is critical that the respective roles of the company and government entities are clearly drawn. An important component of the role of social-strategy developer is therefore developing relationships and concluding agreements with government entities, including municipalities.

Skills and experience

The lack of social analysis in the SLPs in the sample raises questions as to whether the documents were drafted by people or teams that included those experienced in utilising concepts and methodology from the social sciences. At present, both the skills and experience that must be possessed by the individual practitioner leading the SLP-making process and the skills mix required for her/his team are unregulated and lack policy guidance.

This paper will not reach definitive conclusions regarding the actual and the ideal skills mix in SLP teams in view of the following limitations. Firstly, the failure of SLPs to provide the particulars of the people responsible for them adds to the difficulty of determining the skills required. Secondly, whereas the skills needed for EIAs are relatively distinct, with relatively clear disciplines and specialisations such as hydrologists, specialists in different types of flora and fauna, and archaeologists, social and economic planning tends to be more policy-laden and involves a more diffuse mix of hard and soft skills. Nevertheless, from the above discussion of the content of SLPs, and the roles involved in developing them, some tentative observations can be made as to what the combination of skills and disciplines might be for an optimal SLP.

The public-participation process would require the involvement of a public-participation specialist. The social and economic background would, to be substantive, involve sociological and anthropological analysis of the social landscape, and an economic analysis would be required in respect of the economic component. The design of a successful SLP will entail a dialogue between an integration of a range of disciplines and will thus necessitate a transdisciplinary methodology. SLP designers will effectively need to marshal a similar mix of skills as LED specialists.

Another issue is the unequal resources of mining companies, which might result in significant variances in the size, skills levels, and diversity of skills of the teams responsible for producing SLPs. This requires empirical research to establish whether such a variance exists and whether there is a strong correlation with the resources of companies.

A potential solution to any deficiencies in the skills mix of SLP-making teams might lie in developing a standardised training module/qualification for SLP or LED practitioners more broadly and which designers of SLPs should be required to complete. The course/module could be developed by a committee inclusive of multiple stakeholders such as community-based organisations, academics, consultants and mining companies. There is also scope for partnerships between practitioners and educational institutions in the design and administration of the qualification. Any professional body established to regulate SLP practitioners or LED specialists more broadly could require the completion of the training module/qualification as a prerequisite for entry as a practitioner/specialist.²⁶

Independence and accountability to peers

In evaluating the SLP sample, it emerged that a significant proportion of SLPs did poorly with respect to important attributes, including context sensitivity (evidence of knowledge

ANY PROFESSIONAL BODY ESTABLISHED TO REGULATE SLP PRACTITIONERS OR LED SPECIALISTS MORE BROADLY COULD REQUIRE THE COMPLETION OF THE TRAINING MODULE/ QUALIFICATION AS A PREREQUISITE FOR ENTRY AS A PRACTITIONER/ SPECIALIST.

and understanding of local social, political and ecological systems) and forward planning (many SLPs did not contain evidence of project feasibility studies). There was often reason to believe that many of the SLPs in the sample were not designed in a manner required for them to be effective in advancing the objectives of the system. There are a range of possible factors responsible for this state of affairs. Variables include the training of the people responsible for designing SLPs, and the extent to which senior management in companies is committed to impactful SLP programmes or is merely concerned with ticking the boxes in order to obtain or retain a mining right.

Another possible problem, however, relates to questions of independence. Arguably, SLP designers' primary line of accountability is to the mining company, whose commitment to achieving substantive impacts will vary, but whose primary interest will be in obtaining or retaining a mining right. This is obviously the case where SLPs are designed in-house, but also where they are designed by outside consultants whose source of income is the mining company.

To come to more definitive conclusions about independence, it is necessary to have an accurate understanding of the institutional location of designers of SLPs. From our existing research, it seems that there are variations in where SLPs are housed in company structures, whether in corporate social investment, human resources or at a project level. Further, while it is clear that consulting companies are involved in the development of SLPs for some companies, especially the larger companies, the extent to which the prevailing practice is to design SLPs in-house or to outsource to consultants (or a hybrid of the two) is not clear – and neither is the division of labour between external consultants and the persons primarily responsible for SLPs within companies.

Requirements of transparency could enhance accountability of the people involved in the design of an SLP, whether in drafting the document, conducting background research or designing particular projects. If people involved could be identified publicly with their work, the knowledge that peers within their discipline/profession might view their work could provide a disincentive for designing poor-quality SLPs or contributing studies outside their expertise. As is already required by the 2014 National Environmental Management Act (NEMA) EIA Regulations, the relevant Regulations should require that all SLPs identify all who contributed to their design, and that such persons provide information pertaining to their qualifications and experience as well as the professional associations to which they belong.²⁷ Other useful provisions of the 2014 NEMA EIA Regulations that could be adapted for the SLP setting include requiring those formally involved to take an oath or make an affirmation attesting to the correctness of the information concerned, as well as requiring the inclusion of comments by all stakeholders (communities and workers in particular).²⁸

Responsiveness to communities

The primary intended beneficiaries of SLPs are mine workers (especially as regards the human-resources development component of SLPs) and local and labour-sending communities. Given that consultants are paid by the company, there is a risk that they will be more accountable to the interest of the company than communities. They will also often be drawn from a sector of society closer to company management. It is therefore not guaranteed that the consultants will be responsive to the needs of communities.

An absence of responsiveness would make SLPs less likely to achieve their underlying *raison d'être*, namely that of facilitating LED in a manner that advances the needs, interests and priorities of communities. The failure of transformative mechanisms like





SLPs has significant implications for the social and economic sustainability of the mining industry, as persisting inequality and deprivation create conditions for high levels of conflict and instability.

A response to this problem that is being widely articulated by civil society organisations such as the Bench Marks Foundation and ActionAid, as well as by mining-community networks, is for concrete measures to be introduced for the resourcing and capacitation of mine-affected communities in order to allow them to participate in decisions about mining, the environment and LED. One of these measures is an independent fund established to pay for mining-, environment- and development-related specialists to service communities and for mutual capacitation between specialists and community members.²⁹

Conclusion

CALS' research on SLPs found significant deficiencies in the study sample with regard to the analysis of the social and economic circumstances of the beneficiary communities, evidence of meaningful community participation in the design, and evidence of project feasibility. There are numerous possible factors that account for these findings, and some of these relate to the individuals or teams that are responsible for producing SLPs. This paper has identified numerous questions that have been grouped under a number of themes.

The first of these is: What are the roles involved in producing an SLP? Drawing on Wong and Ho's typology, we identified the conducting of research, the facilitation of public participation, and project planning as key roles. In relation to the former, it is critical that research methodologies with a proven record of successfully promoting community agency be identified.

The second set of questions relates to the qualifications and experience of the persons charged with designing SLPs. Here, as in most of the themes, there are both empirical (what are the skills and experience of people currently designing SLPs?) and normative aspects (what should the required qualifications and experience of people designing SLPs be so as to increase the likelihood of effective SLPs?). The latter require research into whether particular skill sets can be associated with strong and successful LED plans more broadly.

The third theme is the absence of a professional body for practitioners to offset the influence of mining companies. Identifying the appropriate professional body entails defining its scope. Given the importance of avoiding duplication of resources, it would seem to make sense for the body to regulate all LED specialists.

The final theme relates to ensuring that the people tasked with designing SLPs are responsive to the communities and workers who are the intended beneficiaries of SLPs. In this regard, the suggestion emanating from civil society and community organisations, that a fund be established for community capacitation which will pay specialists in areas relevant to decision-making concerning the environment, mining and LED so as to service communities, is worth exploring.

To answer these questions in more depth, further discussion and research are needed regarding all the themes identified in this paper. This would include empirical research on the actual roles, expertise, institutional affiliations, and relationships to other role players of practitioners, as well as how these should be defined. Some of this research

will be undertaken under the auspices of CALS' SLP project, as our interviews will include people who have been involved in designing SLPs. There is also a need for discussions encompassing government, academia, local development practitioners, and communities regarding the skills required for effective social and labour plans and a more effective marshalling of knowledge and expertise to further communities' interest in LED.

ENDNOTES

- 1 Centre for Applied Legal Studies (2016), *The Social and Labour Plan Series, Phase 1: System Design Trends Analysis Report* (CALS SLP Report 1), 78–79. This study involved a sample size of 50 SLPs and can be accessed at CALS' website: <https://www.wits.ac.za/cals/our-programmes/environmental-justice/>.
- 2 Ibid. at 70.
- 3 Ibid. at 49.
- 4 Ibid. at 45.
- 5 Ibid. at 81.
- 6 M Legassick (1974), *Capital Accumulation and Violence*, 3 *Economy and Violence*, 253; H Wolpe (1972), *Capitalism and Cheap Labour-power in South Africa: From Segregation to Apartheid*, 1 *Economy and Society*, 425.
- 7 Act 28 of 2002. The primary legislative basis for the SLP system lies in sections 23(1)(e) and (h), 24(3)(c), and 25(2)(h) of the MPRDA and Regulations 40 to 46. Much of the detail regarding the content of SLPs is to be found in the Revised Social and Labour Plan Guidelines 2010 (2010 SLP Guidelines). The legislative basis for the Mining Charter is section 100(2) of the MPRDA.
- 8 GN R. 527 of 2004. Section 40 of the Regulations addresses the application of the provisions. Section 41 identifies the objectives of the SLP system. Section 42 sets out the process for submitting the SLP as part of the mining-right application. Section 43 provides that the SLP is valid until the issuing of a closure certificate. Section 44 states that rights holders require the consent of the minister to amendments and variations of the SLP. Section 45 provides that annual SLP reports must be submitted to the relevant regional manager. Section 46 provides a succinct description of the required content of SLPs.
- 9 This, it must be noted, is the second iteration of the guidelines. The original 2004 guidelines were, however, far less detailed and did not add much to the Regulations. For this reason, the 2004 SLP Guidelines will not be discussed in detail for the purposes of this article.
- 10 Act 107 of 1998; Appendix 3(a), Appendix 4 1(a), Appendix 5 1(1)(a) of the Environmental Impact Assessment Regulations, 2014 GN R. 982 (2014 NEMA EIA Regulations).
- 11 The powers and functions of local government in South Africa are set out in section 156 of the Constitution, read together with Part B of Schedule 4 and Part B of Schedule 5.
- 12 CHM Wong & W Ho (2015), *Roles of Social Impact Assessment Practitioners*, 50 *Environmental Impact Assessment Review*, 50, 124–133.
- 13 Ibid. at 128.
- 14 Ibid. at 127.
- 15 Ibid. at 126.
- 16 4.1.2 of the 2010 SLP Guidelines.
- 17 4.2 of the 2010 SLP Guidelines.
- 18 See the discussion in Bench Marks Foundation *Policy Gap 6 – a Review of Platinum Mining in the Bojanala District of the North West Province: A Participatory Action Research (PAR) Approach*, 4–9.
- 19 A Benya (2015), *The Invisible Hands: Women in Marikana*, 42 *Review of African Political Economy*, 545. See also the collection by Women Unite against Destructive Resource Extraction (WoMin) summing up research on women and the extractive sector, available at: <http://womin.org.za/collection-one.html>. See, in particular, *Paper II – Women Miners:*

Navigating Difficult Territory Underground; Paper III – Land and Food Sovereignty Undermined: Impacts on Peasant Women; and Paper IV – Women's Unseen Contribution to the Extractives Industries: Their Unpaid Labour.

- 20 In response to this trend, the Society, Work and Development Institute at the University of the Witwatersrand (SWOP) is undertaking a six-year research project on the impacts of minerals-driven development on the social landscapes in rural areas'. Available at: <http://www.wits.ac.za/swop/research-clusters/>.
- 21 See n 19 above. *Paper III – Land and Food Sovereignty Undermined: Impacts on Peasant Women*.
- 22 Ibid. at 9.
- 23 Ibid. at 13.
- 24 The limited number of women employed by mines is illustrated by the very low target in the MPRDA Regulations of 10% representation of women in mining.
- 25 Only two SLPs in our sample displayed evidence that field research had been undertaken – CALS SLP Report, 46.
- 26 See the following section for a discussion of the professional body.
- 27 Appendices 1 and 4 of the 2014 NEMA EIA Regulations.
- 28 3(r) of Appendix 2 of the 2014 NEMA EIA Regulations.
- 29 This is a consistent recommendation by the Bench Marks Foundation. See, for example, Bench Marks Foundation (2014), *Policy Gap 9: South African Coal Mining – Corporate Grievance Mechanisms, Community Engagement Concerns and Mining Impacts*, 60.





THE **FUTURE** OF MINING IN SOUTH AFRICA: FROM LABOUR INTENSITY TO MACHINE INTENSITY

Saliem Fakir



Introduction

Accumulation in mining, in the 150-year history of South Africa, involved the interchange between technology, the restructuring of capital, and the use of cheap labour. Mining has been a critical endowment for South Africa's state formation and modernisation. It is an endowment that will last for some time but will not last forever.

This paper provides a brief history of the evolution of the minerals-energy complex (MEC) in South Africa and explores South Africa's renewed commitment to creating a mining-industrial complex. Against this background, it will explore the changing nature of mining globally and in South Africa and, in particular, the changes being driven by technological innovation. We shall do this through the lens of the 'Fourth Industrial Revolution', a concept which gained traction at this year's World Economic Forum (WEF) and which is characterised by K Schwab, the founder and chairperson of the WEF, as being 'a fusion of technologies that is blurring the lines between the physical, digital and biological spheres'.¹ The question, however, is: To what extent will this technological revolution impact the development trajectories of emerging economies and, in particular, what effect will it have on jobs and industrialisation? This paper is an attempt to understand some of the implications of this new technological wave for the mining sector in South Africa. The main emphasis is on automation or the mechanisation of mining. These two terms will be used interchangeably and mean the same thing.²

A brief overview of the history of mining in South Africa

To begin with – and for the purposes of context – this paper will provide a very brief account of South Africa's mining history. South Africa has a 150-year mining legacy, although, anthropologically speaking, early mining in South Africa dates back to the Mapungubwe³ era, as archaeological finds will testify. Modern mining in the mid-1900s was dominated by gold, coal, diamonds and iron. This was followed by the discovery

of areas with rich deposits of platinum-group metals (PGMs) such as manganese, titanium, thorium, and many others. The discoveries of Hans Merensky and his interesting biographical sketches give a good outline of what this period felt and looked like in the interior and northern parts of the country.⁴

South Africa's mineral wealth is in many respects unique and quite diverse. A widely cited media report from Citigroup puts our mineral wealth⁵ in the trillions of dollars.⁶ This 150-year legacy, through the generation of surpluses, expanded both public- and private-sector ability during the good times to invest in new economic territory - allowing the expansion of the forestry, banking and services sectors among others.

Briefly, South Africa's mining history can be broken down into three broad periods:⁷

1. The first period, dominated by Anglo-Saxon capital, was largely driven by resource extraction, with foreign capital exploiting South Africa's domestic natural-resource advantage, including the availability of cheap black, white and, at one point, Chinese labour. This period can be characterised as one in which Britain filled its coffers with bullion derived from the South African resource base.
2. The second period encompassed the government of Jan Smuts and the subsequent rise of Afrikaner nationalists. It involved the co-mingling of foreign and domestic capital with a nationalist focus of taming external leakage and maximising mining for the purposes of internal industrial development and growth. This marked the beginning of the so-called Minerals-Energy Complex (MEC).
3. The third period is the post-apartheid era (post-1994). This is a period in which big mining companies have internationalised South Africa's mining economy and have become more financialised. The focus of the incumbent government has been on ownership redistribution and far less on using mining as a catalyst for broader economic diversification.⁸ The consequence has been that industrial development has become a victim to benign neglect and the relation between mining and industrial policy is weak. As in the previous two periods, cheap labour and capital intensity have continued to play a central role.

The establishment of the minerals-energy complex

In their book, *The Political Economy of South Africa: From Minerals-Energy Complex to Industrialisation*, Fine and Rustomjee⁹ explore how mining surplus¹⁰ was leveraged during apartheid South Africa to build other forms of capital and examine the particular political and economic conditions that existed at the time which supported the creation of what they have dubbed the 'minerals-energy complex' (MEC). The MEC describes a set of closely linked industries associated with the large-scale extraction of South Africa's mineral resources and the provision of cheap electricity.¹¹ The MEC was based on the idea that, if one unlocked cheap energy that supported mining, one could build strong cross-linkages in steel and coal use. The boundaries of the MEC that developed comprised mining, mineral processing (steel), electricity, chemicals and liquid fuels. Later, this would be extended to armaments and other sectors.¹²

Fine and Rustomjee argue that a number of factors served as catalysts for the creation of the MEC. These included the rise of Afrikaner nationalism, decisive state intervention in the economy by the National Party, and the promotion of Afrikaner capital accumulation with a strong relationship to the state. At the heart of this development were two primary objectives. The first was the desire to restructure ownership so that Afrikaners

FINE AND RUSTOMJEE DESCRIBE HOW, ON THE BACK OF THE GOLD BOOM, THE NATIONAL PARTY ACTIVELY DEVELOPED INDUSTRIAL LINKS WITH LARGE-SCALE MINERAL EXTRACTION.

had a firmer hold in the South African economy. The second was the need to defeat sanctions and South Africa's international isolation as a result of apartheid.

Fine and Rustomjee describe how, on the back of the gold boom, the National Party actively developed industrial links with large-scale mineral extraction. It did this through directing investment into heavy industries like iron and steel, supporting the establishment of controlled enterprises like Sasol (which developed unique expertise in converting coal to liquid fuels and other chemicals), and creating state agencies like Iscor and Eskom – the former to exercise control over steel manufacturing and the latter over electricity generation.¹³ The formation of development-finance institutions such as the Industrial Development Corporation (IDC) provided the capital support for the government's objectives. These state agencies and development-finance institutions¹⁴ not only created enabling conditions during the period between the world wars, but also served to domesticate capital accumulation rather than see it go offshore.¹⁵

This constellation of controlled enterprises (like Sasol), financing vehicles (like the IDC) and the effective use of production capital (ideas and the zeal of entrepreneurs) successfully brought about shifts in the ownership patterns between Anglo-Saxons and Afrikaners.¹⁶ Key to the redistribution of surpluses and the transformation of ownership was the state's direct and active intervention.¹⁷ This could only have been mediated through the political control and dominance of the Afrikaners,¹⁸ who successfully managed to break the disjuncture between economic and political power – the former dominated by imperial capital and the latter by Afrikaner nationalists.¹⁹ These shifts not only brought more Afrikaners into the mainstream economy, but also raised the employment and income levels of Afrikaners in relation to those of the English.

Apart from strong state support and other enabling factors, both the English and Afrikaner capitalists had access to a cheap-labour pool which was demobilised from subsistence agriculture through land confiscation, displacement and forced segregation. The apartheid government's brutal racist policies created a surplus labour supply ripe for exploitation in the mining and industrial sectors.

The apartheid government's industrial policy in the 1970s was, however, 'uneven across sectors and was short-lived', as Fine and Rustomjee point out.²⁰ They argue that, during the 1980s, a 'confluence of factors ... contributed to impede diversification out of the MEC. The orientation of the corporate sector and the nature and structure of the financial sector, together with policies of deregulation in the latter, were not conducive to diversification'.²¹ Furthermore, the anti-apartheid insurrectionary period saw increased flows of capital out of the country, increased speculative investments, and a decline in investments in productive sectors of the economy. This was particularly notable in the non-MEC sectors in the late 1980s and into the 1990s.²² By 1990, financial services contributed around 15% to South Africa's gross domestic product (GDP) compared with 11% in 1980.²³ This was driven partly by the deregulation of the financial sector as well as the conglomerate consolidation thereof in the 1980s.²⁴

Fine and Rustomjee point out that the growth and power of the finance sector increasingly began to reflect that of the United Kingdom (UK), where speculative activity became self-sustaining.²⁵ To compound this, conglomerates also adopted an outward orientation – moving money out of the country either through investment overseas or illegal capital flight via transfer pricing.²⁶ Furthermore, the 1980s and 1990s saw a dramatic decline in both public- and private-sector investment performance. For instance, public-sector investment – which was at its peak in the late 1970s, accounting for 16% of GDP – had dropped to 4% of GDP by the mid-1990s.²⁷ Compared with other countries such as

Australia and South Korea, where investment performance was around 20% or more of GDP, South Africa's performance in this regard was very poor.

Whereas government spend was already on the decline, private spend was not moving out of the starting blocks either. Private investment was not focused on long-term, deep-rooted investments into the South African economy. Instead, it was focused on achieving efficiency gains through consolidation and on securing high rates of return from productivity improvements.²⁸ Returns were also generous, as the post-1994 period saw inflation brought under control, as well as cheap and easily accessible credit for the growing middle class, which was encouraged to spend.²⁹ At the same time as formerly fixed investment-led growth was quickly displaced by consumptive-led growth in the late 1980s and 1990s onwards, government spend post-1994 was characterised as heavily weighted towards social transfers and salaries rather than fixed capital investments.³⁰

South Africa's renewed interest in the mining-industrial complex

What the previous section has shown is that, since the 1980s, the industrial and manufacturing linkages within the MEC in South Africa have been weakening. Furthermore, since the 1990s, the South African economy has been shifting, becoming far more service- and finance-oriented. Like some developed economies such as the UK and the United States of America (USA), South Africa is experiencing increased financialisation of its economy. The following section explores if and how South Africa, in the context of its waning manufacturing and industrial competitiveness, can create the linkages needed between mining and industrialisation.

In the post-1994 era, the primary focus of the incumbent government in the mining sector has been on the restructuring of ownership. It has leveraged state ownership over the mineral resources of the country and its control over granting rights to access those resources in order to facilitate transformation of the sector. The Mining Charter's overall rider is that white-dominated mining firms must create space for black-empowerment deals. This, together with social and labour plans (SLPs), has forced mining companies to open the membership of the once exclusive Anglo-Afrikaans club to the new political establishment. While transformation of the sector is imperative, the lack of an industrial-policy linkage in the early days of black empowerment has been problematic. It has been argued that the black economic empowerment (BEE) requirements, which added an extra cost in mining companies' books³¹ (sourced from private capital and the state development-finance institutions), have further encouraged the financialisation of the mining sector and the listing of companies abroad.

Following the appointment of President Jacob Zuma, changes to the existing minerals regime have also gained ascendance. Some of the proposals being mooted in the Minerals and Petroleum Resources Development Act (MPRDA) involve higher royalty rates, greater participation rights for the state, more ministerial discretion with respect to the allocation of mining rights, and many others. Very simply, the state is seeking to intensify its control and net take in terms of taxes, royalties, and other streams of income from mining.³² There is also a new commitment within the ruling party to facilitate a mineral-industrial complex. This is partly in response to calls for nationalisation by sections of the African National Congress (ANC). Attempts are now being made, for example, to create the link between transformation of the mining sector and industrialisation through the Black Industrialist Programme.

In line with this changing focus, the ANC, in its State Intervention in the Minerals Sector (SIMS) Report, has explored potential opportunities for creating linkages between mining

VERY SIMPLY, THE STATE IS SEEKING TO INTENSIFY ITS CONTROL AND NET TAKE IN TERMS OF TAXES, ROYALTIES, AND OTHER STREAMS OF INCOME FROM MINING.

and industrialisation.³³ Two things stand out in this discussion: 1) the need to strengthen relations between mining and purposeful industrial development; and 2) the need to diversify the South African economy through growth led by the mining-industrial complex.³⁴

The SIMS Report shows that the linkages between mining and industrial development can be extensive. Some of these linkages may occur naturally when scale is achieved; others will depend on the relative maturity of economic institutions. This is particularly true for the financial sector, for human-resource development and for industrialisation. The Report indicates that the linkages between mining and industrialisation will largely be achieved through the expansion of the minerals value chain from the mining of the ore to the processing thereof and its fabrication into new materials that can be further used in other product formation. Apart from basic fabrication, additional opportunities exist for new industries such as the manufacturing of fuel cells using PGMs. The challenge, as recognised by the Report, is capturing more value-add within the domestic economy through the co-aggregation of mining and industrial beneficiation.³⁵

The SIMS Report identifies a number of mechanisms for achieving these linkages. One example is encouraging industrial clustering, which involves the 'agglomeration of producers, customers and competitors, whether based in geographical proximity or linked by complementary expertise'.^{36,37} In the PGM sector, for example, the Report identifies industrial clustering as providing opportunities for beneficiation beyond autocatalysts and jewellery.

While the renewed interest in creating linkages between mining and industrialisation is positive, in reality South Africa's ability to achieve this has already weakened for various reasons. Whereas South Africa's economic isolation pre-1994 fostered domestic capabilities in technological innovation and development, the opening of its economy saw the rationalisation of South African multinational corporations (MNCs) and the decommissioning of local capabilities. In line with the general pattern globally, South African mining MNCs moved towards centralised planning, with research and development (R&D) as well as investment located at the centre - in this case, their new international head offices in London - while mining activity and technology application in those geographies where the resources existed and needed to be mined were decentralised.³⁸ The post-apartheid government has been slow to tame the decommissioning of these local capabilities and reviving them now will prove difficult.

D Kaplan suggests that South Africa has some advantage in the mining equipment and specialist services sector. This sector has attracted a great deal of foreign investment and foreign subsidiaries tend to use local expertise and support services. Kaplan, however, notes that the future outlook for South Africa is not optimistic. In interviews with various companies, three major barriers for future growth were identified: skills shortages, deteriorating public research, and limited access to finance. Part of this is attributed to the global boom in mining, high migration of skilled labour out of South Africa, and increased competition from countries like China. The more crisp part of his conclusion is that mining activity - given its scale and diversity in South Africa - created a natural cluster that reinforced itself through knowledge and practice. The combination of poor state support, specifically for mining capital goods, and public research coupled with increased globalisation of local engineering and mining services has led to a steady deterioration of what was once a thriving hub of capability and export.³⁹

The reality today is that, while some of the equipment required for mining and beneficiation may be manufactured under licence by local firms, by and large most original equipment manufacturers (OEMs) in South Africa are local subsidiaries of foreign firms, which are

the biggest suppliers of equipment, components, and ancillary services related to specific technologies.⁴⁰ While local engineering consulting firms that render engineering, procurement, construction and management (EPCM) services, to South African-based companies may be wholly or partly South African-owned, they maintain strong ties with international research organisations, companies and experts. Most OEMs do their R&D outside South Africa.

Furthermore, there is a tendency both within South Africa and the African region as a whole to purchase foreign-branded machinery and equipment.⁴¹ This is related to market size.⁴² The purchasing patterns for large pieces of capital equipment, bulk materials-handling machinery, underground drilling, hauling, and mineral-processing equipment of PGM companies serve to illustrate this. The value-add for hi-tech products manufactured by OEMs tends to be accrued to the overseas company's home base rather than the domestic economy.⁴³ As Kaplan points out, although South Africa remains a net exporter of mining capital equipment, especially to sub-Saharan Africa (SSA), it still carries a large current account deficit for the import of capital goods. Furthermore, the extent to which its exports translate into higher value-add for the South African economy is not entirely certain.

To add to South Africa's woes, the globalisation of local firms and the unbundling of the industry have ensured that long-term R&D capabilities in the mining industry have been thinned and, in some cases, incorporated into international firms.⁴⁴ In the past 20 years we have witnessed a shift in South Africa towards R&D that supports short- and medium-term product development and design – mostly in the domain of optimisation.

With the increased financialisation of the South African economy, the relative importance of manufacturing will continue to decline⁴⁵ – and this despite the fact that the overall size of the South African economy has grown.⁴⁶ Currently, manufacturing accounts for half of South Africa's exports, a large component of which is linked to the MEC. However, as manufacturing's contribution to the South African economy shrinks, particularly in the mining sector, its dependency on the export of raw minerals for foreign exchange will continue to grow, as will its dependency on the import of manufactured goods and services. This will have significant implications for its current account deficit. Diversification and revival of manufacturing – with a strong export focus – from mining and other sectors can lead to a more sustainable economy in the future.

Nevertheless, South African-based companies still hold some advantage. The technological challenges South Africa's unique mining geology can present – in particular, the fact that some of the deepest mines in the world are found in South Africa – fosters technological innovation and specialist skills. Challenging geography in the mining sector is the mother of inventiveness and innovation.⁴⁷ The challenge in South Africa is how we can leverage this to create mining and industrial links. Can we support local R&D and ensure that the intellectual property (IP) remains with South Africa? How can we leverage the manufacturing potential associated with the development of new technologies?

Achieving South Africa's mining-industrial complex ambitions in the light of changes being brought about in the global economy with the onset of the Fourth Industrial Revolution

The previous two sections have attempted to provide some context to South Africa's mining sector and to outline the current government's ambitions to create a mining-

THE VALUE-ADD FOR HI-TECH PRODUCTS MANUFACTURED BY OEMS TENDS TO BE ACCRUED TO THE OVERSEAS COMPANY'S HOME BASE RATHER THAN THE DOMESTIC ECONOMY.

THE EXTENT AND VELOCITY OF THIS SHIFT TOWARDS INCREASED AUTOMATION GLOBALLY AND IN SOUTH AFRICA WILL DEPEND ON A RANGE OF FACTORS, INCLUDING COMMODITY PRICES, GEOLOGY, THE COST OF LABOUR, AND THE AVAILABILITY OF SKILLED LABOUR.

industrial complex. This section will attempt to unpack some of the challenges South Africa will face in this regard, especially in the light of the global shift taking place with the onset of the Fourth Industrial Revolution.

The Marikana massacre (in August 2012) is seen as a watershed moment in South Africa's history.⁴⁸ The post-Marikana era has ushered in a new period in South Africa's mining history. It is characterised by the revisiting of mining's political economy, by shifts in labour organisation and representation, and by a push towards more technology in the future. This phase of upscaling technology is likely to take place sooner rather than later and will likely manifest itself over the next decade. There are several factors driving this: a decline in mine productivity due to geological reasons, exchange-rate volatility (most mining countries tend to rely on exchange rates to boost mining prospects), labour disputes, and the end of the sunset period of cheap energy in South Africa, leading to ever-increasing energy costs for companies.

This period has also witnessed the end of the global commodities supercycle. Companies around the world and in South Africa are struggling to remain profitable in the face of a decline in global demand. As a result, there is far greater emphasis on increasing productivity and cutting costs.⁴⁹ Deloitte's Tracking the Trends 2016 describes how mining companies are attempting to increase productivity through

a continued investment in innovation. From automation and enhanced drilling systems to data analytics and mobile technologies, companies embracing innovation are improving mining intensity whilst reducing people, capital and energy intensity.⁵⁰

This increased focus on productivity is bringing about a new vision for mining. Rio Tinto, in Chile, talks of a 'Mine of the Future' and the Chamber of Mines (ComSA) in South Africa talks of 'Next-Generation Mining'. This vision is characterised by the adoption of new hi-tech solutions which will have significant implications for labour intensity.⁵¹ South Africa's unique political economy in the mining sector may have driven the momentum for automation by companies. There are also some sound geological reasons for this shift. Some of South Africa's mines are the deepest in the world and certain resources - such as gold - are becoming more difficult to extract. High commodity prices and favourable exchange rates may have led to some inertia by South African mining companies in the past. But, with the end of the global commodities supercycle and in line with global trends, companies in South Africa are now pursuing automation more aggressively. Automation, in many senses, is an attempt to decouple mining from commodity boom-or-bust cycles, as machines can be made to run 24/7 or can be slowed down without companies having to bear the human cost of retrenchments during down cycles.

The extent and velocity of this shift towards increased automation globally and in South Africa will depend on a range of factors, including commodity prices, geology, the cost of labour, and the availability of skilled labour. If automation on the scale anticipated by ComSA plays out, the South African economy will have to create jobs elsewhere. Creating stronger linkages between mining and industrialisation would provide opportunities, but, as outlined earlier, South Africa will face many challenges in this regard. If automation is inevitable but may not be universal for all types of mining, consideration will have to be given to how much of the automation industry can be localised and to how strategic types of beneficiation (e.g. in platinum) should be enhanced by increasing global market share in autocatalysts and in the use of fuel cells or other technologies. No doubt automation will reduce the demand for unskilled

and semi-skilled labour and increase the demand for skilled and high-skilled labour. Machine intensity is inevitable in some areas because of geological conditions. Intensity without a planned transition that supports labour welfare and deployment elsewhere in the economy can lead to sectoral imbalances, and the benefits of automation intensity will advantage only certain segments of the labour force, thus further increasing the inequality gap.

This shift to automation in the mining sector is also taking place in the midst of a shift globally with the onset of the Fourth Industrial Revolution. As indicated above, the Fourth Industrial Revolution is characterised by a 'fusion of technologies that are blurring the lines between the physical, digital and biological spheres'.⁵² The rise of artificial intelligence, robotics, three-dimensional printing, nanotechnology and biotechnology, autonomous vehicles, etc., is set to change the way in which modern societies operate.⁵³ The impact on labour, particularly in emerging economies, is set to be significant. This is the warning contained in the WEF's Future of Jobs Report, which notes that emerging economies that are reliant on low-skilled and unskilled jobs are the most vulnerable to these global shifts.⁵⁴

The tension between machines and policies that favour labour maximisation is an ongoing one that will be exacerbated by the global changes brought about by the Fourth Industrial Revolution. A growing body of evidence is showing that advanced economies have expanded low- and middle-end (or income) jobs within the non-tradable sectors, while the tradable sectors' share of the economy is decreasing in size.⁵⁵ For example, advanced economies like those of Germany and Japan are growing their tradable sectors in areas of goods and services that involve higher quality, complexity and knowledge input, while the manufacturing of lower-cost goods with less complexity has been offshored to low-cost countries. They are also focusing on more advanced science applications in biotechnology, nanotechnology, new materials sciences, cleaner-energy technologies, and many others which draw on years of research and capabilities that these countries have invested in. This puts them in a good position to take advantage of the changes brought about by the Fourth Industrial Revolution.

Machines or technology have played a big role in these shifts. Even in the non-tradable sector, human labour that is routine, repetitive and mundane is being replaced by technology. Technology is also reshaping the nature of global supply chains and networks – allowing OEMs to disperse supply chains for component manufacturing to more diverse regions of the world than ever before. Again, these trends have implications for governments, particularly in emerging economies that wish to achieve their objectives of providing decent, meaningful and full-time jobs.

In the mining sector, major advances since the 2000s in information technologies, robotics and geological data gathering and mapping are offering the industry new capabilities to deal with a number of challenges, particularly geological ones. Increasing depths to recover minerals, the quality of the ore being recovered, the cost of mining it, and the decreased profit margins are major drivers of these technology developments. For example, since 2000, over 75% of new base-metal discoveries have been at depths greater than 300m. The best-grade ore has also been depleted. In the mid-1800s, copper-ore grades were over 10% in Australia and around 8% in Canada. Australia, Canada and the USA currently have copper-ore grades of less than 1%. Furthermore, global copper-ore grades are forecast to drop from 0.55% in 2012 to just 0.16% by 2088.

In essence, to mine nowadays one has to go deeper and/or has to extract more minerals because the percentage of valuable mineral ore one can extract is far less. The more

THE TENSION BETWEEN MACHINES AND POLICIES THAT FAVOUR LABOUR MAXIMISATION IS AN ONGOING ONE THAT WILL BE EXACERBATED BY THE GLOBAL CHANGES BROUGHT ABOUT BY THE FOURTH INDUSTRIAL REVOLUTION.

THE OTHER MAJOR CHALLENGE FOR SOUTH AFRICA IS UNDERSTANDING HOW IT CAN JUMP ONTO THE FOURTH INDUSTRIAL REVOLUTION TRAIN INSTEAD OF BEING KNOCKED DOWN BY IT WHEN IT ARRIVES.

work that goes into retrieving smaller quantities of valuable minerals reduces mining productivity and raises costs.⁵⁶ The industry's primary focus is on throughput and yield or recovery rate, while pushing for greater reduction in energy costs and plant availability. Over time, and as mineral reserves closer to the surface are depleted, the remaining deposits tend to be of a lower grade, in more remote locations, deeper underground, mixed with more impurities, and influenced by other factors that make extraction more difficult and costly. For instance:

- As the quality and accessibility of deposits decline, more capital and labour are generally needed to extract them;
- When deposits are deeper, more development work is needed to access and mine the resources; and
- If there are more impurities, greater costs are incurred in extracting and processing the material into a saleable product.

It is only really since 2000 that there has been a focus on technology development in the mining sector. In general, mining technology has changed little in the last three decades and R&D spend has been on the decline not only in South Africa but all over the world. However, from 2000, aspects in mining like low-grade ore, complex mineralogy, and increased energy and labour costs have revived interest in new mining technologies. Even where automation existed prior to 2000, mining companies were slow to adopt these technologies for a variety of reasons. Mining companies today do not enjoy that luxury.⁵⁷

What are some of the technological innovations taking place in the mining sector? New capabilities range from asset-management solutions, remote-access capabilities, performance-monitoring solutions, and advanced process-control technologies to the formation of an intelligent, collaborative environment, among others. Asset-management solutions entail managing an entire suite of operational assets in the mine in order to deal with equipment breakdown, enhance plant availability and utilisation, and reduce maintenance costs through information technology tools that have the ability to deal with predictive failure of machines and optimise repair and maintenance schedules. Information technologies allow for the integration of process, business and people data into one seamless system. These technologies make it possible for expertise to be applied remotely rather than on-site. For example, a few experts in Finland could be operating several mines in remote and inaccessible areas of the world at a fraction of the cost owing to improvements in information and visual technologies.⁵⁸ Today, it is as easy for a geologist based in Finland to offer geological advice remotely as it is for an engineer to fix a problem sitting at an operational command centre rather than physically going into a mine. Autonomous machines are here too. In this regard, the challenge for miners is getting all the autonomous machines to work together in a coordinated manner during a mining-production process.⁵⁹

While the onset of technological changes has the potential to address industry demand for increased efficiencies and reduced operational costs, the socio-economic ramifications are still poorly understood. Ironically, ComSA talks of the transition to machines as a form of 'just transition', with all the contradictory parlance that is embodied in this catchphrase. The real difficulty for South Africa is understanding how it can remain abreast of the developments, localised knowledge, IP and manufacturing, as well as absorb jobs lost in the industry. The other major challenge for South Africa that is linked to this is understanding how it can jump onto the Fourth Industrial Revolution train instead of being knocked down by it when it arrives.

Conclusion

As the saying goes: There are no sustainable diamond mines, only diamond countries with sustainable economies. In theory, it is possible for countries to achieve this, even in cases where surpluses from mineral wealth have previously been misappropriated or inefficiently deployed. Surpluses generated from mining, whether directly or indirectly, should be deployed in the diversification of the economic base – such as beneficiation, manufacturing, strategic industrial development or export of services – in order to counterbalance boom-and-bust cycles that are in the nature of the minerals sector.

However, in the context of major shifts happening globally, achieving this will require strong government intervention and political will to drive the mining-industrial complex, and strong collaboration between industry, government and labour. In the absence of this, South Africa stands the risk of falling into the famous resource curse.

There is no doubt that geological conditions (e.g. with regard to certain minerals like gold) will primarily drive automation and mechanisation in South African mining. How quickly this will spread to other strategic minerals like coal and platinum among others will depend on the richness of the ore border, commodity prices, the future trajectory of variable input costs, and the rapidity with which automation becomes a norm across the globe. The reality is that automation is inevitable in the long term given the convergence of many technologies and the cost reductions that automated technologies will achieve, as well as the global changes being driven by the Fourth Industrial Revolution.

The biggest risk that these shifts pose for South Africa is the disruption they will cause to labour. This will require serious consideration. A number of critical questions need to be addressed, namely:

- How does South Africa prepare for the inevitable transition to automation, and over what period? The question is not *if* but *when* automation will happen.
- Should South Africa not create a framework for a managed transition rather than allowing each industry player to ‘do its own thing’?
- How do we create the conditions in which industry, government and labour can work together on a mining plan that utilises SLPs and the Mining Charter to identify areas in mining and outside of mining where labour-intensive opportunities can be created or alternative compensation mechanisms explored? One area that needs to be looked at more closely is artisanal mining. Artisanal mining is labour-intensive but needs to be formalised and regulated properly.
- How can our institutions of higher education, including training colleges, fill the skills gap created by the adoption of new technology? New machines require different kinds of expertise – they will need to be built or assembled from component parts, and some of this could be localised. We need to understand the level of beneficiation that can be achieved and what we need to do to achieve this – including our skills requirements. This could drive new types of investments and job opportunities in the mining sector.

The hard truth is that the future of mining is shifting. The transition to automation is starting gradually and can become a race-to-the-bottom as mining companies scale up automated operations. There is currently a policy vacuum as far as the transitional

AS THE SAYING GOES: THERE ARE NO SUSTAINABLE DIAMOND MINES, ONLY DIAMOND COUNTRIES WITH SUSTAINABLE ECONOMIES.

phase is concerned. While government is focusing on a host of other challenges, a new world of mining is being shaped with little notice being given to its implications.

ENDNOTES

- 1 K Schwab (2016), *The Fourth Industrial Revolution*, World Economic Forum.
- 2 It is obvious that, as mining has evolved over time, automation or mechanisation has also evolved. However, today when we talk about automation and mechanisation, we are referring to advances that can be achieved using information technology, advanced optics, and remote control of machines and processes where there is less and less reliance on human labour, except highly skilled labour. We are really referring to intelligence and knowledge integration and intensification on an unprecedented scale, because the cost of doing so has come down significantly.
- 3 An ancient archaeological site located close to the border of Zimbabwe where the use of metals, especially gold, shows that the Kingdom of Mapungubwe (1075–1225) was a developed civilisation which laid the foundation for the Kingdom of Zimbabwe in the 1300s.
- 4 EW Machens (2009), *Platinum, Gold and Diamonds: The Adventure of Hans Merensky's Discoveries*, Proteaboekhuis, Pretoria.
- 5 A lot depends on how much can be mined and on the prices minerals commodities will fetch.
- 6 Chamber of Mines figures put the present-day contribution of mining at 8.6% of GDP in terms of direct contributions and 10% of GDP in the form of indirect contributions. The mining industry creates about 1 million direct and indirect jobs, pays R6 billion in royalties, and has a total expenditure profile of R441 billion, with between R4 and R7 billion of the latter being spent locally.
- 7 For a good historical overview, see J Davenport (2013), *Digging Deep: A History of Mining in South Africa*, Jonathan Ball Publishers, Cape Town.
- 8 Even though there has been a lot of rhetoric asserted in the direction of beneficiation.
- 9 B Fine & Z Rustomjee (1996), *The Political Economy of South Africa: From Minerals-Energy Complex to Industrialisation*, Witwatersrand Press.
- 10 We will later make use of the word 'rent(s)' to describe, in similar vein, their use of the word 'surplus'.
- 11 N Pons-Vignon & L Takala-Greenish (2016), Minerals Energy Complex and Comparative Industrialisation Working Group. International Initiative for Promoting Political Economy. Available at: http://iippe.org/wp/?page_id=277.
- 12 A great deal of it is described by Fine and Rustomjee as comprising 'lumpy' investments. While manufacturing fixed investments grew from 35.5% to 49.8% (1961–1972), it was concentrated in MEC sectors like steel, chemicals and processed minerals – see Fine & Rustomjee (n 9 above), 164.
- 13 In the period between the two world wars, there were two industrial-policy instruments: tariff protection and the creation of a state sector around heavy industry. This period was marked by a distinct and purposeful attempt to implement industrial policy. Not all of this met with success and the desired linkages between primary and secondary industries were not always successful.
- 14 This was largely consolidated in the 1960s with the support of the state.
- 15 Fine & Rustomjee (n 9 above), 127.
- 16 The best example of successful state coordination and erosion in the disjuncture between English and Afrikaner capital was in the coal industry. The creation of Eskom provided the glue that fostered better integration between power generation, coal extraction and industrialisation. The development of the coal export market would not have been possible without coordinated policies. See Fine & Rustomjee (n 9 above), 168–169.
- 17 Fine & Rustomjee (n 9 above), 123.
- 18 Ibid.

- 19 Ibid. at 147.
- 20 Ibid. at 174. Interestingly, they note that, while industrial coordination was uneven within the MEC and non-MEC sectors, the paradoxical was true for the armaments sector where state coordination was strong – see 178.
- 21 Ibid. at 174–175.
- 22 Ibid. at 174.
- 23 Ibid. at 175.
- 24 Ibid.
- 25 Ibid. at 176.
- 26 Ibid. at 177.
- 27 A Hirsch (2005), *Season of Hope: Economic Reform under Mandela and Mbeki*, UKZN Press, South Africa, 239.
- 28 High rates of return are usually a result of capital accumulation (where cash is earned through unearned income such as investment in the stock market), technical change (reducing labour by substituting routine tasks with machines), and changes in resource inputs (making more efficient use of inputs for greater output).
- 29 This is particularly true for the rapidly, upwardly mobile black middle class, also called ‘Black Diamonds’, whose share of income rose dramatically.
- 30 Hirsch (n 27 above), 241–245.
- 31 See A Butler (July 2006), Black Economic Empowerment, UCT, draft discussion paper. Available at: http://www.yale.edu/macmillan/apartheid/apartheid_part1/butler.pdf.
- 32 See <http://www.bdlive.co.za/business/mining/2014/03/16/new-mine-law-may-cost-sa-billions>.
- 33 See <http://www.anc.org.za/docs/reps/2012/simssummaryz.pdf>.
- 34 B Turok (1 December 2012), Beneficiation of Mineral Resources: The Key to Economic Development? New Agenda.
- 35 Consider the fact that we have the second-largest reserves of ilmenite in the world after Australia. When it is exported as a raw material, we receive USD0.29 per kg and import it back as titanium metal at USD30 per kg. Ilmenite is the main source for titanium dioxide, which is used in paints, sunscreens and other products. The South African government, through the Department of Science and Technology, has established a Titanium Centre of Competence to look at ways to support value-add activities in South Africa. A pilot titanium-powder plant has been established in Pretoria – see *Mail @ Guardian*, 7–13 June 2013.
- 36 M Walker (2005), Unpacking the Nature of Demand and Supply Relationships in the Mining Capital Goods and Services Cluster: The Case of PGMs, UNU-WIDER, TIPS and Development Policy Research Unit, School of Economics, UCT.
- 37 The cluster concept raised its head at a BRICS (Brazil, Russia, India, China, South Africa) meeting in Durban a few years back at which Russia and South Africa loosely talked of a PGM group – <http://venturesafrica.com/russia-south-africa-set-to-launch-precious-metals-trading-bloc/>. Together, these two countries would dominate the supply of PGMs.
- 38 Panitch, L and Gindin, S (2012). *The Making of Global Capitalism: The Political Economy of American Empire*. London: Verso p.220.
- 39 D Kaplan (2012), South African Mining Equipment and Specialist Services: Technological Capacity, Export Performance and Policy, Resource Policy; available at: <http://dx.doi.org/10.1016/j.resourcepol.2012.06.001>. Kaplan’s paper points to the fact that the bulk of South Africa’s mining equipment industry is on the Rand. Of the 678 companies surveyed, 33% were foreign-owned and 67% were local. They collectively employed 95 000 people and 17 large firms were responsible for 60% of the employment figures. The majority of the firms were either subsidiaries or private firms.
- 40 Ibid. at 7.
- 41 Ibid. at 8.
- 42 Ibid.

- 43 Ibid.
- 44 Ibid. at 16.
- 45 O Smith (13 March 2013), Manufacturing in South Africa: At a Cross Road, RMB Global Markets Research, Rand Merchant Bank.
- 46 Ibid.
- 47 See Kaplan (n 39 above).
- 48 A group of striking Lonmin workers were fired on by the South African Police at a place called Marikana, some 100 km north-west of Johannesburg in the North West province. The fateful event left 34 mine workers dead and 78 wounded, and more than 250 people were arrested.
- 49 Productivity, while a politically contested concept, is in reality a product of a number of factors interacting with one another – labour, capital, materials, and organisational competency and efficiencies – to define the relative ratio of output to inputs in which either is measured in terms of quantity or costs.
- 50 Deloitte (2016), Tracking the Trends 2016: The Top Ten Issues Mining Companies Will Face in the Coming Year. Available at: <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Energy-and-Resources/gx-er-tracking-the-trends-2016.pdf>.
- 51 See Ernst & Young (2014), Productivity in Mining: A Case for Broad Transformation. Available at: <http://ey.com/miningmetals>.
- 52 See Schwab (n 1 above).
- 53 Ibid.
- 54 World Economic Forum (2016), The Future of Jobs: Employment, Skills and Workforce Strategy for the Fourth Industrial Revolution. Available at: http://www3.weforum.org/docs/WEF_Future_of_Jobs.pdf.
- 55 M Spence (15 January 2013), Technology and the Employment Challenge, Project Syndicate.
- 56 See Ernst & Young (n 51 above).
- 57 F Mielli (February 2011), Seven Trends for the Future of Mining Automation, US Mining, Metals and Minerals Segment Manager Schneider Electric USA, Inc. Available at: <http://www.schneider-electric.us>.
- 58 BS Fisher & S Schnittger (February 2012), Autonomous and Remote Operation Technologies in the Mining Industry: Benefits and Costs, *BAEconomics Pty Ltd*.
- 59 DG Almond, K Becerra & D Campain (March 2013), The Minerals Plant of the Future – Leveraging Automation and Using Intelligent Collaborative Environment, *The Journal of the Southern African Institute of Mining and Metallurgy*, Vol. 13.



ACCESS-TO-INFORMATION CHALLENGES IN THE DEPARTMENT OF MINERAL RESOURCES

Tholakele Nene



Introduction

This paper addresses the issues of how the lack of proactive and skilled enforcement capacity in the Department of Mineral Resources (DMR) poses a challenge to the accessing of crucial information, and of how this infringes on transparency and the basic right to information.

In a paper written by representatives of the Centre for Environmental Rights (CER) (Horsfield, Theart, Matola et al.) titled, *How Mining Authorities' Failure to Invest in Environmental Compliance Monitoring and Enforcement Capacity Violates Fundamental Rights*, we discover how the DMR is in 'disarray'. The paper describes in detail, and with supporting evidence, the continuing negligence and lack of compliance monitoring and enforcement capacity in the DMR. It highlights cases and events in respect of which the DMR failed to take the necessary action in ensuring that mining companies adhered to environmental laws. It further highlights cases where, although mining companies had violated such laws, no action was taken by the DMR to ensure that the companies concerned were prosecuted.

Upon reading the paper, one realises the obvious and growing frustration among communities affected by mining and on the part of civil society organisations struggling to obtain relevant documentation on mining activities. However, one also becomes aware of the measures that the DMR is taking to improve its compliance monitoring and enforcement capacity. In its 2013/2014 Annual Report, the DMR indicated that it was putting capacity in place to improve compliance monitoring, an example of this being the appointment of a chief director to deal with such monitoring. The report stated that an additional 30 DMR officials had been trained in order to strengthen the Department's capacity. In the 2015/2016 Annual Report, the Department revealed that 60 officials had received training as environmental mineral resource inspectors during the 2015/2016 financial year. This training was completed in terms of the National Environmental Management Act (NEMA). 'A standalone Enforcement and Compliance

component is successfully being facilitated,' Minister Mosebenzi Zwane was quoted as saying in the Annual Report.

The report continued:

The Minister has designated officials in terms of NEMA for those who had completed the training together with newly recruited officials who already have the EMRI training from the Department of Environmental Affairs. The regional offices have been empowered in terms of NEMA to conduct compliance inspections, with each regional office having three officials attending the training.

It further noted that, in the year 2015/2016, government had rehabilitated 50 derelict and ownerless mines in the areas of Gauteng, KwaZulu-Natal, Mpumalanga and Limpopo.

Bridging the transparency gap encourages public participation

South Africa hosts some of the world's richest biodiversity, but its economy is centred on mining and is energy- and carbon-intensive. Increasing development pressures on natural resources are threatening water, energy and food security. Resource constraints have erupted in community conflicts and violent service-delivery protests. A primary reason for this is that there has been no effective public participation in the granting of mining licences and associated environmental authorisations.

According to the NEMA, affected communities and stakeholders have a right to public participation in proposed mining activities. It is the responsibility of mining companies that have applied for mining rights/environmental authorisations in a particular area to make sure that interested and affected parties are consulted during the application process. This allows stakeholders to voice their concerns and suggestions regarding the proposed development. NEMA also makes provision for communities to have access to relevant documents and related reports. This information is supposed to be easily accessible to those registered as interested and affected parties.

However, this is not always the case, as we have seen in media reports on the opposition of the mining-affected Xolobeni communities to the proposed Xolobeni mine development. There have also been cases where mining companies have deliberately overlooked the important consultation process and have not provided sufficient documentation and information on the development concerned. One such case was that of the Save Our iMfolozi Wilderness, where the Fuleni community complained about the lack of transparency and communication between communities and mining companies, and specifically about the fact that the relevant companies had held a meeting without inviting community members who had registered as interested and affected parties.

According to the NEMA:

The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured. ... Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.

There is a gap between the people holding the information and those who need access to this information. Transparency is a serious problem in the extractive industry and it

INCREASING
DEVELOPMENT
PRESSURES ON
NATURAL RESOURCES
ARE THREATENING
WATER, ENERGY AND
FOOD SECURITY.

DRIVEN BY A
NEED TO INCREASE
TRANSPARENCY AND
ACCOUNTABILITY
USING TECHNOLOGY,
#MINEALERT ALLOWS
USERS TO REGISTER
AND FORMALLY
COMMENT ON MINING
AUTHORISATIONS.

seems that provisions such as those laid down by the NEMA need to be reinforced constantly by the relevant authority so that they are adhered to.

Section 32 of the South African Constitution, as well as the Promotion of Access to Information Act (PAIA), also make provision for the right to access information.

Accessing information

In April 2015, the Oxpeckers Centre commenced communications with the DMR. The initial idea was to create a working relationship with the Department. This relationship would help Oxpeckers to develop and launch a citizen-focused, mine-mapping platform called #MineAlert, a mobile and web-based resource providing users with real-time and location-based alerts about mining and associated environmental applications. Driven by a need to increase transparency and accountability using technology, #MineAlert allows users to register and formally comment on mining authorisations.

#MineAlert is a centralised platform for users to access, track and share information on mining licences. Readily available and accessible information on mining plans enables citizens and communities to take preventative measures to avoid exposure to risks, to participate meaningfully in decision-making, to track the progress of a mining project, and to notify stakeholders and authorities if something seems amiss. It empowers citizens by drawing them into the public-participation process.

The level of transparency that the platform encourages is in keeping with clauses in the South African Constitution which guarantee citizens right of access to information held by the state and the right to live in a healthy environment. The latter provision is underpinned in legislation such as the NEMA, which makes provision for public participation during the course of an application for environmental authorisation and includes access to associated reports and documentation.

According to the NEMA, all registered interested and affected parties need to be notified of the availability of reports and other submissions made to the competent authority by the applicant, and they are entitled to comment on these reports and submissions. The parties should be notified of the outcome of the application, of the reasons for the decision, and of the fact that an appeal may be lodged against the decision.

Right of access and the Department of Mineral Resources

To develop a mining public-participation platform requires an ongoing process of data collection from various sources. The chief of these sources is the DMR, which has a national database on existing and future mining applications and on the operational status of mines around the country.

On conducting research, we found that this information was already featured on the DMR's SAMRAD (South African Mineral Resources Administration System) portal. However, getting access to the information was impossible. We created a test account in the hope that this would give us a foot in, but were never able to view any information on completed and pending applications on the SAMRAD portal. We only had access to the test account that we had created. Our next step was to approach the Department and propose a working relationship in order to promote transparency and good governance through #MineAlert.

We sent a letter to key stakeholders within the Department, putting forward our proposal for a working relationship. Confirmation of receipt was made by the office of the chief information officer and Oxpeckers was informed (telephonically) that such officer had received the letter and would respond soon. After a string of unanswered voicemails to the DMR and weekly follow-ups on the status of the letter, we were transferred to the office of the deputy director general (DDG), where, again, we had to conduct weekly follow-ups which eventually led to unanswered voice messages, phone calls and emails.

We then spoke to an environmental and mining attorney at the Centre for Applied Legal Studies (CALs) who recommended that we speak to the chief director of legal services in the Department. However, he, in turn, referred us back to the chief information officer, sending us the following communication:

As Deputy Information Officer appointed in terms of the Promotion of Access to Information Act, I am primarily responsible for adjudication of requests for access to record. I am not involved in the IT development side, and am therefore not familiar with the platform mentioned in your e-mail. I propose that you contact our Chief Information Officer, [name omitted], for further discussions in this regard. The Chief Information Officer is also copied on this e-mail.

We pointed out that we had previously tried to engage the chief information officer (CIO) through her professional assistant (PA): We were asked by the head of administration and systems to send a letter for the CIO's attention to her PA. This letter we sent on 4 May 2015. After two months of sending and resending the letter, the PA to the CIO transferred us to the DDG's (Mineral Regulation) office, saying that he was the custodian of the information we were requesting and was the only person that could accede to or refuse our request for the information.

We then reforwarded the letter to the DDG's office on 13 July 2015 and have been doing telephonic and electronic follow-ups ever since, but without any constructive feedback from the Department. 'It is a struggle to get anyone on the phone in that office. We would truly appreciate any assistance from you or DMR regarding this request' - this was stated in an email sent to the chief director of legal services on 31 August 2015. However, there was no response.

Formally requesting information through the Promotion of Access to Information Act (PAIA)

Since we were not having any success in informally establishing a working relationship with key representatives at the DMR, we believed that it was time for a different approach. This saw Oxpeckers formally requesting access to records using PAIA (Act 2 of 2000) in the hope that we would be successful, as records are publicly available documents. The relevant documents were completed and submitted and the standard request fee of R35 was paid, as per PAIA Regulations.

According to section 25(1) of PAIA, a requester must receive a response from the Department within a maximum period of 30 days. The Oxpeckers Centre launched the said PAIA application on 1 October 2015 and was still doing countless weekly follow-ups with the Department in January 2016. Since the PAIA application sent by Oxpeckers had long since expired, it was evident that the Regulation had not been adhered to, thereby violating section 25(1).

SINCE THE PAIA APPLICATION SENT BY OXPECKERS HAD LONG SINCE EXPIRED, IT WAS EVIDENT THAT THE REGULATION HAD NOT BEEN ADHERED TO, THEREBY VIOLATING SECTION 25(1).

USING THIS MERGED DATABASE, WE DEVELOPED A FAST AND EFFICIENT HYBRID TRACKING PLATFORM THAT OPERATES ON MOBILE DEVICES AND COMPUTERS.

During this period, Oxpeckers continuously followed up with the Department to confirm receipt of the documents and to attempt to obtain constructive feedback, but to no avail. In the course of our communications late in 2015 it was confirmed by a DMR official responsible for the processing of PAIA applications that our file was with the office of the DDG and that the custodian (the office of the DDG) still needed to confirm the availability of the information. We were given a general response with no indication of when we should expect a response from the Department on whether the information was available or not.

It was clear that the Department was underperforming, and there seemed to be shared experiences amongst fellow organisations and stakeholders. The belief was that the PAIA section of the DMR was possibly understaffed. There was, and still is, very limited communication between the Department and the requester of the information. Not once during our multiple PAIA applications has the Department confirmed receipt of any of our applications as the PAIA Regulations provide. In each case, we have had to call the Department's PAIA representative to find out about the status of the application. This is why we suspected that the Department might be understaffed at the time. Moreover, Oxpeckers and other fellow non-profit organisations (NPOs) all reported dealing with one person in the Department. One can only imagine the volume of requests this one particular individual has to sift through on a daily basis.

In January 2016, we drafted and lodged an internal appeal with the chief director of legal services based on the grounds of deemed refusal. 'Deemed refusal', according to PAIA, occurs 'when an information officer fails to give the decision on a request for access to the requester concerned within the period contemplated in section 25(1). In such a case, the information officer is regarded as having refused the request'.

Within seven days of having lodged the internal appeal, we received the requested information, that is, a copy of the most recent national mining database containing existing and future mining applications. Out of the thousands of mining applications and related documents that the Department receives every day, we managed to secure a database containing more than 2 000 mining applications. This was a small victory, but a victory nevertheless – the months invested in constant follow-ups had finally paid off. However, we still have a long way to go to source additional mining-related documents and annual, updated data sets.

Bringing #MineAlert to life

During the course of waiting for the most recent database from the Department, we had approached the national office of the chief surveyor-general and other relevant stakeholders in order to start bringing #MineAlert to life, as, at the time, we had no indication from the DMR when a decision to grant or refuse the information would be made.

This exercise enabled us to secure enough data sets to develop and launch the #MineAlert Mapping Platform. #MineAlert was formally introduced to the public on 26 April 2016, using data sets we had obtained on mining applications and licences in Mpumalanga, the latest data set provided by the DMR, and a data set of African mines.

Using this merged database, we developed a fast and efficient hybrid tracking platform that operates on mobile devices and computers. The platform provides easy access to crucial information on mines around South Africa. Because it is also available on mobile, this means that people who would otherwise not have access to a computer, and who rely on cellphones for Internet access, are able to access, track and share information on

mining activities in their areas. #MineAlert has more than 2000 data points on mining applications and licences around South Africa, and our database is growing daily.

Each data point has a mine name, farm name, commodity type, geocoordinates, operating company and status, and, in some cases, related documents and records. We have been unsuccessful in our attempts to obtain large volumes of documents from the DMR and have therefore currently had to rely on documents shared through crowd-sourcing as well as those shared by stakeholders. These related documents range from background information on a mine, its mining licence or permit, and social and labour plans (SLPs), to environmental impact assessments and water-use licences.

Thousands of these documents were sourced from the CER, a non-profit law clinic based in Cape Town, and CALS, a social-justice organisation based at the School of Law at the University of the Witwatersrand. We have received great assistance from these stakeholders and others, not only as regards the sharing of documents, but also during our challenging times with the DMR.

The working relationship between the Oxpeckers Centre and these stakeholders is the kind of relationship we aim to foster with the DMR. #MineAlert users are able to use these documents to inform themselves and as a stepping stone to implement accountability. The information shared on the platform and between users can be a tool for awareness-raising among communities, organisations and individuals. They can petition for safe and legal mining practices that have limited impacts on the occupants of the land proposed for mining or experiencing the effects of mining activities.

#MineAlert strives to educate these communities and the government on the importance of knowledge- and information-sharing, as well as provide them with such knowledge and information. We aim for the platform to bridge the transparency gap and call on relevant departments, mining companies, civil society organisations, environmental specialists and other stakeholders to start a conversation on the importance of transparency and accountability, both for the future of our natural resources and the people.

Each one, teach one

#MineAlert was launched on 26 April 2016 on the eve of Freedom Day and at a time when debate was focused on provisions contained in the revised Mining Charter. Since its launch, #MineAlert has received positive and encouraging feedback from stakeholders who are engaged on a daily basis in fighting for social justice and government accountability, as well as in encouraging transparency and the free flow of information between the government and ordinary citizens.

In the weeks that followed the launch, the Oxpeckers Centre undertook a number of online training sessions with stakeholders. These sessions ranged from an email communication containing easy-to-follow steps on how the #MineAlert platform works, to a Skype conversation with an Oxpeckers representative during which one could share one's comments and queries on the spot, to telephone-based training where we talked users through the steps. The aim of these training sessions was to walk users through the platform, thereby making it easy for them to understand and use. Moreover, we wanted to properly equip users so that they could share and teach others about the importance of using geojournalism platforms for advocacy, access to information, community empowerment and change. The more people who know of and use the platform, the closer we are to achieving our vision of a well-informed and active society in which transparency and accountability are not an issue.

WE AIM FOR THE PLATFORM TO BRIDGE THE TRANSPARENCY GAP AND CALL ON RELEVANT DEPARTMENTS, MINING COMPANIES, CIVIL SOCIETY ORGANISATIONS, ENVIRONMENTAL SPECIALISTS AND OTHER STAKEHOLDERS TO START A CONVERSATION ON THE IMPORTANCE OF TRANSPARENCY AND ACCOUNTABILITY, BOTH FOR THE FUTURE OF OUR NATURAL RESOURCES AND THE PEOPLE.

By mid-May 2016, trainees included representatives of organisations such as the Mining Affected Communities United in Action (MACUA), a national organisation affiliated with over 90 organisations in 'all eight provinces that are affected by mining'. MACUA's national organiser, Meshack Mbangula, commented that our platform was 'quite interesting' and that it would be very useful for MACUA.

A representative of the Community Conservation Resilience Initiative (CCRI) in Mpumalanga, Philip Owen, was equally interested in the concept, saying that '#MineAlert is a GREAT initiative'. CCRI is a grassroots environmental movement aligned to the Global Forest Coalition.

The Association for Water and Rural Development (AWARD) created a slot to demonstrate #MineAlert to delegates at its CSO Indaba in Limpopo in May and expressed interest in doing a seminar on #MineAlert with its network of NPOs. AWARD has recently featured #MineAlert as a catchment action tool that mining-affected communities can use to advocate for social and environmental justice.

There has been broad interest in expanding the platform to make it more interactive. This will see Oxpeckers initiating working relationships with like-minded stakeholders such as the Faculty of Law at the University of Cape Town through the Mineral Law in Africa Project. Such partnerships will allow for new features such as the inclusion of policy work and the simplifying of legal jargon to assist communities to better understand documents such as SLPs and to obtain a greater understanding of their rights to public participation and accountability.

As part of spreading the word on the importance of the #MineAlert platform as a tool for advocacy in the global context, #MineAlert was featured as part of The Access Initiative at the World Resources Institute as a blog post on how #MineAlert promotes information access and how this can improve governance in the extractive industry.

These are just a few of the positive responses we received from organisations and communities, which were excited to hear about a free, easily accessible platform that promotes the importance of transparency and accountability in the mining sector.

This is in contrast to the SAMRAD portal, which is difficult to navigate and understand. The #MineAlert platform is easily accessible on mobile for communities to use, is not an elitist platform with multiple restrictions, and does not limit the user to what he/she has access to. Furthermore, all documents are freely accessible and downloadable, and there is a map on the home page that users can navigate to find entries of interest and create alerts for these. The platform also has features that allow the user to share documents and entries. In addition, it has articles that cover mining-related issues. Lastly, it is highly interactive and, should users become confused as to what to do, there is a 'how to' video on the front page to help them find their way.

Crowdsourcing

During the launch and training period, we initiated a conversation with the DMR to try to secure copies of official documents related to the #MineAlert data entries. Our initial request concentrated on scanned copies of mining rights, water-use licences, environmental authorisations, and SLPs for 50 mines based in Mpumalanga, where we are setting up a pilot project to prove the effectiveness of #MineAlert.

All documents, licences, permits and other records are shared on #MineAlert via a cloud-based repository called sourceAFRICA.net.

In March 2016, we submitted a second PAIA application to the DMR requesting the related documents, which application was unsuccessful. The reason given was that our request would divert the resources of the Department: 'Given the nature of your request and your stated intention to submit further similar requests in future, the work involved in processing these requests will substantially and unreasonably divert the resources of the Department.'

As we continue to negotiate a way forward with the DMR, we have received an overwhelming response from stakeholders and interested and affected parties (I&APs), with such entities sharing notifications, documents, videos and other relevant information on mining activities. The sharing of this information has enabled us to alert other users to what may be happening in their backyard using the entries on #MineAlert. As a registered user, one will have access to all this free flow of information that is at one's disposal and one can take whatever steps necessary going forward.

The response by users has highlighted the pressing need for a centralised platform where citizens can keep up to date with information on mining applications and related permits. The following is an example of the kind of response we have received from users:

A notice was discovered in Hennops River in the first week of April, announcing that an application had been lodged with DMR by Kaywell Holdings (Pty) Ltd 'to mine beryl, limestone, iron ore, gold and copper on the farm Hennopsriver JQ 489', Tshwane (Ref GP 30/5/1/1/2 (10418) PR).

I&APs were invited to direct comments to the 'Regional Manager, Private Bag X5, Braamfontein 2017', or to the 'Director, Kaywell Holdings, PO Box 34093, Erasmia, 0023', no later than '30 days after the issuing of this notice'.

No date on the notice, no email address or fax number or phone number. No indication as to the exact property/properties in Hennops River, which is an area of several thousand hectares.

Local residents have since delivered about 100 letters from I&APs to DMR. Others have posted batches to the post boxes given, with no guarantee that these will be delivered in time by the Post Office.

Another user complained that he had registered as an interested and affected party for a proposed new mine near Piet Retief in Mpumalanga

since it started, and now that it has gone through the processes and is at the appeal process. However, I was waiting for more information from the 'Blue Scorpions' [water enforcement authorities], but haven't heard from them. Also note that the letter is dated 9 March, but the period for letters ended on 29 March. Isn't this unfair, because it is not a full month?

These are just some of the challenges and concerns facing communities affected by mining activities and proposed mining activities. In a case where there is no information indicating who should be contacted directly, to whom does one send one's grievance and comments? Who does one approach?

AS WE CONTINUE TO NEGOTIATE A WAY FORWARD WITH THE DMR, WE HAVE RECEIVED AN OVERWHELMING RESPONSE FROM STAKEHOLDERS AND INTERESTED AND AFFECTED PARTIES.

It is thus important for Oxpeckers that the word on #MineAlert spreads as far as possible to South African communities so that these communities and organisations can do their own investigations and compliance monitoring and can, if need be, call the culprits to book. We want to empower these communities to have a voice. We want them to join the conversation through the compulsory public-participation process that each mining company is required by the NEMA to undertake when proposing a mine in a certain area. If we do not have a proactive team of officials in departments like the DMR, then perhaps we can encourage these communities to be proactive.

#MineAlert: A more accessible, user-friendly version of SAMRAD

By using #MineAlert, we have managed to provide a bridge of knowledge sharing between the government and affected citizens, and vice versa. We have developed an easily accessible, simplified version of SAMRAD, which is very difficult to navigate and use as a potential, digital-savvy user. One can therefore only imagine how difficult it will be to use in the case of the average mining-affected community member. SAMRAD is neither Web- nor mobile-friendly. #MineAlert, in contrast, is a simpler version that actually achieves the initial goal of promoting transparency and accountability. It is thus a user-friendly platform.

We believe that communities affected by mining across the country deserve to know who is 'digging in their backyard' and whether that individual or company has complied with the necessary laws and regulations. Furthermore, alerts on mining activities in an area will mean more illegal mines being uprooted. It will also ensure that mining companies do not mine outside their authorised area, as documentation and other relevant information will be available on #MineAlert. Communities are already taking action against injustices, as we can see in cases such as that of the proposed Fuleni Mine in northern KwaZulu-Natal where a determined community is standing united against the proposed mine belonging to Ibutho Coal.

According to the CER, only four cases of criminal prosecution for violations of environmental laws/provisions in the MPRDA by mines have been reported in the media. The criminal complaints in all the cases were initiated by communities and CSOs.

The message we are trying to drive home with platforms like #MineAlert is that it is important to include communities in decision-making processes. A public-participation process is legally required of a mining applicant under the NEMA. Moreover, it is important for the government (in this case, the DMR) to encourage forums that promote transparency and freedom of expression by making data easily accessible. It is also important for such institutions to invest in the strengthening of capacity. This improves compliance monitoring and enforcement of mining laws and regulations. In order for communities to see good governance at work, the DMR needs to be more open to the sharing of information and data. There needs to be a successful working relationship between the DMR and organisations rallying for transparency. The strengthening of capacity is essential for this.

Using advanced technology as a solution

In our first PAIA application to the DMR, we requested the most recent copy of the national mining database containing information on existing and future mining applications, as well as on active and abandoned mines. As an alternative to this, we requested access to the SAMRAD Application Program Interface (API). Such access would enable automatic sharing of information or data from the SAMRAD portal to the #MineAlert

platform. This means that we would no longer have to request information, there would be less administration for the DMR, and #MineAlert would be constantly updated and relevant. This, we believe, is a more effective and modern way of accessing data. We would, of course, ensure that SAMRAD security is not compromised and that the security of mining applicants and licence holders is protected by filtering out personal information about such applicants and holders.

Our goal is to have easy access to mining-related information currently at the disposal of the DMR through an established, ongoing working relationship that will allow us to negotiate the future of mining data. We believe #MineAlert is a more user-friendly and easily accessible version of SAMRAD, and that it will help the DMR realise the vision it had for SAMRAD, namely that of transparency, public participation and strengthened governance. In our view and experience, the SAMRAD portal is very limited and rigid regarding the sharing of information. We are a team of skilled researchers and technicians, but we were unable to gain access to a single document on the platform. We tested the platform for usability and ease of access, but it seemed that one can only access the information which one inputs. We were unable to access any other entries. The features are complex and limiting. It was obvious to us that not many mining-affected communities would be able to actually use the platform. This is why we want to develop a working relationship with the DMR. We want to show the DMR that transparency is crucial in developing strong relationships with communities.

Being transparent through the applications requires the user to create something that helps the community; that educates and encourages public participation. Activists working with mining-affected communities need a platform that is engaging and informative. #MineAlert, in being available on mobile, means that anyone with a smart phone can access it. It also means that the data and information which we want to get to communities reaches a greater number of people, as it is cellphone-friendly. If Oxpeckers were to gain access to the SAMRAD portal, it would mean less work for the DMR in processing PAIA requests. It would further decrease the volume of requests, as #MineAlert will have the information accessible on its platform.

Security features can be provided to protect sensitive information. The most important thing for Oxpeckers is to get the information to the people who need it the most in order to change their circumstances and to ensure that #MineAlert reaches masses of people from all walks of life. It is now being used for research papers and as an educational tool that equips vulnerable and disadvantaged communities.

We also believe that continuous and ongoing applications addressed to the DMR requesting updated copies of databases and documentation will be an administrative nightmare both for the Department and Oxpeckers. If we had to wait for over 90 days to get feedback on one PAIA application, with very limited communication from the Department, how long would it take to get feedback or documents for thousands of mining applications, and how up to date would they be at the time we receive them? There are new mining applications streaming in everyday to the Department. It will be impossible to keep up with the most recent data through applications for access. Our experience is that the PAIA process involving the DMR is most likely to exceed 30 working days and requires constant follow-ups. This route is therefore exhausting and resource intensive.

We believe that we can help to make SAMRAD's vision of transparency a reality through the #MineAlert platform. We can help the average person find information on prospecting rights, licences, authorisations, etc. We want to help them report illegal mining, to make

WE WANT TO BRIDGE THE GAP BETWEEN MINING COMMUNITIES AND THE TRANSPARENCY AND GOOD-GOVERNANCE PRACTICES EXPECTED FROM THE DMR.

their voices heard. We also want to bridge the gap between mining communities and the transparency and good-governance practices expected from the DMR. We need a proactive, skilled team of officials at the DMR. We need a higher level of cooperation from the Department.

Using #MineAlert

During our training sessions, we used the six steps set out below to help users navigate the platform and to register for alerts and updates on mines:

STEP 1 Open the #MineAlert url at mine-alert.oxpeckers.org

STEP 2 On the home page, you will find two options:

- (i) If your location services are active on your device, click on 'Use my location' to find mining projects in your area. Then click on 'Register for alerts in your area' in the top right-hand corner.
- (ii) If you do not want to use your location services, click on the 'Register for alerts in your area' tag at the top right of the home page. Type in your details to register.

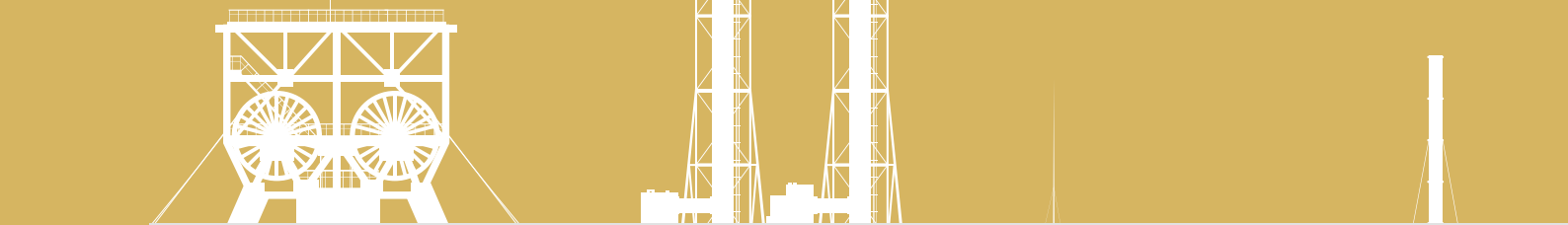
STEP 3 Click on the 'Map' tag at the top left.

STEP 4 Click on 'Create alert' on the right. Here you can subscribe to alerts by typing in an area, a mine, a company, a commodity or a type of mine.

STEP 5 #MineAlert automatically sends you all updates and documentation for the area and fields you create.

STEP 6 If you no longer want to receive alerts: Once logged in, click on the 'Alerts' tag at the top right. Delete the alerts you no longer want.

Tholakele Nene is an Associate of Oxpeckers Investigative Environmental Journalism. #MineAlert is a geojournalism mobile app developed by Oxpeckers in partnership with Open Society Foundation for South Africa, ScienceLink and Code for Africa.





UNDERSTANDING AND PREVENTING ILLICIT FINANCIAL FLOWS IN SOUTH AFRICA: HOW FAR HAVE WE COME, AND WHAT LIES ON THE ROAD AHEAD?

African Monitor



Background: How far have we come?

That South Africa is losing significant amounts of resources through illicit financial flows (IFFs) is no longer questionable or debatable. The size of illicit outflows from South Africa is not only enormous, but is growing.¹ For example, between 2002 and 2011, IFFs grew at an average rate of 6.8%.² During the same period, South Africa lost over USD1 trillion in illicit outflows, and in 2011 alone it lost R237 billion.³ Of this total, transfer mispricing constituted over 80% of the illicit financial outflows. Because the illicit outflows constitute revenue and capital foregone, the impact on planned growth, job creation, wealth creation and distribution is enormous. In opportunity-cost terms, the R237 billion that South Africa lost to IFFs in 2011 could have accomplished any of the following: funded 1 million students on National Student Financial Aid Scheme (NSFAS) scholarships; created 6.6 million jobs for the young; or built a clinic in every village in South Africa.⁴ The effects of illicit flows on growth potential are also not negligible. For example, it is estimated that South Africa's economy could have grown by an additional 0.9% in terms of gross domestic product (GDP) had the illicit money that left the country between 2002 and 2011 been stopped.⁵

Against this background, reducing IFFs from South Africa is both an economic and social imperative given the high social and developmental opportunity cost associated with IFFs (as highlighted above). The Panama Papers exposé is further confirmation of how much illicit flows are bleeding developing countries (including South Africa).⁶ But how far has the country progressed in addressing this? Are the current efforts enough, and what else needs to be done?

To date, the South African government has put in place various measures to curb illicit flows, including the Financial Intelligence Centre Act (FICA), the Financial Advisory and Intermediary Services Act (FAISA), the Financial Sector Regulation Bill, and the Davis Tax Committee, among others. In his budget speech for 2015/2016 tax year, Minister of Finance Pravin Gordhan reiterated the importance of addressing IFFs. In the South African Parliament, IFFs are being discussed with increasing regularity, and opposition

parties (such as the Economic Freedom Fighters) are increasingly focusing on IFFs. However, there is a need to go beyond the talk and rhetoric and take concrete steps to address this scourge. Key challenges that still dog the IFFs terrain in South Africa include:

- legislative clarity on the definition of IFFs that goes beyond the current focus on money laundering;
- implementation challenges such as lack of proper skills on the part of various stakeholders dealing with IFFs;
- inadequate and incomplete statistics on IFFs;
- inadequate engagement with stakeholders, including civil society organisations (CSOs); and
- insufficient monitoring of IFFs across sectors and stakeholders.

A more collaborative approach among the key stakeholders could be useful and complementary. In the case of South Africa, this means stronger collaboration between the South African Revenue Service (SARS), the South African Police Service (SAPS), the Financial Intelligence Centre (FIC), as well as key private-sector players. South Africans and the rest of Africa are looking to the key stakeholders in government, business and civil society to provide leadership in addressing this pervasive challenge.

The road ahead: Key issues and collaborative options

Legislative and capacity issues

In addressing IFFs, it is clear that legislative changes, regulation and enforcement will play an important role. While FICA is undergoing amendment, it is important to continuously sharpen the definition of IFFs as new forms emerge and a better understanding of IFFs is gained. Passive mention of IFFs in the area of anti-money laundering (as per FICA of 2001) and in the terrorist finance definition (as per the Protection of Constitutional Democracy against Terrorist and Related Activities Act of 2004) is not enough. Lack of clarity on the definition of IFFs, as well as an inability to sharpen our understanding of IFFs as new forms and information emerge, result in the pervasive and disproportionate focus on anti-money laundering and terrorist financing (which constitute less than 5% of IFFs in South Africa) at the expense of dominant forms such as transfer mispricing (which constitutes over 80% of IFFs in South Africa).

In addition, the mandate of the FIC needs to be considerably expanded in order to go beyond requiring companies to self-report and identify the clients so as to empower it to conduct independent assessments working collaboratively with apex, accountable and law-enforcement institutions.⁷ Such a proactive approach is essential in addressing the problem of IFFs.

Although the legislative route remains viable, it is important to explicitly address capacity challenges that hamper enforcement efforts. Inadequate capacity to monitor and enforce compliance poses a serious risk for the effectiveness of FICA. While the Financial Services Board (FSB) is charged with the role of having oversight in respect of anti-money laundering and terrorist finance laws in South Africa, the institution has indicated (during interviews undertaken by African Monitor) that it lacks adequate financial and human capability to deal with this given the complexity of these crimes. In an interview, the FSB also admitted that its monitoring scope is limited to promoting the integrity of various acts and the interests of South African consumers of financial services. The FIC is also limited by its mandate to analysing self-reported data and providing stakeholders with financial intelligence. Both SARS and the FIC have, for

THE HISTORY
OF AMNESTY
REGARDING IFFS
HAS NOT BEEN AN
ENCOURAGING ONE
FOR SOUTH AFRICA.

their part, outlined plans to increase their skilled personnel over the next five years. Furthermore, the capacity of the FIC to collect and submit key statistics for use by other stakeholders such as SARS, the SAPS, etc., in prosecuting IFF cases is very limited, thereby negatively affecting the implementation of FICA. Additionally, punitive penalties, blacklisting of IFF perpetrators, as well as naming and shaming should be used increasingly by the FIC and other authorities. Pronouncements (made a couple of months ago) to provide amnesty for violators of beneficial ownership are not helpful in this respect. The history of amnesty regarding IFFs has not been an encouraging one for South Africa. Some time back in 2007, then Minister of Finance Trevor Manuel offered amnesty to perpetrators of IFFs in the hope that they would return to South Africa the money that had been illicitly siphoned off. However, only a small percentage of this money was in fact returned.

A coordinated approach among key stakeholders is a must

A coordinated approach that brings all key stakeholders together in an ongoing forum in order to share solutions on IFFs, is key. The forum should also articulate a transparent monitoring framework premised on utilisation of available data on IFFs from key stakeholders, including CSOs. The key stakeholders with regard to IFFs, such as CSOs, SARS and other policy-makers, should use this platform to share challenges as well as progress made in respect of IFFs. Currently, policymakers are not coordinating as much with CSOs and other players. Therefore, deliberate measures to promote engagement and information exchange among the key organisations dealing with IFFs, such as SARS, the Asset Forfeiture Unit (AFU), the FIC, and SAPS will go a long way in addressing the above challenges and also reducing IFFs. In addition, authorities need to make use of evidence from whistle-blowers and other stakeholders as a basis for more serious investigations relating to IFFs.

Furthermore, a clear monitoring framework will help stakeholders know what to look for when monitoring IFFs. This would require the development of a baseline balanced scorecard with various performance indicators, qualitative and quantitative measurements, milestone-based measures, and performance plans for the various stakeholders involved. Key stakeholders such as the FIC and SARS should report on progress made with respect to commonly agreed milestones for reducing IFFs. The role of CSOs in promoting transparency concerning the above, and in articulating and implementing the policy options and solutions, is important in this regard. An open multistakeholder platform to promote the aforementioned coordination, as well as monitor and review progress on delivery of agreed targets to reduce IFFs, will be important in reducing IFFs in South Africa.

And so is a shared-value framework

A number of instruments used to address the issue of IFFs to date have largely been compliance-based. However, where moral suasion has been employed, it has not achieved the expected results (South Africa is a case in point). It is therefore important to complement the above measures by exploring some collaborative approaches that call for a 'whole-society' approach to IFFs. Constituting an open forum where information, knowledge, best practices and responsibilities concerning IFFs can be shared is one such approach. This should be underpinned by a shared-value framework adopted by the key stakeholders.

The above provides a solid basis for a complementary, shared-value framework among the key stakeholders (government, the private sector, communities and CSOs) that

prioritises joint goal-setting and also creates spaces for transparent and honest conversations among key stakeholders regarding their interests and future plans, thereby leading to collaborative frameworks that reduce IFFs and address the interests of all concerned.

‘Shared value’ refers to the benefits generated and shared by stakeholders arising from an economic or social activity aimed at addressing their interests. In general, the private sector’s thinking on value has largely been shaped by the classical and neoclassical perspective of viewing profits as a trade-off between capital and labour, as well as a trade-off between company and society. This antagonistic characterisation makes it impossible for stakeholders to work together on the basis of shared value and calls for a rethink on how business and society should co-exist. Lack of trust and pure greed then drive IFFs. In fact, the pervasiveness of IFFs suggests the need to re-orientate and reshape the way production and consumption are organised in our economies.

The shared-value framework is essentially a subset where the interests of government, the private sector, civil society and other key stakeholders intersect. The discussions and engagements through the above multistakeholder platform should be aimed at growing and increasing this intersection space based on mutual transparency and accountability. This will enable government regulation to be proactive and to respond to the concerns of key stakeholders, including those responsible for IFFs. The private sector will also realise that addressing and reducing IFFs is not just about reducing its profit slice, but is important for the sustainability of their business. Increasingly, shareholders are looking at reducing risks (including those emanating from IFF perpetration) and increasing their social dividend and relevance to society. Reducing IFFs is not just another regulatory inconvenience, but represents an important step in countering aggressively a bad business practice that denies government and citizens key resources that are important to development. For civil society, pointing out IFFs and monitoring the implementation of measures aimed at reducing them constitute a critical part of corporate citizenry and accountability. In addition, civil society has an important role in generating, and advocating for, solutions to IFFs. It moreover has a critical role in ensuring that the commitments made through the multistakeholder platforms are publicised (so that everyone knows what is expected of them) and met by key stakeholders. Civil society itself will be responsible for some commitments, especially in raising awareness, generating and proposing solutions, and providing policy-makers with data and evidence to reduce IFFs.

For example, in the mining sector, the ideal shared value requires that stakeholders (government, the community and the private sector) create space for honest conversations regarding their interests and future plans, thereby leading to a collaborative framework that addresses the interests of all stakeholders. On the basis of the identified interests, each of them clearly specifies what they want to do to realise their interests, while at the same time taking into account the expectations of the other stakeholders. An intersection matrix is generated and resource and time implications are attached to this matrix. This matrix framework need not address all the needs and interests of key stakeholders, but it should address the key ones underpinned by mutual responsibility to each other. It is this framework that should be binding on key stakeholders and which needs to be reinforced through legislation, and oversight of non-profit organisations, among others.

The above multistakeholder platform provides a good starting point for articulating a shared-value framework. This will go a long way in shifting the current, pervasive neo-classical framing of profits as a trade-off between capital and labour as well as a trade-

off between company and society. This framing has, as already indicated, been a key driver of IFFs in general.

Stakeholder vigilance going forward is equally important

It should be pointed out that perpetrators of IFFs are always devising ways of staying ahead of policy and legislation. Several years ago, IFFs were an unfashionable policy issue among policymakers (at both national and global levels) as well as civil society. What was dominant then was capital flight, which was believed to be triggered by poor policies in developing countries. With the current onslaught on multinationals both nationally and globally (under the United Nations (UN) system as well as the base erosion and profit shifting (BEPS) process), it is important for policymakers to reflect on which additional front is likely to be opened due to this onslaught.

International trade agreements remain one of the most obvious loopholes in the effort to reduce IFFs. For example, the current wave of bilateral and multilateral trade agreements being signed by countries such as the United States of America (USA) are retrogressive insofar as IFFs are concerned. This also explains why the current Transatlantic Trade and Investment Partnership (TTIP) discussions between the US and the European Union (EU) have encountered massive resistance in Europe. A notable example is the demonstrations by thousands of German nationals against the TTIP during President Obama's visit to Germany at the end of April 2016. One of the key aspects of the new wave of bilateral and multilateral trade agreements that is likely to have a direct impact on IFFs is the fact that these agreements give too much power to big corporates and the private sector in general. For example, with this new wave of trade agreements, a multinational company is in a position to take a national government to a tribunal (either local or United States-based) in the event that such government puts in place any measures (legislative or otherwise) that interfere with the company's profits. It does not matter at all if such measures are well-intended and are aimed at protecting the public. It is also highly likely that the multinationals and private companies can sue the government for putting in place measures (legislative or otherwise) aimed at reducing IFFs. This may include current measures compelling companies to comply with automatic information exchange and transparency requirements under BEPS and other legislation. All this will undo the efforts undertaken to date in reducing IFFs.

In addition, current IFF measures such as automatic information exchange may be challenged (under a trade and investment agreement) on the basis that they impinge on the competitiveness of the companies concerned. This is not far-fetched, as a number of governments (including the government of Colombia) currently stand accused of introducing policies and measures that reduce the profitability of USA multinationals and are currently facing private tribunals in the USA.

All this calls for vigilance on the part of the key stakeholders working to reduce IFFs and requires them to plug all possible loopholes, irrespective of the channel. While the TTIP is currently between the EU and USA, it clearly has the ability to influence current and future bilateral and multilateral trade agreements between the two biggest global blocs and any developing country. In addition, the agreement clearly demonstrates the direction global trade is taking, irrespective of the negotiations and developments within the World Trade Organization (WTO). In fact, it is the lack of agreement on key transformative issues of importance to developing countries (under the Doha Round of world trade negotiations) that has given rise to an influx of these opportunistic and development-damaging bilateral agreements.





ENDNOTES

- 1 Global Financial Integrity. Available at www.gfintegrity.org.
- 2 Ibid.
- 3 Ibid.
- 4 African Monitor. Available at www.africanmonitor.org.
- 5 Ndikumana Leoncé (2013), Capital Flights and Tax Havens: Impact on Investment and Growth in South Africa. Available at [http://www.afd.fr/webdav/shared/PRESSE/Evenements/eudn/EUDN2013_Session%204_Ndikumana%20\(speaker\).pdf](http://www.afd.fr/webdav/shared/PRESSE/Evenements/eudn/EUDN2013_Session%204_Ndikumana%20(speaker).pdf).
- 6 The Panama Papers are 11.5 million leaked documents that detail financial and attorney-client information for more than 214,488 offshore entities. The leaked documents were created by Panamanian law firm and corporate service provider Mossack Fonseca; some date back to the 1970s. The leaked documents illustrate how wealthy individuals and public officials are able to keep personal financial information private. While offshore business entities are legal, reporters found that some of the Mossack Fonseca shell corporations were used for illegal purposes, including fraud, kleptocracy, tax evasion, and evading international sanctions. Source: Wikipedia, available at https://en.wikipedia.org/wiki/Panama_Papers [accessed 30 November 2016].
- 7 Apex institutions include: SARS, the FSB, the Johannesburg Stock Exchange (JSE), and Treasury, among others. Accountable institutions include: financial-service providers, banks, insurance companies, gambling companies, among others. Law-enforcement institutions include: the SAPS and the AFU, among others.





CAN OWNERSHIP, OPERATIONAL AND FINANCIAL TRANSPARENCY ENHANCE SUSTAINABLE MINERAL DEVELOPMENT IN SOUTH AFRICA?

Tracy Humby and Fola Adeleke



Introduction: Sustainable mineral development; transparency; accountability

Mining involves the extraction, processing and use of mineral resources that are irreplaceable over the course of a human lifespan, or even over many human generations. Addressing the oft-stated observation that sustainable mining is an oxymoron, Franks points out that the crux of sustainable development and mining is not the slow rate at which minerals are replenished, but rather the manner in which the scale and rate of mineral extraction intersects with the integrity of the earth's ecosystems and the development of its people.¹ Accordingly, sustainable mineral development references the two-sided ideal of maximising the social and economic benefits realisable from resource rents and minimising the negative social and environmental impacts necessarily associated with mineral extraction. This task is further complicated by the need to consider intergenerational equity, as well as the pace at which different forms of capital increase and decrease. A mining project may irreversibly degrade the natural-resource base upon which future generations would have depended, for example in a manner that outpaces development of the human and institutional capital necessary to absorb and harness investment and revenues on the one hand, and to rigorously regulate detrimental social and environmental impacts on the other.

The literature on the governance of the extractive industry is increasingly recognising that transparency and accountability are important for sustainable mineral development, alongside the traditional focus areas of appropriate policy, political and institutional frameworks; effective legal and regulatory frameworks; institutional capacity; and incentive structures for appropriate actors.² It is notable, for instance, that the outcome document of the Rio+12 Conference, *The future we want*, expressly calls on governments and businesses 'to promote the continuous improvement of accountability and transparency' in order for the mining sector 'to deliver economic and social benefits and include effective safeguards that reduce social and environmental impacts.'³

Elucidating the connections between transparency and sustainable mineral development

The linkages between sustainable mineral development and the different dimensions of transparency – ownership, operational and financial – become more discernible by having regard to the entire extractive industry ‘value chain’ as developed by the World Bank and other development partners.⁴ The value chain encompasses key decisions made before, during and after mining, including the granting of rights and authorisations; the regulation and monitoring of operations; the collection of taxes and royalties; revenue management and allocation; and the implementation of projects and policies.⁵ Sustainable mineral development emerges from the wisdom of such decisions, but what role do the different dimensions of transparency have to play?

Transparency of beneficial ownership enables the state, other businesses, and civil society at large to know who is benefitting from a particular extractive project. This may have value for simply showing that state-associated institutions have significant shareholding in extractive companies, as is not infrequently the case in South Africa.⁶ At a systemic level, transparency regarding beneficial ownership also enables a political community to examine, interrogate and change skewed ownership patterns, patterns that have been the concern of South Africa’s employment equity legislation and frame-works. Ownership transparency may also assist in detecting corruption or inappropriate levels of political connectedness – which are threats to the sustainable mineral development value chain if the business advantage gained through political connection sacrifices efficiency and meritocracy, and if private interests capture the apparatus of the state. Knowing with whom one is dealing in relation to an extractive project is also critical for establishing the framework of politics and power within which transparency – and flowing from this, accountability – must function.⁷

Apart from affording shareholders and non-shareholders a glimpse into the internal functioning of a company, operational transparency directly assists in better understanding how mining intersects with the well-being and human development of people and the integrity of a nation’s ecosystems. Information on mine health and safety, and the greenhouse-gas emissions, water use and energy use of a company, for example, enables interested parties to assess the cost and sacrifice associated with mineral extraction. For shareholders, honest and accurate reporting on impacts is also essential for assessing business risk. Transparency with respect to rights and authorisations, and associated management frameworks, further strengthens accountability frameworks, for, without such information, social actors wishing to hold extractive companies to account are left in the dark, not knowing which standards apply and for whose benefit they operate. Operational transparency concerning production and reserve volumes is critical for assessing the viability and future prospects of an extractive company, but can also assist policymakers and decision-makers to take wise decisions relating to the rate and scale of mineral extraction.

Finally, financial transparency is crucial for assessing the scale and flow of benefits arising from an extractive operation. Particulars of gross sales, earnings, costs, assets, dividends, taxes and royalties enable a critical assessment of how the constituent inputs to a mineral operation (the mineral wealth, water, energy, biodiversity loss, absorptive capacity for waste, labour, institutional capital and other manufactured capitals) are being transformed into both capital and income flows for business, labour and the state. Financial transparency is about more than assessing illicit financial flows and the potential for corruption between businesses and the state. Ultimately, financial infor-

THE POLICY AND REGULATORY FRAMEWORK IN RESPECT OF BENEFICIAL OWNERSHIP IS STILL LARGELY UNDER-DEVELOPED, DESPITE SOUTH AFRICA'S OPEN GOVERNANCE PARTNERSHIP COMMITMENT TO INTRODUCING AND IMPLEMENTING ITS ACTION PLAN ON THE G20 HIGH LEVEL PRINCIPLES ON BENEFICIAL OWNERSHIP TRANSPARENCY.

mation should be facilitating deliberation on whether mineral extraction – at a given market price and when all considerations have been taken into account – is worth pursuing.

Can South Africa's disclosure regime enhance sustainable mineral development?

In South Africa, a large number of laws mandating or encouraging ownership, operational and financial disclosures are already in place.⁸ However, there are significant transparency gaps, which suggests that South Africa may not be fully capitalising on the use of transparency as a governance instrument in the pursuit of sustainable mineral development.

In the case of ownership transparency, South African legislation and the listing requirements of the Johannesburg Stock Exchange (JSE) certainly require records to be kept of shareholders, ownership, directors' indirect and beneficial interests, black economic empowerment, and so forth. However, in many instances, the broader publication of this information is discretionary or is not required at all. The regime is largely focused on enhancing ownership information and disclosures to shareholders and investors rather than to the public and local host communities. Companies have a discretion to disclose ownership information more broadly. In some instances – in the case of share capital and the identification of major shareholders, for example – they are in fact disclosing this information in their annual reports, but such disclosure largely functions as a veneer that does not facilitate understanding of beneficial ownership. The policy and regulatory framework in respect of beneficial ownership is still largely underdeveloped, despite South Africa's Open Governance Partnership commitment to introducing and implementing its Action Plan on the G20 High Level Principles on Beneficial Ownership Transparency, as well as the tabling of the Financial Intelligence Centre Amendment Bill in Parliament.⁹ Moreover, the complexity of corporate structures, with their extensive levels of cross-ownership, makes identifying the beneficial interests behind the corporate veil very difficult.

This gap in the legal definition and regulation of beneficial ownership weakens accountability frameworks. For example, in recent years, there has been an extended legal battle between the Bengwenyama Community and a black empowerment firm, Genorah Resources, to obtain prospecting rights over the community's ancestral farms in Sekhukhuneland.¹⁰ The chair of Genorah Resources was the husband of a Cabinet Minister, and the shareholders allegedly included a provincial leader of the ruling political party, yet this, and the identity of the remaining shareholders, could never be firmly established. Genorah Resources, in turn, held shares in Nkwe (Pty) Ltd, a company listed on the Australian Securities Exchange and registered in Bermuda. The beneficial owners of Genorah and Nkwe have never been established, thus preventing the community from understanding with whom they were really dealing, and, indeed, whether vested interests were acting to block not only their prospecting rights application, but also their land-reform application, which has not been finalised after more than a decade.

Opaque ownership structures similarly plague the controversial, proposed dune-mining project in Pondoland on South Africa's Wild Coast.¹¹ Mineral Resources Commodities (MRC), a company listed on the Australian Securities Exchange and headquartered in Perth, holds the prospecting rights to four of the five blocks of the Xolobeni Mineral Sands Project. This project has faced fierce resistance from the Amadiba community. There have also been allegations that a few members of the community have been co-opted by MRC to sow conflict and quell resistance to the project. Through a subsidiary, Mineral Sands Resources (Pty) Ltd, MRC mines and processes sand at the Tormin Mineral Sands Project on the West Coast of South Africa. Its joint shareholder and black





economic empowerment (BEE) partner in Mineral Sands Resources is Blue Bantry Investments 255 (Pty) Ltd. In its 2014 annual report, MRC acknowledged the contribution of Blue Bantry Investments “in assisting in bridging the cultural divide that can sometimes exist in managing the expectations of interests and affected parties and communities”.¹² More particularly, the report continues: ‘Blue Bantry’s origins rest in the Transkei in the Eastern Cape of South Africa, where the Company’s Xolobeni project is located.’¹³ Blue Bantry Investments 255 was registered in South Africa in 2008, but other than the company name, enterprise number, the date of its incorporation, and its physical address, no further details regarding the beneficial owners of the company are publicly accessible. In 2015, there was speculation, however, that local residents Zamokwakhe ‘Bashin’ Qunya and his older brother, Zamile, were ‘set up in a company’ (i.e. Blue Bantry Investments 255) to do business with Mineral Sands Resources.¹⁴ The same media report alleges that a MRC-funded, R12-million loan to Blue Bantry Investments has in effect been used to fund the conflict over prospecting and mining rights in the Xolobeni area. For example, in court papers filed with the Grahamstown High Court in 2015, it was alleged that, on 3 May 2015, Bashin Qunya and an associate beat an elderly woman with a knobkrie and hacked her arm with a bush knife, among other incidents.¹⁵ This situation demonstrates how, in the absence of ownership transparency, it is impossible for communities to know which of their members have a vested interest in a mining project and to demand accountability with regard to the relationship between local actors and their transnational partners.

In the case of operational transparency, there are still worrying gaps that prevent the broader South African political community from appreciating the full extent of mining’s impact on earth system processes and the well-being of people. A review of company practice revealed that companies regularly report on their environmental and social impacts in terms of highly aggregated statistics. Such statistics are not set against a broader context and, given the different commodity profiles, are difficult to compare across companies. In some cases, legal obligations to disclose key environmental impacts – by way of greenhouse-gas reporting, for example – are still in draft format, or have only recently been promulgated, for example the requirement that a company should ensure that its environmental authorisations are accessible and available on its website if such website exists. Some companies are adopting a ‘wait-and-see’ approach to implementing these requirements, or are attempting to interpret them in the narrowest way possible. There is also a deeply entrenched notion that the disclosure of non-compliance with environmental laws is ‘dangerous’, because it threatens the commercial interests of a company. This much was established in the Centre for Environmental Rights’ recent review of the disclosure of environmental incidents and risks on the part of 20 listed South African companies, many of which are also listed as part of the Johannesburg Socially Responsible Investment Index.¹⁶ In its 2014 report on the ongoing experience of using the Promotion of Access to Information Act 2 of 2002 (PAIA), the Centre also established that, in 2013 and 2014, ‘mandatory protection of commercial information of a third party’ under section 36 of the PAIA was the predominant reason for the refusal of PAIA requests.¹⁷ This points to government oversight bodies increasingly deferring to the wishes of business entities to withhold certain categories of information from the public eye, contrary to the spirit of the PAIA. At the moment, therefore, operational transparency is not contributing to an understanding of the benefit that the extraction of natural resources confers, set against the costs it imposes. The problem here, however, is not simply about disclosure, for the broader malaise centres on the lack of legislated concepts, information categories, and information-gathering processes that would allow society to evaluate the ‘cost’ to the integrity of the earth’s ecosystems and human development arising from natural-resource extraction. In some cases, such ‘cost’ may equate to irreplaceable loss.

In the case of financial transparency, companies do disclose historical financial information in their annual financial reports, yet many other categories of financial information – including profit taxes, capital gains tax, value-added tax (VAT), customs and excise levies, licence fees, and so forth – need only be disclosed on a discretionary basis. In other words, on the question of tax transparency alone, through their processes of annual reporting, companies are not legally obliged to provide a comprehensive picture of financial flows to government, including traditional authorities. In practice many companies do report their profit taxes, but this is rarely disaggregated on a country-by-country or project-by-project basis, and the practice of reporting on other types of taxes is varied. There is also no legal requirement on companies to financially account for the manner in which their operations contribute to a reduction of natural capital, or to account for financial flows between companies of the same group.

It is difficult, therefore, to assess the extent to which mineral extraction is contributing positively to sustainable development at this point of the mineral value chain.

The way forward: The need to improve transparency along the entire mineral value chain

Ownership, operational and financial transparency play different roles in enhancing sustainable mineral development. Improved disclosure of ownership information will enable governments and civil society to know who is ultimately benefiting from natural-resource extraction and flush out vested interests. Improved disclosure of operational information will enable citizens to know and appreciate the scale and severity of environmental, social and economic impacts associated with extraction and whether these pose a threat to their health and well-being. An active citizenry, cognisant of the standards to which mining companies should be held accountable, could enhance the government's monitoring and enforcement reach. Improved disclosure of financial information will lead to a better understanding of the full range of financial benefits flowing from mining to the various levels of government, including traditional authorities.

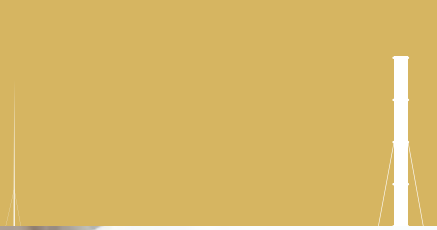
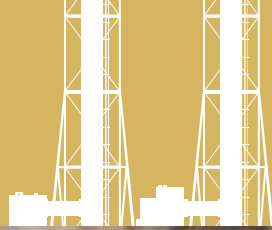
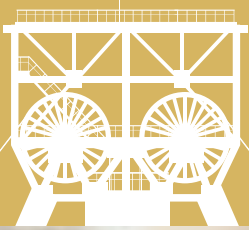
Disclosure of these categories of information is not a panacea in and of itself, yet is a crucial first step in establishing accountability frameworks that enable a mineral-rich political community to interrogate the benefits and costs of extraction. The current disclosure regime in South Africa is not optimising transparency as a governance tool and there is worrying deference to corporate entities' self-understanding of protected commercial information. Legal developments instigated through a variety of new international reporting frameworks and aimed at defining and regulating beneficial ownership, the implementation of new standards of environmental reporting and disclosure, and the mandatory publication of taxes paid to governments in all spheres could contribute to changing this trend.

Together with an independent judicial system, conditions allowing for freedom of expression and association, and measures that respond to and ameliorate the significant power imbalances that frequently mark relations in the extractive sector, improved disclosure frameworks can contribute to an extractive governance system that has greater integrity and rigour, can result in an environment in which it is easier to operate, can lead to responsive governance that responds appropriately to citizens' concerns, and, ultimately, can bring about more prudent management of natural-resource wealth.

THE CURRENT DISCLOSURE REGIME IN SOUTH AFRICA IS NOT OPTIMISING TRANSPARENCY AS A GOVERNANCE TOOL AND THERE IS WORRYING DEFERENCE TO CORPORATE ENTITIES' SELF-UNDERSTANDING OF PROTECTED COMMERCIAL INFORMATION.

ENDNOTES

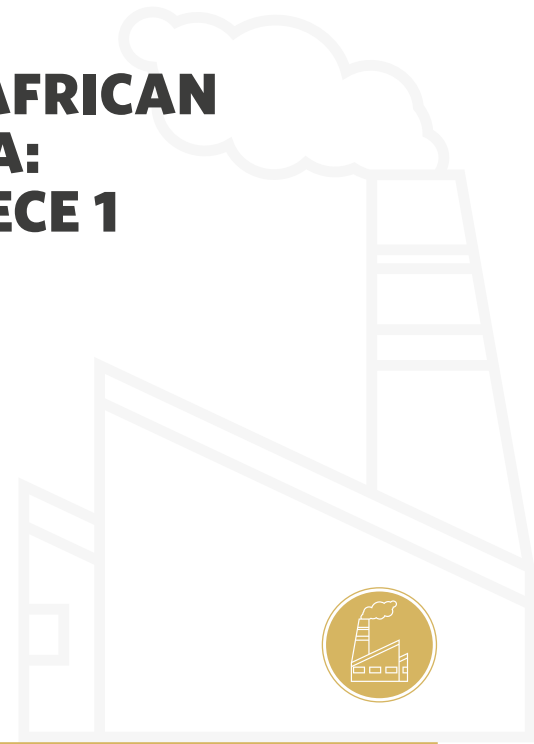
- 1 Daniel M Franks (2015), *Mountain Movers: Mining, Sustainability, and the Agents of Change*, Earthscan, x.
- 2 Deval Desai & Michael Jarvis (2012), Governance and Accountability in Extractive Industries: Theory and Practice at the World Bank, 30 *Journal of Energy and Natural Resources Law*, 101, 114.
- 3 *The Future We Want* (2012), para 228.
- 4 Desai & Jarvis (n 2 above), 114.
- 5 Ibid.
- 6 For example, the two largest individual shareholders in Sasol Limited are the South African Government Employees Pension Fund and the Industrial Development Corporation; the Public Investment Corporation is a significant shareholder in Anglo American and Implats; and the South African government is the third-largest shareholder in Harmony Gold.
- 7 Desai & Jarvis (n 2 above), 107.
- 8 T Humby & F Adeleke (2016), *South Africa's Extractive Industry Disclosure Regime: Analysis of the Legislative and Regulatory Regime as well as Selected Corporate Practice*, Open Society Foundation for South Africa.
- 9 F Adeleke, (2015), Ownership, Operational and Financial Disclosure Requirements in South Africa: Beneficial Ownership and Tax Benefit Disclosures, Working Paper prepared for the Open Society Foundation. The Open Governance Partnership (OGP) is a multilateral organisation dedicated to facilitating and supporting governments to be more transparent, accountable and responsive to their citizens. South Africa was a part of the cohort of founding countries establishing the OGP in 2011. Membership of the OGP has since grown to 69 participating countries (see <http://www.opengovpartnership.org/countries>). Together with civil society, OGP participating countries are required to develop a National Action Plan (NAP) which specifies commitments that advance transparency, accountability, participation and/or technological innovation over a two-year period. In its third NAP, covering the period 2015–2017, South Africa has committed to implementing its action plan on the G20 High Level Principles (see Commitment 8, available at: <http://www.ogp.gov.za/documents/SOUTH%20AFRICAN%203RD%20OGP%20COUNTRY%20ACTION%20PLAN%202015.pdf>). The Financial Intelligence Centre (FIC) Amendment Bill was recently tabled in Parliament in a bid to improve South Africa's anti-money laundering laws and incorporates the concept of beneficial ownership.
- 10 See, for example, the cases reported as *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC), and *Bengwenyama-ya-Maswazi Community v Minister of Mineral Resources* [2014] ZASCA 139; *Bengwenyama-ya-Maswazi Community v Genorah Resources (Pty) Ltd* [2014] ZASCA 140.
- 11 The Amadiba community has been resisting mining in this area for more than ten years. In March 2016, civil society organisations were shocked to learn of the alleged assassination of the chair of the Amadiba Crisis Committee, Sikhosiphi Bazooka Rhadebe – see Tariro Washinyira, (23 March 2016), Wild Coast Amadiba Mining Opponent 'Assassinated', *Mail & Guardian*. Available at: <http://mg.co.za/article/2016-03-23-wild-coast-amadiba-mining-opponent-assassinated> [accessed 21 April 2016].
- 12 Mineral Resources Commodities (MRC), Annual Report 2014, 13. Available at: http://www.mineralcommodities.com/wp-content/uploads/2015/04/LNK508_Mineral-Commodities_AR_v4_Final.pdf [accessed 21 April 2016].
- 13 Ibid.
- 14 John Clarke (26 May 2015), Amadiba Residents Get Interdict to Stop Xolobeni 'Reign of Terror', *Rand Daily Mail*.
- 15 Ibid.
- 16 See Centre for Environmental Rights (CER) (2015), 'Full Disclosure: The Truth about Corporate Environmental Compliance in South Africa'. Available at: <http://cer.org.za/download/CER-Full-Disclosure.pdf>.
- 17 CER (2014), Money Talks: Commercial Interests and Transparency in Environmental Governance. Available at: <http://cer.org.za/wp-content/uploads/2014/11/CER-Money-Talks-Nov-2014.pdf>.





INVESTING IN AFRICAN MINING INDABA: REFLECTION PIECE 1

Suzanne Powell



During February 2016, I attended the Investing in African Mining Indaba (Mining Indaba). The name says it all, but, for completeness, I will reproduce what the organisers tell us the event entails: ‘an annual professional conference dedicated to the capitalisation and development of mining interests in Africa’.¹

A few days into the Mining Indaba, and having witnessed what was regarded as important to communicate by the mining company and government representatives, academics, and other persons who had been given a microphone and a time slot at the Mining Indaba, I felt a deep sense of sadness. Upon reflection, I realised that I was experiencing disappointment at how little the majority of the persons that I had listened to seemed to genuinely care about other people and the natural environment. Profit-interest reigned supreme.

Market pressures and entrenched ways of thinking, among other causes I am sure, continue to secure a capitalist hierarchy of interests – something along the lines of: 1. profit, 2. political interests, 3. labour, 4. community, and 5. natural environment. In an interactive, small-group forum, a young Zimbabwean mining company representative sympathetically confessed that the squeeze of falling profits meant that the mining company simply could no longer prioritise the treatment of mining-polluted water (as required by law). How easy it seems to render environmental pollution an externality. In view of the inflated profit expectations of investors (the result of, among other things, our externality-abundant global economy), I do understand the challenges faced by mining companies. Dreams of a more socially and environmentally conscious mining sector are pushing against not only the entrenched unconsciousness of the mining sector, but also the entrenched unconsciousness of our society and the global community as a whole.

Mining is a short-lived bounty of economic opportunities – for those fortunate enough to have access to the opportunities, which are predominantly determined by pre-existing empowerment (access to resources, education, etc.). However, it occurs in the context of seasons, lifetimes, generations, and other patterns of nature. Communities of people

and their descendants over generations witness the arrival of mining, experience the hope of opportunity, experience promises of 'development' ... experience an influx of other people and a change in social dynamics, experience the degradation of their natural home: water, vegetation, air and animal and microbial life, experience unsolicited interventions and change, experience financial gain ... experience the sudden cessation of activities and the end to their financial livelihood, experience the abandonment and decay of that which was created by the mine, and, for many, many years, experience the damaged state of their natural home.

In my view, the intimate richness of the experiences of mining-affected communities of their social and natural environments and the long-term impacts of mining mean that they can provide perspectives on mining that the rest of us are not capable of conceiving. We are all profoundly affected by the contexts in which we live and work. As I see it, we have constructed contexts in government and business that alienate people from connecting empathetically with themselves, each other and our natural environment. Accordingly, I am not surprised to see mining company representatives and members of the investment community (myself included, insofar as I have a bank account and investments with financial institutions) unable to fully conceive of and internalise the impacts of mining beyond their financial interests; and I am not surprised to see government representatives unable to fully conceive of and internalise the impacts of mining beyond their political mandates.

Mining-affected communities can empower the rest of us with a unique consciousness of the significance of their social and environmental contexts, as well as the impacts of mining thereon, and – in this – can empower us to make more holistically conscious decisions about mining. This role of mining-affected communities is hugely undervalued in our current mining-governance system.

Minister of Mineral Resources Mosebenzi Zwane, in his opening address at the Mining Indaba, expressed this undervaluing as follows:

There is a perception that the mineral resources of this country belong to those who live near [them]. We should collectively be able to ensure that all the people of South Africa benefits from the mineral resources of the country and once we have given rights to a particular right holder, we should be able to help them develop without any hindrances.²

This seems to me to be an implicit criticism of communities like the Xolobeni community of the Eastern Cape Wild Coast, who, for many years, have been boycotting intended dune mining. I have learnt from Xolobeni community members, who have explained the likely social and environmental impacts of the proposed mining with a nuanced perspective that I personally was unable to perceive. We can sometimes be short-sighted in determining that a proposed mining venture is beneficial to 'all the people of South Africa', given the legacies of mining of extreme environmental degradation and the unequal (unfair) extraction of benefits, both of which have caused suffering, and will continue to do so, well beyond the boundaries of our mines. A simple example: the mining sector generates the majority of South Africa's waste, but employs only 5% of the country's people. Furthermore, approximately half of the jobs created by mining constitute migrant labour (which I can only imagine to be hugely challenging for any person), the jobs are by their nature unsustainable (they are bounded by the lifetime of the mine), and, as the recent Lily Mine tragedy and the silicosis litigation have reminded us, these jobs involve significant risks to human health and safety.

A SIMPLE EXAMPLE:
THE MINING SECTOR
GENERATES THE
MAJORITY OF SOUTH
AFRICA'S WASTE,
BUT EMPLOYS ONLY
5% OF THE COUNTRY'S
PEOPLE.

The week after the Mining Indaba, I spent a few days engaging in capacity-building with the Highveld Environmental Justice Network (HEJN), a network of civil society organisations pursuing environmental justice in the Highveld region, and members of the Arbor community, a mining-affected community in Mpumalanga province. During our discussions, we recognised a long-standing norm of mining, as well as of social and environmental 'solutions' to mining, being brought to (imposed on) communities. This norm has cultivated (and is continuing to cultivate) conditions that make meaningful engagement challenging for all parties.

Mining companies lack the necessary structures and skills for engagement. Imagine, for example, if they had dedicated community liaison officers conversant in the relevant languages and properly skilled in dealing with diverse, multi-represented groups of people. To a reasonable person, is it surprising to learn that community groups can be dynamic, changeable bodies – making community engagement challenging to mining companies (a frustration expressed on more than one occasion by mining company representatives at the Mining Indaba)? Staffed as they are with well-resourced, empowered persons, is it too much to expect mining companies to obtain the information and develop the skills necessary to competently engage with dynamic community groups?

Communities, on the other hand, are very often not resourced or empowered in the ways required to engage optimally and to their own benefit with mining companies (because such engagement chiefly occurs in ways dictated by mining companies and on the basis of laws and systems foreign to communities). Imagine, for example, community-administered environmental monitoring, such as water-quality testing and monitoring. Equipped with their own data, coupled with access to the environmental licence conditions applicable to the mine, communities could more confidently hold mining companies responsible for environmental damage and know where to direct their energies.

Pausing to reread what I have written here, I spent some time reflecting on whether I am a naïve, city-bred, resource-privileged person idealising a constructed notion of communities of people. After some contemplation, I decided that my intention is not to impose a false construction on anyone, but rather to reflect on who in our society is most in touch with empathy (by this I mean, who is most likely to be connected in intimate relationships with each other and with their natural environments). I believe that this is a significant inquiry because, in my view, empowering empathetic people is key to meaningful societal transformation. At present, we are failing to empathise with the current contexts of people (including our own current contexts), as well as over time with future generations who will be impacted by our actions today.

If we, as a society, are to benefit from the unique experiences and perspectives of mining-affected communities, how can we support them to be able to meaningfully engage in mining? My fellow activists at HEJN and Arbor spoke of the importance of practical knowledge and skills development, as well as of financial support for community engagement, in enhancing communities' abilities to meaningfully engage. They also spoke of their frustration that, as the law currently stands, they are merely consulted by mining companies prior to the commencement of prospecting and mining, after which companies then seem to do what they originally intended anyway. Legally entrenched rights to impact (including to veto) significant developments in the mining venture (including the question of whether it should go ahead in the first place) would go a long way towards securing meaningful community engagement.

The Mineral and Petroleum Resources Development Act (MPRDA), 2002, the primary law regulating mining in South Africa, is in the process of being amended. It is not clear at this stage how this amendment, already many years in progress, will unfold. At the Mining Indaba, Minister Zwane assured the mining community (or, at least, those who could afford the hefty cost of a ticket to be present there) that the amendment is being prioritised by government, because 'regulatory certainty is necessary' in 'moving the mining industry [to] new and sustainable heights'.³ Are these *environmentally* sustainable heights? Do they involve *sustainable employment* for people? Will these heights sustain communities of people, or merely an elite few?

ENDNOTES

- 1 See <http://www.miningindaba.com/ehome/119660>.
- 2 See <http://www.politicsweb.co.za/news-and-analysis/mining-industry-failed-to-prepare-for-hard-times>.
- 3 Ibid.

INVESTING IN AFRICAN MINING INDABA: REFLECTION PIECE 2

Thelma Nkosi



THE LARGELY INTERACTIVE AND MARKET-LED PROGRAMME BRINGS TOGETHER THE LEADING REPRESENTATIVES FROM THE MINING INVESTMENT COMMUNITY, THE WORLD'S LARGEST MINING HOUSES AND GOVERNMENT MINISTRIES.

This year, I was fortunate to be afforded the opportunity to participate in the Investing in African Mining Indaba (Mining Indaba) which takes place in Cape Town, South Africa, every year in February. My thanks to the Mining and Environmental Justice Community Network of South Africa (MEJCON-SA) which elected me to participate. Thanks are also due to the Centre for Environmental Rights (CER) which made it possible through its network for us as communities affected by mining to get a chance to see what is happening at the big conferences on mining issues. Furthermore, I wish to thank the Open Society Foundation for South Africa for sponsoring me financially and thereby allowing me to be involved in this important gathering. My hope and belief are that this is the beginning of civil society and communities affected by mining being afforded an opportunity and given a platform to raise their concerns and frustrations with the big corporations.

Over 7 000 delegates from various sectors in the mining industry attended this event. The annual Mining Indaba is the foremost global gathering dealing with investment in the African mining value chain. The largely interactive and market-led programme brings together the leading representatives from the mining investment community, the world's largest mining houses and government ministries to share insights into how the sector can drive investment and capitalise on the opportunities available to Africa's mining industry.

The programme has been coordinated to ensure that each delegate can strategically maximise their time at the Mining Indaba and take away key information on the industry that cannot be accessed anywhere else.

However, as with many conferences, there are a number of 'side events' that create additional networking and deal-creation opportunities.

The Mining Indaba focuses on developing content and coordinating the presentation of the information so that it is of maximum value and can be strategically navigated by each delegate. The development of more interactive presentations and panel discussions,

as well as enhanced networking opportunities, is designed to support attendees and, furthermore, enable communities to ascertain how they can become involved in order to be able to protect their land and the environment, how they can benefit in the process, and how they can overcome the challenges they are facing in their communities affected by mining.

Many of the people who attend the Mining Indaba indicate that their primary goal is to meet like-minded professionals under one roof, that is, to avail themselves of opportunities that help facilitate meeting the right people at the right time in a setting that works for them.

The event was most informative and enabled many of us to network with others in civil society organisations and share information and frustrations that we are facing as communities.

Although the event appears very progressive for those focusing on mining, in my view it is a drawback that the conference is not held in areas where mining operations are actually taking place. While the people of Cape Town benefit in many ways when this conference is held, one should bear in mind that the vast majority of mines in South Africa are in other provinces north-east of the Western Cape. The process appears very unfair to me and to be capitalism at its best. It would be preferable if this conference were to be held in the provinces where most mining takes place to enable delegates to see the impacts of mining and the living conditions of mining-affected communities.

However, every problem presents an opportunity. What I realised is that this gathering gives communities an opportunity to raise their frustrations and concerns, as representatives of all the mining companies come together at this event. Although it may take some time, I believe that the community's voice will eventually be heard. Representatives of our government also attend this gathering, and there are certain associated events where one has a chance to interact with them. If, as concerned community members from mining-affected communities, we could attend this event in large numbers, I believe we could make a difference. Also, together we can advocate for the reduction of the registration fee so that more community members will be able to participate.

I have on two occasions also attended the Alternative Mining Indaba. The second time that I did so I found myself frustrated by the fact that we, the community members, seemed to be talking only to one another and not taking our issues forward. However, at the Mining Indaba itself, we come face-to-face with those we need to be engaging with, namely the mining conglomerates. Thus the Mining Indaba can give us an opportunity to move forward, which will not be an easy task, but a task nevertheless that will enable us to rejoice one day as a result of the face-to-face engagement.

There are many issues that need to be addressed through platforms such as the Mining Indaba. What is important, though, is that there must not only be discussion, but also implementation. Most of the time people talk without being challenged. This makes it easy for them to put things down on paper, without actually engaging in implementation.

Although this was my first time as a participant and I was trying to gather as much information as I could, the Mining Indaba indeed presents an opportunity to engage more as affected communities.

T: +27 +21 511 1679
E: admin@osfsa.org.za
T: @osfsa



**OPEN SOCIETY FOUNDATION
FOR SOUTH AFRICA**

Community opposition to multinational or local-led mining projects is perhaps as old as mining itself. Ecological degradation, air and water pollution, a decimation of cultural heritage, impact on agricultural production, resource looting, physical displacement and land loss are often some of the reasons for opposition to mining activities.

All over the world, mine-affected communities are increasingly asking for better living standards, improved service delivery, jobs, and better environmental governance. While the extractive sector in South Africa has historically contributed significantly to economic development, negative social and environmental impacts of such operations are now emerging through documented evidence.

As with the first edition of *In Good Company?* published in 2015, our second edition is again a platform for sharing varied perspectives on South Africa's extractive sector, particularly mining. In this edition of the publication, we benefit from the insights of highly regarded authors who, over decades, have worked on issues related to mining sustainability and governance.

We hope that this work will go some way in contributing to a solid body of knowledge regarding the management of the extractive sector in South Africa, and assist the government and communities in their quest for sustainable extraction for the benefit of the country, as envisaged in the Mineral and Petroleum Resources Development Act.

