



BLOOD, SWEAT, AND TEARS:

**COMMUNITY REDRESS STRATEGIES AND
THEIR EFFECTIVENESS IN MITIGATING
THE IMPACTS OF EXTRACTIVES AND
RELATED INFRASTRUCTURE PROJECTS
IN SOUTH AFRICA: 2008–2018**



CONTENTS

PREFACE

List of Acronyms and Abbreviations	4
Acknowledgements	7
Summary and Conclusions	9
Key Findings and Recommendations	11

CHAPTER ONE

1. Background to the Study	15
1.1. Introduction	16
1.2. Background to South Africa (Country Analysis)	16
1.3. Statement of the Problem	18
1.4. Research Objectives	20
1.5. Literature Review	21

CHAPTER TWO

2. The Legislative Architecture of the MPRDA	23
2.1. Analysis of SA Mining Environmental Legislation	24
2.2. Regulatory Governance Framework Undermined	28

CHAPTER THREE

3. Impacts	41
3.1. Water	46
3.2. Air pollution	47
3.3. Dust Pollution	47
3.4. Health and well-being of communities	48
3.5. Socio-Economic Impacts	49
3.6. Illegitimate/Illegal Business Operations	50
3.7. Grave Sites	50

CHAPTER FOUR

4. Strategic Interventions	51
4.1. Mitigating Mining Impacts	52
4.2. Barriers Restricting Effective Implementation of Strategies Addressing Negative Impacts Associated with Mining	70
References	78
Appendices	82

LIST OF ABBREVIATIONS/ ACRONYMS

ACC	Amadiba Crisis Committee
AECA	Australia's Export Credit Agency
AMD	Acid Mine Drainage
AMI	Alternative Mining Indaba
BBKTA	Bakgatla Ba Kgafela Traditional Administration
CALS	Centre for Applied Legal Studies
CBOs	Community-based Organisations
CER	Centre for Environmental Rights
CSR	Corporate Social Responsibility
CWP	Coal Workers' Pneumoconiosis
DEA	Department of Environmental Affairs
DWS	Department of Water and Sanitation
EAPs	Environmental Authorisation Practitioners
EESG	Economic, Environmental, Social and Governance
EIA	Environmental Impact Assessment
EMI	Environmental Management Inspectorate
EMP	Environmental Management Plan
EMPR	Environmental Mining Processing Rehabilitation
GDP	Gross Domestic Product
GHG	Green House Gas
HEJN	Highveld Environmental Justice Network
IAPs	Interested and Affected Parties
ICMM	International Council on Metals and Mining
ICWA	iMfolozi Community Wilderness Alliance
IDPs	Integrated Development Plans
IFI	International Finance Watcher Toolkit
IP	Inspection Panel
IPSS	Independent Problems Solving Service
ISS	Institute for Security Studies
LHR	Lawyers for Human Rights
MACUA	Mining Affected Communities United in Action
MCEJO	iMfolozi Community Environmental Justice Organisation
MEJCON	Mining and Environmental Justice Community Network of South Africa
MPRDA	Mineral and Petroleum Resources Development Act
MSR	Mineral Sands Resource
MW	Mega Watt
NEMA	National Environmental Management Act
NERSA	National Energy Regulator of South Africa

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Authors: Allan Basajjasubi, Johnlyn van Reenen, Gino Cocchiaro.

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SUMMARY AND CONCLUSIONS

The present study examines the extent to which communities have utilised redress strategies and their effectiveness in mitigating impacts of extractives and related infrastructure projects in South Africa during the period of 2008–2018.

The recent victory in the Pretoria High Court by the Xolobeni community has set a precedent for community rights. For years, communities have used, with “blood, sweat, and tears”, various strategies to mitigate against the impact of mining. We are noticing a turn in the tide as the extractive industry becomes a highly litigious arena. This study highlights a number of different strategies that have been employed by community-based organisations, civil society, and mining-affected communities to raise awareness of the economic, social, and environmental impacts on their well-being and livelihood. From the information obtained, it became apparent that three main types of strategies have been employed consistently during the ten-year period of observation. These include litigation, media coverage, and protest action. Although litigation seemingly has been the most effective in stopping operations or suspending application processes, our research results have indicated that communities often feel that litigation fails to address effectively their challenges and transform their circumstances when utilised by civil society and legal firms. In recent times, however, research and interview results have revealed that mining-affected communities and community-based organisations have become increasingly more mobilised around other types of strategies that best articulate their grievances, and that best try to resolve their circumstances in a manner consistent to their context.

The following results were found:

1. Community-based organisations and mining-affected communities have taken ownership of their circumstances by

increasingly adopting other strategies such as the use of *petitions, memoranda, public campaigns, social audits, community trainings, and monitoring networks*, to collect and collate information about environmental, social, and economic impacts for the purposes of presenting these findings to mining management, the DMR, and parliamentarians. Findings from the data indicated the following:

- a. It would appear from the research that campaigns, petitions, and memoranda have been effective strategies that community-based organisations and civil society have used to draw awareness to the negative impacts of mining on communities, while mobilising community participation in attempts to engage with the responsible authorities.

2. Attempts by mining-affected communities and community-based organisations to engage with *international finance institutions* for the purposes of addressing impacts by mining companies who have accessed finances were used in one instance of the sample of 31 case studies. Findings were made by an inspection panel of the World Bank, which did not translate into directives to remedy harms mentioned by communities. The results in this particular strategy proved to be ineffective in the circumstances¹. Our research further substantiates why this strategy is not commonly utilised by communities. From our discussions with community members, community-based organisations, and other NGOs, this strategy requires a specific skill set of knowledge, expertise, and the strength of a well-established NGO that has

1 <http://www.bateleurs.co.za/assessment-of-the-medupi-power-station-for-groundwork-and-the-world-bank/>;
<http://www.groundwork.org.za/EskomFinalDocs/ResponsetotheWorldBankpanelreportandFactSheet.pdf>.

the necessary financial clout for continued engagement on an international level with international finance institutions, while also having the ability to deal with day-to-day challenges, as they arise, as experienced by communities. It must be noted, however, that this finding is limited, in that information around international finance mechanisms was difficult to obtain.

Our research did indicate that, when it comes to the implementation of these overall strategies/interventions, their effectiveness is limited occasionally due to specific barriers, such as: legislative restrictions placed on community consultation proceedings; mining sector being shrouded in secrecy; division and contestation within mining-affected communities; inaccessible and ineffective community company dialogue mechanisms; and use of force and intimidation by mining companies, DMR, and local government.

All this emphasises the urgent need for community capacity strengthening around other strategies that can be utilised directly by communities, thus enhancing their agency and empowerment.

While it is true that there have been some improvements, evidenced by recent wins (for example Xolobeni² and Lesetlheng Village Community³), these advances have affected only the select few belonging to these particular communities, while the general contingent of mining-affected communities still battle for the protection and promotion of their rights in relation to a clean and healthy environment and sustainable development.

There have been strides taken by individual organisations and, in some cases, among networks, but there is still a need for a common platform where NGOs and CBOs interrogate different strategies and contribute towards innovating strategies that address particular issues in different contexts.

² *Duduzile Baleni and Others v DMR and others*. (2016). <https://www.miningmx.com/news/markets/35209-dmr-studying-historic-high-court-ruling-in-favour-of-xolobeni-community/>

³ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*. (2018). CC 41.



KEY FINDINGS AND RECOMMENDATIONS

The research has highlighted that, as a result of the various changes to the legislative governance frameworks regulating the environmental management of the mining industry, the inherent conflict of two mandates given to the Department of Mineral Resources and the legal complexities caused by the One Environmental System have resulted in a compliance and enforcement deficit. This report demonstrates how:

- The transitional periods in which both the MPRDA and NEMA underwent significant iterations and amendments, and created an environment of uncertainty with regards to the standard of environmental management to be applied which best reflects the principles of section 24 of the Constitution and NEMA.
- Uncertainty regarding the boundaries of authority between the DMR, Department of Environmental Affairs, and Department of Water and Sanitation with relation to the environmental management of mining often resulted in a duplication of mandates. This duplication weakened the DMR's resolve to invest in developing its regulatory capacity to enforce a robust and effective standard of enforcement and compliance in environmental authorisations.
- The conflation of the DMR's NEMA obligations and its promotion of mineral development has created a conflict of interest, which has impacted the DMR's ability to simultaneously support the promotion of mineral development without diminishing its capacity to apply a strong compliance monitoring and enforcement programme for mining operations.

Legislative gaps/loopholes within the MPRDA have added further ambiguity and uncertainty around the regulation of the environmental authorisations for mining activities. The

various gaps within the current MPRDA regulatory framework for the management of environmental authorisations have left the environmental management processes weakened in their capacity to meaningfully protect, promote, and advance the rights of individuals and communities severely impacted by mining activities.

The report demonstrates the failure of the DMR as well as DWS to prioritise the views and concerns of environmental authorities (DEA) and affected communities within enforcement and compliance processes, as it pertains to environmental authorisations. This assertion is supported by the absence of specific provisions regarding procedural rights that give effect to meaningful participation, consultation, and consent within the management of environmental authorisations and the granting of permits/licences. Some examples, which are raised in the report, support the above assertion and include the following:

1. Although the MPRDA and its regulations provide for consultation of interested and affected parties during the application and formulation of the EMP/EMPR, there is no express requirement regarding the form that this consultation must take. There is no express provision indicating what constitutes adequate notice and what type of information with which interested and affected persons should be furnished.
2. There appears to be an absence of provision for ongoing and periodic consultation on the progress of the implementation of the closure plans and other rehabilitative initiatives in terms of the EMPR/EMPs.
3. The MPRDA and its regulations make no provision for the right to consent to mining activities during periods of consultation, as permits and licences are granted

prior to applications for environmental authorisations and consultation processes with interested and affected persons.

The report demonstrates that at all steps of the environmental authorisation application process and the regulatory governance framework of the MPRDA are undermined. The undermining of the regulatory framework by mining firms and lack of apportioning accountability by the DMR breed a culture of impunity. A failure on the part of DMR and DWS to remain transparent about violations of environmental regulations by mining companies, as well as transparency on the enforcement actions taken, give credence to a crisis in compliance monitoring and enforcement. This assertion is substantiated by the following results:

1. Data acquired from a parliamentary written reply by the Minister of Mineral Resources, which revealed that the number of inspections conducted by the enforcement and compliance branches of the respective departments produced fewer issuing of orders and directives. Please refer to page 32 where these statistics are set out in reference to the answer given by the minister.
2. According to the National Environmental Compliance and Enforcement Report for 2009–2010, there were only 84 positions in the DMR dedicated to environmental protection and monitoring at mines.¹ The DEA, on the other hand, in the same period established effective enforcement structures such as the Environmental Management Inspectorate (EMI). The Compliance and Enforcement Report of 2010 states that 2,380 compliance inspections were held, 1,260 directives and court applications were issued, and 673 criminal convictions were secured by the EMI in 2010. It would appear from the data that the DEA is better equipped in its resources, capacity, and knowledge of the environmental management standards and principles of NEMA as they pertain to

mining. This finding, however, is limited, in that the absence of proper reporting and publication about compliance and enforcement activities by the DMR, particularly following from 2010, can only lead us to assume that the compliance and enforcement programmes by the DMR are negligible. This can be apportioned to the DWS, as it has also contributed to negligible compliance and enforcement programmes, particularly where evidence indicates numerous instances in which mines continued to operate without water-use licences.

3. Transparency on enforcement actions and violations of environmental regulations is often unduly restricted without any sufficient and reasonable justification. This is apparent in the poor response by the DMR as reflected by our data showcasing the number of appeals for access to information into enforcement, compliance, and environmental violations on the part of mining companies and the response by DMR. It can be deduced from our findings that the DMR is unable to be transparent about violations of environmental regulations and enforcement action, especially when such reports could put the DMR at odds with the mining industry. Our research findings from our 31 cases, bolstered by community interviews, indicate that communities often have no information, or are unable to access information about environmental risks created by mining operations, management of environmental impacts, and the implementation of CSR programmes.

The research has also allowed us to consider critically the overall methodology of what we generally would term 'participatory research' and its utility beyond findings and recommendations. Many NGOs have written many reports and, in many cases, the reports have been seminal pieces of literature, which have been the impetus for transformation in mining communities. "Policy Gaps", a Bench Marks Foundation publication, studies the commitments made by companies and compares them to what happens in practice. CER has produced the "Zero Report" and there

¹ Le Roux, Naudene. (2011). "Environmental Governance, Fragmentation and Sustainability in the Mining Industry." Part of a Master's Dissertation, available at https://repository.nwu.ac.za/bitstream/handle/10394/7398/LeRoux_N.pdf?sequence=1

are numerous pieces of literature like it, however communities relate differently to reports produced by NGOs.²

- Moreover, MACUA has coined a slogan that says, “Nothing about us, without us.” This should, in practice, be true for everything related to mining-affected communities. Platforms should be multi-disciplinary and should always include first-hand community representation to qualify as participation.
- Reports often are written to change policy and do not reflect what communities want immediately. For research to be truly participatory, it should not solely be determined by an NGO agenda, rendering it technically inaccessible. Marie suggests that the process must start with the community in as far as how they want to express themselves in their own vernacular.

Based on the findings contained in this report, we recommend the following:

In order to improve community engagement and ensure meaningful consultation and participation between mining-affected communities and the Department of Mineral Resources with regards to mining application processes:

- Provision should be made within the current MPRDA and its regulatory framework for early and regular community consultation and engagement, within the environmental authorisation and mining/permit application process. This can be facilitated through inclusion of mining-affected community representatives on the committee of the Regional Mining Development and Environmental Committee (RDMEC). This may develop into an effective multi stakeholder oversight authority to monitor compliance with the consultation requirements;
- Provision should be made within the MPRDA and its regulations, for the development of adequate platforms for

women to participate meaningfully within community engagement processes;

- Provision should be made in the MPRDA and its regulations that mining companies develop guidelines to mainstreaming community engagement as a primary operational objective in the implementation of their projects. These guidelines should be developed from direct input gathered from representatives of mining-affected communities, community-based organisations, and civil society; and
- Owing to the deficiencies of transparency and accountability within the MPRDA as it relates to its community complaint mechanism systems, it is recommended that the complaints mechanism governed by the MPRDA be managed and overseen by the DMR. This process should be subjected to an independent audit comprising of representatives from the DEA, local councillors, representatives of civil society, and representatives of community-based organisations. This will address the currently flawed system.

In order to better facilitate and operationalise ongoing community engagement, dialogue and provision of information between mining management and the affected community when concerns are raised:

- Mining companies should establish various systematic mechanisms within their operation programmes that regularly conduct investigations into complaints raised by mining-affected communities. These mechanisms should be designed for the purposes of obtaining complaints at contact points within the affected community from community members, commissioning a response team/unit to conduct visible investigations within the community, and to construct a response plan to challenges raised. Findings from the investigations should be released thereafter with action plans or remedial steps to be taken for the affected community. A parallel investigation should be conducted and managed by a compliance unit within the DMR, in order to ensure findings are

² Interview conducted with Bobby Marie of Bench Marks Foundation on 10 September 2018

consistent with investigation findings conducted by mining companies. The DMR, together with mining companies, should develop actions and remedial steps to be taken for the affected community and its representatives.

- Companies should strengthen their local community grievance mechanisms by including regular reviews/audits of these grievance mechanisms by an independent audit team comprising of representatives from the DEA, DMR, local councillors, representatives of civil society, and representatives of community-based organisations.
- Publicly disclosed information related to SLPs, EMPs/EMPR, and closure certificates should be accessible merely on request. This information should be provided in a language that is accessible and at venues or portals that are made accessible to mining-affected community members. Section 15(2) of PAIA can be relied on to facilitate this process, as it pertains to form D.

In order to garner support for mining operations from mining-affected communities before, during, and after the completion or closure of a mining operation, it is recommended that mining operators obtain a social licence to operate, which entails:

- Making provision for community inclusion within project monitoring and evaluation before, during, and after the completion or closure of a mining operation; and
- Obtaining consent should be considered to be a continuous process and not a once-off, tick-box exercise, as one is aware of the ever-changing nature of impacts. Dialogue should be facilitated in such a manner, so that the playing fields are level, thereby demonstrating a genuine partnership.

Our qualitative interviews support our assertion that community-based organisations are often divided regarding what is a priority for them, and the resultant effect is that they do not share their successful strategies. There is an acute realisation by CBOs regarding the weight attached to international solidarity, support, and endorsements. CBOs should be encouraged to become more cohesive and collaborative, and leverage their networks.

The findings corroborated that communities often expressed that research, which was meant to encourage participation, failed to reflect how communities have been affected and what steps are needed to fully achieve meaningful change. As a recommendation, NGOs and broader civil society should consider conducting research that integrates communities within the strategic development and implementation of the legal empowerment research strategy. An effective example to provide when suggesting a recommendation that could be designed to give effect to this type of idea is using the United Nations Guiding Principles on Business and Human Rights (UNGPs) as a basis to host a plenary session where civil society, government, business- and mining-affected communities can engage in dialogue about the implications of the principles on mining. Such a forum will allow stakeholders to direct questions within an environment where the playing fields were level and an impartial facilitator can mediate discussions.

CHAPTER ONE

BACKGROUND TO THE STUDY



1.1 Introduction

The study aims to examine the diverse strategies used by communities and civil society organisations (CSOs) to seek redress and obtain remedies for the impacts caused by extractive and related infrastructure projects. The study will include a review of the types of impacts communities suffer, the strategies used to remedy impacts – including litigation and non-litigation strategies – and the success of the different strategies in obtaining remedies.

The study will examine existing policy, and institutional and legal frameworks and their usefulness in remedying and mitigating the impacts of projects on the environment and community. Gaps in the legal framework and judicial/quasi-judicial system¹ will also be excavated through an analysis of the implementation of the law, judgements, and rulings in cases where litigation strategies are used. The information generated from this study is intended to find utility beyond research, and find benefit by citizens, community organisations, academics, and institutions which inform policy.

It is important to mention at the outset that the ten-year time period as a workable period was particularly selected because, after 1994, the MPRDA went through a so-called “grace period” to bring companies into compliance post-Apartheid and the divestment which ensued. This also saw the advent of the first types of coal-related litigation, and activism shifted as stakeholders came to terms with the new legal framework.

This report will seek to understand how citizens are using regulatory frameworks, and how conditions (or remedies for affected people) can be improved. We seek to understand how empowered citizens can invoke regulatory compliance and increase the institutional accountability of government agencies to address impacts on livelihoods and their environments.

1 An entity that has partly judicial powers and procedures resembling those of a court of law which hears facts and draws conclusions from them so as to pronounce itself on the pursuit of an official action by a party e.g. an arbitrator or a tribunal, but generally a public administrative agency.

1.2 Background to South Africa (Country Analysis)

Although South Africa is renowned for its mining economy, this was not always the case. South Africa was also well-known for its subsistence economy, with agriculture and trade as the bedrock of the economy.² Structural and systemic inequality resulted in a labour shortage and black workers, through a combination of desperation and propaganda by the Witwatersrand Native Labour Association, reluctant to enter mines. Legislation was strategically and intentionally crafted to disempower black miners and the reality is no different today to what it was then³, despite the promise of absolute protection under the South African Constitution.

The constitutional environmental right contained in Section 24 of the Bill of Rights, states that, “Everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and environmental degradation, promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.” Despite this explicit obligation of promulgating legislation for purposes of preservation and posterity, South Africa arguably has the most lenient mining legislation in the world. This then would substantiate the grey areas, which creates an enabling environment for the abuse of power to the detriment of mining communities.

The recently published report by the South African Human Rights Commission, in its investigative report on the underlying socio-economic challenges of mining-affected communities in South Africa, shed light on the lax manner in which mining legislation is applied, stating: “There’s a gap in the mining license application process where mining companies

2 See www.sahistory.org.za

3 First, R “The Gold of Migrant Labour” available at <http://www.sahistory.org.za/sites/default/files/DC/asapr61.3/asapr61.3.pdf>

and government departments systematically disregard key pieces of legislation.”⁴

One of the key issues remains the consultation deficit, which also exposes the Northern vs. Southern notion of consultation. Particularly in the former homelands, tribal authorities continue to represent the community. Delegated authority often is mistaken for constituting legitimate consultancy, and this is demonstrated in the agency practised by traditional leaders. This agency is not always to the benefit of the community, as is evidenced by the protests in Mapela, Limpopo, which resulted in the local authority hall being burnt down.⁵ The tribal leader does not live in the location and has no connection to the community⁶. An investigation by amaBhungane asserts that an agreement concluded between the tribal authority and Rustenburg Platinum, a subsidiary of Anglo Platinum, placed R175 million in trust. The community, however, knows nothing about this and has not seen the benefit of this transaction. Public interest lawyers from Richard Spoor Inc. were appointed to represent the community and have resolved the matter.

1.2.1 Background to Platinum and Coal Mining in South Africa

Coal is arguably the most contested sector among the three primary minerals – gold, platinum, and coal⁷. Gold, for historical purposes, has been a sector of contestation. Open-cast mining in the coal sector is a common practice which brings atmospheric issues into question. We are noticing renewed activism in the platinum sector post-Marikana, especially with new sectors being uncovered. Many of these issues, however, are cross-cutting and systemic in nature. Although the coal sector is over-saturated

with data, this does not negate the necessity of analysing the strategies used over the ten years to mitigate the impacts of these practices and, henceforth, provides a good opportunity to analyse critically the strides taken over the said period.

The North West province is home to the Bushveld Mineral Complex, a large igneous complex about 370km east-west and up to 240km north-south. The aforementioned complex stretches for 400km from North West to Limpopo and Mpumalanga and is estimated to host around 88% of the world’s platinum and palladium reserves⁸. The DMR’s report on PGM mines in South Africa for 2014⁹ notes that the directory is aimed at providing a list of current PGMs producers in SA. The aforementioned report profiles 23 operations, as certain mines have been placed on long-term care and maintenance, while others produce very small quantities of PGMs, to be included in the profile.

Similarly, South Africa’s coal reserves have been a significant contributor to South Africa’s exports of minerals. Coal reserves in South Africa lie in 18 coal fields. Historically, the Vaal coalfields were the first to be exploited intensively, hosting a number of coal-fired power stations as well as steel and heavy industry. The largest coalfields are found in a continuous expanse from Mpumalanga into Kwa-Zulu Natal, where seams are between 15 and 100 metres deep, and around seven metres thick, but very variable. According to the DMR’s report on coal mining production during 2015,¹⁰ South Africa’s total run-of-mine (ROM) production increased marginally due to new coal mines coming online, resulting in an increase of operating coal mines from 83 to 95.

Opencast mining accounted for 61.80% of ROM production, followed by board and pillar’s 35.95%, stooping’s 1.73%, and longwall at 0.52%. The five major producers were noted as being Anglo Coal,

4 “Inequality accounts for the highest human rights violation in SA” – SAHRC at <http://www.702.co.za/articles/296722/inequality-accounts-for-the-highest-human-rights-violation-in-sa-sahrc>, accessed on 21 March 2018.

<https://www.iol.co.za/the-star/ignoring-license-application-leads-to-migrant-influx-in-mining-towns-16702985>

5 <https://www.dailymaverick.co.za/article/2016-05-10-amabhungane-broken-trust-in-mapela-the-people-the-kgoshi-and-the-cool-r175m/>

6 Interview conducted with Mokete Khoda, MACUA coordinator in Mokopane, Limpopo on 8 August 2018.

7 Interview conducted with Louis Snyman at the Centre for Applied Legal Studies in June 2018.

8 Curtis, M “The impact of Anglo Platinum on poor communities in Limpopo, South Africa,” (2008), https://www.actionaid.org.uk/sites/default/files/doc_lib/angloplats_miningreport_aa.pdf

9 Directorate Mineral Economics, DMR, Operating Platinum Group Metal Mines in South Africa, 2014, Directory D6/2014, Tenth Revised Edition, published in March 2014.

10 Directorate Mineral Economics, DMR, Operating and Developing Coal Mines in the Republic of South Africa, 2015, Directory D2/2015, Thirtieth Edition, published January, 2015.

Glencore Xstrata, Exxaro, SASOL, and BHP Billiton Energy Coal South Africa. It is recorded that the aforementioned players accounted for 84% of South Africa's total saleable production and junior coal producers accounted for the remaining 16%.

1.3 Statement of the Problem

With the integration of local content development in extractive industries, South Africa is one of the few sub-Saharan countries that have managed to harness economic development from extractives in the country. With the world-famous diamonds on the banks of the Orange River and gold rush on Witwatersrand, South Africa's political, social, and economic landscape has been dominated by mining, in light of the fact that it has been the bedrock of the economy for so many years. Besides gold and diamonds, it also hosts platinum, coal, chrome, vanadium, and titanium. But the impacts borne by surrounding communities, and the root causes of that impact, include lack of capacity, corruption, and political interference. Given its long-standing history of actions which harm the surrounding communities, many environmental justice organisations have used various strategies such as litigation, protests, and training to mitigate these harmful impacts.

While the presence of these highly prized commodities would seemingly signal a host of positive consequences for communities living in areas in which these reserves are located, it appears that this, sadly, has not been the reality for many of these communities.

In addition, the environmental consequences of irresponsible coal and PMG mining have exacerbated the social impacts that mining communities have experienced. Issues commonly complained of include the loss of agricultural land, which for many is the primary means of livelihood; loss/disruption of access to clean drinking water, either by way of pollution of water resources or lack of access to water resources that the communities rely on; and displacement of communities from their villages and ancestral land, including the relocation of

ancestral burial grounds¹¹, as evidenced by our site visitations to mining-affected communities.

Many of these consequences continue unchecked. We have seen communities increasingly employ strategies to rectify the impacts of irresponsible mining practices. Such strategies include taking to the streets in protest action, instituting legal action against mining companies, and petitioning the government to take action against mining companies operating irresponsibly or illegally. Recently¹², we have seen an upsurge in community action against mining companies, and litigation is on the rise. It is not clear, however, whether these strategies can be employed singly to mitigate against the impacts of extractives and related infrastructure projects or the strategies can be combined in order to yield better results. It is against this background that this study was undertaken.

The mining sector finds itself in a tenuous state, demonstrated by the increase in litigation against mining corporations and the reinvigoration of community activism.¹³ This is demonstrated by recent cases such as the Eskom case by the applicant, Earth Life; the Mining Charter Case; and the silicosis class action suit which resulted in an out-of-court settlement of R5 billion. Despite these wins, the mining sector has a long way to go until it is considered to be a safe and protected sector, taking the livelihoods of its intended beneficiaries into account.

The legislative architecture has historically favoured profits over people and therefore, as we draw analyses from the legal instruments, we shall interrogate the evolution of the regulatory framework.

11 https://www.sahra.org.za/sahris/sites/default/files/heritagereports/EXX0564_GRP_Report.pdf. See also: <https://www.pressreader.com/south-africa/the-mercury/20180620/281771334911429>

12 <https://cer.org.za/wp-content/uploads/2017/10/Mining-Charter-Intervention-Litigation-MR.pdf>. See also: <https://www.businesslive.co.za/bd/companies/mining/2018-07-06-watch-mining-communities-reject-mining-charter-2018/>

13 See also: "The Case of the Social and Labour Plan Outcomes of Mineral Sands Resources Limited, Tormin Mine and the Community of Lutzville."

Case Studies

As part of the research process, and to demonstrate the effectiveness of the environmental governance framework, four case studies were conducted. These are detailed below:

1. Dominionville, North West
2. Kanana, North West
3. Lephalale, Limpopo
4. Mokopane (Mapela Community), Limpopo
5. Ogies, Mpumalanga

The rationale for the focus of the case studies in parts of Mpumalanga, Limpopo, and North West are predominantly historical and based on the intensity of mining activity, concentrating on the effects on the environment as a result of historic and current mining activities. In selecting these mines, it was important that a representative sample of those operating in the region according to sector, compliance, and remedies of the mine was chosen. In addition to this, relevant Non-Governmental Organisations (NGOs) operating within the region were consulted, and their guidance provided us with the necessary contacts to engage upon our arrival.

Ethical Considerations

Throughout the gathering of primary evidence, ethical considerations were of utmost importance and were taken into account to maintain the integrity of the individuals, communities they represented, and for the veracity of the research. All information was collected in a confidential manner and names have not been attributed to responses, where requested to do so. Respondents were not coerced into providing information and they did not act under duress. There was mutual consent to the interview and each respondent was aware of his/her choice of withdrawing from the process. The intent of the research was made clear at the outset, and this was followed up with in writing, in the event that communication was done electronically.

Research Limitations

Interview Response Rate

While the lead consultant and researcher applied their best efforts to interview all relevant stakeholders, in several cases this was not achieved. Stakeholders either did not respond to attempts to contact them or were unsupportive of an interview, specifically those in academia. To mitigate this limitation, secondary research supplemented gaps in primary research.

Research Criteria

During our interview process, it became apparent that there are instances where certain communities are overly focussed on, while others remain overlooked. This also informed our selection of five studies in particular, ensuring that we were not duplicating information and case studies that have received sufficient attention by others.

Our selection of five cases as a sample for the qualitative study from the group of 31 cases was very important, as there remains a tendency to focus on where the information is and not where the focus should be, leaving these “forgotten” communities far from reach of authorities and legal assistance. There are many NGOs operating across communities and in Dominionville, for example, they have been the subject of numerous studies, which rarely have benefited the community. Interventions have absorbed much time and attention, and arguably, negatively affected their struggles. Therefore, in site selection, it was important to choose communities which have not been subject to extensive research and who could benefit from a research intervention oriented to supporting their struggles.

Site Visits

During our site visits, it became apparent that many communities suffer from so-called “NGO fatigue”. Over the years, they have seen NGOs come and go, and this has caused issues of mistrust and, in some cases, even distrust in NGOs to change their everyday realities. Some sentiments are that NGOs

use communities as case studies without a reciprocal burden or responsibility of genuinely assisting. Communities, generally, are divided regarding their support of mining, and all communities which were visited complained of factionalism within community structures.

Information

There is a plethora of information on coal especially, and therefore selection has to be strategic. The DMR claims to have information regarding land size available on their portal, SAMROD, but it is not readily available.

Recorded Complaints

All community-related complaints to mining companies between 2008–2018 are a potential niche component that will add value to the sector. Organisations like CALS will be able to assist with the PAIA application from the DMR (Form C), which has a complaints mechanism to deal with this request.

1.4 Research Objectives

1.4.1 General Objective

The general objective of this study was to examine the effectiveness of redress strategies employed by communities in South Africa in mitigating the impacts of extractives and infrastructure projects between 2008–2018.

1.4.2 Specific Objectives

The study sought to achieve the following objectives:

1. To establish redress strategies employed by the community in mitigating the impacts of extractives and infrastructure projects.
2. To determine the effectiveness of each of the redress strategies employed by the community in mitigating the impacts of extractives and infrastructure projects.
3. To find out the effectiveness of combined redress strategies employed by the community in mitigating the impacts of extractives and infrastructure projects.

1.4.3 Research Questions

The main research question sought to be answered is:

What are the strategies employed to mitigate the impacts of extractive and (related) infrastructure projects in South Africa from 2008–2018?

The focus of the study from a mineral focus perspective will be coal and PMGs with the geographic focus being the North West, Mpumalanga, and Limpopo, as these are the most mining-intensive areas. Literature and industry experts inform us that the coal and PMG sector are the most significant segments of the mining industry. As a result, it may be deduced that the environmental impact in the coal and PMG sector, and consequently number

of environmental complaints, will be greater than those in other industries.

In addition, the methods of mining used by the coal¹⁴ and PMG¹⁵ sector employ both underground and opencast methods, providing a broad spectrum of environmental issues posed by such mining methods, and the minerals selected for the focus of this report present certain environmental risks that other minerals may not present. In this regard, coal mining is synonymous with pollution, which also extends to the use of coal during energy-generating activities.¹⁶ Due to the ancillary nature and the geographic proximity to the mining projects considered, coal-fired power stations will form the basis of the related infrastructure study.

The selection of a ten-year period (2008–2018) is deemed to be a workable time period, particularly because after 1994, the MPRDA went through a so-called “grace period”, as a means to bring companies into compliance post-Apartheid. This also saw the advent of the first types of coal-related litigation in tandem with litigation against the MPRDA in contestation to the irregularities in the governance framework. As a result, activism shifted as stakeholders came to terms with the new framework.

1.5 Literature Review

There is a plethora of literature on the extractive industries, and while common understanding would render this an advantage for research purposes, it presents its own challenges. There have been seminal documents which have been particularly helpful in framing the research: *South African Human Rights Commission Report on Mining*¹⁷; *Oxfam South Africa Report*¹⁸; and *Zero Hour Report*¹⁹ to name but a few.

The rationale of the literature review is to understand the context within which mining operations take place in South Africa’s legislative framework, and to document the experiences of different communities. To enlarge, the literature review filled knowledge gaps of primary evidence from the case studies and interviews and, in some cases, enhanced the veracity of the primary evidence. The literature review included a country analysis of South Africa’s mining industry; the evolution of the regulatory framework and legislative loopholes; the life cycle of a mine and the culture of impunity that is aided and abetted by an enabling environment; and, finally, we focus on the benefits and negative effects of mining.

14 According to Victor Munnik (Mvula Trust), “The Social and Environmental Consequences of Coal Mining in South Africa, A Case Study”, Environmental Monitoring Group, January 2010, “About 51 percent of South African coal mining is done underground and about 49 percent is produced by open-cast methods”, and “More mines are using open-pit and strip-mining techniques to exploit shallow reserves – with severe environmental impact in some areas. A range of organisations, from local farmers to the Wildlife and Environment Society of SA (WESSA) has pointed out the loss of wetlands, grasslands, and the species that live in them, both through abuses by existing mines and by the large numbers of prospecting applications. An extreme example of this conflict is proposed opencast mining within the catchment of the Mpumalanga Lakes District.”

15 According to Bonnie J Glaister and Gavin M Mudd, “The environmental costs of platinum-PGM mining and sustainability: Is the glass half-full or half-empty?” February 2010 <http://wikirate.org/files/~784785/854451.pdf>

16 “The Mpumalanga province has been declared as an air quality priority area. Currently this province has amongst the worst air quality in the world, largely due to coal mining activities, uncontrollable underground fires and power-stations burning coal”.

17 “Investigative Hearing Report on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa,” August 2018.

18 “The Case of the Social and Labour Plan Outcome of Mineral Sands Resources Limited, Tormin Mine and the Community of Lutzville.” <http://www.polity.org.za/article/oxfam-report-2018-04-23>

19 “Zero Hour Report: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga.” (2016). Centre for Environmental Rights. Accessed at: <https://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf>



CHAPTER TWO



THE LEGISLATIVE ARCHITECTURE OF THE MPRDA



2.1 Analysis of SA Mining Environmental Legislation

South African mining law is currently regulated by the Mineral and Petroleum Resources Development Act (MPRDA), 2002, in addition to the National Environmental Management Act (NEMA) of 1998, and the National Water Act of 1998, which also governs the mining sector as it relates to environmental management of water resources. The Department of Mineral Resources, under the executive leadership of the Minister of Mineral Resources, is responsible for facilitating a process of allocations of mining authorisations that comply with environmental management principles provided for by NEMA.

The significant changes that were introduced by the MPRDA from the 1991 Minerals Act, included changes in the duration of holding prospecting rights, mining rights, and mining permits, and the implementation of a “use it or lose it” policy. This is significant because such a policy which is represented in provisions 17(6)¹, 18(4)², 23(6)³ and 24(4),⁴ has enabled the development of the type of environment that encourages the acceleration of mining while neglecting environmental and social considerations. The result is that mining companies are now compelled by this policy to start mining, without pursuing the allocation of environmental authorisations out of fear for losing their titles due to protracted application processes and processing periods. This has serious implications for compliance and enforcement, as an enabling environment is created in which compliance and enforcement are threatened by economic interests.

Another significant change from the 1991 Minerals Act was the Mining Charter, whose objective is to readdress historical, socio-economic inequalities, and to ensure broad-based and meaningful participation of black persons in the mining and minerals industry. The fundamental purpose of the mining

charter is to facilitate transformation, with the intention to meet specific targets centred on the empowerment of local citizens and their communities as it relates to mining projects. According to the MPRDA, failure to comply with the Charter amounts to an offence which could result in a fine or imprisonment.⁵

It is important to point out that following the amendment of NEMA and the MPRDA in 2009, the issue of the competent authority responsible for regulating the mining industry from an environmental perspective, became a hotly contested issue between the Department of Mineral Resources and the Department of Environmental Affairs.

At that stage, both the DMR and DEA had their respective mandates intertwined with one another, thus causing confusion as to who was the responsible department regulating the mining industry from an environmental management perspective. This confusion persisted, causing a lack of clarity regarding the environmental regulation of mining activities. Under a parliamentary-induced agreement back in 2008, the DEA and the DMR made a sensible agreement: that the environmental regulation of mining would be managed by the DEA under NEMA. This would replace the inferior system of environmental regulation of mining under the Mineral and Petroleum Resources Development Act, 2002 (MPRDA).

To give effect to this agreement, the NEMA Amendment Act 62 of 2008 (NEMAA 2008) and the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (MPRDA 2008) were promulgated with the intention of incorporating temporary transitional provisions, transferring environmental regulation from the DMR to the DEA under NEMA for a period of 18 months.

The result of the transitional periods had the cumulative effect of creating gaps in the environmental framework, due to the iterations and amendments both of MPRDA and NEMA. This caused significant challenges with regards to the environmental regulation of mining

1 Section 17(6) of the Mineral and Petroleum Resources Development Act of 2002.

2 See s 18 of MPRDA.

3 See s 23 of MPRDA.

4 See s 24 of MPRDA.

5 Sections 98 and 99 of MPRDA.

activities as the DMR retained its authority to oversee environmental management, which had considerable implications for the preservation of the environment and the protection of the well-being of individuals and communities against mining-related impacts.

2.1.1 Legislative Loopholes

The above-mentioned challenges have created legislative loopholes which create legal ambiguity and uncertainty around what is above board in terms of the legal requirements for the mining approval processes. The MPRDA seems to entrench broad commitments to the well-being of communities, but in practice the MPRDA has limited provisions pertaining to community consultations, notification, and participation in the regulatory processes. The legal provisions regarding community consultation have been criticised for being riddled with loopholes. The loopholes stem from the vague requirements prescribed in the legislation in relation to the type of consultation, and standard of consultation necessary for ensuring meaningful participation in the mining approval processes, development of social and labour plans associated with mining approvals, and closure and rehabilitation processes.

Legislative loopholes appear in the following instances:

1. Notice requirements and practices concerning mining applications are flawed, resulting in interested and affected persons and communities being excluded from mining approval processes. An example of this is the 30-day public participation timeframe provided for in the environmental impact assessment regulations administered by the DMR. The time frame is too short to allow for “meaningful” consultation with affected communities.
2. MPRDA does not set out with clarity or certainty requirements for public participation in the Social and Labour Plans design process. An example in which this is apparent is loopholes in the laws and regulations pertaining to what information is to be provided to communities in the design process of SLPs, and on what schedule the design is to occur. The effect of this type of exclusion means that communities are deprived of information in order to actively participate in the process.
3. No provision is made for periodic consultation involving communities as it relates to progress of the implementation and review of closure plans, and other rehabilitation initiatives in terms of the EMP/EMPR. It has been highlighted that no express requirement mandating consultation during closing certificate application processes exists. Absence of this clear legal requirement only justifies calls made by communities that they are not consulted by mining companies on environmental issues during decommissioning, closure, and post closure phases.
4. In the context of closure of mines and rehabilitation, while the regulations require the right or permit holder to review annually the financial provisions set aside for rehabilitation, there is no express requirement for regular reviewing of the closure plan. A lack of an express provision providing for a formal and periodic review of closure plans has a corresponding effect of leaving the review of financial provisions open to the potential of not adapting/evolving with the changing circumstances. This results in the spike in mines becoming abandoned and derelict due to the avoidance of penalties that may occur as a result of poor closure management.
5. In respect of water use licences, the process of acquiring the licence has also been inept at ensuring adequate compliance, due to legislative weaknesses in the prevailing application process. A serious flaw in the provisions regulating the application process can be attributed to the vague wording of section 29, in particular. This provision states that the responsible authority “may” attach conditions to every general authorisation or licence.

The discretionary provision means that its application is open to vague interpretation. This weakened provision opens up the potential for poor quality licences being granted, as the prescription of conditions that adequately regulate activities is left to the discretion of the regulator. If the regulator does not possess the requisite skill to request the quality of information that will empower him/her to sufficiently assess applications before it, the quality of licence issued then becomes affected and ineffective in compliance processes.

Three of the four instances highlight a lack of implementation of provisions that enables “meaningful” participation of communities and affected persons in practice, signalling that meaningful participation and consultation for affected communities impacted by mining operations often are frustrated by mining companies.

2.1.2 Mining Right/Prospecting Right Application Process



2.2 Regulatory Governance Framework Undermined

2.2.1 Exploration and Construction Stage

At the exploration stage and construction stage of the mining process, a prospecting permit followed by an application for mining right must be applied for before mining operations can commence. At these stages, consultation with land owners, land occupiers, and interested and affected persons remains an area of contestation as it relates to inadequate enforcement, management, and oversight of the environmental regulations by the DMR.

Although the MPRDA and its regulations provide for consultation of interested and affected parties during the application and formulation of the EMP/EMPR, there is no express requirement regarding the form that this consultation must take.⁶ There is no express provision indicating what constitutes adequate notice and what type of information interested and affected persons should be furnished with.⁷ Inclusivity in the process then becomes stifled, and renders participation and oversight over the mining approval process by communities ineffective.

Due to the lack of detailed regulation of the consultation and participation processes under the MPRDA, companies are able to adopt forms of consultations which suit and accommodate the quick advancement of their mining plans, which is likened to a “tick-box” exercise. The legal frameworks governing public participation become undermined through companies conducting consultations that often fail to mirror communities’ customary practices, meaning that the input received often does not

accurately reflect the positions or decisions of the community.

The absence of a provision requiring procurement of information that is capable of being understood by interested and affected persons in a language that is accessible prevents these people from actively engaging in consultation around issues that have severe implications on their well-being. To compound the issue, there appears to be no express provision requiring periodic consultation on the progress of the implementation of the EMP/EMPRs throughout the life cycle of a mine, with consultation only being conducted prior to commencement of operations. This invariably makes it difficult for communities to participate and report malfeasance during the construction, production, closure, and rehabilitation stages of the mining process.

6 See R.D. Krause and L. Snyman, “Rehabilitation and Mine Closure Liability: An assessment of accountability of the system to the community.” (2015). Centre for Applied Legal Studies Witwatersrand University, available at <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/Rehabilitation%20and%20mine%20closure%20liability.pdf>

7 Ibid.

Examples in which community considerations of the mining approval process during exploration and production stage are undermined include:

30-day public consultation timeframe provided in the environmental impact assessment regulations for the consideration of EMPS, EMPRs, draft scoping, are too short to allow adequately for meaningful public participation in the form of comments and consultation.

There is an absence of a legal provision in the Water Act that provides affected and interested parties with guaranteed opportunities to participate in water use licence decisions for environmental authorisations.

Notice requirements and practices concerning the mining applications are incredibly flawed, thereby undermining many interested and affected persons from participating in the approval process for lack of notice. Section 41 of the EIA Regulations sets out the process for publicizing notice in respect of EIAs, while section 10 deals with notice in respect mining activities. It seems in practice that applicants usually only follow one public notification process as set out in EIA regulations, without following section 10 notice processes. Confusion as to which notice process applies results in applicants following section 10 notice as they are not as onerous.

Absence of express provisions setting out the requirements for participation in the SLP design and development process, undermine community involvement within the mining approval processes. The communities are then unable to ensure companies remain compliant with statutorily-mandated goals.

The laws and regulations do not specify what information communities should be provided, on or on what schedule.

During the construction stage, affected and interested persons often are removed from the land that they have often occupied for long periods of time, without due process or compensation being discussed and determined in advance. The flaw here is that communities are susceptible to being evicted, with their land expropriated before compensation is even offered. Section 54⁸, in our view, is flawed by virtue of its inadequacy in ensuring that compensation is discussed and determined before a mining right can be granted, mining operations can commence, and disputes sufficiently dealt with it.

It is a common occurrence that communities and their traditional leaders and mining companies become embroiled in disputes around expropriation and relocation of communities, in order to make space for the construction of mines. It is telling to note that section 54 does not provide guidance as to how and when compensation is deemed appropriate and justifiable in the circumstance. That scenario is left to the absolute discretion of the mining or permit right holder, subject to a dispute resolution process overseen by an arbitrator or court.

Another flaw in section 54 is that no provision is made for the compensation of affected and interested parties who face impacts caused by mining, but who occupy land close to the mine and not land on which the project exists. Such people, by virtue of not actually occupying the land that seems to be in dispute, still suffer ill effects such as cracks in the houses, and dust affecting their crops from blasting processes. This gap in the law fails to empower them to receive compensation because of their occupancy not falling within the purview of section 54.

2.2.2 Closure and Rehabilitation Stage

The MPRDA and its regulations seemingly provide less clarity on the extent of community participation and oversight over the closure and rehabilitation processes as they relate to the land in their immediate vicinity. There seems to be an absence of provision for periodic consultation on the progress of the implementation of the closure plan and other rehabilitative initiatives in terms of the EMPR/EMP.⁹

There seems to be no indication of a requirement that communities should be consulted with during the closure certificate application process. In effect, the legal process governing the regulation of the closure procedures of mines is undermined and rendered ineffective without communities being given secure rights to consult with mining companies on environmental issues during the decommissioning, closure, and post-closure phases. Due to the absence of an express provision mandating reporting to communities and providing access to documents (which include up-to-date closure plans, environmental risk reports, final performance reports), the communities' ability to participate in the oversight of closure and rehabilitation processes becomes undermined. As a result, communities are not placed in a meaningful position to assess whether rehabilitation initiatives adequately address their experienced impacts.

The implementation of the outdated cost rehabilitation guideline that mining companies must facilitate when setting aside financial provision for closure and rehabilitation also seems to create a scenario in which some mining companies fail to meet their obligations to ensure smooth closure and rehabilitation because of lack of financial provision. This invariably leads to mines abandoning their projects and leaving behind derelict mines that have yet to deal with post-closure environmental effects.

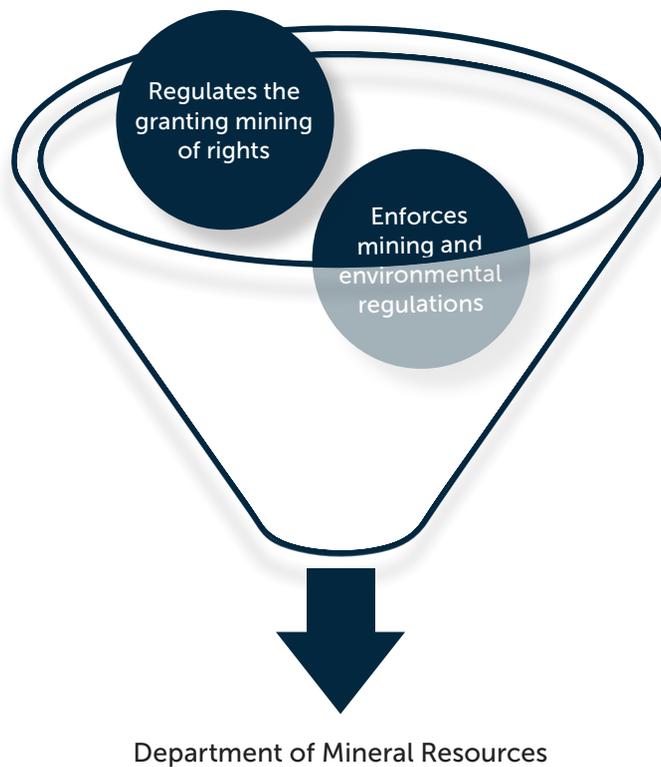
⁸ See section 54 of the Mineral and Petroleum Development Act of 2002.

⁹ See note 38 above.

2.2.3 Regulation Culture

When it comes to the effective enforcement of mining and environmental laws, the DMR occupies the role both of promoter of mining and the enforcer of mining and environmental regulations as they pertain to mining activities. The sequence of events that lead to the amendments of the MPRDA and NEMA catapulted the DMR to occupy this dual role, while the legislative frameworks underwent transition to the OES system. At the time of drafting the publication, however, OES is yet to come online, and, as it stands, the DMR is responsible for the effective enforcement of mining regulations, while the DWA is responsible for enforcement of water use licences.

The legislative developments of the environmental governance framework for mining have placed the DMR in a precarious position, as the DMR has often become conflicted in its dual role of promoting mining through the approval of mining applications, and the enforcement of mining and environmental laws. This sentiment is echoed by the following statistics, which outline the litigation trajectory against the DMR during 2010–2014, as it pertains to the issues of compliance and enforcement.¹⁰



¹⁰ Information obtained from www.pgm.org.za/question-reply questions posed to the Minister of Mineral Resources and Energy.

No. of judgements and court orders made against DMR	2010–2011	2011–2012	2012– 2013	2013–2014	Total
No. of judgements and court orders made against DMR	14	11	35	14	74
No. of court orders implemented	14	11	33	13	71
No. of court orders awaiting implementation	0	0	2	1	3
Nature of judgement/ court order: Interdicts	2	3	0	0	5
Nature of judgement/ court order: reviews	2	2	5	4	13
Nature of judgement/ court order: Mandamus Applications	7	5	29	7	48
Nature of judgement/ court order: PAIA Matters	3	1	1	3	8

2.2.4 Accountability in the Mining Sector is a Myth

Opacity in the mining sector has historically meant that accountability and transparency is not a natural tenet of the industry. This is evident in the regulations that set out the process for challenging mining authorisations, albeit being riddled with problems. Section 10(2) of the MPRDA requires a DMR Regional Manager to refer any public objections to prospecting or mining rights to a 14-member expert committee referred to as the Regional Mining Development and Environmental Committee (RMDEC). It is before this committee that communities and individuals who fear being affected by a potential approval of a mining project may raise their objections. It is this forum in which issues are ventilated.

It is the responsibility of the RMDEC thereafter to raise issues and provide advice/recommendations to the minister before a right is to be granted. It is important to note here that the minister is not bound by recommendations made by the RMDEC, and can still grant a right even when

the RMDEC has advised against it. Although the legislation intended to establish a mechanism in which accountability is strengthened, in practice, such accountability is stifled through the RMDEC not holding public hearings, nor giving open access to its proceedings to parties who have objected to applications.

This prevents affected and interested parties from holding the DMR and mining companies to account for approving applications that pose a threat against the environment, and the people who live in it. In effect, prospecting operations continue unabated.

The following statistics¹¹ provide a clearer picture of the actual operations of the Department of Mineral Resources and their role in the enforcement and compliance of the mining sector:

¹¹ *Number of inspections to assess compliance with environmental management plans or programmes conducted in respect of regions between (a) 2013–14 and (b) 2014–15 financial years.

REGIONS	Inspections 2013/14	Orders issued 2013/14	Inspections 2014/15	Orders issued 2014/15
Limpopo	261	147	268	211
Mpumalanga	290	19	284	64
Gauteng	167	71	173	48
North West	292	110	304	58
Kwa-Zulu Natal	151	19	156	151
Eastern Cape	100	02	164	09
Free State	187	30	201	34
Western Cape	157	33	141	27
Northern Cape	263	42	165	11
TOTAL	1868	473	1856	613

2.2.5 Environmental Compliance Monitoring and Enforcement System

Environmental compliance and monitoring have proved to be ineffective by the DMR, substantiated by the following reasons:

1. Authorisations are difficult to monitor;
2. Lack of resources allocated to environmental compliance monitoring and enforcement activities. Evidence of this can be found in a 2016 CER report in which it was documented that there were only five environmental compliance inspectors developed by the DMR in Mpumalanga.¹² According to the National Environmental Compliance and Enforcement Report 2009–2010, there were only 84 positions

in the DMR dedicated to environmental protection and monitoring; and

3. Lack of transparency in terms of release of information about environmental non-compliances and enforcement activities. Below is the set of statistics that indicates the lack of transparency of the enforcement and compliance by the DMR as represented through the number of applications seeking access to information from the DMR from January 2011 to March 2013.¹³

¹² Centre for Environmental Rights. *Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga*. (May 2016) ("Zero Hour"), p.1, available at <http://cer.org.za/wpcontent/uploads/2016/06/Zero-Hour-May-2016.pdf>.

¹³ Information obtained from parliamentary questions posed to Minister of Mineral Resources during parliamentary question session, www.pgm.org.za/question-reply.

	1 April 2011 to 31 March 2012	1 April 2012 to March 2013
No. Requests for access to information received by DMR	11	182
No. of requests refused or partially refused by DMR	348	325
No. of deemed refusals by DMR in terms of s 27	2	0
No. of appeals received by DMR	6	3
No. of internal appeals under the act received and granted	2	0 Appeals were pending at this stage
No of internal appeals deemed refused by the DMR in terms of s 77(7)	None	None

*Number of mines operating without a valid water use licence from January 2007–June 2009¹⁴

Province	No. of Mines
Eastern Cape	1
Free State	0
Gauteng	19
Kwa-Zulu Natal	8
Limpopo	32
Mpumalanga	13
Northern Cape	2
North West	29
Western Cape	0
TOTAL	104

In 2014, it was reported¹⁵ by Centre for Environmental Rights (CER) that 103 mines in South Africa were operating without water-use licences, which is a violation of the Water Act. This number increased to 104 by the end of July. The DWA was only reported to have brought 12 enforcement actions against those found to be non-compliant, with no evidence that any convictions occurred.¹⁶

¹⁴ National Assembly written reply: Mr GR Morgan question to Minister of Water and Sanitation on 13 August 2009, accessed via www.pgm.org.za/question-reply.

¹⁵ Centre for Environmental Rights. *Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga*. (May 2016) ("Zero Hour"), pp 57-58, available at <http://cer.org.za/wpcontent/uploads/2016/06/Zero-Hour-May-2016.pdf>.

¹⁶ Ibid.

Below is a table illustrating this point as it depicts the number of mines that have been found to be operating without a water use licence in Mpumalanga from the period 2009-2014.¹⁷

2009	2010	2011 Feb	2011 Oct	2012	2014
13	54	41	24	17	16

The DWS reports that 55 mines were inspected for compliance with the NWA in Mpumalanga in 2014/15. CER reported that there were only two DWS officials in Mpumalanga dedicated to compliance and enforcement. Given the limited capacity of officials available to monitor and activities and ensure compliance, there is a likelihood that more mines were operating with a water use licence since 2009, than those detected by the DWS. The following statistics outline this reported reality:



**Number of mines found to be non-compliant with regulations pertaining to water use licences within (a) the 2016–17 financial years and (b) since 1 April 2017*

This strengthens the ensuing assertion that there seems to be no robust and predictable administrative enforcement by the DWS and DMR.

It is important to note at this point that, in the absence of its own environmental compliance and enforcement report, information about compliance monitoring and enforcement by the DMR is hard to come by and therefore findings to be made in regards to the DMR is limited. This publication therefore has limited scope to provide accurate analysis of available data around enforcement and compliance with regards to the DMR, but it is worthwhile to note that, according to the “Zero Hour” report by CER, the DMR and the DWS are unresponsive or slow to respond.¹⁸

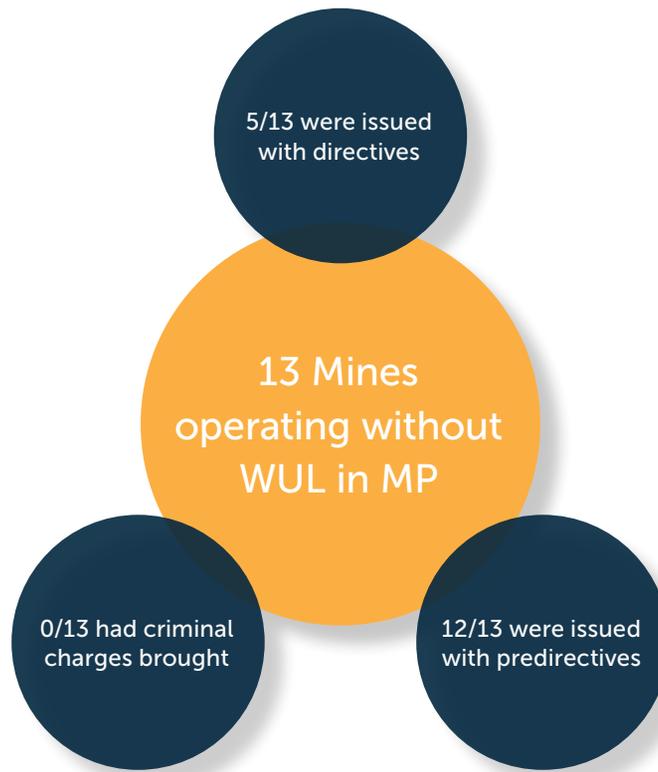
According to the Minister of Water and Sanitation, there were 103 cases investigated in the first and second quarter of the financial year in 2015. Of the 103, only 37 were investigated, with none of these investigations taking place in Mpumalanga.¹⁹ When it comes to administrative enforcement, the DWS has faltered significantly. Below are illustrations referring to the issuing of statutory notices and directives by the DWS directing companies to undertake required activities to resolve non-compliance or face penalisation.

¹⁸ See CER’s “Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga” report, published May 2016, at pp 53–61.

¹⁹ Ibid n.42 at page 59.

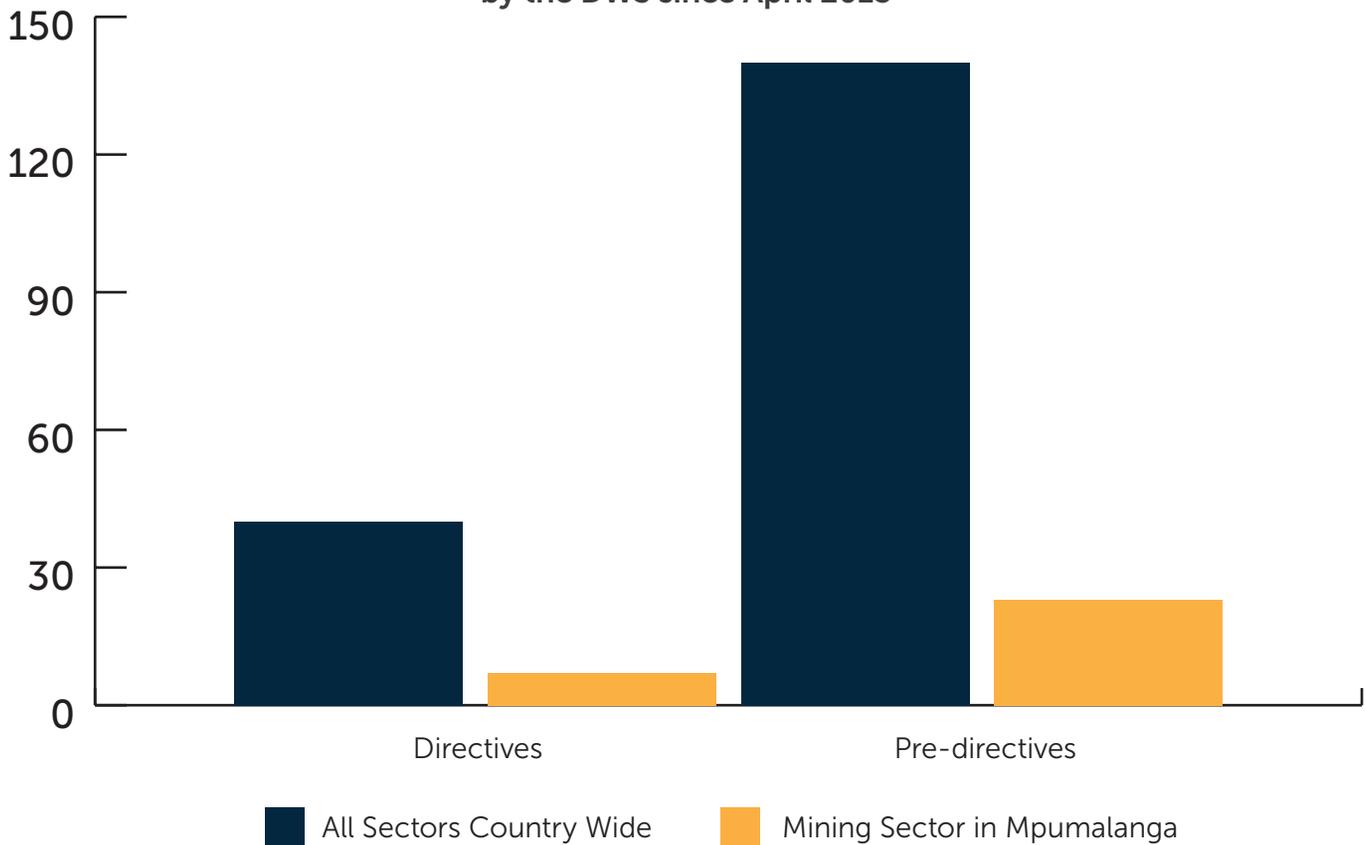
¹⁷ Ibid. page 37.

Since July 2009²⁰:



In August 2015²¹:

Directives and Pre-directives issued under the National Water Act by the DWS since April 2013



20 National Assembly, Question No. 1998. Date of publication in internal question paper: 30 July 2010 (Internal Question Paper No. 18)

21 Ibid. No.50 CER "Zero Hour" Report at page 61.

According to the CER Zero Hour Report, as of 2015, the DWS conducted²²:

1. One hundred and twenty-two inspections of mines nationally, 55 of which were in Mpumalanga.
2. Two hundred and thirty-nine mines were formally operational in Mpumalanga, with 122 of them being coal mines.

The report concluded that the statistics indicate that the DWS is only inspecting a fraction of mining operations in a given year, and taking even less enforcement action.

2.2.6 Environmental Compliance Monitoring in SLPs Proving to be Ineffective

Applicants of mining rights are required by law to develop an SLP, which outlines what activities the applicant will endeavour to contribute to the livelihood and social and economic well-being of mineworkers and communities in and around the mine site. This SLP forms a component of the application for a mining right, which means that its proper monitoring is important for the purposes of ensuring that the disparity between workers, communities, and mining management does not go unchecked and unregulated. It is concerning that the DMR has no monitoring mechanism in place to ensure that SLPs commitments are followed through on.²³

This is particularly detrimental because, if companies are well aware of the fact that there is no system in place to hold them accountable, SLPs are more likely to become tick-box exercises to fulfil application requirements as opposed to legally binding documents with serious repercussions.

The Marikana Massacre, which left 36 mineworkers dead, was widely publicised in a publication entitled "The Bermuda Connection"²⁴, which further exposed the under-handed dealings of Lonmin. It also demonstrated the

²² Ibid.

²³ Department of Monitoring and Evaluation (DPME).

²⁴ See at <http://aidc.org.za/download/Illicit-capital-flows/BermudaLonmin04low.pdf>

failure of a mining company to follow through with its SLPs commitments. As part of its SLPs, Lonmin mine undertook to convert all its single sex hostel accommodation and committed to build 5,500 houses for migrant workers, by September 2011. It was stipulated in the SLP that in the first three years, 3,200 houses were to be built with 70 hostels being converted. By the end of the 2009 financial year, however, only three of the 3,200 houses had been built and only 29 hostels converted.²⁵ This is an example not only of an applicant's lack of compliance, but ineffective monitoring on the part of the regulator. This assertion is validated by the following statistics provided for below during a parliamentary question and answer session.

Total number of mines that DMR has found to not be fully compliant with obligations of the Mining Social and Labour Plans (SLP) as required by the Mineral Petroleum Resources Development Act, Act 28 of 2002, (a) in the 2016–17 financial year and (b) since 1 April 2017²⁶



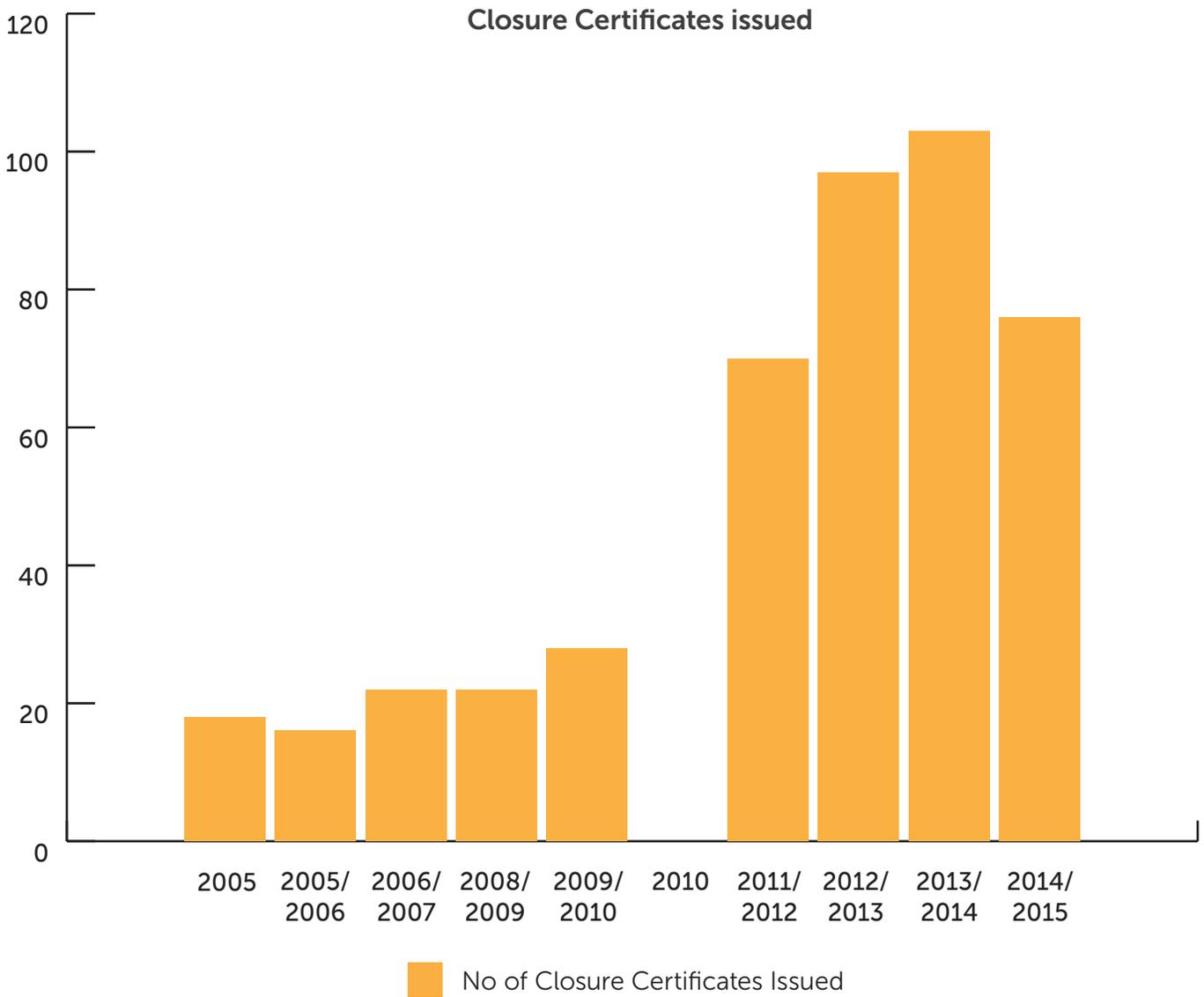
2.2.7 Environmental Compliance Monitoring in Closure and Post-rehabilitation Processes

While the institution of financial provision to incentivise compliance with environmental remediation obligations are sound on paper, there is evidence that the system in practice is ineffective in ensuring companies comply with their environmental obligations regarding post-closure rehabilitation. Under the legislation, we have evaluated that a mine is liable until a closure certificate has been issued by the DMR. Once the DMR, along with the other departments, is satisfied that the mining company has complied sufficiently with its rehabilitation obligations,

²⁵ Dasnois, Alide. (2014). "Marikana: World Bank loan undermines Lonmin's arguments." *GroundUp News* available at https://www.groundup.org.za/article/marikana-world-bank-loan-undermines-lonmins-arguments-says-academic_2426/

²⁶ National Assembly Question for written reply by Ms N R Mashabela to Minister of Mineral Resources on 8 September 2017 available at www.pgm.org.za/question-reply

the State takes over liability for rehabilitation. It appears, however, that not many closure certificates have or are being issued. Below is a table disclosing how many mining closure certificates were issued by the DMR, which is juxtaposed with the number of unrehabilitated mines. These statistics are in reference to a parliamentary question posed to the Minister of Mineral Resources during 2016.



Below is the number of unrehabilitated mines that have been recorded (a) country wide and (b) in each province during the 2010–11; 2011–2012; and 2012–2013 financial years.²⁷

Provinces	Number
Limpopo	794
Free State	244
Kwa-Zulu Natal	335
North West	945
Mpumalanga	831
Western Cape	890
Northern Cape	1037
Eastern Cape	278
Gauteng	504
TOTAL	5 858

Between the periods of 2012–2014 the following statistics on closure certificates revealed the following:²⁸

575 Closure certificates were under review	Only 159 were issued
Only 60.4% of operational mines were operating with adequate financial provision	

Not issuing closure certificates has the adverse effect of disincentivising mines to rehabilitate.²⁹

²⁷ National Assembly written reply for GR Morgan’s question to Minister of Mineral Resources on 24 August 2012, available at www.pgm.org.za/question-reply

²⁸ Report on the Implementation Evaluation of the effectiveness of environmental governance in the mining sector. Compiled by Digby Wells Environmental for the Department of Mineral Resources. August 2015 at page 11.

²⁹ Ibid.



CHAPTER THREE



IMPACTS



Mining operations promise socio-economic advancement, and this is the primary reason why communities consent, when they do consent. Communities are often promised benefits as a result of their acceptance to mining. However, this acceptance is usually followed by negative impacts incidental to mining, with the result that promised benefits rarely meaningfully improve their lives. An article by Kerwin Lebone from SA Institute of Race Relations offers the following benefits of mining to the economy, namely: contribution of fixed investment; employment; exports; and contribution to tax revenues.¹

Mineworkers are arguably the “best paid of South Africa’s industrial workers”, he asserts. This statement is ironic and refuted by many, particularly in the face of the numerous mining protests, and evidenced by the highly publicised Marikana killings in 2013, or as recent as the Sibanye-Stillwater operations in May 2018.² South Africa generally imports more than it exports; therefore mining investment offsets this deficit. A reported, “33.6% was contributed to exports in 2015”³, and, moreover, the tax contribution made by mining investors and because of employees’ income tax contribute towards social services.

Lebone, like many mining proponents, points to lenient policy that provides an enabling environment for mining investors, stating: “When the South African government makes it difficult for them to invest because of uncertain and subjective licensing processes, counter-productive empowerment policies and poorly thought through safety and other regulations, this harms the whole country. It is for this reason that South Africa needs policies that are attractive to mining investors, and local regulators who act in a manner that allows those investors to be successful and profitable. Currently South Africa does poorly at both, and the price is being paid by South Africa’s people.”⁴ To the contrary, Tax Justice Network Director and Chair of the Board, John Christensen, believes that companies are after what is under the ground and not swayed by tax incentives or tax breaks.⁵

1 <https://www.iol.co.za/capetimes/business/south-africans-do-benefit-from-mineral-wealth-2074021> Published on 29 September 2016.

2 <https://www.timeslive.co.za/politics/2018-05-12-miners-protest-for-better-safety-following-sibanye-stillwater-deaths/>. Published on 12 May 2018.

3 Ibid.

4 Ibid.

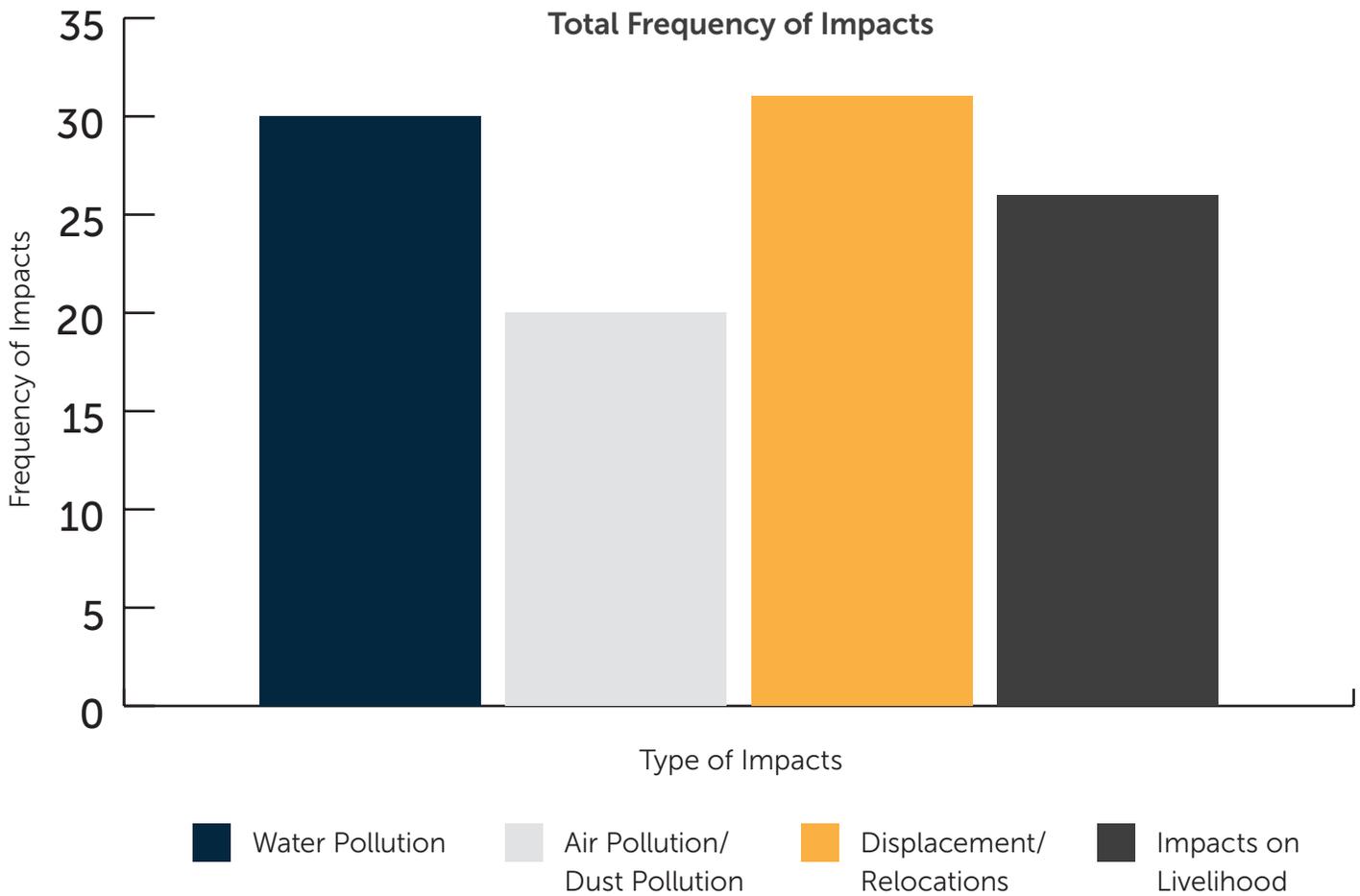
5 Also see <http://taxjustice.blogspot.com/2008/05/tjn-4-africa-press-release.html>

Below are a number of common environmental impacts from mining operations:⁶

Mineral Extraction	Vegetation and habitat destruction
	Erosion
	Landform changes
	Alteration of water tables
	Dust
	Aesthetics
Water Discharge	Heavy metals overloading
	Acid Mine Drainage
Dewatering	Sediment runoff
	Effluent contamination
	Ecological impacts
	Impacts on water resources
Smelting	Acid deposition
	Air pollution
	Heavy metals contamination
Transportation	Dust and sediment pollution
	Noise pollution
	Gas emission
	Oil and fuel spills
	Soil Contamination

⁶ Hilson and Murck. (2000). "Community perceptions of mining: The rural South African Experience." Mini dissertation for Master's in Business Administration, North West University, page 34.

Graph 1: Assessing the Total Frequency of Impacts



Type of Impacts	Frequency
Water Pollution	30
"Air Pollution /Dust Pollution"	20
"Displacement/ Relocations"	31
"Impacts on livelihood"	26

The data above shows that the most prominent impacts caused by mining-related projects in our study were impacts related to water pollution, and the displacement of communities from communal land where mining is most intensive. The data related to water pollution is indicative of the type of mining that the majority

of projects were coal-fired power stations and a few platinum mines. Coal mining and coal-fire power stations, in particular, consume significant amounts of water resources, and often have extensive impacts on water pollution as a result of coal processing such as dumping of waste, coal washing etc. With regards to the number of displacements, all related cases in our study had surface area mining rights that covered significant hectares of land. As a result, many communities occupying land in close proximity were subject to relocation and displacements impacts. This has a correlating effect on livelihoods, as most communities residing on the land subject to mining engaged in subsistence practices and relied on the land and natural resources for their development. With regards to the data on air pollution/dust pollution, this related to the type of mining which was either open cast or underground. A sizable number of related cases in our study were open cast mines, which could account for the majority of 26 cases in which air and dust pollution impacts were most significant



by-products of this type of mining. To a lesser extent, underground mining may have accounted for reported air and dust impacts as recorded in our overall number. The impacts of mining on communities is told in the ensuing chapter and integrates interviews and research.

It is not until you have stood on a coal mine, flanked by a sinkhole that holds unspeakable secrets of those believed to have fallen into the deep, and it is not until you have heard the whispers of how women prostitute themselves for a meagre R20 in order to put some food on the table, that you realise the immense depravity that mining also brings to communities. How then do you measure the impact caused by mining, to those living on an abandoned mine? Like the community living in Coronation, Mpumalanga, where, on a hot summer's day, as inquisitive children climb the coal hills and, given the correct set of circumstances, are often burnt when the heat meets the coal? Or where women, who gather coal for winter nights and sell it for income, often disappear from their digging expeditions, swallowed up by their very source of livelihood?⁷

This narrative depicts the reality of most mining-affected communities and how, despite the advancement in mining operations, there are negative impacts which not only affect the communities' way of life but, in some instances, cost them their lives. Environmental impacts, then, should not merely be understood or defined in narrow terms but within a broader field of interpretation, which includes direct as well as indirect socio-economic impacts.

The recently published Responsible Mining Index (RMI) Report 2018 "supports the principle that minerals and metals mining should benefit the economies, improve the lives of people and respect the environments of producing countries, while also benefiting mining companies in a fair and viable way." The RMI report informs us that companies generally fail to perform well when it comes to their policies being reflective of a human rights-centred approach towards mining.

⁷ See <https://www.news24.com/Archives/City-Press/The-earth-that-burns-20150429>, Also see <http://communitymonitors.net/2015/10/coronation-mpumalanga-living-in-a-aol-sinkhole/>.

Their interventions centre mostly on developing business skills and there is little attention paid to the protection of human rights defenders. There appears to be no genuine concern for the improvement nor the sustainability of livelihoods. Rather, it is a case of "business as usual".

South Africa is truly a paradox of plenty – how can a country so well endowed with natural resources be so poor? All of the impacts need to be mitigated against in order to preserve the natural endowment. Open-cast mining, for example, is intensive and erodes the environment to a higher degree compared to underground mining. Rehabilitation of mines is a costly exercise and, therefore, mining operations should be considered carefully because they carry a pecuniary and human cost. Louis Snyman, an attorney at the Centre for Applied Legal Studies (CALs), suggests that social benefit streams should be offset by negative impacts in terms of the Mining Charter. Therefore, when community members responded to the question as to whether or not they have benefited from mining in their communities, there were few surprises.

In Lephalale, Limpopo, we met with Francina Nkosi, MACUA coordinator, who has taken on many battles in protection of the community against mining companies. Exxaro has built a Health Centre, and the first phase of the building of a railway line to export coal to neighbouring countries like Kenya, Swaziland, and Mozambique has commenced. Francina is currently writing to the railway line to insist on public participation regarding the building of the railway line, as Spoornet has allegedly been awarded the tender but there was no consultation process.

Dominionville, ironically named, is checkered with the ill-effects of mining. Families live in small shacks, and have no running water or electricity. There is a tarred road which was built primarily for the mining company to transport the natural resources. We met with Talitha, who has lived in Dominionville for more than eight years. Her husband was contracted to work on the mine closest to Dominionville and, after three years, his contract was cancelled. She had left her job working at a lodge to be able to be closer to the mine. Her husband has not worked since 2010,



and finds odd jobs in order to provide for the family. The family also recycles as an additional income stream. The family's housing situation and those in the community are not fit for human beings to live in, exposing adults and children alike to diseases. Housing is a prerequisite for mining staff, but it has become commonplace for shack dwellings to substitute this requirement due to non-compliance by companies. Talitha then introduced us to family members of those who have suffered fatalities owing to mining in the community. We met the mother of a young boy who was killed by private security because he was playing too close to the mine. Another young, pregnant woman was recently shot dead by zama zamas (underground miners).

3.1 Water

For the past two to three years, South Africa has experienced its worst drought in decades. Home to some of the most beautifully vast oceans in the world, it is still a conundrum as to how South Africa, according to a report by the Centre for Environmental Rights, has become "the 30th driest country in the world".⁸ The government's plan that is outlined in the National Development Plan 2030, demonstrates the gravity with which they regard the pressurised water resources.⁹ These considerations, however, do not seem to influence the development of restrictions as far as mining operations are concerned.

There have been seismic shifts owing to underground blasting and, as a result, the community in Rustenburg is no longer able to access water.¹⁰ These sentiments are echoed by community organiser Matthews Hlabane who insists that mining impacts on your water sources: "To mine, you tamper with the water

tables and contaminate all water sources. Once contaminated, it becomes acidic with PH levels, reaching about two because of the heavy metal content." As a result, those drinking portable water supplied by the municipality suffer kidney failure and skin diseases. Costs then are suffered by the community members, and families have to carry the cost which is externalised by the companies. Farmers, too, are negatively impacted. Due to the high levels of acidity, they have to use lime to raise the PH levels, and, as such, food prices increase because of the costs of agricultural maintenance. These conditions are disadvantageous to small-scale farmers, who generally are not able to afford the cost of lime as their commercial counterparts are.¹¹

In Dominionville, like most mining communities, there is no running water. When the municipality does deliver water, water to the capacity of 80 litres is provided for every household which must last for between one to three weeks. Water scarcity has therefore created a gap in the market and so a local farmer is selling the commodity and profiting off their misfortune. In the same province of North West, a little town called Kanana (land of milk and honey) accurately demonstrates the paradox: "Sometimes the water will be dark and it tastes like metal," says Tobi, a young man who resides in Kanana. He says that many people suffer from diarrhea; and there is a high rate of tuberculosis and other respiratory problems but there are no efforts made to remedy this. "There's nothing that I am proud of regarding the mine's intervention since I've been here since 1990," he says. Coal mining has caused severe devastation in communities like Witbank. Water is required for washing the coal, and this contaminated water runs into the water streams. The practice of burning coal underground has also caused huge

8 Centre for Environmental Rights, "Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga." (May 2016), available at <http://cer.org.za/wpcontent/uploads/2016/06/Zero-Hour-May-2016.pdf>.

9 "There is an urgent need for a coherent plan to ensure the protection of water resources and the environment in the Mpumalanga Highveld coalfields, upstream of the Vaal and Loskop dams, as well as in the Lephalale-Waterberg area. Given environmental pressures and development demands, current water allocations in the upper Vaal and Olifants River water management areas urgently need to be revised. Local planning should also ensure that groundwater resources are optimally used."

10 Interview conducted with Thembinkosi Dlamini, Lead of Extractives of Oxfam South Africa on 25 April 2018.

11 A study also found that although less than 1% of these water source areas are mined, in Mpumalanga, a staggering 70% of these areas that are of "high importance for water run-off" are the subject of mining-related development applications (17.3% are for mining applications, while 53.9% are prospecting applications). A reported 216 billion litres of water is used by Eskom per annum to clean the coal. Kusile Power Station, one of the biggest coal-fired power stations, located in the Vaal River in Gauteng, uses up to 71 million litres of water per day.

cracks in the homes of people living close to blasting operations.

In Lephalale, Limpopo, there is a stench as you enter the location due to the broken sewer pump. Lephalale has been declared a “high priority area” because of air pollution. Despite having approached the local councillor, nothing has been done and there is an increased amount of pollution due to the dumping. Communities consume this water, and this has ongoing negative impacts on people’s health. Medupi and Exxaro uses a lot of water and, as a result, there is contamination and scarcity: “Eskom used an average of 320 000 Ml per annum over the past 10 years.”¹² Reports state that Eskom is making progress towards lessening its water footprint.¹³

The municipality also provides water once a day but this is not clean. The land has become arid and the Mukholo River is dry and sandy due to the mining projects, especially the operations at the Medupi Power Station. Subsistence farming has come to a halt because the heat has caused the river to dry up in the last three to four years, coinciding with the arrival of the Medupi Power Station.

In Ogies, Mpumalanga, conditions are no better. We met with Millicent and Sisi Flo, who both live in the location. There are more than 15 active mines in Ogies. Millicent says that, at times, they go three weeks without the municipality delivering water or collecting garbage. “They always have excuses but the coal mines use most of the water. How can we not have water but we have running taps and the coal mines get water?” she laments.

In eMalahleni, Matthews Hlabane, who is the founder of Southern African Green Revolutionary Council (SAGRC) and a member of MACUA, explains the effects of mining on the water. Mining must affect your water sources because it requires companies to tamper with the water tables. This results in contamination of all water sources and once contaminated, it becomes acidic with PH levels of about two and contains

heavy metals. There are reports that those drinking portable water supplied by municipality suffer from kidney failures, skin cancer, and rashes caused by high PH levels. Costs must be suffered by community members. Families have to carry the costs that are externalised by companies.

3.2 Air Pollution

The degradation in air quality where mining operations occur is evident. Particularly in the Mpumalanga region where the majority of coal is mined, there are dust particles from blasting and other related activities that have settled in the air. In Witbank, Mpumalanga, there is a specialised TB hospital located opposite the former Vanchem Vanadium Products (Pty) Ltd, which closed a few years ago. Ironically, the majority of young men who apply to work in the mines in and around eMalahleni are deemed unemployable on failing the health test because of the dust pollution.¹⁴

3.3 Dust Pollution

Mining cannot be discussed without acknowledging the environmental degradation intrinsic to the industry: “One particular area of concern is mine dumps which are made up of crushed, sand-like by-product refuse material, known as tailings, produced during the mining process. Mine dumps are made up of a complex mixture of metals and dust particles. This means that dust exposure can be high for communities living nearby, particularly during windy conditions and when it’s dry and vegetation cover is low.”¹⁵ This invariably leads to respiratory diseases such as asthma, bronchitis. and even pneumonia. Without adequate interventions such as buffer zones, which is often the case in mining communities, the most vulnerable communities will continue to be affected negatively.

For mineworkers working in gold mines, particularly, the likelihood exists to contract tuberculosis and/or silicosis which comes from

¹² See <http://www.eskom.co.za/AboutElectricity/FactsFigures/Documents/RawWaterSupply.pdf>

¹³ See <https://www.news24.com/Archives/City-Press/Power-stations-gulp-our-water-20150429>

¹⁴ Interview conducted with Matthews Hlabane in 2016 during the “Toxic Tour.”

¹⁵ <http://theconversation.com/how-mine-dumps-in-south-africa-affect-the-health-of-communities-living-nearby-77113>



exposure to silica dust. Prior to the *Maccsand*¹⁶ case, Dust Control Regulations were in disrepute due to the singular test they offered for dust emissions. The *Maccsand* Constitutional Court (CC) case of 2012 was a seminal case on the issue of dust pollution. The CC decided that:

- The judgement confirms the Supreme Court of Appeal's decision that, where mining is not permitted by a zoning scheme, the holder of a mining right or permit cannot start to mine, unless and until the land is rezoned to allow mining.
- The Court clearly and correctly held that the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) – like the National Environmental Management Act, 1998 (NEMA) – is intended to promote s.24 of the Constitution, the Constitutional right to healthy environment, and that these statutes require the Minister for Mineral Resources to consult and cooperate with environmental authorities who administer NEMA.
- Crucially, the judgement confirms that mining operations and mining companies must comply with all laws, and that the MPRDA does not trump other legislation, including provincial legislation like the Land Use Planning Ordinance. In other words, rights granted in terms of the MPRDA do not enjoy any special status over other pieces of legislation.
- For too long, the mining sector has operated on the assumption that mining approvals outweighed any other legal requirements.
- Today's judgement marks the beginning of the end of decades of special treatment for the mining industry. The consequences of decisions made on mining operations without proper regard for other authorities and other legislation are severe; aggravate the detrimental impact mining operations have on the environment; and do nothing to benefit the country, the mining industry,

mineworkers, or communities. It can no longer be justified.¹⁷

3.4 Health and Well-being of Communities

The recent R5 billion silicosis settlement in the South Gauteng High Court, involving African Rainbow Minerals, Anglo American South Africa, Anglo Gold Ashanti, Gold Fields, Harmony, Sibanye-Stillwater, and Pan African Resources, called these seven heavy-weights in the mining sector to book in the largest class action the country has seen to date. The settlement covers miners who contracted this deadly virus from 1965 until recently. "Silicosis is a debilitating pulmonary disease which is caused by inhaling excessive amounts of silica dust found underground, causing damage to the lungs and ultimate death."¹⁸ Therefore, death as an ultimate consequence cannot be excluded. During our site visits in the North West, Limpopo, and Mpumalanga provinces, our MACUA coordinators informed us that there were cases of women giving irregular birth to babies and, in many instances, there is a high rate of stillbirths. The areas which are located close to the mining operations are generally not well suited to withstand the damaging effects of extraction. This leads to irreversible damage, including, and not limited to, "chronic health problems and premature deaths, particularly among children, pregnant women, and those with pre-existing health conditions and compromised immune systems."¹⁹

The most notorious health impact from coal is pneumoconiosis, commonly known as black lung disease or CWP, which permanently scars lung tissues. When people are repeatedly exposed to dust that contains crystalline silica, present in coal dust, they can develop this disease, which hardens the lungs and prevents oxygen from easily reaching the bloodstream."²⁰ Most

¹⁷ Ibid. n. 69.

¹⁸ See <https://www.fin24.com/Companies/Mining/miners-settle-for-about-r5bn-in-silicosis-class-action-20180503>

¹⁹ Ibid n.61

²⁰ Centre for Environmental Rights. (May, 2016). "Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga", available at <http://cer.org.za/wpcontent/uploads/2016/06/Zero-Hour-May-2016.pdf>

¹⁶ *Maccsand (Pty) Ltd vs. City of Cape Town CCT 103/11 [2012]*.

importantly, the inherent danger to one's life as a consequence of mining has been demonstrated by the deaths of miners in Marikana and Sibanye-Stillwater. Twenty miners from Sibanye-Stillwater lost their lives between February–June 2018 alone.²¹

There is a historical preference for migrant workers, naturally causing variance between local communities and those from other provinces. It is a well-known practice to provide those from other provinces with a travel allowance. Thabang, whom we met in Kanana, has lived in the location for most of his life and has nothing good to say about mining. According to Thabang's knowledge, there are approximately five mines that are operating in Dikgang and Dominionville, and those that have closed have not been rehabilitated: "There is no skills development centre for young people and there is only one library. We need to be capacitated and we want a form of accreditation for employment."

The influx of migrant workers has created, in many areas, overpopulated informal settlements in deplorable conditions and straining the already-scarce resources. Due to land scarcity, people have to live in dangerous conditions and some, as Francina says, even live under power cables. In Steenbokpan, a former agricultural area between 80–90km from Exxaro, residents are still living in shacks. It is common-place to find teenage pregnancies; a high drop-out rate among school learners; alcoholism; drug abuse; HIV/AIDS and a high degree of crime. The high drop-out rate is primarily as a result of there being no secondary school in the community and, therefore, learners are required to travel to the nearest town.

3.5 Socio-Economic Impacts

Large-scale mineral extraction projects change the physical landscape of environments immensely, thereby causing social conflicts between mining companies and communities that live within close proximity of said project. But the conflicts that significantly affect the nature of the relationship between the mining company

21 <https://www.fin24.com/Companies/Mining/20-deaths-so-far-in-2018-the-sibanye-stillwater-blame-game-20180621-2>

and the communities impacted by the mining project are social and economic in nature.²² These conflicts revolve around the unequal distribution of benefits, tensions around culture and custom, and fundamental change to their sources of livelihood.

In South Africa, applicants who acquire approved mining and prospecting rights are entitled to exclude other land uses.²³ This often results in the restriction of access to land that has been used by communities for the purposes of agriculture, housing, ecotourism, and access to natural resources. This has the effect of depriving communities, particularly in rural areas, of the use of the land, and consequently their livelihoods. A 2012 report found that the social and environmental impact of mining activities on a particular region is often so severe that farming activities cannot be sustained on the land that is left between all the mining activities.²⁴ Even in instances where the mining project is ceased/completed, and the land returned, the resources and the land in question are often so polluted that they cannot be used productively again.²⁵

It is important to note that the loss and destruction of land caused by mineral extraction, whether underground or via opencast mining, reduces the potential of access to food which has a detrimental effect of increased dependence on imports, thereby driving up food prices, making food increasingly unaffordable for poor and marginalised communities.²⁶ This was reported in Mpumalanga, where a survey conducted by the South African National Health and Nutrition Examination found that nearly a

22 May Hermanus, Joshua Walker, Ingrid Watson and Oliver Barker. "Impact of the South African Minerals and Petroleum Resources Development Act on Levels of Mining, Land Utility and People." *LABOUR, Capital and Society* 48:1&2 (2015), 22.

23 Section 5 of the South African Mineral Petroleum Resources Development Act (MPRDA).

24 Bureau for Food and Agricultural Production (BFAP), *Evaluating the Impact of Coal Mining on Agriculture in the Delmas, Ogies and Leandra Districts – with a Specific Focus on Maize Production*, 2012, p.11, available at <http://www.bfap.co.za/documents/research%20reports/The%20impact%20of%20coal%20mining%20on%20agricult> ure%20-%20a%20Pilot%20study%20focus,%20based%20on%20maize%20production%20(2012).pdf

25 Ibid.

26 Hisana O. et al. (2013). *South African National Health and Nutrition Examination Survey (SANHANES-1)*.

Cape Town: HSRC Press, <http://www.hsrc.ac.za/en/research-outputs/view/6493>

third of the province, which contains the most arable and fertile land, was food insecure, and experienced hunger due to a high concentration of coal mines.²⁷

In addition to this, natural areas are often used by communities for spiritual and cultural practices.²⁸ For example, in Mpumalanga, a wetland of significant cultural and spiritual value to the Madadeni community was destroyed in the construction of Nkomati Anthracite Mine, without the community being consulted prior to the construction's commencement.²⁹ In Steenbokpan, Limpopo, gravesites were damaged by farm owners and, in some cases, relocated without the family's consent. Families need to request permission from the mine to bury their loved ones. Francina is in the process of instituting court proceedings with the assistance of Lawyers for Human Rights (LHR) against the farm owner for infringing on the community's cultural rights.

Loss of livelihood is a real threat to those living in mining communities. This is broadly to be understood to include unemployment. Every community we visited during our expedition was beset with the issue of high rates of youth unemployment. This has ancillary negative consequences for the community in the forms of drugs, prostitution, and criminal activity. Some young people have opted to start their own businesses, like spaza shops. Mokete is of the opinion that part of the impetus for this entrepreneurial spike is because of coercion between mines and Traditional Councils supporting local businesses.

3.6 Illegitimate/Illegal Business Operations

In the small town of Kanana, community leaders argue that the mines that are operational do so without legitimacy because the community has no stake in the decision-making process. The exclusion of communities, or even the tokenistic inclusion by virtue of delegated authority,

²⁷ Ibid.

²⁸ Centre for Environmental Rights submission to the South African Human Rights Commission, page 5.

²⁹ Ibid.

arguably renders the tripartite agreement null and void. There are three parties to these agreements: government; business; and the community. The agency given to tribal authorities in order to protect the community's interests appears to do more harm than good.

3.7 Grave Sites

Burial sites are respected in terms of cultural practice and bodies are subjected to rituals. Therefore, they cannot simply be exhumed. In Lephalale, grave sites have been damaged by farm owners and relocated without the families' consent. In order to bury their loved ones, the family requires permission from Ivan Platts, a Canadian platinum mining company. The mining company was granted a licence without community consent, and is mining underground in Mokopane. It has fenced the land, so that indigenous persons are unable to use the ploughing fields. As a result, MACUA coordinator, Francina, will be instituting legal proceedings against the farm owner with the assistance of Lawyers for Human Rights (LHR).

“

Where there's mining, there's no peace. Even when you die, there is no resting in peace.



CHAPTER FOUR



STRATEGIC INTERVENTIONS



4.1 Mitigating Mining Impacts

A range of strategies have been utilised by communities alongside community-based organisations, non-governmental organisations, and public interest law firms, to address the severe impacts of mining on the environment and the communities' well-being and livelihood. These different strategies have sought to engage mining companies, local government, and the DMR using numerous mechanisms or initiatives that can either restrict or mitigate the negative impacts on communities.

The most prominent strategies that have been reported to being relied on the most have ranged from protest action to media coverage and the institution of legal proceedings. Although these three strategies have featured quite prominently as the most utilised and influential as a means of engaging with local government, mining companies, and DMR, there have been other strategies which have been employed where direct contestation through legal action, protest action, or media coverage have failed to yield positive results.

Research into this area has revealed a resurgence of large community-based networks who are well organised, informed, and engaged in the struggle to vindicate the rights to land, sustainable development, and protection against harmful impacts of mining. Louis Snyman, senior attorney at the Centre for Applied Legal Studies, states: "These networks have their own lawyers and are now being capacitated to deal with systemic issues, and this means that these networks are spearheading capacitation initiatives, which has changed the game."¹ Visibility of the plight of mining-affected communities has in part increased, as a result of interventions by large community networks targeted at raising awareness.

There have also been seminal reports which have been produced by large organisations, such as CER, Ground Work, and the South African Human Rights Commission.² CER produced "Zero Hour" and "Mining: An Environmental Rights Resource Kit", which sought to capacitate mining-impacted communities in relation to their rights, as well as drawing attention to the deficiencies of the regulatory governance structures of the DMR and DWS with regards to compliance and enforcement of coal mining in Mpumalanga. These reports worked well to raise the profile of the destructiveness of the extractives industry on the well-being and livelihood of communities dependent on the environment. Publication of these reports has been an effective strategy in cataloguing the various challenges faced by communities such as poor response from mining companies, DMR, and local government as they relate to mining impacts.

Below, the report will provide an overview of strategies utilised during the study period represented through graphs and table presentations, with a particular focus on the following:

¹ Snyman adds that "there is value in local community networks like MEJCON; MACUA; Platinum Belt Alliance; Witbank Coal Fields."

² The South African Human Rights Commission (SAHRC) released a scathing report titled National Hearings on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa. The community of Somkhele also participated in the hearings, and human rights abuses identified in the area form a large part of the findings by the SAHRC.

4.1.1 How Many Times Was a Particular Strategy Used During the Period of Study?

Graph 1: Numerical Application of Strategies

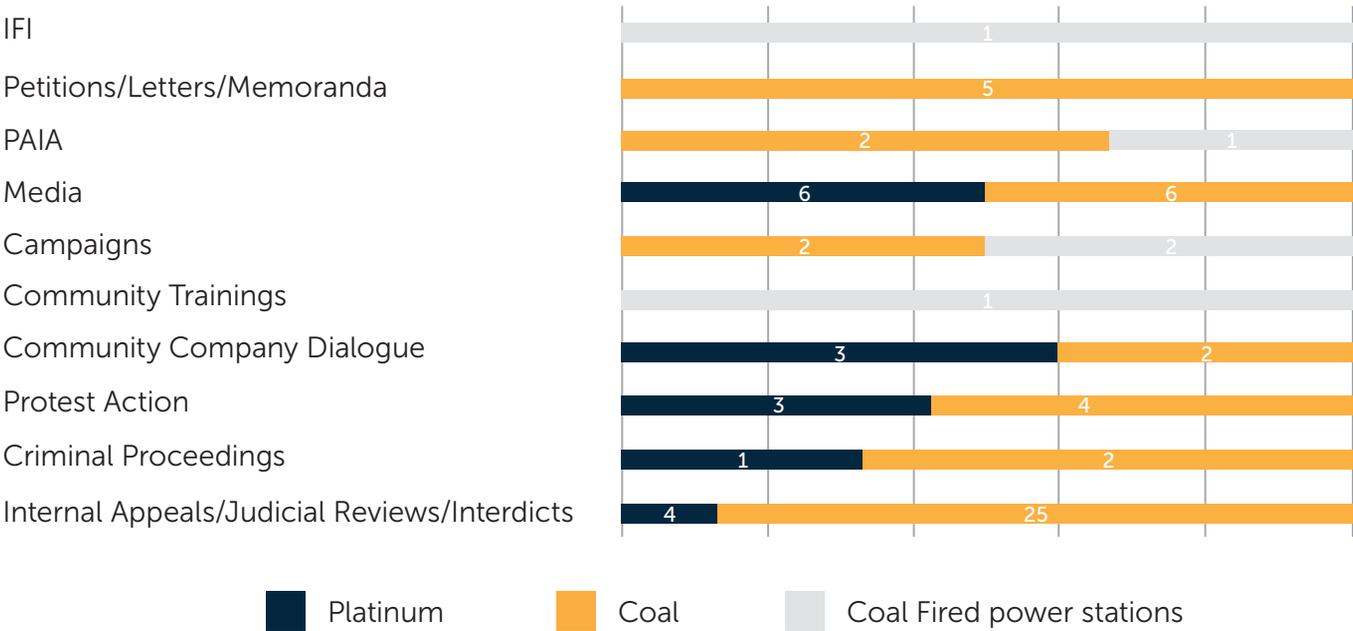
Name of Strategies	Frequency of Application
Campaigns	5
Litigation Reviews/Appeals	31
Memoradums/Petitions/ Letters	8
PAIA	3
Criminal Proceedings	3
Protest Action	8
Parliamentary Submission	1
Community Trainings	1
Social Audits	0
IFIs	1
Company-Community Dialogue	5
Media	13

Graph 2: Case Studies

Number of Case Study	Number of Combination-Strategies Employed
Case Study 1	3
Case study 2	2
Case Study 3	4
Case study 4	3
Case study 5	2
Case Study 6	2
Case Study 7	2
Case study 8	4
Case Study 9	2
Case Study 10	2
Case Study 11	2
Case Study 12	2
Case Study 13	2
Case Study 14	3
Case Study 15	1
Case Study 16	2
Case Study 17	1
Case Study 18	2
Case Study 19	6
Case Study 20	2
Case Study 21	1
Case Study 22	1
Case Study 23	1
Case Study 24	2
Case Study 25	1
Case Study 26	1
Case Study 27	3
Case Study 28	2
Case Study 29	1
Case Study 30	2
Case Study 31	4

From the data analysis, in order of frequency and in light of the 31 case studies analysed, litigation, protest action, and media are the most favoured forms of strategies that have been relied on by communities. This correlates with the stage of mining cycle in which these types of strategies are commonly used and thought to be more impactful. In at least 20 of the 31 cases, mining had already commenced, while in 11 cases, the mining cycle was at prospecting stages. Analysis of the data indicated that, where mining was at a more advanced stage, communities, CBOs, and NGOs resorted to more robust strategies of protest action, litigation, and use of media, which coincides with the mining life cycle stage in which these strategies were adopted. It could be possible that the stage of the mining cycle may influence the type of strategy adopted by communities, NGOs, and CSOs. It's possible that at different stages of the mining cycle, less robust strategies may have the potential of being more impactful, and thus utilised more frequently.

Frequency of Strategies used per different extractive and infrastructure sector



Graph 3: Assessing Frequency of Strategies per Different Extractive and Infrastructure Sector

Observing the data above, it appears that internal administrative appeals/judicial reviews and interdicts, as part of an overall litigation strategy stream, feature very prominently within the coal mining sector. This may be attributed to the existence of coal mines that exceed the number of platinum mines within different parts of South Africa. South Africa is typically known for its numerous reserves of coal, which impacts on the generation of energy particularly through coal fire power stations. With the rise of impacts brought on by coal mining, efforts are being taken by community-based organisations, communities, and civil society to reduce or stop these impacts by targeting efforts against coal fired power stations through campaigns, community trainings, promotion of access to information, and approaching international finance institutions. Out of the 31 case studies we looked at:

- 19 of them were related to prominent coal mining projects;
- 8 were related to prominent platinum mining projects;
- 3 were related to prominent coal fired power stations; and
- 1 titanium related to prominent mining projects.

Out of the 31-case sample that was collected and analysed, community training as a strategy

was only found to feature in the one case example connected to the coal fired power station sector. In our analysis of the case study sample, community training as a strategy did not feature at all within the platinum sector. There is a possibility that it may have featured as a strategy in other cases falling outside our sample size, but time restrictions, response rate restrictions from CBOs, communities, and civil society interviews, and limited access to information on other mining projects affected our ability to analyse more cases. This was a limitation consequence of our study.

It is also apparent within the data that a more diverse range of strategies is being utilised within the coal mining sector, which differs from the range of strategies used within the platinum mining sector. It appears that strategies within the platinum sector primarily focus on the most robust type of strategies, such as internal administrative appeals/judicial reviews and interdicts forming part of the overall litigation strategy stream, protest action, and community company dialogues.

Citation	Forum	Area	Prospecting or mining	Mineral, type	Applicant/ Plaintiff/ Appellant	Mining company
ANGLOPLATINUM BLINKWATER (SEKURUWE)	North Gauteng High Court	Blinkwater 820 LR, Mokopane District, Limpopo Province	Mining (construction of tailings dam)	Platinum, tailings	Members of the Sekuruwe community	Potgietersrus Platinum Ltd (wholly-owned subsidiary of Anglo Platinum)
ANKER COAL STEENKOOLESPRUIT	Regional Court Ermelo Mpumalanga	Farm Steenkoolspruit, Amsterdam, Mpumalanga	Prospecting	Coal	State	Anker Coal and Mineral Holdings (Pty) Ltd
BENICON MINE BANKFONTEIN	Administrative Appeal, MEC Mpumalanga	Remaing extent of portion 7 of the farm Bankfontein 215 IS, Breyton, Mpumalanga	Mining	Coal	Mpumalanga Lakes District Protection Group (MLDPG)	Benicon Mine
BHP BILLITON/ OPTIMUM COAL MINE SCHOONOORD	Pending Admin Appeal (MPRDA)	Portions 1, 3, 4, 5, 8, 9, 10, 13, 15, 16, 17, 20, 23 of the Farm 164 IS situated within the jurisdiction of the Steve Tshwete local municipality, Mpumalanga.	Mining	Coal	Jaco Oosthuysen, Jaco Oosthuysen Trust	BHP Billiton Energy Coal South Africa Ltd, Optimum Colliery
BRIGHT COAL COMMISSIEKRAAL	Pending admin appeal (MPRDA)	Portions 2, 3 and 8 of the farm Commissiekraal, 90 HT, Utrecht, KwaZulu Natal	Prospecting	Coal	Greater Pongola River Catchment Protection Association (GPRCPA)	Bright Coal (Pty) Ltd; Commissiekraal Coal (Pty) Ltd
EYESIZWE COAL PAARDEPLAATS	Pending admin appeal (MPRDA)	Portions 28, 29, 30, 40 of the farm Paardeplaats 380 JT and the remaining extent of portion 2 of the farm Paardeplaats 425 JS, in the district of Belfast, Mpumalanga.	Prospecting	Coal	Affected community in the district of Belfast, Escarpment Environment Protection Group (EEPOG)	Eyesizwe Coal (Pty) Limited
EYESIZWE COAL ZOEKOP BLYVOORUITZICHT	North Gauteng High Court (former TPD), RMDEC	Portions 1 through 8 of the Farm Zoekop 426 JS, portion 2 and 4 of the Farm Blyvooruitzicht 383 JT, and the remaining extent of portion 1 of Farm Leeuwkop 427 JS. District of Belfast, Mpumalanga.	Prospecting & Mining	Coal	Highland Organics (Pty) Limited and private landowners and affected communities near Leeuwkop farms in district of Belfast	Eyesizwe Coal (Pty) Limited, Exarro Coal Mpumalanga (Pty) Ltd
GOLFVIEW MINING LELIESFONTEIN	Criminal Prosecution, Regional Magistrates' Court Ermelo Mpumalanga	Leliesfontein Farm, Ermelo, Mpumalanga	Mining	Coal	State	Golfview Mining/Anker Coal
KHULILE MINES (PTY) FARM WITKRANZ	Pending admin appeal (MPRDA)	Portions 4, 7, 11 and the remaining extent of Farm Witkranz 53 IT, Ermelo, Mpumalanga (close to Carolina)	Prospecting	Coal	Mpumalanga Lakes District Protection Group (MLDPG) and affected landowners	Khulile Mines (Pty) Limited
LIMPOPO COAL COMPANY MAPUNGUBWE	Pending admin appeal (MPRDA); interdict proceedings in South Gauteng High Court; appeal against s 24G authorizations in terms of NEMA; appeal to Water Tribunal	Bergen op Zoom 124 MS; Semple 15 MS; portions 3, 4, 5, 6, 13, 14 and the remaining extent of Overvlakte 125 MS; Voorspoed 836 MS. District of Musina, Limpopo Province	Mining	Coal	life After Coal/ Impilo Ngaphandle Kwamalahle campaign, a joint effort by EarthLife, groundWork, and the Centre for Environmental Rights	Limpopo Coal (Pty) Ltd (owned by Australian-based Coal of Africa); Minister of Mineral Resources

Environment Allegedly Harmed	Relief Sought	Strategies Employed
Yes	Judicial review of lease between PPL and Minister of Rural Development and Land Reform; declaratory and interdictory relief against pumping of tailings into dam	<p>The interim interdict application was made in the North Gauteng High Court by the Sekuruwe community against Anglo Platinum's Potgietersrus Platinum mine to stop the mine from continuing with further construction of the tailings dam on their land and from pumping more waste into the dam unless it has obtained the required authorisations.</p> <p>It has also launched a review application to set aside the minister of rural development and land reform's decision to grant the firm a lease over a substantial portion of the community's land on Blinkwater.</p> <p>Protest Action was also reported in mainstream media. The community has also written letters to the President, the Premier's Office, the Department of Minerals and Energy and many others to request them to come to the community to resolve the issues, but no one has responded.</p>
Yes	Conviction, ceasing activities and rehabilitation	Criminal Proceedings launched affected communities and civil society against the offending directors of the mining company
Yes	Overturn the positive EA	Litigation and internal legal administrative appeals.
Yes	Set aside conversion of old order right to new order right	Protest action
Yes	Set aside the prospecting right	Internal Administrative Appeal of the granting of prospecting right; 3 letters of objection were submitted to DMR and Bright Coal regarding prospecting right one each on the part of the GPRCPA, WWF (per Angus Burns) and the Impala Water Users Association; access to information request.
Yes	Set aside prospecting right and approval of environmental management plan, suspend prospecting right pending finalization of appeal.	<p>Legal proceedings involving internal administrative appeal processes of MPRDA of the granting mining right to the DMR.</p> <p>Eyesizwe Coal applied for a prospecting right for coal near Belfast in Mpumalanga. The company however did not submit the details of its public participation process to RMDEC (Regional Mining and Development and Environment Committee) (which RMDEC had specifically requested). Both EEPOG (Escarpment environment protection group) and the MTPA (Mpumalanga's Tourist and Parks Agency) objected to the prospecting rights application and these were tabled at four RMDEC meetings</p>
Yes	Set aside prospecting right and approval of environmental management plan, undertake proper public participation and consultation, correct deficiencies in EMPR and scoping report.	When Eyesizwe Coal applied for a prospecting right in Belfast, Mpumalanga, the MTPA similarly lodged strong objections to the granting of the right, because the proposed site was located in a fertile agricultural area. The MTPA clearly stated that farming was a more suitable option in the area and that coal mining was "not an option". Once again, the prospecting right was nevertheless granted
Yes	Conviction, ceasing activities and rehabilitation	Criminal Proceedings launched affected communities and civil society against the offending directors of the mining company
Yes	Withdrawal of approval of prospecting right/EMP and suspension of prospecting right until finalization of appeal.	Legal proceedings involving internal administrative appeal processes of MPRDA of the granting mining right to the DMR.
Yes	Withdrawal of approval of mining right/EMP; final and interim interdicts restraining operations at Vele colliery; withdrawal of approval of section 24G authorizations; withdrawal of approval of WUL.	Various organisations protested against the development in Mapungubwe, in Limpopo, even threatening legal action should the department decide to grant authorisation for further construction. Coalition groups also attempted to enter into negotiations with the mining company which often broke down. In 2012, coalition of groups and communities accepted to participate on a body known as Environmental Management Committee.

Citation	Forum	Area	Prospecting or mining	Mineral, type	Applicant/ Plaintiff/ Appellant	Mining company
MASHALA RESOURCES FERREIRA MINE ERMELO	Pending admin appeal (MPRDA), objection re WUL (NWA), pending court case dealing with access to road and spoliation	Portion 19 of Farm Witbank 262 IT, Ermelo, Mpumalanga	Mining	Coal	Dolla van Rensburg Trust, Van Rensburg Family, Kleinbegin Boerdery, Lawyers for Human Rights	Mashala Resources (Pty) Ltd
MINE WAST SOLUTIONS STILFONTEIN	Admin Appeal (NEMA), Water Tribunal	Various portions of the farms Stilfontein 408 IP, Hartebeesfontein 422 IP, Zandpan 423 IP, Kiepersol 481 IP, Mapieskraal 441 IP, Buffelsfontein 443 IP, and Wildebeestpan 442 IP, all situated in the North-West Province.	Mining	Tailings (establishment of Centralized Tailings Deposition Facility)	Federation for sustainable development (FSE)	Mine Wast Solutions (Pty) Ltd, Chemwes (Pty) Ltd, First Uranium (Pty) Ltd
TRANSWORLD ENERGY AND MINERALS RESOURCES XOLOBENI	Interim decision on internal admin appeal	Xolobeni tenement area, Eastern Cape	Mining	Titanium-bearing mineral sands	The Amadiba Crisis Committee	Transworld Energy and Minerals Resources (SA) (Proprietary) Limited
TROLLOPE MINING SERVICES ELANDSKLOOF	Pending Admin Appeal (MPRDA)	Farm Elandskloof 321JT, Belfast, Mpumanga	Prospecting	Coal	Mining company (Trollope mining services 2000 (Pty) Ltd)	Trollope mining services 200 (Pty) Ltd
UMCEBO KLIPPAN	Administrative Appeal in terms of MPRDA, EMPR amendment, WUL application, EIA appeal	Farm Klippan 452 JS, Belfast, Mpumalanga	Mining	Coal	Escarpment Environment Protection Group (EEPOG)	Umcebo Mining
XSTRATA VERKEERDEPAN WITRAND JAGLUST	Pending Admin Appeal (MPRDA)	Verkeerdepan 50IT, Witrand 52IT, Jaglust 47IT, magisterial district of Carolina, Mpumalanga.	Mining	Coal	Community (Mpumalanga Lakes District Protection Group)	Xstrata Coal (Pty) Ltd
VELE MINE	Administrative Appeal (MPRDA)	9 km from the Mapungubwe Cultural Landscape, Limpopo Province	Mining	Coal	Mapungubwe Action Group which is a group made up of local residents, farmers, community groups and concerned citizens from Limpopo, EWT, Birdlife SA, WWF SA, Wilderness Foundation SA, Peace Parks Foundation SA, Association of Professional Archeologists SA, Centre for Child Law	Limpopo Coal (Pty) Ltd (owned by Australian-based Coal of Africa); Minister of Mineral Resources

Environment Allegedly Harmed	Relief Sought	Strategies Employed
Yes	(1) Appeal against the decision to grant a mining right and approve the EMP. Request to suspend the grant of the mining right pending the outcome of the appeal. (2) Objection to granting of WUL to Mashala Resources; request to suspend granting until proper consultation undertaken. (3) Spoliation proceedings to restore access road and/or pay compensation.	Legal proceedings involving internal appeal processes of MPRDA of the granting of mining right to the DMR.
Yes	Reversal of positive environmental authorization, withdrawal of water use licence	Criminal Proceedings launched by affected communities and civil society (FSE) against the offending directors of the mining company. Internal appeal of Water Use License at Water Tribunal
Yes	Overrule of the grant of the mining right; suspend prospecting activities while the appeal is being considered.	Blockades; submissions of complaint letters and petitions to DMR and parliament; Media based activism; creation of alternative reports; circulation of newsletters raising awareness by Amadiba Crisis Committee; objections raised against EIAs before DMR; legal action through court proceedings
Yes	Overrule the grant of the prospecting right; suspend prospecting activities while the appeal is being considered.	The MTPA (Mpumalanga Lakes District Protection Group) therefore lodged express objections to the granting of the right. Mining authorisation was nevertheless granted by the DMR. Affected landowners requested that the mining consultant appointed by the company provide them with access to information. These requests were however refused. The landowners then instructed their attorneys to submit a PAIA request to the DME to obtain this information. The DME only partially granted this request, but did not give any reasons why the rest of the information was not disclosed. The landowners requested that the rest of the information be released. However, the DME did not respond.
Yes	Set aside mining right, approval of EMPR amendment and positive environmental authorization, secure participation in granting of WUL	The MTPA (and the Mpumalanga Lakes District Protection Group) strongly objected to the granting of the mining right, but authorisation was nevertheless granted by the DMR
Yes	Withdrawal of approval of mining right/EMP and suspension of mining right until finalization of appeal.	Protest action; Community company meetings. In late June 2012, and acting on behalf of the Silobela community and the Federation for a Sustainable Environment (FSE) respectively, the Legal Resources Centre (LRC) and Lawyers for Human Rights (LHR) took the Chief Albert Luthuli Local Municipality, Gert Sibande District Municipality, the Minister of Water Affairs and others to court to compel them to provide an adequate water supply to Carolina. The court found in favour of the Silobela community in July 2012, ordering the Gert Sibande District Municipality to provide temporary potable water to residents within 72 hours. It also ordered the municipality to meaningfully engage with the residents of Carolina. No order was granted against the Minister of Water Affairs or her Department.
Yes. Right to water is violated due to the high water consumption and water pollution, due to the mine's close proximity to the Limpopo River	Withdrawal of approval of mining right/EMP; final and interim interdicts restraining operations at Vele colliery; withdrawal of approval of section 24G authorizations; withdrawal of approval of WUL.	An opposition group consisting of local landowners, the Endangered Wildlife Trust, the Mapungubwe Action Group, the Office of the International Coordinator and Greater Mapungubwe Transfrontier Conservation Area (GMTFCA) – on behalf of Peace Parks Foundation – objected to all industrial activity through court reviews of the decision to grant a water use license, an interdict and appeal against the the EMP developed by Vele Mine in that part of the very sensitive Limpopo Valley without an approved Integrated Regional Development Plan.

Citation	Forum	Area	Prospecting or mining	Mineral, type	Applicant/ Plaintiff/ Appellant	Mining company
MAKHADO MINE	Administrative Appeal pending (MPRDA)	Vhembe District, Limpopo Province	Mining	Coal	Mudimeli Community, Vhembe Mineral Resources Stakeholders Forum, Makhado Action Group	Limpopo Coal (Pty) Ltd (owned by Australian-based Coal of Africa); Minister of Mineral Resources
THABAMETSI COAL FIRED POWER STATION	Administrative Appeal (NEMA)	Lephalale in Waterberg Limpopo	Project (Not operational)	Coal-fired power station	Earth Life Africa	Exxaro Resources Limited
SOMKELE MINE	Pending admin appeal (MPRDA); interdict proceedings in Kwa-Zulu Natal High Court against continueing mining operations	Somkele Mine in the district of Mtubatuba adjacent to Hluluwe-Imfolozi Park Kwa-Zulu Natal	Mining	Coal	Global Environmental Trust; Mfolozi Community Environmental Justice Organization	Tendele Coal Mining (Ltd)
BARBETON MINE	Administrative Appeal of a prospecting right granted in terms of s 17(1) (MPRDA); Appeal proceedings in Supreme Court of Appeal against High Court order confirming the granting of a prospecting right by Director of DMR in an area reserved as a protected area according to s 48(1)(a) and s 48(1) (b) of NEMPA	Barbeton Nature Reserve, Barbeton a district in the province of Mpumalanga	Prospecting	Gold and Silver	Mpumalanga Tourism and Parks Association, Mountain Owners Association	Barbeton Mining Ltd

Environment Allegedly Harmed	Relief Sought	Strategies Employed
<p>Yes. Right to water is violated due to cumulative impacts of water abstraction, water quality changes, changes in the hydrology and sedimentation of the Mutamba River and riparian wetland floodplain ecosystems. This will affect access to water and the ability to farm for communities and farmers located in close proximity</p>	<p>Withdrawal of approval of mining right/ EMP and suspension of mining right until finalization of appeal; withdrawal of use of WUL</p>	<p>Communities in the Mudimeli area where the mine attempted to begin process, applied for an interdict at the Limpopo High Court, where the court ruled that any development will be halted until the mine resolved issues pertaining to empowerment arrangements and environmental impact assessments</p> <p>Campaigns featuring local communities and farming businesses to halt operations and development of the mine.</p>
<p>Yes. The power station would be built in the Waterberg, an area in Limpopo that is already so water stressed that the Department of Water and Sanitation is pumping water into it as part of the Mokolo Crocodile Water Augmentation Project to supply industry and residents with water</p>	<p>Upholding an appeal against the decision granting an environmental authorisation of the building of a coal fired power station. This would suspend appeal process thereby temporarily stopping the application process to acquire water use licence and atmospheric emission licence.</p>	<p>The Coal Campaign began in 2013 and is a partnership between groundWork, Earthlife Africa Johannesburg and the Centre of Environmental Rights to challenge Eskom, South Africa's parastatal energy producer, and government to change the country's energy policies and practice due to the many impacts of coal on people's health, the environment and of course, its major contribution to climate change. Whilst Eskom is an evident target, the campaign also looks at resisting the construction of new independent coal-fired power stations and coal mines. Therefore, a large part of this campaign deals with creating awareness and raising the profile of the negatives of coal in South African and the world, in order that people call on the government for a different energy future. Currently, the people most affected live close to the operational coal-fired power stations and the open-pit mines supplying the power stations. People along the roads where coal is transported are affected by the increase in traffic and the deteriorating road conditions.</p>
<p>Yes</p>	<p>Withdrawal of approval of mining right/EMP; final and interim interdicts restraining operations at Somkele.</p>	<p>Community Company Dialogue: The woman in the Somkhlele and Fuleni communities in northern KwaZulu-Natal, affected by the Tendele Coal Mine have been involved in numerous attempts to have the mine fulfil its obligations to the impacted communities. They wrote and submitted a letter which sought to encourage community company dialogue. The main message of this letter focuses on the reality that impacted people in Somkhele have been seeking response and assistance from the mine for more than five years. These efforts date back to at least June 2011, when an attorney from Cullinan & Associates was mandated to meet with the mine to discuss the many concerns of affected people in Somkhele.</p>
<p>Yes</p>	<p>Set aside prospecting right and approval of environmental management plan</p>	<p>The grant of a right to Barberton Mines (Pty) Ltd in 2006 to prospect for gold and silver inside the Barberton Nature Reserve near Nelspruit. Legal challenges in relation to this right are still ongoing.</p>

Citation	Forum	Area	Prospecting or mining	Mineral, type	Applicant/ Plaintiff/ Appellant	Mining company
MOGALAKWENA PLATINUM MINE	No reported litigation underway that one is aware of	Mapela district in the province of Limpopo	Mining	Platinum, tailings	Mapela community members and leaders	Anglo American Platinum
Yzermyn Mine	Pending Judicial Review of Ministerial decision, judicial review of decision of Minister to approve mining in a protected area, pending WUL Appeal before Water Tribunal, appeal against land use change/rezone application	Wakkerstroom within Enkangala Drakensberg strategic water source area in the district of Mpumalanga	Prospecting	Coal	The coalition consists of the Mining and Environmental Justice Community Network of South Africa, Earthlife Africa Johannesburg, Birdlife South Africa, the Endangered Wildlife Trust, Federation for a Sustainable Environment, groundWork, Association for Water and Rural Development (AWARD) and the Bench Marks Foundation, and is represented by the Centre for Environmental Rights	Atha-Africa Ventures Pty Ltd
Modikwa Platinum Mine	Notice issued by the Department of Water and Sanitation under the National Water Act	Mudikwa Limpopo	Mining	Platinum, tailings		African Rainbow Minerals
KHANYISA POWER STATION	Administrative Appeal (NEMA) Two Pending judicial review of environmental authorisation granted by Minister of Environmental Affairs in the Pretoria High Court	The power station would be located on the site of Anglo American Thermal Coal's Kleinkopje colliery in Mpumalanga	Proposed project (Not operational)	Coal fired power station	Life After Coal/Impilo Ngaphandle Kwamalahle campaign, a joint effort by EarthLife, groundWork, and the Centre for Environmental Rights	Anglo American Thermal Coal

Environment Allegedly Harmed	Relief Sought	Strategies Employed
Yes	Community members seek to secure inclusion in the decision making processes related to how funds are allocated for development and how mining operations are to be conducted in full view of the entire community as a whole and not dealings with just traditional leaders. They seek meaningful inclusivity within decisions addressing the interests of the community at large	In September 2016, residents from Ga-Malukane and Chaba Village blocked off the road at Witvinger that leads to Anglo American's Mogalakwena platinum mine, in Limpopo, and set a truck alight, allegedly over unresolved mine promises. Most recently, nine residents of Ga-Pila were arrested for demanding to meet with the Mogalakwena mine.
Yes	Set aside approval of mining right and approval by Ministers of Environment to undertake mining operations within protected Mabola area. Suspending application for Water Use Licence pending appeal before Water Tribunal	Judicial Review application has been made by an eight member coalition of community and civil society groups, to set aside the decision of the Mpumalanga DEA to grant environmental authorisation to Atha. An interdict has also been applied to prevent any activities commencing.
Yes	Enforcement of compliance water use licence by the DWA, through issuing of notice to ARM	One protest that turned especially violent occurred in June 2006 when around 150 villagers from the Maandagshoek community held demonstrations at Onverwacht farm against the company's plans to begin drilling operations there
Yes	Setting aside of environmental authorisation granted by the Minister of Environmental Affairs to commence building and operating power station	The Life After Coal Campaign (comprising representation from groundwork, Earthlife and CER) urges NERSA (National Energy Regulator of South Africa) to refuse the applications and the Minister of Energy, Eskom and the financiers of this project to reconsider their support for these two projects. The Campaign will continue, through litigation and advocacy, to oppose all new coal-fired power stations, including the two preferred bidders. Communities have also relied on Promotion to Access to Information Applications: 30 civil society organisations representing communities affected by Eskom's coal fired power stations wrote an open letter to the Ministers of Public Enterprises, Energy, Environmental Affairs, and Health in regards to Eskom's activities. In the open letter the organisations asked for access to pertinent information which included: <ul style="list-style-type: none"> • each coal-fired power station's latest plans to ensure compliance with: <ul style="list-style-type: none"> o the emission standards in the relevant air emission licences, and o in relation to periods not covered by the current licences, at least with the minimum emission standards prescribed by law • copies of these compliance plans and the latest decommissioning schedule and plans for each coal-fired power station; and • the decision-making timelines and mechanisms within Eskom's board to ensure compliance with the licences and the standards, and the decommissioning schedule and plans Eskom has, to date, failed to respond to a request under the Promotion of Access to Information Act for these records. CER acting on behalf of the organisations has also filed written objections.

Citation	Forum	Area	Prospecting or mining	Mineral, type	Applicant/ Plaintiff/ Appellant	Mining company
FULENI		Hluhluwe-Mfolozi Kwa-Zulu Natal	Proposed project (Not operational)	Coal	Mfolozi Community Environmental Justice Organisation (MCEJO) activists and researchers from the Centre for Civil Society (CCS) – UKZN, Mining Affected Communities United in ActionFarmers Indigenous groups or traditional communities.	Ibutho Coal
MEDUPI POWER STATION	No reported litigation underway that one is aware of	Lephalale in Waterberg Limpopo		Coal fired power station		
WONDERFONTEIN	No reported litigation underway that one is aware of	Portion 14 of the Farm Klippan 452 JS Albert Luthuli Local Municipality, Nkangala District Belfast Mpumalanga	Mining	Coal	Wonderfontein Community Association,	Umsimbithi Mining (Pty) Ltd

Environment Allegedly Harmed	Relief Sought	Strategies Employed
<p>Yes. Community members of complain that they now receive water once a week from a truck. The issue of water for the proposed mine remains unresolved. The Mfolozi River catchment is a highly water stressed area recently in the grip of one of the worst droughts in living memory. The sourcing of such a large volume of water, without taking it away from people and their needs, has not been clarified. Pollution of surface and ground water resources is an inevitable consequence of open cast coal mining. Rural people, their livestock and wild animals are dependent on existing water resources. Should the Mfolozi river become polluted by AMD, there would be impacts for residents living downstream in the towns of Mtubatuba</p>		<p>Blockades Boycotts of official procedures/non-participation in official processes Creation of alternative reports/knowledge Development of a network/collective action Involvement of national and international NGOs Media based activism/alternative media Objections to the EIA Official complaint letters and petitions Public campaigns Street protest/marches</p>
<p>Frequent complaints of air pollution brought about by coal burning. Community complained of foul smells coming from areas in which waste from coal fire station was being dumped. Community members also noted lack of access to water brought about by water shortage as a result of Medupi's operations.</p>		<p>Community training: Community to pressure World Bank to admit gender impacts of Medupi Lephale Limpopo Women and men from these local communities will be trained to minimise and mitigate Medupi's harmful gender impacts. Gender Action, with host environmental justice organisations groundWork [3] and support from Earthlife Africa (Johannesburg) [4], will train civil society organisations and communities from Lephale, Thabazimbi, south Durban, the Vaal and Highveld to use the IFI Toolkit [5]. This toolkit will train participants on conducting IFI gender analyses to better understand the impacts Medupi will incur on the lives of women and how mitigation of these can take place. Through this workshop, the training received may help the local community identify the negative impacts on gender equality they will face as a result of Medupi and give them the tools to hold the Bank accountable to their own policies promoting gender equality and women's empowerment. This training presents the communities of Lephale an opportunity to demand compliance from Medupi and possibly the World Bank through its Inspection Panel by highlighting the social issues that this construction will bring to bear on the community at large. International financial institutions: Earthlife, groundwork and affected communities has been involved in monitoring and challenging the World Bank's loan to Eskom for the development of Medupi from the beginning. GroundWork played in major part in convincing the World Bank (WB) Board to review its loan to Eskom. Before the loan was granted to Eskom, various issues were highlighted by the Lephale community including concerns about water availability, health impacts, cultural and heritage issues, impacts from increased mining, impacts of sand mining, climate change and a host of other concerns. groundWork, together with the community and other NGOs, challenged the World Bank and called for the intervention of the World Bank Inspection Panel (IP).</p>
<p>Yes</p>	<p>Community expressed the importance of concluding agreements for relocation followed by compensation, prior to relocations being facilitated</p>	<p>Community members from a nearby township in Carolina Mpumalanga called Silobela, organised a protest that sought to stop operations Phembani, East side, Wonderfontein Colliery, Umncebo, Mimoosa, Stratray, Alsu, Msimbithi, Muhangu and other mines. The Police however strongly responded with use of force to quell protest action. Letters were written by the Federation of Sustainable Environment (FSE) to DMR and DWS alerting both that the mine was conducting operations in contravention of MRPDA, NEMA, DWS and the town planning and township ordinances. Legal appeal lodged by FSE at Water Tribunal against decision to grant water use license.</p>

4.1.2 Most Frequently Used

The data typically shows that communities have continued to rely on voicing their contempt by means of protest action, media and memorandums, and where that has been unsuccessful, they have resorted to litigation. The use of media has worked hand-in-hand with protest action as a means to amplify the struggle demands. Memorandums have been somewhat effective in the issues faced by mining communities to handing over to influential members of government and corporations. The ability to be able to record grievances has enabled communities to see that this is an alternative way to amplify their voices, since the space to do this is somewhat limited in litigation proceedings. The handing over of memorandums to government or corporate officials is often incidental to protest action. One such example is the Alternative Mining Indaba (AMI).³

Although litigation is most frequently used, the sequential order shows us that litigation is not necessarily a first resort, but rather a culmination of multiple strategies employed prior to seeking legal relief for the promotion, protection, and enforcement of rights to land and natural resources.

Common relief sought within litigation strategy includes: internal appeal (within the MPRDA); reviews (outside of the MPRDA); and interdicts (outside of the MPRDA). Internal complaints mechanisms through the MPRDA first must be exhausted before courts can be approached to review, set aside the minister's decision, and or to temporarily suspend mining operations through granting of interdicts. The high cost and lengthy process of litigation proceedings are not represented on the graph above, with the resultant effect that the wheels of administrative justice grind very slowly.

4.1.3 Less Frequently Used

Outside of the most prominent three strategies mentioned, communities have sought relief using alternative strategies, namely: company-community dialogue; campaigns; PAIA and criminal proceedings. Communities are able to express themselves more directly and capture feelings of the community in garnering support in raising the outcries in a public space using these strategies. These particular strategies increase the principles of agency and self-determination by communities and increasingly gain traction as grass roots-based interventions.

Drawing from data and interviews, communities typically write letters and receive responses, which is a positive indication that mining corporations are willing to engage directly with communities around their grievances. Over the past five years of the AMI's existence, from what started with 40 civil society actors has now expanded to more than 300 international participants, including mining corporations. Engagement with industry is incorporated into the agenda through the Secretariat's interaction with International Council on Metals and Mining (ICMM). This approach has demonstrated to communities that there are avenues and that companies can be approached directly, but, often, approaching them directly has resulted in incidences of violence and oppression, which diminishes the effectiveness of the strategy. This could be offered as a reasonable explanation as to why this particular strategy is not as frequently used as previous examples.

Drawing from data and interviews, campaigns typically are focused on a common goal requiring general consensus. From our interviews with community leaders and members as well as background literature, factionalism within communities has resulted in divided interests and allegiances, which have curtailed communities leveraging support through campaigns. A prominent case in which there was an effective utilisation of a campaign, however, was the

³ See <https://www.businesslive.co.za/bd/companies/mining/2018-02-08-alternative-mining-indaba-lays-out-list-of-demands-in-memorandum/>

“Right to Say No”, which garnered support across the board.

Proponents of PAIA, such as CER and CALS, regard this mechanism as a viable strategy, but this is not often used because communities are not sufficiently capacitated around the technical aspects required in lodging this request. Communities require the expertise and resources with which to approach lawyers, often hampering many communities, since there are not many PIL offering services on a pro bono basis. Further, PAIA applications are lengthy and often fail to grant access to important information, necessary for the promotion of rights of the communities in relation to land and natural resources. This is as a result of specific information being declared confidential at the discretion of the regulator. In a subsequent section, we shall elaborate on the barriers to using PAIA as a strategy, and this supports the less frequent use thereof.

Criminal proceedings are not a viable remedy for communities in the face of intimidation, retaliation, and threats by mining companies and private security companies, which are well documented and frequently referred to during our interviews with community leaders. On the rare occasion where complaints are lodged with relevant authorities, the remedies often only result in criminal sanctions against the mining officials in their personal capacity. In these instances, however, the fines are either suspended or officials imprisoned, and the remedies do little to reduce the overall negative impacts of mining.⁴

⁴ Criminal prosecution of environmental crimes is slow and difficult, particularly in an already overburdened criminal justice system. Criminal prosecution requires collecting evidence that will withstand the burden of proof required in criminal cases, namely beyond a reasonable doubt. It also crucially requires the cooperation of both police and individual prosecutors, many of whom are not well acquainted with environmental laws. It also requires judges and magistrates who are willing to impose maximum penalties for crimes that are often not, in our socio-political context, considered particularly serious.

4.1.4 Least Frequently Used

Parliamentary Submissions

Parliamentary submissions are an entry point that has not been penetrated sufficiently by mining-affected communities or bridged by NGOs for access by communities. This translates to policy determinations being further removed from where it would affect most change.⁵ This was most apparent in the recent rejection of the Draft Mining Charter by community-based organisations, represented by CALS. One of the motivations offered for the ineffective use of this strategy is the fact that there is disparity between the importance placed on the protection of environmental rights compared to the governance of transparency and accountability within the mineral sector. Communities are hampered from directly engaging these spaces, unless represented by NGOs within strategic partnerships, thereby further disenfranchising them. This perhaps indicates why the reported number of use of this strategy is low across the studies that we have analysed.

IFIs

Earth Life, Ground Work, and other CBOs have been monitoring Eskom’s Medupi Power Station. The data contained in news articles and websites affiliated to Earth Life and Ground Work reported that communities living in close proximity to Medupi approached the World Bank Board, relaying concerns and requesting them to conduct an inspection into Medupi. The inspection probed the veracity of Eskom’s operational policy and procedures in relation to the project. They called for the intervention of the World Bank Inspection Panel and alleged numerous health and other environmental harms by Medupi as a result of operational irregularities.

Trainings

Over the last ten years, there has been a proliferation of legal cases representing mining communities, with little to no benefit to the same communities. As more NGOs become aware of the needs of communities, there is an increased

⁵ See <https://www.wits.ac.za/news/sources/cals-news/2018/cals-and-community-networks-weigh-in-on-draft-mining-charter.html>

realisation that NGOs need to create a dedicated space with a particular focus on training. This is evidenced by the work of Action Aid, CER, Oxfam, and others. CER, for example, were initially litigation-focused but recognised that this is not always the best strategy. In February 2018, they undertook a Litigation review and developed a more people-centred approach because “litigation wins do not necessarily translate to a better life (for communities)”. Only one out of the 31 case studies examined relied on training as a strategy for empowerment, which is a cause for concern. In light of recent discussions with NGOs, however, there appears to be a renewed focus on training. One such example is the legal training conducted by CER that selected approximately 20 community activists for a three-week-long training on disclosure legislation.

Social Audits

This study is limited in its scope and, while we are aware of the increasing amount of social audits currently undertaken by organisations such as Action Aid, MACUA, and Plan Act, our data indicated that social audits were not a strategy that was relied on. To the contrary, our interviews with community leaders and NGOs would indicate that social audits have gained sufficient traction on the ground to the extent that communities are trained in this specific strategy. While they are prevalent, they are not widely reported in mainstream media, and data is restricted; therefore there are no results of use of this strategy. We have been informed that a publication on the results and effectiveness of social audits conducted over the 2017/8 period will be released in 2019.

4.1.5 Whether the Strategy Was Successful in Achieving Remedies

Graph 4: Assessing the effectiveness of strategies utilised across the 31 sample case studies

Assessing Effectiveness of Strategies										
Name of Strategy	Did the strategy prevent further impact?		Were the direct impacts to affected persons minimised?		Did the impacts stop?		Did the strategies achieve the remedies the community was seeking?		Were the affected persons'/ communities' concerns acknowledged?	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Litigation (Reviews/ Appeals/Interdicts)	x		x			x	x		x	
Campaigns		x	x			x		x	x	
Memorandums/ Petitions/Letters	x		x			x		x	x	
PAIA		x		x		x	x			x
Criminal Proceedings		x	x		x			x	x	
Protests		x	x			x		x	x	
Parliamentary Submissions		x	x			x		x	x	
Community Trainings	x		x			x		x	x	
Social Audits		x	x			x		x	x	
IFI	x		x			x	x		x	
Company-Community Dialogue		x	x			x		x	x	

4.1.6 Whether Multiple Strategies Were Used in Conjunction with Other Strategies?

Drawing our analysis from our sample of 31 cases, the use of multiple strategies at multiple points was necessary to bolster the success of addressing the impacts brought on by mining. Our interviews have also supported the notion of a successful combination of strategies to include litigation, community mobilisation in its various forms, and media.

According to our case studies, approximately 50% of the 31 showed at least two strategies being used simultaneously. Strategies used in conjunction with others and most frequently were media and litigation. Only 13% of the case studies examined used three strategies and 10% used four or more strategies collectively. The recent victory by the Xolobeni community demonstrated the strength of utilising multiple strategies in combination. In this case, six strategies were used, which culminated in litigation being the resultant strategy, and in the High Court positively pronouncing the community's right to self-determination of their land after 15 years.⁶ From the data, we can conclude that a sustainable challenge to mining impacts requires a multi-pronged approach at different stages of the mining cycle and throughout the duration of the project.

Different strategies will be more effective at different stages of a project and the data suggests that, where multiple strategies were used prior to the commencement of mining, the prospects of negative impacts on communities were reduced. The data indicated that, at this stage, multiple strategies were utilised in combination. Once mining commenced, however, the number of strategies used collectively decreased, which could be indicative of some strategies not being as effective at this stage of mining.⁷ In the Xolobeni case, with the

support of the Amadiba Crisis Committee, the community over time resorted to litigation as an option, after utilising a number of strategies, such as local community protests and local level complaints. Furthermore, in the case of Somkhele⁸, the affected community sought closure of the coal mine as their ultimate objective and, in pursuit of that, adopted multiple strategies which included direct engagement with the mining establishment, which progressed to protest action and culminated in the initiation of legal proceedings.⁹

4.2 Barriers Restricting Effective Implementation of Strategies Addressing Negative Impacts Associated with Mining

There are a number of barriers that communities or community-based organisations often encounter and will encounter whenever they attempt to utilise different strategies, to address the negative impacts that are associated with mining. These barriers often diminish the capacity of communities and community-based organisations to successfully address the circumstances by which mining-related activities curtail their environmental and socio-economic rights. At various stages throughout the life cycle of a mine, these barriers present obstacles that undermine valuable attempts by communities and community-based organisations, to either raise objections to continued mining without benefits, or to require remediation for degradation to the environment and their well-being and livelihoods. These barriers will be discussed below, and how these barriers undermine or seek to undermine the effective

community and the mine. They also approached the LHR to lodge requests for all information and correspondence in relation to the project. See also <http://www.lhr.org.za/news/2012/kgobudi-community-challenges-platreef-mining-companys-interdict-keep-them-their-land> and <https://reviewonline.co.za/151477/controversy-over-platreef-mines-operational-legality/>, See <http://www.lhr.org.za/news/2014/press-statement-community-organisation-appeals-against-platreef-resources%E2%80%99-mining-right>

⁶ See <https://www.dailymaverick.co.za/article/2018-11-22-wild-coast-community-wins-15-year-david-and-goliath-battle-against-australian-mining-company/>
⁷ In the case of *Mokopane community vs. Platreef Mine*, it was reported that the community approached the Regional Mining Development and Environment Committee (a provincial government body) and requested mediation between the
⁸ See <https://mg.co.za/article/2018-11-23-00-mine-fight-goes-on-despite-ruling>
⁹ See <https://www.iol.co.za/dailynews/news/court-bid-to-close-kzn-coal-mine-16704690>

implementation of strategies designed to address mining-associated impacts.

4.2.1 Community Consultation Proceedings

Although NEMA and the MPRDA make provision for consultation with all “interested and affected people”¹⁰ on the potential impacts of mining operations on land, water, air, people, plants, animals, buildings, and houses, in practice this does not translate to the type of adequate and meaningful consultation that the legislation and Constitution envisage.

Mining companies create barriers to meaningful and effective consultation in practice in two ways:

4.2.1.1 Dissemination of Information

Mining companies create this barrier through the utilisation of environmental authorisation practitioners (EAPs), who are tasked with engaging with interested and affected parties (IAPs) through public meetings and recording comments and concerns raised. Affected communities have expressed that some mining companies rarely make accommodations to ensure that many people in mining-affected communities can understand the relevant issues, and participate fully by virtue of consultation being done in a language and at a venue that is easily accessible. Some communities affected by mining-related impacts have expressed that *“the public participation process has not been enough and that the reports were not clear enough, or that the community did not really understand the explanations provided by the EAPs”*.¹¹ They have expressed that concerns raised during the consultations have not been taken seriously enough, and that rather a tick box approach was adopted in order to validate consultation being completed according to legislative requirements expressed in NEMA and the MPRDA.¹² According to mining representatives coming from the Sekhukhune region in Limpopo, where the

Twickenham and Bokone Platinum Mine, are based, they stated:

“

Communities were relocated because of the mines. There were no meaningful consultations with communities around relocation. People partly agreed, but they lacked information.¹³

¹⁰ Section 29(a) of the MPRDA.

¹¹ Ibid.

¹² CER. “Mining and Your Community.” p9; Warren Beech and Nicholas Veltman, Hogan Lovells (South Africa) Inc, “Environmental law and practice in South Africa: overview”, in Practical Law Country Q&A, 2018, pp1–2.

¹³ “We are Activists: Reflections on our struggles in communities affected by mining.” p. 46.

This is further echoed by mining-affected communities in the Dilokong and Ga-Pila villages in the Sekhukhune and Waterberg districts of Limpopo, where they expressed the following:

“

Although the company does engage the community in various meetings, it seems as if our opinions do not matter that much to the company.

The formulation of CSR policies are mainly done by the company with no or little consultation with the community who are supposed to benefit from such policies. For instance, the vegetable gardens project initiatives were all planned by the company and implementation was imposed upon us.¹⁴

¹⁴ Mathabatha, Margaret. (2011). "The impact of mining companies on community development in the Dilokong and Ga-Pila villages in the Sekhukhune and Waterberg Districts of Limpopo Province." Master's Dissertation for the University of Limpopo, page 40.

In the above example, the community complained that they wished the company had consulted them before coming up with the project, to seek their consent and opinions about how to make it more meaningful than it already is. Since they are poor, they do not have any choice but to accept any little help that the company wants to offer them.

4.2.1.2 Delegation of Authority

The second practice that mining management make use of, and which results in a barrier to effective and meaningful consultation, is that mining management enter into agreements with people who purport to have legal authority to represent the interests of communities by virtue of their position as traditional leaders. This often arises in the case of tribal authorities who rule over particular traditional areas. Often there exists disputes between factions within communities over who possesses legitimate authority over a particular area, and there are disputes over which issues the authority may exercise exclusive jurisdiction.¹⁵ Despite a lack of understanding of the laws that define the customary law pertaining to consultation and traditional leadership structures, mining companies continue to engage with traditional leaders to the exclusion of the wider community. This practice undermines any meaningful and effective participation and consultation of the community as it relates to impacts that directly affect them. Evidence of this can be found in a statement provided by members of the communities belonging to the Dilokong and Ga-Pila villages in the Sekhukhune and Waterberg districts of Limpopo, they stated the following:

“

The chiefs only show up when there has been pressure from the community. Otherwise they receive kickbacks from the company.¹⁶

¹⁵ Phalane, M “Broken Trust in Mapela – the people, the kgoshi and the cool R175m” found at <https://www.dailymaverick.co.za/article/2016-05-10-amabhungane-broken-trust-in-mapela-the-people-the-kgoshi-and-the-cool-r175m/>

¹⁶ Ibid.

This statement confirms that it is a normal practice for mining companies to forgo consulting with all affected persons, rather entering into private deals with the leaders, and without any benefit for the entire community.¹⁷

4.2.2 Mining Sector Shrouded in Secrecy

Mining-affected communities affected by mining have had to encounter opposition against accessing information relevant to the approval of environmental authorisation of mining operations. The laws regulating mining do not place a mandatory obligation on mining companies or government to share or provide the public unrestricted access to basic information that includes: environmental authorisations; environmental management programmes; waste management licences; atmospheric emission license; mining rights; mining work programmes; social and labour plans; mining agreements; or compliance and enforcement information.¹⁸

This is captured by the following statement provided by a community activists in Mpumalanga who describe their encounters in trying to access information as it relates to the operation of coal mines and collieries in the Mpumalanga Highveld region.

“

The community living in the area are not consulted before the mines come. We just see machinery coming into our area without knowing what it is for.

When they start mining we get informed.

We don't get any documents or meetings – there is no consultation.¹⁹

17 Claassens, Anika. (2011). "Contested power and apartheid tribal boundaries: the implications of 'living customary law' for indigenous accountability mechanisms." *Acta Juridica: Pluralism and Development: Studies in Access to Property in Africa*. pp 174–209; Oral submissions made by the Mining and Environmental Justice Communities Network of South Africa (MEJCON-SA) to the South African Human Rights Commission on 13 September 2016 in Johannesburg some of those submissions are captured in this article: <http://www.sowetanlive.co.za/news/2016/09/15/traditional-leaders-fuel-mining-tension>; see also MPRDA, Section 22(4).

18 Centre for Environmental Rights, Submission to the South African Human Rights Commission for the National Investigative Hearing on the Underlying Socio-economic Challenges in Mining-Affected Communities in South Africa, ("CER SAHRC Submission"), 26 August, 2016 at page 12; Centre for Environmental Rights, "Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga." (May 2016). pp. 55, 66, available at <http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf>

19 "We are Activists: Reflections on our struggles in communities affected by mining." page 48.

In order to access this important information and overcome this particular barrier, official requests must be made to the DMR and mining companies using the Promotion of Access to Information Act 2000 (PAIA). This process often becomes a hindrance that undermines community attempts to access information in order to be equipped to address their concerns, due to the processing of requests often being lengthy. This is further compounded by the reality that there are no clear guarantees that the mining companies or the DMR will in fact respond to the requests, or grant the requests in their entirety.²⁰ Communities must further contend with the reality that the process of making official requests requires some fair degree of legal knowledge. The reality is that communities either lack the capacity to draft their own requests or are limited by financial constraints to do so on their own. Requests are often made on their behalf by civil society organisations.

Evidence of the above has been captured through the investigation done by the Centre for Environmental Rights (CER), who have kept records of the PAIA requests it has sent on behalf of affected communities since 2010 to the DMR and DWS.²¹ Results of the study can be obtained from the CER website with the title of the report being "Signs of Hope".²²

4.2.3 Division and Contestation within Communities

Many mining-affected communities commonly contend with issues of division and contestation within the community as they relate to ongoing mining operations. The divisions usually result from a range of different incidences. A common incidence that causes divisions is a lack of solidarity when it comes to engaging mining companies and the DMR on steps to be taken to address mining-related impacts brought on by mining operations. This lack of solidarity is indicative of some sections of the population within mining-affected communities becoming fragmented on issues concerning the effectiveness of engagement strategies with DMR and mining companies. Some sections of the population within mining-affected communities become disillusioned as a result of poor response from either the DMR or mining companies, while attempts to engage the DMR and mining companies prove futile as a result of lack of support. A lack of solidarity on whether to engage mining companies and the DMR, and how to engage them renders any collective attempts by mining-affected communities futile. This was commonly expressed during community site visits by mining-affected communities in Mokopane, Limpopo, and Kanana, North West, where it was stated:

20 CER, Signs of Hope available at <https://cer.org.za/wp-content/uploads/2015/11/Signs-of-Hope-Nov-2015.pdf> at pp 2-3.

21 CER, Signs of Hope available at <https://cer.org.za/wp-content/uploads/2015/11/Signs-of-Hope-Nov-2015.pdf> at pp 2-3.

22 Ibid.

“

Communities cannot work together. They are divided. Kanana Unemployment Forum mostly consists of members from Eastern Cape, and if you don't speak isiXhosa, then they ascribe less weight to what you have to say. Some organisations do not want to be a part of a Forum of Forums. This impacts the power of the community to be able to be heard with one voice.”

“Lack of congruence among communities. Communities are bound to comply with whatever the mining companies are saying.”²³

4.2.4 Community Company Dialogue Mechanisms

The relationship that exists between mining companies and the communities who are affected by mining activities is often very tenuous and strained. This stems from a lack of trust resulting from poor social management of community concerns and expectations on the part of the mining company. Mining companies are adept at developing and implementing a corporate strategic planning process that addresses the prospects of mining, but sometimes neglect to understand the importance of integrating the social management of community concerns and expectations into the corporate strategic planning process. The result of this neglect is that the need for social management of issues stemming from community concerns and expectations only becomes important as a part of the company's public relations strategy.

A barrier begins to develop as some mining companies develop a very simplistic understanding of the “community” surrounding a mining operation, and a simplistic and different understanding of the notion of development and quality of life which differs from the perspective and understanding of affected communities. This barrier that now begins to develop between affected communities and corporate decision makers within the mining company manifests itself in poorly constructed grievance mechanisms, which in their design undermine intended corporate efforts to support local sustainable development activities.²⁴ The dominance and power dynamic steering a mining company's corporate culture can and has formed barriers to genuine action on sustainable development in collaboration with affected communities, community-based organisations, and civil society.

²³ Statement provided by a community activist in Mokopane as part of a community network of mining-affected communities

²⁴ Kapelus 2002; Banerjee 2001.

The case study of the Mogalakwena mine involving Anglo Platinum and communities surrounding the mine in Mokopane, Limpopo provide an interesting illustration of company-community relations in the context of local and national tensions between the corporate and community interests. This is explored in greater detail within the in depth case study section further in the report.

4.2.5 Use of Force and Intimidation

The skewed and unbalanced power relations between mining companies, the municipalities, and the communities affected by mining are a cause of concern, especially as related to rising conflicts that often turn violent. These unbalanced power relations and the resultant conflict point towards an underlying frustration that communities struggle to contain as they seek to resist rampant exploitation without meaningful beneficiation.

Although the DMR and municipalities exist to advocate and advance adequate platforms for meaningful engagement and dialogue and community development, the reality is that mining-affected communities are excluded from the meaningful platforms and structures where they can discuss, bargain, negotiate, and take decisions that affect them directly. This disenfranchisement bubbles over into community resistance taking the form of skirmishes and struggles aimed at stopping production or campaigning to harm the reputation of the mining company. To date, mining companies and the municipalities have relied on use of force and intimidation as a barrier to respond to this strategy by blocking out and repressing community resistance. An instance where this occurred was during an incident reported by a member of a community residing close to the Pilanesberg Platinum Mines in Rustenburg in North West. The following occurred:

“

In 2008 the Pilanesberg Platinum Mines started operating about 5km from our village. The community negotiated with the mine to give first priority to local employment. The mine said the youth of Mothalbe are unskilled and they promised training centres. But over the years they did nothing. So in 2012, four years after the mine started its operation, the community protested against the mine. The police attacked and arrested us. They kept the police in prison for several days, thinking that they would not go back to protest out of fear of going back to prison”.²⁵

Without the development of mechanisms that provide for genuine resolution through dialogue and inclusion, mining companies and municipalities revert to a simplistic way of repressing resistance through violence and intimidation.

²⁵ “We are Activists: Reflections on our struggles in communities affected by mining.” page 43.

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APPENDICES

A. Research Study Methodology

The research study embodies a mixed methodology comprised of quantitative and qualitative methods.

Quantitative Study

- The Master list of the scoping report on the research study was used to conduct further analysis e.g. How many cases were successful? Why? Were there different actors in those cases which were successful?
- Thirty-one case studies were selected and, from this grouping, five were selected for in-depth analysis, detailing where strategies have worked as well as where they had not worked. These cases provided us with a sample from which to draw analysis of diverse strategies.

Qualitative Study

- Consistent interview questions were used as a means of consistency and comparison. These interview questions took the form of semi-structured interview guidelines where we utilised open-ended guiding questions, as opposed to leading questions. In order to ensure the veracity of information provided for by interviews, we conducted site inspections of some case studies within the study's geographical focus areas.
- Research ethics in our study were closely observed. All interviews conducted were by consent, as interviewees indicated an interest to participate and to be quoted in the study.

B. Key Stakeholder Interviews (KSIs)

KSIs were conducted with key stakeholders telephonically, via email and in person, to collect qualitative information to answer general questions and questions pertaining to criteria (detailed below).

Stakeholders included government officials; individuals from NGO's; CBO's; attorneys practicing in the field of environmental law.

Each interviewee was sent an email with a letter of introduction from the Lead Consultant and Researcher. In cases where emails went unanswered, follow-up phone calls were made. If the stakeholder felt he/she was not in a relevant position to be interviewed, the team asked to be put in contact with someone who was. In-person interviews were held with KSIs where a lengthier and more in-depth conversation was required.

C. Criteria

MAIN CATEGORY	SUB-CATEGORY
Summary of Project	Sector
	Name of Project
	Funder/Owner
	Province
	Town
	Land-size
Status of Project	
Law complied with:	EIA
	Community agreement
	Licensing and permits
Impact	
Strategies	
Remedies (including responses)	Types of remedies granted
	Types of remedies that significantly empower communities
NGO/CBO	
Recorded complaints	
Closure and Rehabilitation	

