

Remedies for human right abuses by multinational corporations

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Dedication

To the many mineworkers who push their bodies to the limits and have moved this country to where it is.

Abstract

Internationally, the debate on business and human rights has evolved within the last decade, with more efforts being made to address the issue of what role corporations play in the human rights domain. The latest international effort to address the issue was the adoption of the *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework”* by the United Nations Human Rights Council in 2011. In brief, the Guiding Principles observe that the state must protect human rights, that businesses must respect human rights, and that there should be effective remedies for human rights violations.

Locally, the Constitutional Court of South Africa ruled that mineworkers who are eligible to get compensation under the *Occupational Diseases in Mines and Works Act* had a common law right to sue the employer for injuries sustained at work. This was despite the fact that legislation was put in place to replace the common law liability of an employer for injuries or death sustained at work. On a broader scale, the Guiding Principles then formed the yardstick for the determination of whether there are adequate and effective remedies for human rights violations in the South African mining industry.

The investigation essentially leads to the conclusion that the South African state has not fallen short of its duty to protect and to provide sufficient remedies for business-related human rights violations in the mining industry. The forums are in place and there is legislation that also provides for compensation as remedies for either injuries or death at work. Some issues of concern are the accessibility of the structures in place to address human rights violations, the disparity between compensation provided for in different legislation, and the lack of a more proactive approach by the Human Rights Commission.

Keywords

Guiding Principles, business and human rights, state duty to protect, effective remedies, judicial mechanisms, non-judicial mechanisms

Opsomming

Gedurende die afgelope dekade het die debat oor besigheid en menseregte internasionaal ontwikkel, met die klem op wat die rol van groot besighede in die menseregte domein behoort te wees. Die mees onlangse internasionale poging om hierdie saak aan te spreek, is die *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework"*, deur die United Nations Human Rights Council in 2011. Kortliks bepaal die *Guiding Principles* dat die staat verantwoordelik is vir die beskerming van menseregte, dat besighede menseregte moet respekteer, en dat daar effektiewe remedies vir menseregteskendings behoort te wees.

Plaaslik het die Konstitusionele Hof van Suid-Afrika bepaal dat mynwerkers wat in aanmerking kom vir kompensasie onder die *Occupational Diseases in Mines and Works Act*, onder die gemene reg die reg het om die werkgever te dagvaar vir beserings aan diens. Dit is nieteenstaande die feit dat wetgewing in plek geplaas is om die gemenerereg aanspreeklikheid van 'n werkgever vir beserings aan diens of dood gedurende werk te vervang. Op 'n groter skaal verskaf die *Guiding Principles* die maatstaf waarteen die effektiwiteit van remedies vir menseregteskendings in die Suid-Afrikaanse mynindustrie gemeet word.

Die konklusie waartoe hierdie studie kom, is dat die Suid-Afrikaanse staat voldoen aan die plig om menseregte te beskerm en voorsiening te maak vir voldoende remedies in gevalle waar groot besighede skuldig is aan menseregteskendings in die mynindustrie. Forums is in plek, en wetgewing maak voorsiening vir kompensasie waar beserings of afsterwe aan diens plaasvind. Daar is egter sekere redes tot kommer, soos die toeganklikheid van strukture om menseregteskendings te adresseer, die verskil in kompensasie deur verskillende wetgewing gespesifiseer, en die tekort aan 'n pro-aktiewe benadering deur die Menseregte Kommissie.

Sleutelwoorde

Guiding Principles, besigheid en menseregte, staat se plig om te beskerm, effektiewe remedies, regtelike meganismes, nie-regtelike meganismes

Index

Acknowledgements	i
Dedication	ii
Abstract / Opsomming	iii
Index	v
List of abbreviations	viii
1 Problem statement	1
1.1 Introduction	1
1.2 Business and human rights	2
1.3 Efforts to address the issue of business and human rights	3
1.4 The Guiding Principles	6
1.4.1 <i>Relevance of the Guiding Principles</i>	7
1.5 The role of mining in South Africa	9
1.6 Problem statement and substantiation	9
1.7 Aims of the study	10
1.8 Research methodology	11
1.9 Chapter outline	11
2 The duty to protect and the nature of remedies	13
2.1 Introduction	13
2.2 Legal framework governing the state duty to protect	13
2.3 The Guiding Principles and the duty to protect	17
2.4 The Guiding Principles and access to remedies	18
2.4.1 <i>Judicial remedies</i>	19

2.4.2	<i>State based non-judicial grievance mechanisms</i>	21
2.4.3	<i>The involvement of businesses</i>	22
2.5	<i>Criterion for measuring the effectiveness of non-judicial mechanisms</i>	23
2.5.1	<i>The mechanisms must be legitimate</i>	23
2.5.2	<i>The mechanisms must be accessible</i>	24
2.5.3	<i>The mechanism must be predictable</i>	24
2.5.4	<i>The mechanisms must be equitable</i>	24
2.5.5	<i>The mechanisms must be transparent</i>	25
2.5.6	<i>The mechanisms must be rights-compatible</i>	25
2.5.7	<i>The mechanisms must be a source of continuous learning</i>	25
2.6	<i>Conclusion</i>	26
3	<i>The South African framework for remedies</i>	27
3.1	<i>Introduction</i>	27
3.2	<i>Common law remedies</i>	27
3.2.1	<i>An action for damages</i>	28
3.2.2	<i>Interdicts</i>	32
3.2.3	<i>Summary</i>	33
3.3	<i>Constitutional litigation</i>	33
3.3.1	<i>Constitutional remedies</i>	35
3.4	<i>Legislative framework that provides for remedies</i>	38
3.4.1	<i>Occupational Diseases in Mines and Works Act</i>	39
3.4.2	<i>The Compensation for Occupational Injuries and Diseases Act</i>	40
3.4.3	<i>The National Environmental Management Act</i>	41
3.5	<i>The South African Human Rights Commission</i>	43
3.5.1	<i>Clarifying the mandate of the SAHRC</i>	44
3.5.2	<i>The report of the SAHRC against Anglo Platinum</i>	45
3.6	<i>Selected cases</i>	46
3.6.1	<i>Mankayi v AngloGold Ashanti Ltd</i>	46
3.6.2	<i>Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty)</i>	48

<i>Ltd</i>	
3.7 Conclusion	50
4 Summary and conclusion	51
4.1 Introduction	51
4.2 Summary of the chapters	51
4.3 Conclusions	52
4.3.1 <i>Legal remedies</i>	53
4.3.2 <i>Legislation</i>	53
4.3.3 <i>SAHRC</i>	54
4.4 Recommendations	55
Bibliography	58

List of abbreviations

ACHPR	African Charter on Human and People's Rights
Alt L J	Alternative Law Journal
CLR	California Law Review
Denv U L Rev	Denver University Law Review
ELLJ	European Labour Law Journal
Hum Rts Q	Human Rights Quarterly
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
IOE	International Organisation of Employers
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
PELJ	Potchefstroom Electronic Law Journal
SAHRC	South African Human Rights Commission
SAIFAC	South African Institute for Advanced Constitutional, Public, Human Rights and International Law
SOMO	Centre for Research on Multinational Corporations
TB	Tuberculosis
Tex Int'l L J	Texas International Law Journal
UN	United Nations
Vanderbilt J Transnat'l L	Vanderbilt Journal of Transnational Law

1 Problem statement

1.1 Introduction

Soon after the Second World War, there were efforts to bring human rights onto the forefront.¹ This led to the formation of the United Nations² and the crafting of the most comprehensive codification of human rights norms in the form of the *Universal Declaration of Human Rights* (UDHR).³ The UDHR has had a lasting impression on both world politics and governance,⁴ such that it has been held to be a contract between a government and its people.⁵ This understanding shows the distinction between the state and individuals; the state has the power to regulate and enforce rights (human rights/fundamental rights) and individuals are the holders of these rights and are worthy of protection. This distinction has been held to be “premised on a notion of the state as the ultimate guardian of its population's welfare”.⁶ It is with this understanding of the history of human rights that Ibrahim⁷ notes that:

We are living in a world in which the moral legitimacy of cultures, religions, ideologies, and the practices of states, international organizations, and even corporations is being measured against human rights norms.

While politicians have advanced the cause for sovereignty, the cause of human rights has been advocated for by NGO's.⁸ The importance and relevance of human rights in modern day political or social integration can no longer be ignored. The actions of every player on the international scene has to be looked at from a human rights perspective, with the result that actions that violate or have a potential to violate human rights do not remain matters of individual, but national and international, concern.

¹ Flowers Date Unknown www1.umn.edu.

² October 24, 1945.

³ *Universal Declaration of Human Rights* (1948).

⁴ Blitt 2012 *Tex Int'l L J* 38.

⁵ United For Human Rights Date Unknown www.humanrights.com. The importance of the UDHR is of such a magnitude that it has been considered to be the most translated document in the world according to the Guinness Book of World Records.

⁶ Jochnick 1999 *Hum Rts Q* 58.

⁷ Ibrahim 2013 *German Law Journal* 321.

⁸ Chandler “Evolution of the Business and Human Rights Debate” 23 and Blitt 2012 *Tex Int'l L J* 57.

1.2 *Business and human rights*

International law recognises the state as the bearer of responsibilities and individuals as the bearers of rights.⁹ This has led to the current debate on business and human rights wherein some commentators argue that, because of the growth of big corporations and the effects of globalisation, corporations should be given human rights responsibilities as non-state actors.¹⁰ Ruggie¹¹ has summarised the current debate in the following way:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization-between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.

Some authors go as far as claiming that the potential impact of the decisions and activities of multinational corporations are capable of doing more harm than decisions and activities of states.¹² Other commentators argue that human rights are not the business of companies, but the business of governments, with violations of human rights to be regarded as “internal political issues” in which companies “should on principle not interfere”.¹³

What makes the debate more interesting, is the fact that some corporations have grown as big as to even outperform the national economies of some states.¹⁴ This turn of events has many consequences, including the fact that these big corporations could be able to command so much power that they can even dictate terms where

⁹ Jochnick 1999 *Hum Rts* Q 58.

¹⁰ Many authors agree on the fact that there still is a debate on whether corporations should be given responsibilities. In that regard see Knox “Ruggie Rules” 51, 61; Paust 2002 *Vanderbilt J Transnat’l L* 802 and Blitt 2012 *Tex Int’l L J* 37.

¹¹ Ruggie *Protect, Respect and Remedy* 189.

¹² Paust 2002 *Vanderbilt J Transnat’l L* 802.

¹³ Chandler “Evolution of the Business and Human Rights Debate” 24.

¹⁴ Kinley and Joseph *Alt L J* 9 and Blitt 2012 *Tex Int’l L J* 36. It is further noted that the 100 biggest corporations in the world have grown bigger than many nation states. Blitt then quotes Charles Handy who argued that “if we haven’t bothered much about these things in the past, it is probably because we never thought of businesses as political institutions, but rather as engines and instruments of commerce, as machines not communities. We did not, therefore, apply the same rules to them as we would to a nation-state, where matters of human rights, free speech and the responsibility of governors to the governed would be argued about and even fought over”.

they operate. For instance, Ozden¹⁵ argues that some transnational corporations dictate their agendas to the weakest countries and exploit the people while controlling and reinforcing their hold on natural resources of the planet. In such a situation, the arguments of most NGOs and critics that there should be some form of responsibility on corporations in relation to human rights, cannot be ignored. Business affects human rights in many ways. For example, in the mining sector, there are health rights, labour rights, environmental rights and even other rights like dignity. Without business most economies would not run, yet without a respect for human rights international law may be violated. Therefore, there should be regulation of businesses so that they operate within defined and accountable parameters.

These concerns have characterised the debates on business and human rights. As a result, efforts have been made internationally to try and attend to these concerns. These will be discussed below.

1.3 Efforts to address the issue of business and human rights

There have been various attempts to regulate the sphere of business and human rights. Many of the attempts have, however, been in the form of non-binding soft laws which do not provide a legal framework that is enforceable. However, in the course of this study it will be argued that lack of a treaty or binding covenant on this issue is not necessarily a setback to the effective protection of human rights, because there are international standards which impose obligations on states to act. The nature of these obligations requires the state to regulate business and human rights within its territory.

The Organisation for Economic Cooperation and Development produced voluntary guidelines in 1976 titled *OECD Guidelines for Multinational Enterprises* (herein after referred to as the OECD guidelines). These guidelines are comprehensive and cover issues such as the responsibility of corporations to respect the human rights of those affected by their activities. The foreword to the OECD guidelines¹⁶ states the following:

¹⁵ Ozden *Transnational Corporations and Human Rights* 3.

¹⁶ OECD 2011 dx.doi.org.

The *OECD Guidelines for Multinational Enterprises* are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The *Guidelines* are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting.

What is evident from the start is that they are non-binding and they do not apply to every country. In the realm of business and human rights, the debates that are currently being put forth are not answered by the OECD guidelines, questions like whether there should be human rights obligations on corporations.

In 2000 the former Secretary General of the United Nations initiated the coming into existence of the Global Compact. It has as its foundation ten principles which address human rights and corruption. The Global Compact was set up as an “initiative for businesses that are committed to aligning their operations” with these ten principles.¹⁷ The principles¹⁸ are the following:

1. Businesses should support and respect the protection of internationally proclaimed human rights.
2. Businesses should make sure that they are not complicit in human rights abuses.
3. Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining.
4. Businesses should uphold the elimination of all forms of forced and compulsory labour.
5. Businesses should uphold the effective abolition of child labour.
6. Businesses should uphold the elimination of discrimination in respect of employment and occupation.
7. Businesses should support a precautionary approach to environmental challenges.
8. Businesses should undertake initiatives to promote greater environmental responsibility.

¹⁷ UN Global Compact Date Unknown (a) www.unglobalcompact.org.

¹⁸ UN Global Compact Date Unknown (b) www.unglobalcompact.org.

9. Businesses should encourage the development and diffusion of environmentally friendly technologies.
10. Businesses should work against corruption in all its forms, including extortion and bribery.

The principles do not envisage a working relation between business and the state as the principles are all dedicated to addressing businesses. Still, the Global Compact has met with success in so far as setting standards upon which businesses should act.¹⁹ However, there are some who argue that the fact that the Global Compact is voluntary is a setback and that there is no strict monitoring.²⁰ It is submitted that these arguments fail to realise the impact that the Global Compact has had.²¹ Furthermore, the fact that it is not binding does not detract from the fact that it sets viable principles which, if adopted by businesses, can bring more respect for human rights.

The United Nations Sub-commission on the Promotion and Protection of Human Rights²² made the most serious efforts to try and regulate in the sphere of business and human rights in 1998. This sub-commission sought to introduce norms that went beyond the other voluntary efforts for binding principles. This resulted in the now infamous *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (UN Norms).²³ The biggest undoing thereof was the wording of the norms, which was structured in language that resembles a treaty. It also made bold declarations that were highly controversial. For example, the norms put the state and corporations (as non-state actors) on almost the same footing by including a norm that noted that multinational or transnational corporations and other business enterprises had duties in relation to human rights in

¹⁹ Crane and Matten 2013 sustainablebusinessforum.com. The Global Compact now has over 10 000 participants and over 7 000 businesses.

²⁰ SAIFAC 2008 www.saifac.org.za.

²¹ See note 19 above.

²² This Sub-Commission was made of around twenty six independent experts and had the mandate to make recommendations and proposals on the methods of work and activities of transnational corporations for the purposes of (among other things) promoting the enjoyment of economic, social and cultural rights and also civil and political rights.

²³ *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) (UN Norms).

their spheres of influence.²⁴ The backlash that followed these norms resulted in the UN Sub-commission rejecting them, while acknowledging that the norms contained useful elements and ideas.²⁵

1.4 The Guiding Principles

The rejection of the norms (which were made as an effort to address the issue of business and human rights, with corporations being given responsibilities) meant that there was still no clear authority and guidance on the issue of business and human rights.²⁶ This situation led the then Secretary of the United Nations to commission a special project to be undertaken on business and human rights. There were rigorous consultations on every continent by Professor John Ruggie, the Special Representative of the Secretary-General (SRSG) tasked with coming up with a framework on business and human rights. The project resulted in the formulation of the “protect, respect and remedy” framework which has three legs, namely that the state has a duty to protect human rights, that business enterprises must respect human rights and that states should take appropriate steps to make sure that there are effective remedies for those whose rights have been violated.²⁷

On the 16th of June 2011, during its seventeenth session, the United Nations Human Rights Council made a resolution adopting the ‘protect, respect and remedy’ Guiding Principles on Business and Human Rights (herein after referred to as the Guiding Principles).²⁸

The substance of these Guiding Principles which relate to the state’s duty to protect against human rights violations and the requirement for effective remedies will be the focus of this study. It will be argued that state conduct can be measured against these principles, as will be shown in this study.

²⁴ This was highly welcomed by NGOs but firmly rejected by big business represented by the International Chamber of Commerce. See ICC and IOE 2004 www.reports-and-materials.org, in this regard.

²⁵ See Feeney 2009 *International Journal on Human Rights* 165.

²⁶ See Ruggie *Protect, Respect and Remedy* 190.

²⁷ *UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc A/HRC/17/31 (2011) (hereafter Guiding Principles).

²⁸ Guiding Principles.

1.4.1 Relevance of the Guiding Principles

The lack of hard law²⁹ (in the form of conventions or treaties) on the issue of business and human rights bears proof to the fact that this area is contentious. Guzman³⁰ has argued that there is a general presumption that soft law is less binding than the traditional sources of international law and that states are less likely to comply with them. On the other hand, it has been contended that the Resolutions of the United Nations General Assembly or its committees are not binding, but nevertheless are widely acknowledged to impact the legal obligations of states.³¹ It is also understood that non-binding rules can have legal significance when they shape expectations as to what constitutes compliance with binding rules as shown in the following extract:³²

A glance at General Assembly resolutions and their impact, however, makes it clear that many such resolutions do not represent ICL and yet implicate issues of concern to states, impact debates among states, and appear to affect behaviour. They do so by influencing the expectations of states and shaping the meaning of existing legal rules. In this way, General Assembly resolutions are similar to the rulings of tribunals. They elaborate on what an underlying binding rule of international law requires.

The most persuasive argument for the Guiding Principles is that they are based on already accepted principles and practices of international law as embodied in treaties and conventions that elaborate on the state's duty to protect against human rights violations. The obligation of the state to protect these rights can be traced back to Thomas Hobbes and his theory of the social contract.³³ According to this social contract, individuals cede their power to the state, which in turn offers its protection to all within its territory.³⁴ In other words, the state must protect against human rights violations because people have given up their right to seek their own justice. In the event that there is a violation, the state must ensure that there are mechanisms to

²⁹ The OECD Guidelines and the UN Norms and the Guiding Principles are all soft laws as opposed to covenants and treaties.

³⁰ Guzman 2002 *CLR* 1880.

³¹ Guzman and Meyer 2010 *Journal of Legal Analysis* 216.

³² Knox "Ruggie Rules" 61.

³³ Friend 2004 www.iep.utm.edu.

³⁴ Friend 2004 www.iep.utm.edu.

provide for effective remedies. Without effective remedies, the state will not be fulfilling its duties.

Furthermore, the requirement that the state must provide effective remedies cannot be considered in isolation. It stems from the state obligation to protect against human rights violations as codified in the UDHR, and more importantly in the *International Covenant on Civil and Political Rights* (ICCPR)³⁵ and the *African Charter on Human and People's Rights* (ACHPR).³⁶

In simple terms, the Guiding Principles are relevant because they are rooted in the already established principles of international law. Furthermore, the Guiding Principles have been considered to be “avowedly consistent with the law as *it is* rather than the law as it might someday be”.³⁷ In other words, the Guiding Principles are not some abstract principles that will need new law for them to find acceptance, but they are a reflection of the law that is already in place. Blitt³⁸ puts the argument for the Guiding Principles as follows:

...although SRSG Ruggie's freshly minted Guiding Principles might strike one as plainly non-binding and aspirational today, these same principles can and will find surreptitious ways of growing up and becoming enforceable international norms that may carry serious repercussions for corporations, officers, and ill-prepared shareholders.

The argument made above is sound. The two biggest covenants on human rights were also preceded by a non-binding document, the UDHR.³⁹ There has to be a foundation upon which the issue of business and human rights will be built on. If there will ever be a binding document on business and human rights, the Guiding Principles could be a good source of reference.

³⁵ Article 2.3 *International Covenant on Civil and Political Rights* (1966) (ICCPR).

³⁶ Article 26 *African Charter on Human and People's Rights* (1981) (ACHPR).

³⁷ Knox “Ruggie Rules” 61.

³⁸ Blitt 2012 *Tex Int'l L J* 41. He further goes on to argue the following: “Thus, the story of the UDHR is the story of how aspirational non-binding principles, or ‘soft law’, can evolve continually over time into more durable and enforceable ‘hard law’ - either in the form of a written treaty or in the consolidation of customary international practice.”

³⁹ These are the *International Covenant on Civil and Political Rights* (1966) (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR).

The Guiding Principles are yardsticks against which states can measure their performance in terms of the duties they have in international law. The South African landscape can also benefit by a comparison on what the Guiding Principles say and how the state acts. This study will try to analyse if South Africa is in line with the Guiding Principles, specifically focussing on mining.

1.5 The role of mining in South Africa

Mining is a major industry in South Africa. It significantly contributes to the economy of the country. It has even been argued that it was responsible for the establishment of the Johannesburg Stock Exchange and has shaped South Africa politically, culturally and economically.⁴⁰ South Africa is the largest producer of chrome, manganese, platinum, vanadium and vermiculite, and mining contributes roughly 20% to the economy, and is one of the country's major employers.⁴¹

Mining is done by corporations, some of which are multinational. Thus they form part of the debate on human rights. Furthermore, there are many cases of rights violations in the mining sector, especially health rights. The South African Health Department has noted that South Africa's mining industry has the highest occurrence of tuberculosis (TB) cases annually in the world.⁴²

This study will focus on the mining industry in South Africa, measuring the state's duty to protect and also to provide for effective remedies for violations of rights by corporations.

1.6 Problem statement and substantiation

In South Africa, workers who have suffered human rights violations (for instance, a violation of their right to health or life) in the form of occupational injuries or death in a controlled mine have the *Occupational Diseases in Mines and Works Act*⁴³ (ODIMWA) to rely on. Any other occupational health claims fall under the

⁴⁰ Mining IQ 2013 www.projects iq.co.za.

⁴¹ Mining IQ 2013 www.projects iq.co.za.

⁴² IRIN News 2013 mg.co.za.

⁴³ *Occupational Diseases in Mines and Works Act* 78 of 1973.

*Compensation for Occupational Injuries and Diseases Act*⁴⁴ (COIDA). Other human rights violations could be remedied under the common law as influenced by the *Constitution*. On close scrutiny, ODIMWA remedies the violation of the right to health and the right to life, as workers who contract silicon disease and cancer or TB from work have their health and life compromised.

The case of *Mankayi v AngloGold Ashanti Ltd*⁴⁵ shows the difficulties that are faced by miners whose rights have been violated. This case started in 2006 and ended in 2011, with the victim dying of his disease a week before judgment was given by the Constitutional Court. The case dealt with the effectiveness of statutory remedies as opposed to common law remedies for occupational health claims. From the case it was evident that access to the courts is difficult, with the majority of workers not being able to afford the cost of litigation. This situation is made even worse by the fact that mining corporations have big legal teams and the resources to finance legal proceedings.⁴⁶ The predicament, as shown in the *Mankayi* case, is that in most cases, statutory remedies do not provide sufficient redress for any individual whose rights have been violated by the mining companies. Furthermore, the effectiveness of the available non-judicial mechanisms is called into question, given the struggle and the prolonged period of time from when Mr Mankayi had suffered his injuries until the court gave redress.

As a result, this research will be guided by the following question: to what extent do the South African remedies for human rights violations by mining corporations comply with the requirement for sufficient remedies as adopted in the United Nations' 'protect, respect and remedy' framework?

1.7 Aims of the study

This study will be guided by the following aims:

⁴⁴ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

⁴⁵ *Mankayi v AngloGold Ashanti Ltd* 2011 3 SA 237 (CC) (the *Mankayi* case).

⁴⁶ This is also the case in the *Mankayi* case.

- i. to describe the framework of the duty to provide remedies for business related human rights violations;
- ii. to analyse the remedies that specifically apply in the mining sector; and
- iii. to indicate whether South African remedies qualify as effective remedies as described in the Guiding Principles.

1.8 Research methodology

The methodology to be employed in this research is a qualitative literature study. This method of research is one in which the aim is a detailed description involving analysis of data found in written articles and documents on the issues that will be discussed.⁴⁷ The textual analysis involves international documents and treaties from which standards of conduct are developed, and cases that explain these standards of conduct. This is supplemented by a wide range of academic articles, both international and national that shed some light on the issues. There will be reference to South African case law and legislation in an effort to relate the guiding principles on effective remedies to the South Africa context.

1.9 Chapter outline

Apart from this introduction, chapter two introduces the framework of the Guiding Principles that represents the outline upon which remedies are envisaged. The Guiding Principles which relate to remedies are discussed and elaborated on, mindful of the fact that they are soft law. The chapter also outlines the law (both international and national) against which the Guiding Principles should be understood.

Chapter three will consider the remedies that are applicable in South Africa with respect to violations or threats of violations of rights in the mining industry. The discussion will consider the common law remedies as well as the statutory remedies.

⁴⁷ Neill 2007 wilderdom.com.

The cases to be discussed will be *Mankayi v AngloGold Ashanti* and *Lascon Properties (Pty) Ltd V Wadeville Investment Co (Pty) Ltd*.⁴⁸

The last chapter will provide a summary of the whole discussion and will also make conclusions from the findings. This involves an analysis of the South African position against the yardstick of the Guiding Principles set out in chapter two. The chapter will draw from these findings to make recommendations that might be able to strengthen the position in South Africa as far as effective remedies are concerned.

⁴⁸ The *Mankayi* case and *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) Ltd* 1997 4 SA 578 (W).

2 The duty to protect and the nature of remedies

2.1 Introduction

The state has the duty to protect its citizens against human rights abuses. This obligation is placed on the state by international law. The Guiding Principles are interpretive guides which draw from this responsibility established in international law and elaborate on how this duty should be understood and how it links with the requirement for effective remedies.

This chapter will discuss the origins of the state duty to protect and also explain the duty to provide remedies. The point of departure is that the state duty to protect does not mean anything if the state cannot provide remedies when there is a violation. The Guiding Principles' provisions on the state duty to protect are found in international, continental and national laws. The same reasoning underpins the Guiding Principles on access to effective remedies and the understanding and grounding of these principles will be elaborated on through case law that has pronounced on these principles.

2.2 Legal framework governing the state duty to protect

The Guiding Principles are grounded on international law. This gives them the force of being interpretive guides to international law in so far as matters of business and human rights are concerned.⁴⁹ The *Universal Declaration of Human Rights* has thirty articles that list the rights that everyone is entitled to and is directed at the state.⁵⁰ Article 8 thereof provides that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”. Article 30 states that the Declaration may not be interpreted as implying that any state, group or person may have any rights to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms espoused in the document. Article 8 pronounces that the state is responsible for the protection of human rights and must at all times make efforts to

⁴⁹ Knox “Ruggie Rules” 61 and Blitt 2012 *Tex Int'l L J* 41.

⁵⁰ ICHRP 1999 www.ichrp.org.

ensure that there is access to remedies. Article 30 also declares that the state may not act in a way that violates rights. The UDHR sets out the rights that everyone is entitled to and imposes the obligations to protect these rights on the state.

The *International Covenant on Civil and Political Rights* also provides for the state duty to protect against human rights violations and to provide for effective remedies. Article 2.3 provides for the following:

- 2.3 Each State Party to the present Covenant undertakes:
- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

The ICCPR flows from the UDHR and puts it into a legally binding Covenant. As a result, the state duties are codified into international law which binds the states, whose duty clearly “lies at the very core of the international human rights regime”.⁵¹ The state duty and obligations as stated in the ICCPR has been interpreted by the United Nations Human Rights Committee. General Comment 31 explains this duty by stating that the obligations imposed on states also bind all branches of government and all other governmental or public authorities.⁵² It also states that the state is obliged to protect people against violations of human rights from its own agents and also from private parties and other entities, while in other circumstances a failure by the state to ensure these rights may give rise to a situation where the state itself becomes indirectly complicit in the violations of rights.⁵³ The Human Rights Committee then goes to make an important statement by noting in no unclear terms that states must be aware of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the

⁵¹ Ruggie *Protect, Respect and Remedy* 191.

⁵² See para 4, *UN General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) (General Comment 31).

⁵³ See para 8, General Comment 31.

event of breach under article 2, paragraph 3.⁵⁴ This statement emphasises that the state duty to protect cannot be considered in isolation, but must be considered together with the duty to provide remedies. From the foregoing it is clear that there is a duty placed on the state by the ICCPR from which the state cannot opt out of.

The state duty to protect is also provided for by the African Union's *African Charter on Human and People's Rights*.⁵⁵ Article 26 thereof provides for the following:

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

The *African Charter* reinforces the state duty by outlining that this duty goes as far as setting up the courts and ensuring their independence.⁵⁶ In the landmark case of *Social and Economic Rights Action Centre (SERAC) v Nigeria*⁵⁷ the African Commission made the following remarks:

Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties (see [*Commission Nationale des Droits de l'Homme et des Libertés v Chad (2000) AHRLR 66A (ACHPR 1995)*]). This duty calls for positive action on the part of governments in fulfilling their obligation under human rights instruments.

Similarly, in *Zimbabwe Human Rights NGO Forum v Zimbabwe*⁵⁸ the African Commission states the following:

In fact, international and regional human rights standards expressly require states to regulate the conduct of non-state actors containing explicit obligations for states

⁵⁴ See para 8, General Comment 31. Article 2 thereof requires the state to take positive steps to respect and ensure all individuals' rights by taking legislative and any other steps necessary thereto.

⁵⁵ *African Charter on Human and People's Rights* (1981).

⁵⁶ See note 57 below.

⁵⁷ *Social and Economic Rights Action Centre (SERAC) v Nigeria* 2001 AHRLR 60 (ACHPR 2001) 57. The Commission at 44, further indicates that: "Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights - both civil and political rights and social and economic - generate at least four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties."

⁵⁸ *Zimbabwe Human Rights NGO Forum v Zimbabwe* 2006 AHRLR 128 (ACHPR 2006) 147.

to take effective measures to prevent private violations of human rights. The doctrine of due diligence is therefore a way to describe the threshold of action and effort which a state must demonstrate to fulfil its responsibility to protect individuals from abuses of their rights. A failure to exercise due diligence to prevent or remedy violation, or failure to apprehend the individuals committing human rights violations gives rise to state responsibility even if committed by private individuals.

These cases provide a rich jurisprudence from which African countries can draw from, apart from the already cited international instruments. The most plausible conclusion that can be drawn from the African Commission's rulings is that the duty of the state is now ground in international law as a duty. Therefore, governments must not have the option to choose when not to protect its citizens. The least that can be done is to put measures in place; the effectiveness and enforcement of those matters is a separate concern.

South Africa has gone further by entrenching the duty to protect rights domestically. The Constitution⁵⁹ provides for the state duty to protect by stating that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights".⁶⁰ The Constitutional Court has held that this obligation goes beyond mere negative obligations not to act in a manner that would infringe a right, but also includes positive duties on the state to "take deliberate, reasonable measures to give effect to all of the fundamental rights contained in the Bill of Rights".⁶¹ The Constitutional Court has also found that constitutional obligations "are now placed on the state to respect, protect, promote and fulfil the rights in the Bill of Rights"⁶² and that such duties are placed not only on the state, but also on all of its organs and branches.⁶³

From the above discussions, it can be concluded that the state's duty and obligations regarding human rights are engraved and well supported in law. Professor John Ruggie made sure that the Guiding Principles do not override existing laws, but that they would be built on the foundations of these existing laws. The benefit of his actions is that, when there is uncertainty as to the content and meaning of any of the provisions in the Guiding Principles, there is always the law upon which they were based where one could go to for guidance and clarity. In other words, the state duty

⁵⁹ The *Constitution of the Republic of South Africa*, 1996.

⁶⁰ Section 7(2) of the *Constitution of the Republic of South Africa*, 1996.

⁶¹ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 105.

⁶² *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 57.

⁶³ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 44.

to protect would not mean anything if the state cannot provide the forums for effective remedies. The duty to protect, it is argued, has a corresponding duty to make sure that remedies are available. The following discussions will be about the Guiding Principles that pertain to the state duty to protect and to provide for effective remedies.

2.3 The Guiding Principles and the duty to protect

The first foundational principle in the Guiding Principles affirms the state duty to protect which has been discussed above. The first principle states:⁶⁴

States must protect citizens against human rights violations within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such violations through effective policies, legislation, regulations and adjudication.

The explanation in the notes to the Guiding Principles that follows this statement goes on to assert that the duty to protect is a standard of conduct.⁶⁵ In 2011 the Egyptian government was criticised heavily when it made orders that Vodafone should suspend all mobile and internet services which were then used by the government to send pro-government text messages and to rally calls for action against those labelled as democratic protestors.⁶⁶ The government further invoked emergency rules that made sure that Vodafone could not contest these measures to the authorities. Such actions are contrary to the duty expected of the state. Similar actions that undermine the rights of the people were condemned in the *SERAC*⁶⁷ case where the government of Nigeria had allowed oil consortiums to control operations, and where the military government itself was perpetrating violations of rights of the people in Ogoniland. The standard of conduct expected of the state is high, considering that the state has the responsibility to protect human rights and not to erode them, or to actively undermine them.

⁶⁴ Principles 1 and 3 of the Guiding Principles.

⁶⁵ Principle 3 of the Guiding Principles.

⁶⁶ Tripathi 2011 www.ihrb.org.

⁶⁷ *Social and Economic Rights Action Centre (SERAC) v Nigeria* 2001 AHRLR 60 (ACHPR 2001).

As part of the state duty to protect, the Guiding Principles envision that the state must carry out investigations and thereafter take necessary measures for the prevention of further violations.⁶⁸ In a case decided by the African Commission⁶⁹ the remarks made were that a state is “duty-bound” to conduct thorough investigations and to make sure that measures are taken to prevent similar violations in future. The Commission further agreed with the finding of the Human Rights Committee that failure by a state to investigate allegations of violations “could in and of itself” give rise to a separate breach of the Covenant (ICCPR) by the state itself. The Guiding Principles, therefore, add to this internationally sound reasoning and extension of the duty of the state.

2.4 The Guiding Principles and access to remedies

The duty to provide access to remedies imposes responsibilities on the state. Unlike the UN Norms, the Guiding Principles make it clear that it is only the state that is laden with this responsibility as provided for in international law.⁷⁰ The Guiding Principles provide for the following:⁷¹

As part of their duty to protect against business-related human rights violations, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such violations occur within their territory and/or jurisdiction those affected have access to effective remedies.

This statement sums up the nature of the duty to provide remedies and it indicates that the duty of the state is multifaceted, stretching from judicial to non-judicial mechanisms. While the duty is clear, there are some commentators who have argued that states can sacrifice their duty for other goals like getting more investment in their countries. Anderson⁷² argues that developing countries actually have a disincentive to enact and enforce laws to protect human rights and remedy violations, because they “compete among themselves for a limited pool of

⁶⁸ Principles 1 and 3 of the Guiding Principles.

⁶⁹ *Madoui v Algeria* 2008 AHRLR 3 (HRC 2008) para 9.

⁷⁰ Business entities are not included when the protection of human rights is mentioned. However, there is still much debate on the place and role of business in the sphere of human rights. They are big players and some argue for responsibilities in the form of legal cords to be imposed on business entities because they are the main culprits.

⁷¹ Principles 25 and 27 of the Guiding Principles.

⁷² Anderson 2010 *Denv U L Rev* 13.

investment” and that this results in governments making different choices about “legislation and enforcement than might be the case if they were working in concert with other governments”. That, however, does not detract from the fact that states cannot opt out of their duties regarding human rights. It only goes on to show that issues of business and human rights must not be solely matters of individual states, but should be a global concern.

Furthermore, the Guiding Principles are grounded in international law and case law. For instance, the Human Rights Committee⁷³ has interpreted article 2(3) of the ICCPR to mean that individuals should have accessible and effective remedies to vindicate their rights, and that the remedies must be appropriately adapted so as to take into account the special vulnerability of certain categories of people. On the other hand, the African Commission⁷⁴ has found that the requirement for sufficient remedies involves due diligence. The African Commission also made reference to the findings of the Human Rights Committee that the existence of legal rules is not in itself adequate and sufficient: those rules and laws must be implemented and applied (this covering investigations and judicial proceedings) and when there is a law, the government must perform its functions to “effectively ensure” that there are investigations and punishment for the perpetrators.⁷⁵ From the above it is evident that there is support and legal backing for the principle that the state must provide sufficient remedies.

The following discussions will elaborate on the principles that underpin the duty of the state to provide effective remedies.

2.4.1 Judicial remedies

A state cannot live up to the expectations of democracy if there is an absence of an efficient and effective judiciary. Such judiciary must be independent and distinct from

⁷³ See para 15, General Comment 31.

⁷⁴ *Zimbabwe Human Rights NGO Forum v Zimbabwe* 2006 AHRLR 128 (ACHPR 2006), 159.

⁷⁵ *Zimbabwe Human Rights NGO Forum v Zimbabwe* 2006 AHRLR 128 (ACHPR 2006), 159.

the other branches of the government (executive and legislative). The Guiding Principles are conscious to this reality and provide for this in the following terms:⁷⁶

States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

This point underscores the importance of judicial processes in the process of searching for redress, because courts are one of the most effective forums for the enforcement of rights when there is a violation.⁷⁷ However, as noted by the Guiding Principles, there are many hindrances relating to access to courts. The most notorious hindrance is the cost of litigation, and Anderson⁷⁸ says the following in this regard:

However, as mentioned above, many plaintiffs do not have the significant financial resources necessary to pursue remedies through private litigation. Further, even if private litigants have the resources to successfully pursue litigation against a corporation, there is no guarantee that those plaintiffs would have the financial resources to enforce the judgment. After all, large transnational corporations have comparatively infinite time and resources with which to oppose litigation and the enforcement of judgments.

This analysis indicates just how difficult it is for people whose rights have been violated to launch legal actions which, apart from being expensive, are very long and cumbersome. The courts are a good forum for the resolution of any issues; however, access to them is very difficult. If the costs remain high and there is no alternative way to go around this predicament, then it does not matter how many courts a state provides, because the duty to provide effective remedies will not be fully discharged.

⁷⁶ Principles 26 and 28 of the Guiding Principles.

⁷⁷ See General Comment 31, where the Human Rights Committee notes the following: "The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law."

⁷⁸ Anderson 2010 *Denv U L Rev* 20.

2.4.2 State based non-judicial grievance mechanisms

Grievance mechanisms are defined⁷⁹ as formal, legal or non-legal (or judicial and non-judicial) complaint processes that can be used by individuals, workers, communities and/or civil society organisations that are being negatively affected by certain business activities and operations. As shown above, litigation is expensive and not easily accessible to a large number of people.⁸⁰ For that reason, the Guiding Principles, conscious of this as well, provides for non-judicial grievance mechanisms for those who cannot find the means nor the will to pursue judicial remedies which can be lengthy and time consuming. The Guiding Principles contain provisions on non-judicial ways (for the purposes of finding redress) which have the benefit of being facilitated by the state and should work in tandem with judicial mechanisms.⁸¹

Some of the efforts that states can make in order to facilitate non-judicial based grievance mechanisms is setting up independent directorates or commissions.⁸² These institutions are known to be cheap. They probably charge a small fee for the purposes of lodging a complaint and in some instances they even carry all the costs of the investigations involved.⁸³ The Human Rights Committee acknowledges the importance of these non-judicial based grievance mechanisms as shown in General Comment 31⁸⁴ where it states:

Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.

The mandate these institutions carry can, among other processes, include mediations or adjudicative processes. In the case of South Africa there is the South African Human Rights Commission (SAHRC).⁸⁵

⁷⁹ SOMO Date Unknown www.grievancemechanisms.org.

⁸⁰ See Anderson 2010 *Denv U L Rev* 13, where he notes that: "In addition, many plaintiffs do not have the financial resources to pursue legal remedies. As a result, most cases of alleged violations never make it to court. Reaching a settlement often first requires the incentive of a pending court case".

⁸¹ Principles 27 and 30 of the Guiding Principles.

⁸² For example, national human rights institutions and labour bodies.

⁸³ SOMO Date Unknown www.grievancemechanisms.org.

⁸⁴ General Comment 31.

⁸⁵ It is provided for in terms of s 184 of the *Constitution of the Republic of South Africa*, 1996.

2.4.3 *The involvement of businesses*

The United Nations adopted the Guiding Principles with the understanding that the process of redress can never be complete without the participation of businesses (voluntary or otherwise). It is for that reason that the Guiding Principles strike a balance between defining clearly the role of the state and also defining the role of business in the whole process of finding remedies for individuals. Business enterprises are given a role and it is stated as follows:⁸⁶

To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

A further provision extends the above mentioned point and provides that “industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available”.⁸⁷ This requires businesses to be diligent and not passive. It presupposes positive action on the part of businesses.⁸⁸ If these operational-level grievance mechanisms are set up, then there can be less reliance on courts. The operational-level mechanisms also would operate with the inclusion of society and workers. As a result, Melish and Meidinger⁸⁹ have come up with criteria which they call “human rights compliance systems” that a corporation can adhere to, which are the following:

- i. a formally articulated human rights policy;
- ii. a commitment to undertaking impact assessments as a risk management tool;

⁸⁶ Principles 27 and 31 of the Guiding Principles.

⁸⁷ Principles 30 and 32 of the Guiding Principles.

⁸⁸ The Guiding Principles offer a good explanation of what the point entails in the following terms: “First, they support the identification of adverse human rights impacts as a part of an enterprise’s ongoing human rights due diligence. They do so by providing a channel for those directly impacted by the enterprise’ operations to raise concerns when they believe they are being or will be adversely impacted. By analysing trends and patterns in complaints, business enterprises can also identify systemic problems and adapt their practices accordingly; second, these mechanisms make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating.”

⁸⁹ Melish and Meidinger “Protect, Respect, Remedy and Participate” 5.

- iii. the integration of the company's human rights policy into operational practice guides;
- iv. a way to track performance; and
- v. internal redress mechanisms to ensure appropriate remedies where unjustified harm occurs.

Although the effectiveness of having corporations participating in the process of redress is doubtful (given that corporations aim for the maximisation of profits and lower production costs),⁹⁰ there is considerable merit in still having them in the process as they are not or are not meant to be the sole vehicles for addressing violated rights or potential violations. They are part of a wider range of processes which can be used by those who seek remedies. The state can also have a limited role of supervision in these processes to ensure that there is compliance with national laws.⁹¹

2.5 Criterion for measuring the effectiveness of non-judicial mechanisms

The Guiding Principles have criteria through which the efficiency and effectiveness of non-judicial based grievance mechanisms can be measured. It is acknowledged that this is not a closed list, but represents the core criterion to be considered.

2.5.1 The mechanisms must be legitimate

The grievance mechanisms will be legitimate if they are to be trusted by the affected groups and they should also not undermine legal mechanisms.⁹² Legitimacy is needed so that it enables “trust from the stakeholder groups for whose use they are intended” and also that there is some form of accountability for the fair conduct of grievance processes. This also means that the mechanism has to be objective in terms of having a clearly defined process.⁹³ The confidence has to come from all

⁹⁰ See Shah 2006 www.globalissues.org and Makwana 2006 www.stwr.org.

⁹¹ See Melish and Meidinger “Protect, Respect, Remedy and Participate” who further note that: “Likewise, states must have systems in place to address three component areas: more effective policy alignment, both vertically and horizontally; market incentives aimed at promoting a corporate human rights culture; and available systems of human rights redress”.

⁹² Rees *Rights Compatible Grievance Mechanisms*.

⁹³ CSR Europe 2013 www.csreurope.org.

parties involved in it. The process must not adopt a win lose approach, but an inclusive one that seeks to establish with genuine interest what transpired.

2.5.2 The mechanisms must be accessible

If the grievance mechanism is accessible, then it provides ease of access for complaints. When a process is accessible it would also have ways to identify the parties to the grievance.⁹⁴ The Guiding Principles explain that the processes must be “known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access”.⁹⁵ There should be active engagement by those facilitating these mechanisms so that all those concerned or who might be affected by the business concerned, know where to go if they have complaints.

2.5.3 The mechanism must be predictable

Predictability means that the grievance mechanism provides sureness on the key steps and options within the process and with means to monitor the agreed outcomes.⁹⁶ It is desirable if the mechanisms do not work on *ad hoc* procedures because there is need for consistency and effectiveness, which can only happen when there is an institutionalised way of handing grievances. The Guiding Principles⁹⁷ note that the mechanisms must provide a clear and known procedure with an indicative time frame for each stage, with clarity on the types of processes and outcomes available, and the means of monitoring implementation.

2.5.4 The mechanisms must be equitable

When a process is equitable it addresses the imbalances in power, treats every complainant with respect and keeps complainants informed.⁹⁸ Without equity, the process cannot be regarded as fair. There should be ways to make sure the

⁹⁴ Rees *Rights Compatible Grievance Mechanisms*.

⁹⁵ Principles 29 and 34 of the Guiding Principles.

⁹⁶ Rees *Rights Compatible Grievance Mechanisms*.

⁹⁷ Principles 29 and 34 of the Guiding Principles.

⁹⁸ Rees *Rights Compatible Grievance Mechanisms*.

aggrieved party does not struggle to comprehend or follow the proceedings because of a lack of resources or anything that would help with the process. The mechanisms must seek to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms.⁹⁹

2.5.5 The mechanisms must be transparent

Transparency means the process must be open and clear to those involved and there should be records and openness about the outcomes.¹⁰⁰ The mechanisms must keep parties to a grievance informed about its progress, and provide sufficient information about the mechanism's performance to build confidence in its effectiveness and to meet any public interest at stake.¹⁰¹ Transparency can also determine the fairness and inclusiveness of the grievance mechanisms.

2.5.6 The mechanisms must be rights-compatible

A rights-compatible grievance mechanism is one which provides a vehicle for addressing grievances (regardless of whether they raise substantive rights issues) in a manner that respects and supports human rights.¹⁰² The purpose of taking a grievance to a grievance body, is to make sure that there is a determination of the right that has been violated, if any. The outcomes should reflect such a finding, whether there has been a violation of any right at all, and the outcomes must accord with internationally recognised human rights.

2.5.7 The mechanisms must be a source of continuous learning

The Guiding Principles envision a society where there is constant and continuous learning so that the gains and exposure of these non-judicial based remedies can reach many more people. Continuous learning also ensures that there is no rigidity in the processes, but rather flexibility, which would allow for constant and

⁹⁹ Rees *Rights Compatible Grievance Mechanisms*.

¹⁰⁰ Rees *Rights Compatible Grievance Mechanisms*.

¹⁰¹ Rees *Rights Compatible Grievance Mechanisms*.

¹⁰² Rees *Rights Compatible Grievance Mechanisms*.

necessary change without necessarily losing the essence of the process itself. It has been argued that, for the processes to be a source of continuous learning, there should be means to integrate lessons and means to revise as appropriate.¹⁰³

2.6 Conclusion

This chapter focused on the duty of the state to provide remedies. However, this duty was drawn from the state duty to protect against human rights violations. The framework laid out in this chapter forms the basis or groundwork upon which an analysis of the position in South Africa is examined. The following chapter will look at the application of remedies in South Africa.

¹⁰³ Rees *Rights Compatible Grievance Mechanisms*.

3 The South African framework for remedies

3.1 Introduction

South Africa has a diverse framework that regulates how remedies for rights violations can be sought. On the one hand there is an established framework to be found in common law and on the other there is also a framework laid out in the *Constitution*. In addition, there is legislation and a human rights body that all seek to address how remedies can be sought.

In this chapter, the common law remedies, statutory remedies and also non-judicial grievance mechanisms are discussed. This chapter does not seek to conclude that mining companies willfully or strategically violate human rights. The point of departure is that, where there are mining activities, there is bound to be some rights that are affected, and sometimes the cause of this is negligence on the part of companies. However, for the purposes of this study, it matters not how a right was affected or violated, the study is focused on laying out the framework within which remedies in South Africa are applied.

3.2 Common law remedies

Common law remedies flow out of a delict which can be defined as an intentional or negligent (here the issue is on the blameworthiness of the act, focusing on either the intention or negligence of a person) and unlawful act which causes damage or injury to another person or his or her property.¹⁰⁴ Under the common law, a person who would approach the court must have been adversely and personally affected by the alleged wrong, in other words, the person has to approach the court and allege that his or her own rights have been violated.¹⁰⁵ The law of delict essentially plays a dual role of indicating which rights are worthy of protection and in what way a violation or

¹⁰⁴ Burchell *Principles of Delict* 10. For a simplified definition see Neethling and Potgieter *Law of Delict* 4, who state that a delict is an “act of a person that in a wrongful and culpable way causes harm to another”. Van Der Walt and Midgley hold that a narrow definition of delict is that a delict is a “wrongful and blameworthy conduct which causes harm to a person” (see Van Der Walt and Midgley *Delict* 2).

¹⁰⁵ Currie and De Waal *Bill of Rights Handbook* 79.

threat of violation of those rights warrant a remedy. It must be noted that only a legally recognised interest is worthy of protection in the law of delict.¹⁰⁶

The point of departure that is used to simplify the matter is that, between two private parties, the wrongdoer has an obligation to pay compensation for the harm he or she has occasioned, while the victim/prejudiced party has a right to claim compensation for the harm done to him.¹⁰⁷ Furthermore, it really does not matter whether the harm that befalls an individual was either negligently or intentionally incurred.¹⁰⁸ However, it should be noted that the law of delict is a separate branch of South African law which is too wide for a discussion in this study. Only a brief outline which is necessary for the understanding of how delict operates in common law will be made. This discussion will focus on the remedies that flow from a delict, namely an action for damages and interdicts.

3.2.1 *An action for damages*

Damages as remedies are a court's determination of an amount of money that will serve as either compensation¹⁰⁹ or satisfaction¹¹⁰ for a wrong done. The purpose and object of damages is to put the person in the position he would have been in, had the harm not been done.¹¹¹ There are three types of actions for damages in delict and these are the *actio legis aquiliae*, the *actio iniuriarum* and the action for pain and suffering.¹¹² The *actio legis aquiliae* is an action for damages from the wrongful and culpable causing of patrimonial loss,¹¹³ while the *actio iniuriarum* is a wrongful and culpable conduct which causes non-patrimonial loss which is

¹⁰⁶ See Neethling and Potgieter *Law of Delict* 3.

¹⁰⁷ See Neethling and Potgieter *Law of Delict* 3; Van Der Walt and Midgley *Delict* 2.

¹⁰⁸ See *Perlman v Zoutendyk* 1934 CPD 151, 155 where it is stated that: "...in general all damage caused unjustifiably (*injuria*) is actionable, whether caused intentionally (*dolo*) or by negligence (*culpa*)". It should be noted though that sometimes the law requires intention and sometimes no fault is required at all. For this, see *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) Ltd* 1997 4 SA 578 (W) below.

¹⁰⁹ See Neethling and Potgieter *Law of Delict* 211 where they argue that damages in the form of compensation is the monetary equivalent of damage with an object of eliminating past and future patrimonial or non-patrimonial loss.

¹¹⁰ See Neethling and Potgieter *Law of Delict* 211 where they contend that satisfaction is the reparation of damage in the form of injury to personality by effecting retribution for the wrong suffered by plaintiff.

¹¹¹ Burchell *Principles of Delict* 35.

¹¹² Loubser and Midgley *Law of Delict* 400; Neethling and Potgieter *Law of Delict* 5.

¹¹³ See Van Der Walt and Midgley *Delict* 2; Neethling and Potgieter *Law of Delict* 10.

associated with bodily injuries.¹¹⁴ Lastly, the action for pain and suffering is the wrongful and intentional infringement of a person's *corpus* (physical integrity), *fama* (good name) and *dignitas* (dignity).¹¹⁵ The general principles of these actions will be briefly discussed below.

3.2.1.1 An act/conduct

Conduct is a prerequisite of all three actions for damages without which no action can be founded. The act must have been done voluntarily.¹¹⁶ Conduct may be in the form of a commission or an omission.¹¹⁷ For example, there will be conduct by commission if a mining company dumps hazardous waste near a residential area, while an omission would be when a mining company fails to provide a safe working environment.

3.2.1.2 Wrongfulness

Conduct that founds a delict must be wrongful, meaning that the act must have been legally reprehensible or unreasonable.¹¹⁸ The wrongfulness of the action is considered objectively in the light of all the facts and circumstances at the relevant time and the wrongful act must have as its consequence the infringement of a legally recognised interest.¹¹⁹ As a way of determining the wrongfulness of an act, the courts will use the *boni mores* test,¹²⁰ which boils down the legal convictions of the community and is considered on the basis of objectivity. Wrongfulness can be determined on the basis of the following:

¹¹⁴ See Van Der Walt and Midgley *Delict* 2; Neethling and Potgieter *Law of Delict* 15-16.

¹¹⁵ See Van Der Walt and Midgley *Delict* 2; Neethling and Potgieter *Law of Delict* 14.

¹¹⁶ Neethling and Potgieter *Law of Delict* 26; Van Der Walt and Midgley *Delict* 51; Burchell *Principles of Delict* 23.

¹¹⁷ See Neethling and Potgieter *Law of Delict* 30; see also Burchell *Principles of Delict* 24-25; Van Der Walt and Midgley *Delict* 54.

¹¹⁸ See Neethling and Potgieter *Law of Delict* 33. Burchell makes no real difference between unlawfulness and wrongfulness (Burchell *Principles of Delict* 24).

¹¹⁹ See Van Der Walt and Midgley *Delict* 55 and Neethling and Potgieter *Law of Delict* 33-34.

¹²⁰ The *boni mores* test simply put is determining the legal convictions of the community which is done by a test of reasonableness and objectivity. According to Van Der Walt and Midgley *Delict* 58-61, the *Constitution* now influences the *boni mores* test as s 8(1) states that the Bill of Rights binds all law and may be used to develop the common law (see s 8(3)(b) of the *Constitution*). For a broader discussion of the *boni mores* test, see Neethling and Potgieter *Law of Delict* 36-40.

- i. as an infringement of a subjective right,¹²¹
- ii. as a breach of a legal duty,¹²² and
- iii. as the reasonableness of holding the defendant liable.¹²³

By way of example, a mining company can be said to have breached a subjective right when there is an injury resulting from the negligence of the company; there can be a breach of a legal duty when there is a degradation or pollution of the environment, when there is legislation that impose duties.

3.2.1.3 Fault

Fault relates to the legal blameworthiness or the reprehensible state of mind of someone who has acted wrongfully.¹²⁴ It is determinable as either intention (*dolus*) or negligence (*culpa*), with the test for intention involving a subjective test and the one for negligence involving an objective test.¹²⁵ For a person to be found to be at fault, he or she must have had the necessary ability to distinguish between right and wrong.¹²⁶ However, in the case of a corporation, it can be held to be liable vicariously if a person representing the company is found to be at fault, or through the theory of “controlling or directing minds”.¹²⁷

¹²¹ It is accepted that everyone is a holder of subjective rights, an infringement of which found wrongfulness. See also Burchell *Principles of Delict* 28; Van Der Walt and Midgley *Delict* 55. For a comprehensive explanation of this, see Neethling and Potgieter *Law of Delict* 50-54.

¹²² A legal duty is usually associated with an omission, the issue being that one party failed to act to prevent harm to another. See *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 395; Van Der Walt and Midgley *Delict Cases* 55. For a full discussion of this matter see Neethling and Potgieter *Law of Delict* 54-77.

¹²³ According to Neethling and Potgieter *Law of Delict* 78, this criterion represents a variation of the general test for wrongfulness. It was formulated by the SCA in the case of *Telematrix (Pvt) Ltd t/a Matrix Vehicle Tracking v Advertising Authority* SA 2006 1 SA 461 (SCA) wherein the court held that “conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant”.

¹²⁴ Neethling and Potgieter *Law of Delict* 123.

¹²⁵ Burchell *Principles of Delict* 30-31; Neethling and Potgieter *Law of Delict* 123.

¹²⁶ If a person does not have the necessary *culpa capax* then there can be no accountability on their part. Neethling and Potgieter *Law of Delict* 125; Van Der Walt and Midgley *Delict* 126. Burchell further points out that capacity is assessed subjectively in the circumstances facing the defendant (see Burchell *Principles of Delict* 29).

¹²⁷ *First National Bank of Southern Africa Ltd v Rosenblum* 2001 4 SA 355 (A) paras 17-18.

In so far as the different delictual actions relate to fault, the *actio legis aquiliae* and the action for pain and suffering, require either intention or negligence to impute fault while the *actio iniuriarum* requires intention on the part of the wrongdoer.¹²⁸

3.2.1.4 Causation

Every conduct that occasions an action for delict must have caused damage. In other words, there must be a nexus between the conduct and the resulting damage, and the presence or absence of causation is a factual issue determinable from all the evidence.¹²⁹ The law of delict, however, recognises that one act can have a number of different consequences, and so it would not be fair to impute unlimited liability to a wrongdoer, therefore, as a matter of principle, legal causation and not factual causation results in a person being held responsible.¹³⁰ Legal causation in this sense means the limits within which the law can impute responsibility to a person for the harmful consequences of his actions.¹³¹

3.2.1.5 Harm or damage

Harm or damage must be the ultimate consequence of the wrongful and culpable act. There must be some damage or harm for which the law makes compensation, satisfaction or reparation.¹³² Loubser and Midgley note that the “harm element is the cornerstone of the law of delict” and the fundamental point of departure.¹³³ In other words, if a person can prove all the previously discussed elements but fails to prove that there is harm, he or she will not succeed with the action.

¹²⁸ Neethling and Potgieter *Law of Delict* 124.

¹²⁹ Neethling and Potgieter *Law of Delict* 175; Burchell *Principles of Delict* 32; Van Der Walt and Midgley *Delict* 165.

¹³⁰ Burchell *Principles of Delict* 33; Neethling and Potgieter *Law of Delict* 175; Van Der Walt and Midgley *Delict* 168. The tests for factual causation are the *conditio sine qua non* theory while the tests for legal causation are the flexible approach, the adequate causation and the direct consequences.

¹³¹ Neethling and Potgieter *Law of Delict* 188; see also Burchell *Principles of Delict* 33 who goes on to say that some consequences of a conduct are legally too remote to create liability.

¹³² Neethling and Potgieter *Law of Delict* 211; Loubser and Midgley *Law of Delict* 45.

¹³³ See Loubser and Midgley *Law of Delict* 45.

3.2.2 Interdicts

An interdict is an order of court aimed at preventing a violation of a right from happening, or preventing the continuation of a violation that has already started.¹³⁴ The interdict is different from the ordinary compensatory remedies through damages. Van Der Walt and Midgley argue that an interdict is a way for a person to take steps to prevent a wrong from happening as one is not compelled to stay and let it happen;¹³⁵ in other words, if a person is aware that there might be a violation of his or her rights, he or she does not have to wait and see if it happens. Furthermore, there are two forms of interdicts, namely prohibitory interdicts and mandatory interdicts. Prohibitory interdicts are interdicts that a court issues for the purposes of stopping a violation of a right that has already begun.¹³⁶ On the other hand, mandatory interdicts require that some positive steps be taken to stop the violation that has already been committed.¹³⁷

The requirements for an interdict to be issued by a court are that there must be an act, a clear right must be established and that there must be no other remedy available to the applicant.¹³⁸ If that is satisfied, then a court can either issue a temporary interdict or a final interdict.¹³⁹ An interdict, therefore, is an effective remedy because it ensures that rights are protected by an order of court. For as long as the applicant can prove the existence of a right worthy of legal protection that is about to be violated or is being violated, the courts will make an appropriate order for their protection.

¹³⁴ See Loubser and Midgley *Law of Delict* 432; Van Der Walt and Midgley *Delict* 178; Neethling and Potgieter *Law of Delict* 254.

¹³⁵ Van Der Walt and Midgley *Delict* 179.

¹³⁶ See Neethling and Potgieter *Law of Delict* 254; Loubser and Midgley *Law of Delict* 433; Van Der Walt and Midgley *Delict* 179.

¹³⁷ Neethling and Potgieter *Law of Delict* 254; Van Der Walt and Midgley *Delict* 179; Loubser and Midgley *Law of Delict* 433.

¹³⁸ See Neethling and Potgieter *Law of Delict* 254; Loubser and Midgley *Law of Delict* 433; Van Der Walt and Midgley *Delict* 179. Neethling and Potgieter do not mention the requirement that a clear right must be ascertained. These authors are in agreement that fault in the form of either intent or negligence is not a requirement for the successful application of an interdict.

¹³⁹ Van Der Walt and Midgley *Delict* 179, Neethling and Potgieter *Law of Delict* 254.

3.2.3 Summary

When it comes to common law remedies, the courts are the ultimate forums for the determination of issues. In the event that an order of court is not followed after the determination, there is the possibility of having that order enforced. Therefore, the remedies discussed above qualify as comprehensive remedial actions that fall under judicial remedies as indicated in the Guiding Principles. The following discussion will be on constitutional standing and the remedies provided by the *Constitution*.

3.3 Constitutional litigation

Any actions that arise from a claim that a constitutional right has been violated, will only be heard by the courts if the applicant has the necessary standing to approach the courts. Standing in this regard is the relationship between the applicant in a case and the relief he or she seeks.¹⁴⁰ Section 38¹⁴¹ contains a list of people who may allege that a right in the Bill of Rights has been violated, and it does not limit the categories of persons to those personally injured only. The categories of the persons who may approach the courts will be briefly discussed below.

Firstly, individuals can approach the courts in their own interest, or a number of people can do the same in their own interests.¹⁴² Sufficient interest¹⁴³ in such cases is not in dispute and is easier to establish¹⁴⁴ and, as the SCA found, in the case of *Langa CJ v Hlophe*,¹⁴⁵ any person has the right to approach a competent court on the ground that a fundamental right has been infringed upon. In the case of miners,

¹⁴⁰ Currie and De Waal *Bill of Rights Handbook* 79.

¹⁴¹ Section 38 of the *Constitution* states the following: Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.

¹⁴² See s 38(a) of the *Constitution*.

¹⁴³ Sufficient interest relates to the interest that a person who approaches the court has to the outcome or remedy sought.

¹⁴⁴ Currie and De Waal *Bill of Rights Handbook* 87.

¹⁴⁵ *Langa CJ v Hlophe* 2009 4 SA 382 (SCA) 27.

any person whose right has been threatened or violated can individually approach the court to allege that his rights have been violated.

Secondly, the *Constitution* also permits another person to act on behalf of the victim whose rights have been violated. In this category, the premise would be that the person whose rights have been violated is unable to pursue a remedy by him- or herself.¹⁴⁶ The person who acts on behalf of the person whose rights have been violated can be anyone and can only assume the responsibility to act if there is consent from the person with sufficient interest in the outcome.¹⁴⁷ In this case an example would be of a group of miners being represented by an NGO because they cannot afford litigation individually.¹⁴⁸

The third category is class actions, which are court actions that allow for a group of people or a class of people with a common interest to commence an action that would result in a remedy for all of them.¹⁴⁹ The parties joined together will be named parties to the action. However, if there are parties who do not want to be bound by the outcome they can opt out.¹⁵⁰ The class of persons must be identifiable with sufficient clarity.¹⁵¹ In the case of *Highveldridge Residents' Concerned Party v Highveldridge*,¹⁵² the court allowed a voluntary association to act on behalf of a group of people who had been affected by water service cut-offs because these people had no money and could also not individually pursue their claims.

The fourth category involves actions commenced for and on behalf of the public interest.¹⁵³ This is considered to be the most problematic of all the categories.¹⁵⁴ The difficulty is in defining public interest and proving that the action is of public interest,

¹⁴⁶ See s 38(b) of the *Constitution*.

¹⁴⁷ Currie and De Waal *Bill of Rights Handbook* 87.

¹⁴⁸ See the *Highveldridge Residents' Concerned Party v Highveldridge TLC* 2002 6 SA 66 (T) para 27 where the court accepted that a voluntary association could act on behalf of residents because they were indigent.

¹⁴⁹ See s 38(c) of the *Constitution*.

¹⁵⁰ Currie and De Waal *Bill of Rights Handbook* 88.

¹⁵¹ Currie and De Waal *Bill of Rights Handbook* 88.

¹⁵² *Highveldridge Residents' Concerned Party v Highveldridge TLC* 2002 6 SA 66 (T) para 27.

¹⁵³ See s 38(d) of the *Constitution*.

¹⁵⁴ Currie and De Waal *Bill of Rights Handbook* 89.

which is much broader than class actions.¹⁵⁵ Among other issues, the considerations which a court will consider will include the degree and vulnerability of the people affected, the nature of the right alleged to be infringed and also the consequences of the infringement of the right.¹⁵⁶

The last category is for actions by an association acting in the interest of its members.¹⁵⁷ This category would, for example, involve persons who form part of an organisation or association acting on behalf of the members of that organisation or association.¹⁵⁸ An example of this would be a trade union acting on behalf of its members.¹⁵⁹

3.3.1 *Constitutional remedies*

Section 38 of the *Constitution* states that any person may approach the court alleging that a right in the Bill of Rights has been violated. In terms of that section the court has the power to either make a declaration of rights or to grant appropriate relief.¹⁶⁰ The court can also grant an interdict because a person may allege that a right is being threatened.¹⁶¹ Nevertheless, an issue that needs explanation is whether the courts can award constitutional damages as “appropriate relief” and this will be discussed below.

In *Fose v Minister of Safety and Security*¹⁶² it was held that appropriate relief is “relief that is required to protect and enforce the Constitution”.¹⁶³ The court then went on to indicate that such relief is dependent on the circumstances of each case, with the court being able to make a declaration of rights, an interdict, a mandamus or any

¹⁵⁵ See *Louw v Matjila* 1995 11 BCLR 1476 (W) 1484; Currie and De Waal *Bill of Rights Handbook* 89.

¹⁵⁶ See *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC) 40; *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC) 18.

¹⁵⁷ See s 38(e) of the *Constitution*.

¹⁵⁸ See Kidd 2010 *PELJ* 6; Currie and De Waal *Bill of Rights Handbook* 91.

¹⁵⁹ This was the case in *South African National Defence Force Union v Minister of Defence* 1999 3 BCLR 321 (T).

¹⁶⁰ See s 38 of the *Constitution*.

¹⁶¹ See s 38 of the *Constitution*.

¹⁶² *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC).

¹⁶³ See *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 19.

other relief as may be necessary.¹⁶⁴ Most importantly, Justice Ackermann concluded that it is possible for the court to fashion new remedies to secure the protection and enforcement of rights.¹⁶⁵ Furthermore, the court acknowledged that an award for damages fits into the description of “appropriate relief”.¹⁶⁶ Ackermann concluded that the matter in *Fose* did not call upon them to decide issues as to whether the courts could fashion other constitutional damages not sounding in money; rather, he surmised that such issues would be dealt with as they arise on a case by case basis.¹⁶⁷

Perhaps the most compelling part of the judgment insofar as remedies for violations of rights by multinational corporations are concerned, is the judgment delivered by Justice Didcott.¹⁶⁸ The judge argued that punitive or exemplary damages may well be suitable against “large and wealthy industrial companies” because there are no public coffers to take the money from and that the punitive or exemplary damages can serve as an effective deterrence.¹⁶⁹ The reasoning behind this ratio was that the blame for the harm would go to the “very top who determine the policies and direct the activities of the company”.¹⁷⁰ In another part of the judgment, Justice Kriegler goes on to suggest that in the case before the court punitive damages were not acceptable, but that the court should “refrain from any broad rejection of any particular remedies in other circumstances”.¹⁷¹

The latest judgment delivered by judge Mothle in the North Gauteng High Court early this year proves that constitutional damages have a place in South African law. In the case of *M v Minister of Police of the Republic of South Africa*¹⁷² the court made reference to the *Fose* case and concluded that constitutional damages are recognised in South Africa as appropriate relief in compensation for loss suffered as a consequence of the unlawful infringement of a constitutional right.¹⁷³ Judge Mothle

¹⁶⁴ See *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 19.

¹⁶⁵ See *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) paras 19, 69.

¹⁶⁶ See *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 60.

¹⁶⁷ See *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 74.

¹⁶⁸ He however argues that if his views were ever to come to fruition, it would be better off if they were as a result of legislative action.

¹⁶⁹ See *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 87.

¹⁷⁰ See *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 87.

¹⁷¹ See *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 91.

¹⁷² *M v Minister of Police of the Republic of South Africa* 2013 5 SA 622 (GNP).

¹⁷³ See *M v Minister of Police of the Republic of South Africa* 2013 5 SA 622 (GNP) para 18.

also acknowledged that courts may fashion new remedies for that purpose.¹⁷⁴ The most striking part of the judgment was a remark that infringements of constitutional rights deserved constitutional protection and enforcement and that “an infringement of these rights by third parties, where it results in damages, should be compensated for”.¹⁷⁵

From the above discussions, it can be argued that it is possible to get constitutional damages (or any other relief for that matter) as appropriate relief for any violation of constitutional rights. O'Regan argues that the South African law of delict “provides suitable remedies for the breach of constitutional rights and requires relatively little adjustment to meet this purpose”.¹⁷⁶ Her comments embody the finding in the *Fose* case by Ackermann J that common law remedies provide enough compensation for violation of rights. However, in the same *Fose* case, Justice Kriegler concluded that a court is not limited when it comes to the remedies it can offer for violations of constitutional rights. As a result, common law relief, statutory relief, declaratory relief and other appropriate remedies could be used by the courts.¹⁷⁷ Therefore, it is submitted that the courts have not made a hard and fast rule that constitutional damages are only for instances where the state is concerned. If the findings in the *M v Minister of Police* case are anything to go by, then it can be argued that it is possible that the courts could be able to fashion constitutional damages for violations of rights that happen in the private sector.

To conclude this matter, it is evident from the above discussions that both the common law of delict and constitutional litigation provide perfect avenues for searching for a remedy. In addition to that, there are various advantages to judicial remedies. For example, there is finality of the matter, there is an order that is enforceable and a court can prevent further or continued violation of a right. The approach to standing which came with the *Constitution* brought a new avenue for those who might have been affected as a group and could not individually approach the courts. It also makes provision to seek a remedy in the form of an interdict. Thus, remedies in terms of section 38 are not meant only for rights that have already been

¹⁷⁴ See *M v Minister of Police of the Republic of South Africa* 2013 5 SA 622 (GNP) para 18.

¹⁷⁵ See *M v Minister of Police of the Republic of South Africa* 2013 5 SA 622 (GNP) para 52.

¹⁷⁶ O'Regan “Fashioning Constitutional Remedies” 43.

¹⁷⁷ See *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 100.

violated, but also for where there is a potential that a right will be violated (a threat of a violation) or where one seeks to prevent further violation of rights.¹⁷⁸ The next discussion will consider the remedies that are available through legislative provisions.

3.4 Legislative framework that provides for remedies

The legislative framework that will be discussed hereunder deals with claims to occupational health and injuries at work and protection of the environment. This study adopts the broad understanding that human rights include occupational health matters¹⁷⁹ and environmental rights. In so far as occupational health relates to human rights, the Committee on Economic, Social and Cultural Rights has advanced that “health is a fundamental human right indispensable for the exercise of other human rights”.¹⁸⁰ This argument supports what the present study terms the broad view on human rights, which is inclusive of all human rights that can be attributed to an individual or groups of people. Additionally, section 24 of the *Constitution* states that everyone has the right “to an environment that is not harmful to their health or well-being”.¹⁸¹ The right to a healthy environment invariably affects the right to life¹⁸² as well. In other words, the right to life is dependent on a healthy environment and healthy individual. As a result, an environment at work that is not safe and that compromises the health of workers or any work that in any way pollutes or damages the environment where people live, would be a violation of section 24(a).

The legislation that will form the subjects of discussion are the *Occupational Diseases in Mines and Works Act* (ODIMWA),¹⁸³ the *Compensation for Occupational*

¹⁷⁸ See note 37 above.

¹⁷⁹ Although occupational health issues might be classified under labour rights, the latter falls under the broad view of human rights. Mantouvalou dismisses the argument that labour rights are not human rights and concludes that the acceptance of labour rights as human rights does not mean that labour rights as a field of study is exhausted (see Mantouvalou 2012 *ELLJ* 27). See also Rees *Rights Compatible Grievance Mechanisms* 3.

¹⁸⁰ *UN General Comment No 14: The Right to the Highest Attainable Standard of Health* (2000) (General Comment 14) para 1.

¹⁸¹ See s 24(a) of the *Constitution*.

¹⁸² Tshoose 2011 *PELJ* 253.

¹⁸³ *Occupational Diseases in Mines and Works Act 78 of 1973*.

*Injuries and Diseases Act (COIDA)*¹⁸⁴ and the *National Environmental Management Act (NEMA)*.¹⁸⁵

3.4.1 *Occupational Diseases in Mines and Works Act*

The ODIMWA came before the COIDA and it covers a specific area, being occupational diseases, injuries and death occurring from work in a controlled mine. A mine or work that is termed “controlled” is a mine or work that is risky.¹⁸⁶ The Minister for National Health and Welfare is empowered to declare any mine, or work performed, to be risky (which leads to the mine or work being controlled) only after consultations with the Risk Committee and representations made by the owner of the mines.¹⁸⁷ The Act provides for the establishment of a Risk Committee which determines the risk of every mine or work, and which is always in consultation with the Minister as stated above.¹⁸⁸ According to the Act, harmful dust, gases, vapors, chemical substances, or working conditions that are harmful, warrant a determination that the mine or work is controlled.¹⁸⁹ Furthermore, no one may work in these risky mines or works without first having obtained a certificate of fitness.¹⁹⁰

The Minister appoints the Compensation Commissioner for Occupational Diseases¹⁹¹ who controls the Mines and Works Compensation Fund.¹⁹² In the event that a person is found to be suffering from a compensatable disease¹⁹³ under this Act, the owner of a mine can be ordered by the Director-General of National Health to pay the medical costs associated with the examination of that person (only the legitimate and proven costs are payable).¹⁹⁴ Any person who has a compensatable disease applies to the Commissioner (the degree of the disease is established) who

¹⁸⁴ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

¹⁸⁵ *National Environmental Management Act* 107 of 1998 (hereafter NEMA).

¹⁸⁶ See s 10 ODIMWA.

¹⁸⁷ See s 13(2) ODIMWA.

¹⁸⁸ See s 20 ODIMWA.

¹⁸⁹ See s 13(2) (a) and (b) ODIMWA.

¹⁹⁰ See s 23 ODIMWA.

¹⁹¹ See s 54(a) ODIMWA.

¹⁹² See s 61(2) ODIMWA. Mine owners pay their contributions to this fund.

¹⁹³ According to the Act, pulmonary diseases like TB and silicosis fall under compensatable diseases.

¹⁹⁴ See s 36A ODIMWA.

provides them with a form where all the details are filled in.¹⁹⁵ In addition, the Act expressly denies anyone who gets compensation or who is entitled to compensation under ODIMWA to also receive compensation under COIDA.¹⁹⁶ However, as will be shown hereunder, the payments that are offered to these employees are far lower than those offered to employees who get benefits under COIDA.

3.4.2 *The Compensation for Occupational Injuries and Diseases Act*

There has been an effort by the government to provide for the protection of the right to health in the mining sector. The *Compensation for Occupational Injuries and Diseases Act* was enacted for the purpose of providing compensation for disability caused by occupational injuries and diseases, sustained or contracted by employees in the course of their employment, or death resulting from such injuries and diseases.¹⁹⁷ Accordingly, COIDA was put in place to remedy violations of the rights to health, dignity and life of those who might fall victim to rights violations in the workplace.

The Act establishes a Compensation Board which handles issues like the nature and extent of benefits payable to employees.¹⁹⁸ The Act also establishes a compensation fund¹⁹⁹ which consists, among others, of the monies of the fund and the assessments paid out.²⁰⁰ There is also a reserve fund established that consists of either cash or investments or both.²⁰¹ The Act then states that, if any employee has an accident which either results in his/her disability or death, the benefits that accrue from the Act will be due to that person (or to the dependents in the event that the person dies).²⁰²

¹⁹⁵ See s 78 ODIMWA.

¹⁹⁶ See s 100(2 ODIMWA).

¹⁹⁷ Boshoff Date Unknown www.labourguide.co.za.

¹⁹⁸ See s 12 COIDA.

¹⁹⁹ See s 15 COIDA.

²⁰⁰ The fund (in terms of s 15(2) COIDA) also consists of the assessments paid out by employers, penalties and fines in terms of the Act.

²⁰¹ See s 19 COIDA.

²⁰² See s 22 COIDA.

COIDA does not allow for a person to sue under common law.²⁰³ This would mean that once compensation is paid out, no further action lies against the employer. The difference between payment under COIDA and payment under ODIMWA is that, under ODIMWA, the compensation is limited to those who were working in a controlled mine or doing controlled work. COIDA applies to every other occupational health claim. On the other hand, a person who gets compensated under ODIMWA cannot be compensated under COIDA.²⁰⁴

In sum, the two Acts are meant to replace the common law liability of the employer with payment through the Acts.²⁰⁵ This is hugely beneficial to employees. For example, the Acts have the effect that every single individual who is certified to have been injured at work through the negligence of the employer is assured of compensation (even when there is no negligence). Furthermore, the dependents of a person who dies as a result of injuries or health issues at work are assured of compensation as well. If there was no legislation like these two Acts, not every individual would have been able to have the means to go to the courts to enforce their rights to compensation, because, as already indicated, litigation is expensive and time consuming.

The third piece of legislation to be discussed is the *National Environmental Management Act*.

3.4.3 *The National Environmental Management Act*

The *National Environmental Management Act* states that “everyone has the right to an environment that is not harmful to his or her health or well-being”.²⁰⁶ NEMA then goes on to affirm that the state has the responsibility to protect the environment, that the law should be enforced by the state, and also that the law should facilitate the

²⁰³ See s 35(1) COIDA which states the following: “No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death”.

²⁰⁴ *Mankayi v AngloGold Ashanti Ltd* 2011 3 SA 237 (CC) 73.

²⁰⁵ The Constitutional Court has since found that payment under ODIMWA is not enough so employees can still sue the employer.

²⁰⁶ See the Preamble to NEMA.

enforcement of environmental laws by civil society.²⁰⁷ These affirmations are declarations of intent, which indicate the importance of the nature of the right that is to be protected; that is the right to a healthy environment.

Section 28 of the Act imposes a duty of care towards the environment, applicable to every individual, including juristic persons like corporations.²⁰⁸ It states that every person who cause, has caused or may cause significant pollution or degradation of the environment must take “reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring”. From this provision, it is evident that everyone, including corporations, is required to be mindful of the effects of their actions on the environment. In the event that there is pollution or degradation of the environment, the entity responsible for such pollution or degradation is required to remedy the effects of such pollution or degradation.²⁰⁹

The Act also provides for standing that is similar to that provided for in the *Constitution* in the event that there are people who want to seek relief. The Act²¹⁰ accords standing to anyone acting:

- a. in that person's or group of person's own interest;
- b. in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- c. in the interest of or on behalf of a group or class of persons whose interests are affected;
- d. in the public interest; and
- e. in the interest of protecting the environment.

²⁰⁷ See the Preamble to NEMA.

²⁰⁸ See s 28(2) NEMA which states the following:

(2) Without limiting the generality of the duty in subsection (1), the persons on whom subsection (1) imposes an obligation to take reasonable measures, include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which-

- a) any activity or process is or was performed or undertaken; or
- b) any other situation exists, which causes, has caused or is likely to cause significant pollution or degradation of the environment.

²⁰⁹ See s 28(3)(c) NEMA.

²¹⁰ See s 32(1) NEMA.

The benefit of NEMA is that there is an assurance that any individual or corporation that partakes in the degradation and pollution of the environment will be held accountable. If an action is brought, there is the possibility that those affected can have a remedy or relief decided in their favour if they can prove that there has been degradation or pollution. A further advantage is that, because these provisions are codified, it is easier to enforce them, as reference can and will always be made to the statute itself regarding the standard of conduct and duty of care that is required. The next discussion will be on the South African Human Rights Commission (SAHRC), a state-based non-judicial mechanism that also seeks to address complaints and provide for remedies.

3.5 The South African Human Rights Commission

South Africa has made a serious effort to try and regulate human rights issues. The *Constitution* itself, the Bill of Rights specifically, is hailed as an archetype²¹¹ from which other countries should learn. The *Constitution* provides for state institutions which support democracy, one of them being the South African Human Rights Commission (SAHRC). The *Constitution*²¹² states as follows:

- (1) The South African Human Rights Commission must-
 - (a) promote respect for human rights and a culture of human rights;
 - (b) promote the protection, development and attainment of human rights; and
 - (c) monitor and assess the observance of human rights in the Republic.
- (2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power-
 - (a) to investigate and to report on the observance of human rights;
 - (b) to take steps to secure appropriate redress where human rights have been violated;
 - (c) to carry out research; and
 - (d) to educate.

²¹¹ This statement is highly debatable and some would consider it controversial as well. See Kende 2011 academic.udayton.edu; Vivian 2012 www.cover.co.za; MediaClub South Africa Date Unknown www.mediaclubsouthafrica.com; Monyae Date Unknown www.sarpn.org. A United States Supreme Court Judge got into trouble for suggesting that Egypt needs a constitution like the South African one and not the United States Constitution: see Keating 2012 blog.foreignpolicy.com.

²¹² Section 184 of the *Constitution of the Republic of South Africa*, 1996.

3.5.1 Clarifying the mandate of the SAHRC

The SAHRC is a body that extends its mandate to both the public and private sector.²¹³ Through its enabling legislation,²¹⁴ it is empowered to “conduct or cause to conduct any investigation that is necessary”, and it may also call individuals as witnesses for the purposes of inquiry.²¹⁵ Anyone can lodge a complaint with the SAHRC and the whole process is free of charge.²¹⁶ In the case of *Bhe v Khayelitsha Magistrate*,²¹⁷ the Constitutional Court affirmed the role, purpose and functions of the SAHRC by stating the following:

The South African Human Rights Commission is a state institution supporting democracy under Chapter 9 of the Constitution. Its mandate is, among other things, to “promote respect for human rights and a culture of human rights . . . [and] to take steps to secure appropriate redress where human rights have been violated”.

Institutions such as the SAHRC have been described as “public watchdogs” which are capable of holding governments to account, and can also reassure the people and let them know when problems occur.²¹⁸ Their impact have been noted internationally,²¹⁹ as they are understood to play a crucial role in promoting and ensuring the “indivisibility and interdependence of all human rights”.

The SAHRC is, consequently, a major non-judicial based grievance mechanism that can be used to access a remedy when there is a violation of a right. South Africa is in acquiescence with the recommendations espoused in the Guiding Principles in relation to state based human rights institutions. It helps in the facilitation of redress where it finds that a violation of rights occurred, or where it finds that there is a potential for a violation of rights.²²⁰ In order to demonstrate how the SAHRC works, a

²¹³ Murray 2006 *PELJ* 137.

²¹⁴ *Human Rights Commission Act* 54 of 1994.

²¹⁵ See s 9(1) *Human Rights Commission Act* 54 of 1994.

²¹⁶ Horsten 2006 *PELJ* 189.

²¹⁷ *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 29.

²¹⁸ Murray 2006 *PELJ* 141.

²¹⁹ Horsten 2006 *PELJ* 178.

²²⁰ See Rees and Davis *Non-judicial and Judicial Grievance Mechanisms* where it is noted that “...even where rule of law institutions are well-developed, non-judicial mechanisms often operate as part of a deliberately tiered system designed to complement and/or precede national judicial mechanisms (e.g., labor dispute resolution bodies, national human rights institutions)”.

brief discussion of an investigation into Angloplats' mining activities will be discussed below.

3.5.2 *The report of the SAHRC against Anglo Platinum*

ActionAid, an NGO, produced a report²²¹ that accused Angloplats of human rights abuses in its relocation of communities for the purposes of paving way for platinum mining at its Potgietersrust Platinum mine in the Limpopo province. From this report, the SAHRC then took up the issue for investigation.²²² Some of its findings (in relation to human rights) were the following:

- There were perceptions relating to the poor quality of water to the relocated communities.²²³
- The Commission found that the people were complaining about Envirolaos (dry sanitation systems which do not use chemicals for treatment and which are meant to be odourless)²²⁴ which, according to the Commission, posed a potential sanitary and health risk for the resettled communities.²²⁵
- There were concerns that the impact of blasting (at the mine) on the environment and the surrounding communities was not fully considered.²²⁶
- The process of removal of graves was marred by allegations of lack of consent from the communities and also disrespect in the process itself.²²⁷

On its part, Angloplats stated that the report by the SAHRC revealed the “potential hidden vulnerabilities of communities and residents involved in a complex, multi-year, multi-million rand relocation project”.²²⁸ However, the potentially disturbing issue to be noted from this case is that the SAHRC had to initiate its investigation at the instance of a report made by an NGO. While the report by ActionAid was welcome, it goes to show the lack of institutional mechanisms in place for the

²²¹ ActionAid *Precious Metals*.

²²² SAHRC 2008 www.sahrc.org.za.

²²³ SAHRC 2008 www.sahrc.org.za 29-35.

²²⁴ SAHRC 2008 www.sahrc.org.za 36.

²²⁵ SAHRC 2008 www.sahrc.org.za 36-38.

²²⁶ SAHRC 2008 www.sahrc.org.za 38-42.

²²⁷ SAHRC 2008 www.sahrc.org.za 43-46.

²²⁸ Van der Merwe 2008 www.miningweekly.com.

SAHRC to monitor human rights compliance. It is well understood that capacity might be an issue, but it is submitted that in instances like this where a mine relocates communities, the SAHRC must and should be part of the process to safeguard any potential human rights issue that stems from the process. Be that as it may, the report demonstrates how the SAHRC undertakes its mandate.

3.6 Selected cases

There have been many cases that highlight how the above mentioned and described remedies are applied in practice. This study will consider two examples of cases to illustrate how the courts tackle actions for remedies. These cases are *Mankayi v AngloGold Ashanti Ltd* and *Lascon Properties (Pty) Ltd V Wadeville Investment Co (Pty) Ltd*²²⁹.

3.6.1 Mankayi v AngloGold Ashanti Ltd

3.6.1.1 Facts of the case

Mr Mankayi, the applicant, had contracted tuberculosis and chronic obstructive airways during the course of his employment at a controlled mine of AngloGold Ashanti Limited (AngloGold). He received compensation worth R16 320 in 2004 from the ODIMWA compensation board. He then proceeded to institute delictual claims against AngloGold for negligence, and claimed amounts that covered past and future loss of earnings (as he was unable to work any longer) and also medical expenses, including general damages. AngloGold excepted on the grounds that, because Mr Mankayi was an employee and AngloGold was an employer under COIDA, Mr Mankayi's claim was barred by section 35(1) of COIDA (this section limited compensation to that provided under COIDA and replaced the employer's liability with the Act).²³⁰ The High Court and SCA had all found that the common law claims

²²⁹ The *Mankayi* case and *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) Ltd* 1997 4 SA 578 (W).

²³⁰ The section reads: "No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."

of miners were extinguished by section 35(1) of COIDA because all employees fell under COIDA, regardless of the fact that their claim for compensation was due under ODIMWA.

The issue in the case was whether section 35(1) of COIDA extinguished the common law right of mineworkers to recover damages for occupational injuries or diseases caused by negligent mine owners, even though the mine workers were not entitled to compensation under COIDA, but under ODIMWA. The applicant in the Constitutional Court argued that section 35(1) does not apply to him because section 100(2) of ODIMWA barred him from getting compensation under COIDA. The appeal though, was late as it had been brought to the court six days after the lapse of the period within which appeal was supposed to have been made.

3.6.1.2 Findings of the court

The court found that the issues pertaining to whether Mr Mankayi's common law right to sue was extinguished by section 35(1), implicated his right to freedom and security of the person as contained in the Constitution.²³¹ Regarding what constituted an effective remedy, the courts ruled that delictual remedies may be regarded as sufficient and effective to vindicate constitutional right infringements.²³² Additionally, the court found that if section 35(1) precluded Mr Mankayi from claiming for injuries caused by the negligence of the employer, then he would be deprived of an appropriate and effective remedy.²³³

As to the question on the definition of "employee" under COIDA, the court ruled that this definition could not be construed as to cover also employees who were not able to benefit under the Act.²³⁴ The court then found that those who receive compensation under COIDA were in a better position than those under ODIMWA. The former are able to claim additional amounts if the employer is negligent. As a result, the court found that the High Court and the SCA had erred in finding that the

²³¹ See s 12(1)(c) of the *Constitution*.

²³² See para 17 of the *Mankayi* case.

²³³ See para 18 of the *Mankayi* case.

²³⁴ See para 76 of the *Mankayi* case.

legislations could not be contrasted.²³⁵ The court further found that if the legislature intended that section 35(1) would apply to those falling within ODIMWA, it would have explicitly mentioned it.²³⁶ As a result, the court found that there was nothing irrational in preserving an employee's common law claims against their employers under ODIMWA.²³⁷

In support of the findings of the court, Tshoose contends that the judgment represents the court's formulation of a yardstick or "standard of conduct against which the employer's conduct can be measured and judged". He also argues that the judgment will bring about accountability from those who have been abusing workers.²³⁸

3.6.2 *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) Ltd*

3.6.2.1 Facts of the case

At the centre of the dispute was a regulation²³⁹ pursuant to the *Mines and Mines Works Act*²⁴⁰ which provided that water containing any injurious matter in suspension or solution may not be permitted to escape without having been previously been rendered innocuous. The plaintiff had leased a property which was bordering the land on which the defendant owned and on which there were sand dumps and slime dams (waste materials from mining activities). The defendant had a dump permit which allowed him to retain possession of and treat tailings, slimes, waste rock and other mineral residue situated on the land. On the other hand, the plaintiff bore the risk of damage to buildings on the leased property. The land of the defendant had mine dumps that were treated by the second defendant. The plaintiffs had brought an action on the grounds that the first and second defendants had allowed acidic water polluted by injurious and noxious substances to escape to the leased property, causing and continuing to cause damage to the leased property and building on it.

²³⁵ See para 87 of the *Mankayi* case.

²³⁶ See para 102 of the *Mankayi* case.

²³⁷ See para 111 of the *Mankayi* case.

²³⁸ Tshoose 2011 *PELJ* 261.

²³⁹ Regulation 5.9.2 in terms of s 12(1) of the *Mines and Works Act 27 of 1956*.

²⁴⁰ *Mines and Mines Works Act 27 of 1956*.

The defendants filed an exception indicating that there was no cause of action since the plaintiff had not alleged fault or negligence on the part of the defendants. The court had to answer the question as to whether a breach of a statutory duty which causes damage gives rise to a claim for damages independently of the *actio legis aquiliae* or whether it must be brought within such action and accordingly satisfy the requirements of the *aquilian* action.

3.6.2.2 Findings of the court

The court came to the conclusion that a breach of a statutory duty founds an action. In their arguments the defendants argued that the regulation did not create a right to compensation outside the common law (which would require either intention or negligence).²⁴¹ The court agreed with this submission, but went on to find that the right test was a test proposed by Professor McKerron which was whether the legislature intended to give a right of action arising out of the breach of the statute.

The court considered that, among other reasons, the regulation was promulgated for:

- the protection and preservation of the surface of mines, works and adjoining land, of buildings, roads, railways and other structures and enclosures on or above the surface of such land,
- for the prevention and combating of pollution of the air, land or sea which arises or may possibly arise in the course of the operations involved in prospecting or mining for any minerals, and
- for the conservation of the environment at or near any mine or works, including the restoration of land on which activities in connection with mines or works are performed or have been performed.

From these considerations, the court concluded that the regulation was *prima facie* promulgated for the benefit of the owners of land which might be polluted as a result of the actions of a mining company. As a result, the legislature would not have imposed an obligation to prevent the escape of noxious water without intending

²⁴¹ See chapter 3 above.

persons harmed thereby to be entitled to be compensated by the person permitting the water to escape.

This case shows that the courts are willing to rule in favour of the protection of the environment, even where there is no fault or negligence. This serves to demonstrate just how reliable and effective judicial remedies can be. The findings of the court also serve to qualify the reference to breach of a statutory duty as mentioned in chapter 3 under the discussion on common law remedies.

3.7 Conclusion

The purpose of this chapter has been to examine the remedies that are in place in so far as they relate to the mining industry. These have been found to be judicial, non-judicial and also statutory in nature. The following chapter will be the conclusion and summary of the study.

4 Summary and conclusion

4.1 Introduction

Remedies are fundamental to the smooth and just settlement of disputes regarding alleged violations of rights. These human rights are all embracing, ranging from environmental rights and labour rights that usually affect groups of people or communities, to rights that affect the person alone, like the violation of the rights to equality, dignity or freedom and security of the person. The objective of the study was to measure the degree to which South Africa, as a state, protects and remedies human rights violations by corporations in the mining industry. This was done by introducing the Guiding Principles, a recently adopted international framework that sets out some criteria upon which both business and state performance regarding the protection and remedy of human rights is concerned.

This final chapter concludes the study by setting out the summaries and findings of each chapter. This is followed by conclusions drawn from the chapters and will culminate in the formulation of some recommendations in line with the conclusions reached in the study.

4.2 Summary of the chapters

Chapter one found that the debate regarding business and human rights centres on the question as to whether multinational companies should be given human rights responsibilities that are parallel to those of the state. The findings were that the efforts taken internationally were voluntary and non-binding, including the Guiding Principles. The study found that these soft laws can create standards of conduct through which state actions can be measured. Subsequently, chapter one found that the *Mankayi* case demonstrated how difficult it was to get judicial remedies, and this resulted in the need to determine if South Africa has effective remedies as described in the Guiding Principles.

In chapter two, it was found that the state has the duty to provide for remedies when there is a human rights violation. The study also found that this duty stems from, or

must be considered together with, the state duty to protect against human rights violations. This duty was found to be grounded in international, continental and national law through the ICCPR, the ACHPR and the *Constitution* respectively. Furthermore, chapter 2 found that the remedies were judicial and non-judicial in nature. However, non-judicial remedies were found to be the more accessible means for most people who are indigent.

The purpose of chapter three was to describe and discuss the framework within which remedies in South Africa are applied in the mining sector. The study found that there are common law remedies through delict for which any person or persons may approach the courts. Moreover, it was found that the *Constitution* allows for parties to search for remedies in the courts if there is an alleged violation of a right in the Bill of Rights. Apart from these judicial mechanisms, it was found that in so far as the mining industry is concerned, the South African legislature has made efforts to enact legislation that provide for remedies and protection of the environment. The study also showed that South Africa has a national human rights institution in the form of the SAHRC, empowered through the *Constitution* and its enabling statute to investigate and report on human rights issues.

4.3 Conclusions

From the study, it is apparent that the state has gone a long way in trying to live up to its duties of protecting against and remedying human rights violations, more so in the mining industry. Ultimately, South Africa adheres to, and would not fail, the test of the Guiding Principles in so far as remedies are concerned. The government is fulfilling its duty to protect, the necessary court structure is in place, a functional national human rights institution exists and legislation have been set up to provide for compensation.

However, the issue as to whether the efforts, institutions and measures put in place by the state in fulfilment of its duty to protect and to provide for a sufficient remedy, are effective, is another matter. Credit is duly given to the state for its effort, but the duty to protect is not a once-off duty. It is ongoing and has to be vigorously kept in

check and updated as and when necessary. The following discussions will comment on each specific remedy identified and its shortcoming.

4.3.1 *Legal remedies*

The study showed that in South Africa, any violation of rights in the mining sector can be vindicated through common law remedies (delictual claims) and through actions based on standing as provided for in section 38 of the *Constitution*. The courts are efficient in so far as a violation or a potential violation of rights needs redress, as they will issue a relevant order (for example, the *Lascon* case). However, the main issue is with regard to the access to these courts, which is difficult. The constitutional provision on class actions is a very welcome development that allows many people to join their cases. This can even be considered an effort to address the problem that runs deep in the judicial sector, which is expenses (for example, if many people join their cases, they can have a single legal team, which makes it possible to save on legal costs).

4.3.2 *Legislation*

The system of compensation developed by the government is a big step in the right direction. Many people can now have access to compensation. However, as the *Mankayi* case shows, those miners who fall under ODIMWA are not compensated enough. Furthermore, an author has remarked that the *Mankayi* case also highlights the lopsided nature of the workers' compensation laws in South Africa, which lean towards compensation, and place little focus on human rights.²⁴² However, it is submitted that this author's submissions are incorrect. There is the *Mine Health and Safety Act* (MHSA)²⁴³ which regulates safety in mining. The MHSA sets up an inspectorate²⁴⁴ which has a wide range of powers, including *ad hoc* inspections²⁴⁵ and even closing a site where there has been death, serious injury or illness, or even

²⁴² Tshoose 2011 *PELJ* 256.

²⁴³ *Mine Health and Safety Act* 29 of 1996.

²⁴⁴ See s 47 MHSA.

²⁴⁵ See s 50(1) MHSA.

a health threatening occurrence.²⁴⁶ What is more, any negligent acts or omissions are regarded as offences.²⁴⁷

4.3.3 SAHRC

The SAHRC is a success story, given the history of the country. Its credence stems right from the *Constitution* and also the empowering legislation, the *Human Rights Commission Act*. Its powers are wide-ranging and include mediation, investigations, reports etc. However, the Commission is not without hindrances. For instance, it has openly acknowledged that there are difficulties in making the Commission known around the country.²⁴⁸ It has been found that the Commission can handle grievances against public companies but not private companies.²⁴⁹ Another problem is that there is no provision in the *Constitution* or the Act that requires or compels the government to respond to the reports or recommendations made the Commission.²⁵⁰ There is evidence to support the view that government is lax when it comes to some of the work of the Commission, as proved by the engagement of the Commission with the Department of Performance, Monitoring and Evaluation.²⁵¹

4.4 Recommendations

The recommendations that can be made at the end of this study, is listed below:

- If the events preceding the *Mankayi* case in the Constitutional Court²⁵² and the observations by Horsten²⁵³ are anything to go by, then there is serious

²⁴⁶ See s 50(7A) MHPA.

²⁴⁷ See s 86 MHPA.

²⁴⁸ Rees 2008 www.hks.harvard.edu 14.

²⁴⁹ Rees 2008 www.hks.harvard.edu 9.

²⁵⁰ OHCHR 2012 www.ohchr.org. These observations were made by Margaret Sekaggya the South African Special Rapporteur on the Situation of Human Rights Defenders.

²⁵¹ OHCHR 2012 www.ohchr.org.

²⁵² Specifically the fact that the appeal was lodged late because of lack of funds.

²⁵³ Horsten 2006 *PELJ* 189-190. She makes the following observation: "While judicial processes and individual complaints are important means of enforcement, they are often inadequate. Vulnerable groups (and individuals) are less likely to be able to access these processes for various reasons, including lack of knowledge of the processes available to them and financial constraints. While these processes address the specific violation in question, they do not easily offer a means of addressing deeper systematic problems."

need for the state to seriously consider the impact of costs to litigation, especially for vulnerable groups.

- The state must consider providing legal clinics that are specifically meant to assist vulnerable groups on such civil claims, depending on the levels of their income. The Legal Aid Board currently assumes this role. However, it has been argued by the North Gauteng High Court Judge President (Judge Mlambo), that the Legal Aid Board usually reduces civil legal aid in order to handle more criminal matters.²⁵⁴ It is thus submitted that if the Legal Aid Board is to keep these functions, then it must do more in the area of civil cases. The need for a dedicated body for these issues becomes more pertinent if regard is given to the fact that most civil litigations take long to reach finality, with the unfortunate predicament that most workers do not have the financial muscle to sustain any prolonged legal battle.
- The state should consider ways to educate people more on the benefits of the remedies that flow from litigation. Knowledge of the remedies will not be complete without knowledge of the litigation process itself. This education must also have a specific focus of informing those whose rights have been violated to come out. If there is the assurance of legal assistance it is possible that people will come out.
- With regards to the legislative framework that governs compensation for occupational health, the findings of the Constitutional Court in the *Mankayi* case are welcome, but that does not solve the bigger problem, which is the impediment of access to courts (because of costs and expenses). Even if there is a possibility of common law actions, without addressing the issue of costs, hardly any progress has been made. Therefore, ODIMWA must be amended so that it is in line and harmony with COIDA. The benefits due to miners under ODIMWA must not be inferior to those under COIDA, as is currently the case.
- It is submitted that out of court settlements are ideal and very helpful. However, it is suggested that institutions like the SAHRC must be part of the process, especially when there has been a flagrant disregard of human rights. The recent out-of-court settlement were AngloGold paid compensation to 23

²⁵⁴ Mlambo 2012 www.sabar.co.za.

miners who suffered from silicosis had, as a condition, that the settlement would be made “on the basis of no admission of liability”.²⁵⁵ The benefit that accrues to the minors is welcome, but there is a “potential” that no measures might be taken to ensure that no violation is further done or that there is punishment for the violation. Therefore, when there are out of court settlements, it would be beneficial if the SAHRC can be part of it and if possible, there should be investigations to observe if there are commitments to prevent further violations (if possible).

- The SAHRC needs to be proactive and pre-emptive. They should conduct their own independent investigations and take up cases for representation (the cases or reports of the SAHRC are predominantly a result of a report or complaint having been made). Sometimes waiting for a person whose rights have been violated to file a complaint is not the best way. Not all people know of the procedures or their rights. If the SAHRC had taken control of the *Mankayi* case and represented him earlier, the late Mr Mankayi would have seen and received justice more timely. This significance of this case is that it would not only have implications for Mr Mankayi, but for the whole group or classes of persons in his situation. Furthermore, as indicted in chapter 3, instances of community and society interests, like the relocation in Limpopo by Angoplats, are matters of concern where the SAHRC was supposed to have been part of from the beginning. One wonders what would have happened had ActionAid not made the report.
- Coupled with this is the education of the roles and importance of the human rights institution. It serves no good to have this institution if most people do not know about it. There should be a mass flow of information, especially in mining areas and mining towns, so that the people know exactly where to go and where to lodge their claims.
- There should be more empowerment of the SAHRC. As indicated earlier, there is no obligation on government departments to respond to the SAHRC reports and recommendations. Therefore, there should be legislative intervention that ensures that the SAHRC is not a “toothless bulldog”, but a body that is respected by government.

²⁵⁵ Sapa 2013 www.fin24.com.

- Internationally, there are community- or industry-based organisations and multi-stakeholder initiatives, like the Social Accountability International or the International Council of Toy Industries, that can be used as non-judicial based grievance mechanisms. In South Africa, it can be beneficial to have a separate body that involves all stakeholders (community, government and employers) that is a non-judicial based grievance mechanism. Alternatively, it might be worthwhile to delegate such duties or functions to the Chamber of Mines.
- Companies should seriously give attention to the need for “effective and genuine” company level grievance mechanisms. It is no use to have a company level grievance mechanisms that is not independent, or that does not have the criterion listed in chapter 3. The objective must and should never be to make profit, but to ensure that employers are responsible in the manner in which workers are treated.
- On a general scale, NGOs should and must play a major role in making sure that there are non-judicial grievance mechanisms in place and that people know about them. They can play an active role in facilitating company level and community level grievance mechanisms to be effective. As indicated earlier, NGOs like ActionAid contributed to the final resolution of the issue on Angloplats’ relocation of communities.
- Other organisations are encouraged to represent indigent workers with their claims. Already there are influential bodies like the Legal Resource Centre who have been offering a lot of their services. More groups with the same cause would ensure that the scourge of legal fees is alleviated.

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