

**Protection of the procedural rights of indigenous people
affected by mining in South Africa**

by

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DECLARATION BY STUDENT

I declare that the submitted work "Protection of the procedural rights of indigenous people affected by mining in South Africa" was completed by me, the undersigned, and that I have only used the permitted reference sources or materials and have not engaged in any plagiarism. All references and other sources I have used have been appropriately acknowledged in the work. I also declare that this work is the result of my own investigations except where otherwise identified by references and that I have not plagiarised the work of others.

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Abstract

This dissertation analyses whether the rights of indigenous people are being recognised, respected and upheld when the state awards prospecting and mining rights on land owned and lawfully occupied by indigenous people in South Africa. This analysis is based on the fact that most prospecting and mining rights in South Africa are awarded on or around communal lands where rural communities and, in some instances, indigenous people reside.

Through the Constitution, the NEMA, the MPRDA and other environmental sector-specific legislation examples, it is established that the state tends to prioritise economic development that alienates indigenous peoples' right to live in a healthy and safe environment as a result of the on-going mining operations. A sustainable approach which appreciates the balance between economic, social and environmental sustainability is proposed as a means and step towards realisation of South Africa's mineral wealth, the right of communities to live in a healthy environment and community, as well as prior consultation when prospecting and mining rights are awarded on communal lands. The approach of the *Bengwenyama-ye-Maswati* Constitutional Court decision pertaining to the rights of local communities and indigenous people when mining takes place in South Africa is adopted to link the three sustainability pillars to the realisation of the rights of these local communities.

Keywords

Indigenous people, constitutional procedural rights, consultation, mining operations.

Opsomming

In hierdie verhandeling word 'n ontleding gedoen oor die saak of die regte van inheemse groepe erken, gerespekteer en in stand gehou word wanneer die staat prospekterings- en mynregte toeken op grond wat wettig deur die betrokke inheemse Suid-Afrikaanse groepe beset en bewoon word. Die ontleding is gebaseer op die feit dat meeste prospekterings- en mynregte in Suid-Afrika op of rondom plattelandse gemeenskappe toegeken word waar plattelandse en in sommige gevalle inheemse groepe woon.

Deur die Grondwet, die NEMA, die MPRDA en ander omgewings- en sektor-spesifieke wetgewing, is vasgestel dat die staat neig om ekonomiese ontwikkeling te bevoordeel wat inheemse groepe se regte om in 'n gesonde en veilige omgewing te woon benadeel deur middel van deurlopende mynbou-aktiwiteite. 'n Volhoubare benadering, wat die balans tussen ekonomiese, sosiale en omgewingsvolhoubaarheid ondersteun word voorgestel as 'n middel tot en stap in die rigting van die realisering van Suid-Afrika se minerale rykdom, die regte van gemeenskappe om in 'n gesonde omgewing en gemeenskap te woon, sowel as tydige vooraf-konsultasie wanneer prospekterings- en mynregte op kommunale grond toegeken word. Die benadering gevolg in die Bengwenyama-ye-Maswati Grondwethofbeslissing met verwysing na die regte van plaaslike gemeenskappe en inheemse groepe wanneer mynbou ter sprake kom in Suid-Afrika word gekoppel aan die drie volhoubaarheidspilare wat nodig is vir die realisering van die regte van hierdie plaaslike gemeenskappe.

· Sleutelwoorde

Inheemse groepe, grondwetlike prosedurele regte, konsultasie, mynbou-aktiwiteite

LIST OF ABBREVIATIONS

ANC	African National Congress
BEE	Black Economic Empowerment
CC	Constitutional Court
CER	Centre for Environmental Rights
DPRU	Development Policy Research Unit: University of Cape Town
EJCL	Electronic Journal of Comparative Law
GDP	Gross Domestic Product
J S Afr Inst Min Metall	The Journal of the Southern African Institute of Mining and Metallurgy
JSAL	Journal of South African Law
JSAS	Journal of Southern African Studies
LCC	Land Claims Court
MHSA	Mine Health and Safety Act 29 of 1996
MMSD	Mining, Minerals and Sustainable Development
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
NEMA	National Environmental Management Act 107 of 1998
NHRA	National Heritage Resources Act 25 of 1999
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
para	paragraph(s)
PELJ	Potchefstroom Electronic Law Journal
PULP	Pretoria University Law Press
RECIEL	Review of European Community and Environmental Law
reg	regulation(s)
SADC	Southern African Development Community
SAHRA	South African Heritage Resources Association
SAIIA	South African Institute of International Affairs
SAJELP	South African Journal of Environmental Law and Policy
SAJHR	South African Journal on Human Rights
SAJS	South African Journal of Science
SAPLJ	South African Public Law Journal
SCA	Supreme Court of Appeal
SIMS	State Intervention in the Minerals Sector

Ss / ss	Sections / sections
TJICL	Tulane Journal of International and Comparative Law
UN ESOSOS	United Nations Economic and Social Council Sub-Commission on Prevention of Discrimination and Protection of Minorities
UNESCO	United Nations Educational, Scientific and Cultural Organisation
VEJA	Vaal Environmenatal Justice Alliance
XoICo	Xolobeni Empowerment Company
ZAC	Zululand Anthracite Colliery

TABLE OF CONTENTS

Acknowledgements	i
Declaration	ii
Abstract	iii
Opsomming	iv
LIST OF ABBREVIATIONS	iii
LIST OF TABLES	xii
CHAPTER 1	1
Introduction	1
CHAPTER 2	9
Overview and historical background of mining in South Africa	9
2.1 Introduction	9
2.2 History of mining and its impact on South Africa	9
2.3 Overview of key challenges faced by Indigenous people in mining areas	16
2.3.1 Upholding of customary law by indigenous people on their communal land	19
2.3.2 Approval of mining operations near land inhabited or owned by indigenous people	20
2.3.3 Summary of some vulnerability concerns	24
2.4 Preliminary observations	25
CHAPTER 3	28
Constitutional procedural rights applicable to indigenous people affected by mining	28
3.1 Introduction	28
3.2 Current state structure	28
3.3 Common law perspectives on procedural rights	30
3.4 Relevant constitutional procedural rights	32
3.4.1 Right of access to information	32
3.4.2 Right to just administrative action	34
3.4.3 Right of access to courts or justice	37

3.4.4	<i>Right to be involved in decision-making</i>	39
3.5	Conclusion	43
CHAPTER 4		44
	Statutory procedural rights applicable to indigenous people affected by mining	44
4.1	Introduction	44
4.1.1	<i>MPRDA and its regulations</i>	44
4.1.2	<i>MPRDA Amendment Act 49 of 2008</i>	54
4.1.3	<i>NEMA and its regulations</i>	57
4.1.4	<i>National Heritage Resources Act 25 of 1999</i>	65
4.1.5	<i>National Environmental Management: Protected Areas Act 57 of 2003</i>	69
4.1.6	<i>National Environmental Management: Biodiversity Areas Act 10 of 2004</i>	73
4.1.7	<i>National Water Act 36 of 1998</i>	76
4.2	<i>Rights in context: An analysis of some case law</i>	78
4.2.1	<i>Alexkor Limited and Another v Richtersveld Community and Others</i>	79
4.2.1.1	Facts	79
4.2.1.2	Legal question	80
4.2.1.3	Applicable law	80
4.2.1.4	Relevance to this study	82
4.2.2	<i>Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd and Others</i>	83
4.2.2.1	Facts	83
4.2.2.2	Legal question	83
4.2.2.3	Applicable law	84
4.2.2.4	Relevance to this study	85
4.2.3	<i>Meepo v Kotzé and Others</i>	86
4.2.3.1	Facts	86
4.2.3.2	Legal question	87
4.2.3.3	Applicable law	87

4.2.3.4	Relevance to this study	88
4.2.4	<i>Joubert and Others v Maranda Mining (Pty) Ltd</i>	90
4.2.4.1	Facts	90
4.2.4.2	Legal question	90
4.2.4.3	Applicable law	90
4.2.4.4	Relevance to this study	91
4.3	<i>Conclusion</i>	92
CHAPTER 5		94
Strengths and weaknesses of South Africa's existing framework for protection of procedural rights		94
5.1	<i>Introduction</i>	94
5.2	<i>Some legal and related strengths distilled</i>	95
5.2.1	<i>A strong legal basis</i>	95
5.2.2	<i>Acknowledgement of a need for participation of and consultation with affected parties</i>	95
5.2.3	<i>Access to courts and judicial precedents</i>	96
5.2.4	<i>Involvement of non-governmental and civil society organisations</i>	97
5.3	<i>Some legal and related weaknesses distilled</i>	99
5.3.1	<i>Prioritising economic development in favour of environmental and procedural rights</i>	100
5.3.2	<i>Lack of strict measures to monitor consultation with affected parties</i>	100
5.3.3	<i>Unverified consultation with interested and affected parties seems adequate</i>	101
5.3.4	<i>Lack of mandatory consultation when water-use licences are being applied for</i>	102
5.3.5	<i>Absence of specialised environmental practitioners during MPRDA impact assessment</i>	102
5.3.6	<i>Lack of mining skills of traditional leadership</i>	103
5.3.7	<i>Internal divisions</i>	104
5.3.8	<i>Misuse of BEE structures</i>	104
5.4	<i>Conclusion</i>	106

CHAPTER 6

Conclusion and recommendations	108
6.1 Conclusion	108
6.2 Recommendations	112
BIBLIOGRAPHY	117

LIST OF TABLES

Table 1	The MPRDA, its provisions and implications for indigenous people	47
Table 2	Provisions of the <i>MPRDA Amendment Act</i> and implications for indigenous people	53
Table 3	NEMA, its provisions and implications for indigenous people	60
Table 4	The NHRA, its provisions and implications for indigenous people	66
Table 5	Provisions of the <i>NEM: Protected Areas Act</i> and implications for indigenous people	70
Table 6	Provisions of the <i>NEM: Biodiversity Act</i> and implications for indigenous people	73
Table 7	Provisions of the <i>National Water Act</i> and implications for indigenous people	78

CHAPTER 1

Introduction

South Africa's transition to a democratic dispensation in 1994 came to have a significant impact on the administration and behaviour of the public and private sector institutions of South Africa. All spheres of government (national, provincial and local) and non-governmental private actors, *inter alia*, had to change the manner in which they interacted with members of the public. These institutions (public and private) for example today must all act in accordance with the supreme law of the country, the *Constitution of the Republic of South Africa, 1996* (the Constitution). Since the adoption of the Constitution people have therefore acquired certain rights which have resulted in new responsibilities on the part of the state and other decision-makers.

Any law or conduct that is inconsistent with the Constitution is null and void to the extent of its inconsistency with the Constitution.¹ The Bill of Rights contained in Chapter 2 of the Constitution (sections 7-39) provides everyone, including indigenous people, with both substantive and procedural rights. The Bill of Rights binds the legislature, the executive, the judiciary, and all organs of state.² In similar vein, the establishment of the Constitutional Court as the guardian of the Constitution brought hope and relief to aggrieved or affected members of the public. For the first time South Africans have legal recourse and a reliable judicial place — independent from other arms of government — to apply for judicial review of decisions taken by the state, for example. Today, judicial review of administrative actions taken by organs of state is likely to occur in situations where constitutional rights of communities (including indigenous people) are infringed. This has a lot to do with the move towards justification for decisions taken at different levels across South Africa.

1 S 2 Constitution.

2 Hoexter *Administrative Law* 2; De Ville *Judicial Review* 7.

Mureinik³ in this context states that:

If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification, a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.

Mureinik's view, *inter alia*, suggests that since the Constitution is a measure used to close the old chapter of racial prejudices and inequalities in South Africa, everyone in the Republic of South Africa should now be treated with respect and their constitutional rights should be acknowledged.

Since its inception in 1996, the Constitution has further become a benchmark which all arms of government (executive, judiciary, and legislature) must utilise to assess its decision-making processes and conduct when dealing with matters affecting communities. Typically this would include the awarding and regulation of mining-related licenses. It is in this context very relevant that section 24 of the Constitution provides a right to an environment that is not harmful to health or well-being; and imposes a duty on the state to protect the environment for the benefit of present and future generations. Together with this substantive environmental right, provision is also made in the Constitution, *inter alia*, for a right to just administrative action (section 33) and for a right of access to information (section 32). Both of these may be labelled as so-called procedural rights.

This said, there is growing tension in the area of mining between, *inter alia*, the Department of Mineral Resources (DMR), the Department of Water Affairs (DWA), the Department of Environmental Affairs (DEA) and municipalities having jurisdiction over the land where mining is to take place.⁴ All these

3 Mureinik 1994 SAJHR 31.

4 One of a number of examples is the *City of Cape Town v Maccsand (Pty) Ltd and Others* 2012 4 SA 181 (CC) (hereafter the Maccsand case). The Maccsand case precedent is significant for its interpretation of the powers of the different spheres of government as set out in the Constitution, and for its interpretation of the MPRDA and land zoning when mine operations are approved to take place. See also <http://www.lhr.org.za> follow Kgobudi community challenges Platreef (Pty) Ltd interdict to keep of their land. See also <http://www.lhr.org.za> following residents of Silobela,

institutions are organs of state and this tension relates primarily to applications for mining rights. For example, tension between the DMR, the DWA and the DEA is evident when the DMR treats all administrative and compliance matters concerning mining, water and the environment as its prerogative and neglects and/or overshadows administrative and compliance duties of other departments — such as the DEA — on matters concerning environmental management.⁵ This raises questions as to which state department has decision-making powers when it comes to the total package of environmental matters related to mining.

The *Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)* with its regulations was promulgated as mining framework legislation⁶ to replace multiple other statutes (the *Mines and Works Act 27 of 1956* and the *Minerals Act 50 of 1991*, for example) which governed mining-related activities for a long time in a fragmented and isolated manner. Section 39(3) of the MPRDA currently requires an applicant for a mining permit *to investigate, assess and evaluate the impact of proposed mining; consult with local communities where the mine will be located* (own emphasis) regarding socio-economic issues (creation of small business enterprises, employment opportunities, skills development, etc.) which exist or may arise as a result of mining operations; and to prepare and to submit an environmental management plan and programme. This provision is one of a number directed at the protection of local communities' rights. At the same time there are more generic statutes protecting the administrative and procedural rights of local communities, including those who live in the vicinity of mining areas. These statutes include the *Promotion of Access to Information Act 2 of 2000 (PAIA)* and the *Promotion of Administrative Justice Act 3 of 2000 (PAJA)*. The relevance of these laws in the mining context is evident from recent case law. *Bengwenyama-ye-Maswati Tribal Council and Others v Genorah Resources*

Caro Park and Carolina communities in Mpumalanga protest against acid mine water (North Gauteng High Court case no 3567/12 unreported).

5 Humby "Mining and Environmental Litigation Review" (2011) 55–57.

6 *Mineral and Petroleum Resources Development Act 28 of 2002 Preamble.*

*(Pty) Ltd and Others*⁷ (Bengwenyama-ye-Maswati community case) and *Alexkor Limited and Others v Richtersveld Community and Others*⁸ (Richtersveld community case) serve as decided cases suggesting that applicant mining companies should investigate and assess the local community's socio-economic issues (and rights) as an intrinsic part of preparing environmental management plans (EMP) and other programmes. This should take place *prior* to the granting of the prospecting and mining rights by the DMR.

In terms of the MPRDA, consultation with local communities is an essential requirement prior to the awarding of prospecting rights and mining permits.⁹ Within 30 days after an applicant for a mining permit has completed its EMP and other environmental programmes, the regulations of both the MPRDA and the *National Environmental Management Act 107 of 1998 (NEMA)*¹⁰ require an applicant for a mining permit to consult with interested and affected parties and local communities to conduct an environmental impact assessment (EIA).¹¹ The latter process is intended to inform the applicant for a mining permit about the positive and negative impacts on the environment (in future and/or at present) and on local communities as a result of the proposed mining operations. The EIA process is furthermore intended to identify possible movement of mine trucks, use of railway lines, influx of migrant labourers in the area and other related socio-economic activities which may arise during the mining operations.¹²

In terms of the regulations of the MPRDA and NEMA the applicant for a mining permit must also analyse the EIA findings to enable it to design an EMP and

7 *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd and Others* 2011 3 BCLR 229 (CC). The case is discussed in more detail in 4.2.2.1 below.

8 *Alexkor Limited and Others v Richtersveld Community and Others* 2003 BCLR 1301 (CC). The case is discussed in more detail in 4.2.1.1 below.

9 S 39 MPRDA.

10 MPRDA reg no R527 GG 26275 of 23 April 2004; NEMA reg no R543 GG 33306 of 18 June 2010.

11 MPRDA reg no R527 GG 26275 of 23 April 2004; NEMA reg no R543 GG 33306 of 18 June 2010.

12 NEMA reg no R543 GG 33306 of 18 June 2010; MPRDA reg no R527 GG 26275 of 23 April 2004.

programme that will be used as a guideline for the protection of the environment (in future and or at present) by the permit holder and to ensure that the environment and the existing biodiversity of the local community are not detrimentally affected by mining operations.¹³ With these provisions in mind it appears as if the consultation process with interested and affected parties and local communities to prepare EMP, EIA and other environmental management programmes, as described above, is a *legislative pre-condition* for a mining permit to be granted. It also appears as if consultation processes and preparation of environmental documents — in terms of these provisions of the MPRDA and NEMA — are the mechanisms which should enable or ought to force applicants for mining permits to meet and meaningfully to consult with affected communities, in order jointly to identify positive and negative mining impacts in the area.

The Bengwenyama-ye-Maswati community case serves as a decided challenge in court demonstrating the faulty approach followed by mining companies whereby indigenous people and local communities which own and lawfully occupy affected land are disregarded when consultation between the state and applicant mining companies takes place. Following the Bengwenyama-ye-Maswati community case ruling it appears that there is no meaningful consultation in some instances between interested and affected parties and mining companies when the DMR grants prospecting rights on communal land.¹⁴ Yet the prevailing legal position in South Africa is that the MPRDA be read and interpreted together with the NEMA principles¹⁵ when it comes to environmental aspects, policy, and regulation.¹⁶ As a result, environmental concerns and impacts caused by mines cannot be regulated effectively in terms of the MPRDA, without explicit reference to the NEMA principles. These principles, *inter alia*, require active participation and

13 NEMA reg no R543 GG 33306 of 18 June 2010; MPRDA reg no R527 GG 26275 of 23 April 2004.

14 *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd and Others* 2011 3 BCLR 229 (CC) para 62–65.

15 Ss 2 4(f), (g) and (h) NEMA.

16 S 37 MPRDA.

consultation¹⁷ with those to be affected by various environmental impacts caused by mining. There are also various other pieces of environmental sectorial-specific legislation relating to water, air quality and dust, biodiversity, heritage sites, protected areas, and land use applicable to guide the exchange of information between the state, interested and affected parties, and the applicants for a mining permit; consultation with interested and affected parties; environmental regulation; and compliance in mines.¹⁸ For example, in protecting the rights of communities to be consulted, section 48 of the *National Environmental Management: Protected Areas Act* 57 of 2003 provides that, for any person to carry out prospecting or mining activities in a protected area, such person must first obtain written permission from the Minister responsible for minerals in the Republic of South Africa before any mining-related activities can commence in such an affected area.

The MPRDA (section 39(3)) and NEMA (section 2 principles) are both mandatory processes of consultation and participation of interested and affected parties when mining takes place, as highlighted in the Bengwenyama-Ye-Maswati community case.¹⁹ Still, a lack of adequate interaction and exchange of information to clarify impacts caused by mining (positive or negative) is among the continuing problems which hamper legislative compliance and enforcement with regard to consultation with interested and affected parties.²⁰ This includes interaction between indigenous people, their traditional leaders, government authorities (specifically those in the local sphere) and mining companies when mining projects are undertaken on land owned and lawfully occupied by indigenous people.²¹ Mitchell states further that refusal to share information with indigenous people and their traditional

17 Ss 2 (4)(f), (g) and (h) NEMA.

18 See, *inter alia*, the *National Environmental Management: Air Quality Act* 39 of 2004; *National Environmental Management: Biodiversity Act* 10 of 2002; *National Environmental Management: Protected Areas Act* 57 of 2003; *National Environmental Management: Waste Act* 59 of 2008; *National Radioactive Waste Disposal Institute Act* 53 of 2008; and the *National Heritage Resources Act* 25 of 1998.

19 Ss 2 (4)(f), (g) and (h) NEMA and s 37 MPRDA; *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd and Others* 2011 3 BCLR para 40.

20 Humby "Mining and Environmental Litigation Review" (2011) 45–46, Mitchell *et al* 2012 *J S Afr Inst Min Metall* 2.

21 *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd and Others* 2011 3 BCLR 229 (CC); Badenhorst, Olivier and Williams 2012 *JSAL* 114.

leaders during consultation processes gives the impression that government authorities condone non-compliance with mining-related regulations, or act as representatives of the mining companies that are applying for mining rights and permits.²² It also appears as if the rights of interested and affected parties and communities to have access to information and to engage in a fair and reasonable consultation process — where each party has an opportunity to respond and to make informed decisions (procedural fairness) — become compromised by the almost secretive approach of government authorities and mining companies when the state ultimately decides on the allocation of mining rights.²³

The above line of argumentation provides the context of this study. The body of procedural rights of indigenous people (the rights to access information, to be heard, and to participate in the decision-making process) — particularly in awarding and regulating mining-related licenses and permits — forms the cornerstone of this study. In this regard, public sector (government) conduct when mining rights and permits are granted by the state is critically analysed from a legal perspective. NEMA and its regulations²⁴ are studied and reviewed in order to examine how this Act as framework *environmental* legislation specifically protects, *inter alia*, statutory procedural rights of communities whose environment is affected by mining. The MPRDA and its regulations²⁵ are also studied and reviewed, to examine how and when interested and affected parties can lodge claims for and can have access to information from state authorities during and after prospecting and mining rights are granted.

This study focuses specifically on the scope and meaning of the procedural environmental rights of indigenous people affected by mining, as well as on how marginalised communities can be enabled to have access to and enjoy their constitutionally entrenched environmental rights. These rights include substantive environmental rights such as the right to live in an environment that

22 Mitchell *et al* 2012 *J S Afr Inst Min Metall* 2.

23 Mitchell *et al* 2012 *J S Afr Inst Min Metall* 2; Humby "Mining and Environmental Litigation Review" (2011) 55–56.

24 NEMA reg no R543 GG 33306 of 18 June 2010.

25 MPRDA reg no R527 GG 26275 of 23 April 2004.

is not harmful to health or well-being (section 24). Particular attention is also paid to sections 32 and 33 of the Constitution. Section 32 provides for everyone to have the right of access to information held by the state and others, for protection of any rights. Section 33 provides for a right to administrative action that is lawful, reasonable and procedurally fair. An ancillary objective of this study is to contribute in a conceptual fashion to the administration of justice as well as the simplification and improvement of relations between the state (in the local sphere), communities (specifically indigenous communities), and companies in the mining industry.

This study is conducted by means of a literature review. A review of existing primary and secondary sources in the field of environmental law and other literature is undertaken. Various applicable South African statutes, regulations, textbooks, scholarly journals and electronic materials are studied. This study also explores a number of decided cases.

Chapter 2 provides an overview and historical background of mining in South Africa and the vulnerability concerns of indigenous people. Chapter 3 critically reflects on the constitutional procedural rights applicable to indigenous people affected by mining. Chapter 4 examines in more detail the statutory procedural rights applicable to indigenous people affected by mining. Chapter 5 offers a critical discussion of the strengths and weaknesses of the relevant South African legal framework. The study concludes with recommendations for addressing some of the identified weaknesses to improve and strengthen the interaction in decision-making between the state, mining companies and interested and affected parties, specifically indigenous local communities.

CHAPTER 2

Overview and historical background of mining in South Africa

2.1 Introduction

This chapter outlines the history of mining in South Africa and the impact this industry has had on communities living on or near mining operations as being at the basis of the need for (legal) protection of indigenous local communities.

2.2 History of mining and its impact on South Africa

Mining in South Africa has a rich history. In South Africa, formal mining operations commenced during 1852 in the copper mines of Springbok in the modern-day Northern Cape.²⁶ This was followed by large discoveries of diamonds in or around the vicinity of the present-day Kimberley during 1867.²⁷ The discovery of diamonds was followed by the finding of commercial quantities of gold in the former Transvaal during 1896.²⁸ These discoveries resulted in the inflow of European fortune-seekers in remote Africa.²⁹ During 1924 Merensky made the famous discovery of platinum-rich ore-bearing reefs across the Bushveld Complex underlying the current South African provinces of Limpopo, Mpumalanga, Free State, North West and some parts of Zimbabwe.³⁰ The discovery of precious minerals in these areas spread around the then towns of Johannesburg, Rustenburg, Pietersburg (now Polokwane) and Kimberley, which were then surrounded by underdeveloped villages and farms occupied by indigenous people. Indigenous people settled in the vicinity of the mining developments in Transvaal and the Orange Free State and they were racially segregated as opportunities to own mines and to exploit these minerals were limited to white people.³¹

26 Pogue *Producer Services in the Mining Industry 2*.

27 Harington, McGlashan and Chelkowska 2004 *J S Afr Inst Min Metall* 65–66; Pogue *Producer Services in the Mining Industry 2*.

28 Harington, McGlashan and Chelkowska 2004 *J S Afr Inst Min Metall* 65–66.

29 Pogue *Producer Services in the Mining Industry 2*.

30 Cawthorn 2007 *J S Afr Inst Min Metall* 1-3.

31 Cawthorn 2007 *J S Afr Inst Min Metall* 1-3.

It seems as if the contribution of indigenous people during the period when minerals were discovered in South Africa was limited to manual labour in the mines.³² The lack of work opportunities for indigenous people across South Africa created an influx of indigenous migrant labourers — predominately black people from colonial provinces such as Natal, the Orange Free State and Transvaal.³³ In later years mines in South Africa attracted migrant labourers from former homelands such as Bophuthatswana, Lebowa, Gazankulu, Transkei, and Ciskei.³⁴ Migrant labourers from neighbouring countries such as Lesotho, Swaziland, Mozambique, Botswana, and Rhodesia (now Zimbabwe) also found work in mines in South Africa.³⁵

The development more than a century ago of gold-mining operations on the Witwatersrand generated unprecedented direct and indirect investments in South Africa's economy.³⁶ The development of large-scale coal-mining resulted in the building of railway infrastructure to transport mining produce and large mining equipment around the country and to the harbours.³⁷ The output and the electrification of coal and gold mines were boosted when the state-owned Electricity Supply Corporation (Eskom) was established in 1923.³⁸ Another economic boost to the South African mining industry was the founding in 1928 of the state-owned Iron and Steel Corporation (ISCOR). This created a platform for South Africa to attract long-term foreign investment.³⁹ South Africa's coal resources led to the formation of still another major industrial sector as the then government went ahead to establish the South African Coal, Oil and Gas Corporation (Sasol) in 1950.⁴⁰ The establishment of Eskom, ISCOR and Sasol by the government seems to have significantly strengthened and boosted the mining and trade of coal, diamonds, gold and other minerals.

32 Harington, McGlashan and Chelkowska 2004 *J S Afr Inst Min Metall* 65–66.

33 Harington, McGlashan and Chelkowska 2004 *J S Afr Inst Min Metall* 65–66.

34 Cawthorn 2007 *J S Afr Inst Min Metall* 4-5.

35 Cawthorn 2007 *J S Afr Inst Min Metall* 4-5.

36 Pogue *Producer Services in the Mining Industry* 2

37 Pogue *Producer Services in the Mining Industry* 2.

38 Pogue *Producer Services in the Mining Industry* 2.

39 Pogue *Producer Services in the Mining Industry* 2.

40 Pogue *Producer Services in the Mining Industry* 2.

In 1948 the National Party won the whites-only general election and formed the government that started a process of social engineering, supported by legislation and aimed at excluding black people from political and economic participation in South Africa.⁴¹ The system of apartheid was characterised by racially discriminatory laws and policies in terms of the now repealed *Black Administration Act* 38 of 1927, the *Natives' Land Act* 27 of 1913 and the *Development Land and Trust Act* 18 of 1936, among others. During the 1970s apartheid policies gave rise to the "independence" of four homelands; the Transkei, Bophuthatswana, Venda and Ciskei as a base for indigenous people. International pressure and violent protests gradually prompted the apartheid regime to give in to demands for the release of political prisoners in 1990.⁴² On 27 April 1994, the first democratic elections resulted in a black majority government by the African National Congress (ANC) with Mr Nelson Mandela as president. The ANC won the subsequent general elections of 1999, 2004 and 2009, appointing first Mr Thabo Mbeki and then Mr Jacob Zuma as president.

It seems as if the growth of the mining industry in South Africa since 1867 has gained steady momentum, despite political leadership and government changes. The all-inclusive multiracial and democratic dispensation implemented since 1994 did not diminish South Africa's long-standing history of mineral exploitation and trading. Amongst the key documented transitional changes in the South African mining industry was the promulgation of the MPRDA in 2002, followed by the South African Mining Charter⁴³ in 2004. The MPRDA and the Mining Charter⁴⁴ were introduced with the aim to promote equitable access to mineral resources by all South Africans — including indigenous people — through broad-based socio-economic empowerment

41 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 11.

42 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 11.

43 *South African Mining Charter* no R26661 of 13 August 2004.

44 *South African Mining Charter* no R26661 of 13 August 2004.

structures, so that all South Africans would be able to participate in the ownership, procurement and trading of minerals found in their land.⁴⁵

South Africa has over the years become a country rich in minerals since copper had been discovered during 1852 as highlighted above. Discovered minerals to date include coal, diamonds, gold, platinum, chrome, manganese, iron ore and others.⁴⁶ It has also been reported by the South African Chamber of Mines and the State Intervention in the Minerals Sector (SIMS) Policy Discussion document that this country hosts the world richest platinum reserves located in the vicinity of the Bushveld Complex, extending over provinces such as Limpopo, the North West and Mpumalanga,⁴⁷ and the world's richest deposits of manganese, located in the vicinity of the Northern Cape.⁴⁸ It has been reported further that South Africa had unexplored mineral reserves estimated to be worth R20,3 trillion (US\$2,5 trillion) in 2012, that mining contributes about 18 percent towards South Africa's Gross Domestic Product (GDP), that in 2012 there had been around one million people employed directly and indirectly in South African mines, and finally that the mining industry accounts for around R17 billion of corporate tax receipts and R6 billion in royalties to the state.⁴⁹

Despite the above, in the sustainability context the country faces various challenges related to meeting the needs of people and the social transformation objectives set out in the Constitution. Kidd in this regard states that:

It is critical in South Africa today with its emphasis on economic growth and development that such growth and development be sustainable. If sustainability is seen as entailing only concern for the physical environment, it is likely to be dismissed as a middle-class concern with green issues that is irrelevant to the majority and to the eradication of

45 MPRDA Preamble.

46 Harington, McGlashan and Chelkowska 2004 *J S Afr Inst Min Metall* 67; Leon "South African Mining Industry at the Cross Roads" 2–3.

47 Harington, McGlashan and Chelkowska 2004 *J S Afr Inst Min Metall* 67; Leon "South African Mining Industry at the Cross Roads" 2–3.

48 Leon "South African Mining Industry at the Cross Roads" 2–3; ANC "Maximising the Developmental Impact of the People's Mineral Assets" Policy Discussion Document para 11. <http://www.anc.org.za>.

49 Leon "South African Mining Industry at the Cross Roads" 2–3; ANC "Maximising the Developmental Impact of the People's Mineral Assets" Policy Discussion Document para 11. See <http://www.anc.org.za>.

poverty. By combining concerns with the environment with concerns relating to social upliftment and economic progress, the concept of sustainable development will be much more difficult to sideline. This is why it is critical that people must remove their green-tinted spectacles and respect the three pillars of sustainable development in a way that ensures that there is equilibrium in them.⁵⁰

The existing South African mineral wealth enabled the DMR to continue awarding mining rights and permits for operations across most provinces of South Africa on land owned and lawfully occupied by indigenous people.⁵¹ It has been reported that the Minister in the Presidency, Trevor Manuel, stated at the African Mining Indaba (2012) that:

The ongoing debate around nationalisation of South Africa's mineral resources which affects investors does not form part of the ANC policies as the ruling party in South Africa and government is looking for smarter ways to further unlock South Africa's mineral resources valued at about R20,3 trillion (US\$2,5 trillion at that time), in order to address prevailing poverty and social inequalities in the country.⁵²

It was also reported that the Minister of Mineral Resources, Susan Shabangu, informed delegates at the same gathering that the MPRDA, which came into effect in 2002, has fulfilled the requirements of the Freedom Charter⁵³ by transferring South Africa's mineral wealth to the people — including indigenous people — by vesting all mineral rights in the state and by allowing mining companies to extract them under licence.⁵⁴ These statements may be interpreted as being indicative of the democratic government's commitment to include all South Africans in the ownership, extraction and trade of mineral resources found in the Republic.

Nevertheless, it seems as if the history of South Africa's mining industry, whereby opportunities for indigenous people were limited to manual labour in mines, has led to the belief of and perception by ordinary citizens — especially indigenous people — that the mining industry is not concerned about its work-

50 Kidd 2008 SAJELP 101.

51 *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd and Others* 2011 BCLR 299 (CC). To be discussed in more detail in 4.2.2.1 below; Leon "South African Mining Industry at the Cross Roads" 2.

52 Mkokeli and Seccombe *The Star Business Day News Paper* 7 February 2012 21.

53 *South African Freedom Charter* 26 June 1955.

54 Mkokeli and Seccombe *The Star Business Day News Paper* 7 February 2012 21; Leon "South African Mining Industry at the Cross Roads" 3.

force and communities residing near mine operations. This belief may be prompted by challenging socio-economic conditions and polluted environments as a result of exploration and mining operations undertaken by local and international companies near residential areas.⁵⁵ To correct the unequal socio-economic standing of previously disadvantaged people in South Africa, including indigenous people affected by mining, the ANC-led government introduced the concept of Black Economic Empowerment (BEE) during the mid-1990s. This was one of the measures through which government could address the prevailing socio-economic imbalances created by the apartheid regime in South Africa's economy, including the mining industry.⁵⁶ The vision of the ANC-led government was that implementation of the BEE concept in the mining industry would or should increase the shareholding of black South Africans in privately-owned mining enterprises. In other words, historically disadvantaged South Africans were to be involved in the owning of mining companies through the BEE concept.⁵⁷ In 2002, Parliament passed the MPRDA as mining framework legislation following inputs by the private sector and other stakeholders. The preamble to the MPRDA provides that:

... this Act has to recognise the need to promote local and rural development and social upliftment of communities affected by mining in South Africa.

This objective of the MPRDA — more particularly section 100(2)(a) and (b) — which calls for empowerment of all South Africans through mineral resources, led to the drafting of the Mining Charter in 2004. This transitional document (Mining Charter)⁵⁸ specified that 26 percent of ownership of the mining industry in South Africa should gradually be transferred to historically disadvantaged South Africans and local communities.⁵⁹

55 Brand "Marikana and its Lessons for Corporate South Africa" 2; Manson and Mbenga 2003 JSAS 294–296.

56 Gqada "Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project" 23; Leon "South African Mining Industry at the Cross Roads" 6; Brand "Marikana and its Lessons for Corporate South Africa" 2.

57 Gqada "Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project" 23; Leon "South African Mining Industry at the Cross Roads" 6.

58 *South African Mining Charter* no R26661 of 13 August 2004.

59 *South African Mining Charter* no R26661 of 13 August 2004; Leon "South African Mining Industry at the Cross Roads" 6.

It seems as if it was as a result of the implementation of the MPRDA, the BEE concept and the Mining Charter framework that black economic empowerment companies were formed to partner existing mining companies to obtain mining rights in South Africa.⁶⁰ An example of such an empowerment company is the Xolobeni Empowerment Company (XolCo) which was formed in 2003 to represent shareholding interests on behalf of the Amadiba community within the greater Mpondoland in the Eastern Cape. A mining licence was granted to an Australian company to mine mineral sands on their communal land.⁶¹ The formation of XolCo to own shares in the mining company that was permitted to carry out operations on the Amadiba communal land became an example of BEE companies which exposed challenges and vulnerability concerns surrounding indigenous local communities affected by mining. One of the key challenges experienced as a result of the establishment of XolCo is that it was crucial for such BEE companies to be incorporated in consultation with the intended beneficiaries (the community) as envisaged by the MPRDA and the Mining Charter.⁶² BEE companies, established to partner the existing mining companies, should in fact improve the lives of local communities near mining operations progressively and in a sustainable manner.⁶³ Furthermore, the expected economic benefits from mining operations should not accrue to the selected few within such an empowerment company (the tribal chief and his close associates) to the detriment of the general community, as such selective participation and gains defeat the purpose of the BEE concept.⁶⁴

60 Leon "South African Mining Industry at the Cross Roads" 6.

61 Gqada "Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project" 23.

62 S 100(2)(a) and (b) MPRDA; Leon "South African Mining Industry at the Cross Roads" 6.

63 *South African Mining Charter* no R26661 of 13 August 2004; ss 100(2)(a) and (b) MPRDA; Leon "South African Mining Industry at the Cross Roads" 6.

64 Gqada "Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project" 5 23; Leon "South African Mining Industry at the Cross Roads" 6.

2.3 Overview of key challenges faced by indigenous people in mining areas

Mukundi explains that, as is the case in most African countries, no exact criterion exists for identifying indigenous people in South Africa.⁶⁵ This author provides that the term "indigenous" is used in South Africa's legal discourse with reference to the languages and legal customs of the majority of the black population as opposed to the other races.⁶⁶ Mukundi further explains that, indeed, the Preamble to the *Traditional Leadership and Governance Framework Amendment Act 41 of 2003 (Traditional Leadership and Governance Framework Amendment Act)* provides that "South African indigenous people consist of a diversity of cultural communities".⁶⁷ In the South African context indigenous people include various sub-groups such as the Batswana, the Basotho, the Bapedi, the AmaZulu, the AmaXhosa, the AmaSwati, the VhaVhenda, the MaTsonga and the AmaNdebele. Amongst the key administrative structures which were introduced by the 1994 government is the traditional leaders framework meant to advise local, provincial and national government on matters relating to traditional and customary laws.⁶⁸ Traditional leaders in South Africa have been described as the "custodians of moral, value, cultural and social systems" of many people in South Africa (mainly indigenous people).⁶⁹

Indigenous people in South Africa still live in many ways according to customary law and practices.⁷⁰ According to Bennett, land inhabited by indigenous people is owned by a tribe or small social units as a whole, while

65 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 11.

See also Crawhall "Indigenous Peoples of South Africa: Current Trends project to Promote International Labour Organisation Policy on Indigenous and Tribal Peoples" 2–11.

66 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 1.

67 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 1.

68 Chapter 12 Constitution; Preamble to the Traditional Leadership and Governance Framework Amendment Act.

69 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 12.

70 Bennett "Official" vs "Living" 140-149.

individual community members primarily obtain protected rights of occupancy and use of such land for residential and subsistence farming.⁷¹ Indigenous people use their communal land to explore and to utilise natural resources, such as water and clay, to sustain themselves and their families. It is thus common in South Africa — as pointed out in the *Bengwenyama-ye-Maswati* community case — to find that land where the proposed mining is to take place is held under communal ownership. Bennett explains that tribal and chieftainship authority and owning land as a tribe or as social units lead to land occupied by indigenous people in South Africa to be "communal land"⁷² because it seems that everything that relates to the purchase and disposal of such land can only be decided by tribal authorities.⁷³ This is typically a form of ownership which requires community consultation and participation before mining operations can commence on such land, for example.⁷⁴ Put differently, community consultation and participation are required when communal land is transferred to make way for *inter alia* mining operations. This is so because the community has a vested interest in the use and enjoyment of such land in the form of farming and grazing their livestock, for example. Communal land therefore differs from land owned by an individual and as such an individual can decide to dispose of the land unilaterally by virtue of the ownership title that the person holds over the land and without consulting with other third parties who have no rights to the land.⁷⁵

To summarise Bennett's view, land belongs to the community at large, the village or the families and not to the individual (in terms of South African customary law).⁷⁶ All members of a community, village or family have an equal

71 Bennett *African Customary Law* 7-9; Pienaar 2012 *PELJ* 158–159.

72 *Communal Land Rights Act* 11 of 2004 s 1 defines 'communal land' as meaning "land which is, or to be occupied, or used by members of a community subject to the rules or custom of that community". However, the Constitutional Court in the case of *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 held that the *Communal Land Rights Act* 11 of 2004 was unconstitutional in its entirety. The policy direction on communal land in South Africa post the *Tongoane* Constitutional Court judgment is not yet clear.

73 Bennett *African Customary Law* 7-9; Pienaar 2012 *PELJ* 158-159.

74 *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd and Others* 2011 *BCLR* 299 (CC) para 79–80.

75 Bennett *African Customary Law* 7-9.

76 Bennett *African Customary Law* 7-9; Pienaar 2012 *PELJ* 158–159.

right to the land, but in every case the chief or headman of the community or village has authority over the land.⁷⁷ The term "trustee" better describes the position of the chief and the headman *vis-à-vis* their subjects and the land on which they live. It follows that when communal land is to be used for mining operations consultation with community members becomes highly relevant.

Downing *et al* state that the term "indigenous people" describes many types of people.⁷⁸ When defining indigenous people these authors indicate that indigenous people usually call themselves "people of the land" or "people of the place X".⁷⁹ The authors further state that the World Bank Indigenous Policy Number 169 of 1986⁸⁰ defines indigenous people in various ways, including by reference to the attachment of these people to their ancestral territories and the natural resources found in that area; the presence of customary, social and political institutions; or an indigenous language often different from the predominant language spoken in that area.⁸¹ When switching from the World Bank approach on indigenous people Downing *et al* indicate that the United Nations Economic and Social Council Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN ESOSOS) describes indigenous people as people or nations which have historical continuity with pre-invasion and pre-colonial societies that have developed on their territories, and which consider themselves distinct from other sectors of the societies prevailing in those territories, or part of them.⁸² The UN ESOSOS definition of indigenous people is in accordance with the way indigenous people in South Africa live and pass their traditions and culture on from one generation to the other. This is because indigenous people in South Africa live according to customary law and practices which they have developed and practised from generation to generation in the territories they live in.⁸³

77 Downing *et al* 2002 *MMSD* 6; Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 9.

78 Downing *et al* 2002 *MMSD* 6.

79 Downing *et al* 2002 *MMSD* 6.

80 Downing *et al* 2002 *MMSD* 6.

81 Downing *et al* 2002 *MMSD* 6; See also Crawhall "Indigenous Peoples of South Africa: Current Trends project to Promote International Labour Organisation Policy on Indigenous and Tribal Peoples" 2-11.

82 Downing *et al* 2002 *MMSD* 6.

83 Bennett *African Customary Law* 8; Bennett "Official" vs "Living" 140-149.

Indigenous people in South Africa often suffer from a variety of infringements of their constitutional rights, including their right to live in a healthy environment and to have access to information.⁸⁴ With that said South Africa is one of the few countries on the continent that has embarked on ambitious efforts aimed at redressing problems faced by its indigenous people. These include emerging legislative, policy and judicial interventions to address the concerns of indigenous people.⁸⁵ The discussion below focuses on examples of key challenges faced by indigenous people in the mining context specifically.

2.3.1 Upholding of customary law by indigenous people on their communal land

The customary legal nature and the tenure in which indigenous people hold land under the auspices of tribal and chieftainship authority are among the vulnerability concerns that arise when mining takes place on their communal land.⁸⁶ This is because the communal ownership title under which indigenous people hold land seems to conflict with the land use and ownership legal system which currently prevails and informs mining legislation, such as the MPRDA,⁸⁷ the *Mining Title Registration Act* 16 of 1965 (*Mining Title Registration Act*), the *National Water Act* 36 of 1998 (*Water Act*) and other legislation applicable to mining in South Africa. As a measure of preventing the potential conflict between the common law as it currently stands and statutory provisions, section 4(2) of the MPRDA states that "in so far as the common law (or any other law) is inconsistent with this Act, this Act shall prevail". This can be interpreted as meaning the common law and the customary practises which indigenous people have been applying to regulate their affairs on their communal land with regard to use of water and other natural resources, for example. The latter law will therefore be overruled by provisions of the MPRDA,

84 See, *inter alia*, *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd* 2011 BCLR 299 (CC); *Alexkor Limited and Others v Richtersveld Community and Others* 2003 BCLR 1301 (CC). To be discussed in more detail in 4.2.1.1 and 4.2.2.1 below.

85 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 25.

86 Smith *et al* "Complex commons under threat of mining" 8–9.

87 MPRDA reg no R527 GG 26275 of 23 April 2004.

should there be a conflict between statutory provisions as outlined by the MPRDA and the customary practices adopted by indigenous people.⁸⁸ The implication of the MPRDA provisions overruling customary rules and practices adopted by indigenous people on their communal land is that indigenous people find themselves under duress to adopt statutory laws in favour of their customary practices when conducting their affairs on land affected by mining.

2.3.2 Approval of mining operations near land inhabited or owned by indigenous people

As already alluded to, South Africa has vast mineral resources estimated to be worth US\$2,5 trillion, which can still be exploited over the decades to come.⁸⁹ It seems as if the ongoing discovery of unexplored mineral fields on land owned by indigenous people, and development of greenfield mining projects in South Africa on land owned and lawfully occupied by indigenous people, will continue to be met with resistance when community members protest against their relocation to other areas to make way for mining. It has been witnessed in recent years that, when the state through the DMR has approved the relocation of indigenous people from their ancestral land and permits mining operations to commence on land falling under communal ownership, community members affected tend to take the law into their own hands with the intention of protecting their communal land.⁹⁰ In this regard, relocated community members resort to violent protest action when, for example, they raise their objections against implementation of social and labour plans which the DMR had already approved. The major objection by the affected community members is that blasting activities which take place at the mines contaminate the community's living environment and water resources used to subsidise community livelihood. Further objections are raised against unconvincing rehabilitation plans presented by the mining companies to the community, for example⁹¹

88 Mitchell *et al* 2012 *J S Afr Inst Min Metall* 3. An analysis of the MPRDA provisions relating to statutory procedural rights is presented in chapter 4.

89 Mkokeli and Seccombe *The Star Business Day News Paper* 7 February 2012 21.

90 Manson and Mbenga 2003 *JSAS* 294–296.

91 Smith *et al* "Complex commons under threat of mining" 8–9.

Still, the state has adopted measures to enforce compliance with the provisions of the MPRDA and the *Mine Health and Safety Act 29 of 1996 (MHSA)* against offending mining companies. It has, for example, been reported that Coal of Africa Limited in 2010 was served with a notice from the DEA to halt its construction activities at the Vele Colliery and mine project owing to the negative environmental impacts which detrimentally affect the living environment and health of indigenous people who own and lawfully occupy land near the project.⁹² It has been reported further that a team of environmental experts from the United Nations Educational, Scientific and Cultural Organisation (UNESCO) was to visit the mine construction site following the DEA suspension notice, to assess the impact of coal mining next to the Mapungubwe world heritage site and to assess whether interested and affected parties — specifically those who live in and in the vicinity of the mine project — had been meaningfully and adequately consulted by state authorities and mining company representatives *prior* to commencement of the construction activities.⁹³ The continuous blasting of rocks, dust, air pollution, depletion of community water resources and relocation of indigenous people — which occurred when the Vele Colliery project was undertaken — served to flag a few of the vulnerability concerns faced by indigenous people affected by mining in their areas.⁹⁴

Among the objections to and key challenges raised by the interested and affected parties against the Coal of Africa Limited project was that the mine site is situated six kilometres from the Mapungubwe heritage site, that the heavy-duty trucks which were scheduled to transport coal from the mine would significantly impact on future tourism developments in that region, and that the interested and affected parties in the vicinity of Mapungubwe had not been meaningfully and adequately consulted during the environmental impact assessment and environmental management plan and programme preparation processes.⁹⁵ From the establishment of the Vele project in Limpopo the insight

92 Derby *The Star Business Day Newspaper* 17 November 2011 25.

93 Derby *The Star Business Day Newspaper* 17 November 2011 25.

94 Derby *The Star Business Day Newspaper* 17 November 2011 25.

95 Derby *The Star Business Day Newspaper* 17 November 2011 25.

may be gleaned that approval of mine projects on or near communal land of indigenous people have in some instances created socio-economic challenges to local communities, because often the community will, for example, have to give away part of their water resources and farming and grazing land to the mine. In such cases the community will be left with less land to utilise for their own needs, for example.⁹⁶

Similar to the Coal of Africa Vele project, it has been reported that the Zululand Anthracite Colliery (ZAC) in KwaZulu-Natal, which is owned by an Australian-based holding company, was given 21 days by the DMR to address all infringements of the MPRDA and the MHSA.⁹⁷ The mine is located a few kilometres away from rural villages in the Okhukho, Ulundi and Newcastle areas in KwaZulu-Natal. Indigenous people in the Okhukho area are governed by tribal authorities and live according to their traditional lifestyle with regard to their communal land. It has been reported that the mine had been operational in that area since 1985.⁹⁸ Indigenous people affected by the ZAC mining operations were among the parties who approached the DMR to lodge complaints against negative impacts caused by mining in the vicinity of their communal land.⁹⁹ At the core of their concerns and grievances against the mining company operations on their communal land was the failure of ZAC to comply with the South African Mining Charter (as amended). The Charter aims to promote equitable access to mineral resources for all South Africans through broad-based socio-economic empowerment structures, which were introduced by the government after 1994 and were intended to involve indigenous people in the ownership, procurement and trading of minerals in South Africa.¹⁰⁰ The community further protested that ZAC had failed to set up and to implement proper social and labour plans to include local community members in the

96 <http://www.coalofafrica.com> follow the Vele Project in Musina. See also <http://www.lhr.org.za> follow Kgobudi community challenges Platreef (Pty) Ltd interdict to keep of their land. See also <http://www.lhr.org.za> follow residents of Silobela, Caro Park and Carolina communities in Mpumalanga protest against acid mine water (North Gauteng High Court case no 3567/12 unreported).

97 Magwaza *The Star Business Day Newspaper* 22 June 2012 21.

98 Magwaza *The Star Business Day Newspaper* 22 June 2012 21.

99 Magwaza *The Star Business Day Newspaper* 22 June 2012 21.

100 *South African Mining Charter* no R26661 of 13 August 2004; Leon "South African Mining Industry at the Cross Roads" 6.

mining operations with skills development and employment opportunities; that the mine sewage system had contaminated the Umvalo River which flows into the Umfolozi River; and that the mine had failed to administer its dumping site properly. The community pointed out respiratory diseases among the illnesses they had suffered as a result of the failure of the mine to administer its dumping sites.¹⁰¹

The cases of Coal of Africa Limited in Limpopo, ZAC in KwaZulu-Natal and XolCo representing the Amadiba community in the Eastern Cape, as reported respectively, have exposed and highlighted some of the on-going socio-economic challenges, hardships and vulnerability concerns of indigenous people affected by mining.¹⁰² The cases of Coal of Africa Limited and ZAC also suggest that mining companies fail to implement social and labour plans successfully during operations approved by the DMR, when mining rights are granted. In addition, both the well-being and health of indigenous people who live near mines are affected by drilling and blasting of rocks, by large volumes of water usage by the mines during operations and tailings dams and by the relocation of communities.¹⁰³ It appears from the ZAC mine project and the community members around Okhukho, Ulundi and Newcastle areas in KwaZulu-Natal that indigenous people who live near mine projects still lodge their grievances against the mining company infringing the MPRDA and MHSA provisions firstly with their traditional leaders and representatives and then approach the DMR authorities as a measure of last resort. This seems to have been the approach followed by the community because grievances of indigenous people in the Okhukho, Ulundi and Newcastle villages against ZAC had only been resolved through the intervention of the DMR in 2012 while the mine had been operational on communal land since 1985.¹⁰⁴

101 Magwaza *The Star Business Day Newspaper* 22 June 2012 21.

102 Derby *The Star Business Day Newspaper* 17 November 2011 25; Magwaza *The Star Business Day Newspaper* 22 June 2012 21; Gqada "Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project" 6–9.

103 Humby "Mining and Environmental Litigation Review: (2011) 55–60. See also <http://www.lhr.org.za> follow Kgobudi community challenges Platreef (Pty) Ltd interdict to keep of their land. See also <http://www.lhr.org.za> follow residents of Silobela, Caro Park and Carolina communities in Mpumalanga protest against acid mine water (North Gauteng High Court case no 3567/12 unreported).

104 Magwaza *The Star Business Day Newspaper* 22 June 2012 21.

2.3.3 Summary of some vulnerability concerns

Based on the examples discussed above, the vulnerability concerns of indigenous people affected by mining in the South African context appear to include:

- Indigenous people have a special attachment to their communal lands or territories. A key characteristic for most indigenous people in South Africa is that the survival of their particular way of life depends on access and rights to their communal lands and the natural resources thereon;¹⁰⁵
- Communities residing on or near land where the state has approved mining operations often suffer discrimination as they are regarded as "less developed" and "less advanced" than other more dominant sectors of society. Indigenous people therefore suffer exploitation within national economic structures that are commonly designed to reflect the interests and activities of the national majority such as mining;¹⁰⁶
- Indigenous people in South Africa are socially, culturally and economically distinct. Their culture and way of life differ considerably from that of other societies and the culture of indigenous people are often under threat, in some instances to the extent of extinction;¹⁰⁷
- Community leaders appear to be manipulated by mining company representatives with gifts and donations when the utilisation of communal land for mining purposes is proposed to the tribal leadership;¹⁰⁸ and

105 Bennett *African Customary Law* 8; Bennett "Official" vs "Living" 140-149; *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources Pty) Ltd and Others* 2011 BCLR 299 (CC).

106 Bennett *African Customary Law* 8; Bennett "Official" vs "Living" 140-149; *Alexkor Limited and Others v Richtersveld Community and Others* 2003 BCLR 1301 (CC).

107 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 12; *Alexkor Limited and Others v Richtersveld Community and Others* 2003 BCLR 1301 (CC) para 9–10.

108 Gqada "Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project" 23. When XolCo was established when an Australian company was granted a mining right on the Amadiba communal land, tribal leaders were reported to have co-opted selected community members to become directors of the BEE company (XolCo) — even when such "directors" did not appear in official documents of the company and such directors were to act as if they represented the

- Tribal authorities and community members appear to be lacking in-depth knowledge, financial resources and skills to challenge and to question environmental and mining impacts (positive or negative) expected to be caused during operations and mitigating measures that the mining company submit to the community in the form of environmental impact assessments, environmental management plans and programmes and similar environmental instruments.¹⁰⁹

Communities in the vicinity of Coal of Africa's Vele project in Limpopo and the Amadiba community represented by XolCo in the Eastern Cape, as highlighted above, serve as examples of indigenous people who appeared to be lacking skills and resources to challenge impacts when mining operations were approved to take place near their communal lands. In the Amadiba community versus XolCo case, community objections to mine operations were raised to a large extent by advocacy groups such as the Endangered Wild Life Trust, Bench Marks Foundation and Lawyers for Human Rights.¹¹⁰

2.4 Preliminary observations

Some of the factors which detrimentally affect the socio-economic standing of indigenous people who live near mine operations include:

- Mining companies not formally and timeously consulting with indigenous people who own and lawfully occupy land to be mined, as experienced

socio-economic interests of the Amadiba community during operations of the mining company on communal land.

109 MPRDA reg no R527 GG 26275 of 23 April 2004; NEMA reg no R543 GG 33306 of 18 June 2010; *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd and Others* 2011 BCLR 299 (CC), para 9. The lack of in-depth understanding and knowledge on the part of indigenous people was reflected in the Bengwenyama-ye-Maswati case. Representatives of the applicant mining company (Genorah Resources) were reported to have requested the tribal chief to mark "Yes" or "No" on the form provided by them, to prove that the company did consult with the community.

110 Gqada "Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project" 23.

in the Bengwenyama-ye-Maswati community case against Genorah Resources;¹¹¹

- The ongoing practice of indigenous people holding land under communal ownership as experienced with community members around the Okhukho, Ulundi and Newcastle villages in KwaZulu-Natal near the ZAC mine project;¹¹² and
- Mining in South Africa which is dominated by migrant labourers coming from Southern African Developing Countries (SADC) such as Lesotho, Swaziland and Zimbabwe to seek employment in South Africa to better their lives. These migrant labourers often focus on employment with the mining companies and, together with community members who own or lawfully occupy land affected by mining, they find themselves less involved in socio-economic factors affecting their right to live in a healthy environment.¹¹³

These socio-economic factors — when considered in context with the overview of key challenges and vulnerability concerns faced by indigenous people affected by mining — are highlighted by the vulnerability concerns of communities residing near the Coal of Africa Limited Vele mine in Limpopo, the ZAC mine in KwaZulu-Natal and the Amadiba community in the Eastern Cape, where the state-approved mine operations take place near communal lands. It seems as if the combination of these socio-economic factors — which inherently relate to the active participation and consultation of indigenous people when mining takes place — can be resolved by proper implementation of the MPRDA (discussed in detail in chapter 4) and the provisions of the Mining Charter.¹¹⁴ Furthermore, the Mining Charter and the BEE concept, introduced after 1994 to facilitate ownership in the major economies of the country by historically disadvantaged South Africans, could be among the

111 *Bengwenyama-ye-Maswati Community case* to be discussed in more detail in 4.2.2.1 below.

112 Magwaza *The Star Business Day Newspaper* 22 June 2012 21.

113 Brand "Marikana and its Lessons for Corporate South Africa" 2; Manson and Mbenga 2003 JSAS 294–296; Pogue *Producer Services in the Mining Industry* 2.

114 S 100(2)(a) and (b) MPRDA; *South African Mining Charter* no R26661 of 13 August 2004. Also S 7(2) of the Constitution read with ss 31 and 32 of the Constitution.

catalytic measures which can be used to integrate and accelerate consultation and active participation of previously disadvantaged people, including indigenous people, when mining takes place.

Following the historical descriptions and introduction of the existence and context of indigenous people in South Africa, the following chapter ventures into a discussion of procedural rights at the disposal of indigenous communities.

CHAPTER 3

Constitutional procedural rights applicable to indigenous people affected by mining

3.1 Introduction

In this chapter, an overview is provided of relevant constitutional procedural rights of indigenous people to be considered when mining operations are approved to take place on land owned and/or lawfully occupied by indigenous people. Applicable common law is also considered. The objective of this chapter is to show that there is existing law which interested and affected parties can rely on to challenge their marginalisation when the state approves, without prior consultation, mining operations to take place on or near their communal land.

3.2 Current state structure

The government of South Africa consists of three spheres, national, provincial and local, that are 'distinctive, interdependent and interrelated'. All spheres have legislative and executive authority.¹¹⁵ The national government is primarily responsible for policy on matters of national concern and the provincial and local spheres for the co-implementation thereof.¹¹⁶ There are currently nine provinces and approximately 280 municipalities.¹¹⁷ The Constitution enshrines the doctrine of the separation of powers between the legislature, the executive and the judiciary when governance and administrative decisions affecting the public are taken.¹¹⁸ The executive consists of the President, the Deputy President, the Cabinet and state departments such as the DMR, the DEA and

115 Du Plessis *et al* *The balancing of interests in environmental law in Africa: Striking the sustainability balance in South Africa* 421.

116 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 12; De Ville *Judicial Review* 31.

117 Du Plessis *et al* *The balancing of interests in environmental law in Africa: Striking the sustainability balance in South Africa* 421.

118 Currie and De Waal *Bill of Rights Handbook* 18–19; ss 41 and 154 *Constitution*.

the DWA, amongst others, which deal with policy, the implementation of law and administration, generally.¹¹⁹

The Constitution contains an outline of the rights to just administrative action and information (sections 32 and 33) and guards against violation of procedural rights.¹²⁰ The notion of procedural rights refers generally to rights and principles of law which regulate administrative institutions, fairness and efficacy of the administrative process, and govern the administrative and judicial remedies relating to such action or inaction.¹²¹ It also provides remedies for individuals affected by administrative decisions, where administrative powers have not been properly exercised or obligations imposed by principles of procedural fairness have not been complied with.¹²²

The Constitutional Court — in its pronouncing on the application of administrative justice and the provision of separation of powers between the three arms of government in *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others*¹²³ — held that administrative law should be treated as an incident of separation of powers under which courts (the judiciary) regulate and control the exercise of public power by the other branches of government. Procedural rights by its very nature stem from administrative law which in turn forms a core part of public law¹²⁴ - public law being the law relating to the exercise of public power and functions and how these (power and functions) ought to be performed by the state when administrative decisions affecting the public are taken.¹²⁵

119 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 12.

120 These sections will be discussed in more detail in this chapter.

121 Currie *Promotion of Administrative Justice Act 2; Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 8 BCLR 872 (CC) para 75; Currie and De Waal *Bill of Rights Handbook* 12-13.

123 Currie *Promotion of Administrative Justice Act 3*; Currie and De Waal *Bill of Rights Handbook* 12-13.

123 *Pharmaceutical Manufacturers Association of South Africa and Others v In re Ex parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) para 33.

124 Hoexter *Administrative Law* 2-3.

125 Hoexter *Administrative Law* 2-3.

3.3 Common law perspectives on procedural rights

This study focuses on the protection of the procedural rights of indigenous people affected by mining. This suggests that emphasis will be placed on the constitutional rights mentioned above. However, the South African legal system derives its roots from Roman Dutch law. The legal system further borrows from common law owing to South Africa's English colonial history.¹²⁶ African customary law also forms part of South Africa's legal system.¹²⁷

Common law has been well received in South African jurisprudence, developed by the courts and carried from generation to generation through the courts of law in South Africa.¹²⁸ Common law has therefore over the years become an integral part of enforcement and regulation of *inter alia* procedural rights by South African courts.¹²⁹ When procedural rights are enforced in South Africa, the two common-law maxims of *audi alteram partem* (hear the other side) and *nemo iudex in sua causa* (no one should be a judge in his or her own cause) still find indirect application in the pursuit of "procedural fairness", as envisaged by sections 32 and 33 of the Constitution.¹³⁰

The common-law maxim *audi alteram partem* by definition requires that interested and affected parties that will be affected by the administrative action and the decision to award prospecting and mining rights, for example, should be given a fair hearing by those who will make the decision.¹³¹ For example, a decision by the DMR to grant a mining right to a company on land owned by indigenous people should involve such a community as being an interested and affected party. The common-law procedural rights which the maxim *audi alteram partem* seek to protect, and reinforced by provisions of PAJA,

126 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 14.

127 Preamble to the *Traditional Leadership and Governance Framework Amendment Act*; *Alexkor Limited and Others v Richtersveld Community and Others* 2003 BCLR 1301 (CC) para 51–56.

128 *Alexkor Limited and Others v Richtersveld Community and Others* 2003 BCLR 1301 (CC) para 51–56.

129 Pienaar 2012 *PELJ* 153–155; Grant *Administrative Law* 46–47.

130 Grant *Administrative Law* 46–47.

131 Grant *Administrative Law* 46–47.

include:¹³² a right to a fair hearing where each party is allowed to present its side of the matter; notice of the intended action to be served timeously on interested and affected parties; access to information which such interested and affected parties can use to protect any of their constitutional rights; and to engage in a fair and reasonable consultation process where each party has an opportunity to respond and to make informed decisions.

In order not to violate the administrative rights of interested and affected parties, including the right to procedural fairness indicated above, a decision-maker from the state should consider, *inter alia*, how long in advance prior notice should be given to the interested and affected parties, whether there should be an oral hearing or whether it will be sufficient to consider written representations from interested and affected parties, and whether the interested and affected parties have a right to be legally represented.¹³³ In this manner the initial common-law basis for decision-making in the context of the public sector is still part of the protection afforded to people affected by decisions of government.

On the other hand, the common-law maxim *nemo iudex in sua causa* requires of decision-makers from the state to be impartial when decisions are made.¹³⁴ This maxim provides against decision-makers being biased because of actual or potential personal or financial interest or any other factor which may compromise their impartiality when making decisions that may affect a person or a community.¹³⁵

It is therefore necessary for decision-makers in government — also in the departments involved with mining — to be vigilant and mindful of *audi alteram partem* and *nemo iudex in sua causa* principles as common-law measures meant to protect administrative rights of interested and affected parties. This holds true also for decisions affecting indigenous people and relating to mining on communal land.

132 Ss 3 and 4 PAJA.

133 Hoexter *Administrative Law* 78–79; ss 3 and 4 PAJA.

134 Grant *Administrative Law* 46–47.

135 S 8 PAJA.

3.4 Relevant constitutional procedural rights

The Constitution provides for at least four procedural rights that since 1996 have protected the people of South Africa against abuse of power by the state and that aim to foster good governance. These rights are relevant when decision-making processes of the state are initiated to consider applications for prospecting and mining rights or when indigenous people affected by mining are relocated to give way to mining operations. These rights are of particular relevance to the relationship between the state as custodian and regulator of minerals in South Africa, companies applying for prospecting and mining rights, and communities — including indigenous people.¹³⁶ The parcel of rights to be discussed below comprises the right of access to information, the right to just administrative action, the right of access to courts or justice and the right to be involved in decision-making.

3.4.1 Right of access to information

State departments — such as the department responsible for mineral rights and others such as the department responsible for government communications — were historically allowed to refuse to divulge information required for the protection of people's rights.¹³⁷ However, the Constitution now enables everyone to have access to information held by the state. Access to information is currently comprehensively regulated by the PAIA which effectively codify the right of access to information enshrined in the Constitution (section 32).¹³⁸

Section 32 of the Constitution provides that:

Everyone has the right of access to any information held by the state and any information held by other person that is required for the exercise or protection of any rights.

136 S 3 MPRDA.

137 Mitchell *et al* 2012 *J S Afr Inst Min Metall* 4; Preamble to the PAIA.

138 Kotzé and Paterson *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* 582.

Section 32 was framed in such a manner that its application is extensive as opposed to a restrictive application.¹³⁹ It enables everyone in South Africa to have access to information, such as information compiled and exchanged between the state and mining companies when mining projects are considered and approved. The application of section 32 thus provides constitutional grounds according to which indigenous people affected by mining can submit their requests to have access to and to study information on how prospecting and or mining rights were granted on land they own or lawfully occupy; minutes and records of consultation processes with interested and affected parties if any; EIA, EMP and other environmental programme documents; land rehabilitation plans and availability of trust money to be used for the rehabilitation of the affected land when operations ceases; and any other related information which a community can use to contest mining activities on the land they own and lawfully occupy.¹⁴⁰ A community may also use information obtained from their interaction with the state and mining companies to enforce other rights it may have against any other party which has contravened their constitutional rights.¹⁴¹

When pronouncing on the interpretation of PAIA and right of access to mining companies' environmental records – the court in the case of *Vaal Environmental Justice Alliance (VEJA) v Company Secretary of ArcelorMittal SA Limited and ArcelorMittal SA Limited* held that the participation of public interests groups is vital for the protection of the environment,¹⁴² for example, and they further hold that a community based civil organisation such as the VEJA is entitled to monitor, protect and exercise the rights of the public at least by seeking information which will enable the organisation to assess the impact of various mining activities on the environment, and organisations such as

139 S 2 PAIA.

140 Ss 6, 30(1) and 41 MPRDA.

141 Preamble to the PAIA, ss 75 and 76 PAIA.

142 *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal SA Limited and ArcelorMittal SA Limited* (South Gauteng High Court Case No. 39646/12 unreported) para 14-16.

VEJA must be encouraged to exercise a watch-dog role in the preservation and rehabilitation of national natural resources.¹⁴³

3.4.2 *Right to just administrative action*

Section 33 of the Constitution provides that:

Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

This right should be read together with PAJA as the national legislation that was passed to give effect to section 33 and that outlines in greater detail the right of everyone to administrative action that is lawful, reasonable and procedurally fair.¹⁴⁴ PAJA was also promulgated to facilitate processes and/or means by which everyone — whose rights have been adversely affected by administrative action taken by the state — is to be given reasons for such action.¹⁴⁵

Administrative action as defined in terms of PAJA means any decision taken or any failure to take a decision either by organs of state (the DMR, the DEA, the DWA for example) or by a natural person or juristic person — when exercising power in terms of authority granted by the Constitution or in terms of any legislation — which adversely affects the rights of any person (indigenous people included) and which has an external legal effect on other interested and affected parties.¹⁴⁶ Hoexter, in stating the requirements of an administrative action as stipulated in section 1 of PAJA, provides that these may be conveniently divided into seven main elements in a manner that has found

143 *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal SA Limited and ArcelorMittal SA Limited* (South Gauteng High Court Case No. 39646/12 unreported) para 14-16.

144 *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 8 BCLR 872 (CC) para 95.

145 S 1 PAJA. See opening paragraph of subsec 3.4.2 for a definition of administrative action. With the definition of an administrative action given above in mind, PAJA defines an "administrator" in terms of this Act as meaning an organ of state or any natural person or juristic person taking administrative action.

146 S 1 PAJA.

favour with South African highest courts.¹⁴⁷ Hoexter lists the seven elements of an administrative action as comprising the following:

- A decision
- by an organ of state (or a natural or juristic person)
- exercising a public power or performing a public function
- in terms of any legislation (or in terms of an empowering provision)
- that adversely affects rights
- that has a direct, external legal effect and
- that does not fall under any of the listed exclusions.

In providing the right to procedurally fair administrative action through PAJA the legislature envisaged not only protecting constitutional rights of citizens, but also to protect legitimate expectations of any person who might adversely be affected by decision-making processes of the state as well as actions such as awarding and regulating of mining rights and permits, for example.¹⁴⁸ The right protected under PAJA generally refers to any constitutional right which has a direct or external legal effect on any person, but does not include functions and executive powers listed under section 1 (aa) – (ii) of PAJA itself.¹⁴⁹

Kotzé and Paterson state that the inclusion of a right to just administrative action in the Bill of Rights as further codified in the PAJA has significantly altered the manner in which administrative disputes are raised and resolved by authorities.¹⁵⁰ The authors further state that PAJA has over the years become a legal tool simplifying the adjudication of cases brought by communities seeking to challenge decisions by state authorities relating to the granting/failure to

147 Hoexter *Administrative Law* 197; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 7 BCLR 687 (CC) para 23–24.

148 S 1 PAJA.

149 Excluded from the definition of administrative action in terms of PAJA is the excluded executive powers or functions of the National Executive, excluded executive powers or functions of the Provincial Executive, excluded executive powers or functions of a municipal council, excluded the judicial functions of a judicial officer of a court, a decision to institute or continue a prosecution, a decision relating to any aspect regarding the appointment of a judicial officer by the Judicial Service Commission, any decision taken or failure to take a decision in terms of any provision of the *Promotion of Access to Information Act*.

150 Kotzé and Paterson *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* 582.

grant environmental permits, land development rights and the right to mine mineral resources by companies on communal lands.¹⁵¹

Administrative law is further of critical importance when, for example, indigenous people affected by mining apply for review of administrative actions and decisions taken by the DMR, the DEA and the DWA approving mine operations to take place on or near land owned and lawfully occupied by such people, without the community having been consulted formally. As per administrative law, it would appear that decisions by the said authorities must comply with the following in order to avoid administrative action being challenged by communities, for example:

- adequate notice of the nature and purpose of the proposed administrative action;
- a reasonable opportunity to make representations;
- a clear statement of the administrative action;
- adequate notice of any right of review or internal appeal, where applicable, and
- adequate notice of the right to request reasons in terms of PAJA.¹⁵²

It follows that to achieve the purpose of section 33 within the context of this study, indigenous community members and other interested and affected parties should have their review application heard formally and should be granted an opportunity fully to present their side of the issue when an administrative law concern arise. Their concerns must be responded to timely, in a satisfactory manner and in a language they understand. An independent person may have to be involved for reasons of impartiality where potential conflict of interest between the state, indigenous people, and the mining company exists.

151 Kotzé and Paterson *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* 580-581; Currie and De Waal *Bill of Rights Handbook* 649.

152 S 3(2) PAJA.

3.4.3 *Right of access to courts or justice*

In the previous South African regime, not every community or individual had the right to approach courts of law for resolution of violations of human rights by the state and others. Access to justice in terms of the prevailing legal system is, however, now envisioned by the Constitution through its guarantee of equal protection of the law and the right to a fair trial.¹⁵³

Section 34 of the Constitution provides that:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Efficient and accessible courts of law and quasi-judicial forums are therefore important to guarantee access to justice for all in South Africa, including indigenous people. Indeed, the Constitutional Court in the case of *Bernstein v Bester* observed that the state has a duty to establish independent tribunals for the resolution of civil disputes and for the prosecution of persons charged with having committed crimes.¹⁵⁴ The Constitutional Court in the *Bernstein v Bester* case further observed that the judiciary has a role to play in protecting the rights of minorities and the marginalised (arguably including indigenous people affected by mining), for example.¹⁵⁵ The Constitutional Court has demonstrated through a number of pronouncements that courts in South Africa can contribute significantly to the protection of the interests of disadvantaged groups. The courts provide a judicial forum in which the marginalised can be heard and can seek redress in circumstances where administrative and political processes undertaken by the state (and mining companies) failed to assist the marginalised members of the society, such as indigenous people affected by mining.¹⁵⁶ The Richtersveld community and the Bengwenyama-Ye-Maswati community matters, whereby marginalised indigenous people affected by

153 Ss 9(1) and 35(3) *Constitution*.

154 *Bernstein v Bester* 1996 2 SA 751 (CC) para 51.

155 *Bernstein v Bester* 1996 2 SA 751 (CC) para 52.

156 S 34 *Constitution*.

mining successfully relied on the independence of South African courts, serve as cases in point in this regard.¹⁵⁷

The MPRDA also stipulates that the state, through the Minister of Mineral Resources, is the custodian and regulator of all minerals found in the Republic.¹⁵⁸ The DMR is therefore the primary decision-making institution which decides on applications to mine on land of indigenous people.¹⁵⁹ With the DMR functioning as the leading state department in the awarding and regulation of mining rights, history has, however, shown that matters concerning the application and awarding of prospecting and mining rights in South Africa tend to be challenged and finally to be settled by courts of law, as a result of review proceedings instituted by interested and affected parties who are not satisfied with decisions taken by the DMR.¹⁶⁰ The ruling of the Constitutional Court in the *Bengwenyama-ye-Maswati* case suggests that courts of law can, by application, review and set aside administrative decisions to grant prospecting rights on communal land, if there are constitutional grounds to set aside such a decision by the DMR.

The essence of section 34 of the Constitution is to open the doors of the justice system to people in South Africa – among others for the review of administrative decisions taken by the state. Review of such decisions by courts or tribunals should follow, *inter alia*, in instances where administrative decisions adversely affect substantive constitutional rights e.g. the right to a healthy and safe environment. Section 34 thus provides grounds for indigenous people to rely on the courts to challenge administrative decisions taken by officials of the DMR, the DEA and the DWA, amongst others, when the right of the community to have access to information and/or the right to live in an environment that is not harmful to their health, are violated, for example. The courts may for

157 *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd and Others* 2011 3 BCLR 299 (CC); *Alexkor Limited and Others v Richtersveld Community and Others* 2003 BCLR 1301 (CC). These cases are discussed in more detail in 4.1.1.1 and 4.2.2.1 below.

158 S 3 MPRDA.

159 S 3 MPRDA and MPRDA preamble.

160 *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd and Others* 2011 3 BCLR 229 (CC) para 87–88. To be discussed in more detail in chapter 4 subsection 4.2.2.1.

example go to the extent of setting aside ministerial (executive) decisions permitting exploration and mining operations to take place on communal land, in the manner that the Constitutional Court did in the *Bengwenyama-ye-Maswati* case when a prospecting right granted to Genorah Resources and Others by the DMR was set aside.¹⁶¹

With judicial legal processes being technical, expensive and taking considerable time to be resolved when court action is instituted (given also that most indigenous people — owing to their historical and continued marginalisation — are impoverished); there is need for more than mere availability of courts to espouse community rights. To make provision for persons who cannot afford to pay for legal services, South Africa has established the national legal aid scheme to assist indigent citizens to have access to justice, even when they cannot afford to pay.¹⁶² In providing indigent people with access to justice, many universities' legal aid clinics and non-governmental organisations in South Africa have also provided some form of legal aid to communities faced with challenges against the state and mining companies, amongst others.¹⁶³

3.4.4 *Right to be involved in decision-making*

In facilitating transparent participation by communities in decision-making processes at all levels, including when mining-related applications are received and processed by the state, sections 195(1)(d), (e) and (g) of the Constitution bestow rights on communities to be involved in decision-making. Section 195(1) of the Constitution lays down nine broad principles which should guide state departments such as the DMR, the DWA and the DEA in carrying out their administrative functions in an orderly and efficient manner. The three principles identified in sections 195(1)(d), (e) and (g) reinforce the fact that the public, including indigenous people, has a right to participate in public functions

161 *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd and Others* 2011 3 BCLR 229 (CC) para 87–88.

162 *Legal Aid Act* 22 of 1969 as amended by the *Legal Aid Amendment Act* 20 of 1996.

163 See the Legal Resource Centre involvement in the *Alexkor Limited and Others v Richtersveld Community and Others* 2003 BCLR 1301 (CC), for example.

performed by the state and a right of timely access to information, when required. Most importantly section 195(1) is against state departments with authority to administer related matters (the DMR, the DWA and the DEA, for example, on matters concerning mining and the environment) operating in an isolated and fragmented manner, when these departments administer matters affecting the public interests. Put differently, the principles of section 195(1) exist to foster the spirit of co-operative government among various state departments and to encourage good governance, which involves participation of communities when decisions are made.¹⁶⁴ It should be acknowledged at this point that the right to be involved in decision-making processes, provided by the Constitution in terms of section 195(1), is derived from constitutional duties imposed on the state. It is not an explicit right granted to communities to involve themselves in such decision-making processes.

It seems as if realisation of the right to be involved in decision-making processes envisaged by section 195(1) is impeded every time the DMR, the DWA and the DEA, for example, fail to co-operate in matters affecting the living environment of communities when mining takes place.¹⁶⁵ Failure by various state departments established to administer related matters such as mining and the environment seems to be defeating the very same purpose of co-operative government and the right of interested and affected parties to be involved in decision-making processes undertaken by the state.¹⁶⁶ On the other hand, the right to be involved in decision-making processes is impeded when state authorities (regional environmental managers of the DMR, for example) fail to respond to queries made by interested and affected parties with regard to their living environment.¹⁶⁷

The right of communities to be involved in public decision-making processes is also protected by section 118(1) of the Constitution which stipulates that

164 Chapter 3 *Constitution*, specifically s 41.

165 *Maccsand CC* case para 18.

166 Hamann 2003 *SAJELP* 24-25; Humby "Mining and Environmental Litigation Review" (2100) 9-11.

167 Mitchell *et al* 2012 *J S Afr Inst Min Metall* 4; Humby "Mining and Environmental Litigation Review" (2011) 9-11.

members of the public, which would include indigenous people, have a right to be involved in the affairs of provincial legislatures and to have access to public information to protect and to enforce their constitutionally entrenched rights; such as the right to live in a healthy environment, for example.¹⁶⁸ Communities in provinces where large-scale mining operations take place, such as the North West, Limpopo, Mpumalanga and the Northern Cape, can therefore rely on section 118(1) to enforce their participation in provincial legislatures; and in so doing, to contribute to matters affecting their living environment. Section 118(1) of the Constitution suggests that community members may have access to information relating to the awarding and regulation of mining-related permits and rights granted by the national government in their provinces; the community to monitor these mining activities as they have a negative impact on their living environment and the land they own and lawfully occupy. In such circumstances provincial authorities will exercise their executive duties by protecting the procedural right of interested and affected parties, such as indigenous people, to be consulted and by reporting participation of and input received from communities to relevant state departments which have authority over prospecting and mining of minerals in South Africa.

In terms of the Constitution and the MPRDA, local government does not have jurisdiction to administer the granting and regulation of mineral rights in South Africa.¹⁶⁹ Section 152(1)(e) of the Constitution, however, describes the objectives of local government and affords members of the public an implicit right to participate, with the state, in matters affecting the rights and interests of local communities.¹⁷⁰ Among the constitutional objectives of local government structures, when decisions are taken, is the encouragement of the involvement of community organisations. Section 152(1)(e) of the Constitution requires municipalities to involve communities within their areas of jurisdiction in matters of governance which affect their lives and living environment. With green

168 Hamann 2003 *SAJELP* 24–25.

169 S 152 *Constitution*; s 3(3) MPRDA.

170 Ss 152, 153 and 154 read with Schedule 4 Part B of the *Constitution*.

field¹⁷¹ and existing mining projects in South Africa being located within administrative jurisdictions of municipalities, municipal integrated development plans that will generally acknowledge mining as a form of land-use would seem to be among local government instrumentation which municipalities are legally obliged to utilise to involve local communities generally.¹⁷²

The Constitutional Court in *City of Cape Town v Maccsand (Pty) Ltd and Others*¹⁷³ had to consider and to decide, among other legal questions, whether land-use planning legislation is superseded or "trumped" by the MPRDA when mining takes place in areas falling under municipal jurisdiction. This was after the City of Cape Town instituted proceedings for an interdict restraining Maccsand (Pty) Ltd from mining sand dunes until the dunes had been rezoned to allow mining as a land use. The Constitutional Court in deciding the matter held that mining-right holders are not exempted from the requirement to obtain rezoning of the land in respect of which they held a permit or a right (as required by the *Land Use Planning Ordinance* 15 of 1985).¹⁷⁴ The court held further that obtaining rezoning authorisation from the municipality did not amount to the local sphere of government unlawfully intruding into the national sphere and taking upon itself powers of the national sphere, or even vetoing the exercise of national powers (*decision-making to approve prospecting or mining operations would still remain competency of national government as per the MPRDA*).¹⁷⁵ The court reasoned further that in cooperative governance different spheres of government do not operate in isolated compartments.¹⁷⁶ This should mean that local authorities are among the state departments which should be consulted prior to the issuing of prospecting or mining rights. Also, preparation and adoption of instruments such as integrated development plans by local governments should enable community members to raise concerns

171 In the context of this study *green field* refers to investments by companies which construct new projects from planning to operations and building new facilities and/or plants to conduct business in a long term and creating employment.

172 Hamann 2003 SAJELP 24–25.

173 *Maccsand* CC case para 17–18.

174 Humby "Mining and Environmental Litigation Review" (2011) 37; *Maccsand* CC case para 17.

175 *Maccsand* CC case para 17–18.

176 *Maccsand* CC case para 18.

and inputs affecting their lives — even if concerns relate to non-municipal functions such as mining.

3.5 Conclusion

The overview of constitutional procedural rights above indicates that indigenous people and other interested and affected parties do have a range of constitutional rights at their disposal. The protection that the Constitution affords to communities affected by mining includes the right of access to information, the right to just administrative action, the right of access to courts or justice and the right to be involved in decision-making, as discussed above. Various pieces of legislation have also been passed to support and further unpack and/or outline the protection afforded by the Constitution. Having discussed the relevant provisions of the Constitution above, the chapter to follow specifically focuses on the statutory procedural rights applicable to indigenous people affected by mining.

CHAPTER 4

Statutory procedural rights applicable to indigenous people affected by mining

4.1 Introduction

For most of its history, the mining industry in South Africa has not been subjected to comprehensive environmental regulation and governance. Because of legislation such as the *Development Land and Trust Act* and the *Minerals Act*, regulation and governance of environmental impacts on land and on the health of neighbouring communities had been separated from mining itself.¹⁷⁷ Since 1996, however, this has changed significantly and the mining industry is now required to comply with strict mining and environmental procedures, policy and legislation in terms of, *inter alia*, the NEMA and the MPRDA.¹⁷⁸ This body of law today serves to complement the procedural environmental rights contained in the Constitution.

Statutory procedural rights are scattered across the MPRDA and its regulations, NEMA and its regulations, the *National Heritage Resources Act 25 of 1999 (NHRA)*, the *National Environmental Management: Protected Areas Act 57 of 2003 (Protected Areas Act)*, the *National Environmental: Biodiversity Act 10 of 2004 (Biodiversity Act)* and the *National Water Act 36 of 1998 (Water Act)*. In discussing these laws attention is paid to the sections which provide for the right of interested and affected parties to be consulted by the state and applicant (mining) companies, and other statutory procedural rights which apply at different stages in government decision-making.

4.1.1 MPRDA and its regulations

The MPRDA serves as mining framework legislation and its provisions apply to both mining activities and environmental management.¹⁷⁹ The preamble to the

177 Leon "South African Mining Industry at the Cross Roads" 3.

178 Leon "South African Mining Industry at the Cross Roads" 3.

179 S 37 MPRDA.

MPRDA states that the objectives of the Act also include the need to promote local and rural development and the social upliftment of communities affected by mining.

A community, as defined in terms of the MPRDA, means:¹⁸⁰

A coherent, social group of persons with interest or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law.

Of relevance for purposes of this study is the fact that in terms of section 6 of the Act, (administrative) decisions taken by the state to grant prospecting or mining rights must be procedurally fair, and interested and affected parties — including indigenous people who own or lawfully reside on or near the land to be mined — should be consulted promptly and formally and procedural fairness should be ensured by the state and the mining company concerned.¹⁸¹ Interested and affected parties should also have access to information which they may require to protect any of their constitutional rights. Upon request they should receive written reasons for the decision taken by the state.¹⁸² The court, in examining the meaning of "consultation" in the case of *Magoma v Sebe*, held that:¹⁸³

Consultation in its normal sense, without reference to the context in which it is used in dictionaries, denotes a deliberate getting together of more than one person or party in a situation of conferring with each other, where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate.

It can be concluded from the court definition of consultation in the *Magoma v Sebe* case that consultation — in the context of this study — should be a reciprocal process between the state through the DMR as the custodian and regulator of mineral resources in the Republic, indigenous people or communities affected by mining, and applicant mining companies, for example. A mere passive notification from one party cannot be deemed sufficient to constitute proper consultation, according to the reasoning in the *Magoma v*

180 S 1 MPRDA.

181 Humby 2012 *PELJ* 173–175; De Ville *Judicial Review* 146.

182 Humby 2012 *PELJ* 177.

183 *Magoma v Sebe and Others* 1987 3 All SA 414 (CK) 490C–E.

Sebe case. Mere notification by an applicant about prospecting or mining rights on land owned and lawfully occupied by indigenous people will also not be sufficient to meet the objectives of the MPRDA sections 5(4), 16 and 22, which require the applicant for mining rights to consult with interested and affected parties, prior to the commencement of operations, as discussed in chapter 4.¹⁸⁴

The court in the case of *S v Smit*¹⁸⁵ further gave a strong warning to applicants for mining rights who ignore formal consultation with landowners. The court in the *Smit* case held that failure by a party applying for mining-related rights to engage genuinely and effectively with interested and affected parties may result in a contravention of the MPRDA and constitute grounds on which the Minister may decline to grant the mining-right application submitted by such defaulting party.¹⁸⁶ The court held further that communities with the standing required may approach a court of law to apply for review and setting aside of the mining right, if the Minister of Mineral Resources went ahead with granting such mining right despite evidence of a flawed consultation process undertaken by the applicant company when engaging with the community and other interested and affected parties.¹⁸⁷

The MPRDA affords communities with mineral resources on their land a preferent right to apply for prospecting or mining rights ahead of other prospective applicants.¹⁸⁸ Section 104 of the MPRDA permits communities to be granted a preferent right to prospect if they prove (i) that the right will be used to contribute to the development and social upliftment of the community concerned; (ii) that the envisaged benefits of the project will accrue to the community in question; and (iii) that the community has access to technical and financial resources to exercise such a right.¹⁸⁹ In the context of this study, when section 104 of the MPRDA preferent right is exercised by indigenous people, this provision can be the means by which the state — through the DMR and

184 See also the case of *Meepo v Kotzé and Others and the case of Joubert and Others v Maranda Mining (Pty) Ltd* discussed in chapter 4.

185 *S v Smit* 2008 1 SA 135 (T) para 152.

186 *S v Smit* 2008 1 SA 135 (T) para 153.

187 *S v Smit* 2008 1 SA 135 (T) para 153.

188 S 104 MPRDA.

189 Humby 2012 *PELJ* 177.

other stakeholders — is forced formally and timeously to consult and to exchange relevant information with the indigenous people affected regarding mining operations and the use of communal land for mining purposes. With the MPRDA preferent right in operation, it will become a breach of the MPRDA provisions if and when the state decides to award a prospecting right to other third parties, after indigenous people — who own and lawfully occupy the land affected — have exercised their preferent right in terms of section 104 of the MPRDA. The Bengwenyama-ye-Maswati community case serves as an example of indigenous people who successfully relied on section 104 of the MPRDA preferent right, as ruled by the Constitutional Court, when the prospecting right awarded to Genorah Resources was reviewed and set aside because the DMR failed to observe the preferent right exercised by the Bengwenyama-ye-Maswati community.¹⁹⁰

On the other hand, the MPRDA permits indigenous people affected by mining operations to have access to information and data of a mining company to protect any of their constitutional rights.¹⁹¹ Section 30(1) of the MPRDA provides that any information or data submitted (to the mining company or the state) in terms of the MPRDA provisions may be disclosed to any person to give effect to the right of access to information, as contemplated in section 32 of the Constitution.¹⁹² Section 30(1) of the MPRDA is also, by implication, affording communities the right to approach courts of law to enforce any of their constitutional rights, which may be violated by others — such as the state — when mining-related permits and rights are approved on their communal land.¹⁹³

190 *Bengwenyama-ye-Maswati Community (CC)* case para 86.

191 S 30(1) MPRDA.

192 S 30(1) MPRDA.

193 Humby 2012 *PELJ* 173–175, S 36(1) PAIA. It should be noted that section 30(3) of the MPRDA affords mining companies a right to withhold confidential proprietary information when the right of access to information in terms of the Constitution is exercised by anyone affected by mining. The right of companies to object to disclosing and protecting business and other proprietary information in terms of section 30(3) of the MPRDA is derived from the PAIA.

The MPRDA regulations¹⁹⁴ which define consultation with and participation by interested and affected parties — such as indigenous people — when licences for prospecting and mining rights are being applied for and granted by the state, are stipulated in various sections of these regulations.¹⁹⁵ The MPRDA regulations which acknowledge and regulate consultation with and participation of interested and affected parties — with respect to procedural rights in the context of this study - can be summarised as follows:

Within 14 days of accepting an application for prospecting or mining rights, the regional manager of the DMR must announce that an application had been received in respect of specified land and must call on interested and affected parties to submit comments regarding the application within 30 days of the date of notice.¹⁹⁶ In terms of the MPRDA regulations, a notice in this regard must be placed on a notice-board accessible to the public at the office of the regional manager of the DMR.¹⁹⁷ The regional manager must also announce the application by at least one of the following additional methods: publication in the official *Provincial Gazette*, a notice in the Magistrates' Court in the magisterial district of the land concerned, or an advertisement in a local or a national newspaper circulating in the area where the land, to which the application relates, is situated.¹⁹⁸

Publication of the mining application at the regional offices of the DMR, Magistrate Courts and local newspapers appears to be an effective measure of reaching out to indigenous people, when considering the prescribed method of publicising the application through newspapers and notice to courts. It is proposed that the DMR may also in this regard be required to allocate personnel who will drive through the village announcing the application for a prospecting or mining right with a loudspeaker, calling upon interested and affected parties and community members to submit their comments and inviting them to consultation sessions. Such announcement by loudspeaker should

194 MPRDA reg no R527 GG 26275 of 23 April 2004.

195 Ss 5(4)(c), 10, 16(4)(b), 22(4)(b), 33, 37 and 39 MPRDA.

196 S 10(1) MPRDA.

197 Reg 3(2) MPRDA.

198 Reg 3(3) MPRDA.

preferably take place during the evenings and weekends when adult community members have returned from work, so that the announcement reaches the relevant people who can give input on the use of communal land for mining purposes. The prescribed contents of such a notice must include an invitation to members of the public to submit comments in writing on or before a date specified in the notice (which date may not be earlier than 30 days from the date of publication of the notice), the name and title of the person to whom any comments must be submitted, as well as the contact details.¹⁹⁹

It seems that the prescribed timeframe in which to carry out the consultation process with interested and affected parties would assist the DMR and the applicant mining company to collate information received. Disclosure of the name of the contact person from the DMR would assist interested and affected parties to make enquiries and to track information they have submitted.

Section 10(2) of the MPRDA provides that if any person objects to the granting of a prospecting or mining right in that area the regional manager must refer the objection to the Regional Mining Development and Environmental Committee, which must consider the objections and must advise the Minister accordingly. The Minister may not approve the EMP and other environmental programmes unless s/he has considered any recommendation by the Regional Mining Development and Environmental Committee.²⁰⁰ While the legislature took measures to ensure that consultation with interested and affected parties — such as indigenous people — takes place and is observed at all times by the state and applicant mining companies as required by the MPRDA. In this regard the words "the Minister may not approve" as used above seem to be creating potential problems to interested and affected parties in that the words "may not" give the responsible Minister a discretion to decide on the approval to mine with or without the approved EMP as required by the Act.²⁰¹

In addition to the opportunity to comment or object via a notice published by the regional manager, the MPRDA indicates that an applicant for a prospecting

199 Reg 3(4) MPRDA.

200 S 39(4)(b)(i) MPRDA.

201 S 39(4)(b)(i) MPRDA.

right must also carry out consultation processes with interested and affected parties who wish to submit their comments.²⁰² The applicant must consult with the landowner or lawful occupier and any other affected parties and must submit the results of such consultation within 30 days of being notified by the regional manager of the requirement to consult.²⁰³ The applicant for a mining right must also notify and consult with interested and affected parties within 180 days of being notified by the regional manager of the requirement to consult.²⁰⁴ The latter consultation seems to be linked to the preparation of the environmental reports required by the MPRDA to obtain prospecting or mining rights. For example, the EMP and other environmental programmes which must be submitted to obtain a prospecting or mining right must include a record of public participation undertaken by the applicant and the comments or objections by the interested and affected parties, so that authorities have documentary proof that interested and affected parties were indeed consulted, as well as the manner in which their input could be incorporated into mitigating factors, to be adopted when operations are under way.²⁰⁵

The MPRDA requires public participation for both the EIA and scoping reports when an application for mining rights is lodged with the regional manager.²⁰⁶ Scoping reports submitted to authorities must describe comments and objections by interested and affected parties, the formation of the mineral to be mined, and the mining method to be adopted.²⁰⁷ The EIA reports, on the other hand, must similarly describe *how* interested and affected parties were engaged; *how* their comments or objections had been addressed by the applicant for mining rights; and *what* mitigating factors the applicant company intended to adopt to curb negative environmental impacts in the area.²⁰⁸ Consultation and participation of interested and affected parties, such as indigenous people who live in the vicinity of the proposed mining area, may be crucial when the EIA and scoping reports are prepared. Such communities may

202 S 16(4)(b) MPRDA.
203 S 16(4)(b) MPRDA.
204 S 22(4)(b) MPRDA.
205 Reg 52(2)(g) MPRDA.
206 Reg 52(2)(g).
207 Reg 49(1)(f) MPRDA.
208 Reg 50(f) MPRDA.

continue to live near the mine during and after operations. As such their input is vital to steer mitigating measures to be proposed and adopted by state authorities, for example.

After obtaining a prospecting or mining right and prior to commencing the prospecting or mining operations the holder of the right must consult with the landowner or lawful occupier of the land in question.²⁰⁹ The requirement to consult with the landowner or lawful occupier of the land in question, prior to the commencement of operations, was confirmed in the case of *Kotzé and Others*²¹⁰ (to be discussed below). In a nutshell, the court in this case held that consultation envisaged by section 5(4)(c) of the MPRDA amounts to more than a mere notice to the interested and affected parties. The permit holder must obtain written consent from the landowner before drilling operations commence on the affected land.²¹¹ The reasoning in the *Kotzé and Others* case — with regard to prior consultation with the landowners before mining activities take place — was confirmed in the *Bengwenyama-ye-Maswati* community case²¹² (to be discussed below). The Constitutional Court, in confirming the *Kotzé and Other* case, held that the applicant had to inform the landowner in writing that his/her/their application for prospecting or mining rights on the land affected had been accepted by the DMR; had to inform the landowner in sufficient detail of what the prospecting operations would entail for the landowner in good time to assess the impacts on the land; what precautionary or mitigating measures the landowner should adopt; and had to submit the results of the consultation process with the landowner and interested and affected parties to the regional manager of the DMR, so that environmental authorities from the regional office could assess environmental and socio-economic impacts and could co-operate with all interested and affected parties in formalising mitigating factors.²¹³

209 S 5(4)(c) MPRDA.

210 *Kotzé and Others* (NC) case. Discussed in detail below.

211 *Kotzé and Others* (NC) case 113 para A–B.

212 *Bengwenyama-ye-Maswati Community* (CC) case para 63–64, discussed in detail below.

213 *Bengwenyama-ye-Maswati Community* (CC) para 63–64.

The MPRDA consultation process with interested and affected parties, as summarised above, indicates that there is generally a variety of information which must be exchanged between the state, interested and affected parties, and an applicant mining company before mining rights are finally awarded by the DMR. The specific days and the manner in which information must be exchanged between the parties, as indicated above, indicate that non-compliance with such specified timeframes by the parties will be a contravention of the MPRDA statutory procedural rights and consultation processes. Such contravention of the MPRDA statutory procedural rights can be a ground on which the prospecting or mining right is challenged by interested and affected parties. The prospecting and or mining right awarded can be set aside, as the Constitutional Court shown through the Bengwenyama-ye-Maswati community case.

The provisions of the MPRDA, the defining statutory procedural rights applicable and meaning which may arise when these procedural rights are violated by the state and others are summarised in Table 1. The table highlights, in summarised form, the relevant statutory provisions which provide interested and affected parties (in particular indigenous communities) with procedural rights to be consulted, to access information and to participate in decision-making processes undertaken at different stages by the state.

Table 1: The MPRDA, its provisions and implications for indigenous people

Right	Section(s)	Details of provision	Implications for indigenous people
Access to information	30(1)(a), (b) and (c)	Information or data submitted in terms of the MPRDA may be disclosed to any person, to give effect to the right of access to information contemplated in s 32 of the Constitution.	Right of access to information exchanged between the state and applicant mining companies means indigenous people affected have an enforceable right to deter any party — including government — from taking decisions without details of impacts and implications having been exposed, for example.
Just administrative action	6(1) and (2)	Administrative processes or decisions must be conducted or taken within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness.	Indigenous people affected by the lawfulness, reasonableness or procedural fairness requirements of a mining application decision-making process have legal recourse in terms of the MPRDA.
Participation	10(1) and (2)	Within 14 days of accepting an application for prospecting or mining rights, the regional manager of the DMR must announce that an application has been received and must call on interested and affected parties (including indigenous people) to submit comments regarding the application, within 30 days of the date of notice.	Timeframes within which the regional manager must publicise applications received for prospecting or mining rights, enable indigenous people who own the land affected to be aware of the proposed operations. The community is to submit comments within specified timeframes. Timeframes within which the regional manager must publicise the application should prevent the community owning the land affected, only becoming aware of the application to mine on their communal land years after the DMR has granted the rights to mining companies.
	16(4)(b)	An applicant for a prospecting right must formally consult with the landowner, lawful occupier and any other affected party and must submit the results of such consultation within 30 days of being notified by	Consultation with the landowner and other interested and affected parties required should be more than a mere passive notice. ²¹⁴ Formal and adequate consultations, with records, enable indigenous people to use disclosed proof thereof in case of review and court challenges.

214 *Meepo v Kotzé and Others* case to be discussed in more detail below.

Right	Section(s)	Details of provision	Implications for indigenous people
		the regional manager.	
			Exchange of relevant documentary information where each party is afforded an opportunity to consult and respond may fulfil requirements for proper consultation.
	50(f)	The EMP and environmental programme reports must describe how interested and affected parties were involved; how their comments or objections have been addressed by the applicant for the mining right; and what mitigating factors the applicant company intends to adopt to curb negative environmental impacts in the area.	Indigenous people affected by operations can make use of information received to ascertain whether objections and comments have been incorporated into management reports and whether community recommendations are being implemented during operations. EMPs, environmental programmes and other environmental compliance reports can and should serve as documentary proof which indigenous people can use to challenge failure by a mining company to comply with mitigating factors in the plans the DMR has approved.
	5(4)(c)	After obtaining a prospecting or mining right, and prior to commencing prospecting or mining operations, the holder of the right must consult with the landowner or lawful occupier of the land affected.	Consultation in this regard means more than a mere passive notice as the holder of the right must obtain written consent from the landowner before drilling operations commence. ²¹⁵

4.1.2 MPRDA Amendment Act 49 of 2008

The *MPRDA Amendment Act* is still under review, albeit at an advanced stage with some parts having been brought into operation during June 2013.²¹⁶ Against the backdrop of the MPRDA discussion above the writer finds it useful to refer to the provisions of the *MPRDA Amendment Act* which deals with consultation with communities. It is believed that the remaining parts of the

²¹⁵ *Meepo v Kotzé and Others* case to be discussed in more detail below.

²¹⁶ The *MPRDA Amendment Act* came into effect on the 7th June 2013 as per Proc 14 in GG 36512 of 31 May 2013 3.

revised *MPRDA Amendment Act* will come into effect during the course of 2013 or soon thereafter.

The *MPRDA Amendment Act*, with the intention of providing more protection to vulnerable historically disadvantaged South Africans,²¹⁷ including indigenous people, is altering the existing definition of a community highlighted above in this chapter, for example. Under the *MPRDA Amendment Act*, a community has been redefined to mean:

A group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercised communal rights in terms of an agreement, custom or law, provided that, whereas as a consequence of the provisions of this Act, *negotiations or consultations with the community is required, the community shall include the members or part of the community directly affected by mining on land occupied by such members or part of the community* (own emphasis).

The objectives of the MPRDA in section 2 of the Act have also been amended. The amended section 2(d) currently provides that the MPRDA aims

[t]o substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and *communities, to enter into and actively participate in the mineral and petroleum industries* and to benefit from the exploitation of the nation's mineral and petroleum resources (emphasis mine).

Section 17 of the MPRDA has also been amended by insertion of subsection (4A) which provides that if an application for mining rights relates to land occupied by a community:

The Minister responsible for mineral resources may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.

It is submitted that the current MPRDA and the proposed changes brought by the *Amendment Act* represent a significant working legislative step taken by the government to better lives of communities residing near mining operations. Changes brought by the *MPRDA Amendment Act* seem to be capturing and clearly defining some statutory procedural rights of all South Africans, including indigenous people, to participate in decisions related to the authorisation of

217 Preamble to the *MPRDA Amendment Act*.

mines.²¹⁸ While it is noted that the provisions of the MPRDA have not always been successful in remedying the injustices of the previous government, whereby fundamental rights and socio-economic interests of indigenous people affected by mining were ignored in favour of local and international mining companies,²¹⁹ changes proposed in the *Amendment Act* seem to be providing South Africans with hope when the state approves mining operations to take place on communal land. In future, measures will have to be taken by the state formally and timeously to consult with the community at large (not only traditional leaders and a selected few)²²⁰ and active participation of communities affected from inception of the mining project to operations will be ensured.

The provisions of the *MPRDA Amendment Act*, the defining statutory procedural rights applicable and implications which may arise when applicable procedural rights are violated by the state and others, are summarised in Table 2. The table highlights in a summarised form the relevant statutory provisions of the *MPRDA Amendment Act* which in future may assist interested and affected parties in participating in the relevant decision-making processes.

218 Ss 3(1) and (2) MPRDA; Leon "South African Mining Industry at the Cross Roads" 3.
219 Badenhorst, Olivier and Williams 2012 *JSAL* 117-118; Leon "South African Mining Industry at the Cross Roads" 3.
220 *Bengwenyama-ye-Maswati Community (CC)* case para 9.

Table 2: Provisions of the MPRDA Amendment Act and implications for indigenous people

Right	Section(s)	Details of provision	Implications for indigenous people
Access to information			
Just administrative action			
Participation	S 1	Amended definition of community: A group of historically disadvantaged persons with interest or rights in a particular area of land which the members have or exercised communal rights whereas as a consequence of the provisions of this Act, negotiations or consultations with the community are required, the community shall include the members or part of the community directly affected by mining on land occupied by such members or part of the community.	The community affected should be consulted by the state and other stakeholders, when negotiations relating to communal land use for mining purpose are undertaken. Amended definition of community implies that all community members should be involved in consultation and decision-making processes.
	S 17 (amended by insertion of subsection (4A))	The section added provides: The Minister responsible for mineral resources may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.	Minister should consult with interested and affected parties when proposing conditions to be imposed on the applicant mining companies.

4.1.3 NEMA and its regulations

NEMA serves as environmental framework legislation in South Africa and its provisions apply across all sectors which have an impact on the environment.²²¹ "Environment" under NEMA is broadly defined to include the surroundings of human beings made up of the land, water, atmosphere, micro-organisms, plants, animal life or any of their parts or combination thereof.²²² With the impact mining activities have on the environment — comprising land

221 Kidd *Environmental Law* 4–5; Kotzé 2007 *RECIEL* 299.

222 S1 NEMA.

surface, the atmosphere, conditions underground, human and animal lives as per the definition of the environment highlighted above — it seems that negative environmental impacts are an inevitable result of mining activities and this can at best be mitigated rather than eliminated.²²³ NEMA, as environmental framework legislation, is relevant to this study in that mining is a listed activity, which requires adherence to procedural compliance under NEMA and its regulations.²²⁴ For example, NEMA requires competent authorities to assess, investigate and communicate in time potential consequences or the impact of activities caused by listed activities — such as mining — on the environment and on interested and affected parties.²²⁵ Competent authorities are also required by NEMA to decree the manner of consultation with landowners, lawful occupiers of the land and other interested and affected parties as well as to decree procedures to be followed for preparation of EIAs, EMPs and other environmental risk assessment documents and reports.²²⁶

Some NEMA principles²²⁷ relate to public consultation and participation with interested and affected parties — such as indigenous people — when activities such as mining have an impact on their living environment. This includes the principle in section 2(4)(f) which states that the participation of all interested and affected parties in environmental governance must be promoted. All people (including indigenous people affected by mining) must also have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation. Participation by vulnerable and disadvantaged persons must further be ensured.²²⁸

Principle 2(4)(g) acknowledges and regulates procedural rights of communities affected by an environmental impact. It states that decisions taken by authorities must take into account the interests, needs and values of all interested and affected parties. This includes recognising all forms of

223 Badenhorst, Olivier and Williams 2012 JSAL 128.

224 Chapter 5 s 24 NEMA.

225 Ss 24(1), (3), (5), (7) NEMA.

226 S 24 NEMA reg no R543 GG 33306 of 18 June 2010.

227 S 2 NEMA.

228 Badenhorst, Olivier and Williams 2012 JSAL 128; s 2(4)(f) NEMA.

knowledge, including traditional and ordinary knowledge. In the context of this study, principle 2(4)(g) means that customary values and communal interests such as use of communal land for farming and grazing by indigenous people affected by mining, for example, may not be ignored when the state considers the approval of mining operations.

Principle 2(4)(h) — which acknowledges and ensures a healthy living environment for communities and procedural rights to raise their concerns — states that the well-being and empowerment of the community must be promoted through environmental education, raising of environmental awareness, sharing of knowledge and experience, and other appropriate means. In the context of this study, principle 2(4)(h) means that when the state approves mining operations to take place on communal land, the processes of conducting environmental assessment reports, management plans and programmes should be undertaken in conjunction with the community affected so that such communities can learn and become empowered with knowledge and appropriate skills for managing their surrounding environment.

These NEMA principles seem to be providing a firm ground on which statutory procedural rights of communities (including indigenous people) to participate in environmental matters affecting the community, when activities such as mining are approved, can rely.

To ensure that the NEMA principles are not disregarded by mining companies, the legislature enacted section 37 of the MPRDA, which states that the principles specified in section 2 of NEMA apply to all prospecting and mining operations and to any other matter relating to such operations. This means that integration of the NEMA principles (specifically those discussed above) into the granting and regulation of prospecting and mining rights on land owned by indigenous people, is prescribed by section 37 of the MPRDA. This integration provides grounds on which interested and affected parties negatively affected by mining can challenge the DMR and mining companies, when MPRDA section 37 is contravened by not affording communities an opportunity to be heard before mining operations commence.

Mining is a listed activity which requires adherence to procedural rights under NEMA application.²²⁹ In the context of this study it is also possible to argue that the NEMA principles, discussed above, reinforce the fact that the state and mining companies should observe and comply with the rights of affected community members to live in a healthy environment, have their values and interests protected and should permit such communities to raise their environmental concerns and participate in environmental management in the surrounding areas. The NEMA EIA Regulations (2010) have declared public participation to be an integral or an essential process when EIA, EMP and other environmental programmes are conducted in mines.²³⁰ These Regulations require the Environmental Assessment Practitioner responsible for the public participation process to be independent and to implement the public participation process objectively, even if the findings or results are not favourable to the applicant for prospecting or mining rights.²³¹ Environmental Assessment Practitioners are also required to disclose negative or positive information — which may influence the decision to approve EIA, EMP and other programmes conducted — to interested and affected parties and environmental authorities.²³² Engagement of an independent Environmental Assessment Practitioner, as required by the NEMA Regulations, seems to be a measure adopted by the legislature to ensure that the outcome of public participation and consultation has credibility and procedure followed is transparent.

The public participation process which should or ought to force the state and applicant mining companies meaningfully and timeously to consult with interested and affected parties that is required by the NEMA 2010 EIA Regulations²³³ in the context of this study is summarised as follows:

An Environmental Assessment Practitioner is required to take into account the above Regulations and guidelines when giving notice to all interested and

229 Chapter 5 s 24 NEMA.

230 Chapter 6 NEMA EIA reg no R543 GG 33306 of 18 June 2010.

231 Ss 16(1) and (2) NEMA EIA reg no R543 GG 33306 of 18 June 2010.

232 S 17(f)(i) and (ii) NEMA reg no R543 GG 33306 of 18 June 2010.

233 Chapter 6 ss 54, 55, 56 and 57 NEMA reg no R543 GG 33306 of 18 June 2010.

affected parties before prospecting or mining operations commence.²³⁴ Notice to interested and affected parties should be given by attaching a notice-board at a visible place on the fence of the site where the prospecting or mining operations will take place. The notice must provide interested and affected parties with sufficient details about the prospecting or mining operations planned.²³⁵ It seems that a clear description of the land to be mined will assist the parties — including indigenous people — to identify the portion of their land to be affected or to understand how their residential and/or farming land will be affected by the proposed mining operations. Written notice should be given to the owner or lawful occupiers of the land where prospecting or mining operations will take place. Written notice should also be given to owners or lawful occupiers of neighbouring properties. The Regulations also require that notice should be served on the municipality which has jurisdiction over the land affected.²³⁶ Notification to the municipality seems to be crucial in that the municipality concerned will have an opportunity to use such notification to devise measures that incorporate the proposed mining operations into or check the proposed development against its IDP, for example, and to create procedures (e.g. meetings) to consult with the local community. The same notice informing interested and affected parties about the proposed prospecting or mining operations in the area should be advertised in at least one local newspaper, in the official *Government Gazette* and in at least one provincial and one national newspaper circulating in the area affected.²³⁷ Publication of the proposed mining notice to interested and affected parties by various methods seems to expedite the process of getting a message to communities. Officials of the DMR may also be required to inform affected community members by loudspeaker in the evenings or during weekends to include community members who do not have access to the *Government Gazette* and newspapers advertising such mining applications. The applicant for a prospecting or mining licence is also required to arrange alternative publication methods, as agreed with the local authorities, to inform interested and affected

234 Reg 54(1) and (2) NEMA.

235 Reg 54(1) and (2) NEMA.

236 Reg 54(2)(c) NEMA.

237 Reg 54(2)(c) NEMA.

parties — residing in the vicinity of the affected area — who are illiterate, disabled or who have disadvantages in terms of reading written notices as advertised in the local newspapers and the *Government Gazette*.²³⁸ Such interested and affected parties should also at all times be allowed access to the register maintained by the Environmental Assessment Practitioner. Their concerns or comments should be submitted to the Environmental Assessment Practitioner within the timeframe stipulated in the public notice.²³⁹

The name and contact details of the person maintaining the register seem to be a measure which can assist community members to follow up and to determine whether their comments and input have been/are being considered and integrated into mitigating measures to be adopted. Interested and affected parties who are listed in the register should be given an opportunity by the Environmental Assessment Practitioner to submit their concerns or comments to the authorities. Their concerns or comments must be included in the draft EIA, EMP and other environmental documents. The Environmental Assessment Practitioner should also ensure that the concerns or comments of interested and affected parties — such as indigenous people — are recorded in the final reports of EIA, EMP and other environmental programmes.²⁴⁰

In the context of this study, the NEMA 2010 EIA Regulations process indicates that framework environmental law explicitly provides for public participation. The relevant process should be the means by which interested and affected parties — such as indigenous people — affected by mining can be and should be consulted; be provided with access to adequate information; and raise objections, if any, timeously when they object to the proposed prospecting or mining operations on or in the vicinity of the land they own or lawfully occupy.

The provisions of NEMA, the defining statutory procedural rights applicable and implications which may arise when applicable procedural rights are violated by the state and others, are summarised in Table 3. The table highlights, in a summarised form, the relevant statutory provisions which provide interested

238 Reg 54(2)(e) NEMA.

239 Reg 55(1) NEMA.

240 Reg 56(2), (3), (4), (5).

and affected parties with rights to participate in decision-making processes undertaken at different stages by the state.

Table 3: NEMA, its provisions and implications for indigenous people

Right	Section(s)	Details of provision	Implications for indigenous people
Access to information	24(1), (3), (5) and (7)	Authorities are required to assess, investigate and convey potential consequences or the impact of activities on the environment to interested and affected parties.	Competent authorities are mandated to investigate potential consequences and impacts on communal land during operations. Investigating potential negative environment impacts with participation of indigenous people and traditional leaders empower communities to acquire necessary environmental management skills/knowledge.
Just administrative action			
Participation	2(4)(f)	Participation of all interested and affected parties in environmental management must be promoted.	Principle serves the purpose of inviting and involving interested and affected parties in environmental management in and around their areas – in this instance including decisions related to mining authorisations.
	2(4)(g)	Decisions taken by authorities must take into account interests and values of all interested and affected parties, including recognising all forms of knowledge.	Consultation with indigenous people, as encouraged by NEMA, enables recognition of traditional and ordinary knowledge of indigenous people in the use of land when environmental governance decisions are taken by state authorities.

Right	Section(s)	Details of provision	Implications for indigenous people
	2(4)(h)	Community well-being and empowerment must be promoted through environmental education, raising of environmental awareness, sharing of knowledge and experience, and other appropriate means.	<p>Environmental authorities should promote and educate communities, including indigenous people, with regard to awareness of environmental impacts.</p> <p>Education received and awareness promoted may improve knowledge of indigenous people thereby empowering them to in future be able to assess, investigate and communicate potential environmental consequences and impacts to relevant authorities without external assistance from applicant mining companies.</p>
	54(1) and (2)	Notice with sufficient details to interested and affected parties should be publicised with a visible notice-board at the site where prospecting or mining operations will take place.	<p>Enable indigenous people who own or lawfully occupy affected land, to be aware of proposed operations on their land and to submit comments within specified timeframes.</p> <p>Notice and publication to indigenous people affected by mining mean community members stand a better chance of becoming aware of applications for prospecting or mining rights on their communal land on time before DMR awards the right.</p>
	54(2)(b)	Written notice should be given to owner or person in control of the land affected, lawful occupiers of the site where prospecting or mining operations will take place and to the municipality which have jurisdiction over the land affected.	Requisite notice to <i>inter alia</i> authorised municipality promotes co-operative governance and exchange of information at the government sphere closes to affected communities.
	(54)(2)(c)	Notice informing interested and affected parties about the proposed prospecting or mining operations in the area should be advertised in at least one local newspaper, in the official <i>Government Gazette</i> and in at least one provincial and	Advertisement would enable indigenous people who own or lawfully occupy affected land, to be aware of proposed operations on their land and to submit comments within specified timeframes.

Right	Section(s)	Details of provision	Implications for indigenous people
		one national newspaper circulating in the affected area.	
	55(1)	The Environmental Assessment Practitioner dealing with the prospecting or mining application must set up and maintain a register which interested and affected parties can use to list their names, contact details and concerns or comments regarding the proposed prospecting or mining operations on or in the vicinity of land they own and occupy.	The Independent Environmental Practitioner managing applications for mining-related rights and the comments register should ensure that interested and affected parties raised and lodged concerns will be able to monitor whether their inputs are being incorporated into approved environmental management plans and programmes.
	55(2)	Interested and affected parties who are listed in the register should be given an opportunity by the Assessment Practitioner to submit their concerns or comments to the authorities. Concerns should be included in draft EIA, EMP and other environmental documents. Documents ultimately should be submitted to authorities to consider the draft EIA, EMP and other programme when application for prospecting or mining rights is processed.	EIA, EMP and other programmes prepared without consultation and participation of interested and affected parties should be regarded as flawed.

4.1.4 National Heritage Resources Act 25 of 1999

In an effort to afford legal protection to national heritage resources, the legislature enacted the NHRA. This Act in particular provides an opportunity for indigenous people to participate in the conservation and management of heritage resources in the Republic.²⁴¹ The Act also mandates heritage resources authorities to develop the skills and capacities of individuals and

241 Preamble to the NHRA.

groups undertaking heritage resources management. These groups would naturally include indigenous people who own and lawfully occupy land affected by mining operations.²⁴² The NHRA provisions are relevant to this study because heritage resources such as archaeological sites, ancient graves, and structures which require protection commonly are found on the surface of land to be mined. Tampering with heritage resources will be in contravention of the NHRA provisions which relate to procedural rights if, for example, sites or graves are removed without permission and consultation with heritage authorities and interested and affected parties such as indigenous people who own the land surface concerned.

The MPRDA, which serves as mining framework legislation, defines "mining" as any operation or activity for the purpose of winning any mineral on, in or under the earth, water or any residue deposit, whether by underground or open-cast method.²⁴³ The manner in which the MPRDA defines "mining" indicates that tampering with the land surface and the earth geological formation is inherent to mining activities, irrespective of whether the mining method adopted is underground or open cast.²⁴⁴ The NHRA provisions, which provide for public participation and consultation with interested and affected parties — such as indigenous people — state as follows:

No person without a permit issued by the South African Heritage Resources Association (SAHRA) may destroy, damage or remove any burial ground which contains graves, bring onto or use at a burial ground or grave any excavation equipment or any equipment which assists in the detection or recovery of metals.²⁴⁵ It seems as if the words "without a permit issued by the SAHRA" may be interpreted as meaning that interested and affected parties who had buried their families and loved ones on the land where the state has approved mining operations to take place, should formally be consulted, timeously and

242 Preamble to the NHRA.

243 S 1 MPRDA.

244 Cawthorn 2007 *J S Afr Inst Min Metall* 2.

245 S 36(3) NHRA.

adequately, by the party who intends to use the land (where graves are located) for mining purposes.²⁴⁶

The NHRA further states that — after consulting with the owner of the land on which an archaeological site is situated — the SAHRA may serve a notice on the owner or any other interested person to prevent activities (prospecting or mining) within a specified distance from such archaeological site.²⁴⁷ With the notice that the SAHRA is required to serve on interested and affected parties, such as indigenous people and the prospecting or mining applicants, it seems that these parties (the state, communities and mining companies) may be required to participate in a formal consultation process. In this process relevant information pertaining to the protection of the archaeological site is exchanged and each party is given an opportunity to raise concerns and to receive a response from stakeholders, before authorities decide to permit mining activities.²⁴⁸

It is often the case that indigenous people preserve archaeological sites on their land for their own cultural use and benefit. They perform ceremonies in graveyards, especially where their ancestors are buried, as a symbol of ancestral veneration.²⁴⁹ It is therefore significant for heritage resources authorities, recognised in the preamble to the NHRA, to involve indigenous people in the protection of heritage resources. Indigenous people often possess skills and expertise on the sound management of their resources and the environment.²⁵⁰ The Richtersveld community in the Northern Cape serves as an example of an indigenous community that venerated their ancestors and objected to mining operations taking place on the land where their archaeological sites and graveyards were located.²⁵¹ These two NHRA

246 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 48–49; Chapter XI NHRA reg no R548 GG 21239 of 2 June 2000.

247 S 35(6) NHRA.

248 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 48–49; Chapter X and XI NHRA reg no R548 GG 21239 of 2 June 2000.

249 Mitchell *et al* 2012 *J S Afr Inst Min Metall* 3.

250 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 48–49.

251 *Richtersveld Community (CC)* case para 58–62.

provisions (sections 35(6) and 36(3)) indicate that timeous consultation and access to information by interested and affected parties — such as indigenous people — are prerequisites to the commencement of mining operations, when mining is proposed to take place on or in the vicinity of their graveyards and/or archaeological sites.

The provisions of the NHRA, the defining statutory procedural rights applicable and implications which may arise when applicable procedural rights are violated by the state and others, are summarised in Table 4. The table highlights, in a summarised form, relevant statutory provisions which provide interested and affected parties with information about rights enabling them to participate in decision-making processes undertaken at different stages by the state.

Table 4: The NHRA, its provisions and implications for indigenous people

Right	Section(s)	Details of provision	Implications for indigenous people
Access to information	35(6) and 36(3)	'(S)erve notice on the interested parties" means that SAHRA, interested and affected parties and the applicant for prospecting or mining rights must cooperate in the process of exchanging relevant information. Each party is to be given an opportunity to raise concerns and respond before authorities decide to grant a mining permit.	Communities who observe ancestral veneration at various times should be notified and/or consulted by authorities prior to their heritage resources, such as archaeological sites and graveyards, are tampered with or relocated to make way for mining operations on their communal land.
Just administrative action			
Consultation	36(3)	No person may destroy or remove any burial ground which contains graves, bring onto or use at a burial ground or grave any excavation equipment which assists in the detection or recovery of metals without authorisation issued by SAHRA.	Applicant companies and state representatives should produce authorisation as proof of consultation with interested and affected parties before heritage resources can permit activities to go ahead.
Consultation	35(6)	After consulting with the owner of the land on which an archaeological site is situated, SAHRA may serve a notice on any interested person to pre-	SAHRA officials are mandated formally and timely to consult with the owner of the land affected or interested parties affected by mining before any

		vent activities (prospecting or mining) within a specified distance from such archaeological site.	tampering of heritage resources take place. SAHRA is required to issue a formal notification to interested and affected parties such as indigenous people; informing them about proposed activities which may affect heritage resources in the area.
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4.1.5 National Environmental Management: Protected Areas Act 57 of 2003

South Africa is a country made up of different landscapes; spread across national parks, ecosystems and mountainous areas worthy of being protected when activities such as mining take place in or near such terrains.²⁵² The *Protected Areas Act* provides that protected areas include special nature reserves, national parks, world heritage sites and marine protected areas.²⁵³ The *Protected Areas Act* may therefore be seen as an important piece of legislation that can be enforced to provide solutions to balance the protection and preservation of protected areas in South Africa with access by private companies and the state to vast mineral deposits available in South Africa.²⁵⁴ The Coal of Africa Limited Vele Colliery project,²⁵⁵ situated 6 kilometres from the Mapungubwe World Heritage site in Limpopo is a typical example demonstrating that South Africa is faced with competing socio-economic interests among indigenous people who own and lawfully occupy land where there are unexplored mineral resources; communities and companies concerned with the preservation of ecotourism; wildlife sanctuaries; and mining companies which continue mining and trading with minerals.²⁵⁶ Hydraulic fracturing for shale gas has further been reported to be taking place in the Karoo²⁵⁷ on the border of the Northern Cape and Western Cape. Indigenous people of that area have been maintaining their livelihood with wildlife and

252 Humby 2012 *PELJ* 167.

253 S 9 *Protected Areas Act*.

254 ANC "Maximising the Developmental Impact of the People's Mineral Assets" Policy Discussion Document para 11. See <http://www.anc.org.za>.

255 <http://www.coalofafrica.com> follow Vele Project situated in Musina Limpopo province.

256 ANC "Maximising the Developmental Impact of the People's Mineral Assets" Policy Discussion Document para 11. See <http://www.anc.org.za>.

257 De Wit 2011 *SAJS* 5.

heritage resources found in the area.²⁵⁸ This serves as an example of an area worthy of being protected and if the land is to be used for mining or other economic activities, it may be necessary for indigenous people who own and/or lawfully occupy the land affected formally to be consulted and the consent of the Minister to be obtained, prior to commencement of operations.

In restricting prospecting and mining in protected areas, the *Protected Areas Act* provides that no person, without written permission of the Minister of Mineral Resources, may conduct commercial prospecting or mining activities in protected areas that fall under section 9 of the Act.²⁵⁹ Protected areas, in terms of this Act, include special nature reserves, national parks, world heritage sites and marine protected areas. It should be noted that the *Protected Areas Act* mandates the Minister of Mineral Resources to consult with stakeholders such as environmental experts, companies intending to carry out prospecting or mining activities, and other interested and affected parties to prescribe conditions under which such prospecting or mining may be undertaken.²⁶⁰ Above all, section 48(4) of the *Protected Areas Act* provides that, when the Minister of Mineral Resources consults with stakeholders and interested parties affected by a proposed activity, the Minister is required to take the interests of local communities and NEMA section 2 principles into consideration. Put differently, section 48(4) of the *Protected Areas Act* requires consultation between the Minister of Mineral Resources and interested and affected parties before mining can take place in a protected area. The Minister is prohibited from permitting or exempting mining operations to be carried out in a protected area if the interests of local community members and NEMA section 2 principles have not been considered and mitigating measures have not been put in place.

With section 48 of the *Protected Areas Act* in operation, it is reasonable to expect that the Minister of Mineral Resources should consult adequately and formally with interested and affected parties, such as indigenous people of the

258 De Wit 2011 SAJS 5.

259 S 48 *Protected Areas Act*.

260 Ss 48(2) and (3) *Protected Areas Act*.

Karoo, before hydraulic fracturing for shale gas is permitted to continue, for example.²⁶¹ The *Protected Areas Act* Regulations further prohibits commercial activities such as mining from taking place in protected areas without environmental impact assessment being undertaken in terms of NEMA, and without environmental authorities having approved such commercial activity.²⁶² In the context of this study, it will be unlawful for the DMR to approve mining operations in areas protected in terms of the *Protected Areas Act* without the requisite impact assessment having been approved by authorities in terms of regulation 56 of the *Protected Areas Act*.

The *Protected Areas Act* is linked with the *National Environmental: Biodiversity Act* 10 of 2004 when it comes to protecting and restricting activities such as mining, which has the potential to cause negative impacts on the living environment of indigenous people. The link between the *Protected Areas Act* and the *Biodiversity Act* is recognised because if environmental authorities exempt mining from taking place in a protected area in terms of the *Protected Areas Act*, such exemption may result in biodiversity — on the surface where mining is to take place — being harmed in the long run by such mining activities. The preamble to the *Biodiversity Act* states that the purpose of this Act is to protect species and ecosystems that warrant national protection and to ensure sustainable use of indigenous biological resources in the Republic of South Africa.

The *Biodiversity Act* provides that, before the Minister responsible for environmental affairs exempts a person from carrying out a restricted activity which has an impact on biodiversity — such as mining²⁶³ — such Minister is required to follow a consultative process with the interested and affected parties who live in the vicinity of the area affected before an exemption permitting a restricted activity to commence is issued. In carrying out such a required consultative process with interested and affected parties, the *Biodiversity Act* requires the Minister to invite members of the public to submit

261 De Wit 2011 SAJS 5.

262 S 56 *Protected Areas Act*; reg no 32472 of 3rd August 2009.

263 S 57(4) *Biodiversity Act*.

their comments or objections regarding exemption of such listed activity affecting biodiversity.²⁶⁴

The Minister responsible for environmental affairs is also required to allow interested parties to submit their oral or written representations or objections to the proposed activity affecting biodiversity, before the proposed activity commences.²⁶⁵ The Minister is also required to give due consideration to all representations and/or objections received or presented by interested and affected parties before exercising his/her powers to exempt a restricted activity affecting biodiversity, such as mining, to be performed on land owned by indigenous people.²⁶⁶

The provisions of the *Protected Areas Act*, the defining statutory procedural rights applicable and implications which may arise when applicable procedural rights are violated by the state and others, are summarised in Table 5. The table highlights, in summarised form, relevant statutory provisions which provide interested and affected parties with rights to participate in decision-making processes undertaken at different stages by the state.

264 Ss 99 and 100 *Biodiversity Act*.

265 S 100 *Biodiversity Act*.

266 S 100 *Biodiversity Act*.

Table 5: Provisions of the *NEM: Protected Areas Act* and implications for indigenous people

Right	Section(s)	Details of provision	Implications for indigenous people
Access to information			
Just administrative action			
Participation	2(4)(f), (g) and (h)	The NEMPAA is guided by NEMA principles when it comes to participation of interested and affected parties- see Table 2.	<p>Indigenous people are encouraged by these principles to participate in environmental governance and management in their areas when activities such as mining take place.</p> <p>Participation by indigenous people may foster recognition of traditional and ordinary knowledge of indigenous people when authorities decide on environmental governance matters.</p>
	48	Without written permission by the Minister of Mineral Resources no person may conduct commercial prospecting or mining activities in protected areas falling under s 9.	<p>The Minister should involve and consult with the owner of a protected area before mining activities take place on the land affected.</p> <p>Communal land, protected in terms of this Act, should not be mined without the community being consulted and without the Minister having issued written permission authorising mining in the protected area concerned.</p> <p>Failure by the Minister of Mineral Resources to consult with affected community members may warrant such community to challenge the granting of such mining rights on their land.</p>

	48(2), (3) and (4)	Minister to consult with stakeholders such as environmental experts, the company intending to carry out prospecting or mining activities, and other interested and affected parties, with the intention of prescribing conditions under which such prospecting or mining may be undertaken.	<p>If the Minister of Mineral Resources issues written permission authorising mining to take place in a protected area owned by indigenous people, they must be consulted beforehand and formally when prescribed conditions under which mining will be authorised to take place, are planned.</p> <p>Prescribed conditions — which will be adopted to guide mining operations in a protected area owned or occupied by indigenous people — should not be designed without input from the people being affected.</p>
	48(4)	<p>Minister to consult with stakeholders and interested parties affected by the proposed activity.</p> <p>Minister is required to take the interests of local community members as well as the NEMA s 2 principles into consideration when carrying out the required consultation.</p>	EIA, EMP and programmes prepared without consultation and participation of interested and affected parties should be regarded as flawed.

The provisions of the *Biodiversity Act*, the defining statutory procedural rights applicable and implications which may arise when applicable procedural rights are violated by the state and others, are summarised in Table 6. The table highlights, in summarised form, relevant statutory provisions which provide interested and affected parties with rights to participate in decision-making processes undertaken at different stages by the state.

Table 6: Provisions of the *NEM: Biodiversity Act* and implications for indigenous people

Right	Section(s)	Details of provision	Implications to indigenous people
Access to information			
Just administrative action			
Participation	S 2 and NEMA principles 2(4)(f), (g) and (h)	NEMBA informed by NEMA principles when it comes to participation of interested and affected parties. .	This provision encourages co-operative governance in biodiversity management and conservation among all stakeholders. Education received and awareness promoted means that awareness of indigenous people of environmental matters will be increased. In future communities can be empowered to investigate and to communicate potential environmental consequences to relevant authorities without external assistance from applicant mining companies.
	S 57(4), 99 and 100	Before Minister responsible for environmental affairs exempts a person to carry out a restricted activity which has an impact on biodiversity, for example mining, he/she is required to consult with interested and affected parties who live in and in the vicinity of the area affected.	If the Minister responsible for environmental affairs permits restricted activities which have an impact on biodiversity; the Minister should consult with interested and affected parties. The Minister is to receive input from affected parties relating to measures which should be adopted to avoid or mitigate negative effects on the biodiversity of the land affected. Consultation with the landowner and other interested parties affected by mining should precede exemption by the Minister authorising restricted activities — which have an influence on the existing biodiversity — to take place on the land affected.
	99 and 100	The Minister responsible for environmental affairs is required to allow interested and affected parties to submit oral or written representations or objections to proposed activity affecting biodiversity before the proposed activity commences.	

4.1.6 *National Water Act 36 of 1998*

Mining is an activity which consumes large volumes of water because of operations and tailing dams that are used to recycle contaminated water.²⁶⁷ In South Africa it is often found that the department responsible for water affairs grants mining companies integrated water use licences to utilise water resources which local communities adjacent to such mines also utilise for their household needs.²⁶⁸ This is the challenge faced by indigenous people who utilise water resources from dams and streams adjacent to their villages, as reported when the department responsible for water affairs granted Coal of Africa Limited a water use licence for its Vele project near the Mapungubwe world heritage site in Limpopo.²⁶⁹

The preamble to the *National Water Act* states that sustainability and equality are central guiding principles in the protection, use, development, conservation, management and control of water resources. Section 41 of the *National Water Act* acknowledges and regulates consultation and access to information by interested and affected parties when water use licences are lodged and processed by state authorities.

The legislature when enacting section 41(2), (3) and (4) of the *National Water Act* which deals with the procedure of consulting with interested and affected parties during the granting of water licenses to mining companies — adopted the use of the following words in terms of section 41(2):

A responsible authority *may* to the extent that it is reasonable to do so, require the applicant to provide information required to assess the application, conduct an assessment by a competent person and invite written comments from any organ of state or person who has an interest in the matter. (own emphasis)

In section 41(3) the legislature adopted the use of the words:

267 Cawthorn 2007 *J S Afr Inst Min Metall* 1-3.

268 Mitchell *et al* 2012 *J S Afr Inst Min Metall* 4.

269 Derby *The Star Business Day Newspaper* 17 November 2011 25. See also <http://www.coalofafrica.com> follow Vele Project situated in Musina, Limpopo Province.

A responsible authority *may* direct that any assessment under section 41 must comply with the requirements contained in regulations of the Act (own emphasis).

In section 41(4) the legislature further adopted the use of the words:

A responsible authority *may* at any stage of the application process, require the applicant to give suitable notice in the newspapers and other media calling for written comments and objections to the application, to satisfy the responsible authority that the interests of any other person having an interest in the land will not be adversely affected (own emphasis).

The responsible authority or water regulator, as referred to in this Act, principally refers to the DWA as the current state department responsible for water conservation, regulation and licensing in South Africa. The repeated use of the operative words "a responsible authority may" in section 41(2), (3) and (4) of the *National Water Act* means that the DWA and the applicant for a water use licence, such as a mining company, have a discretion to consult with and involve interested and affected parties in the decision-making process relating to the award of a water use licence. The state and an applicant mining company are not legally required or obliged to conduct a public participation process and to invite interested parties, such as indigenous people, affected by mining to submit their comments or concerns regarding the granting of a water use licence to a mining company in their area.²⁷⁰

Put differently, section 41(4) of the *National Water Act* means that it is only when the responsible authority (the DWA) has exercised its discretion to order consultation with interested and affected parties that the applicant for a water use licence must give notice of the application through the media and newspapers circulating in the area, must call on interested and affected parties and general public members to submit their objections within stipulated timeframes and must supply an address where written objections by interested and affected parties and the general public must be lodged. The *National Water Act* may in this regard be interpreted as meaning that the extent to which public participation is accommodated in the decision-making process when an application for a water use licence is considered, either in the form of

270 Ss 41(2), (3) and (4) *National Water Act*.

commenting or submitting formal objections, is entirely within the discretion of the water regulator or responsible authority, being the DWA.²⁷¹

The provisions of the *National Water Act*, the defining statutory procedural rights applicable to indigenous people when mining takes place, and implications which may arise when applicable procedural rights are violated by the state and others, are summarised in Table 7. The table highlights, in summarised form, relevant statutory provisions in terms of the Act which may assist interested and affected parties to participate in the decision-making processes undertaken at different stages by the state.

Table 7: Provisions of the *National Water Act* and implications for indigenous people

Right	Section(s)	Details of provision	Implications for indigenous people
Access to information			
Just administrative action			
Participation	41(2), (3) and (4)	The responsible authority or water regulator (DWA) <i>may</i> consult with interested and affected parties when water use applications are lodged with authorities.	Indigenous people affected by mining may submit their input and be consulted if and when invited by the responsible authorities from the DWA.

4.2 Rights in context: An analysis of some case law

Courts in South Africa have always been instrumental in interpreting legislation and giving effect to people's rights. In recent years the South African courts have also been instrumental in giving effect to the procedural rights of indigenous people. The process of consulting with interested and affected parties when communal land is dispossessed to make way for mining operations; when communities are relocated; and access to information which interested and affected parties require to protect any of their rights include

²⁷¹ S 41(4) *National Water Act*.

some of the issues that have been tested and decided by the judiciary. In the recent past, South African courts have also shed some light on the right of indigenous people to be actively involved in the mining of minerals found on ancestral land owned and lawfully occupied by these communities.

As stated before, some of the decided cases discussed in this section which relate to the procedural rights of indigenous people affected by mining, include the case of *Alexkor Ltd and Another v Richtersveld Community and Others*, *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd and Others*, *Meepo v Kotzé and Others* and the case of *Joubert and Others v Maranda Mining Co. (Pty) Ltd*.²⁷² These high court and Constitutional Court cases are discussed to the extent that they shed light on consultation and participation of interested and affected parties in mining-related decision-making. In each instance, the facts, legal questions, applicable law and relevance to this study are discussed.

4.2.1 *Alexkor Limited and Another v Richtersveld Community and Others*²⁷³

4.2.1.1 Facts

The Richtersveld is a large area of land situated in the north-west corner of the Northern Cape. For centuries it has been inhabited by what is now known as the Richtersveld community.²⁷⁴ The Richtersveld community had been in occupation of the subject land prior to annexation to the British Crown in December 1847. Even after annexation, the Richtersveld community continued to occupy the land until the 1920s when diamonds were discovered. After the

272 *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 12 BCLR 1301 (CC) (henceforth *Richtersveld Community (CC) case*); *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources and Others* 2011 3 BCLR 229 (CC) (henceforth *Bengwenyama-ye-Maswati (CC) case*), *Meepo v Kotzé and Others* 2008 1 SA 104 (NC) (henceforth *Kotzé and Others (NC) case*) and *Joubert and Others v Maranda Mining Co (Pty) Ltd* 2010 1 SA 198 (SCA) (henceforth *Joubert and Others (SCA) case*.)

273 *Richtersveld Community (CC) case*.

274 Trahan 2008 *TJICL* 565. The present Richtersveld population is descended from the Nama people, who are thought to be a subgroup of the Khoi people. These people were a "discrete ethnic group" who shared the same culture, including the same language, religion, social and political structures, customs and lifestyle. The primary rule of these people was that the land of their territory belonged to their community as a whole.

commencement of mining operations in the 1920s, the Richtersveld community was progressively denied access to its land. During the early 1990s the Richtersveld Community was forcefully removed without compensation and in an undignified manner by the former government of South Africa, to make way for diamond-mining operations.²⁷⁵ Soon thereafter Alexkor Limited was established in terms of the *Alexkor Limited Act* 116 of 1992 (*Alexkor Limited Act*). By 1993 the then government of South Africa granted ownership of the subject land to Alexkor Limited. This company was established as wholly owned by the government of South Africa to conduct business in the diamond sector.²⁷⁶

4.2.1.2 Legal question

The legal question to be considered and to be decided by the Constitutional Court in the Richtersveld Community case against Alexkor Limited was whether it is constitutional and lawful to remove indigenous people forcefully and without dignity from their ancestral land without being compensated and without being adequately and formally consulted, to make way for mining.

4.2.1.3 Applicable law

The Richtersveld Community court battle was instituted at the Land Claims Court (LCC)²⁷⁷ and the community relied on the *Restitution of Land Rights Act* 22 of 1994 (*Restitution of Land Act*) for their communal land to be restored by the state-owned Alexkor Limited. The community originally argued that their right in land was either (a) ownership; (b) a right in land based on the common-law doctrine of aboriginal title; (c) or a right in land acquired through its beneficial occupation of the land for a period longer than ten years prior to their eventual dispossession, as per section 1 of the *Restitution of Land Act*.²⁷⁸ The

275 *Richtersveld Community (CC)* case para 4–9, Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 43.

276 *Richtersveld Community (CC)* case para 4–9.

277 *Alexkor Limited and Others v Richtersveld Community and Others* 2001 3 SA 1293 (LCC).

278 S 1 of the *Restitution of Land Act* defines a right in land as "any right in land registered or unregistered, and may include the interest of a labour tenant and sharecropper,

Constitutional Court held that the Richtersveld Community was part of the group of indigenous people who had been racially dispossessed of their right in land after 19 June 1913 by the previous government of South Africa.²⁷⁹ The Constitutional Court, in affirming the reasoning of the Supreme Court of Appeal (SCA), in this case held that the Richtersveld Community — as at 19 June 1913 — had enjoyed a right of ownership, the right to exclusive beneficial occupation and use of the land and the right to use the subject land for certain specified purposes, including exploitation of natural resources found in that land.²⁸⁰

When outlining the relationship of the community *vis-à-vis* their land, the court stated that the real character of the title which the Richtersveld Community possessed over the subject land was a right of communal ownership under indigenous law (it seems as if the practising and upholding of the indigenous laws by the Richtersveld community on their communal land was among their vulnerability concerns, which government and the mining company capitalised on).²⁸¹ For example, it seems as if government considered diamond mining as more important than the Richtersveld Community's practice of their culture and tradition on the communal land.

The Constitutional Court in summary decided that it was unconstitutional and unlawful for the Richtersveld Community to be dispossessed of their communal land in an arbitrary manner, without dignity and without being consulted. The court ordered the communal land to be restored to the Richtersveld Community and Alexkor Limited was ordered to involve the Richtersveld indigenous people, as landowners, in the mining of diamonds in the area. The Constitutional Court also held that, while the community was entitled to their right to land through the more direct route in terms of the *Restitution of Land Act*, the court

customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession.

279 *Richtersveld Community* (CC) case para 9–10.

280 *Richtersveld Community* (CC) case para 9.

281 *Richtersveld Community* (CC) case para 64–66. 19 June 1913 is the limitation of period specified by the *Restitution of Land Act* from which communities may commence applications for the restitution of their land.

acknowledged that the community's indigenous law was applicable in the matter and indeed could be said to have paved the way for the application of aboriginal title in South Africa under its indigenous law, as evidenced by customary laws.²⁸²

4.2.1.4 Relevance to this study

The Richtersveld Community case provides a guiding precedent, in that indigenous people in South Africa should not arbitrarily be removed and be dispossessed of their ancestral land without consultation and compensation, when mining is to take place on land owned and lawfully occupied by these communities. This case is also relevant to this study in that the reasoning of the Constitutional Court indicated that consultation with indigenous people — before mining takes place on communal land — is crucial because indigenous people in South Africa use their communal land for, *inter alia*, grazing their domestic livestock, hunting and subsistence farming, use of water resources found in that area for their household needs, ancestral worship and for cultural and other traditional beliefs. The latter usage of land by the Richtersveld Community seems to have been among the grounds on which the Constitutional Court recognised and paid attention to indigenous law in the light of the Constitution.²⁸³ The Court held that state departments (the DMR for example) and mining companies should not treat traditional and cultural beliefs of indigenous people as inferior and deserving to be superseded by economic and mining operations to the detriment of communities, including the right to live in a healthy environment.²⁸⁴

282 *Richtersveld Community* (CC) case para 51–64.

283 *Richtersveld Community* (CC) case para 51.

284 *Richtersveld Community* (CC) case para 58.

4.2.2 *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd and Others*²⁸⁵

4.2.2.1 Facts

Bengwenyama-ye-Maswati is an indigenous community which owned and lawfully resided on the Eerstegeluk and Nooitverwacht properties in the Limpopo. This community also owned shares in the Bengwenyama Minerals (Pty) Ltd, which was a BEE company. The court challenge came during September 2006 after the DMR had awarded prospecting rights on land owned and occupied by the Bengwenyama-ye-Maswati community. The traditional council of the Bengwenyama-ye-Maswati and members of Bengwenyama Minerals (Pty) Ltd approached various courts to challenge the awarding of such prospecting rights on their communal land, based on the fact that the community had not been properly consulted when the DMR granted prospecting rights to Genorah Resources.²⁸⁶

4.2.2.2 Legal question

The legal question that had to be considered and decided by the High Court in this case involved the administrative fairness (administrative act or authority exercised by the Executive Member of Parliament, being the Minister of Mineral and Resources) relating to the awarding of prospecting rights to Genorah Resources (Pty) Ltd in terms of the MPRDA on land owned and lawfully occupied by indigenous people.²⁸⁷ The community's major argument in challenging the administrative fairness and manner in which the prospecting right was granted to Genorah Resources (Pty) Ltd was that such prospecting right was granted without them, as landowners, being consulted formally and adequately.²⁸⁸

285 *Bengwenyama-Ye-Maswati Community (CC) case.*

286 *Bengwenyama Minerals Others v Genorah Resources (Pty) Ltd and Others* (unreported Transvaal Provincial Division, case no 39808/2007); *Bengwenyama-Ye-Maswati Tribal Council and Others v Genorah Resources (Pty) Ltd and Others* 2010 3 All SA 577 (SCA).

287 Humby 2012 *PELJ* 173–174; Badenhorst, Olivier and Williams 2012 *JSAL* 117.

288 *Bengwenyama-ye-Maswati Community (CC) case* para 79–80.

4.2.2.3 Applicable law

The Constitutional Court, in upholding the claim of the applicants (indigenous peoples) and emphasising that the respondents (Genorah Resources and the DMR) did not follow proper consultation processes in terms of the MPRDA and its regulations,²⁸⁹ held that the EIA, EMP and programme processes undertaken by the mining company in terms of the MPRDA and its regulations and the NEMA provisions had to investigate, assess and evaluate the impact of the proposed prospecting operations on the environment and socio-economic conditions of any person who might directly be affected by the prospecting operations (emphasis mine).²⁹⁰ It was submitted that the words "any person who might be directly affected", as used by the Constitutional Court in this case, included indigenous people who own and lawfully occupy the land affected. "Any person who might be directly affected" would also mean that interested and affected parties, such as indigenous people, have a right to be consulted and to participate in decision-making processes when communal land is to be used for mining purposes.

The court held further that prospecting, and indeed mining activities, have the potential to change the physical formation of the land. As such these are activities which should not be carried out without the landowner and those who lawfully occupy such land being consulted meaningfully and timeously.²⁹¹

The viewpoint of the Constitutional Court on consultation and participation of interested and affected parties in this case was emphasised when the court held that the granting and execution of a prospecting right represented a grave and considerable invasion of the use and enjoyment of the land on which prospecting was to take place.²⁹² The implication of this reasoning is that landowners should not be ignored when a decision to grant prospecting rights

289 S 3 MPRDA reg no R527 GG 26275 of 23 April 2004.

290 *Bengwenyama-ye-Maswati Community* (CC) case para 79–80; Humby 2012 *PELJ* 182–183.

291 *Bengwenyama-ye-Maswati Community* (CC) case para 68.

292 *Bengwenyama-ye-Maswati Community* (CC) case para 79–80; s 3 MPRDA reg no R527 GG 26275 of 23 April 2004.

is taken by the DMR.²⁹³ The Court held further that *consultation requirements in the MPRDA are accordingly indicative of a serious concern* (emphasis mine) for the rights and interests of landowners and lawful occupiers in the process of granting prospecting rights.²⁹⁴

The Constitutional Court in the *Bengwenyama-ye-Maswati* case essentially held that consultation with interested and affected parties, envisaged by the MPRDA, required that the applicant for prospecting and mining rights should:²⁹⁵

- inform the landowner in writing that his/her/their application for prospecting or mining rights on the land affected had been accepted by the DMR;
- inform the landowner in sufficient detail of what prospecting operations on the land would entail, for the landowner timeously to assess what impact the operations would have on the land and what precautionary/mitigating measures the landowner should adopt; and
- submit the result of the consultation process with the landowner and interested and affected parties to the regional manager of the DMR so that environmental authorities from the regional office could assess environmental and socio-economic impacts and co-operate with all interested and affected parties in formalising mitigating factors.

4.2.2.4 Relevance to this study

The facts and decision of the Constitutional Court in the *Bengwenyama-ye-Maswati* case are relevant to this study in that the highest court on constitutional matters in the Republic of South Africa had an opportunity to make a landmark ruling on the omission by mining companies to consult with indigenous people who owned and lawfully occupied land with mineral resources. This omission still impedes the lives of indigenous people owing to

293 *Bengwenyama-ye-Maswati Community* (CC) case para 63–64.

294 *Bengwenyama-ye-Maswati Community* (CC) case para 63–64.

295 *Bengwenyama-ye-Maswati Community* (CC) case para 67; Badenhorst, Olivier and Williams 2012 JSAL 125-126.

mining operations being carried out on communal lands.²⁹⁶ It could be inferred from the reasoning of the Constitutional Court that statutory procedural rights of the Bengwenyama-ye-Maswati community and those of other indigenous people in South Africa to be formally and adequately consulted should be protected by officials of the DMR and mining company representatives.²⁹⁷ The court held that the envisaged consultation and exchange of information between indigenous people, the state, and the mining company should take place *prior* to the awarding of prospecting and mining rights on the land owned and lawfully occupied by such indigenous people.²⁹⁸ The precedent laid by the Constitutional Court in the Bengwenyama-ye-Maswati community case is that other indigenous people in South Africa — who suffer from the loss of their communal land without being formally and adequately consulted by the state — have a binding judicial precedent which the community can rely on to oppose the arbitrary dispossession of their communal land by mining companies.

4.2.3 *Meepo v Kotzé and Others*²⁹⁹

4.2.3.1 Facts

In this case the respondents (Kotzé and Others) lodged an application to the state for a diamond prospecting right on the farm owned by Kotzé. Before the respondents had been informed of the outcome of their application and after the commencement of the MPRDA in 2002, the appellant (Meepo) lodged a similar prospecting application for the same land in terms of the MPRDA, as the latter Act had repealed the *Minerals Act*. The appellant's prospecting right application was successful even though it was launched subsequent to that of the respondents. The respondents contended in court that their procedural rights and their right to a fair hearing as landowners had been contravened by

296 Humby 2012 *PELJ* 182–183; Leon "South African Mining Industry at the Cross Roads" 3.

297 *Bengwenyama-ye-Maswati Community (CC)* case para 67; Badenhorst, Olivier and Williams 2012 *JSAL* 125-126.

298 *Bengwenyama-ye-Maswati Community (CC)* case para 62–63.

299 *Kotzé and Others (NC)* case.

the state when a prospecting right was awarded to Meepo, which is the company that lodged the prospecting right application subsequent to theirs.

4.2.3.2 Legal question

The two primary legal questions that had to be considered and answered in this case were:

When should interested and affected parties (Kotzé and Others in this instance), whose rights or legitimate expectation that had been affected materially and adversely by an administrative decision taken in terms of the MPRDA by the DMR, lodge their internal appeal and seek redress for their concerns; and

When should consultation with interested and affected parties envisaged by section 5(4)(c) of the MPRDA take place?

4.2.3.3 Applicable law

The High Court, in answering these two questions, stated that the MPRDA had done away with the previous traditional concept of holding and applying for mineral rights.³⁰⁰ For example, with operation of the MPRDA the landowner (Kotzé and Others) did not necessarily become the owner of minerals that lay underneath the land surface. The High Court held that in terms of the MPRDA, the state was the custodian and regulator of all mineral and petroleum resources in South Africa as per section 3 of the MPRDA. The reasoning of the *Meepo v Kotzé and Others* case indicates that indigenous people or a community which owns land which contains mineral resources will not automatically become holders of mineral rights by virtue of being landowners. The state is the custodian and regulator of all mineral resources and parties can only acquire mineral rights through an application approved by the state.

In answering the first question the High Court held that interested and affected parties (whether individually or as a community) who wished to challenge the

300 *Kotzé and Others* (NC) case 110 para C–D.

granting of a mining permit or a mining right had to exhaust their internal appeal remedies in terms of section 96 of the MPRDA, before such interested and affected parties could lodge their outside appeal and approach courts of law to review administrative decisions taken by the DMR for granting mining-related permits and licences.³⁰¹

In answering the second question the court held that consultation with interested and affected parties, such as communities envisaged by section 5(4)(c) of the MPRDA, should occur after a prospecting right had been granted but before drilling operations could commence.³⁰² The High Court in formulating and/or providing the meaning of consultation held that consultation required by the MPRDA in this context amounted to more than a mere notice by an applicant for or holder of the mining right to the landowner. The holder of the prospecting and/or mining right had to attempt to obtain written consent from the landowner with regard to accessing the land affected, for the purpose of prospecting.³⁰³ The implication of having to obtain written consent from the landowner may be interpreted as meaning that the applicant for the mining right should engage in a process of adequately and formally meeting with the landowner, with the intention of receiving the landowner's requisite written consent permitting land to be used for mining-related operations.

4.2.3.4 Relevance to this study

The facts and the decision of the *Meepo v Kotzé and Others* case are relevant to this study in that the court in this case attempted to clarify the point in which the holder of the prospecting right must consult with the owner and lawful occupiers of the land on which prospecting is to occur. The High Court in this case ruled that the holder of the prospecting right must first consult with the landowner (which includes indigenous people or the community) and must obtain written consent before drilling operations could commence on the land affected.

301 *Kotzé and Others* (NC) case 110 para D; Badenhorst, Olivier and Williams 2012 JSAL 114.

302 *Kotzé and Others* (NC) case 113 para A–B.

303 *Kotzé and Others* (NC) case 114 para D–E.

It is common occurrence in South Africa to find interested and affected parties and indigenous people affected by mining — such as the parties in the *Meepo v Kotzé and Others* case and the Bengwenyama-ye-Maswati case — rushing to courts of law to apply for a review of administrative decisions granting mining-related rights on their land. This approach was clarified when the court ruled in the *Meepo v Kotzé and Others* case that a judicial review application should be launched in courts of law only after the internal appeal process provided by section 96 of the MPRDA had been exhausted. This reasoning by the court means that indigenous people — and others affected by mining — should first exhaust remedies provided by the MPRDA before a review application can be initiated in the courts of law.

The reasoning in the *Meepo v Kotzé and Others* case with regard to the applicant for prospecting and/or mining rights having to obtain written consent from the landowner may be problematic in terms of implementation. "Written consent" referred to in the judgment may be obtained by the applicant without adequately and formally consulting with the individual landowner or community who owns the land affected. The High Court in the *Meepo v Kotzé and Others* case may as well be criticised for failing to provide a clear and comprehensive meaning of the notion of consultation.

The implication of having to exhaust the MPRDA internal appeal process in terms of section 96 before a court challenge is instituted may also turn out to be problematic to indigenous people and other interested and affected parties, because the DMR often experiences administrative backlogs and takes longer to finalise review applications.³⁰⁴ The same internal appeal process in terms of the MPRDA, on the other hand, would mean that the DMR, by itself, could possibly deal with appeal proceedings instituted against its initial decision of awarding the mining right or permit. This can potentially hinder the fair administrative process envisaged by PAJA and the *nemo iudex in sua causa* common-law principle discussed in chapter 3 above.

304 Humby "Mining and Environmental Litigation Review" (2011) 35–36.

4.2.4 *Joubert and Others v Maranda Mining (Pty) Ltd*³⁰⁵

4.2.4.1 Facts

In this case the respondent company (Maranda Mining) had acquired mining rights in terms of the MPRDA on the farm owned by the appellants (Joubert and Others). The respondent company had already submitted its EIA, EMP and programme documents in compliance with the MPRDA regulations and at the time of this court action the respondents' EIA, EMP and programme had already been approved by environmental authorities. The appellants opposed the mining operations because they ran a wildlife sanctuary and an ecotourism enterprise on the farm affected. The appellants also challenged the manner in which the DMR had consulted with them, as parties opposed to the mining operations on the land affected. The appellants challenged the manner in which they had been consulted on the grounds that as a group conducting wildlife and ecotourism enterprise next to the land affected, the state and Maranda Mining (Pty) Ltd had failed to offer alternative commercial land where they could continue operating their business.

4.2.4.2 Legal question

The legal question that had to be considered and answered in this case is: When does a mining-right holder acquire a right of access to the land where the relevant minerals are located?

4.2.4.3 Applicable law

The SCA in considering section 27(7)(a) of the MPRDA held that this section clearly affords the holder of a mining permit the right to enter the land in respect of which the mining rights have been granted, to carry out operations.³⁰⁶ The Court held that in placing section 27(7)(a) of the MPRDA into operation, the right to enter the land by the holder of the mining right "solidifies" once the legitimate holder of the right has complied with the provisions regarding

305 *Joubert and Others* (SCA) case.

306 *Joubert and Others* (SCA) case 200 para 12.

notification and consultation with the landowner and other interested and affected parties (which includes indigenous people) in the leading-up to the granting of such prospecting or mining rights.³⁰⁷ The court in this case decided in favour of the respondent company (Maranda Mining) because the company had complied with the consultation process *vis-à-vis* interested and affected parties, EIA, EMP and programme documents, which were approved by the DMR. Other provisions of the MPRDA required for the granting of a mining right were complied with as well.³⁰⁸ The SCA ruled that, given the steps that the respondent company had taken to comply with the MPRDA provisions, the respondent should be allowed to enter the farm for the purpose of exploiting its mineral rights in terms of the MPRDA.

In this case the SCA approved consultation as having taken place on the grounds that the landowner and interested and affected parties had been provided with timeous and formal notification about the proposed mining operations, the landowner and interested and affected parties had been physically consulted in time ahead and during the EIA and their inputs were incorporated in the EMP and programme, which were intended to mitigate negative impacts on the surrounding environment.³⁰⁹

The SCA in this case failed to consider concerns of the landowners, that the state and the mining company had failed to provide alternative commercial land when mining operations were approved nearer to their wildlife and ecotourism business.

4.2.4.4 Relevance to this study

The facts of this case reflect a recurring situation in South Africa. Landowners and other interested and affected parties — such as indigenous people — who operate their enterprises outside the mining industry in the form of farming, ecotourism and other business sectors, oppose mining on or nearby the land on which they conduct their business. Such interested and affected parties —

307 *Joubert and Others* (SCA) case 200 para 13.

308 *Joubert and Others* (SCA) case 200 para 13.

309 *Joubert and Others* (SCA) case 200 para 13.

as in the *Maranda Mining (Pty) Ltd* case — oppose mining on the grounds that the natural formation of the landscape in which they operate their enterprises should not be disturbed — for purposes of nature conservation; that blasting activities which take place at the mine create noise during the day and night; and that mining activities cause dust and pollute the surrounding atmosphere. The reasoning in the *Joubert and Others v Maranda Mining (Pty) Ltd* case has, however, provided a precedent that a mining company must comply with the MPRDA provisions relating to consulting with interested and affected parties, and that the DMR should have approved environmental and other compliance documents before operations could lawfully be conducted.

4.3 Conclusion

Courts in South Africa have, over the years, been instrumental in pronouncing the application of the MPRDA as mining framework legislation; developing applicable common law; and clarifying statutory procedural rights of various parties, such as indigenous people, affected by mining.³¹⁰

The four cases discussed above are among those decided in recent years by South Africa's higher courts. The two cases which were decided by the Constitutional Court involving the Richtersveld Community and the Bengwenyama-ye-Maswati Community respectively, have provided much-needed judicial precedents as to how mining companies may be ordered to involve and consult with indigenous people and landowners when mining takes place on privately owned or communally owned land. The cases of the Richtersveld Community and the Bengwenyama-ye-Maswati have also clarified statutory procedural rights of indigenous people affected by mining, specifically in relation to the use of communal land owned by such indigenous people, when mining takes place in or in the vicinity of their ancestral land. The time and manner in which interested and affected parties, such as indigenous people, should be consulted and their input received prior to the commencement of mining operations on the land they own or lawfully occupy,

310 De Ville *Judicial Review* 339.

have also been clarified to some extent by the reasoning in the cases discussed above.

It can be inferred from the ruling in the *Joubert and Others v Maranda Mining (Pty) Ltd* case that prospecting or mining rights cannot lawfully be exercised without interested and affected parties, specifically those who own the land, being formally consulted. This is because mining operations detrimentally change the land on which operations are conducted.³¹¹ It can also be inferred from the reasoning in both the *Meepo v Kotzé and Others* case and the *Joubert and Others v Maranda Mining (Pty) Ltd* case that, once the applicant for prospecting or mining rights has complied with the process of formally consulting with the landowner and other interested and affected parties, and environmental authorities from the DEA, the DWA and the DMR have approved such consultation processes, EIA, EMP and programme documents are declared valid for the purpose of complying with the provisions of the MPRDA and its regulations. Then the landowner and other interested and affected parties will have no standing to deny the holder of such rights access to the land to exercise such prospecting or mining rights in terms of the MPRDA.

Having discussed the applicable legal framework and the judiciary's interpretation and application thereof, the next chapter attempts to distil and comment on the strengths and weaknesses of South Africa's existing legal framework directed at the protection of procedural rights as discussed in this study.

311 *Joubert and Others* (SCA) case 200 para 13; Leon "South African Mining Industry at the Cross Roads" 3.

CHAPTER 5

Strengths and weaknesses of South Africa's existing framework for protection of procedural rights

5.1 Introduction

South Africa is a country rich in mineral resources. Some are still unexplored as highlighted in chapter 2 above. Mining is an activity which involves drilling and blasting of rocks, land excavations and consequently noise, dust and water pollution as a result of tailing dams, for example.³¹² The combination of these environmental intrusions consequently has a negative impact on, *inter alia*, the constitutional right of people to live in a healthy environment. It seems that printed publications, radio and television, civil society organisations and advocacy groups create awareness of the negative impact mining causes on the land of indigenous people.³¹³ Protests are staged against mining companies violating the constitutional rights of indigenous people and judicial interference through our courts of law.³¹⁴ It also seems as if indigenous people affected by mining are getting better organised and are steadily being informed about their procedural rights to be consulted before their communal land is alienated for mining operations.³¹⁵ This is, *inter alia*, as a result of various publications relating to court challenges by interested and affected parties and community protests against mining companies recently reaching indigenous people.³¹⁶

312 Harington, McGlashan and Chelkowska 2004 *J S Afr Inst Min Metall* 67.

313 Leon "South African Mining Industry at the Cross Roads" 2–3; ANC "Maximising the Developmental Impact of the People's Mineral Assets" Policy Discussion Document para 11. See <http://www.anc.org.za>.

314 Leon "South African Mining Industry at the Cross Roads" 10; Humby "Mining and Environmental Litigation Review" (2011) 19. See also <http://www.lhr.org.za> follow Kgobudi community challenges Platreef (Pty) Ltd interdict to keep of their land; see also <http://www.lhr.org.za> follow residents of Silobela, Caropark and Carolina communities in Mpumalanga protests against acid mine water (North Gauteng High Court case no 3576/12 unreported).

315 Humby 2012 *PELJ* 173–174; Trahan 2008 *TJICL* 565.

316 Leon "South African Mining Industry at the Cross Roads" 10; ANC "Maximising the Developmental Impact of the People's Mineral Assets" Policy Discussion Document para 11.

5.2 Some legal and related strengths distilled

5.2.1 A strong legal basis

The law relating to procedural rights of indigenous people affected by mining principally emanates from the Constitution meaning that it is afforded with the strongest of legal recognition and protection³¹⁷ The statutory framework is backed by procedural and substantive rights in the Constitution as discussed in chapter 3 above - the MPRDA and its regulations, NEMA and its regulations, the PAIA and the PAJA, the NHRA, the *Protected Areas Act*, the *Biodiversity Act* and the *Municipal Systems Act* are among the legislation forming the legal basis for the protection of people's procedural rights in decision-making processes in the mining context – e.g. when prospecting and mining rights applications are approved. Specific sections of the various pieces of legislation were discussed in more detail in chapter 4 above.

5.2.2 Acknowledgement of a need for participation of and consultation with affected parties

It is clear from a number of provisions in both the Constitution and legislation that the law acknowledges the need for people affected by government decisions (e.g. mining-related decisions) to be involved in the decision-making process. Such acknowledgment is found in, for example, the provisions related to consultation with interested and affected parties before authorities takes decisions, access to information held by the state and just administrative action as provided for in the PAIA, PAJA, NEMA and the MPRDA.

In the context of this study, chapter 3 of the NEMA Environmental Impact Assessment Regulations³¹⁸ provides that an independent environmental assessment practitioner must be appointed when various environmental assessments are conducted to enable an impartial person to liaise with the interested and affected parties, the state, and the company applying for the

317 NEMA EIA reg no R543 GG 33306 of 18 June 2010.

318 Chapter 3 ss 16(1) and (2) NEMA reg no R543 GG 33306 of 18 June 2010.

mining rights.³¹⁹ The NEMA Environmental Impact Assessment Regulations also provide that the person conducting the public participation process required in terms of NEMA must give prior notice to all potential interested and affected parties before activity — which has an impact on the environment — commences.³²⁰ The MPRDA, which serves as mining framework legislation, also has explicit provisions which require any person who applies for prospecting or mining rights to investigate, to assess and to evaluate the impact of the proposed operations on the environment, on any person who might be affected by the proposed operations and on socio-economic conditions of interested and affected parties in the vicinity of the proposed operations.³²¹ The above acknowledgment of a need for participation and consultation with affected parties implies that mining authorisations and permits granted by the DMR, for example, without having involved affected parties in the processes which lead to the granting of such authorisations and permits should be flawed, irregular and may be challenged for review.

5.2.3 Access to courts and judicial precedents

In recent years the right of indigenous people affected by mining to be consulted timeously and formally by the state and applicant mining companies, which carry out or intend to carry out prospecting or mining operations on land lawfully occupied and owned by indigenous people, has also been strengthened by judgments of the SCA and the Constitutional Court. As discussed in chapter 4, the landmark judicial precedents set by our higher courts include the Richtersveld Community case, the Bengwenyama-ye-Maswati community case, Joubert and Others (SCA) and the case of Kotzé and Others. These judgments were all favourable towards and strengthened directly and indirectly by the right of indigenous people to be consulted timeously and formally prior to, for example, an applicant mining company establishing its drilling and working machinery to be used for mining operations on communal land. The procedural rights of interested and affected parties were

319 Chapter 3 ss 16(1) and (2) NEMA reg no R543 GG 33306 of 18 June 2010.

320 Chapter 6 s 54(2) NEMA reg no R543 GG 33306 of 18 June 2010.

321 S 39(3)(b) MPRDA.

strengthened by these various higher court decisions in that South African courts which, in these instances, were prepared to review and set aside prospecting and mining rights awarded by the DMR for failure timeously and formally to consult with interested and affected parties, such as indigenous people, when mining was approved to take place on communal land. The various judgments pronounced by higher courts are and should be treated as precedents legally binding on the state, mining companies, and every person who carries out or intends to carry out prospecting or mining operations on land owned and/or lawfully occupied by indigenous people.

5.2.4 Involvement of non-governmental and civil society organisations

Indigenous people affected by mining find sympathy and support from non-governmental organisations and advocacy groups when communities are faced with challenges brought by mining companies which intend carrying out mining operations on communal land.³²² In the context of this study, the Lawyers for Human Rights advocated for the statutory right of the Richtersveld community to be formally consulted when the state authorised Alexkor Limited to conduct diamond-mining operations on communal land; the right of the community to live in a healthy environment; the right to have access to information and the right to protect biodiversity, heritage resources and sites found on the land of the indigenous people of the Richtersveld.³²³

In terms of the MPRDA, the state is the custodian and regulator of all minerals found in South Africa.³²⁴ Against the backdrop of the latter MPRDA provision and with various organisations that exist in South Africa, it is essential that non-governmental organisations and civil society organisations should be lobbied and be involved in disputes between the state, mining companies and indigenous people affected by mining. Involvement of such non-governmental organisations and civil society organisations can add value in challenging the

322 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 45–46.

323 *Richtersveld Community* CC case; Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 45–46.

324 S3 MPRDA.

state outside the MPRDA internal appeal and review proceedings in terms of section 96.³²⁵ Examples of organisations which may be lobbied and be involved to stand up against applicant mining companies and the state include, but are not limited to, the Bench Marks Foundation, the Centre for Environmental Rights, the Endangered Wildlife Trust, Lawyers for Human Rights, the Wilderness Foundation South Africa, Birdlife South Africa and the Centre for Applied Legal Studies of the University of the Witwatersrand.³²⁶

The mining-industry professionals and owners from all over the world gather at the annual African Mining Indaba held in Cape Town to showcase their projects' milestones and to advertise new projects they intend to undertake.³²⁷ The Bench Marks Foundation, a civil society organisation with a focus on mining and the socio-economic impacts caused by mining on communities living nearby, also mobilises interested and affected parties detrimentally affected by mining operations and other advocacy groups to gather on the sidelines of the African Mining Indaba.³²⁸ It seems that the purpose of this gathering is to express concerns of indigenous people directly to mine owners.

It seems that various non-governmental organisations and civil society organisations succeed in voicing the concerns of indigenous people to the DMR, the DEA, the DWA and the mining industry. This is because non-governmental organisations — such as the Bench Marks Foundation — have an organisational focus on specific mining projects such as the Coal of Africa Limited Vele Colliery project situated within 10 kilometres from the Mapungubwe world heritage site in the Limpopo. These non-governmental organisations also have resources ranging from capital to technical skills to engage and to challenge state officials and mining company representatives on behalf of indigenous people affected by mining operations.

325 MPRDA section 96 provides that internal review and appeal proceedings against decisions of the DMR should be undertaken before court proceeding are instituted.

326 <http://www.bench-marks.org.za>; <http://www.cer.org.za>; <http://www.ewt.org.za>; <http://www.lhr.org.za>; <http://www.wildernessfoundation.org.za>; <http://www.birdlife.org.za>; <http://www.cals.ac.za>.

327 Mkokeli and Seccombe *The Star Business Day Newspaper* 7 February 2012 21; Leon "South African Mining Industry at the Cross Roads" 3.

328 Mkokeli and Seccombe *The Star Business Day Newspaper* 7 February 2012 21; Capel "Ethics of Extraction" *The Star Business Day Newspaper* 8 February 2012 16.

5.3 Some legal and related weaknesses distilled

The South African legal framework regulating consultation with indigenous people, when mining projects are initiated on land owned by indigenous people, also has its own weaknesses and disadvantages.³²⁹ South Africa has environmental sector-specific legislation which guides mining-activity operations such as the *National Environmental Management: Air Quality Act 39 of 2004 (Air Quality Act)* which is informed by NEMA and mining-related legislation such as the MPRDA and its regulations and the MHPA and its regulations. Unfortunately it has become the norm for indigenous people living near mining operations to, for example, find cracks in their houses owing to blasting and drilling activities that occur continuously at the mine, community water resources depleted and polluted and farming and grazing land alienated to make way for mine-dumping areas and tailings dams.³³⁰ The environmental risks that accompany mining operations such as degradation of vegetation cover, soil contamination, reduced water quality and quantity, loss of biodiversity, and forced relocations to other areas³³¹ are all caused by mining operations, which often reduce the capacity of indigenous people to create sustainable livings.³³² It seems that these environmental changes and negative impacts that arise owing to mining operations are often cumulative and take time to manifest. The consequences may not easily be noticeable or understood by indigenous people, owing to the scientific nature of mining drilling and blasting activities.³³³ This *status quo* serves to imply that challenges exist as far as they concern implementation and enforcement of the environmental (and mining) laws that accompany indigenous communities' procedural rights.

329 Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 58–59; Humby 2012 *PELJ* 173–174; Mitchell *et al* 2012 *J S Afr Inst Min Metall* 7.

330 Smith *et al* "Complex commons under threat of mining" 6; Badenhorst, Olivier and Williams 2012 *JSAL* 125-126.

331 Smith *et al* "Complex commons under threat of mining" 6; Badenhorst, Olivier and Williams 2012 *JSAL* 125-126.

332 Badenhorst, Olivier and Williams 2012 *JSAL* 125-126.

333 Leon "South African Mining Industry at the Cross Roads" 2–3; Smith *et al* "Complex commons under threat of mining" 6.

5.3.1 Prioritising economic development in favour of environmental and procedural rights

The state seems to sympathise with mining companies (both local and international) and to give precedence to economic development in South Africa.³³⁴ The rights of indigenous people to be consulted formally and timeously prior to mining operations commencing on their communal land, as well as to environmental protection, are ignored.³³⁵ Environmental protection and governance in South Africa seem to be in an inferior position and receive negligible attention from the state while mining companies are permitted to exploit minerals on land owned and occupied by indigenous people, with profit gains accruing to such companies.³³⁶ The Amadiba community in the Eastern Cape and the Bengwenyama-ye-Maswati community in Limpopo serve as examples of communities that have been subjected to environmental degradation in the vicinity of their communal land as a result of mining operations. Only after legal proceedings were instituted against the companies concerned did violation of the procedural rights of indigenous people cease and did the right to live in a healthy environment triumph.

5.3.2 Lack of strict measures to monitor consultation with affected parties

The current framework legislation governing mining (MPRDA) and environment (NEMA) together with their respective regulations only requires of or mandates mining companies and the state to "consult" with the interested and affected parties — such as indigenous people — who own, use and lawfully occupy land to be mined.³³⁷ The said laws, however, do not always have stringent and proper checks and balances in place to monitor the quality, extent, manner and

334 <http://www.coalofafrica.com> follow the Vele Project in Musina. See also <http://www.lhr.org.za> follow Kgobudi community challenges Platreef (Pty) Ltd interdict to keep of their land. See also <http://www.lhr.org.za> follow residents of Silobela, Caropark and Carolina communities in Mpumalanga protest against acid mine water (North Gauteng High Court case no 3567/12 unreported).

335 *Bengwenyama-ye-Maswati Community (CC)* para 9.

336 ANC "Maximising the Developmental Impact of the People's Mineral Assets" Policy Discussion Document para 11. See <http://www.anc.org.za>.

337 S 39(3)(b) MPRDA; Chapter 3 ss 16(1) and (2) NEMA EIA reg no R543 GG 33306 of 18 June 2010; Chapter 6 s 54(2) NEMA EIA reg no R543 GG 33306 of 18 June 2010.

process followed by the required (or supposedly required) consulting party engaging with interested and affected parties, as well as how the consultation process is undertaken and managed.³³⁸ It seems that mere proof by the environmental assessment practitioner and the applicant mining company — that the company has taken measures to consult with interested and affected parties— appears to be adequate to comply with the prevailing provisions of the MPRDA and NEMA and practices in the mining industry. Another weakness in the law is that, after an applicant mining company has consulted with the affected community, the decision of the DMR is not bound by the majority and democratic decision of the community affected. This weakness was observed when the DMR refused to revoke the mining right of the Transworld Energy and Minerals Resources (SA) (Pty) Limited, a subsidiary of the Australian-based Mineral Commodities Limited, in spite of overwhelming opposition of the Amadiba community to the mining of mineral sands on their communal land³³⁹

5.3.3 *Unverified consultation with interested and affected parties seems adequate*

The prevailing sector-specific legislation protecting the environment, protected areas, and biodiversity equally requires *mere consultation* (as opposed to *consultation and consent*) with interested and affected parties by the mining company before the minister responsible for environmental affairs can issue the requisite permit or consent to mining taking place on the land affected. Examples of legislation which enable mining companies to receive ministerial exemption to carry out mining operations in sensitive and protected areas after *mere consultation* with interested and affected parties include the *Heritage Resources Act*, the *Biodiversity Act* and the *Protected Areas Act*.³⁴⁰

338 S 39(3)(b) MPRDA; Chapter 3 ss 16(1) and (2) NEMA reg no R543 GG 33306 of 18 June 2010; Chapter 6 s 54(2) NEMA EIA reg no R543 GG 33306 of 18 June 2010.

339 Gqada "Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project" 10–11.

340 S 35 (6) and 36(3) NHRA; ss 57(4), 99 and 100 *Biodiversity Act*; ss 48(2), (3) and (4) *Protected Areas Act*.

5.3.4 *Lack of mandatory consultation when water-use licences are applied for*

The *National Water Act* — in its current form and application — does not compel or require consultation with interested and affected parties, such as indigenous people, residing near the water resources to be used by the mining company. Consultation with interested parties only takes place if and when the responsible authority (DWA) calls for such consultation through the Minister.³⁴¹ It seems that lack of consultation with interested parties affected by mining, such as indigenous people who utilise the local water resources for household and farming needs, will become a problem as communities often lack the capacity and resources to stand up to mining companies permitted by the DWA to utilise the same water resources as the community.

5.3.5 *Absence of specialised environmental practitioners during MPRDA impact assessment*

Unlike the regulations of NEMA Environmental Impact Assessment 2010, which expressly require an impartial and independent environmental assessment practitioner to administer and to monitor the environmental process as required by NEMA provisions,³⁴² the regulations of the MPRDA do not expressly require the appointment of an impartial and independent environmental assessment practitioner to monitor the EIA required by the MPRDA. The lack of an impartial and EIA practitioner during the MPRDA impact assessments is a weakness which currently exists in the South African environmental legal framework, which weakness can possibly permit mining companies applying for prospecting and mining rights to ignore complying with the provisions of the MPRDA, which require proper EIA and consultation with interested and affected parties, owing to the lack of an independent party who oversees these prescribed processes.³⁴³

341 Ss 41(1), (2) and (3) *National Water Act*.

342 Chapter 3 ss 16(1) and (2) NEMA reg no R543 GG 33306 of 18 June 2010.

343 *Bengwenyama-ye-Maswati Community (CC)* para 9.

Further to this, is the lack of stringent control by the state when the MPRDA EIA, EMP and other programmes are conducted and lack of verification when these results are submitted to environmental authorities.³⁴⁴ Indigenous people often lack resources to object to the results of the EMP and programme and the EIA.³⁴⁵ The lack of technical skills and capital resources of indigenous people to challenge documentary proof submitted to the state and to interrogate the applicant mining company regarding communal land use for mining purposes, lack of independent verification of the environmental documents of the mining company, unequal authority and lack of negotiating skills of indigenous people seem to be reasons why mining companies easily ignore meaningful consultation processes with indigenous people negatively affected by mining operations in the vicinity of their communal land.³⁴⁶

5.3.6 Lack of mining skills of traditional leadership

Another weakness in our governance is that traditional leadership structures of indigenous people consist of *dikgosi* and *bakgomane* (chiefs and headmen in Setswana). They seem to be informed insufficiently and without the technical knowledge required to counter the mining company's disregard of and non-compliance with the provisions of the MPRDA and NEMA, when mining takes place in or in the vicinity of communal land.³⁴⁷ The roles of traditional council structures, tribal authority and *dikgosi*, when it comes to communal affairs are, however, recognised in the *Traditional Leadership and Governance Framework Act*.³⁴⁸ The provisions of the MPRDA and NEMA, which require prior consultation with indigenous people and active participation of the community

344 *Bengwenyama-ye-Maswati Community* (CC) para 9.

345 *Bengwenyama-ye-Maswati Community* (CC) para 9.

346 <http://www.coalofafrica.com> follow the Vele Project in Musina. See also <http://www.lhr.org.za> follow Kgobudi community challenges Platreef (Pty) Ltd interdict to keep of their land. See also <http://www.lhr.org.za> follow residents of Silobela, Caro Park and Carolina communities in Mpumalanga protest against acid mine water (North Gauteng High Court case no 3567/12 unreported).

347 Manson and Mbenga 2003 *JSAS* 294–296; Mitchell *et al* 2012 *J S Afr Inst Min Metall* 7

348 Mitchell *et al* 2012 *J S Afr Inst Min Metall* 7; Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 1–2.

when communal land is to be used for mining operations, is therefore a matter which traditional leaders are unfamiliar with.³⁴⁹

5.3.7 *Internal divisions*

The scattered villages of indigenous people coupled with chieftainship and internal strife among royal family members often occur when communal land is to be used for mining operations.³⁵⁰ The communal internal strife and divisions seem to render consultation between indigenous people and applicant mining-company representatives difficult. As a result of community members arguing among themselves, mining company representatives would potentially struggle to identify the pertinent persons to be consulted, who have the paramount power to speak for and to represent the community in matters concerning communal land use for mining. It has been reported that Chief Nyalana Pilane of the Bakgatla ba-Kgafela situated in the mining area of Moruleng consisting of 32 villages outside Rustenburg is faced with a secession challenge by some surrounding villages and leaders to break away from his chieftaincy.³⁵¹ This is as a result of a failure by the community to reach consensus on the use of mining proceeds paid by platinum mining companies operating in the area

5.3.8 *Misuse of BEE structures*

The preamble to and section 12 of the MPRDA provide for historically disadvantaged South Africans to participate in and have ownership of the mining industry through BEE structures when minerals are explored and traded.³⁵² As a result of the manner in which traditional leaders were reported to have co-opted some community members to become directors of the BEE company — when XolCo was established on behalf of the Amadiba community

349 Smith *et al* "Complex commons under threat of mining" 8–9; Badenhorst, Olivier and Williams 2012 *JSAL* 128.

350 Gqada "Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project" 18; Pienaar 2012 *PELJ* 158–159; Pienaar 2007 *EJCL* 5–6.

351 Sibase *The Sunday Times: Business Times* 15 September 2013 31.

352 Gqada "Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project" 20; Leon "South African Mining Industry at the Cross Roads" 6.

in the Eastern Cape — without such directors appearing on company letterheads,³⁵³ it can therefore be inferred that traditional leaders can easily be hoodwinked, be manipulated and be corrupted by mining company representatives with gifts such as vehicles and cash when BEE structures are formed and negotiations for the use of communal land for mining take place.³⁵⁴ Corruption is obscured with BEE structures disguised as economic interventions meant to benefit the general community, while in reality only the select few in the community benefit.³⁵⁵ XolCo is an example of BEE structures abused by indigenous people. This may have been the underlying reason why traditional leaders were reported to have co-opted some of the Amadiba community members to become directors of XolCo (although not on official company documents). Traditional leaders also coerced and later manipulated Amadiba community members to support the mining initiative by Transworld Energy and Minerals Limited on communal land.³⁵⁶ Another example of a BEE structure — formed to represent the interests of the general community members when a mining project was initiated on land of indigenous people — later misused is the Bengwenyama Minerals Proprietary Limited. This was created to be a joint venture with Genorah Resources when the DMR granted Genorah Resources the prospecting right to carry out operations on the communal land of the Bengwenyama-ye-Maswati. It was reported that the formation of Bengwenyama Minerals Proprietary Limited had led to internal strife between traditional leaders and the community members, with the major dispute being who should become directors of this enterprise.³⁵⁷ It has further been reported that the community of Ga-Pila village in Mokopane was relocated from their ancestral land to make way for Anglo Platinum (Amplats)

353 Gqada "Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project" 18.

354 Gqada "Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project" 20; Leon "South African Mining Industry at the Cross Roads" 6.

355 Gqada "Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project" 20; Leon "South African Mining Industry at the Cross Roads" 6.

356 Gqada "Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project" 21.

357 Mitchell *et al* 2012 *J S Afr Inst Min Metall* 5; Badenhorst, Olivier and Williams 2012 *JSAL* 125.

operations and promised decent houses (R100 000.00 per family and 21 percent shareholding in the company through a section 21 BEE entity). Seven years down the line the community reports that they were only paid a once-off R5000.00, given a far smaller living area, no land for grazing their livestock and farming, undrinkable water and a tougher way of life.³⁵⁸

It is common cause that, as soon as traditional leadership is divided, leaders have different views regarding communal land use for mining purposes in contrast to that of the community members in general. Such divided leadership would have compromised the standing of the community *vis-à-vis* the mining company. It is possible, as well, as a result of misuse of BEE structures for the community to be divided on whether to support the mining project and operations on the communal land or not. Tension and internal strife among the indigenous people and traditional leadership seem to be probable when the community and the leaders do not have a common ground and consensus during consultations between the community and representatives of the applicant mining company, to discuss the possible (or inevitable) use of communal land for mineral exploitation.

5.4 Conclusion

The strengths and weaknesses of South Africa's existing framework for the protection of procedural rights as assessed above indicates that both the Constitution and legislation acknowledge the need for communities affected by government decisions (e.g. mining-related decisions) to be involved in the decision-making process and to be able to approach courts of law and challenge administrative decisions taken by the state at various levels. The significance of having a functioning and independent judiciary is that when interpreting existing legal frameworks and governance and pronouncing on precedents, the courts should adopt an approach which encourages sustainable development and responsible mining whereby communities and mining companies are encouraged to protect the environment and mineral

358 Sibase *The Sunday Times: Business Times* 8 September 2013 8.

resources. Having discussed the existing strengths and weaknesses in the legal framework, the next chapter provides a conclusion and recommendations emanating from this study.

CHAPTER 6

Conclusion and recommendations

6.1 Conclusion

Historically the rights of access to information, to be consulted, access to courts and participation of indigenous people — who lived on or near land to be mined — were limited by racially discriminating laws which favoured the previous government in South Africa and mining companies while ignoring vulnerability concerns of indigenous people.³⁵⁹ Legislation — which enabled the creation of unequal bargaining and use of force by the state against indigenous people who owned and lawfully occupied land intended to be mined — included the *Development Land and Trust Act*, the *Natives' Land Act* and the *Minerals Act*, as described in chapter 2.³⁶⁰ Even though by 1991 many racially discriminating laws had been abolished, the *Minerals Act* did not address the injustice and imbalances of the past which excluded the rights of indigenous people of access to information held by the state and mining companies, to be consulted and actively to participate when mining takes place.

Indigenous people and traditional communities in South Africa have always used consultation among themselves and between themselves and outsiders as a means of promoting and protecting their interests with regard to the use of their communal land.³⁶¹ This practice of consulting among themselves and also with non-residents was reaffirmed by the Constitutional Court in the Richtersveld Community case, when the court described how the Richtersveld community and their traditional leaders were forcefully removed from their ancestral land without being consulted and compensated by the previous government in South Africa.³⁶² The role of traditional council structures, tribal authority and the role of the *dikgosi* when it comes to communal affairs is,

359 Harington, McGlashan and Chelkowska 2004 *J S Afr Inst Min Metall* 67.

360 Smith *et al* "Complex commons under threat of mining" 5; Leon "South African Mining Industry at the Cross Roads" 3.

361 Smith *et al* "Complex commons under threat of mining" 8-9; *Richtersveld Community (CC)* case para 7-8.

362 *Richtersveld Community (CC)* case para 7-8.

however, recognised in the *Traditional Leadership and Governance Framework Act* as highlighted in chapters 2 and 5.

Vesting ownership of South African's mineral wealth in all South Africans (including indigenous people) provided by section 3 of the MPRDA — as described in chapter 4 and discussed in the case of *Meepo v Kotzé and Others* above — is therefore among the strengths in the South African legal framework. Indigenous people detrimentally affected by mining can and should rely on the MPRDA section 3, among other provisions, to be consulted timeously and to be provided with the information community members may require to protect any of their rights. It also seems that vesting ownership of mineral wealth in all South Africans and held in custody by the state can be a measure which should be used to enable indigenous people, affected by mining, actively to participate when mines are opened and operated on their communal land, and also to apply for preferent rights in terms of section 104 of the MPRDA, as discussed in chapter 4.

Indigenous people live in an integral manner as a community or social unit under the auspices of traditional leadership and prevailing customs, as discussed in chapter 2.³⁶³ Consultation with the community at large is therefore arguably the most important aspect of the involvement of indigenous people in mining operations in or near their communal/ancestral land. Consultation with indigenous people collectively as a community is vital, even if their traditional leadership is entrusted with powers and the authority to make binding decisions on matters affecting communal land in terms of the *Traditional Leadership and Governance Framework Act*.³⁶⁴ This is because consultation (or lack thereof) of mining companies with indigenous people in a scattered, flawed and fragmented manner may become a trigger for community uprising, divisions or internal strife as a result of community members failing to reach consensus

363 Bennet *African Customary Law* 9; Pienaar 2012 *PELJ* 158–159; Mukundi "Constitutional, legislative and administrative provisions concerning indigenous people" 3.

364 Smith *et al* "Complex commons under threat of mining" 5; Badenhorst, Olivier and Williams 2012 *JSAL* 114.

regarding the application of mining rights on their land, as discussed in chapter 5.³⁶⁵

The MPRDA and NEMA legislation together with their respective regulations explicitly provides procedures and timeframes which must be followed when interacting and consulting with interested and affected parties, as discussed in chapter 4.³⁶⁶ With the application of both the MPRDA and NEMA regulations, consultation with indigenous people affected by mining should not be a mere formal process whereby a representative from the traditional leadership structure is asked by the applicant mining company to tick "Yes" or "No" in spaces provided on a "consultation form", as reported in the Bengwenyama-ye-Maswati case.³⁶⁷ Consultation between the parties must be a genuine and constructive engagement of minds between the consulting and consulted parties as discussed above in chapter 4.³⁶⁸

It can be inferred from the Smit case discussed above in chapter 4 that flawed consultation with interested and affected parties by the company applying for prospecting or mining rights should be declared null and void on the basis of contravening the MPRDA regulations which require consultation, publication and notice of the application, as discussed in chapter 4. It is submitted that the Bengwenyama-ye-Maswati case is a classic Constitutional Court case whereby prospecting rights granted by the DMR to a mining company pursuant to a flawed consultation process with the community owning the affected land was reviewed and set aside by a court of law at the instance of the aggrieved indigenous people having been detrimentally affected by the granting of such prospecting right, as discussed in chapter 4.

It remains to be seen to what extent the *MPRDA Amendment Act*, as discussed in chapter 4, in practice will accommodate and will protect statutorily procedural

365 Smith *et al* "Complex commons under threat of mining" 5; Badenhorst, Olivier and Williams 2012 *JSAL* 114.

366 Ss 5(4)(c), 10, 16(4)(b), 22(4)(b), 33, 37 and 39 MPRDA; ss 16(1) and (2) NEMA EIA Regulations no R345 GG 33306 of 18 June 2010; Chapter 6 NEMA Regulations no R345 GG 33306 of 18 June 2010.

367 *Bengwenyama-ye-Maswati Community (CC)* para 9.

368 Mitchell *et al* 2012 *J S Afr Inst Min Metall* 4; Badenhorst, Olivier and Williams 2012 *JSAL* 127.

rights of indigenous people affected by mining to be timely, formally and effectively consulted by mining companies applying for prospecting and mining rights, to carry out operations on land owned and lawfully occupied by indigenous people. It is submitted that with the prevailing mining-related legislation and governance — the Constitution as the supreme law of the Republic of South Africa, PAIA and PAJA as administrative law legislation, the MPRDA as mining framework legislation, NEMA as the environmental framework legislation and various sector-specific legislation which govern, protect and manage the environment, specifically when mining takes place, as discussed in chapters 3 and 4 of this study — the right of indigenous people affected by mining to be consulted and to have access to information held by the state and others, such as mining companies, is thus provided for and protected. Therefore these communities can and should enforce the right to fair and reasonable administrative justice as provided by the Constitution and other legislation. Various pieces of legislation, discussed in chapters 3 and 4, together with the Constitution, also permit indigenous people affected by mining to be provided with written reasons for the decisions taken by the state, relating to the granting of prospecting and mining rights and the use of communal land for mining purposes.

It can also be inferred from the reasoning of the VEJA case discussed above in chapter 3 that community participation in environmental governance, assessment of compliance by companies and access to environmental records do not usurp and/or negate the role of the state in environmental governance. Community participation can at least constitute a vital collaboration between the state and private entities in order to ensure achievement of constitutional objectives and access to information by interested and affected parties.³⁶⁹

It is important to note that the legal framework identified in this study is not exhaustive and only reflects some of the existing provisions that are available generally and could be useful to protect and to promote the statutory rights of

369 *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal SA Limited and ArcelorMittal SA Limited* (South Gauteng High Court Case No. 39646/12 unreported) para 14-16.

indigenous people affected by mining in South Africa. It is hoped that further in-depth research will reveal more angles in the intersecting field of procedural rights protection and mining. The issues identified thus far are useful for further investigation of the legal framework on the subject of indigenous people affected by mining.

6.2 Recommendations

The following are some of the key issues this study identifies and recommends as deserving the attention of the state in a bid to address statutory procedural rights of indigenous people affected by mining:

- Indigenous peoples who own and lawfully occupy land to be mined and other interested and affected parties, as well as the regional offices of the DMR, should simultaneously and formally be informed by the applicant mining company when an application for prospecting or mining rights is lodged with the DMR. South Africa should therefore move away from the current practice in the mining industry whereby the community which owns land to be mined is informed about the prospecting or mining right months or years after the application has been received, considered and mining rights granted by the DMR to the mining company, as was the situation in the Bengwenyama-ye-Maswati community case, as discussed in chapter 4. The approach recommended may solidify and give more effect to section 104 of the MPRDA, which affords preferent rights to communities wishing to apply for prospecting or mining rights on their communal land.
- Indigenous people who own the land to be mined, members of the public, interested and affected parties, officials from the DMR, the DWA, the DEA and the mining company applying for prospecting or mining rights should be mandated or required — by the MPRDA and/or NEMA regulations — to hold a meeting that must be attended by all stakeholders mentioned, so that every interested and affected party can have an opportunity to clarify environmental and mining impacts (good or bad) which may arise as a result of the proposed mining operations on

communal land. This recommended meeting of all stakeholders should take place *prior* to the application for prospecting or mining rights being lodged with the DMR. This will also enable the applicant mining company submitting the application for prospecting or mining rights to the DMR to be assured that landowners and other interested and affected parties have been consulted formally with regard to the intended operations on or near the communal land. Minutes of such prior meeting should be available to all stakeholders and interested and affected parties who attended the meeting, without them having to request such minutes through legal processes in terms of provisions of PAIA and PAJA.

- As soon as the DMR has granted mining-related rights to third parties other than the community which owns the land affected, such third party should carry out mining operations in a responsible and lawful manner and should exploit minerals that lie underneath the communal land with or without active participation of the local community which owns and lawfully occupies the affected land. The DMR and such a third party holding the mining right must have an obligation to make the mining-works programme and all mining and environmental authorisations granted by the DMR, the DEA and the DWA available to the community so that the community and other interested and affected parties are fully aware of the imminent operations on or near the land. Records of such authorisations should be available to the community owning the land, without the community having to request such records through legal processes in terms of provisions of PAIA and PAJA.
- If mining operations are permitted to take place on or near restricted and protected areas such as world heritage sites, the financial provision for remediation of environmental damages and impacts in terms of section 41 of the MPRDA must also be approved by the DEA and/or the DWA in consultation with interested and affected parties, and not only by the DMR, as is currently the practice in the mining industry.
- All mining and environmental related authorisations and processes such as scoping reports, EIA, and other environmental programmes must be

submitted to an independent specialist for independent review and verification, to obtain a second opinion which can be used to confirm initial findings. This recommended corroborating process will ensure that indigenous people who live on or near the mining operations have an opportunity to verify the environmental authorisations of the mining company independently and to ensure that the community participates in the finalisation of such authorisations, where necessary. It will also ensure that the constitutional right of interested and affected parties to live in a healthy environment is being protected before authorities finalise the authorisations. Records of independent specialists verifying environmental and mining authorisations should be available to the community and interested and affected parties, without the latter having to rely on legal processes in terms of the provisions of PAIA and PAJA to have access to such information.

- With the traditional form of leadership of indigenous people — an authority officially recognised in the Constitution and the *Traditional Leadership and Governance Framework Act* — practical involvement and participation of traditional leaders should be encouraged and be recognised in the national, provincial and local houses of traditional leaders so that these leaders can raise and advocate for vulnerability concerns affecting indigenous people in mining areas.
- The South African Human Rights Commission, established in terms of chapter 9 of the Constitution, should set up a specific unit to deal with concerns of and human rights violations against indigenous people; especially in regions where land is communally owned and large-scale mining operations are taking place in provinces such as Limpopo, North West, Mpumalanga and the Northern Cape.
- Within the current legislative framework, the offence of mining or prospecting without a right or authorisation granted and/or without consulting with the landowner, attracts a less punitive penalty to the infringing party; which often happens to be mining companies

encroaching on privately owned land.³⁷⁰ This is because the maximum penalty under the MPRDA is R100 000 or two years' imprisonment or both.³⁷¹ In contrast, commencing a listed activity without authorisation under NEMA can attract a maximum penalty of R5 million or 10 years' imprisonment.³⁷² It is submitted that mining, by its very nature, is an activity which greatly encroaches on the rights of other people. This can be worse if such mining is carried out without authorisation. It is therefore recommended that the maximum penalty under the MPRDA for carrying out prospecting or mining operations without approval or authorisation and/or without consulting with the landowner be increased to R5 million or 10 years imprisonment or both.

- Within the current legislative framework, for the criminal offence of not complying with a directive from the DMR, the maximum penalty under the MPRDA is R100 000.³⁷³ In contrast, in addition to the so-called "polluter pays" principle,³⁷⁴ non-compliance with a NEMA compliance notice can attract a maximum penalty of R5 million or 10 years' imprisonment.³⁷⁵ It is submitted that non-compliance with DMR directives should be strictly penalised as well. Non-compliance with the MPRDA provisions — which may have led to the DMR issuing a directive — may have caused serious environmental damages and/or risks to the land affected. Each case must still be considered on merit, even when the penalty for non-compliance with the DMR directives is increased. It is

370 S 99(1)(a) MPRDA. See request letter as prepared by the CER to the Minister of Mineral Resources to exercise her discretion under s 49 of the MPRDA to prohibit and restrict prospecting and mining in areas of critical biodiversity and hydrological value sensitivity CER 3.1M/F para 3–5.

371 S 99(1)(a) MPRDA. See request letter as prepared by the CER to the Minister of Mineral Resources to exercise her discretion under s 49 of the MPRDA to prohibit and restrict prospecting and mining in areas of critical biodiversity and hydrological value sensitivity CER 3.1M/F para 3–5.

372 Chapter 8 s 71(2) NEMA EIA reg no R543 GG 33306 of 18 June 2010. See request letter as prepared by the CER to the Minister of Mineral Resources to exercise her discretion under s49 of the MPRDA to prohibit and restrict prospecting and mining in areas of critical biodiversity and hydrological value sensitivity CER3.1M/F para 3–5.

373 S 99(1)(a) MPRDA. See request letter as prepared by the CER to the Minister of Mineral Resources to exercise her discretion under s 49 of the MPRDA to prohibit and restrict prospecting and mining in areas of critical biodiversity and hydrological value sensitivity CER3.1M/F para 3–5.

374 Ss 28(1) and (2) NEMA; Du Plessis 2008 *SAPLJ* 90.

375 Chapter 8 s 71(2) NEMA EIA reg no R543 GG 33306 of 18 June 2010.

therefore recommended that the maximum penalty for non-compliance with the directives of the DMR in terms of the MPRDA be increased to R5 million or 10 years' imprisonment as well.

In concluding this study, it is submitted that the state must play a rigorous role as the grantor and regulator of prospecting and mining rights in South Africa. Stringent and tough state participation when mining-related rights are granted can bring about a balancing act when it comes to mineral exploitation by local and international mining companies, improvement of national economy, and protection of statutory procedural rights of indigenous people who own land on which minerals will be exploited. Indigenous people who are found owning and lawfully occupying the land affected are and should be treated as the hosting parties, not tenants with temporary dwelling rights, and worthy of being consulted prior to the commencement of operations on their land.

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31