

# An Analysis of the Legislative Framework concerning Sustainable Mining in South Africa

Linda Muswaka\*

*Faculty of Human Sciences, Vaal University of Technology*

## 1 INTRODUCTION

Mining is one of South Africa's biggest industries.<sup>1</sup> It has played a vital role in the economy for over a hundred years. In 2015 the mining industry contributed R286 billion towards South Africa's Gross Domestic Product<sup>2</sup> representing 7.1% of overall GDP.<sup>3</sup> Mining directly contributed R89.4 billion to fixed investment in 2015, while R3.7 billion in royalties and R12.5 billion in taxes were paid to the South African government in 2015/2016.<sup>4</sup> These funds form part of the government's budget, which is used to improve the infrastructure and lives of South Africans. Mining is also a significant contributor to employment in the nation, with 457 698 individuals directly employed by the sector in 2015.<sup>5</sup>

Over the past years the mining industry<sup>6</sup> in South Africa has been actively involved in the global debate about sustainable development and the need to incorporate it into their mining operations and corporate policy. This need arises from *inter alia*, the fact that mining,<sup>7</sup>

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\* LLB; LLM (UFH); LLD (NWU).

<sup>1</sup> The country is one of the world's largest coal producers – see BP Statistical Review of World Energy June 2016 <https://www.bp.com/content/dam/bp/pdf/energyeconomics/statistical-review-2016/bp-statistical-review-of-world-energy-2016-full-report.pdf>, (accessed 05-07-2017). It is also a leading producer of a wide range of metals. See South Africa Year Book 2015/16 317-328 [http://www.gov.za/sites/www.gov.za/files/SAYB1516\\_3.pdf](http://www.gov.za/sites/www.gov.za/files/SAYB1516_3.pdf) (accessed 05-07-2017).

<sup>2</sup> Hereafter, GDP.

<sup>3</sup> See Mine SA 2016 Facts and Figures file:///C:/Users/20170079/Downloads/facts-and-figures-2016.pdf (accessed 05-07-2017).

<sup>4</sup> *Ibid.*

<sup>5</sup> See Mine SA 2016 Facts and Figures file:///C:/Users/20170079/Downloads/facts-and-figures-2016.pdf (accessed 05-07-2017)

<sup>6</sup> The Department of Mineral Resources regulates all mining activities in South Africa. It derives its constitutional mandate from section 24 of the Constitution of South Africa, 1996. The principal Acts driving the work of the Department are the Mineral and Petroleum Development Act 28 of 2002 and the Mine Health and Safety Act 29 of 1996. The two Acts provide the regulatory framework for the promotion and regulation of the mining, minerals and petroleum industry. They also provide a regulatory framework for ensuring equitable access to and sustainable development of the nation's mineral resources.

<sup>7</sup> For the purposes of this paper, "mining" should be read as including all prospecting, mining, reconnaissance, exploration and production activities regulated by the Mineral and Petroleum Resources Development Act, 2002 as amended (MPRDA) with "mining related activities" read in a similar manner.

notwithstanding its positive contributions<sup>8</sup> to the development of the country,<sup>9</sup> is a destructive process. It produces copious amounts of toxic waste and water, sterilises land and destroys biodiversity. It exposes mining-affected communities to water, land, noise and dust pollution, causing ill health. Mining affected communities almost always experience social disruption ranging from increased crime to forced resettlement. Human settlements are frequently located near mines with the result that houses crack from blasting operations. Some of these settlements are perilously situated above or close to abandoned mines and collapse when subsidence occurs. Furthermore, some of the impacts of mining only appear decades after operations have ceased and many are cumulative. These detrimental impacts generated by mining activities, including their associated social,<sup>10</sup> health<sup>11</sup> and environmental costs<sup>12</sup> are borne by the public and the environment, rather than by the companies whose activities occasion them. Considering the challenges posed by mining, South Africa has put in place various legislation to ensure sustainable mining. Furthermore, South Africa is party to various international agreements on the environment relevant to the mining industry. These include the Vienna Convention for the Protection of the Ozone Layer<sup>13</sup> and its Montreal Protocol on Substances that Deplete the

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<sup>8</sup> Mining has been the main driving force behind the history and development of South Africa's economy. It continues to support and stimulate growth and development in the country. Mining also plays a significant role in fostering the realisation of socio-economic rights.

<sup>9</sup> The economic contribution of mining has fallen over the years, see Chamber of Mines South Africa "The future of the South African Mining Industry" <http://www.chamberofmines.org.za/industry-news/publications> (accessed 14-06-2016). "Mining production in South Africa increased 3.4 percent year-on-year in September of 2016,.... It is the biggest gain since August of 2015, boosted by production of platinum group metals (+10.5 percent); iron ore (+11.7 percent) and coal (+6.8 percent). On a monthly basis, mining output went up 0.9 percent and considering the third quarter of the year, it rose 1.5 percent. Mining Production in South Africa averaged -0.09 percent from 1981 until 2016, reaching an all-time high of 24.30 percent in October of 2013 and a record low of -18.40 percent in March of 2016". See <http://www.tradingeconomics.com/south-africa/mining-production> (accessed 30-11-2016).

<sup>10</sup> For instance, mining tends to attract labour from afar resulting in haphazard settlements in mining towns or areas adjacent thereto. Furthermore, mining has not often necessarily contributed significantly to rural development in "labour migratory areas", although this does not undermine its contribution to income and improved quality of life for families whose members are employed by the mines.

<sup>11</sup> Mining has, for example, historically contributed to social and health impacts such as increasing the risk of contracting and spreading HIV/AIDS due to single sex living arrangements e.g. hostel dwellings.

<sup>12</sup> For example land degradation and water pollution.

<sup>13</sup> The Convention was adopted by the Conference on the Protection of the Ozone Layer and open for signature at Vienna from 22 March 1985 to 21 September 1985, and at the United Nations Headquarters in New York from 22 September 1985 until 21 March 1986. The objective of the Convention is to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer; to promote international cooperation in the legal, scientific and technical fields, and encourage the exchange of information – see Vienna Convention for the Protection of the Ozone Layer <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?redirect=true&treatyId=516> (accessed 30-06-2017).

Ozone Layer,<sup>14</sup> the United Nations Framework on Climate Change Control<sup>15</sup> and the Kyoto Protocol.<sup>16</sup> As a member of the African Union,<sup>17</sup> South Africa is a party to various conventions including the African Convention on the Conservation of Nature and Natural Resources.<sup>18</sup> South Africa as a member of Southern African Development Community,<sup>19</sup> is a signatory to various SADC Protocols including the SADC Protocol on Mining<sup>20</sup> which is focused on the development of a regional mining sector that is economically, socially and environmentally sustainable.<sup>21</sup> Further, South Africa is a founding member of the Kimberley Process Certification Scheme,<sup>22</sup> aimed at preventing trade of conflict diamonds. These international and regional agreements will not be discussed as they fall outside the scope of this paper. The paper provides an analysis of the legislative framework concerning sustainable mining in South Africa.<sup>23</sup> This is done in order to investigate the adequacy, flaws, challenges and effectiveness of that legislative framework.

## 2 SUSTAINABLE DEVELOPMENT – A CONTEXTUAL BACKGROUND

The resurgence of the term, sustainable development, can be traced to a report entitled *Our Common Future* published by the World Commission on Environment and Development in

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<sup>14</sup> The Montreal Protocol on Substances that Deplete the Ozone Layer was agreed upon on 16 September 1987 at the Headquarters of the International Civil Aviation Organization in Montreal. The objective of the Protocol is to adopt and implement world-wide measures to eliminate production and use of almost one hundred regulated substances that damage the ozone layer. See The Montreal Protocol on Substances that Deplete the Ozone Layer <https://treaties.un.org/doc/Publication/UNTS/Volume%201522/volume-1522-I-26369-English.pdf> (accessed 30-06-2017).

<sup>15</sup> The United Nations Framework on Climate Change Control <https://unfccc.int/resource/docs/convkp/conveng.pdf> (accessed 30-06-2017).

<sup>16</sup> The Kyoto Protocol to the United Nations Framework Convention on Climate Change <https://unfccc.int/resource/docs/convkp/kpeng.pdf> (accessed 30-06-2017).

<sup>17</sup> Hereafter, AU.

<sup>18</sup> The African Convention on the Conservation of Nature and Natural Resources [https://www.au.int/web/sites/default/files/treaties/7782-fileafrican\\_convention\\_conservation\\_nature\\_natural\\_resources.pdf](https://www.au.int/web/sites/default/files/treaties/7782-fileafrican_convention_conservation_nature_natural_resources.pdf) (accessed 30-06-2017).

<sup>19</sup> Hereafter SADC.

<sup>20</sup> See The SADC Protocol on Mining <http://womin.org.za/images/regional-and-global-perspectives/africa-region-law-andpolicy/SADC%20%20%20PROTOCOL%20ON%20MINING%20official%20document.pdf> (accessed 30-06-2017).

<sup>21</sup> *Ibid.*

<sup>22</sup> The Kimberley Process Certification Scheme <https://www.kimberleyprocess.com/en/system/files/documents/KPCS%20Core%20Document.pdf> (accessed 30-06-2017).

<sup>23</sup> The focus will be on some of the core legislation impacting on mining. These will be analysed through the lens of sustainable development. The author refrains from engaging in a comprehensive analysis of the provisions dealing with the mining process or an in-depth analysis of provisions impacting on mining in general. The author considers selected provisions concerning sustainable mining.

1987.<sup>24</sup> Also known as the *Brundtland Report*, *Our Common Future*<sup>25</sup> included the “classic” definition of sustainable development: “development which meets the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>26</sup> The concept can be seen as a process of continually striving for a dynamic balance between people, planet and prosperity through using the natural resources and protecting the environment and by ensuring equitable and sustainable use of natural resources now and in the future. The acceptance of the *Brundtland Report* by the United Nations General Assembly gave the concept political salience and in 1992 leaders set out the principles of sustainable development at the United Nations Conference on Environment and Development<sup>27</sup> in Rio de Janeiro, Brazil. At this conference, member states adopted the Declaration on Environment and Development<sup>28</sup> as well as Agenda 21.<sup>29</sup>

In the context of South Africa, the principle of sustainable development received the most detailed attention in the case of *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*.<sup>30</sup> In this case, the decision of the authorities to grant an environmental authorisation for the construction of a proposed filling station was challenged. The applicant specifically contended that the provincial authorities failed to consider the socio-economic impact of the proposed development. The court held that the environmental authorities had to consider the socio-economic impact of the filling station. The court stressed

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<sup>24</sup> The United Nations General Assembly in 1983 passed Resolution 38/161 “Process of preparation of the Environmental Perspective to the Year 2000 and Beyond”, establishing the Commission – see <http://www.un.org/documents/ga/res/38/a38r161.htm> (accessed 21-10-2016). The Brundtland Commission was chaired by former Norwegian Prime Minister Gro Harlem Brundtland.

<sup>25</sup> See *Our Common Future* (the *Brundtland Report*), [http://www.sswm.info/sites/default/files/reference\\_attachments/UN%20WCED%201987%20Brundtland%20Report.pdf](http://www.sswm.info/sites/default/files/reference_attachments/UN%20WCED%201987%20Brundtland%20Report.pdf) (accessed 08-07-2016).

<sup>26</sup> Sustainable development also entails a commitment to equity and fairness, in that priority should be given to improving the conditions of the world’s poorest and decisions should account for the rights of future generations. It can also be seen in light of a long-term view that emphasizes the precautionary principle, i.e., “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation” – see the Rio Declaration on Environment and Development, 1992, Principle 15 <http://www.jus.uio.no/lm/environmental.development.rio.declaration.1992/portrait.a4.pdf> (accessed 25-09-2016).

<sup>27</sup> Hereafter, UNCED, see <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (accessed 22-08-2017).

<sup>28</sup> Hereafter, the Rio Declaration.

<sup>29</sup> Agenda 21 is a non-binding, voluntarily implemented action plan of the United Nations with regard to sustainable development.

<sup>30</sup> 2007 6 SA 4 (CC). Hereafter, *Fuel Retailers*.

the inter-connected nature of environmental, social and economic considerations within the context of sustainable development and explained that:<sup>31</sup>

The Constitution recognises the interrelationship between the environment and development; indeed, it recognises the need for protection of the environment whilst at the same time it recognises the need for social and economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development.<sup>32</sup>

While the court clarified that sustainable development requires balancing the often conflicting demands of economic development, social development and environmental protection, it is argued, Sachs J in his dissenting opinion correctly pointed out that the essence of sustainable development is balanced *integration* of socio-economic development and environmental priorities and norms.<sup>33</sup>

With regard to mining, in the late 1990s, key role players in the mining industry came together and declared their intention to incorporate sustainability measures as part of their activities. They initiated a project called the “Mining, Minerals and Sustainable Development Project”.<sup>34</sup> Since then the issue of sustainability has been on the agenda of various international forums under the initiative of the Global Mining Initiative established in 1998 by mining companies. The Global Mining Initiative has been investigating how the mining industry can contribute to sustainable development. This eventually led to the term “sustainable mining” being incorporated into the 2002 post Johannesburg Plan of Action that evolved from the World Summit on Sustainable Development<sup>35</sup> in Johannesburg.<sup>36</sup> Sustainable mining is a concept that embeds the principles of sustainable development into a mining and minerals context. It calls for a convergence between the three pillars of economic development, social equity and environmental protection. It embodies integration, understanding and acting on the complex interconnections that exist between the environment, economy, and society. This is not a balancing act or a playing of one issue off against the other, but recognizing the interdependent

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<sup>31</sup> *Fuel Retailers* para 71.

<sup>32</sup> *Fuel Retailers* para 71.

<sup>33</sup> *Fuel Retailers* para 113.

<sup>34</sup> The Mining, Minerals and Sustainable Development Project (MMSD) was a research project looking at how the mining and minerals sector could contribute to the global transition to sustainable development <http://www.iied.org/mining-minerals-sustainable-development-mmsd> (accessed 12-08-2016).

<sup>35</sup> Hereafter, WSSD.

<sup>36</sup> See Report of the World Summit on Sustainable Development Johannesburg, South Africa, 26 August - 4 September 2002 [http://www.unmillenniumproject.org/documents/131302\\_wssd\\_report\\_reissued.pdf](http://www.unmillenniumproject.org/documents/131302_wssd_report_reissued.pdf) (accessed 28-08-2016). Also see Whitmore “The Emperor’s new clothes: Sustainable mining?” 2006 *Journal of Cleaner Production* 309-314.

nature of these three pillars. The WSSD set out to reaffirm and strengthen the concept of sustainability as set out in Agenda 21.

In the following discussion, a synopsis of some of the core legislative framework concerning sustainable mining in South Africa is provided. These include the Constitution of the Republic of South Africa 1996,<sup>37</sup> the Mineral and Petroleum Resources Development Act,<sup>38</sup> the National Environment Management Act<sup>39</sup> and the National Water Act.<sup>40</sup> There are however, many other legislative instruments that are applicable to balancing mining against other present and future uses of resources with a view to ensuring sustainability. These include legislation pertaining to health and safety,<sup>41</sup> agriculture,<sup>42</sup> conservation and biodiversity,<sup>43</sup> waste management,<sup>44</sup> land reform<sup>45</sup> and the protection of heritage resources<sup>46</sup> amongst others. These are not covered as they fall outside the scope of this study.

### 3 THE CONSTITUTIONAL FRAMEWORK

Whilst not typical legislation, the Constitution also operates as a framework within which South Africa's mining and environmental legislation must operate. This is due to the fact that the Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.<sup>47</sup> Furthermore, it contains an environmental right and also provides for the allocation of responsibilities amongst the different spheres of government in the country.<sup>48</sup> The Constitution imposes responsibilities upon individuals and juristic persons for the realization of the rights articulated in the Bill of Rights.<sup>49</sup> The following discussion focuses on the right to a healthy environment.

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<sup>37</sup> Hereafter, the Constitution.

<sup>38</sup> The Mineral and Petroleum Resources Development Act 28 of 2002, hereafter, the MPRDA.

<sup>39</sup> The National Environment Management Act 107 of 1998, hereafter the NEMA.

<sup>40</sup> The National Water Act 36 of 1998, hereafter the NWA.

<sup>41</sup> For example the Mine Health and Safety Act, 29 of 1996.

<sup>42</sup> For instance, the Conservation of Agricultural Resources Act 43 of 1983.

<sup>43</sup> For example the Biodiversity Act 10 of 2004; the Protected Areas Act 57 of 2003 and the Mpumalanga Nature Conservation Act 10 of 1998.

<sup>44</sup> For instance, the National Environment Management Waste Act 59 of 2008.

<sup>45</sup> For instance, the Restitution of Land Rights Act 22 of 1994.

<sup>46</sup> Particularly the National Heritage Resources Act 25 of 1999.

<sup>47</sup> See section 2 of the Constitution.

<sup>48</sup> Kidd *Environmental Law: A South African Guide* (2008) 18.

<sup>49</sup> Section 8 of the Constitution.

### 3 1 The right to a healthy environment

Section 24 of the Constitution is arguably the lynchpin for sustainable mining.<sup>50</sup> It proclaims the right of everyone:

- (a) to an environment that is not harmful to their health or wellbeing; and
- (b) to have the environment protected, for the benefit of present and future generations, through legislative and other measures that –
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation; and
  - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.<sup>51</sup>

The State is required to respect, protect, promote and fulfil this right.<sup>52</sup> The Constitution further places an obligation in terms of section 152 (1)(b)<sup>53</sup> and (d)<sup>54</sup> on the part of local government as stipulated in sections 4(2)(d)<sup>55</sup> and 4(2)(i),<sup>56</sup> 73(1) and (2) of the Municipal Systems Act<sup>57</sup> to ensure that the right to a clean and healthy environment is fulfilled. The right to a healthy environment and sustainable development are fundamental and closely connected to health and well-being.<sup>58</sup> The right to a healthy environment contained in section 24(a) of the Constitution thus extends health rights beyond section 27(1) which is limited to the provision of health care services.<sup>59</sup> In section 24(b), the State is obligated to protect the environment through legislative and other measures that *inter alia* “secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”.<sup>60</sup> The

<sup>50</sup> See Humby “Sustainable Mining - Policy and Legislative Framework” <http://www.fse.org.za/Downloads/PROF%20TRACY%20HUMBY%20Policy%20and%20Legislative%20Framework.pdf> (accessed 12-09-2016).

<sup>51</sup> See section 24 of the Constitution. See also Kidd *Environmental Law: A South African Guide* (2008), Glazewski *Environmental Law in South Africa* (2005); Paterson and Kotze *Environmental Compliance and Enforcement in South Africa* (2009) for a discussion of this right.

<sup>52</sup> See section 7(2) of the Constitution.

<sup>53</sup> Section 152(1)(b) states as one of the objects of local government to ensure the provision of services to communities in a sustainable manner.

<sup>54</sup> Section 152(1)(d) states as one of the objects of local government to promote a safe and healthy environment.

<sup>55</sup> Section 4(2)(d) of the Municipal Systems Act states that the council of a municipality, within the municipality’s financial and administrative capacity and having regard to practical considerations, has the duty to strive to ensure that municipal services are provided to the local communities in a financially and environmentally sustainable manner.

<sup>56</sup> Section 4(2)(i) highlights the duty to promote a safe and healthy environment in the municipality.

<sup>57</sup> The Municipal Systems Act 32 of 2000 [https://cer.org.za/wp-content/uploads/2014/02/32-OF-2000-LOCAL-GOVERNMENT-MUNICIPAL-SYSTEMS-ACT\\_5-Jul-2011-to-date-1.pdf](https://cer.org.za/wp-content/uploads/2014/02/32-OF-2000-LOCAL-GOVERNMENT-MUNICIPAL-SYSTEMS-ACT_5-Jul-2011-to-date-1.pdf) (accessed 30-07-2017).

<sup>58</sup> There is a strong connection between the quality of the environment and the health of the people living and/or exposed to those environments.

<sup>59</sup> For instance, a particular environment may be damaging to people’s health, yet not necessarily infringe a person’s right to health care services. For example, if atmospheric pollution emanating from mining is to be subjected to constitutional challenge on the grounds that people’s health is being damaged, the challenge would have to be brought in terms of the environmental clause and not in terms of section 27.

<sup>60</sup> See section 24(b)(iii). It is noteworthy that to give effect to this provision, various legislation which will be discussed, have been enacted.

Constitutional Court had an opportunity to consider how the State is to meet this type of constitutional obligation, albeit not in the environmental sphere, in *Government of the Republic of South Africa v Grootboom* where it stated:

“The State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State’s obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State’s obligations.”<sup>61</sup>

The reasonable legislative and other measures must *inter alia* secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.<sup>62</sup> In *Fuel Retailers* the Constitutional Court provided guidance on the meaning of “sustainable development”, thereby informing on the nature of the state’s obligations in terms of the right. Firstly, the court highlighted the inexorable link between development and the environment.<sup>63</sup> Development cannot subsist on a deteriorating environmental base.<sup>64</sup> Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development.<sup>65</sup> Promotion of development therefore requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. Secondly, the court affirmed the precautionary approach to environmental management<sup>66</sup> and held this to be especially important when considering the cumulative impacts of development on the environment and socio-economic conditions.<sup>67</sup>

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<sup>61</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 42.

<sup>62</sup> See section 24(b)(iii).

<sup>63</sup> *Fuel Retailers* para 44.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Fuel Retailers* para 44.

<sup>66</sup> The precautionary principle, as articulated in the NEMA (see section 2(4)(a)(iii)), holds that a risk-averse and cautious approach should be applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.

<sup>67</sup> *Fuel Retailers* paras 98 – 99.

### 3.1.1 *The ripple effect of an infringement on the right to a healthy environment*

As is the case with all rights in Chapter 2 of the constitution, the right to a healthy environment is subject to the limitation clause.<sup>68</sup> The following discussion, therefore, takes cognisance of the fact that it may well be possible that the limitations clause could be used to justify certain mining activities detrimental to the environment on the basis that such actions constitute “reasonable and justifiable” limitations of the right to a healthy environment.

An infringement of section 24 of the Constitution through mining automatically violates various other human rights such as the right to adequate water guaranteed in section 27. Mining pollutes water in many ways.<sup>69</sup> For example, runoff from mines and spills from power plant waste ponds contaminate drinking and irrigation water with toxic pollutants, violating the right to life<sup>70</sup> and the right to food and water.<sup>71</sup> One of the most damaging sources of water pollution is acid mine drainage from both active and abandoned mines.<sup>72</sup> Acid mine drainage is water flowing from mine sites that has become acidified by contact with sulphides in the mining waste rock that have been exposed to air.<sup>73</sup> The resulting water is very acidic and high in salts and heavy metals.<sup>74</sup> Acid mine drainage often leaches into aquifers or flows into rivers and streams, causing widespread devastation by sterilising soils, contaminating food crops, and harming the health of humans, animals and plants.<sup>75</sup> Thus, while prospecting and mining activities can pollute all environmental media, water resources are arguably impacted most severely.<sup>76</sup>

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<sup>68</sup> See section 36 of the Constitution. Section 36(1) states “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and less restrictive means to achieve the purpose”.

<sup>69</sup> See for example World Wildlife Fund South Africa *Coal and Water Futures in South Africa* 2011 <http://www.wwf.org.za/?4981/coalwater> (accessed 10-08-2016).

<sup>70</sup> See section 11 of the Constitution.

<sup>71</sup> See section 27 of the Constitution.

<sup>72</sup> See *Zero Hour Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga* May 2016 <http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf> (accessed 28-10-2016).

<sup>73</sup> WWF South Africa *Coal and Water Futures in South Africa* 2011 [http://awsassets.wwf.org.za/downloads/wwf\\_coal\\_water\\_report\\_2011\\_web.pdf](http://awsassets.wwf.org.za/downloads/wwf_coal_water_report_2011_web.pdf) (accessed 10-08-2016).

<sup>74</sup> See McCarthy “The impact of acid mine drainage in South Africa” <http://www.sajs.co.za/sites/default/files/publications/pdf/712-5387-3-PB.pdf> (accessed 02-07-2017).

<sup>75</sup> See *Zero Hour Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga* May 2016 <http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf> (accessed 28-10-2016).

<sup>76</sup> South Africa is a water scarce country where the demand for water is in excess of natural water availability in several river basins. See Water sustainability of agribusiness activities in South Africa [http://www.unepfi.org/fileadmin/publications/water/chief\\_liquidity1\\_South\\_Africa.pdf](http://www.unepfi.org/fileadmin/publications/water/chief_liquidity1_South_Africa.pdf) (accessed 18-10-2016). South Africa is experiencing its most severe drought in 30 years and climate projections indicate such

The ripple effect of an infringement of section 24 is also evident with regard to people living near mines and power plants who breathe in toxic pollutants that contribute to illness or death, violating their rights to life.<sup>77</sup> Furthermore, pollution from mines destroys ecosystems on which communities rely for cultural and spiritual practices and to sustain their livelihoods, violating their rights to culture<sup>78</sup> and to sufficient food.<sup>79</sup> These rights are also guaranteed in the International Covenant on Economic, Social and Cultural Rights<sup>80</sup> and the International Covenant for Civil and Political Rights,<sup>81</sup> both of which South Africa has ratified. South Africa, thus, also has an international obligation to prevent mining activities within its jurisdiction that may violate these rights.

An infringement of section 24 through mining also automatically derails the achievement of the Sustainable Development Goals for 2015-2030. In September 2015, the United Nations member states adopted “Transforming our World: The 2030 Agenda for Sustainable Development”, which includes a set of Sustainable Development Goals for 2015-2030.<sup>82</sup> The Agenda provides a successor framework for the Millennium Declaration and the Millennium Development Goals that covered the period from 2000-2015.<sup>83</sup> The Sustainable Development Goals represent the world’s comprehensive plan of action for social inclusion, environmental sustainability and economic development.

It is submitted that infringement of section 24 through mining poses significant challenges for advancing the Sustainable Development Goals. For instance, mining, through air pollution, hinders the achievement of the Sustainable Development Goal 3 which focuses on health and well-being.<sup>84</sup> This goal is aimed at ensuring healthy lives and promoting well-being for all at all ages.<sup>85</sup> The challenges posed by mining with regard to the achievement of this goal include

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droughts will become more frequent. In this context, it is concerning that mines continue to drain and pollute the country’s water resources, jeopardizing communities’ access to sufficient and clean water.

<sup>77</sup> See section 11 of the Constitution.

<sup>78</sup> See section 31 of the Constitution.

<sup>79</sup> See section 27 of the Constitution.

<sup>80</sup> See Articles 11, 12 and 15.

<sup>81</sup> See Article 27.

<sup>82</sup> United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development file:///E:/A%20VUT%202017%20%203-4%20Articles/120815\_outcome-document-of-Summit-for-adoption-of-the-post-2015-development-agenda.pdf (accessed 30-06-2017).

<sup>83</sup> See The United Nations Millennium Declaration <http://www.un.org/millennium/declaration/ares552e.pdf> (accessed 26-06-2017).

<sup>84</sup> *Ibid.*

<sup>85</sup> United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development file:///E:/A%20VUT%202017%20%203-4%20Articles/120815\_outcome-document-of-Summit-for-adoption-of-the-post-2015-development-agenda.pdf (accessed 30-06-2017).

*inter alia* increased risk factors for cardiovascular and respiratory diseases resulting from air pollution. It has been reported that the Mpumalanga province has amongst the worst air quality in the world, largely due to coal mining activities, uncontrollable underground fires and power-stations burning coal.<sup>86</sup>

Another example is that of the Sustainable Development Goal 6 which focuses on clean water and sanitation. This goal is aimed at ensuring the availability and sustainable management of water and sanitation for all. Access to clean water and good quality sanitation services prevent disease and improve livelihoods, and clean waterways sustain a healthy environment. Mining is a significant user of water and can negatively impact water quality thereby hindering the achievement of Sustainable Development Goal 6. It has been reported that in 2004, active and abandoned mines released large amounts of polluted water into the Olifants River per day, damaging freshwater ecosystems, and affecting the water supply necessary for irrigation and municipal services.<sup>87</sup> This pollution threatens the entire Olifants ecosystem, including the lives and health of hundreds of communities and wild animal populations that depend on this water for their survival.<sup>88</sup> It is thus not surprising that the responsibility of mining companies to ensure that their operations do not negatively impact water quality is becoming increasingly paramount for maintaining the social licence to operate.

Sustainable Development Goal 15 focuses on sustainable ecosystems. It aims to protect, restore and promote the sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, halt and reverse land degradation and halt biodiversity loss. Mining and its associated infrastructure can disrupt both the ecosystems that provide valuable services to society and the biodiversity on which these ecosystems depend thereby negatively impacting on the achievement of this goal. Mining can however, also contribute to the advancement of the Sustainable Development Goals. Therefore, depending on the context, protection of the right to a healthy environment would tend to lead to the advancement of the Sustainable Development Goals in the same way that it would lead to the protection of many other rights.

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<sup>86</sup> See “The Social and Environmental Consequences of Coal Mining in South Africa” [http://www.bothends.org/uploaded\\_files/uploadlibraryitem/1case\\_study\\_South\\_Africa\\_updated.pdf](http://www.bothends.org/uploaded_files/uploadlibraryitem/1case_study_South_Africa_updated.pdf) (accessed 26-05-2017).

<sup>87</sup> See “The threats to human rights from mining and coal-fired power production in South Africa” <https://cer.org.za/wp-content/uploads/2016/10/2017-SA-UPR-submission-mining-and-HR-2016-10-5-final.pdf> (accessed 18-05-2017).

<sup>88</sup> *Ibid.*

### 3.1.2 Access to information and just administrative action

The rights of access to information<sup>89</sup> and just administrative action<sup>90</sup> are particularly pertinent in regard to the process of granting prospecting and mining rights. Under section 33(1) of the Constitution, everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 32(1) of the Constitution provides that everyone has the right of access to (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any right. The MPRDA requires that mining companies engage in public consultation with regard to exploration rights, mineral rights and environmental impact.<sup>91</sup> In the case of *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*<sup>92</sup> the Constitutional Court considered, amongst others, the issue of consultation in terms of the MPRDA. In this case the landowner took on review the decision of the Minister to grant a prospecting right in favour of the applicant without consulting and notifying the landowner as required by the MPRDA read with the Constitution. The landowner argued that the decision of the Minister of Mineral Resources to grant a prospecting right in favour of the prospector was discharged without consulting and notifying the landowner as required by section 10 (2) and 16(4) of the MPRDA. The court *inter alia* held that the consultation requirements in the MPRDA served at least two general purposes.<sup>93</sup> The first was to see if some accommodation was possible between the prospecting right applicant and the landowner insofar as interference with the landowner's property was concerned.<sup>94</sup> The second was to provide landowners or occupiers with the necessary information on everything to be done in respect of the prospecting operation, so that they could properly assess what its impact would be and make an informed decision.<sup>95</sup>

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<sup>89</sup> Section 32(1) Constitution. The right of access to information is fleshed out in the Promotion of Access to Information Act 2 of 2000, hereafter, PAIA.

<sup>90</sup> Section 33(1) Constitution which guarantees the right to administrative action that is lawful, reasonable, and procedurally fair and section 33(2) which states that everyone whose rights have been adversely affected administrative action has the right to be given written reasons. This right is elaborated in the Promotion of Administrative Justice Act 3 of 2000, hereafter PAJA.

<sup>91</sup> See sections 5(4) (c), 10(2), 16(4)(b), 22(4) (b) and 27(5)(b) of the MPRDA read with regulation 3 published under section 107 of the MPRDA. The obligation to consult with interested and affected parties rests on the applicant, the mining company, and not the State. However, the State, specifically DME, must ensure that this obligation has been fulfilled and proof thereof submitted to the DME as part of the application process.

<sup>92</sup> CCT 39/10 2010 ZACC 26. Hereafter *Bengwenyama Minerals* (CC). For a discussion of the case see Humby "The Bengwenyama Trilogy: Constitutional Rights and the Fight for Prospecting on Community Land" 2012 *PER/PELJ* 166-231.

<sup>93</sup> Humby "The Bengwenyama Trilogy: Constitutional Rights and the Fight for Prospecting on Community Land" 2012 *PER/PELJ* 177.

<sup>94</sup> See *Bengwenyama Minerals* (CC) para 65.

<sup>95</sup> See *Bengwenyama Minerals* (CC) para 67.

In the case of *Director: Mineral Development, Gauteng Region v Save the Vaal Environment*,<sup>96</sup> the Supreme Court of Appeal confirmed the fundamental nature of the public's right to be heard as a component of lawful, reasonable and procedurally fair administrative action, particularly in light of the "enormous damage" that can be caused by mining activity.<sup>97</sup> In *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism and Eskom Holdings*,<sup>98</sup> the Court took the view that this right to be heard can apply at various stages in an application process. In *Aquafund (Pty) Ltd v Premier of the Western Cape*<sup>99</sup> it was held that if it is accepted that every person is entitled to lawful administrative action, it must follow that every person must be entitled to such information as is reasonably required by him to determine whether his right to lawful administrative action has been infringed or not. If a person is not able to establish whether his rights have thus been infringed, he will clearly be prejudiced.

As has been highlighted, the right to environment overlaps with a number of other substantive and procedural constitutional human rights. Therefore, depending on the context, protection of the right to environment would tend to lead to protection of many other rights, for instance, the right of access to sufficient food and water.<sup>100</sup> The right of the child to basic nutrition, shelter, basic health care services and social services also intersects positively with the environmental right.<sup>101</sup> The procedural rights of access to information<sup>102</sup> and just administrative action<sup>103</sup> support protection of the right to a healthy environment by facilitating greater public participation in environmental governance and decision making.

#### 4 CO-OPERATIVE GOVERNANCE

The sustainable development ideal lies at the nexus of environmental, social and economic realms, supported by good governance.<sup>104</sup> It is submitted that good governance *inter alia* includes the principles of co-operative governance. The principles of co-operative governance

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<sup>96</sup> 1999 2 SA 709 SCA.

<sup>97</sup> *Ibid* 710G.

<sup>98</sup> 2005 3 SA 156 (C).

<sup>99</sup> 1997 7 BCLR 907 (C) 916E.

<sup>100</sup> Section 27(1)(b) Constitution.

<sup>101</sup> Section 28(1)(c) Constitution.

<sup>102</sup> Section 32(1) Constitution. The right of access to information is fleshed out in the PAIA.

<sup>103</sup> Section 33(1) Constitution which guarantees the right to administrative action that is lawful, reasonable, and procedurally fair and section 33(2) which states that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. This right is elaborated in the PAJA.

<sup>104</sup> Good governance is amongst other things, participatory, transparent and accountable. It is also effective and equitable, and promotes the rule of law fairly.

are enshrined in Chapter 3 of the Constitution. All spheres of government and all organs of State within each sphere must *inter alia* co-operate with one another in mutual trust and good faith. This is achieved by inter alia fostering friendly relations, assisting and supporting one another, informing one another of, and consulting one another on matters of common interest, coordinating their actions and legislation with one another. Through working together and adhering to the principle of co-operative government, the various spheres of government can meet their mandates and take well-planned and integrated decisions. South Africa's National Development Plan 2030<sup>105</sup> recognized and stressed the importance of co-operative government as follows:

The Department of Energy, Department of Mineral Resources, Department of Water Affairs and Department of Environmental Affairs should collaborate in developing planning instruments that ensure South Africa uses its endowment of renewable energy resources, combined with effective implementation of environmental regulations to mitigate the exploitation of strategic mineral resources.<sup>106</sup>

In the context of mining, which affects the interests of numerous sectors of society, the principles of cooperative government should ensure that the Department of Mineral Resources<sup>107</sup> has all the relevant considerations before it when deciding applications for prospecting and mining rights. This is particularly important for governing the impacts of mining, where other organs of state such as the Department of Water and Sanitation<sup>108</sup> and the Department of Environmental Affairs,<sup>109</sup> may have far more information and expertise.

## 5 THE LEGISLATIVE FRAMEWORK

In terms of section 24(b)(iii) of the Constitution, the State is obligated to protect the environment through legislative and other measures that *inter alia* “secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. “To give effect to this provision, various legislation has been enacted.<sup>110</sup> South Africa therefore, has in place, sound legislation aimed at achieving

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<sup>105</sup> See South Africa's National Development Plan 2030 <http://www.poa.gov.za/news/Documents/NPC%20National%20Development%20Plan%20Vision%202030%20lo-res.pdf> (accessed 16-10-2016).

<sup>106</sup> *Ibid.*

<sup>107</sup> Hereafter, the DMR.

<sup>108</sup> Hereafter, the DWS. Before 2014, the DWS was known as the Department of Water Affairs (hereinafter, the DWA). For the purposes of this paper, references to the DWS includes the DWA.

<sup>109</sup> Hereafter, the DEA.

<sup>110</sup> For example the MPRDA, NEMA, NWA, the National Environment Management Waste Act, the Mine Health and Safety Act and the National Heritage Resources Act, to mention only a few.

sustainable development, including laws that support public participation, impact assessment and environmental management. The following is a brief overview of some of the main legislation<sup>111</sup> regulating the impacts of mining in South Africa. It is noteworthy that any regulatory framework must accord with the Constitution, as South Africa's supreme law,<sup>112</sup> and give effect to the rights enshrined in the Bill of Rights.<sup>113</sup>

## 5 1 Mineral and Petroleum Resources Development Act 28 of 2002

The MPRDA<sup>114</sup> is the primary statute regulating prospecting and mining in South Africa. The MPRDA contains multiple legislative objectives,<sup>115</sup> one of which is to give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.<sup>116</sup> In light of this objective, the Constitutional Court decision in *Maccsand (Pty) Ltd v City of Cape Town*<sup>117</sup> confirmed that the MPRDA is one of the laws passed to promote section 24 of the Constitution. The MPRDA acknowledges that the country's mineral resources belong to the nation.<sup>118</sup> The State is subsequently appointed as

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<sup>111</sup> It is noteworthy that this paper does not discuss all the main legislation relevant to mining but only a selected few.

<sup>112</sup> See section 2 of the Constitution.

<sup>113</sup> See Chapter 2 of the Constitution.

<sup>114</sup> The MPRDA came into effect on 1 May 2004. It makes provision for equitable access to, and the sustainable development of, the mineral resources of the nation. The preamble emphasises the following:

- Recognises that minerals and petroleum are non-renewable natural resources;
- Acknowledges that the mineral and petroleum resources of SA belong to the nation and that the State is the custodian thereof;
- Affirms the obligation of the State to protect the environment for the benefit of present and future generations, to ensure ecological sustainable development of mineral and petroleum resources and to promote economic and social development;
- Recognises the need to promote local and rural development and the social upliftment of communities affected by mining;
- Reaffirms the commitment of the State to reform and to bring about equitable access to the mineral and petroleum resources of South Africa;
- Is committed to eradicating all forms of discriminatory practices in the mineral and petroleum industries;
- Considers the obligation of the State under the Constitution to take legislative and other measures to redress the results of past racial discrimination;
- Reaffirms the commitment of the State to guaranteeing security of tenure in respect of prospecting and mining operations; and
- Emphasizes the need to create an internationally competitive and efficient administrative and regulatory regime.

The MPRDA is supplemented by the MPRDA Regulations. The Regulations address among others, the content of the social and labour plans; the scoping report and the environmental impact assessment report.

<sup>115</sup> See section 2 of the MPRDA.

<sup>116</sup> See section 2(h) of the MPRDA.

<sup>117</sup> 2012 4 SA 181 (CC). Hereafter, *Maccsand*.

<sup>118</sup> See section 3(1). Prior to 1 May 2004, the right to prospect and mine vested in the holder of the mineral rights with the exercise of such rights being regulated by the State. Under the MPRDA which took effect on 1 May

custodian of these resources.<sup>119</sup> As custodian the State has the ultimate responsibility to grant, issue, control, administer and manage all rights in minerals.<sup>120</sup> In the Preamble of the MPRDA, the State affirms its obligation to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development.<sup>121</sup>

In terms of the MPRDA, the Minister has a mandate to ensure the sustainable development of the country's mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development.<sup>122</sup> To ensure this, the MPRDA stipulates that the principles of the National Environmental Management Act 107 of 1998<sup>123</sup> apply to all mining, and serve as guidelines for the interpretation, administration and implementation of the environmental requirements of the MPRDA. As a consequence, a holder of a mining right or mining permit must *inter alia* (i) consider, investigate, assess and communicate the impact of their activities on the environment comprehensively; (ii) as far as is reasonably practicable, rehabilitate the environment to its natural or predetermined state, or to a land use which conforms to the generally accepted principle of sustainable development; (iii) be responsible for environmental damage, pollution or ecological degradation as a result of reconnaissance, prospecting or mining operations which may occur inside and outside the boundaries of the areas to which such right or permit relates; and (iv) ensure that it will take place within the framework of national environmental management policies, norms and standards.

Following the commencement of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008,<sup>124</sup> from 7 December 2014 the environmental management of mining is now governed by NEMA,<sup>125</sup> with the Minister of Mineral Resources as “competent

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2004, the right to prospect and mine is granted by the State. The MPRDA repealed the old mineral right system and placed the mineral resources under state custodianship. The State, acting through the Minister is empowered to “grant, issue, refuse, control, administer and manage”, *inter alia*, the right to prospect and mine.

<sup>119</sup> See section 3(1) and (2) of the MPRDA.

<sup>120</sup> See section 3(2) of the MPRDA. A prospecting right, mining right, exploration right or production right granted in terms of the MPRDA is a limited real right in respect of the mineral and the land to which such right relates – see section 5(1).

<sup>121</sup> See the Preamble of the MPRDA.

<sup>122</sup> See section 3(3) of the MPRDA.

<sup>123</sup> Hereinafter, NEMA.

<sup>124</sup> Hereinafter, the MPRDAA 2008.

<sup>125</sup> See section 50A of NEMA.

authority”<sup>126</sup> and the Minister of Environmental Affairs as “appeal authority”.<sup>127</sup> The agreement for the purposes of section 50A(1) of NEMA is titled<sup>128</sup> “One Environmental System”,<sup>129</sup> which aims to streamline mining, environmental and water use authorisation processes for mining related operations.<sup>130</sup> While it is critical that the environmental standards prescribed by NEMA, which are significantly higher than those that were prescribed under the MPRDA, now apply to mining (as they do for every other industry) the OES retains the DMR as the competent authority for environmental management of mining.<sup>131</sup> Mining is unique in this respect in South Africa as every other industry’s compliance with environmental laws is the DEA’s responsibility. The Minister of Environmental Affairs retains only the authority to decide appeals lodged against the granting of, or refusal to grant, these authorisations.<sup>132</sup> The situation creates conflicting mandates for the DMR, namely, that of promoting economic development through mining whilst at the same time protecting the environment. Having the DMR as the competent authority for the environmental management of mining means the minerals fox is guarding the environmental henhouse in South Africa.<sup>133</sup> This problem stems from *inter alia* the political point of view that the DMR has greater power than the DEA and the DWS and the perception that mining is the backbone of our economy, which puts all the other departments under pressure to support it.<sup>134</sup>

## 5 2 The National Environmental Management Act 107 of 1998

The NEMA defines the national approach to environmental management and contains a variety of innovative regulatory mechanisms aimed at sustainable development of renewable and non-renewable resources. Section 2 of NEMA requires that development must be socially, environmentally and economically sustainable.<sup>135</sup> The EIA Regulations,<sup>136</sup> which were

<sup>126</sup> The DMR is now the competent authority for processing and issuing environmental authorisations under NEMA for all activities involved in mining, and for enforcing the conditions of those environmental authorisations and enforcing environmental laws more broadly.

<sup>127</sup> *Ibid.*

<sup>128</sup> See section 50A(2) of NEMA.

<sup>129</sup> Hereinafter OES. See <https://www.environment.gov.za/mediarelease/oneenvironmentalsystem> (accessed 02-11-2016).

<sup>130</sup> *Ibid.*

<sup>131</sup> See <https://www.environment.gov.za/mediarelease/oneenvironmentalsystem> (accessed 11-11-2016).

<sup>132</sup> See section 50A(2) of NEMA.

<sup>133</sup> Zero Hour Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga May 2016 <http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf> (accessed 28-10-2016).

<sup>134</sup> *Ibid.*

<sup>135</sup> See section 2(a) of NEMA.

<sup>136</sup> See NEMA EIA 2014 Regulations 2014 [https://www.environment.gov.za/sites/default/files/legislations/nema\\_eia2014regulations\\_g38282.pdf](https://www.environment.gov.za/sites/default/files/legislations/nema_eia2014regulations_g38282.pdf) (accessed 16-11-2016); NEMA Amendments to EIA 2014

published in terms of the NEMA, currently regulate General Development. Depending on the nature of the activity, the NEMA EIA Regulations may require either a basic assessment or a scoping and EIA before an environmental authorization may be granted. Environmental authorizations are granted (or refused) by the DMR.<sup>137</sup> The commencement of a listed activity without environmental authorization is regarded as an offence.<sup>138</sup> A failure to obtain such authorization may result in imprisonment for a period not exceeding 10 years or a fine not exceeding R10 million or both.<sup>139</sup> The Act also provides for the establishment of a statutory duty of care and remediation of environmental damage on any person who causes, has caused or may cause significant pollution or degradation of the environment.<sup>140</sup>

Mining and certain developments and activities (which are listed under various laws) which may have an impact on the environment require authorization before they may commence. The DMR traditionally adopted the stance that the obtaining of a mining right or permit trumped the need for any other authorisation required by any other law. This mistaken belief was clarified by the Constitutional Court in the case of *Maccsand*,<sup>141</sup> where it was held that holding a mining right did not negate the need to obtain any further authorisations which may be triggered as a result of mining activities.<sup>142</sup> Various authorisations and permits may therefore be required in addition to a mining right before mining activities may commence. An environmental authorization under NEMA and a water use licence under the National Water Act are one such example. However, as has been noted in the previous discussion, the DMR is now the competent authority for processing and issuing environmental authorisations under NEMA and NWA for all activities involved in mining.

### 5 3 The National Water Act 36 of 1998

One of the purposes of the NWA is to reduce and prevent pollution and degradation of water resources. Section 19 deals with prevention and remedying effects of pollution. It provides that an owner of land, a person in control of land or a person who occupies or uses the land on which any activity or process is or was performed or undertaken; or any other situation exists,

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[https://www.environment.gov.za/sites/default/files/gazetted\\_notices/proposedamendments\\_EIAreulations.pdf](https://www.environment.gov.za/sites/default/files/gazetted_notices/proposedamendments_EIAreulations.pdf) (accessed 16-11-2016).

<sup>137</sup> See section 50A of NEMA.

<sup>138</sup> See section 49A of NEMA.

<sup>139</sup> See section 49B of NEMA.

<sup>140</sup> See section 28 of NEMA.

<sup>141</sup> 2012 4 SA 181 (CC).

<sup>142</sup> *Ibid.*

which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.<sup>143</sup> The reasonable measures that may be taken include measures to cease, modify or control any act or process causing the pollution; to comply with any prescribed waste standard or management practice; to contain or prevent the movement of pollutants; to eliminate any source of pollution; to remedy the effect of the pollution and to remedy the effect of any disturbance to the bed and banks of a watercourse.<sup>144</sup> Any person who fails to take reasonable measures as required may be directed by a catchment management agency to commence taking specific measures before a given date; diligently continue with those measures; and complete them before a given date.<sup>145</sup> If a person fails to comply, or complies inadequately with any given directive, the catchment management agency may take the measures it considers necessary to remedy the situation.<sup>146</sup>

The NWA requires almost all water uses (abstraction, storage, waste disposal, discharge, removal of underground water and alteration to water courses) above certain thresholds to be licensed and registered. Before mining companies may use water as specified, they must first apply for and be issued with water use licences. Water use licences 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. Under the NWA, water use must be licensed, except if that water use is (i) permissible under Schedule 1;<sup>147</sup> (ii) permissible as a continuation of an existing lawful use;<sup>148</sup> and (iii) permissible in terms of a general authorisation issued under section 39.<sup>149</sup> Another exception is where the responsible authority waives the need for a licence.<sup>150</sup> When issuing a general authorisation or licence, the responsible authority must take into account all the relevant factors,<sup>151</sup> including the consideration of existing lawful water uses,<sup>152</sup> the need to redress past

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<sup>143</sup> See section 19 (1) of NWA.

<sup>144</sup> See section 19 (2) (a) – (f) of NWA.

<sup>145</sup> See section 19 (3) (a) – (c) of NWA.

<sup>146</sup> See section 19(4) of NWA.

<sup>147</sup> See section 22(1)(a)(i) of NWA.

<sup>148</sup> See section 22(1)(a)(ii) of NWA.

<sup>149</sup> See section 22(1)(a)(iii) of NWA.

<sup>150</sup> See section 22(1)(c) of NWA.

<sup>151</sup> See section 27(1) of NWA.

<sup>152</sup> See section 27(1)(a) of NWA.

racial and gender discrimination,<sup>153</sup> the socio-economic impact of the water use (both if it were to be authorised or denied),<sup>154</sup> as well as any catchment management strategy applicable to the water resource.<sup>155</sup> Importantly, any water use authorisation should be efficient and beneficial to the public interest.<sup>156</sup>

Section 29 of the NWA states that the responsible authority may attach conditions to every general authorisation or licence. These conditions may specify management practices and general requirements for any water use, including water conservation measures, and may furthermore require the monitoring and analysis of the water use, imposing a duty to measure and record aspects of water use on mining companies. Section 30(1) of the NWA provides that a responsible authority may, if necessary for the protection of the water resource or property, require the applicant to give security for any obligation or potential obligation arising from a licence issued under this Act. Operating without a required water use licence is against the law,<sup>157</sup> but in practice many mines operate without them.<sup>158</sup> Some companies blame the DWS's<sup>159</sup> backlog in processing water use licence applications,<sup>160</sup> but using water without a valid licence is a violation of the NWA, and a criminal offence.<sup>161</sup> While the DMR has the legal authority and the obligation<sup>162</sup> to stop mines using water without a water use licence, the DWS can issue directives to stop all illegal water use. Both departments therefore have powers to stop violations by the mines.

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<sup>153</sup> See section 27(1)(b) of NWA.

<sup>154</sup> See section 27(1)(d) of NWA.

<sup>155</sup> See section 27(1)(e) of NWA.

<sup>156</sup> See section 27(1)(c) of NWA.

<sup>157</sup> See section 151 of NWA.

<sup>158</sup> See "Ninety-six mines operating without water licences, Minister reveals" <http://www.miningweekly.com/article/ninety-six-mines-operating-without-water-licences-minister-reveals-2015-03-24> (accessed 12-08-2016).

<sup>159</sup> Before 2014, the DWS was known as DWA. For the purposes of this paper, references to the DWS includes the DWA.

<sup>160</sup> See *Zero Hour Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga* May 2016 <http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf> (accessed 28-10-2016).

<sup>161</sup> See section 151(2) which states that any person who contravenes any provision of subsection (1) is guilty of an offence and liable, on the first conviction, to a fine or imprisonment for a period not exceeding five years, or to both a fine and such imprisonment and, in the case of a second or subsequent conviction, to a fine or imprisonment for a period not exceeding ten years or to both a fine and such imprisonment.

<sup>162</sup> 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 arguably grounds for suspension of the mining right.

## 6 AN APPRAISAL OF THE LEGISLATIVE FRAMEWORK

South Africa has committed to sustainable mining as evidenced by *inter alia* the legislation discussed. The government has thus, accepted sustainable mining as a guiding principle, made progress on sustainable mining metrics, and improved stakeholder participation in the sustainable mining process. However, despite recognition of and commitment to the principles of sustainable mining, implementation has proven difficult as unsustainable trends continue. Designing the move from theory to practice has been a major challenge as evidenced by the gap between the legislative framework concerning sustainable mining and its implementation and/or enforcement.

For instance, as has been highlighted, before mining operations commence, a mining company must first apply for and be issued with a water use licence. However, in light of many mines operating without the required licences,<sup>163</sup> it seems this illegal activity goes unchecked in part because of the DWS's internal backlog and in part because the DWS lacks the necessary capacity or will to enforce the law.<sup>164</sup> Furthermore, while the NWA empowers the DWS to require a water use licence applicant to give security,<sup>165</sup> a requirement to this effect is only occasionally made a condition<sup>166</sup> of the licence.<sup>167</sup> Where such security is required, there is no enforcement of compliance with this condition and as a result, financial provision is not secured.<sup>168</sup> The applicable laws are thus, not being effectively implemented.

Therefore, one of the challenges facing South Africa with regard to ensuring sustainable mining is that detection of violations of sustainable mining laws does not always lead to action. It is argued that the effectiveness of legislative measures aimed at ensuring sustainable mining is being hindered by the lack of political will to enforce the mining industry's legal obligations. Sustainable mining is therefore often limited to political rhetoric that lacks adequate enforcement. It is, therefore, recommended that where violations of legislation is detected,

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<sup>163</sup> In March 2015 the Minister of Water and Sanitation revealed that they were ninety six (96) mines operating without water use licences, see <http://www.miningweekly.com/article/ninety-six-mines-operating-without-water-licences-minister-reveals-2015-03-24> (accessed 08-08-2016).

<sup>164</sup> Humby "Mining & Litigation Review" <http://cer.org.za/wp-content/uploads/2012/06/Wits-CER-Mining-Litigation-Review-Updated-18-June-2012.pdf> (accessed 16-11-2016).

<sup>165</sup> See section 30(1) of NWA.

<sup>166</sup> See section 29 of the NWA which states that the responsible authority may attach conditions to every general authorisation or licence.

<sup>167</sup> See *Zero Hour Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga* May 2016 <http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf> (accessed 28-10-2016).

<sup>168</sup> *Ibid.*

appropriate sanctions must be imposed. For example, where a mining company is operating without water use licence, it should *inter alia* be instructed to suspend operations immediately.

The limited deterrent effect of penalties is yet another problem. Mild penalties may lack the deterrent effect needed to prevent violations of sustainable mining. Furthermore, sanctions that appear very stringent may also lack deterrent effect where the probability of the sanctions being enforced is very low. It is therefore, not only important for legislation to include sanctions that are sufficient to deter unsustainable mining, but **also** to assure a high probability of enforcement. Furthermore, although companies may pay the fine it may be cheaper than investing in mechanisms capable of preventing further breaches. Thus, where penalties are imposed, there is need for follow-up and lack of it means that one violation may be repeated many times.

Another challenge pertains to the issue of co-operative governance discussed earlier. The practical application of the principle of co-operative governance has been a challenge as the DMR often ignores the input and objections from other government departments, even in cases where environmental sensitivity and hydrological significance are indisputable.<sup>169</sup> It is recommended that the DMR upholds the principle of co-operative governance. All the three departments, the DMR, DEA and DWS must observe and adhere to this principle by cooperating with each other in mutual trust and good faith. By working together and adhering to this principle, the departments can meet their mandates and take well-planned and integrated decisions. Furthermore, and more importantly, this will promote sustainable development which lies at the nexus of environmental, social and economic realms and is supported within a framework of good governance.

Another matter of concern is that the NWA does not require notification of or public participation for water use licence applications. Under section 41(4) of the NWA, the responsible authority *may* require the applicant to give suitable notice of its water use licence. The Minister therefore has a discretion to decide whether or not an applicant for a water use licence should give notification of or conduct a public participation process. The notices must describe the licence being applied for and give the timeframes interested and affected parties

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<sup>169</sup> See *Zero Hour Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga* May 2016 <http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf> (accessed 28-10-2016).

have to lodge their objections. The applicant must also include any other details or take any other steps the responsible authority deems fit “to bring the application to the attention of relevant organs of state, interested persons and the general public”. Importantly, the notification’s purpose is to satisfy the responsible authority that “the interests of any other person having an interest in the land will not be adversely affected”.<sup>170</sup> This principle is confirmed by section 41(2)(c) of the NWA, which states that a responsible authority *may* invite written comments “from any organ of state which or person who has an interest in the matter”. It is recommended that notification of or public participation for water use licence applications be made mandatory. This is important, not only because it involves the public in decisions that may directly affect them, but also because communities often have local knowledge that can help companies and competent authorities ascertain and mitigate the potential negative impacts from proposed projects.

Also of concern is the fact that the DMR is the competent authority for processing and issuing environmental authorisations under the NEMA for all activities involved in mining, and for enforcing the conditions of those environmental authorisations and enforcing environmental laws more broadly. The Minister of Environmental Affairs retains only the authority to decide appeals lodged against the granting of, or refusal to grant, these authorisations. It is recommended that an amendment of the MPRDA and NEMA is needed to make the DEA the competent authority to enforce environmental laws in the mining industry as is the case regarding the enforcement of environmental laws in all other industries in South Africa.<sup>171</sup>

## 7 CONCLUSION

South Africa has put in place various legislation to ensure sustainable mining. The enactment of the various legislation relevant to mining resulted from *inter alia* the State’s obligation in terms of section 24 of the Constitution and the realisation that the detrimental impacts generated by mining activities, including their associated social, health and environmental costs are borne by the public and the environment, rather than by the companies whose activities occasion them. The danger posed by allowing these costs to be passed on to the public and the environment is that it contradicts the duty of the State to respect, protect and promote the rights

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<sup>170</sup> See section 41(4) of the NWA.

<sup>171</sup> See *Zero Hour Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga* May 2016 <http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf> (accessed 28-10-2016).

in the Bill of Rights,<sup>172</sup> including the environmental right,<sup>173</sup> as well as the obligations under legislation such as the MPRDA, NEMA and NWA which have been discussed, all of which enshrine the “polluter pays” principle, which requires that the costs of pollution be carried by those responsible for causing it. Furthermore, pollution and land degradation must be avoided. Where it cannot be avoided, it should be minimised and remedied. Sustainable mining calls for a convergence between the three pillars of economic development, social equity and environmental protection. The ethos of sustainable mining, when entrenched as a way of conducting mining operations, has the potential to lead to wealth creation, poverty eradication, human and social development, without compromising the natural environment.

While South Africa has no lack of legislation for sustainable mining practices, challenges towards sustainable mining still exist. The main challenge lies in the enforcement of such legislation. As has been highlighted, there is a wide gap between the legislative framework pertaining to sustainable mining and its implementation and/or enforcement. The gap needs to be closed if real progress is to be made on sustainable mining. Laws must therefore, be effectively implemented. Furthermore, while to a large extent effective, one of the weaknesses of legislation pertaining to mining in terms of the implementation of a sustainable development policy is that they place greater emphasis on environmental costs associated with mining by attaching fines to damage inflicted upon the environment whereas the social costs such as a wide range of health issues affecting the mining communities are usually minimised or completely ignored. Sustainable development thus remains fundamentally an environmental issue. Sustainable development is intended to encompass environment, economy, and social issues, but is often compartmentalized as an environmental issue. Without diminishing or under emphasizing the need for action in the environmental sphere, in order for mining to be practiced more sustainably, actions and interventions in the social, economic and governance realms must be taken.

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<sup>172</sup> See section 7(2) of the Constitution.

<sup>173</sup> See section 24 of the Constitution.