



# **The nature of public participation for environmental compliance in South Africa in light of recent case law**

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Mini-dissertation accepted in partial fulfilment of the requirements for the degree *Master of Laws in Environmental Law and Governance* at the North-West University

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Graduation: June 2023

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## **DEDICATION**

I dedicate this thesis to my late mom for her endless love, support, and for allowing me to live "my truth".

The information used and presented in this Mini-dissertation was correct and up to date on 30 November 2022 when research for this study was concluded. Any later political, social and/or legal developments have not been considered.

## **ACKNOWLEDGEMENTS**

I wish to convey my gratitude and express my sincerest thanks to the people who played a significant role for the duration of this journey.

Thank you, my little sister, Lefa Lekgau for always supporting me and for always ensuring that I was relaxed at home during my studies. Thank you, sis, I am more grateful to you than words can ever express.

To my Supervisor Dr CB Soyapi, thank you for your unceasing support and for having assisted me throughout this process. Thank you for making time whenever I requested to meet with you. You made me believe that I could do anything I put my mind and heart to.

To my friends, Hugh, Tracey, Olorato, Tumelo, Reshoketswe, Lawrence and Andiswa - thank you for being by my side and for understanding what this journey meant to me. Thank you for not giving up on me and for always applauding me throughout my research and writing process.

To the NWU Faculty of Law Administrators, Sonia Turkstra, and Lezahn Jafta, thank you for your patience and for always supporting me. Your help did not go unnoticed.

My appreciation is also extended to Dr John Mambambo for the language and technical editing of this research.

Lastly, I would like to thank God and my Ancestors, for the gift of wisdom and knowledge and for seeing me through all the huddles. I have experienced your presence and light day-by-day. Thank you for the will bestowed upon me. I am grateful!

## **ABSTRACT**

South Africa's Constitution guarantees environmental rights, that extend to access to environmental information, the right to participate in environmental decision-making, and also the right to access remedies in environmental matters. The country has further made considerable and comprehensive provisions through legislation for public participation. Public participation is imperative for ensuring that the views of affected and interested parties are taken into account and that the environmental decision-making process is equitable, fair and leads to a more informed choice and meaningful environmental outcomes. In recent times, communities in areas with large-scale projects such as mining/extractive developments have been routinely approaching the courts for judicial review of granted environmental authorisations due to the omission or procedural unfairness of public participatory processes related to environmental authorisations and licenses. There is a responsibility on South African authorities to consistently monitor and where necessary, augment public participation process as a way of protecting and promoting environmental rights. To that end, this study investigated the nature of public participation in South Africa through an analysis of recent case law. The study concluded public participation in South Africa remains open to interpretation when it comes to application, with those in governance adopting varying degrees of participatory processes. It is from this open-ended nature of public participation where we see that those required to facilitate public participation fail, from an environmental compliance dimension. Common inconsistencies range from failure to identify and involve relevant interested and affected parties; notifications published in wrong languages or not made available at all; access to environmental information not made possible by applicants for licenses and approvals; and lack of law enforcement.

**Keywords:** Public participation, environmental compliance, environmental authorisation, environmental governance, and sustainable development.

## **LIST OF ABBREVIATIONS AND ACRONYMS**

CC	Constitutional Court
CNSC	Canadian Nuclear Safety Commission
DPLG	Department of Provincial and Local Government
EA	Environmental Authorisation
EAP	Environmental Assessment Practitioner
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
EMPr	Environmental Management Programme
I & AP	Interested and Affected Parties
MPRDA	Mineral and Petroleum Resources Development Act
NEMA	National Environmental Management Act
NHRA	National Environmental Resources Act
NEMAQA	National Environmental Management: Air Quality Act
NWA	National Environmental Management: Water Act
NGO	Non-Governmental Organisation
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
SCA	Supreme Court of Appeal
S & EIR	Scoping and Environmental Impact Report
SEMA	Sectoral Environmental Management Act

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# 1. INTRODUCTION

## 1.1 Background

The Constitution of the Republic of South Africa, 1996 (the Constitution) is instituted on values that advance human rights and freedoms.<sup>1</sup> One of the fundamental human rights enshrined in the Constitution is an environmental right, which asserts that everyone has a right:

- (a) to an environment that is not harmful to their health or wellbeing and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.<sup>2</sup>

The Constitution also makes provision for representation and participatory democracy, accountability, transparency, and public involvement in the attainment of this right.<sup>3</sup> The representation and participatory democracy is reiterated in the South African environmental legislation referred to as the National Environmental Management Act 107 of 1998 (NEMA). Public involvement is emphasised in section 2(4)(f) of the NEMA, which proffers that:

The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills, and capacity necessary for achieving equitable and effective participation, and that participation by vulnerable and disadvantaged persons must be ensured.<sup>4</sup>

The NEMA was introduced, *inter alia* to provide for co-operative environmental governance by establishing principles to be deemed by decision makers on matters impacting the environment. These principles promote environmental compliance, which includes public participation of interested and affected parties who may be underprivileged, and who may have their constitutional right infringed upon by organs of state in environmental policy and decision making.<sup>5</sup> The law makes provision for comprehensive systems, procedures, and guidelines to assist in accelerating and

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<sup>1</sup> Section 1 of *Constitution of the Republic of South Africa* 1996.

<sup>2</sup> See s 24 (1)(2) of the *Constitution*.

<sup>3</sup> See s 116 of the *Constitution*.

<sup>4</sup> See s 2(4)(f) of the *National Environmental Management Act* 107 of 1998.

<sup>5</sup> Preamble of the NEMA.

advocating extensive public participation processes for achieving environmental conformity. This however seems challenging to execute and accomplish successfully, as will be realised below.

The NEMA in section 24(2) requires that the Minister of Environmental Affairs may identify, specify and publish any activities in listing notices, which a developer (or any other person/entity intending to commence such activity) to obtain an environmental permission before they may commence with such an activity.<sup>6</sup> Any such listed activity triggers an Environmental Impact Assessment (EIA) to ascertain if the environmental authorisation is granted. An EIA becomes a helpful tool in environmental decision making and ensuring that any authorised development, will not have substantial environmental impacts.<sup>7</sup> It is a key regulatory structured process used to mitigate and or manage environmental impacts associated with a listed activity.<sup>8</sup> In South Africa, an EIA entails either Basic Assessment (BA) and Scoping and Environmental Impact Reporting (S&EIR) for listed activities.<sup>9</sup>

One of the aims of an EIA is to guarantee and encourage the advancement of all interested and affected parties, whose needs must be prioritised through the pursuit and satisfaction of a robust and inclusive public participatory process.<sup>10</sup> Public participation in the achievement of environmental compliance is not only encouraged but expected in all EIAs in terms of the NEMA.<sup>11</sup> Even though public participation is sometimes regarded as a tick box exercise to simply comply with the rules and formalities, it remains an essential element of Environmental Impact Assessments.<sup>12</sup>

The purpose of public participation is to ensure that there is reasonable access to all information about the environmental impacts of the proposed listed activities or the implications of such decisions.<sup>13</sup> Access to information provides interested and affected parties with an opportunity during public participation processes to voice their concerns,

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<sup>6</sup> *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* 2017 para 2.

<sup>7</sup> Marumbo 2008 *PELJ* 111.

<sup>8</sup> See s 1 of *Environmental Impact Assessment Regulations* 2014.

<sup>9</sup> See s 1 of *Environmental Impact Assessment Regulations* 2014.

<sup>10</sup> Public Participation Guideline in terms of National Environmental Management Act 1998 *Environmental Impact Assessment Regulations* 6.

<sup>11</sup> Kock 2017 *UPJ* 46.

<sup>12</sup> King N, Strydom HA and Retief P *Environmental management in South Africa* 1242.

<sup>13</sup> See s 40 (2) and (3) of *Environmental Impact Assessment Regulations* 2017.

incorporate their needs and values and to even propose ways of reducing and mitigating any negative impacts of the project in the decision making process of an environmental authorisation.<sup>14</sup> This implies that the environmental right and justifiable socio-economic development could only be realised and attained if there is public participation where all interested and affected parties are included in the environmental decision-making process.

Courts, however, continue to be inundated by disputes between communities, interested and affected parties begging for judicial reviews of granted environmental authorisations due to the omission or procedural unfairness of public participatory processes. It appears communities, interested, and affected parties are ignored and treated as incapable of making significant contributions in the decision-making and environmental governance related processes. For example, in a recent matter expected to be heard by the North-division, Pretoria High Court, a case of *SDCEA and The Groundwork Trust v The Minister of Forestry, Fisheries and the Environment and Others*, the applicants approached the court following an environmental authorisation that was granted to Eskom by the Chief Director of the Department of Environmental Affairs in constructing Richards Bay Cycle Combined Power Plant. The applicants are seeking to have this decision reviewed and ultimately set aside due to amongst other reasons, that the decision was premised on an impugnable public participation process that was procedurally unfair.<sup>15</sup>

In another recent private prosecution case of *Uzani Environmental Advocacy v BP Southern Africa 2017*, the court found BP Southern Africa guilty of constructing and upgrading fuel stations without obtaining environmental authorisations.<sup>16</sup> This translates to the omission of public participatory processes which are a critical component of an EIA application process when granting environmental authorisations.

Through these cases, it appears that full, adequate, and rigorous community participation during an EIA process is poorly enforced or not effectively enforced. Through recent case

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<sup>14</sup> Public Participation Guideline in terms of *National Environmental Management Act 1998 Environmental Impact Assessment Regulations 6-7.*

<sup>15</sup> *SDCEA and Groundwork Trust v The Minister of Forestry, Fisheries and the Environment and Others* para 7.

<sup>16</sup> *Uzani Environmental Advocacy v BP Southern Africa 2017.*

law, this research project seeks to examine the role of public participation in ensuring environmental compliance in South Africa.

### ***1.2 A synopsis of the challenges to public participation in South Africa***

It would appear from case law that the state and or private companies are not consulting or engaging with citizens and communities during the EIA processes. Alternatively, it would seem there is inadequate and possibly impugnable omissions in ensuring appropriate opportunity for public participation in decisions that may affect the environment. One would then wonder if this could be because the legal framework is vague on the practical implementation of public participatory process or if there is merely a lack of compliance on the part of the authorities?

It is on the basis of these questions that this study, through recent case law, seeks to examine what the nature of public participation for achieving environmental compliance could and should be. The research project will further explore the objects of public participation as defined and given provision and impetus through the Constitution, the NEMA and Several Sectoral Environmental Management Acts (SEMAs). In pursuance of the need to determine an ideal form of public participatory process that seeks to address potential environmental injustices adequately and meaningfully, Canada's form of public participation will be explored as a benchmark to South Africa's practice. This is due to Canada being considered to have best practices in public participation across government and its citizens on environmental problems.<sup>17</sup> Finally, through a reading of recent case law, the study will establish whether the current nature of public participation for environmental compliance in South Africa is adequate and effective as contemplated in section 2(4)(f) of the NEMA.

### ***1.3 Research question***

What is the nature of public participation for environmental compliance in South Africa and what do recent case laws inform us about the state of public participation for environmental compliance?

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<sup>17</sup> Doyle *Public Participation: Principles and Best Practices for British Columbia* 2008.

### ***1.4 Objectives of the study***

The main objective of this research project is to determine, through recent case law, the nature of public participation in environmental compliance in South Africa. Secondary objectives were identified in order to achieve the main objective, namely:

- a) to interrogate the legal framework on public participation and environmental compliance in South Africa.
- b) to investigate an ideal form of public participatory process for ensuring environmental compliance.
- c) to provide an in-depth discussion on recent case law on public participatory process and environmental compliance and
- d) to establish the extent and level of public participatory process for environmental decision making in order to make findings and reach a conclusion.

### ***1.5 Research methodology***

The study employed a desktop-based methodology. This methodology involved the analysis of primary and secondary sources, which was reviewed within the doctrinal and descriptive methods of analysis. Primary and secondary sources used include legislation, case law, journals, textbooks, applicable electronic resources, and government publications.

### ***1.6 Relevance of the study***

This research project makes some important contributions to South African environmental law, to the continual improvement of public participation in ensuring meaningful environmental decision making. The inquiry into recent case law is therefore necessary, as it would allow for an appreciation of the status quo. The findings are expected to deepen the current understanding and practice on public participation processes for environmental compliance in South Africa. It is anticipated that the study will move the field forward by identifying gaps, if any and recommend well-entrenched and tested systems or and solutions to close the identified gaps and ultimately prescribe a

transparent, fixed, accurate and firm public participatory process that is self-explanatory and easy to implement.

### ***1.7 Chapter outline***

The research project is structured as follows:

1. Introduction
2. The Constitution, Legislation and SEMAs on public participation
3. The ideal form of public participation for environmental compliance
4. Recent case law on public participation and environmental compliance
5. Findings, Recommendations, and conclusion

## **2 THE CONSTITUTION AND LEGISLATION ON PUBLIC PARTICIPATION**

### ***2.1 Introduction***

The purpose of this chapter is to broaden the foundation that has been laid out in Chapter 1. It provides a succinct theoretical synopsis of public participation within the environmental compliance context (and its interpretation thereof). The chapter commences with a discussion of what public participation is for environmental compliance and understanding the supreme law of the country and its imposed public participation obligations that require fulfilment.<sup>18</sup> In seeking to define the concept of public participation for environmental compliance and the nature of public participation for environmental compliance in South Africa, this chapter provides a brief historical background of the notion of public participation in environmental governance. This is achieved by an analysis of:

- the provisions of public participation in the Constitution,
- the environmental legal framework on public participation, and
- the applicable Specific Environmental Management Acts (SEMA) mandating public participation for environmental compliance.

### ***2.2 The notion of public participation for environmental compliance***

#### *2.2.1 Historical background on the notion of public participation in South Africa*

Public participation which is also referred to as 'public consultation', 'public involvement', 'community participation' and or 'citizen participation' has been defined as an open, and accountable process through which all interested and affected parties within a community can comment, express their opinions and influence decision making.<sup>19</sup> It is the involvement of all interested and affected parties who have a potential interest into a matter, for which its outcome could potentially affect them.<sup>20</sup> Prior to 1994 in South Africa, public participation was racially prejudiced in that it was only limited to elections

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<sup>18</sup> See s 2 of *Constitution*.

<sup>19</sup> DPLG *National Policy Framework for Public Participation* 2007.

<sup>20</sup> SAIEA *A Handbook for Public Participation in Environmental Assessment in Southern Africa* 7.

which only White, Coloured and Indian citizens could partake in.<sup>21</sup> No legislation nor the constitutions of the time made specific provision for any forms of public participation.<sup>22</sup> Following the new constitutional dispensation of a democratic South Africa in 1994, public participation has since been an obligation<sup>23</sup> for government and organs of state to consult with the public or communities they serve especially on matters that could affect them.<sup>24</sup>

As a concept, public participation ultimately translated to well defined mechanisms, policies and tools made available to the realisation of the public's participation in governance matters;<sup>25</sup> including amongst others, public meetings, public comments, local ward committee meetings, local government workshops, public hearing of inquiries, advocacy planning, workshops or seminars, public opinion polls and surveys etc.<sup>26</sup> These wide ranging public participation methods or strategies have been embraced even though many of them are found to be impractical to accomplish, thus serving no substantial purpose. For example, there has been instances where a majority of participants in a public meeting have opposed a land development application project due to the potential detrimental effects on flora and fauna on the ecosystem in Knysna and the Provincial Minister continued to grant authorisation without fully considering the views of the public in the decision making process.<sup>27</sup> This affirms the findings of an extensive literature search by different scholars which identified shortcomings in the current traditional systems of hearings and public meetings.<sup>28</sup> The findings concluded that the input gained through public participation rarely makes a real impact on decision outcomes.<sup>29</sup> This will be canvassed further in the next chapter which focuses on the ideal form of public participation for environmental compliance.

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<sup>21</sup> Masango *Public participation in policy-making and implementation with specific reference to the Port Elizabeth municipality* 2.

<sup>22</sup> Masango *Public participation in policy-making and implementation with specific reference to the Port Elizabeth municipality* 2.

<sup>23</sup> Masango *Public participation in policy-making and implementation with specific reference to the Port Elizabeth municipality* 2.

<sup>24</sup> DPLG *Local and provincial Government National Policy Framework for public participation* 6.

<sup>25</sup> Du Plessis 2008 *PER* 6.

<sup>26</sup> Du Plessis 2008 *PER* 6.

<sup>27</sup> Ralph 2003 *SAJELP* 28.

<sup>28</sup> De Poe et al 2004 *SUNY* 3.

<sup>29</sup> De Poe et al 2004 *SUNY* 3.

### 2.2.2 Public participation in the environmental context

The notion of public participation was partly advocated for by the resolutions adopted at the 1992 United Nation Conference on Environment and Development which proclaimed 27 principles on environmental protection, of which one stated that:

a) Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.<sup>30</sup>

b) States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>31</sup>

From this principle, the definition of public participation can be expanded as referring to participatory democratic process that aim to achieve environmental justice by involving all concerned citizens in the fulfilment of their environmental rights.<sup>32</sup> This process is achieved by providing platforms and mechanisms to communities and the public; to raise their concerns as well as inputs regarding a potential development and its possible socio-economic and environmental impacts, thus promoting environmental justice.<sup>33</sup> The United States Environmental Protection Agency defines public participation as a continuous process embarked by organs of state and competent authorities to constantly engage with the public throughout the duration of a project, by notifying and allowing any inputs from them prior to decision making.<sup>34</sup> This implies that access to environmental information by the public remains an obligation to be fulfilled by those in authority, since it enables the public to contribute in administrative processes for informed decision-making.<sup>35</sup>

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<sup>30</sup> Principle 10 of Rio Declaration on Environment and Development (1992).

<sup>31</sup> Principle 10 of Rio Declaration on Environment and Development (1992).

<sup>32</sup> Du Plessis 2008 *PER* 3.

<sup>33</sup> Mnengwane *The effectiveness of public participation in Environmental Impact Assessment in selected South African case studies 2*.

<sup>34</sup> United States Environmental Protection Agency "date unknown" <https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation>.

<sup>35</sup> Richardson and Razzaque *Public Participation in Environmental Decision Making* 181.

The *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (Aarhus Convention), an international instrument, emphasises the critical role of involving the public in environmental decision-making by ensuring that every person's environmental right is promoted and protected.<sup>36</sup> This Convention, although an agreement established for the European region, has its principles embraced by many countries outside the region for roll out and implementation.<sup>37</sup> It explicitly declares the right of public participation in decision making on matters affecting the environment.<sup>38</sup> It acknowledges that the public should be authorised to access environmental information about a proposed and/or an existing socio-economic development which may significantly affect the environment. Therefore, this is no longer a theoretical but practical matter.<sup>39</sup> To this end, and as shall be drawn out in subsequent discussions, public participation is provided for in South Africa through constitutional and legislative means.

### *2.2.3 The importance of public participation in environmental compliance*

The concept of public participation was originally established to afford all interested and affected parties a continual opportunity to take part and have influence in decision making.<sup>40</sup> It is meant to be a two way communication between those in authority and the general public, in ensuring that public concerns, demands and values are integrated in decision making.<sup>41</sup> It is also viewed as a system that promotes and seeks to offer effective environmental tools and solutions in reaching an accurate decision.<sup>42</sup> Du Plessis has listed several explanations as to why public participation is regarded as important and vital in environmental decision making. Some of the reasons she listed, includes:

- a. Communities may provide useful additional information to decision makers especially when cultural, social, or environmental values are involved that cannot be quantified easily.

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<sup>36</sup> United Nations Economic Commission for Europe (1998).

<sup>37</sup> Mnengwane *The effectiveness of public participation in Environmental Impact Assessment in selected South African case studies* 1.

<sup>38</sup> A 1 of Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (The Aarhus Convention) (1998).

<sup>39</sup> A 5 The Aarhus Convention (1998)

<sup>40</sup> Creighton *Making Better Decisions Through Citizen Involvement* 8.

<sup>41</sup> Creighton *Making Better Decisions Through Citizen Involvement* 7.

<sup>42</sup> Du Plessis 2008 *PER* 11.

- b. Public confidence in the reviewers and decision-makers is enhanced since the public can clearly see that environmentally relevant issues have been fully and carefully considered.
- c. Affected persons likely to be otherwise unrepresented are provided with an opportunity to present their views.
- d. Without integrating the viewpoints of citizens, environmental policy runs the risk of being delayed early in the implementation phase.<sup>43</sup>

Moreover, the then Department of Environmental Affairs and Tourism made it clear in a 2006 guideline on public participation that it (public participation) is a prerequisite with an effect that no exemption could be given, unless there were no environmental rights affected.<sup>44</sup> Specifically, the guideline indicated that the public participation process in environmental compliance:

- a) Provides an opportunity for interested and affected parties (I&APs) to obtain clear, accurate and comprehensible information about the proposed activity, its alternatives or the decision and the environmental impacts thereof;
- b) Provides I&APs with an opportunity to indicate their viewpoints, issues and concerns regarding the activity, alternatives and/or the decision;
- c) Provides I&APs with the opportunity of suggesting ways of avoiding, reducing, or mitigating negative impacts of an activity and for enhancing positive impacts;
- d) Enables an applicant to incorporate the needs, preferences, and values of affected parties into the activity;
- e) Provides opportunities to avoid and resolve disputes and reconcile conflicting interests; and
- f) Enhances transparency and accountability in decision-making.<sup>45</sup>

By environmental compliance, the study has limited its definition to refer to conforming to the environmental laws, standards, guidelines, and regulations to respect, protect, promote and fulfil the Environmental Rights as enshrined in the Constitution. Consequently, overall public participation contributes to better decision making. This could be the case in, for example, EIA during the developmental stages of projects. Developers may thus utilise such a public participatory process to gain access to a wider

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<sup>43</sup> Du Plessis 2008 *PER* 12.

<sup>44</sup> Item 2 Gen not. 657 in GG 28854 of 19 May 2006.

<sup>45</sup> Item 2 Gen not. 657 in GG 28854 of 19 May 2006.

range of ideas, point of views, opinions, and concerns on the proposed development.<sup>46</sup> A competent authority is therefore enjoined and enabled to make an informed decision following extensive and effective public participation that has considered all views of participants.<sup>47</sup> Premised on this background on public participation, it is now essential to sketch how public participatory processes are ingrained in the South African legal landscape. As a starting point, public participation provisions are distinctively embedded in the Constitution through its principle of participatory democracy and cooperative governance.

### ***2.3 The Constitution on public participation***

The Constitution strives to defend the fundamental rights of all citizens.<sup>48</sup> It provides that any law inconsistent with it shall be declared as void and invalid.<sup>49</sup> This means that all provisions entrenched in the Constitution are binding and should be recognised and promoted by all spheres of government in exercising their duties. Section 7 of the Constitution compels government to respect, protect, promote and fulfil the rights enshrined in the Bill of Rights.<sup>50</sup> A few of such rights relevant to this study include the Environmental Right: such as the right to a healthy environment, and procedural rights that includes, a right to access environmental information, right to participate in environmental decision-making, right to access remedies in environmental matters and to have the environment protected, for the benefit of present and future generations (sustainable), through reasonable legislative and other measures.<sup>51</sup> Although the right to public participation is not explicitly expressed in the Constitution, public participatory process are considered as the keystone of South African democracy as the Constitution has placed an obligation on government to establish structures for its effect, as we shall establish below.<sup>52</sup>

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<sup>46</sup> SAIEA *A Handbook for Public Participation in Environmental Assessment in Southern Africa* 9.

<sup>47</sup> Item 2 Gen not. 657 in GG 28854 of 19 May 2006.

<sup>48</sup> See s 7 of the *Constitution*.

<sup>49</sup> See s 2 of the *Constitution*.

<sup>50</sup> See s 7 of the *Constitution*.

<sup>51</sup> See s 24 of the *Constitution*.

<sup>52</sup> Maphazi et al *AJPA* 56.

Section 32 of the Constitution provides for another right that is pertinent to public participation. It proffers that:

- 1) Everyone has the right of access to any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights.
- 2) National legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the state.<sup>53</sup>

This has resulted in the enactment of *Promotion of Access to Information Act 2 of 2000* (PAIA). The Constitutional provision in Section 32 gives impetus to a requirement to make any information held by the state or any other person accessible and at reach in enabling the public or interested and affected parties to have a meaningful input during the public participation process. In the *Company Secretary of Arcelor Mittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) case, the right of access to environmental information was validated by the Supreme Court of Appeal (SCA). The SCA affirmed the constitutional right, by declaring that Arcelor Mittal was obliged to release requested documents to private persons (VEJA) who were seeking to protect the right enshrined in section 24.<sup>54</sup> The court noted that there was no room for confidentiality when constitutional values are to be enforced.<sup>55</sup> This confirms the principles of the PAIA which has as one of its intentions, the promotion of lucidity, accountability and effective governance.<sup>56</sup> PAIA generally compels all public and private entities to inform and empower everyone to effectively scrutinize and participate in decision making.<sup>57</sup> In *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC), an effective decision-making process was defined as involving those affected by it and having their say taken seriously and respected in influencing the final outcome.<sup>58</sup> This implies that the decision making process must always consider the interests, needs and values of those that it seeks to serve by providing access to information. Access to information thus, enables communities to make an informed decision and this right is promoted and given drive by the state through the

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<sup>53</sup> See s 32 of the *Constitution*.

<sup>54</sup> *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance* para 82.

<sup>55</sup> *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance* para 82.

<sup>56</sup> See s 9(e) of *Promotion of Access to Information Act 2 of 2000*.

<sup>57</sup> See s 9(e)(iii) of *Promotion of Access to Information Act 2 of 2000*.

<sup>58</sup> *Doctors for Life International v Speaker of the National Assembly* para 235.

Constitution. Beyond the Constitution, PAIA was resultantly endorsed to promote effective access to information held by any public and or private persons in the Republic to secure the fundamental right to of access information.<sup>59</sup>

In addition, the Constitution gives provision in section 33 for a just administrative action and to challenge a decision or failure to take a decision by any organ of state or any other person who performs a public function.<sup>60</sup> In a nutshell, it is a provision that gives effect to administrative action that is lawful, reasonable, and procedurally fair.<sup>61</sup>

The *Promotion of Administrative Justice Act 3 of 2000* (PAJA) was then enacted to give effect to section 33 of the Constitution. PAJA obliges administrators of any organs of state or private entities to adhere to procedures and make decisions that are fair, lawful, and reasonable.<sup>62</sup> This Act authorises everyone whose rights have been adversely affected by a decision taken by administrators to have written reasons provided for the decision. Section 4 of PAJA provides for a standard procedure for in cases where a decision substantially affects public rights. The aim of section 4 is to give effect to procedural fairness of a decision, by compelling an administrator to choose whether to hold public inquiries or follow a notice and comment procedures in complying to this provision.<sup>63</sup> Eventually, the Constitution's founding values are entrenched in participatory democracy and centred around South Africa being a government for the people, who should be involved in decision making.<sup>64</sup> The Constitution requires the legislature to provide a platform through which to take into account public issues and concerns through receiving petitions, facilitating the involvement of the public in legislative and other such processes, transparently.<sup>65</sup> These sensible judicial and other measures demanding public involvement of all interested and affected parties for environmental decision making and governance will now be discussed.

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<sup>59</sup> Du Plessis 2008 *PER* 20.

<sup>60</sup> See s 33(2) of *Constitution*.

<sup>61</sup> Murombo 2008 *PELJ* 2008 and see also preamble of *Promotion of Access to Information Act 2 of 2000*.

<sup>62</sup> The long text of *Promotion of Access to information Act 3 of 2000*.

<sup>63</sup> See s 4 *Promotion of Just Administrative Act 3 of 2000*

<sup>64</sup> *South African Veterinary Association v Speaker of the National Assembly and Others* 2018 para 18.

<sup>65</sup> South African Government 2020 <https://www.gov.za/about-government/public-participation-framework-parliament-and-legislatures>.

## ***2.4 The environmental legislation on public participation***

The *National Environmental Management Act* 107 of 1998 (NEMA), was legislated by the Parliament of the Republic of South Africa to serve as a regulatory framework for environmental governance and matters related therewith. The NEMA entrenches the environmental right as enshrined in section 24 of the Constitution.<sup>66</sup> Section 2 of NEMA set out sustainable principles which must be adhered to when dealing with environmental matters.<sup>67</sup> It provides that the Minister may publish guidelines and regulations regarding listed and specified activities for ensuring environmental compliance.<sup>68</sup> The existing public participation principles are confessed to be pervasive strides to the realisation for an effective and meaningful public participatory process.<sup>69</sup> Environmental compliance for listed activities or projects is given effect by the NEMA in prescribing binding obligations that should be complied with during an EIA application process.<sup>70</sup> The EIA application requirements for an environmental authorisation include measures to conduct public consultation prior to decision making by competent authorities.<sup>71</sup> The NEMA principles and regulations on public participation will now be examined.

### ***2.4.1 NEMA principles on public participation***

The principles outlined in section 2 of the NEMA address the role and duties of organs of state in decision making on matters that may significantly affect the environment.<sup>72</sup> These principles are instituted to oblige the state to meet its responsibilities of ensuring that people's needs are placed at the centre of environmental governance.<sup>73</sup> The promotion of public participation of interested and affected parties in environmental governance is articulated in section 2(4)(f) of NEMA.<sup>74</sup> The principle enunciates that:

The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills, and capacity necessary for achieving

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<sup>66</sup> The long title of NEMA.

<sup>67</sup> See s 2 of the NEMA.

<sup>68</sup> See s 24 J of the NEMA.

<sup>69</sup> Hamann 2003 *SAJELP* 25.

<sup>70</sup> See s 24(1) of the NEMA.

<sup>71</sup> The Preamble of the NEMA.

<sup>72</sup> See s 2 of *Environmental Impact Assessment Regulations* 2014.

<sup>73</sup> See s 2(2) of the NEMA.

<sup>74</sup> See s 2(4)(f) of the NEMA.

equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.<sup>75</sup>

In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC), Ngcobo J, deemed the nature and scope of obligations for the competent authorities to have their decisions to grant or refuse authorisations be made in the light of NEMA principles.<sup>76</sup> The applicant pointed out that the public participation process had ignored some interested persons from an opportunity to express their views on the proposed filling station.<sup>77</sup> This led the Court to underscore the prominence of not only focusing on the needs of the developer while disregarding those of the society.<sup>78</sup> The Court held that the society must also be afforded with opportunities to engage and convey their views on the desirability of a filling station that will impact on socio-economic conditions affecting them. This implied that public participation provisions of NEMA were a necessity, especially where the needs of the people are involved.<sup>79</sup> Section 2(4)(g) further submits that the decisions taken by organs of states must consider the interests, needs and values of all interested and affected parties, by recognising all forms of knowledge, including traditional and ordinary knowledge.<sup>80</sup> The NEMA principles ultimately acknowledge the importance of public involvement through section 2(4)(o), by holding the environment in public trust and creating an obligation that its beneficial use of environmental resources should serve public interest and safeguarded as the people's common legacy.<sup>81</sup> These principles give priority to the founding provision that South Africa strives to attain the advancement of human rights through representative and participatory democracy. Part of public participatory processes for attaining environmental compliance is mainly reflected in the *Environmental Impact Assessment Regulations* 2010, which guide competent authorities and applicants during an application for environmental authorisation. The Regulations will now be considered.

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<sup>75</sup> See s 2(4)(f) of the NEMA.

<sup>76</sup> *Fuel Retailers Association of Southern Africa v Director-General and others* 2007 para 4.

<sup>77</sup> *Fuel Retailers Association of Southern Africa v Director-General and others* 2007 para 11.

<sup>78</sup> *Fuel Retailers Association of Southern Africa v Director-General and others* 2007 para 76.

<sup>79</sup> *Fuel Retailers Association of Southern Africa v Director-General and others* 2007 para 76.

<sup>80</sup> See s 2(4)(g) of the NEMA.

<sup>81</sup> See s 2(4)(o) of the NEMA.

#### *2.4.2 Environmental Impact Assessment Regulations on public participation*

The EIA regulations were introduced in 2006 to administer and continually improve on the inadequacies of the *Environmental Conservation Act* EIA regulations.<sup>82</sup> This meant better and improved regulations in terms of listed activities that required an EIA process.<sup>83</sup> The EIA Regulations remain in place to standardise the procedure and criteria to be followed by Environmental Assessment Practitioners (EAPs) during application processes for environmental authorisations.<sup>84</sup> The EIA regulations compel EAPs to exercise their duties in the preparation, evaluation, submission, processing and consideration as well as decisions thereto on applications for environmental authorisations of listed activities.<sup>85</sup> This process by EAPs entails the involvement of the public. Chapter 6 of EIA Regulations makes a provision that public participation shall follow relevant processes and that guidelines must be complied with.<sup>86</sup> Commonly, either a Basic Assessment or Scoping & Environmental Impact Report (S&EIR) is required by the EIA Regulations for all listed activities or projects.<sup>87</sup> The applicable assessment to be made available is dependent on the severity and impacts of the listed or specified activity undertaken. The EIA Regulations compel a Basic Assessment to be embarked on for listed activities that are classified as less complex whilst the S&EIR for listed activities with more severe and substantial environmental impacts.<sup>88</sup> The Minister has listed and published activities that demand either a Basic Assessment or S&EIR in separate listing notices.<sup>89</sup> Basic Assessment is undertaken for only activities or projects listed and published in Listing notice 1 in attaining an Environmental Authorisation.<sup>90</sup> An environmental authorisation for listed activities listed and published in Listing Notice 2 undergoes S&EIR process prior to commencement of such activity or project.<sup>91</sup> The Basic Assessment report is compiled in line with regulation 19 of EIA regulations, which requires that the environmental

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<sup>82</sup> Murombo 2008 *PEJ* 117.

<sup>83</sup> King and Reddell 2015 *PELJ* 949.

<sup>84</sup> See s (2) of *Environmental Impact Assessment Regulations* 2014.

<sup>85</sup> See s (2) of *Environmental Impact Assessment Regulations* 2014.

<sup>86</sup> See s (40) of *Environmental Impact Assessment Regulations* 2014.

<sup>87</sup> See s 1 of *Environmental Impact Assessment* 2014.

<sup>88</sup> Murombo 2008 *PER* 117.

<sup>89</sup> Jikijela *Co-operative environmental governance: alignment of environmental authorisations in the province of KwaZulu/Natal* 21.

<sup>90</sup> Item 1 Gen not. 706 in GG 41766 of 13 July 2018.

<sup>91</sup> Item 1 Gen not. 706 in GG 41766 of 13 July 2018

information must have been communicated to all interested and affected parties, and their views incorporated in the report.<sup>92</sup>

The current procedure for a Basic Assessment necessitates an applicant to submit an application form to the competent authority through the appointed EAP before conducting Basic Assessment. It is only after the submission of the application form to the competent authorities that the EAP must conduct public participation process.<sup>93</sup> This requirement must be undertaken prior to preparing a Basic Assessment Report that has considered the views and comments of interested and all affected parties.<sup>94</sup> The S&EIR EIA process is however germane to listed activities considered of higher risk, with significant environmental impact and would require an Environmental Authorisation prior to commencement.<sup>95</sup> Part of the S&EIR process entails a final report to be submitted to the competent authorities, and it should incorporate all comments, views and opinions received during public participation process.<sup>96</sup> The different SEMAs provides rules and governs the EIA processes of listed activities, developments and projects requiring environmental authorisations prior to commencement. This is again dependent on the type of environment (land, water, and air) impacted. These SEMAs with provisions on public participation relevant to this study, will now be briefly defined.

## ***2.5 Specific Environmental Management Acts on public participation***

### ***2.5.1 The National Water Act 36 of 1998***

The *National Water Act* 36 of 1998 (NWA) was legislated in South Africa to accelerate the key policy of reforming the law relating to water sources.<sup>97</sup> The NWA in its long text asserts that water belongs to all people; it acknowledges the need for an integrated management; and systems to enable everyone to contribute in all aspects of water resources.<sup>98</sup> The NWA recognises that there should be water resource management

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<sup>92</sup> Reg (19) of *Environmental Impact Assessment Regulations* 2014.

<sup>93</sup> Rantlo *Ex Post facto Environmental authorisation in South Africa* 147.

<sup>94</sup> Rantlo *Ex Post facto Environmental authorisation in South Africa* 147.

<sup>95</sup> Jikijela *Co-operative environmental governance: alignment of environmental authorisations in the province of KwaZulu/Natal* 24.

<sup>96</sup> Reg (21) of *Environmental Impact Assessment Regulations* 2014.

<sup>97</sup> Viljoen 2016 *JENRL* 400.

<sup>98</sup> The long text of the *National Water Act* 36 of 1998.

systems for conservation, protection of water resources in the Republic.<sup>99</sup> This is achieved by a requirement for an application process for a license to use water in respect of certain water uses as prescribed in section 21 of the NWA.<sup>100</sup> It is during a Water Use License application process that a public participation report is expected to be submitted as supporting documentation for the Water Use License application. This means either a BA or S&EIR shall be required to be complied with, should the activity be listed by any of the notices. In the *Escarpment Environment Protection Group and Another v Department of Water Affairs and Others* 2013 ZAGPPHC 505 (GNP), the court held that the responsible authority granted with powers to issue a Water Use License must take all necessary steps to ensure procedurally fair administrative action, by ensuring that public participation expectations are met.<sup>101</sup> The court accentuated this need or expectation as:

An essential tool to ensure that decisions that may significantly affect the environment are scrutinised and made from an informed point of view. This decision-making process both advances the constitutional values of openness and advances by providing platforms for those affected to air their views.<sup>102</sup>

Section 41(2)(c) of NWA asserts that, a responsible authority during a Water Use License application may invite written comments from any organ of state or persons who has an interest in the matter.<sup>103</sup> Section 41(4) provides the competent responsible authority which the application has been submitted to; at any stage of the application process, to require the applicant:

To give suitable notice in newspapers and other media, describing the licence applied for; stating that written objections may be lodged against the application before a specified date, which must be not less than 60 days after the last publication of the notice; giving an address where written objections must be lodged; and containing such other particulars as the responsible authority may require.<sup>104</sup>

Scholars have however slammed this public participation provision, arguing that the NWA has failed to lay out a clear-cut procedure for a vigorous public participation in the Water Use licensing process.<sup>105</sup> The court in *Environmental Protection Group* established that

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<sup>99</sup> Preamble of NWA.

<sup>100</sup> King and Reddell 2015 *PELJ* 952 and see s 21 of NWA.

<sup>101</sup> *Escarpment Environmental Protection Group v Department of Water Affairs* para 23.

<sup>102</sup> *Escarpment Environmental Protection Group v Department of Water Affairs* para 48.

<sup>103</sup> See s 41(2)(c) of NWA.

<sup>104</sup> See s 41 (4) of NWA.

<sup>105</sup> King and Reddell 2015 *PELJ* 953.

misinterpretation of section 41 results in arbitrary and potentially exclusion of those who could not read newspapers or without media, particularly in instances where the license application affects poorly and uneducated parties.<sup>106</sup> The court ruled in favour of the litigants. This shortcoming exhibits how public participation is inadequate and, in some cases, discretionary.<sup>107</sup> The use of 'may' in sections of the NWA regarding a requirement to facilitate public participation by an applicant gives the competent authority wide discretion.<sup>108</sup> This implies that a decision to issue a Water Use License can be taken without public involvement if the responsible competent authority has not seen a need for such public participation. This deficiency has resulted in ordinary citizens approaching the Water Tribunal to object to the issuing of a Water Use Licenses caused by such a decision by a competent authority.<sup>109</sup>

### ***2.5.2 The National Air Quality Act 39 of 2004***

The *National Environmental Management: National Air Quality Act 39 of 2004* (NEMAQA) was enacted to advance the protection of Environmental Rights by policing air quality.<sup>110</sup> NEMAQA's objective is to reform the law that regulates air quality, through measures that are established for the prevention and control of air pollution and ecological degradation while promoting conservation.<sup>111</sup> Through its preamble, NEMAQA has acknowledged that the quality of air in most areas of South Africa is not conducive for a healthy environment, and mostly the poor endure the health impacts associated with polluted air.<sup>112</sup> Accordingly, the principles of NEMAQA are to create a framework to enable all spheres of government to play their role in the minimisation of pollution through robust controls, cleaner technologies, adoption of mechanisms and cleaner production practices.<sup>113</sup> These measures are for the achievement of attaining an environment that is not harmful to health and wellbeing as enshrined in section 24 of the Constitution.

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<sup>106</sup> *Escarpment Environmental Protection Group v Department of Water Affairs* para 44. See also Kotze and Soyapi 2021 *JEL* 20.

<sup>107</sup> King and Reddell 2015 *PELJ* 953.

<sup>108</sup> King and Reddell 2015 *PELJ* 953.

<sup>109</sup> King and Reddell 2015 *PELJ* 953.

<sup>110</sup> See s 24(a) of the *Constitution*.

<sup>111</sup> The long text of NEMAQA.

<sup>112</sup> The Preamble of NEMAQA.

<sup>113</sup> Chapter 2 of NEMAQA.

The Minister or MEC is vested with the powers by NEMAQA to identify listed activities that he/she reasonably believes to have significant harmful effect on the environment. These listed activities shall be subjected to Impacts Assessments that include health, social conditions, economic conditions, ecological conditions, or cultural heritage; for an Atmospheric Emission License application process.<sup>114</sup> The application process is anticipated to be guided by a consultative process and procedure as provided in terms of sections 56 and 57 of NEMAQA.<sup>115</sup>

Section 56 and 57 of NEMAQA mandates public participation, that a consultative process must be followed prior to exercising any power by the Cabinet Ministers, MEC's and all organs of states in accordance with the principles of cooperative governance as set out in chapter 3 of the Constitution.<sup>116</sup> Section 57 articulates that:

(1) The minister or MEC must give notice of the proposed exercise of the relevant power in the Gazette; and in at least one newspaper distributed nationally or, if the exercise of the power will affect only a specific area, in at least one newspaper distributed in that area.

(2) The notice must invite members of the public to submit to the Minister or MEC, within 30 days of publication of the notice in the Gazette, written representations on or objections to the proposed exercise of the power; and it should contain sufficient information to enable members of the public to submit meaningful representations or objections.<sup>117</sup>

The Minister through GN 893 of 22 November 2013 determined a list of activities which result in atmospheric emissions and may have a significant impact on the environment, including to the detriment of socio-economic development.<sup>118</sup> The nature of the listed activities requires the Minister or MEC to give due consideration to all representations or objections received or presented during a public participation process before exercising the power to authorise or grant a license.<sup>119</sup> This implies that the public participation process is mandatory for an AEL and EIA application for a development with a potential to undermine the environmental right.

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<sup>114</sup> See S 21 of NEMAQA.

<sup>115</sup> See s 23 (2)(a) of NEMAQA.

<sup>116</sup> See s 56 of NEMAQA.

<sup>117</sup> See s 57 of NEMAQA.

<sup>118</sup> S 21 (1)(b) in GN 893 in GG 37054 of 22 November 2013.

<sup>119</sup> See s 57 (4) of NEMAQA.

### ***2.5.3 Minerals and Petroleum Resources Development Act 28 of 2002***

The NEMA listing notice 2 has in terms of sections 24(2) and 24D published a list of activities which may not commence without an Environmental Authorisation issued by a competent authority.<sup>120</sup> Mining and petroleum activities have thus been listed in Listing notice 2 as activities that require S&IER EIA process in attaining an Environmental Authorisation.<sup>121</sup> Mining and petroleum activities are usually deemed as intrusive and as a result serves as source of environmental pollution in the surrounding areas of operation.<sup>122</sup> Usually the areas identified for prospecting, exploring or mining operations are in geographical areas inhabited by marginalised communities who are entirely dependent on the land they occupy, for their survival. This implies that, all relevant parties must be involved during the application process for a mining right and communities to take part from the inception of the project, without waiting until it's too late to act.<sup>123</sup>

Chapter 4 of *The Minerals and Petroleum Resources Development Act 28 of 2002* (MPRDA) on Mineral and Environmental Regulation, in section 10 requires consultation with interested and affected parties. It proffers that the Regional Manager must within 14 days after receiving an application for either a prospecting right, mining right or a mining permit follow a notification process.<sup>124</sup> Section 10 provides that the Regional Manager must in a prescribed manner:

- a) make it known to interested and affected parties that such an application has been received in respect of the land in question; and
- b) call upon persons to submit their comments regarding the application within 30 days from the date of the notice.<sup>125</sup>

The MPRDA sanctions that if a person objects to the granting of a prospecting right, mining right or mining permit after it has been received by the Regional Manager, the matter must be referred to the Regional Mining Development and Environmental Committee which will after considering all objections, evaluate and advise the minister accordingly.<sup>126</sup>

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<sup>120</sup> See sections 24(2) and 24D of the NEMA.

<sup>121</sup> Listing Notice 2 of EIA Regulations 2014.

<sup>122</sup> A Practical Guide for Mining of Affected Communities 2008.

<sup>123</sup> Centre of Environmental Rights and Lawyers for Human Rights on Mining and your Community 9.

<sup>124</sup> See s 10(1) of MPRDA.

<sup>125</sup> See s 10(1)(a) and (b) of *Minerals and Petroleum Resources Development Act 28 of 2002*.

<sup>126</sup> See s 10(2) of MPRDA.

The import of public participation by all interested and affected parties warrants that community members are given ample opportunities to exchange views and to fathom the plans of a mining right or permit holder on Environmental Impacts Assessments and to raise concerns thereof. This includes the proposal to mine in the area, environmental harm mitigations plans and the socio-economic benefits by the community for risk taking.<sup>127</sup> In conclusion, MPRDA and amendment Regulations require all relevant parties and organs of state, including an applicant for a prospecting right, mining right or mining permit to conduct meaningful consultation with interested and affected persons. This includes consultation with landowners and lawful occupiers.<sup>128</sup>

#### **2.5.4 National Heritage Resources Act 25 of 1999**

The *National Environmental Management: Heritage Resources Act 25 of 1999* (NHRA) was passed to promote good governance throughout all spheres of government in nurturing and conserving South Africa's heritage resources for the benefit of present and future generations.<sup>129</sup> Section 5(4) of the NHRA provides for general principles for heritage resources management by competent authorities. It provides that history and beliefs of communities should be handled in such a manner that recognises the rights of affected communities who must be consulted and required to participate in the management of their resources.<sup>130</sup>

Furthermore, section 38(1) of NHRA requires that a Heritage Permit application for a proposed development be submitted to the respective competent authority.<sup>131</sup> It states that any person who intends to undertake a development which has been categorised or listed must, before undertaking such activity, inform the relevant responsible resources authority within a specified period.<sup>132</sup> Section 38 (3) provides that the responsible heritage resources should upon receipt of such notification or information to develop an area, specify the information to be included in the report. Consultation with affected and interested communities by the proposed development regarding the impact of the

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<sup>127</sup> LRC *A Practical Guide for Mining of Affected Communities* 15.

<sup>128</sup> Reg (2) Amendment of MPRDA Regulations.

<sup>129</sup> Preamble of the *National Heritage Resources Act 25 of 1999*.

<sup>130</sup> See s 5 (4) of NHRA.

<sup>131</sup> Section 38 (1) of NHRA.

<sup>132</sup> See s 38 (2) of NHRA.

development on heritage resources is a mandatory requirement to be included in such a report.<sup>133</sup>

## **2.6 Conclusion**

The momentous role played by public participation is documented by South Africa's new constitutional democracy which places a burden on legislators and administrators to facilitate public participation in the law-making processes and in decision making. It remains a dictate that principles of participatory democracy provided in the Constitution must be attained in ensuring compliance with environmental law and its requirements. It is understood that through public participation, those involved will learn of the environmental problems that communities face and this could enable them to make better decisions.<sup>134</sup> The participants are all interested and affected parties who are expected to have access to relevant information and knowledge in taking part in a participatory process and thus influencing the outcome of the decision taken by competent authorities. This has been seen as a concern that participants need a certain level of competence in partaking in environmental discussions.<sup>135</sup> The environmental legal framework and SEMAs, used to facilitate public participation are meant to assist in the realisation of participatory democracy of which it advances the constitutional values of openness by providing platforms for those affected and impacted to air their views. Considering the discussions and concerns, the next chapter outlines an ideal form of public participation process for environmental compliance and the information required during the process to lead to better and meaningful decision making. The key players and role of participants in an effective and meaningful participatory process will also be examined.

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<sup>133</sup> See s 38(3)(e) of NHRA.

<sup>134</sup> Coenen F *Public Participation and Better Environmental Decisions* 10.

<sup>135</sup> Coenen F *Public Participation and Better Environmental Decisions* 11.

### **3 THE IDEAL FORM OF PUBLIC PARTICIPATION FOR ENVIRONMENTAL COMPLIANCE**

#### ***3.1 Introduction***

In the previous chapter, public participation was contextualised insofar as environmental compliance is in South Africa concerned. The chapter presented its importance in the advancement of environmental rights and governance as advocated by the Constitution and legislation in South Africa. This chapter builds on this premise by exploring functional forms of various instruments, methods and strategies used by one of the developed countries that has defined and continues to improve its public participatory process for achieving environmental compliance. The Constitution allows in section 39 for the adoption and consideration of international law and foreign law to the extent that they are consistent with the Bill of Rights. The ideal role played by community members in the development and implementation of environmental policies and decision making will also be investigated. This will be compared with an ideal form of public participation process envisioned by the NEMA in the protection of environmental rights in South Africa. In a quest to determining an ideal form of public participatory process that seeks to address potential environmental injustices adequately and meaningfully; South Africa's public participation process and practices for environmental compliance will now be explored and benchmarked against those of Canada.

#### ***3.2 The international environmental law on public participation***

EIA has become an effective tool adopted by many countries in supporting sustainable development through the use of formal and informal guidelines and environmental regulations.<sup>136</sup> Part of the EIA processes demands transparent public participation to be embarked on prior to a governmental decision making.<sup>137</sup> Public participation provisions came to the spotlight for the first time in the 1960s and 1970's within the Western Developed countries.<sup>138</sup> These provisions had an emphasis on the value of a bottom-up approach, which was centred around people, especially on socio-economic

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<sup>136</sup> Kurukulasuriya *Training Manual on International Environmental Law* 26.

<sup>137</sup> Kurukulasuriya *Training Manual on International Environmental Law* 26.

<sup>138</sup> Razzaque *Public Participation in Environmental Decision Making* 168.

development.<sup>139</sup> Scholars suggest that even though public participation for environmental compliance remains entrenched and expressed in more than hundred countries, it still falls short in practice.<sup>140</sup> However, Canada seems to have a transparent and seemingly effective approach to EIA. The specific topics on Canada's approach to public participation are first presented and they are subsequently followed by South Africa's perspective.

### *3.2.1 Canada's Public Participation for environmental compliance*

In 1973, Canada became one of the first countries to adopt a formal requirement for an EIA to be performed prior to a decision being taken, regarding a proposed development or project.<sup>141</sup> The country has made public participation an obligation during an EIA process to further the interest of the Canadians and environmental protection.<sup>142</sup> This later resulted in a bill being passed in the early 1990's to create the *Canadian Environmental Assessment Act* (CEAA, 2012).<sup>143</sup> The CEAA's preamble articulates that:

"The Government of Canada recognises the importance of facilitating public participation in the impact assessment process, including planning phase, and is committed to providing Canadians with the opportunity to participate in that process and with the information they need in order to be able to participate in a meaningful way."<sup>144</sup>

This gives prominence to the effect that Canada's EIA process makes public participation an obligation to ensure environmental compliance. The Act provides for a need to facilitate public involvement in creating opportunities and platforms to contribute and take part in environmental matters.<sup>145</sup> Canada has since introduced a guideline derived from a provision made by the legislation on public participation in Environmental Assessment, under the CEAA 2012. It compels that projects described in Regulations Designating Physical Activities or listed by the Minister, with potential adverse environmental effects or related public concern requires an Environmental Assessment.<sup>146</sup>

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<sup>139</sup> Razzaque *Public Participation in Environmental Decision Making* 168.

<sup>140</sup> Devlin *Public Participation in Environmental Assessment: Case studies on EA Legislation and Practice* 492.

<sup>141</sup> Leblanc *The Canadian Environmental Assessment Act's Public Registry System* 420.

<sup>142</sup> Devlin *Public Participation in Environmental Assessment: Case studies on EA Legislation and Practice* 161

<sup>143</sup> Kirchoff *The Canadian Environmental Assessment Act, 2012 and Associated Policy: Implications for Aboriginal Peoples* 4.

<sup>144</sup> Preamble of Impact Assessment Act 2019.

<sup>145</sup> Leblanc *The Canadian Environmental Assessment Act's Public Registry System* 420.

<sup>146</sup> *Public Participation in Environmental Assessment under the Canadian Environmental Assessment Act, 2012 Interim Reference Guide* 1.

In strengthening public participation obligations, the CEAA proclaimed in 1995 has made provisions that included the establishment of the Canadian Environmental Assessment Agency (Agency), Public Registry, Participant Funding Program and a directive on the Environmental Assessment Process.<sup>147</sup> This meant all impact assessments were to be submitted to this Agency which was accountable to the Minister of Environment and Climate Change.<sup>148</sup> The Agency's sole role is to deliver high quality impact assessments that give attention to the environmental, economic, social, and health impacts of potential projects.<sup>149</sup> The *Impact Assessment Act* stipulates that the Agency must ensure that the public is provided with an opportunity to participate meaningfully, in a manner that is appropriate during an Impact Assessment.<sup>150</sup> It is through the Environmental Assessments of identifying possible adverse environmental effects and mitigation measures that comments from the public are required, to serve and inform the decision making.<sup>151</sup>

One of the guiding principles on which the CEAA is founded on, is of facilitating public participation in the Environmental Assessment of projects where the federal government is involved.<sup>152</sup> Paragraph 19 (c) of the CEAA requires a consideration of public comments during the assessment by gathering input from those who may have interest in the project.<sup>153</sup> A meaningful public participation in Canadian governance is ensured through notifications of opportunities for public participation, reasonable timing, provision of accessible information, transparent reporting of results and financial support for participants.<sup>154</sup> The CEAA has been admired for the positive results it has yielded in providing opportunities for public participation and for extending resources, such as the Participant Funding Program.<sup>155</sup> This funding is provided to the public and indigenous communities at key stages throughout an assessment process in strengthening the

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<sup>147</sup> Leblanc *The Canadian Environmental Assessment Act's Public Registry System* 420.

<sup>148</sup> CEAA <https://www.canada.ca/en/impact-assessment-agency>.

<sup>149</sup> CEAA <https://www.canada.ca/en/impact-assessment-agency>.

<sup>150</sup> See s 27 of *Impact Assessment Act* 2019.

<sup>151</sup> Public Participation in Environmental Assessment under the *Canadian Environmental Assessment Act*, 2012 Interim Reference Guide 2.

<sup>152</sup> CEAA *Canadian Environmental Assessment Act an Overview* 3.

<sup>153</sup> See s 55 of the CEAA 2012.

<sup>154</sup> Public Participation in Environmental Assessment under the *Canadian Environmental Assessment Act*, 2012 Interim Reference Guide 3.

<sup>155</sup> Kirchoff *The Canadian Environmental Assessment Act, 2012 and Associated Policy: Implications for Aboriginal Peoples* 4.

integrity and quality of the participation through seeking expert participants and those who have interest in the project.<sup>156</sup> The special distinctive components of Canada's public participation such as Public Registry, four Environmental Assessment processes and Participant Funding Program in promoting effective and meaningful public participation, will now be considered. This is highlighted for learning and comparative purposes as an ideal form of public participation from a developed country.

### *3.2.2 Public Registry*

The Canadian government has developed what is referred to as the Canadian Environmental Assessment Registry (the Registry), established as a tool to facilitate access to records related to environmental assessments and compliance.<sup>157</sup> This registry ensures convenient access to information, either through an internet site administered by the Agency or a project physical file maintained by a responsible authority or the Agency for ease of access by the public.<sup>158</sup> Section 55(3) of the Act provides that the registry shall contain all records produced, collected, or submitted with respect to the environmental assessment of the project, including:

- (a) any report relating to the assessment;
- (b) any comments filed by the public in relation to the assessment;
- (c) any records prepared by the responsible authority;
- (d) any records produced as the result of the implementation of any follow-up program;
- (e) any terms of reference for a mediation or a panel review; and
- (f) any documents requiring mitigation measures to be implemented.

This Registry has been observed as a ground-breaking system to augment and expedite public participation by simplifying access to information to all people. The development of a Public Registry was solely to ensure that a standard level of basic information is made easily accessible to the public by the responsible authorities, government departments and agencies mandated with the execution of Environmental

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<sup>156</sup> CEAA <https://www.canada.ca/en/impact-assessment>.

<sup>157</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 15.

<sup>158</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 26.

Assessments.<sup>159</sup> These types of assessments and how the public gets involved will now be examined.

### *3.2.3 Types of Environmental Assessment Processes*

In Canada, not every person can participate but the Agency Review Panel determines who an interested party is. CEAA requires public hearings to be held by the authorities in such a manner that interested and affected parties takes part. There are however four types of Environmental Impact Assessments in Canada to which public participation can take place on all assessments. Under this Act, all projects receive a certain level of Environmental Assessment depending on the scale and the complexities of the potential effects.<sup>160</sup> This refers to screening, comprehensive study, mediation and assessment by the Panel Review.<sup>161</sup> The first two methods, screening and comprehensive studies are the most utilised methods of assessments since they are conducted by the responsible authority for the project, hence they are referred to as 'self-directed assessments'.<sup>162</sup> Mediation and review by a panel are independent assessment methods administered by an Independent Mediator or Public Review Panel appointed by the Minister of the Environment and Climate Change.<sup>163</sup> The agency promotes environmental compliance by requiring proponents or applicants of an environmental authorisation not to proceed with any part of the project unless:

- The minister has issued a decision statement;
- The governor in council has made a declaration that such effects are justifiable
- and the proponent for the authorisation has complied with all conditions in the decision statement.<sup>164</sup>

The four types of Environmental Assessment Processes in which public participation opportunities are granted, will now be considered.

#### *3.2.3.1 Screening*

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<sup>159</sup> Leblanc *The Canadian Environmental Assessment Act's Public Registry System* 421.

<sup>160</sup> CEAA *The Canadian Environmental Assessment Agency Fact Sheet II* 2.

<sup>161</sup> Public Participation in Environmental Assessment under the Canadian Environmental Assessment Act, 2012 Interim Reference Guide 12.

<sup>162</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 15.

<sup>163</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 15.

<sup>164</sup> <https://www.canada.ca/en/impact-assessment.htm>.

This is a systematic approach used for a proposed project that allows authorities to identify and document the environmental impacts and to find measures to alleviate, lessen or eradicate the adverse effects that may result from the proposed project.<sup>165</sup> The Review Panel is allowed to modify the assessment of the project plan and to recommend any further interventions.<sup>166</sup> During screening, public participation is not compulsory as it is discretionary in nature, however the decision lies with the Agency depending on factors that includes the nature of the project, its environmental setting, and public concerns.<sup>167</sup> It is noted that provisions to public participation are inadequate during this stage as the proponent or applicant, regulator or both could decide to invite the public or not, of which they always do.<sup>168</sup>

### *3.2.3.2 Comprehensive Study*

The comprehensive study is another method used for conducting an Impact Assessment, which tends to be used for large projects with potential for significant adverse environmental effects. These projects are all listed in the Comprehensive Study List Regulations.<sup>169</sup> Public participation and implementation of follow up programs are mandatory during a comprehensive study.<sup>170</sup> This study is facilitated and governed by the agency in which it must within 90 days from the receipt of an acceptable project description determine whether comprehensive study is necessary.<sup>171</sup> The Agency has up to 14 days to publish a notice of commencement and to start with the comprehensive study following the 90 day period. Government will then have 365 days to review and release a Comprehensive Study Report in which a notice will be posted requesting the public to comment.<sup>172</sup> Three opportunities for public participation will be granted by the Agency in a Comprehensive Study and Public Participation Funding is accessible during this study in assisting groups and individuals to partake.

### *3.2.3.3 Environmental Mediation*

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<sup>165</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 14.

<sup>166</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 14.

<sup>167</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 15.

<sup>168</sup> Sinclair *Using Law as a tool to ensure Meaningful Public Participation* 5.

<sup>169</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 15.

<sup>170</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 17.

<sup>171</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 17.

<sup>172</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 18.

This is a voluntary process led by an independent impartial mediator who has been appointed by the Minister of Environment following issues that would have arisen in a project's Environmental Assessment.<sup>173</sup> Mediation is well described as appropriate dispute resolution mechanism usually applied in different environmental disputes to ensure an achievement of a settlement to the mutual satisfaction of all parties.<sup>174</sup> Though it has been criticised as a monotonous, time consuming and costly exercise, the solutions are seen to be worth the expense.<sup>175</sup> Public participation takes place in a form of Information Programs of informing the general public on the progress and outcome of talks between parties in dispute.<sup>176</sup> Funding is also available in assisting individuals and those willing to participate in a mediation phase.<sup>177</sup>

#### *3.2.3.4 Assessment by Review Panel phase*

An assessment by a Review Panel refers to an evaluation conducted by a group of experts selected on the basis of their knowledge and expertise in adjudicating the Environmental Assessment dispute.<sup>178</sup> The matter is brought to the attention of the Review Panel on the instruction of the Minister of Environment to review and assess, in an impartial and objective manner, a project with likely significant adverse environmental effects.<sup>179</sup> This process allows an opportunity for the general public to attend public hearings where evidence, concerns and recommendations are presented.<sup>180</sup> There are three types of hearings sessions which the Review Panel may allow those wishing to make submissions and presentation on any matter that requires attention.<sup>181</sup> The Agency's responsibilities cease to apply to a designated project if the Impact Assessment is referred by the Minister to a Review Panel.<sup>182</sup> The Canadian Federal Government has in the past made public participation a focus area in ensuring continual improvement for the process.<sup>183</sup> This

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<sup>173</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 19.

<sup>174</sup> Curtis *Integrating Environmental Mediation into EIA* 18. See also Harrison *Environmental Mediation: The Ethical and Constitutional dimension* 80.

<sup>175</sup> Curtis *Integrating Environmental Mediation into EIA* 24.

<sup>176</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 2011 19.

<sup>177</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 2011 19.

<sup>178</sup> Curtis *Integrating Environmental Mediation into EIA* 18.

<sup>179</sup> Harrison *Environmental Mediation: The Ethical and Constitutional dimension* 102.

<sup>180</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 2011 21.

<sup>181</sup> Public Participation in Environmental Assessment under the *Canadian Environmental Assessment Act*, 2012 Interim Reference Guide 17.

<sup>182</sup> See s 24 of the *Impact Assessment Act* 2019.

<sup>183</sup> Sinclair *Using Law as a tool to ensure Meaningful Public Participation* 9.

meant clearer provisions and guidelines that eventually led to the development of what is now termed participant funding program.

#### *3.2.4 Participant Funding Program in Canada*

In order to succeed in achieving a meaningful public participation process as provided in the preamble, Canada introduced and established a Participant Funding Program with the aim to support public engagement and indigenous consultation during an assessment.<sup>184</sup> This funding is limited and available in assisting groups and individuals to participate in a Comprehensive Study, Mediation and Panel Reviews of Environmental Impact Assessments.<sup>185</sup> The funding was introduced to support research, reduce fiscal barriers for interested parties across Canada to participate at different levels and it was also meant for the indigenous and marginalized people.<sup>186</sup> This funding program is used to give both those who support and or are against a project, to participate effectively at the important stages of an Environmental Assessment process.<sup>187</sup> Even though the EIA process of Canada is considered one of the best in identifying environmental impacts early in the planning phase, there is still limitations and concerns that involve inadequate and adversarial public participation in the federal government.<sup>188</sup> The funding is dedicated to applicants in the hope of rebuilding trust, taking a coordinated, open and transparent approach in considering the views of all citizens.<sup>189</sup> The Canadian Nuclear Safety Commission (CNSC) has printed a guide on participant Funding Program that is designed for all individuals and parties requiring funding in the support to participating during environmental assessments, licensing reviews and matters of significant interests to the public.<sup>190</sup> The aspirations of the CNSC's aspirations are to increase participation in its Environmental Assessment for major nuclear operations and financially help individuals bring value-added information.<sup>191</sup> CNSC has identified three phases for an application

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<sup>184</sup> Funding programs <https://www.canada.ca/en/impact-assessment-agency/services/public-participation/funding>.

<sup>185</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 25.

<sup>186</sup> CEAA *Canadian Environmental Assessment Act: An Overview* 26.

<sup>187</sup> CEAA *An Overview of the Canadian Environmental Assessment Process Fact sheet II* 3.

<sup>188</sup> Mendell *Four Types of Impact Assessment used in Canada* 11.

<sup>189</sup> CEAA *Participant Funding Program* 1.

<sup>190</sup> CNSC *Participant Funding Program Guide* 1.

<sup>191</sup> CNSC *Participant Funding Program Guide* 3.

process to the fund, this entails Pre-application phase, Application and Funding award phase.

#### *3.2.4.1 Pre-application phase*

This is the phase where possible eligible parties or individuals are encouraged to follow steps outlined in applying or having interest to participate and receive funding.<sup>192</sup> An opportunity is created and provided by the Commission for funding eligible applicants.

#### *3.2.4.2 Application*

This phase allows an interested party to determine if their application meets the eligibility criteria for the fund. If all requirements are met, the interested party can therefore make such an application as per the guidelines.

#### *3.2.4.3 Funding award phase*

Funding is then awarded to successful recipient whose application has been approved following a review by an independent Funding Review Committee.<sup>193</sup>

#### *3.2.5 Eligible Participants to the Participant Funding Program*

For a participant to be awarded funding to participate, an eligibility criterion is described to determine those to be awarded. A participation through an application process must demonstrate the value they will add by their involvement in one or more of assessments discussed.<sup>194</sup> The criterion calls for eligible recipients who:

- a. have a direct interest in the impact assessment of the designated project,
- b. have community knowledge or indigenous traditional knowledge relevant to the impact assessment of the project,
- c. have expert information or knowledge relevant to the assessment of the project,
- d. or have interests in how the outcomes of the assessment could potentially have an impact on environmental rights.<sup>195</sup>

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<sup>192</sup> CNSC *Participant Funding Program Guide 4*.

<sup>193</sup> CNSC *Participant Funding Program Guide 13*.

<sup>194</sup> CNSC *Participant Funding Program Guide 7*.

<sup>195</sup> CEAA *Participant Funding Program Environmental Assessment Processes 2*.

The Agency responsible for granting authorisation contacts the interested parties who may be affected by a project and notifies them on the opportunities to be part of public participation and the remuneration thereof.<sup>196</sup> The public is considered an important source of information and knowledge regarding the physical site and possibly the environmental effects.<sup>197</sup> This Invitation stage grants applicants willing to be participants to show and demonstrate the value that they add and their expertise in the assessment. This criterion is used to support any participants in getting involved in a participatory process during an Environmental Assessment. It includes those; a) having a direct interest in the proposed project; b) possessing an expert relevant information regarding the impacts of the project and c) possessing indigenous knowledge involving the Impact Assessment.<sup>198</sup> These are a number of few preconditions that are required to exist and be in place for a successful public participation process.

The Canadian Government imagines that public participation is meaningful when it starts early; funding is made available for participants, is designed to increase the knowledge of participants, inclusive, transparent and information is made available to the public.<sup>199</sup> The principles for Canada's meaningful public participation will be weighed with South Africa's consultation approaches and methods. This will assist in determining the common ground, similarities, and any learnings between the two systems on the ideal form of the participatory process, if any. South Africa's public participation in environmental decision making, will now be examined and conclusively weighed against Canada's processes and procedures.

### ***3.3 South Africa's public participation for environmental compliance***

Section 24(5) of the NEMA provides that the Minister or MEC may make regulations that lay down the administrative procedures or rules for issuing, monitoring compliance during EA proceedings.<sup>200</sup> Some of these procedures or rules include consultation with land

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<sup>196</sup> CEAA *Public Participation in Environmental Assessment under the Canadian Environmental Assessment Act, 2012 Interim Reference Guide* 13.

<sup>197</sup> CEAA *An Overview of the Canadian Environmental Assessment Process Fact sheet II 2.*

<sup>198</sup> CEAA Canadian Environmental Assessment Act: An Overview 2011 24.

<sup>199</sup> <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/public-participation-impact-assessment-fact-sheet>.

<sup>200</sup> See s Section 24(5) of NEMA.

owners, lawful occupiers and other interested or affected parties.<sup>201</sup> Section 24 J of NEMA asserts that the Minister may develop, publish and implement guidelines regarding listed activities or specified activities.<sup>202</sup> This has given rise to a guideline which is solely applicable to a public participatory process to promote environmental governance, transparency and accountability.<sup>203</sup> Public participation guidelines or procedures in terms of EIA Regulations have defined an ideal form of public participatory process in obtaining an environmental authorisation.<sup>204</sup> This process is deployed as tool to inform, guide and provide assistance to all relevant stakeholders and competent authorities on the public participation requirements in complying with environmental participatory provisions.<sup>205</sup>

Public participation has always been steeped in the ideals of participatory democracy upon which a) people should have a say in decisions that affect their lives; b) early and ongoing, informed public participation should remain the foundation for sound policy making and c) the public must be involved in deciding the platform and mechanisms suitable in arriving to a decision.<sup>206</sup> The EIA regulations amended in 2017 have outlined approaches to a fair, well-informed and meaningful public participation process in environmental decision making. It remains to be seen if proponents or applicants of an environmental authorisations adhere to the provisions of this regulation as specifically required. The ideal form of public participation process in environmental decision making in South Africa, envisaged by the amended EIA regulations will now be reviewed.

### *3.3.1 The meaningful public participation*

The Department of Minerals and Energy through the Minister, has recently in 2020 published amendment to MPRDA regulations under GN R527 in Government Gazette 26275 dated 23 April 2004.<sup>207</sup> The intention was to omit and incorporate new provisions in the existing regulations. What stands out and pertinent to this study is amendment of

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<sup>201</sup> See s 24 (5)(vii) of NEMA.

<sup>202</sup> See s 24 J NEMA.

<sup>203</sup> Department of Environmental Affairs *Public Participation guideline in terms of NEMA EIA Regulations*, Pretoria, South Africa 6.

<sup>204</sup> Gen not. 657 in GG 28854 of 19 May 2006.

<sup>205</sup> Department of Environmental Affairs *Public Participation guideline in terms of NEMA EIA Regulations*, Pretoria, South Africa 6.

<sup>206</sup> Depoe et al *Communication and Public Participation in Environmental Decision Making* 3.

<sup>207</sup> Gen Notice 420 in GG 43172 of 27 March 2020 3.

Regulation 3 with the insertion of the word 'meaningful' consultation of interested and affected persons.<sup>208</sup> The regulation went further to define meaningful consultation as;

To be in good faith if the applicant has facilitated public participation in such a manner that reasonable opportunity has been given to provide comment by the landowner, lawful occupier or interested and affected party in respect of the land subject to the application about the impact the prospecting or mining activities would have to his or her right of use of the land by availing all relevant information pertaining to the proposed activities enabling these parties to make an informed decision regarding the impact of the proposed activities.<sup>209</sup>

Government Notice R 420 dated 27 March 2020 was recently issued in Government Gazette 43172 to modify MPRDA regulations.<sup>210</sup> Part of the amendments was to give effect to 'meaningful' public participation with interested and affected parties. Prior to these amendments, the consultation process was merely a vague requirement. Regulation 3 of MPRDA regulations as amended on meaningful consultative process requires that:

- 3 The Regional Manager or designated agency, as the case may be, must also make known the application by the following methods.
  - a) Publication in the applicable provincial gazette
  - b) Placement of notice in the Magistrate's Court in the magisterial district applicable to the land in question; or
  - c) advertisement in a local or national newspaper circulating in the area where the land or offshore area to which the application relates, is situated, or
  - d) Placement of notice in local shops, public libraries, municipal offices, and traditional council offices.
  - e) The notice to be in English and one other official language that is dominantly used in the relevant area.
- 4 The notice must include an invitation to members of the public to submit comments in writing on or before the date specified in the notice, which date may not be earlier than 30 days from the date of such notice.
- 5 The Regional Manager must obtain and keep confirmation of placement of the notice from:
  - a) The Clerk of the Court or the photographs taken by the responsible official, if the notice was placed in Magistrate's Court in the magisterial district applicable to the land or

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<sup>208</sup> Reg 2 of Gen Notice 420 in GG 43172 of 27 March 2020.

<sup>209</sup> Reg 1 of Gen Notice 420 in GG 43172 of 27 March 2020.

<sup>210</sup> Gen Notice 420 in GG 43172 of 27 March 2020.

- b) Photographs taken by the responsible official, if the notice was placed in local shops, public libraries, municipal offices, and traditional council offices.<sup>211</sup>

The amended regulations to the MPRDA have added regulation 3A (1) which postulates an obligation on the part of an applicant to consult meaningfully. It provides that meaningful consultation with all stakeholders, including landowners must be undertaken in line with the public participation process prescribed in the EIA regulations.

### *3.3.2 Public participation provisions in EIA Regulations*

Public participation provision is catered for in Chapter 6 of the 2014 EIA regulations. Regulation 39 of EIA Regulations provides that if an activity is to be undertaken on land owned by person other than proponent, he or she must obtain the written consent of the landowner or person in control of the land prior to an application for environmental authorisation.<sup>212</sup> Regulation 40(2) highlights the purposive nature of public participation; it places a duty on applicants and proponents to make environmental information reasonably accessible during public participation, to all interested and affected parties regarding an environmental authorisation application.<sup>213</sup> EIA regulations compels that public participation process is required to be undertaken by a proponent or applicant for an environmental authorisation.<sup>214</sup> Section 41(2) provides that the person conducting public participation must take into account any relevant guidelines applicable to public participation, which includes guidelines on how to make the notice is made accessible. Regulation 41(2) of EIA Regulations provides that public participation process must entail:

- a) Fixing a notice board at a place conspicuous to and accessible by the public at the boundary, on the fence or along the corridor of the site where the activity to which the application or proposed application relates to.
- b) Giving written notice, in any of the manners provided to the occupiers of the site or the owner or person in control of the site where the activity is to be undertaken, the municipal councillor of the ward, the municipality which has jurisdiction in the area and any other party as required by the competent authority.

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<sup>211</sup> Reg (2)(1) Amendment of MPRDA Regulations published in GN 420 in GG 43172 of 27 March 2020.

<sup>212</sup> See Reg 39(1) of EIA Regulations.

<sup>213</sup> See Reg 40 (2) of EIA Regulations.

<sup>214</sup> See s 40 of EIA Regulations.

- c) Placing an advertisement in one local newspaper or any official Gazette that is published specifically for the purpose of providing public notice of applications.
- d) Placing an advertisement in at least one provincial newspaper or national newspaper, if the activity has or may have an impact that extends beyond the boundaries of the metropolitan or district municipality.
- e) using reasonable alternative methods, as agreed to by the competent authority, in those instances where a person is desirous of but unable to participate due to illiteracy, disability and any other disadvantage.<sup>215</sup>

### *3.3.3 EIA guidelines of a comprehensive public participation*

An ideal form of a comprehensive public participation process in South Africa was defined by the Department of Environmental Affairs through the Public Participation guideline in terms of NEMA EIA Regulations. It outlines the necessary procedure to be followed and provides guidance on the level of public participation. Different models and mechanisms are offered in the implementation of a public participation process in which South Africa has since published guidelines to an effective public participation process in terms of NEMA. The guideline requires that at a minimum, comprehensive public participation process should allow to:

- i. Provide for the opportunity for all role players including potential and registered interested and affected parties (RI&APs), EAPs, state departments, organs of state, and the competent authority (CA) to obtain clear, accurate and understandable information about the environmental impacts of the proposed activity or implications of a decision;
- ii. Provide for role- players to voice their support, concerns and questions regarding the project, application, or decision;
- iii. Provide the opportunity for role-players to suggest ways for reducing or mitigating any negative impacts of the project and for enhancing its positive impacts;
- iv. Enable the person conducting Public Participation to incorporate the needs, preferences, and values of potential or RI&AP's into its proposed development that becomes the subject of an application for an environmental authorization (EA);
- v. Provide opportunities for clearing up misunderstandings about technical issues, resolving disputes and reconciling conflicting interests;
- vi. Encourage transparency and accountability in decision-making;
- vii. Contribute toward maintaining a healthy, vibrant democracy; and

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<sup>215</sup> See Reg 41(2)(a)-(e) of EIA Regulations.

- viii. Give effect to the requirement for procedural fairness of administrative action as contained in the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).<sup>216</sup>

These principles define the nature or characteristics of a holistic, significant and a just public participation process in environmental governance which bares the question on when it should be conducted, by who and to which extend. The guidelines notably acknowledge that the minimum requirements for public participation outlined in the EIA Regulations will not be adequate for all applications. This implies that the circumstances of each application will determine the level and extend of participation.<sup>217</sup> The Public participation process is outlined in the Department of Environmental Affairs guidelines published in 2017 to provide guidance as to when and how it must be undertaken. The guidelines supplement provisions of the NEMA, MPRDA and EIA regulations.

### *3.3.4 Mechanisms for public participation in South Africa*

The South African guideline on public participation during Environmental Assessment provides for the involvement of disadvantaged communities, those in the rural areas requiring special needs (disabled and illiterate) and the possible approaches to consider.<sup>218</sup> Those responsible, including the Environmental Assessment Practitioners, has a duty to:

- a. Announce the PPP on a local radio station in a local language, at an appropriate time (e.g., peak hours);
- b. Using participatory rural appraisal and participatory learning and action approaches and techniques could be used to build the capacity of the I&APs to engage and participate more effectively;
- c. Specific approaches to existing community structures, committees, and leaders;
- d. Holding public meetings at times and venues suitable to the community;
- e. Holding separate meetings with vulnerable and marginalised groups; and
- f. Appropriate access to information must be provided.<sup>219</sup>

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<sup>216</sup> Department of Environmental Affairs *Public Participation guideline in terms of NEMA EIA Regulations*, Pretoria, South Africa 7.

<sup>217</sup> Department of Environmental Affairs *Public Participation guideline in terms of NEMA EIA Regulations*, Pretoria, South Africa 6.

<sup>218</sup> Department of Environmental Affairs *Public Participation guideline in terms of NEMA EIA Regulations*, Pretoria, South Africa 10.

<sup>219</sup> Department of Environmental Affairs *Public Participation guideline in terms of NEMA EIA Regulations*, Pretoria, South Africa 10.

The guidelines further require that other public participation mechanisms or platforms may be considered as the approaches are not limited to the above. The use of public meetings and open days; conferences; press releases; questionnaires or opinion surveys; information desks; social media and workshops with constituencies (e.g., national standing committees, non-government organizations) may suffice as applicable.<sup>220</sup> This leaves an open approach to expert authorities by what they deem fit and appropriate in facilitating easy access to information for the public during Environmental Impact Assessments. The lack of involvement of those illiterate and marginalized and the insufficient detail in legislation regarding meaningful methods, processes for practical achievement of public participation remains a concern. This raises questions on who is eligible to participate.

### *3.3.5 Eligible Participants to Public Participation Process in South Africa*

Organizations, individuals and all interested and affected parties by a development approval, permits, licenses, land use approvals and all other environmental authorisations have called for greater transparent and accountable consultation.<sup>221</sup> It has been observed that parties to this process frequently state that they are usually treated as adversaries rather than welcomed participants.<sup>222</sup> The participants also claim that they are also either involved too late already towards the end of the project or their inputs are not reflected.<sup>223</sup> The possible reason why public participation processes are seen to be meaningless is usually associated with how complex and technical the documents are, which requires experts to translate into understandable language to the communities.<sup>224</sup>

Unlike in Canada, there is usually no financial assistance offered to communities in South Africa, no technical and scientific experts to attend parliament to make submissions on legislation nor any consultations. It is mostly various Non-Governmental Organizations with expertise and experience that are willing to participate and intervene during calls for public participation, which they privately fund. It is yet to be seen on how the public can

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<sup>220</sup> Public Participation in Environmental Assessment under the Canadian Environmental Assessment Act, 2012 Interim Reference Guide 11.

<sup>221</sup> Razzaque *Public Participation in Environmental Decision Making* 165.

<sup>222</sup> Depoe et al *Communication and public participation* 101.

<sup>223</sup> Depoe et al *Communication and public participation* 101.

<sup>224</sup> Rottmann *Recommendations on Public Participation* 12.

participate and ensure that the proponent sticks to the design and procedures permitted on authorisation.

### ***3.4 Conclusion***

Public participation is seen to be recognised and its principles adopted by most countries word-wide, however it seems achieving a meaningful and effective participation remains a challenge due to the indefinite nature of this process.<sup>225</sup> Although the purpose of public participation during Environmental Assessment serve to ensure accountability, transparency in decision making and representation, its practical implementation rests with law enforcement and adherence to the rules and regulations in realising the ultimate goal. Canadian and South African laws have distinctively attempted to define and entrench public participatory provisions in environmental compliance matters. The provisions are meant to be comprehensible by all proponents, organs of state and relevant authorities but there seems to be a speculation on how Public Participation is accomplished. Both countries have outlined their forms of public participation processes and procedures that regulate decision making in environmental compliance. It however remains to be seen if adopting any Canadian provisions for either continuous or continual improvement to the South African system is possible. The next chapter will revisit the recent South African case law to establish the nature of public participation in achieving environmental compliance.

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<sup>225</sup> Sinclair *JELP* 2.

## **4. PUBLIC PARTICIPATION IN SOUTH AFRICA: A READING OF RECENT CASE LAW**

### ***4.1 Introduction***

This chapter follows an in-depth benchmarking between South Africa and Canada's legislative tools and protocols utilised in the advancement of public participation principles in environmental compliance and decision making. The intent and mandate can be concluded as both countries seek to promote, protect, and enhance the environmental rights of all its citizens, through a meaningful involvement of the public.<sup>226</sup> In determining and establishing the nature and form of public participation for environmental compliance in South Africa, recent South African environmental case law will be revisited. The chapter focuses on how the courts have recently dealt with cases of public participation in ensuring compliance with environmental precepts.

*Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (4) All SA 533 (ECG); *Baleni and Others v Regional Manager Eastern Cape Department of Resources and Others* 2021 (1) SA 110 (GP); *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* 2021 (2) All SA 1 (SCA) and *Mfolozi Community Environmental Justice Organisation and Others v Minister of Minerals and Energy and Others* 2022 (1) All SA 305 ZAGPPHC, will be used to exemplify the current position of environmental compliance to public participatory provisions in environmental matters in South Africa. Public participation requirement is to a certain extent subjected to interpretation by EAPs at times, to fully exercise their duties and powers vested in them and ensure a principle of equitable access to environmental resources, benefits, and services to meet basic human needs and ensure human wellbeing.<sup>227</sup> It must be noted, however, that the recent available environmental cases on public participation disputes in the South African regulatory space are those in the mining and petroleum. These recent cases that tackled the provisions of MPRDA on meaningful consultation will now be considered.

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<sup>226</sup> United Nations Economic Commission for Europe 1998.

<sup>227</sup> See s 2 of NEMA.

## **4.2 A reading of recent case law**

### *4.2.1 Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*

Recently, the High Court on 28 December 2021 interdicted Shell Exploration and Production South Africa BV (Shell) and others from undertaking a seismic survey operation.<sup>228</sup> This interdict was to forbid respondents from carrying out the survey until an environmental authorisation had been granted under the NEMA.<sup>229</sup> An application for an exploration right in terms of section 79 of MPRDA to explore oil and gas had been submitted to the authorities.<sup>230</sup> This application triggered an Environmental Management Programme to be made available to all interested and affected parties, requesting them to raise issues of concern or have their inputs or views regarding the exploration activities.<sup>231</sup> Part of the process was placing a notice for 30 days to allow public comments. The applicant for the exploration right also placed advertisements in four different newspapers notifying the public on how to comment, provide input on the proposed project and the consultation process. An Exploration Right was eventually granted by the Department of Mineral Resources and Energy (DMRE) following the approval of an Environmental Management Programme.<sup>232</sup>

Shell's exploration work was to take place from December 2021 to April 2022 prior to the interdict.<sup>233</sup> Amongst other submissions, the applicants in the case contended that communities' right to meaningful consultation about the seismic survey had been deprived, and that this had impacted upon their customary rights.<sup>234</sup> Another issue of concern by the applicants was Shell operating unlawfully without an Environmental Authorisation. This implied non-compliance with the NEMA provisions and translates to a direct omission to consult, which could ultimately be considered illegal.

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<sup>228</sup> *Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* para 82.

<sup>229</sup> *Sustaining The Wild Coast NPC* para 1.

<sup>230</sup> *Sustaining The Wild Coast NPC* para 5.

<sup>231</sup> *Sustaining The Wild Coast NPC* para 5.

<sup>232</sup> *Sustaining The Wild Coast NPC* para 6.

<sup>233</sup> *Sustaining The Wild Coast NPC* para 6.

<sup>234</sup> *Sustaining The Wild Coast NPC* para 8.

The applicants were concerned that the seismic survey could have an impact on their cultural needs due to failure by Shell to undertake a Climate Impact Assessment.<sup>235</sup> They alleged that the survey could potentially worsen the environmental conditions already experienced, such as unpredictable weather patterns and the prospect of rising sea levels.<sup>236</sup> The applicants alleged in their application that seismic surveys threaten ecological, marine life and socio-economic conditions.<sup>237</sup> The other applicants even asserted to not having been consulted during the Environmental Management Programme process and only learnt of the exploration right after the Environmental Authorisation was granted.<sup>238</sup> The Court had to decide if the applicants had a reason to complain about the consultation process that was followed before the seismic survey was conducted.<sup>239</sup> Shell contended to have exceeded the expectations of public participation requirements of all interested and affected parties.<sup>240</sup> This was a clear indication of a subjective and vague interpretation of the EIA Regulations by applicants to an Environmental Authorisation. The court found out some consultation process by Shell was insufficient and substantially flawed,<sup>241</sup> due to the following findings:

#### *4.2.1 Identification of interested and affected parties*

The applicant's complaint was on the basis that not all interested and affected parties were identified. For the applicants, there was a duty on Shell to ensure inclusion of all members of the villages, communities and traditional communities impacted to being part of the consultation process. The judge noted that "a person who does not know of the process cannot be expected to register and participate in the process as an interested and affected person."<sup>242</sup> Shell's consultation process was criticised by the applicants for having consulted only with the Kings of the communities as it has assumed that the Kings spoke for their subjects.<sup>243</sup> The Court held that Shell failed to consult adequately with all

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<sup>235</sup> *Sustaining The Wild Coast NPC* para 15.

<sup>236</sup> *Sustaining The Wild Coast NPC* para 15.

<sup>237</sup> *Sustaining The Wild Coast NPC* para 16.

<sup>238</sup> *Sustaining The Wild Coast NPC* para 18.

<sup>239</sup> *Sustaining The Wild Coast NPC* para 11.

<sup>240</sup> *Sustaining The Wild Coast NPC* para 20.

<sup>241</sup> *Sustaining The Wild Coast NPC* para 33.

<sup>242</sup> *Sustaining The Wild Coast NPC* para 21.

<sup>243</sup> *Sustaining The Wild Coast NPC* para 25.

interested and affected persons and if they complied to public participation procedure outlined in MPRDA, they would not have found themselves in such a predicament.<sup>244</sup>

#### *4.2.1.1 Notification*

The Court found that Shell placed four newspaper advertisements to notify the public about the proposed project, however the notifications were published in both English and Afrikaans. In the court's view the notifications could only be accessible to those who can read English and Afrikaans and had excluded isiZulu or isiXhosa languages that are spoken in communities of the applicants.<sup>245</sup> The Court concluded that by virtue of communicating in only English and Afrikaans, this was a direct way of excluding the applicants from public participation.<sup>246</sup>

#### *4.2.1.2 Meetings*

The applicants criticized the series of in person group meetings which were held as part of engagement processes, following the 30 days comment notice. They complained that the meeting was not held in communities or areas accessible by all. The court found that those locations disregarded the communities in question.<sup>247</sup>

#### *4.2.1.3 Access to information*

The consultants hired by Shell developed a stakeholder analysis through the use of historical studies and gave no detail about what the study entailed. The Court found that for the communities to be able to consult, they should at least have knowledge about the seismic survey and the contact details of Shell's consultants.<sup>248</sup> The Court noted that publishing the notices in English and Afrikaans made it unfeasible for the potential interested and affected parties to register and ultimately yielding little prospect for interested and affected parties to discover documents. These studies rendered the consultation inadequate since the previous studies failed to consider and identify the areas by fishing communities along the coastline where the seismic survey was to be

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<sup>244</sup> *Sustaining The Wild Coast NPC* para 68.

<sup>245</sup> *Sustaining The Wild Coast NPC* para 22.

<sup>246</sup> *Sustaining The Wild Coast NPC* para 22.

<sup>247</sup> *Sustaining The Wild Coast NPC* para 24.

<sup>248</sup> *Sustaining The Wild Coast NPC* para 29.

performed.<sup>249</sup> The learnings here clarify how access to environmental information is a concern even though the Constitution permits especially where the Bill of Rights may be infringed. It has been well established in the study that access to information plays an integral role of public participation, as it has a potential to influence any decision during EA.

#### *4.2.2 Baleni and Others v Regional Manager Eastern Cape Department of Resources and Others*

In a judgment recently delivered on 11 September 2020 of *Baleni and Others v Regional Manager*, where the High Court in Gauteng Division, Pretoria, declared that interested and affected parties are entitled to be furnished with a copy of a Mining Right application upon request.<sup>250</sup> This followed a request by the applicants to have access to information or documents furnished to them in enabling them to properly comment, object if they wished to and even participate in the Mining Right application process.<sup>251</sup> The applicants were only provided with access to information of the Mining Right application only after requesting them through a notice of motion with the courts.<sup>252</sup>

Transworld Energy and Mineral Resources Pty Ltd (TEM) made an application for a Mining Right in terms of section 2 of MPRDA without providing the applicants with a copy of an application as contemplated by section 22 of the MPRDA.<sup>253</sup> The applicants were by the PAIA Manual of the DMR automatically entitled to the Mining Right application copy.<sup>254</sup> The DMR PAIA manual was at a time used as an internal document which the DMR annually publish on requirements for the promotion of access to information.<sup>255</sup> The applicants were only furnished with a copy of the mining right application after several attempts and correspondences with the Regional Manager and EAP appointed by TEM.<sup>256</sup> TEM's refusal was based on the fact that the applicants were not entitled to a copy and contents of the Mining Right application and advised them to request a copy through the

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<sup>249</sup> *Sustaining The Wild Coast NPC* para 30.

<sup>250</sup> *Baleni and Others v Regional Manager Eastern Cape Department of Resources and Others* para 95.

<sup>251</sup> *Baleni* para 4.

<sup>252</sup> *Baleni* para 8.

<sup>253</sup> *Baleni* para 6.

<sup>254</sup> *Baleni* para 51.

<sup>255</sup> *Baleni* para 51.

<sup>256</sup> *Baleni* para 15.

DMR in terms of PAIA.<sup>257</sup> TEM went ahead and consulted with interested and affected parties prior to issuing the communities with a copy of the Mining Rights application.<sup>258</sup> The applicants had initially requested a copy in order to prepare for the public participation which was anticipated to be facilitated by an EAP.<sup>259</sup> It was only after the applicants approached the court that TEM forwarded a copy of the Mining Right application to the applicants' attorneys.<sup>260</sup> Based on this case, it is apparent that refusal to provide information on matters that have a potential to cause harm contradicts the principles of transparency. It later emerged to the applicants that TEM's majority shareholder has transferred its majority shares to its partner, Keysha.<sup>261</sup> The applicants expected to be notified again on the potential Mining Right application amendments due to recent developments.<sup>262</sup> The applicants requested TEM to furnish a new copy of the amendment, of which TEM refused. The Court had to decide on whether the applicants were entitled to a copy of the Mining Right application in terms of section 10 and 22(4) of MPRDA.<sup>263</sup>

The Court had to give an interpretation which gives effect to the constitutional rights of the applicants, more especially a right of access to information and just administrative action relating to the notice and consultation process.<sup>264</sup> It found that the use of PAIA application process in obtaining information from private entities yielded low success rates as there was either no timeous responses to the requests, lack of staff capacity and inconsistencies in applying the time periods.<sup>265</sup> The Court clarified the misinterpretation and emphasised the requirement to adequate and meaningful consultation, that the lack of access to the documents will render public consultation impossible for the community affected by the proposed mining.<sup>266</sup> The Court ruled in favour of the applicants and stated that the documents have to be made available to the community before the consultation could take place for a meaningful participation of interested and affected parties.<sup>267</sup> The

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<sup>257</sup> *Baleni* para 15.

<sup>258</sup> *Baleni* para 56.

<sup>259</sup> *Baleni* para 15.

<sup>260</sup> *Baleni* para 15.

<sup>261</sup> *Baleni* para 15.

<sup>262</sup> *Baleni* para 15.

<sup>263</sup> *Baleni* para 16.

<sup>264</sup> *Baleni* para 47.

<sup>265</sup> *Baleni* para 61.

<sup>266</sup> *Baleni* para 67.

<sup>267</sup> *Baleni* para 67.

Court noted that meaningful consultation entailed discussion of ideas between parties in an equal manner whilst agreeing to disagree on certain matters.<sup>268</sup> The Court further conceded to the notion by the applicants that, they were entitled to a copy on request from the Regional Manager and should not go through the PAIA process.<sup>269</sup> The court ordered that the applicants were entitled to be furnished with a copy of an application for a Mining Right application on request as contemplated by section 22 of the MPRDA.<sup>270</sup>

#### *4.2.3 Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others*

The Supreme Court of Appeal (SCA) recently in February 2021 ordered an interdict to stop Tendele Coal Mining (Pty) Ltd (Tendele) from coal mining operations. The appellants approached the court to stop Tendele from having unlawfully commenced with its listed activities and operations without appropriate environmental authorisations. The KwaZulu-Natal Division of the High Court (a court *a quo*), Pietermaritzburg dismissed the *Global Environmental Trust* application in granting an interdict against the Tendele from continuing with any of its mining operations at Somkhele Mine in Mtubatuba area, Kwazulu Natal Province.<sup>271</sup> *The Global Environmental Trust* had in the High Court submitted that the mine was noncompliant with respect to environmental permits, licenses and approvals as required by section 24(2) of the NEMA.<sup>272</sup> The licenses and permits that Tendele required included;

- Approval or permission from the municipality to use the land for mining operations.<sup>273</sup>
- Approval to damage, alter or exhume the traditional graves.<sup>274</sup>
- License for waste management.

In their defence, Tendele asserted that one environmental system which came into effect in December 2014 allowed the transitional arrangements for the continuation of mining operations lawfully without applying for new authorisations, as it was previously governed

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<sup>268</sup> *Baleni* para 89.

<sup>269</sup> *Baleni* para 95.

<sup>270</sup> *Baleni* para 117.

<sup>271</sup> *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* para 4.

<sup>272</sup> *Global Environmental Trust* para 8.

<sup>273</sup> *Global Environmental Trust* para 8.

<sup>274</sup> *Global Environmental Trust* para 8.

by MPRDA.<sup>275</sup> The high court ruled in Tendele's favour as it had through its Environmental Management Plans met all the requirements in obtaining environmental authorisations.<sup>276</sup>

It has been established by now that all licenses or approvals require public consultation with all interested and affected parties of which the Tendele had omitted to do, of which *Global Environmental Trust* proceeded to the SCA. The SCA on its findings found that the appellant was denied access to documents when they requested a copy of all Environmental Authorisations issued to Tendele upon realising that it was conducting activities listed in the EIA Regulations Listing Notices.<sup>277</sup> The DMR's stance was that the EMPs issued under the MPRDA were deemed to be EMPs issued under NEMA.<sup>278</sup> It was later discovered that Tendele had no Environmental Authorisations to conduct its mining operations. The SCA emphasized that the MPRDA does not have the status of an environmental authorisation under NEMA. Therefore, Tendele was obligated to apply for approvals since most of its mining operations were listed activities.<sup>279</sup> It found that the removal, exhumations and relocation of graves was unlawful and inconsistent with the Constitution.<sup>280</sup> Throughout the entire process, Tendele's approach was that it did not require Environmental Authorisation as its mining operations was governed and regulated by the MPRDA, not the NEMA.<sup>281</sup> The SCA eventually made a ruling in favour of the *Global Environmental Trust* as those aggrieved and affected by the mining operations. It further ordered an interdict and declared the commencement or continuation of mining operations unlawful and unconstitutional until it has been granted all the relevant environmental authorisations for the listed activities.<sup>282</sup>

What the judgment expressed in summary was that Tendele's continuation of mining operations would constitute a violation to NEMA in terms of sections 24(2) and 24D. It was clear that all the appellant required was to enforce section 24 Constitutional provision, to have the environment protected.<sup>283</sup> The SCA made it known that it had a

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<sup>275</sup> *Global Environmental Trust* para 9.

<sup>276</sup> *Global Environmental Trust* para 12.

<sup>277</sup> *Global Environmental Trust* para 18.

<sup>278</sup> *Global Environmental Trust* para 18.

<sup>279</sup> *Global Environmental Trust* para 20.

<sup>280</sup> *Global Environmental Trust* para 20.

<sup>281</sup> *Global Environmental Trust* para 19.

<sup>282</sup> *Global Environmental Trust* para 93.

<sup>283</sup> *Global Environmental Trust* para 91.

duty to interpret statutes purposively by promoting and conforming to the Bill of Rights.<sup>284</sup> The SCA held that complying with section 24(1) of identifying the listed activities that requires authorisation is part of an Integrated Environmental Management approach laid down in Chapter 5.<sup>285</sup> It concluded by declaring the mining operations unlawful and unconstitutional. The court also set aside the High Court's decision and granted an order against Tendele to discontinue with undertaking listed activities until it has relevant NEMA approvals.<sup>286</sup> This suggests that public participation was also directly neglected due to an omission during the EIA process.

#### *4.2.4 Mfolozi Community Environmental Justice Organisation and Others v Minister of Minerals and Energy and Others*

In the most recent judgment in the High Court of South Africa; Gauteng Division Pretoria, delivered on 4 May 2022, where the Mfolozi Community Environmental Justice Organisation (MCEJO) applied to review and set aside a Mining Right granted to Tendele in 2016.<sup>287</sup> One of *MCEJO* arguments was on the defects observed in the public participation process, were Tendele during the scoping and EIA failed to comply with stipulated provisions.<sup>288</sup> *MCEJO* contended in their application that interested and affected parties were provided with false impression by Tendele during the EIA process, that the mining area for which the application was for, amounted to 32km<sup>2</sup>, when it was in fact 212km<sup>2</sup>.<sup>289</sup> The Court's findings were that the public participation process undertaken by Tendele was incomplete due to its defective nature, to which Tendele conceded to.<sup>290</sup> The following was canvassed by the court:

##### *4.2.4.1 Environmental compliance*

The Court contended that a problem started during the scoping phase when Tendele's consultation process failed to comply with the obligatory requirements of regulation 49(1)(f) of amendment of MPRDA regulations and the DMR Guidelines for compiling of a

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<sup>284</sup> *Global Environmental Trust* para 31.

<sup>285</sup> *Global Environmental Trust* para 31.

<sup>286</sup> *Global Environmental Trust* para 31.

<sup>287</sup> *Mfolozi Community Environmental Justice Organisation and Others v Minister of Minerals and Energy and Others* para 1.

<sup>288</sup> *MCEJO* para 24.

<sup>289</sup> *MCEJO* para 25.

<sup>290</sup> *MCEJO* para 25.

Scoping Report.<sup>291</sup> It turned out the Regional Manager was not satisfied with Tendele's scoping report as it did not meet all the environmental requirements stipulated by law.<sup>292</sup> The Regional Manager sent out a directive following their scoping report, notifying them of the incomplete nature of their consultation process,<sup>293</sup> which included the identification of interested and affected parties, evidence that consultation was undertaken and information provided. No evidence for a corrective action was available indicating that Tendele acted anyhow in responding to the Regional Manager's directive.

#### *4.2.4.2 Documentation*

Not only did Tendele mislead interested and affected parties, but they also falsely misconstrued the information provided. On request of the scoping report, the applicants requested information to be provided to the community, landowners and interested and affected parties, of which Tendele provided nothing.<sup>294</sup> The Court conceded that Tendele had breached a fundamental law by failing to disclose sufficient details of what the prospecting or mining operation would entail on the land.<sup>295</sup> Tendele's scoping report was seen as being vague, evasive, and immaterial with no provision of information provided.<sup>296</sup>

#### *4.2.4.3 Specialist studies*

The Court observed that the specialist reports and studies conducted in assessing the impacts of the proposed extension of the mine did not adequately cover the entire scope in Tendele's Mining Right application.<sup>297</sup> The EIA regulations require that as part of the EIA compilation process, an applicant of a Mining Right application should describe a process of engagement and of identifying interested and affected persons and all stakeholders, including their views and concerns.<sup>298</sup>

#### *4.2.4.4 Identifying Interested and affected parties*

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<sup>291</sup> MCEJO para 27.

<sup>292</sup> MCEJO para 30.

<sup>293</sup> MCEJO para 30.

<sup>294</sup> MCEJO para 25.

<sup>295</sup> MCEJO para 33.

<sup>296</sup> MCEJO para 33.

<sup>297</sup> MCEJO para 25.

<sup>298</sup> MCEJO para 26.

The court found that Tendele failed to identify interested and affected parties, landowners, and the lawful occupiers of the land. It only relied on the list of interested and affected parties it had developed previously in their other mining applications.<sup>299</sup> It went and failed to keep a list of those parties and proof of such consultation meetings to submit to the Regional Manager.<sup>300</sup> Tendele had on several sections noted on the scoping report that “Consultation has yet to be concluded” on the requirement to provide a list of which of the identified communities, landowners, lawful occupiers, and other interested and affected parties were in fact consulted.<sup>301</sup> The Court established that Tendele possibly falsified the list of names and contact numbers of people it claimed to be residing in the area, noting the surnames such as Vorster, Barker, Fishers.<sup>302</sup>

#### *4.2.4.5 Notifications and Meetings*

The notice issued out by Tendele which was termed “Notice of Commencement of EIA and EMP processes” was only written and published in English.<sup>303</sup> The Court ultimately concluded that Tendele flouted the law on public participation requirements by unreasonably limiting the extent of the mining area to specific sites and leaving out some community members to participate during meetings, the most crucial phase of scoping.<sup>304</sup> The Court narrowed its application of the matter and allowed its consideration on inadequate public participation, more especially on failure by Tendele to identify relevant interested and affected parties and Tendele’s defective EIA process. This was defined by the court as an affront to the law and should have never been allowed.<sup>305</sup>

The Court concluded with an order against Tendele to notify all interested and affected parties to participate and to guarantee proper public participation process as prescribed in NEMA guidelines and EIA regulations.<sup>306</sup>

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<sup>299</sup> MCEJO para 27.

<sup>300</sup> MCEJO para 27.

<sup>301</sup> MCEJO para 28.

<sup>302</sup> MCEJO para 29.

<sup>303</sup> MCEJO para 33.

<sup>304</sup> MCEJO para 36.

<sup>305</sup> MCEJO para 36.

<sup>306</sup> MCEJO para 36.

## ***Conclusion***

Public participation disputes and deficiencies for environmental compliance in light of recent case law in South Africa have extensively been cases attributed to the mining and petroleum industry. The chapter has highlighted through the discussed case law, the inconsistencies, and the discretionary nature in the implementation of public consultations provisions and requirements as outlined in either MPRDA or NEMA. The recent amendments to MPRDA regulations provide for meaningful consultation with interested and affected parties.<sup>307</sup> This requirement of meaningfully consulting with landowners, lawful occupiers and interested and affected parties is expected to be conducted in terms of public participation process prescribed in EIA regulations in terms of section 24(5) of NEMA.<sup>308</sup> An unavoidable yawning gap however is the omission to initially comply with the bare minimum of seeking Environmental Authorisations altogether prior to undertaking any listed work or activity. Public participation unfortunately is embedded within the process of notifying competent authorities for an approval to conduct a listed work. It is evident from the cases discussed that failure to seek Environmental Authorisations equates to lack of public participation in environmental decision making by competent authorities. In cases where an applicant follows a process to apply for an approval and permits, the public participation process is either insufficient, inadequate or is not meaningful. It can sometimes be referred to as a tick-box exercise due to its current nature and form in South Africa. In a recent *Shell* case, the court made a judgment and criticised almost the entire public participation process. It found that the notification process, identification of interested and affected parties, the languages used and access to information procedures were all flawed and a disjuncture to the environmental compliance provisions.

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<sup>307</sup> Reg 2 Gazette 43172 of March 2020.

<sup>308</sup> Reg 3(A) Gazette 43172 of March 2020.

## 5. SUMMARY AND CONCLUSION

### 5.1 Summary

Constitutional Rights are at stake when there is non-compliance with public participatory provisions envisioned by NEMA. It is in the NEMA's preamble that the law should institute procedures and institutions to accelerate and promote public participation for environmental governance.<sup>309</sup> As discussed, the Court held in *Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* that breach of Constitutional Rights, such as the Environmental Right, threatens the wellbeing and livelihoods of communities.<sup>310</sup> Non-compliance with public participatory provisions could translate to failure to promote, protect and advance the Environmental Right, right of access to information and a right to just administrative action. Under section 24D, NEMA requires a listed activity under EIA regulations to undergo an EIA process and part of the assessment is conducting public participation with all interested and affected parties. As the discussion exhibited, the obligatory requirements of the EIA regulations on public participation are either disregarded or neglected, resulting in the disdain of views, inputs, and opinions of previously disadvantaged communities. MCEJO case is a typical recent example of a giant mining company which manifestly failed to comply with the Environmental Law stipulations.

Non-compliance with environmental law by potential applicants or developers was discovered to still exist, despite the obligations of NEMA and EIA regulations on Environmental Authorisation being clear on the specific requirements. This was observed in *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others*, where a mining company rather opted to proceed with its mining operations without relevant approvals and licenses. It can thus be argued that environmental law enforcement may play a pivotal role through its inspectorate in ensuring compliance prior to the institution of litigation by interested and affected parties. It also became evident from the discussions in Chapter 2 and Chapter 4 on the legislative provisions and recent case law in promoting public participation that PAIA still lacks execution and expeditious

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<sup>309</sup> Preamble of NEMA.

<sup>310</sup> *Sustaining The Wild Coast NPC* para 68.

remedies as seen in the *Baleni* case. The application process for obtaining information from private entities yields low success rates as there was either no timeous responses to the requests, lack of staff capacity and inconsistencies in applying the time periods. As a general observation on the recent cases, it can be deduced that access to information held by the state and any person and that is required for the exercise or protection of Environmental Rights has been identified as a hurdle that is yet to be circumnavigated in cases where there is a repudiation. In the event that those seeking information do not have the capacity to approach the courts, then rights could be pungently violated.

In Chapter 3, the study took a turn to Canada's developed form of meaningful public participation in Environmental Governance. The discussion established that Canada ensures meaningful public participation through processes that encompasses notifications of opportunities for public participation, reasonable timing, provision of accessible information, transparent reporting of results and financial support for participants.<sup>311</sup> It was discovered in this chapter that not only was an EIA conducted for physical activities listed by the minister for those with potential adverse environmental effects but also those with potential for public concerns required an Environmental Assessment. What was noticeable in this chapter is the establishment of the Canadian Environmental Assessment Agency, which was independent from the government and solely responsible for all EIAs. The independence of the Agency implies minimal interference by government, and thus ensuring transparent and just administrative action, as they are advising and reporting to the Minister. It was also discovered in this study that access to environmental information in Canada for public participation purposes, is made easier for all interested and affected parties, through a convenient Public Registry that could be accessed by everyone. The chapter revealed the extent of Canada's four classifications of different EIA processes which were dependant on the scale and the complexities of the potential adverse effects. This has simplified uncertainties from applicants on the level and extent of the public participation process to follow. Thus, revealing that meaningful public participation can arguably be effective and realised when clear protocols, channels and resources are allocated specifically for the advancement of public participatory process. The discussion was then concluded by detailing South Africa's

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<sup>311</sup> Refer to Chapter 3 section 3.2.

current form of public participation for Environmental Compliance. An observation was made to the effect that meaningful public participation is only provided for by MPRDA. Most notably, the MPRDA was found to be intentional in its provision for meaningful public participation on its recent amendments to the MPRDA regulations. It has created an obligation on the part of the applicant to consult meaningfully, by complying with the process prescribed in the EIA Regulations promulgated in terms of section 24(5) of NEMA.<sup>312</sup> However, lack of law enforcement, inconsistencies in different public participatory processes required by different SEMAs and the discrepancies on the extent to which public participation should be undertaken could arguably be the reason Courts have lately lambasted against meaningless public participation processes. The discussion and analysis in Chapter 4 explored and interrogated current public participation procedures for complying with environmental law provisions in South Africa through the reading of recent case law. It emerged in the chapter that access to environmental information, environmental compliance with public participation provisions, notifications and identifying interested and affected parties for participation remain common challenges.

## ***5.2 Concluding remarks***

In South Africa, an Environmental Right is a fundamental right as enshrined in the Bill of Rights of the Constitution and the state is obliged to respect, safeguard, promote, and fulfil this right. Part of public participation for environmental justice and compliance is to ensure public involvement that seeks to be inclusive and transparent on issues that affects the people. Public Participation as a principle of international environmental law serves as a tool to ensure that public involvement on environmental matters is fulfilled by those in power, in enabling an informed decision-making.<sup>313</sup>

In this study, the aim was to examine through recent case law, the nature of public participation in pursuance of environmental compliance in South Africa. The study further explored the nature of public participation as defined and given provision through the Constitution, the NEMA and several SEMAs.

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<sup>312</sup> Reg 2 Gazette 43172 of March 2020.

<sup>313</sup> Refer to Chapter 2 section 2.2.2.

The challenge began with what appeared as a significant number of disputes between interested and affected parties and mostly developers, wherein the former approached the courts for either an interdict, judicial reviews, or orders to stop development activities until environmental authorisations are granted. These environmental disputes arose primarily because community members had not been adequately involved in EIA processes related to the development activities which had the likelihood of potentially affecting them or degrading their environment. This then influenced the study to determine if the legal framework was unclear on the practical implementation of public participatory process or whether there was merely a lack of compliance on the part of the authorities and environmental authorisation applicants or developers. The following central research question which guided the whole study was formulated as:

What is the nature of public participation in ensuring environmental compliance in South Africa and what do recent case law inform us about the state of public participation for environmental compliance?

In answering the question, the study established that the process of public participation is not cast in stone, which implies that the criteria and approach used is dependent on the circumstances of each application.<sup>314</sup> The minimum requirements for the level of public participation to be undertaken may not necessarily be applicable for all applications, hence the guidance document on when and at what level to conduct public participation.<sup>315</sup> It has however been observed from recent case law that the nature of public participation in South Africa remains one which is open ended to interpretation by those with a duty to comply with its provisions. It is this open-endedness nature of public participation for environmental compliance that we see common inconsistencies that range from:

- Failure to identify and involve relevant interested and affected parties;
- Notifications published in wrong languages or not made available at all;
- Access to environmental information not made possible by applicants for licenses and approvals;
- No experts involvement in impact assessment studies; and

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<sup>314</sup> Refer to chapter 3 under section 3.3.4.

<sup>315</sup> Refer to chapter 3 under section 3.3.4.

- Lack of law enforcement.

It does appear through the discussion and cases revisited that full, adequate, and rigorous community participation during EIA is either disregarded or undertaken to merely tick the box for environmental authorisation purposes. It was apparent in most of the cases that the environmental authorisations are usually granted, only for the courts to find the process as incomplete and defective in nature. Most of the cases discussed in the study demonstrate the worrying but debatable possibility of more granted Environmental Authorisations which did not comply with the principles of public participation and might never see a day in court. It can be noted from the study that although the SEMAs provides for public participation provisions, there seems to be a gap in the achievement of meaningful public consultations and vague expectations of competent authorities thereof. The NWA is a typical example where public participation requirements in water use licence applications vest in the hands of a responsible authority and who may at their discretion opt to facilitate such a process and have public comments and views included in decision making. The NWA states that a responsible authority during a Water Use License application may invite written comments from any organ of state or persons who has an interest in the matter.<sup>316</sup> It can be held that the discretionary nature by the responsible authorities to facilitate public participation undermines participation of all interested and affected parties. This is again contrary to section 2(4)(f) of NEMA which provides that all people must have the opportunity to develop the understanding and capacity necessary for achieving equitable and effective participation.<sup>317</sup>

The MPRDA is very clear and straight cut on the expectations and obligation on the part of the applicants for a mining right, prospecting, and reconnaissance permits, to conduct meaningful public participation process prescribed in the EIA. The mandatory obligation to conduct public participation in an EIA process in South Africa is still multifaceted, hazy and usually undertaken at the discretion of an applicant, even when the EIA regulations compel otherwise. It is through this study that it can be concluded that there is inadequate detail in statutory provisions regarding meaningful mechanisms, tools and processes on the practical achievement of public participation. It is still open to competent

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<sup>316</sup> See s 41(2)(c) of NWA.

<sup>317</sup> See s 2(4)(f) of NEMA.

authorities, applicants and EAPs to determine the level of public participation and to which extent to lead and drive a meaningful participatory process.

### ***5.3 Recommendations***

If the public participation process prescribed in the EIA regulations promulgated in terms of section 24(5) of the NEMA is mandatory, then a generic rule or regulations should suffice in defining “meaningful public participation.” It has been discussed already that SEMAs and other statutory provisions should define what “meaningful and effective public participation” is and to which extent and under what circumstances of the listed activity should it be conducted by applicants.

In ensuring that meaningful public participation is realised and that equitable and effective participation, by vulnerable and disadvantaged persons is complied with, in terms of section 2(4)(f) of the NEMA; the following discussion could possibly improve and provide a consistent approach.

As seen in Chapter 3, Canada’s form of public participation process which seems to address the already discussed gaps and inconsistencies- listed in South Africa’s status quo, by having introduced a Participant Funding Program, Public Registry, Independent EIA Agency to handle public involvement on environmental matters. Adopting foreign ideal forms of public participation process such as one from Canada as discussed in Chapter 3 could be an alternative to having a well-entrenched and tested system in an attempt to close the identified public participation gaps. The lessons from Canada’s public participatory process are that it has created the Canadian Environmental Assessment Agency (Agency), Public Registry and the Participant Funding Program as means to strengthen public participatory obligations. It is without doubt that a Public Registry permits everyone to have access to the Impact Assessment applications as they would all be centralised into one accessible system.

It is also concluded from this study that meaningful public participation provided for by the MPRDA must be extended to the proposed comprehensive regulations under NEMA. Comprehensive regulations on meaningful public participation could arguably be efficient, effective, and equitable in serving the interest of all interested parties, including those vulnerable and disadvantaged persons. The recommended regulations will ensure a

system that could possibly prescribe a transparent, fixed, accurate and firm public participatory process that is self-explanatory and easy to implement. These regulations promulgated under NEMA would be applicable and utilised across all sectors on environmental matters.

The NEMA stipulates that a person is of an offence if he/she commences with an activity in contravention of section 24F (1). However, lack of law enforcement was observed in Chapter 4, whereby a mining company Tendele; mislead interested and affected parties in *Mfolozi Community Environmental Justice Organisation and Others v Minister of Minerals and Energy and Others*, by falsely misinterpreting information provided. The proposed regulations would define a specific criterion on achieving meaningful public participation. This to include selection of participants for a public participation process, level of competence in partaking in environmental discussions and outlining various types of public participatory processes. The proposed regulations on meaningful public participation would eventually call for the effective law enforcement by environmental management inspectors which would result in perhaps civil claims or even criminal prosecutions.

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