SOCIAL JUSTICE FOR MINERS AND MINING-AFFECTED COMMUNITIES: THE PRESENT AND THE FUTURE*

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SUMMARY

South Africa's history of discriminatory and unfair apartheid laws resulted in significant hardship and suffering of miners and mining communities. Post-apartheid brought about a number of legislative reforms in an attempt to right the wrongs of the past. More than twenty years later, many mining-affected communities and areas are still exposed to water, soil, noise and dust pollution. This not only causes ill health but also causes social disruption, increased crime and forced resettlement. South Africa has all the necessary environmental legislation in place yet communities continue to suffer from the harmful effects of mining. Very often, the poorest and most vulnerable communities suffer the worst of these consequences. Due to poor enforcement and management by governmental departments, there remains inadequate compliance with these laws within the mining sector. It is important to consider what mining companies have done to rehabilitate the environment and the communities around them. The article concludes with suggestions on how environmental and mining law can play a better role in enhancing the lives of mining communities.

1 INTRODUCTION

In South Africa, mining contributes substantially to economic development and job creation. In 2016, it accounted for 8 per cent of the GDP.[1] South Africa is a developing country that is also very rich in mineral resources. As a result, it can neither disregard the importance of development and economic growth nor ignore its obligation to protect the environment from degradation for future generations and the social impacts on mining-affected communities. Mining of natural resources in whatever way is damaging to the environment and has severe impacts on local mining communities. A mining community is a community or town that houses miners and their families. Miners and mining communities in South Africa are predominantly from the previously disadvantaged groups. In terms of section 1 of the

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1 Gross Domestic Product (GDP) is the broadest quantitative measure of a nation's total economic activity. More specifically, GDP represents the monetary value of all goods and services produced within a nation's geographic borders over a specified period of time.

Mineral and Petroleum Resources Development Act[2] (MPRDA), a "community" is defined as a "coherent, social group of persons with interests or rights in a particular area of land, which the members have or exercise communally in terms of an agreement, custom or law".

During the apartheid regime, most of the mineral rights in South Africa were privately owned and concentrated in the hands of large white-owned mining companies. Racist laws enabled these white-owned mining companies to control workers, keep wages very low, and gain immense profits from the diamonds and gold that black miners extracted from the earth. As part of the post-apartheid efforts toward reform, many new pieces of legislation were developed and introduced into the South African mining industry. Mining companies usually forcefully remove communities from their land without any prior arrangements. This is to allow them to prospect for minerals. These removals have been violent, sudden and mostly minimally compensated, or not compensated at all. This has resulted in communities facing numerous human rights violations. For many years, these mining-affected communities, supported by civil society and non-profit organisations, have gathered and mobilised themselves and have started to put pressure on governments and mining entities. These attempts have not been met with much success. There are still many environmental activists and lawyers who are desperately fighting to improve the lives of miners and affected communities. This article will explore the adequacy of the existing South African legislation and enforcement mechanisms in dealing with the challenges facing mining-affected communities. The primary objective of this paper is to provide suggestions for improvement towards a more cooperative and interactive relationship between mining companies, miners, and mining-affected communities.

2 THE SOUTH AFRICAN REGULATORY FRAMEWORK

The Constitution of South Africa[3] (the Constitution), and key legislation, such as the MPRDA and National Environmental Management Act[4] (NEMA) are examined in this section to ascertain the extent of environmental protection afforded to mining-affected communities. What follows below is a framework of the key provisions pertaining to South African environmental law in relation to mining activities.

2 1 The Constitution

The Constitution is the supreme law of South Africa. Section 24 provides for (a) the right to an environment that is not harmful to a person's health or well-being and (b) to have the environment protected for the benefit of present and future generations through reasonable legislative and other

[2] 28 of 2002.
[3] Constitution of the Republic of South Africa, 1996.
[4] 107 of 1998.

measures.[5] The wording suggests that section 24(a), be construed as a traditional, positively formulated fundamental right to which every person is entitled. Section 24(b) however, contains directive principles and therefore resembles the character of a socio-economic right that imposes duties on the state to protect the environment for present and future generations.[6]

The enforcement of environmental rights has always presented a major challenge not only in South Africa but also internationally. The country's past racially discriminatory apartheid policies have further exacerbated environmental problems in South Africa. Prior to the enactment of the Constitution, the parliamentary sovereignty formed the fundamental basis of the South African state.[7] The judiciary did not have the competence to oversee the legitimacy of legislation, which meant that parliament could, on the basis of sovereignty, pass discriminatory legislation provided it followed the correct procedure.[8] The miners who were predominantly part of previously disadvantaged communities felt most of the negative impacts of environmental degradation because their designated residential areas were located close to dumping sites, mines and industrial areas.[9] Despite environmental rights now enjoying constitutional protection in South Africa, many communities continue to be exposed to similar environmental hazards where unsafe and unhealthy working environments continue to exist.[10]

The Constitution is an overarching piece of legislation and overrules any other legislation in South Africa. The Constitution recognises the need for the protection of the environment while at the same time recognising the need for social and economic development.[11] NEMA gives effect to this purpose as it encourages sustainable development by integrating environmental principles into development planning and implementation.[12]

The Constitution also provides in section 32(1) 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 and protection of any rights." Probably the most remarkable element of this right is that it contains a right of access to information, not just from the state, but from the private sector as well. There is a difference between the right, enforceable against a public body and that which communities can exercise against the private sector.[13] Section 32(2) of the Constitution also provides a directive for the enactment of national legislation to give effect to the right of access to information. This resulted in the

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5 These measures are executive measures, such as the establishment of agencies, policies and funding initiatives.

6 Kotze "The Constitutional Court's Contribution to Sustainable Development in South Africa" 2003 6 *PER/PELJ* 81. See also Glazewski *Environmental Law in South Africa* (2005) 78 and Feris and Tladi in Brand and Heyns (eds) *Socio Economic Rights in South Africa* (2005) 249 257.

7 *Ibid.*

8 *Ibid.* See also Dugard *Human Rights and the South African Human Order* (1978) 36.

9 Mostert *Mineral Law Principles and Policies in Perspective* (2013) 35.

10 Centre for Environmental Rights (CER) *Zero Hour: Poor Governance of Mining and The Violation of Environmental Rights in Mpumalanga* (2016) 11.

11 S 24(b)(iii).

12 S 3 of NEMA.

13 Chamberlain "Fighting Companies for Access to Information" 2016 *SUR International Journal on Human Rights* 199 200.

enactment of the Promotion of Access to Information Act[14] (PAIA). The intention behind PAIA was not to replace the constitutional right but to give effect to it.[15] This means that all people in South Africa, including non-nationals, can request information from the public as well as private bodies.[16] According to the Department of Justice and Constitutional Development, the motivation for giving effect to the right to access to information is to foster a culture of transparency and accountability, both in public and private bodies, and to promote a society in which the people of South Africa have effective access to information, enabling them to more fully exercise and protect all their rights.[17]

South Africa is in a very fortunate position to have a Constitution that has a clause specifically protecting the environment. However, having such an environmental right entrenched in the Constitution is by no means exclusive to South Africa. For example, the Brazilian Constitution[18] provides in article 225 that both the government and community have to defend and preserve the environment for the present and future generations. It must be noted that countries with established environmental law systems do not have such a right.[19] Therefore, it is important for this right to be enforced effectively in order to protect environmental interests. Even though the impact of mining is relatively well regulated on the face of it, it seems that the regulatory system is not being used adequately to minimise the harmful effects of mining.[20]

2 2 The Mineral and Petroleum Resources Development Act (MPRDA)

The MPRDA was promulgated and implemented on 1 May 2004. It states that its purpose 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".[21]

It also confirmed the requirement for mining companies to assess the social impact of their activities. In terms of section 100(2)(a) of the MPRDA, the Minister had to, within six months from the date on which the Act took effect, develop a Broad-Based Socio-Economic Empowerment Charter that set the framework, targets and timetable for effecting the entry of historically disadvantaged South Africans into the mining industry. This would allow these South Africans to benefit from the exploitation of mineral resources.

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14 Act 2 of 2000.

15 S 8(3)(a) of the Constitution is the constitutional mandate to pass enabling legislation.

16 See South African Human Rights Commission "Compliance for Public Bodies" (undated) www.sahrc.org.za/home/index433d (accessed 2016-10-10).

17 Department of Justice and Constitutional Development "PAIA" (undated) www.justice.gov.za/paia/paia-faq.htm (accessed 2016-10-10).

18 Brazilian Constitution (Constituieao da Republica Federativa do Brasil) 1988.

19 Kidd *Environmental Law* (2011) 20.

20 See CER *Zero Hour: Poor Governance of Mining and The Violation of Environmental Rights in Mpumalanga*. Also see Davies "Full Disclosure: The Truth about Corporate Environmental Compliance in South Africa" (2015) http://cer.org.za/full-disclosure (accessed 2017-02-17).

21 S 2(h) of the Constitution.

This Broad-Based Socio-Economic Empowerment Charter (BBSEEC), hereinafter "the Mining Charter", was first published on 13 August 2004. The 2010 and more recently 2017, Charter with a new 2018 one on its way has subsequently replaced it. The MPRDA provides for a framework for progressing the empowerment of historically disadvantaged South Africans in the mining industry. A mining operation will have to consider and document its social impact on the surrounding community. If this task is not undertaken, the Department of Mineral Resources (DMR) will not issue a mining right to the applicant.[22] Mining companies also have to furnish and implement a Social and Labour Plan (SLP) detailing its plans to contribute to the socio-economic development of surrounding communities and prevent negative social impacts.[23] Before a mining right is issued by the Minister, mining companies only have to consult with the community and report back on the outcome of those consultations to the Department of Mineral Resources (DMR).[24] Only then will a mining right be issued. The permission of the community is not required. This poses a huge problem and has to date been abused.

The DMR relies entirely on the report given to them by the mining company – the community has no right to see the report and the contents are often disputed.[25] Mining companies often do not consult affected communities properly, or at all.[26] Sometimes mining companies mislead communities by giving them too little or incorrect information.[27] They deny communities access to Environmental Impact Assessments, Environmental Management Plans, Social Impact Assessments, Social Management Plans, hydrological impact information, information about the energy consumption, health and safety information, financial information and disaster management plans and thereby deny them the opportunity to make an informed decision.[28] Many mining communities were on their land for many generations. Mining companies come in and remove them without any

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22 S 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA require Government and the mine to facilitate public participation and consultations with the community. S 10 of the MPRDA and regulation 3 of the MPRDA Regulations say that 14 days after a mine applies for a mining permit, mining right or prospecting right, the Regional Manager must put up a notice, which says that the application has been accepted and asks people to comment on the application. This is the first chance a community has to tell Government what they may be worried about if a new mine comes into the area. The Regional Manager is an employee of the Department of Mineral Resources to oversee the area where the mine is.

23 S 100(2)(a) of the MPRDA.

24 In terms of the provisions of s 29(a) of the MPRDA, all applicants for prospecting rights, mining rights or mining permits are directed to submit a consultation report within 30 days of notification by the Regional Manager of the acceptance of such application.

25 See Corruption Watch "Mining for Sustainable Development Research Report" 2017 https://www.corruptionwatch.org.za/wp-content/uploads/2017/10/Mining-for-Sustainable-Development-report-South-Africa-2017.pdf 3 and 30 (accessed 2018-05-04).

26 *Ibid.*

27 CER "Mining and your Community: Know your Environmental Rights Centre for Environmental Rights and Lawyers for Human Rights" 2014 www.cer.org.za/wp-content/uploads/2014/03/CER-Mining-and-your-Community-Final-web.pdf (accessed 2017-09-21).

28 Hadebe "When Communities Suffer From mining" 2015-02-06 *Business Report* https://www.iol.co.za/business-report/opinion/when-communities-suffer-from-mining-1813993 (accessed 2017-10-05). See also *Company Secretary, ArcelorMittal South Africa Ltd v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) for a full discussion on the information that was withheld from VEJA (the alliance group representing the community).

respect for their tradition and cultural history.[29] This often results in a tenuous relationship between the mining company and communities.[30] This behaviour by mining companies is certainly not in line with the objective of a SLP.

2 3 National Environmental Management Act (NEMA)

Chapter 2 of NEMA provides for a number of principles that policymakers have to consider when making decisions that may affect the environment. Therefore, following the granting or refusal of an environmental authorisation based on an Environmental Impact Assessment, these principles are considered subject to the provisions contained in Chapter 5 of NEMA. Eighteen further principles follow these and some of them are subdivided.[31] NEMA enables all people to be actively involved in decisions that affect their lives. NEMA affords the following rights:

1 The right to be consulted on impact assessments.[32]
2 The right to participate in dispute resolution.[33]
3 The right to report an environmental risk.[34]
4 The right to information and for decisions to be taken in an open and transparent manner.[35]
5 The right to access to information held by the State and organs of the State that relates to the implementation of the Act and any other law affecting the environment, the state of the environment and actual and future threats to the environment.[36]
6 The right to demand that the environment is taken care of.[37]
7 The right to legal standing to enforce environmental laws.[38]

However, to date, NEMA has been unable to address the existing power imbalance between the mining-affected communities and mining companies.[39] Until now, society has largely borne the social costs of mining.[40] This can be seen in a number of cases.[41]

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29 Hadebe (2015-02-06) *Business Report*.
30 *Ibid.*
31 Chapter 1: s 2(2) and (3) of the NEMA.
32 S 2(4)(c) of NEMA.
33 S 22 of NEMA.
34 S 31(4) of NEMA.
35 S 2(4)(j) of NEMA.
36 S 31 of NEMA.
37 Preamble to NEMA.
38 S 32 of NEMA.
39 See the Report of the CER *Zero Hour: Poor Governance of Mining and The Violation of Environmental Rights in Mpumalanga*. Also see Davies "Full Disclosure: The Truth about Corporate Environmental Compliance in South Africa".
40 Burger, Pintér and Spitz "NEMA, Mining and Metallurgy and the Social Environment: Implications from the Melting Pot" 2000 *Journal of the South African Institute of Mining and Metallurgy* 154−155.
41 See *Bareki v Gencor* 2006 (1) SA 432 (T) and *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2010 JDR 1446 (CC).

2 4 Recent case law

There have been a number of recent judgments that have worked in favour of the miners. It is important to consider where case law is going in this regard. The *Nkala* and *ArcelorMittal* cases are discussed below as they highlight some relief extended to miners and mining communities, some twenty years after the enactment of the Constitution. The reason for choosing these two cases is to emphasise the enormous efforts undertaken by the community and community organisations to get this far. The affected people were often sent from pillar-to-post and spent a vast amount of time and resources to achieve these successes.

2 4 1 Nkala v Harmony Gold Mining Company Ltd[42]

Miners have become sick with silicosis and tuberculosis (TB) for over 100 years.[43] The 69 applicants *in casu* represent up to 500 000 current and former gold mineworkers and their dependants in all the Southern African countries from which people came to work on the South African gold mines.[44] More than 45 of the applicants were silicosis patients, with or without TB, and more than 25 of them were TB-only cases.[45] Silicosis is an occupational lung disease, contracted by mineworkers who work underground in gold mines and is one of the oldest industrial diseases[46] caused exclusively by inhaling crystalline silica dust that is generated and raised into the air by many of the processes associated with mining, such as blasting, drilling and the handling and transport of rock and soil.[47] Silicosis is an irreversible, incurable and painful lung disease.[48] TB is a bacterial lung disease, and unlike silicosis, can be treated successfully and cured if detected early.[49]

The applicants in this matter sought an order for the certification of one consolidated class action that would permit them to bring a delictual claim for damages against the gold mining companies in South Africa. All the defendants, except Randgold, opposed the application.

The Constitution recognises class actions in section 38. The mineworkers sought an order for the certification of one consolidated class action comprising of two classes, namely a silicosis class and a TB class, against the respondents. A class action can only proceed to trial if the court certifies it as being an appropriate means of resolving a dispute between the class members and the defendants.[50] The Court held that certification is not dependent on each mineworker's case being fully and finally determined.[51] As long as it is established that the determination of the common issues

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42 2016 (5) SA 240 (GJ) (*Nkala*).
43 Par 61 22.
44 Par 7.
45 Par 131.
46 Par 12.
47 Par 62.
48 Par 14.
49 Par 17.
50 *Children's Resource Centre Trust v Pioneer Foods* 2013 (2) SA 213 (SCA).
51 Par 115.

substantially advance the cases of the individual mineworkers, a certification of the intended class action was justified and would be in the interests of justice.[52] The Court was of the view that the institution of hundreds of thousands of separate individual hearings would not be more appropriate than the proposed class action.[53] This was so even if the proposed class action only resolved a portion of the disputes between the parties. Accordingly, it concluded that the proposed class action would be the most appropriate way for this matter to proceed.[54] This is an important judgment for mineworkers who suffer ill health as a result of contracting silicosis and TB due to their mining activities.

The mineworkers claimed that the mining companies unlawfully exposed all the mineworkers to excessive levels of harmful silica dust and failed to prevent or minimise the escape of dust into the air by introducing appropriate engineering controls and proper ventilation systems.[55] Furthermore, suitable respiratory protective equipment was not provided to mineworkers. The applicants submitted that the mining companies also failed to monitor the effects of the exposure to the contaminated dust. This negligence or fault on the part of the mining companies was not a once-off single event or incident; it was an ongoing unlawful practice or omission.[56]

Another issue to be determined by the court was if the claimant died or dies prior to the finalisation of his case, whether such general damages for delict would be transmissible to his estate.[57] They argued that many mineworkers became ill with these diseases at a young age and were subsequently retrenched from their respective companies with a modest payout, barely enough to survive a few months.[58] They would then require full-time care, as they were unable to work and too sick to look after themselves.[59] As a result, their wives, daughters or other family members provided the necessary care, depriving themselves of the opportunity to seek gainful employment.[60] There was often no money within the household and dire circumstances existed.[61] The early death of the mineworker meant that the delictual claim for damages died with him and it is for this reason that the mineworkers asked that any claim for general damages be transmissible to their estates should they die before the litigation reaches the stage of *litis contestatio.*[62]

The South African law of delict rests on three pillars: the *actio legis Aquilia,* the *actio iniuriarum* and the action for pain and suffering.[63] The *actio iniuriarum* and the action for pain and suffering are actively as well as

52 Par 28.
53 *Ibid*.
54 Par 115.
55 Par 59 1.
56 Par 60.
57 Par 176.
58 Evidence referred to in par 59, 61−64 and 68.
59 *Ibid.*
60 *Ibid.*
61 *Ibid.*
62 Par 19.
63 Neethling and Potgieter *Law of Delict* 7ed (2015) 8.

passively heritable only after *litis contestatio*.[64] The claim, therefore, lapses if the plaintiff or the defendant dies before *litis contestatio*.[65] Claims under these actions are also not cedable, in any case not before *litis contestatio*.[66] The court in this judgment ruled that this violates the Constitution and that the common law needs development to give expression to the Bill of Rights.[67] It reasoned that benefitting from premature deaths they themselves caused is unfair for mining companies. The court developed the law so that general damages may now transfer, even before *litis contestatio*, to surviving family members of the mineworkers who sacrificed their own chances of employment to take care of sick and dying men.[68]

The court concluded that the only way justice can prevail in the cases of the individual mineworkers or their dependents is if they are afforded an opportunity to pursue their claims by at least having significant parts of it determined through a class action.[69] [70] It would seem that the outcome of the *Nkala* judgment not only redresses some of the past injustices of South Africa but also provides some social justice for the most vulnerable in society by ensuring compensation for miners.

2 4 2 Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance[71]

ArcelorMittal is a large multinational steel and mining company. In this case, they refused to provide the Vaal Environmental Justice Alliance (VEJA) with information relating to the company's environmental plans to address pollution in the areas where they operate.[72] VEJA represented a coalition of community organisations. The community suffered for a long time from what they believed to be the effects of the pollution coming from the ArcelorMittal South Africa (AMSA) Vanderbijlpark plant. The company's Integrated Report of 2003 indicated that there was substantial pollution and groundwater chemistry results obtained from boreholes confirmed that there were elevated concentrations of calcium, magnesium, sulphate, chlorine, potassium, sodium, nitrate, fluorine, iron and manganese within both the perched and shallow weathered zone aquifers.[73] The alliance had met with AMSA for years in an attempt to gain access to their environmental plan, referred to as the "Master Plan", with no success, until 2011 when VEJA, in

64 *Ibid.*
65 *Ibid.*
66 *Ibid.*
67 Par 200.
68 Par 204.
69 Par 223.
70 Mtongana "After the Silicosis Victory, New Mines are Targeted" (06-05-2018) *Sunday Times*. The class action has been settled in this matter. Mining companies have to pay R5 billion to mineworkers suffering from silicosis and tuberculosis.
71 (69/2014) [2014] ZASCA 184 (26 November 2014) (*ArcelorMittal*).
72 Par 8.
73 Par 18.

partnership with the Centre for Environmental Rights,[74] requested the document through PAIA.

VEJA required the documents to ensure that ArcelorMittal carries out its environmental obligations under the relevant governing legislation. VEJA sought to ensure that the operations of the steel company were conducted in accordance with the law, the prevention of pollution and the remediation properly planned and correctly and timeously implemented.[75]

In the court, a quo decision the South Gauteng High Court ordered AMSA to release the information to VEJA. The attorneys for AMSA denied the request for information.[76] They alleged that VEJA did not set out a right, which they were entitled to protect or exercise as required in terms of section 50(1)(a) of PAIA and as a result, they did not set out the grounds that demonstrate that they are entitled to the records. Their refusal to produce the required information led to the application by VEJA in the high court for an order declaring the refusal invalid.[77] The South Gauteng High Court ruled that AMSA should release the report to the alliance. However, AMSA believed that it should not have to release records regarding the environmental impact of its operations at Vanderbijlpark and Vereeniging to community-based organisations and subsequently appealed the decision in the Supreme Court of Appeal. This matter first heard in the South Gauteng High Court, where after AMSA appealed to the SCA. The SCA, in a unanimous ruling, dismissed the appeal with costs.

This case shows the struggle that communities go through just to get information from corporates. Despite having the necessary legislation, as well as the enforcement tools, in place, there is a crisis regarding environmental compliance. Judges have proven extremely reluctant to dismantle developments or set aside decisions authorising inappropriate or illegal developments once those developments are already underway, despite procedural irregularities and significant detrimental environmental impacts.[78] Environmental public interest lawyers as well as, environmental organisations should attempt to push the boundaries of section 24.[79]

Considering just how valuable the decision *in casu* has been for the future of South African environmental sustainability is important. Our courts are

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74 The Centre was established in October 2009 by eight civil society organisations (CSOs) in South Africa's environmental and environmental justice sector to provide legal and related support to environmental CSOs and communities. The mission is to advance the realisation of environmental rights as guaranteed in the South African Constitution by providing support and legal representation to civil society organisations and communities who wish to protect their environmental rights, and by engaging in legal research, advocacy and litigation to achieve strategic change.

75 Par 8.

76 Par 15.

77 Par 16.

78 Fourie *Tales from the Trenches: The Unqualified Promise of the Constitutional Environmental Right in South Africa* Paper presented at the New York Law School Workshop on Constitutional Rights, Judicial Independence and the Transition to Democracy: Twenty Years of South African Constitutionalism, New York Law School, (November 2014). See *Endangered Wildlife Trust v Gate Development Pty Ltd* (TPD Case No. 28761/05) for a full discussion.

79 Dugard and Alcaro "Let's Work Together: Environmental and Socio-economic Rights in Courts" 2013 *South African Journal on Human Rights* 14.

now taking a more integrated approach to ensure environmental compliance. The *Nkala* and *ArcelorMittal* judgments gave the right to a healthy environment and justice for miners and mining-affected communities the importance it deserves. The judgment was also very careful in ensuring that this is not a petty request and guards against corporates having to open up their records for negligible indiscretions.[80] This decision also raises an awareness flag for companies once again as the Companies Act[81] and the King IV[82] rules of corporate governance did place a more onerous responsibility on corporates to ensure the sustainability of the natural environment in which they operate. The judgment furthermore passes on a distinct message: industry must be aware that there is still protection of constitutional and environmental rights in South Africa and alerted these corporations to the fact that the courts intend to enforce these rights.

3 INITIATIVES FOR REFORMATION WITHIN MINING COMMUNITIES

To date, there have been many initiatives to reform the industry not only in South Africa but also across Africa. The African Charter on Human and Peoples' Rights[83] in Article 21 and Article 24, details the right of all people to dispose of their wealth and natural resources freely and to a general satisfactory environment favourable to their development. These articles are often referred to as the most relevant with regard to the human rights impact of the extractive industry sector.[84]

The African Commission on Human and Peoples' Rights (ACHPR)[85] has had the opportunity to address human rights violations committed in the extractive industries sector within the framework of its protective mandate, in particular in *Social and Economic Rights Action Centre (SERAC) v Nigeria*.[86] This matter was brought before the African Commission against the Federal Republic of Nigeria. The facts of the case noted the exploitation of oil reserves in Ogoni land, with no regard for the health or environment of the local communities, including actions such as disposing toxic waste into the environment and local waterways, with the resulting contamination of water, soil and air.[87] The Commission held that "[g]overnments have a duty to

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80 Par 80.

81 71 of 2008.

82 See Chapter 9: Integrated reporting and disclosure of the King III Code of Corporate Governance for South Africa 2009.

83 Adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM. 58 (1982), entered into force on 21 October 1986.

84 Manirakiza *Report of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa* Report presented on the 25th anniversary of the African Commission on Human and Peoples' Rights, Yamoussoukro, Côte d'Ivoire, (October 2012).

85 The African Charter established the African Commission on Human and Peoples' Rights. The Commission was inaugurated on 2 November 1987.

86 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*Ogoni* case). The military government of Nigeria had been directly involved in oil production through the state oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and these operations caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni people.

87 Par 2.

protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties"[88] and found the Federal Republic of Nigeria in violation of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter.

The United Nations Guiding Principles on Business and Human Rights of 2011 are also relevant to the extractive industry. It is a set of guidelines for states and companies to prevent, address and remedy human rights abuses committed within business operations. The Officer of the United Nations High Commissioner for Human Rights (OHCHR) has produced an interpretative guide on the corporate responsibility to respect human rights, which explains the meaning, intent and implications of these Guiding Principles directed at companies (private bodies).[89]

In South Africa, over seventy civil society organisations have mobilised themselves by creating the Mining Affected Communities United in Action (MACUA) in an attempt to engage with the Minister and the Chamber of Mines to create a more inclusive and beneficial environment within the mining industry.[90] Their main concern was their exclusion from the mining laws.[91] They noted that the MPRDA failed to deal with any of the longstanding problems in previous legislation including the inability of the public to access vital information about mining and the exclusion of communities from claiming their rights to free prior and informed consent.[92] Mining companies also continue to ignore environmental laws and rehabilitation obligations. SLP's do not make any significant improvement in the lives of mining communities and the longstanding complaint of having the DMR oversee environmental compliance by the mining industry.[93] MACUA has often been unable to achieve any kind of success.[94]

The Africa Mining Indaba[95] did not prove as an appropriate forum for disgruntled communities to raise concerns about challenges in mining-affected communities.[96] As a substitute, mining-affected communities, supported by civil society organisations, have staged an Alternative Mining Indaba (AMI) for the past eight years in Cape Town. It is a podium for

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88 *Ogoni* case par 57.

89 United Nations *The Corporate Responsibility to Respect Human Rights: An Interpretation Guide* (2012).

90 Rutledge "Why Mining Communities Will Take Government to Court" 2015-05-21 *GroundUp* https://www.groundup.org.za/article/why-mining-communities-will-take-government-court_2961/ (accessed 2017-10-05).

91 *Ibid*.

92 *Ibid*.

93 *Ibid*.

94 *Ibid*.

95 The African Mining Indaba is an event that takes place every year. It has been located in Cape Town for over 20 years. It is dedicated to the successful capitalisation and development of mining interests in Africa. This event unites investors, mining companies, governments and other stakeholders from around the world to learn and network, all toward the single goal of advancing mining on the continent. Also known as Mining Indaba, it is dedicated to supporting education, career development, sustainable development, and other important causes in Africa. See also https://www.eiseverywhere.com/ehome/indaba2017/About-Mining-Indaba/ (accessed 2017-10-05).

96 By TMG Digital "Activists hold Alternate Mining Indaba in the Mother City" 2017-02-05 *Times Live* https://www.timeslive.co.za/news/south-africa/2017-02-05-activists-hold-alternative-mining-indaba-in-mother-city/ (accessed 2017-10-05).

mining-affected communities to tell their stories of contaminated water; forced removals from fertile land to uninhabitable patches that cannot sustain farming; and disrespect for their cultural and other rights.[97]

4 COMPARATIVE STUDY

In order to suggest proposals for a more harmonious environment for miners, mining communities and mining companies in South Africa, drawing lessons from other jurisdictions is essential. The paper considers Australia and Brazil. Australia is one of the top five mining countries in the world. It is the second leading supplier of seaborne ore and its mining activity accounted for 10 per cent of the GDP in 2013. Australia is not only a major mining country but also ranked as the third greenest in the world.[98] It will be beneficial to briefly look at Australia's approach to the enforcement of environmental rights in order to understand how it continues to maintain its status as one of the largest mining and environmentally friendly nations of the world.

In order for environmental legislation to be effective, there must be an adequate balance. It must not only be well designed but also efficiently and effectively enforced.[99] The reason for choosing Brazil is that it is a resource-rich country, the world's largest producer of niobium and, like South Africa, a developing country. Brazil, as one of the BRICS countries, has experienced vigorous growth recently because of the urbanisation process in these emerging countries. They have large territorial areas, a high demographic density and high GDP. This makes them important players for global mining.[100] However, the recent collapse of a mining dam in Brazil[101] has brought its mining and environmental laws under intense scrutiny. It was the biggest environmental disaster in the country's history.[102] This tragedy resulted because of a lack of appropriate environmental laws in Brazil.[103] The laxity of the dam's inspection regime and the ludicrously low fines that

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97 *Ibid*.

98 According to the Environmental Performance Index (EPI) 2014 report. The EPI ranks how well countries perform on high-priority environmental issues in two broad policy areas: protection of human health from environmental harm and protection of ecosystems. It is a biennial ranking of how well countries perform on high priority environmental issues. It crunches data from nine categories – from air quality to forest and marine health – using 20 indicators in all. The 2014 Environmental Performance Index is a joint project between the Yale Centre for Environmental Law and Policy (YCELP) and the Centre for International Earth Science Information Network (CIESIN) at Columbia University. Switzerland ranked first, followed by Luxembourg, Australia, Singapore and the Czech Republic.

99 Gunningham "Enforcing Environmental Legislation" 2011 *Journal of Environmental Law* 169.

100 Brazilian Mining Institution "The Strength of Brazilian Mining" 2012 www.ibram.org.br/sites (accessed 2016-01-21).

101 On the 5th of November 2015, a flood of contaminated water moved downstream from the site of a mining dam breach. The dam rupture of the Samarco iron ore mine, owned by mining giants BHP Billiton and Vale, unleashed a massive wave of water and mud containing mining waste products and chemicals. This has destroyed a community and is said to have caused long-term havoc on the local ecosystem.

102 Phillips "Brazil's Mining Tragedy: Was it a Preventable Disaster?" 2015-11-25 *The Guardian Newspaper* www.theguardian.com/sustainable-business/2015/nov/25/brazils-mining-tradegy-dam-preventable-disaster-samarco-vale-bhp-billiton (accessed 2016-01-21).

103 *Ibid.*

were levied have resulted in a push by lawmakers for tougher regulations to be incorporated into the new mining code.[104] Interestingly, however, Brazil has an abundance of good community relations, investment, Social License to Operate (SLO) and human rights guidance literature that can be useful for the South African model.

4 1 Australia

Australia recognised the benefits of mining and made the most of this opportunity. By 2013, the mining boom raised real wages by 6 per cent and lowered the unemployment by 12.5 per cent.[105] Australia also has indigenous communities resident on mining land. Mining on Aboriginal[106] land contributes more than a billion dollars per year to the Northern Territory economy and accounts for 80 per cent of the territory's income derived from mining.[107] It is often difficult to look at the first world, developed countries to find solutions for developing countries due to their different political and economic stability. However, in the Australian context, there is the similarity that the local indigenous people inhabit a major proportion of mining land. Australia has a federal system of government. With the authority to regulate their own mining regime, each state has enacted specific legislation to provide for its legal and administrative framework. This paper will focus on Western Australia but there are similar systems in other states as well. For the purposes of this article, the Australian legal mining framework will not be considered in its entirety, but rather the focus is placed on aspects dealing with mining and its impacts on local communities and how the Australian system manages this.

As Australia has become aware of the benefits that mining brings to the economy, the government quickly seized this opportunity. They understood at the outset who the main stakeholders were and identified that indigenous communities inhabited most of the mining land.[108] It seemed apparent that their primary objective was to create a harmonious relationship between the mining industry and indigenous communities for obvious business reasons. Their relationship is one based on mutual respect and recognition of indigenous Australians' rights in law, interests and special connections to land and waters.[109] Most of the land subject to mining in Australia is subject

[104] Cerqueira and Aleixo "Two Years after the Mariana Disaster the Mining Industry Keeps the Upper Hand in Brazil" 2017-10-16 https://www.opendemocracy.net/democraciaabierta/daniel-cerqueira-let-cia-aleixo/two-years-after-mariana-disaster-mining-industry-k (accessed 2018-05-29).

[105] Minerals Council of Australia "The Whole Story: Mining's Contribution to the Australian Community" (undated) http://www.minerals.org.au/file_upload/files/publications/The_Whole_Story_Minings_contribution_to_the_Australian_community_FINAL.pdf (accessed 2017-10-06).

[106] Indigenous Australians are the Aboriginal and Torres Strait Islander people of Australia, descended from groups that existed in Australia and surrounding islands prior to British colonisation.

[107] Minerals Council of Australia http://www.minerals.org.au/file_upload/files/publications/The_Whole_Story_Minings_contribution_to_the_Australian_community_FINAL.pdf

[108] More than 60% of minerals operations in Australia have neighbouring Indigenous communities.

[109] Preamble and s 3 (objectives) of the Commonwealth Native Act 110 of 1993.

to the Commonwealth Native Title Act.[110] This legislation specifically recognises and protects native title rights against any future dealing on land, including all mining operations.[111] Native title rights and interests are held to exist in accordance with the laws and customs of the indigenous population, where those people have maintained their traditional connection with the land and a law or other action of government has removed their title.[112] In terms of the right to negotiate contained in the Act, registered native title claimants have the right to negotiate with mining companies, and if no agreement is reached within six months, a party may apply to the National Native Title Tribunal for a determination.[113] After a determination is made in the positive, it will normally place conditions on the miner.[114] If a native title right is lost or impaired in the interim, they may apply to a court for compensation. If indigenous parties allow miners access to their land, they are, in turn, compensated.

It is at this point that the author would like to draw a direct comparison to South Africa. When communities believe that they are truly benefitting from mining and mining exploration, they are more likely to cooperate and engage with mining companies. At the end of the day, everyone wants to improve his or her own standard of living. Nobody wants to lose their rights to their land for no rewards or benefits. However, that is exactly what South African mining companies are doing. These companies barge into the indigenous land, and derive all the benefits from it, without any or minimal distribution of the profits. This is bound to create a fragile relationship between the parties. In sharp contrast, most of the indigenous communities in Australia have a positive reaction to mining companies exploring on their land. Communities are consulted properly and many feel positive about the creation of employment, schooling and a better standard of life. Employment of indigenous men and women in mining doubled from 2006 to 2011.[115] Mining companies support upskilling programmes in preparing indigenous people for employment and encourage school students within the community to complete year 12 in order to access higher education or training.[116] They also participate in collaborative projects initiated by the community to reinforce the community culture and heritage.

The industry invests in the communities by providing libraries, recreational facilities for families and enhancing arts, music and culture.[117] This creates a positive environment where all the stakeholders can feel that they are all benefitting from the fruit of the land. It is, furthermore, important to note that the success of mining in Australia is also due to the openness and transparency of its mining and legal framework.

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110 110 of 1993.

111 Preamble and s 3 (objectives) of the Commonwealth Native Act 110 of 1993.

112 Chambers "An Overview of the Australian Legal Framework for Mining Projects in Australia" (undated) http://www.chamberslawyers.com/wp-content/uploads/downloads/2013/10/060518-Presentation-Eng.pdf (accessed 2017-10-31).

113 Subdivision P: s 25, 26 and 27 of the Act.

114 *Ibid.*

115 Langton "From Conflict to Cooperation" 2015 http://www.minerals.org.au/file_upload/files/publications/From_Conflict_to_Cooperation_MLangton_WEB.PDF (accessed 2017-10-31).

116 Preamble and s 3 (objectives) of the Commonwealth Native Act 110 of 1993.

117 *Ibid.*

4 2 Brazil

Despite Brazil's current problems surrounding adequate environmental legislation and proper enforcement mechanisms, a mining company still has to secure a SLO. This means that mining companies not only have to receive government permission or permits but also "social permission" to conduct their business.[118] A social licence to operate refers to the acceptance within local communities of both mining companies and their projects. Social acceptance is granted by all stakeholders that are or can be affected by mining projects, for example, local communities, indigenous people and other groups of interest like local governments and non-governmental organisations.[119] A social licence exists when a mining project is seen to have the broad, ongoing approval and acceptance of society to conduct its activities.[120] In order to gain an SLO, the World Bank recommends that governments, mining companies and local communities undertake trilateral negotiations from the onset of mining projects.[121] There is no one unique method of obtaining an SLO, however, there is practitioner guidance and stakeholder literature available. These guidelines can be accessed from the International Council for Mining and Metals (ICMM). It also offers practically-based publications and experience from mining companies around the world and what is needed for an SLO from local communities in a developing world context.[122]

Maher, in his dissertation, provided an example of the principles needed for an SLO and good community relations from Anglo-American's "Socio-Economic Assessment Toolbox":

- Create a good community relations policy based on the principle of "being a good neighbour".
- Identify the key stakeholders in the communities including those most likely to be impacted on by the mining projects.
- Enter into frequent dialogue and consult in an open and transparent manner with the key community groups to understand their concerns and needs.
- Negotiate a way to collaborate together in local development projects, including a Benefits Agreement for framing and implementing corporate social responsibility (CSR) with the local community.
- Monitor and track community engagement and relations (including having a grievance or complaints mechanism).

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118 The Fraser Institute "Mining Facts" (undated) http://www.miningfacts.org/communities/what-is-the-social-licence-to-operate/ (accessed 2017-11-01).

119 Boutilier and Thomson "Establishing a Social Licence to Operate in Mining" 2009 http://www.edumine.com/xutility/html/menu.asp? (accessed 2017-11-01).

120 Maher *What Influences Community Positions Towards Nearby Mining Projects: Eight Cases from Brazil and Chile* (unpublished doctoral thesis, Cranfield University) 2013−2014 22.

121 World Bank and International Finance Corporation *Large Mines and Local Communities: Forging Partnerships, Building Sustainability* (2002).

122 Maher *What Influences Community Positions Towards Nearby Mining Projects* 28. See also https://www.icmm.com/ (accessed 2017-11-09).

- Partner with community organisations, local government and non-governmental organisations (NGOs) to contribute to the local economic development and other sustainability-related projects.
- Build the capacity of the local stakeholders in different areas such as administering tax revenues from mining, technical skills for gaining employment, or for starting and running their own small businesses.[123]

Maher goes on to question the effectiveness of the plethora of good community relations and the SLO and human rights guidance literature as he says that, in practice, they are not making a significant difference because of the conflict and violence that still exists. However, it is the author's submission that it is still extremely remarkable that a developing nation like Brazil, subjects mining companies to stringent SLO requirements, which is an indication of the importance placed on the well-being and contentment of mining-affected communities.

The SLO model should be considered in the South African mining industry. It is a more formal and transparent system to ensure the acceptance of mining projects within local communities. It is suggested that a specific set of principles, similar to the ones recommended by Maher above, should be adopted.

5 CONCLUSION

The process involved in South Africa for mining communities to receive any kind of relief, or to even just be heard, is a long, difficult and complicated one. This is clearly indicated in case law and the resultant violence and upheaval in these communities. South Africa is well-endowed with the relevant legislation, including the constitutional right to a healthy environment. There is a continuous attempt to amend legislation in South Africa but the problem inherently lies with its enforcement and compliance with these laws. If there are stricter enforcement mechanisms in place, then these should result in better compliance with environmental and social laws within the mining industry and affected communities. This is particularly difficult in South Africa because of its current political instability and alleged corruption within governmental organisations. Instead of effectively communicating with affected communities, mining companies make deals with community leaders, which do not benefit the community at large in any way.[124] This is merely a tick-the-box exercise to fulfil the SLP requirement to consult with the affected community and report back to the DMR.

If mining companies can acknowledge and ensure that the profits derived from mining activity are not only for themselves but shared for the benefit of

[123] Compiled from publications such as Anglo American's "Socio-Economic Assessment Toolbox"; ICMM's "Community Development Toolkit"; BSR's "Six Ways for the Extractives Sector to Improve Stakeholder Engagement"; IFC's "Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets"; Canadian Government's "Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector"; Zandvliet and Anderson's "Getting it Right, Making Corporate-Community Relations Work" (2009); and Ruggie "The Corporate Responsibility to Respect Human Rights: An Interpretive Guide" (2011).

[124] See Corruption Watch "Mining for Sustainable Development Research Report".

those who occupy the land and affected by its activity, then this would be the first step toward synchronisation between the relevant stakeholders. There needs to be an attitude change that reflects the Australian model.

Appreciating that one of the major stakeholders in any mining activity is the community that inhabits the mining land is important. As a result, creating an amicable relationship between the mining industry and the communities is essential. If a community genuinely believes that they are benefitting from mining, they are less likely to object to mining activity. The South African mining industry should make a more concerted and genuine effort to ensure that communities are kept contented with greater emphasis placed on respect of their cultural heritage and mutual trust. This has to be a real attempt and not simply a frivolous exercise.

Mining activity should benefit and enhance the life of a community. A mining community should be able to see an actual improvement in the quality of their own lives and that of their family. It should not have a negative impact and deterioration in their living standards.

Mining activity within a community should bring more job opportunities and this should create a positive feeling. It is suggested that mining companies make a more collaborative attempt to improve schooling and education within these communities. They should also participate in mutual projects to reinforce the community culture and heritage. This should also include places of worship, libraries and recreational facilities for families.

It is probably ludicrous to suggest as part of the reform for the South African mining industry to introduce more legislation, as many would argue that it is already over-regulated, and perhaps one of the reasons for non-compliance in itself. It is, however, my submission that South African mines should also subject themselves to SLOs like Brazil. A social licence to operate would mean that a mining company will have to secure the approval of all of its stakeholders that are or could be affected by mining projects. If South Africa were to adopt such a system, then the government, mining companies and local communities can become involved from the onset of a mining project. This is a more inclusive model and there will be approval and acceptance of society for mining companies to conduct its activities.

This will legislate the requirement that mining-affected communities receive and continue to receive the attention they require before a mining licence is granted and during the mining activity.

This should also help eradicate the current problem in South Africa, where mining communities are not properly consulted and not provided with all the necessary information before mining activity commences on their land or area.