

Regulation of Mining Activities in South Africa: Prospects, Challenges and Pitfalls

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ABSTRACT Mining activities have pros and cons. While they contribute immensely to the wealth of a nation and can be relied upon for economic growth and development, they also create environmental challenges which might lead to potential pitfalls. Therefore, there is need to strike a balance on how to prospect for minerals and ensuring that the environment is protected from being destroyed. Regulatory interventions are the most potent means that can be used to achieve this. In South Africa, mineral resources are being controlled by the government; those who have the responsibility to ensure sustainable mining and clean environment need to stand up to the challenges posed by dangerous mining activities by using the control mechanisms in various regulations to sanitise the industry by making sure that the environment, land and the people where mining activities are taking place are well protected from land degradation, pollution and so on. This paper looks at the impact of regulatory frameworks and interventions in the sector for a sustainable environment and equal benefit of mining to all, especially, the historically disadvantaged people.

INTRODUCTION

Mining, sometimes called extractive business contributes immensely to the economic growth and development of many developed, developing and emerging countries (Bebbington et al. 2008). However, it has its negative impacts if not managed and regulated properly. Garvin et al. (2009) pointed out that *“while the exploitation of natural resources has traditionally been seen as a vital part of economic growth, it is now well recognized that concern for environmental consequences must be included as a key component of development activities. In many lesser-developed nations, mining is an important contributor to the national economy. However, the negative environmental impacts of mining are increasingly being recognized as critical.”*

While there is strong regulation of the mining activities in most of the advanced countries (Jenkins et al. 2006), the same cannot be said for developing and emerging countries. There is need for constant reform of the sector for sustainable mining activities to achieving economic, social and environmental sustainability which will culminate to socio-economic growth and

development without compromising the environment. This is against the backdrop that there has been a mounting awareness of the inability of the private mining sector and some few Black elites who have continually stalled the conditions surrounding the implementation of the legislation regulating the industry. This is one of the numerous challenges being faced by the transformation and developmental agendas in South Africa. In terms of beneficiation, the event and reality on the ground show that existing regulatory and legal frameworks governing mining in South Africa are being manipulated to create a more favourable environment for the private sector and multinational white monopolists' capital to thrive at the expense of poor Black majority. Therefore, the regulatory interventions have profoundly reduced institutional capacity as well as driving down norms and standards in areas of critical importance for socio and economic development, particularly, the protection of the environment from mining activities (Blanco et al. 2009). To address the issue of lasting and enduring sustainable economic growth and development, there is need to take account of the roles being played by different people concerned. Presently, there is disconnection between the mining companies and the communities where they operate and exploit for resources. The mining companies should reconnect with the community and exercise corporate social responsibility in these communities. Garvin et al. (2009) viewed that *“exercising social re-*

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sponsibility in small, remote centres, however, often means that international and transnational corporations must interact with rural or indigenous people who have strong emotional and historical links to the land."

Undoubtedly, engaging in a mining activity in a particular community will invariably strengthen the local economy and increase the deployment of modern technologies and social amenities (Kirkwood 2006). However, the reality is that the community members are still lingering in abject poverty because they do not possess the skills needed to drive the operations and activities in the mining sector. Against the backdrop of this, an entirely new set of problems are being created in the mining community and industry in South Africa Garvin et al. (2009). This paper looks at the prospects and impacts that have been recorded using regulatory frameworks and interventions in the sector and how to improve on and sustain the progress made so far and at the same time closing and filling gaps as they evolve in the industry.

Literature Review

Before the enactment of the Minerals Act, 1991 (Act 50 of 1991), mining companies were behaving irresponsibly without any care or concern of the impact of their mining activities on the environment. Protection of the environment was not aggressively pursued and, hence not considered important in their mining operations. The drive and focus was to maximise profits at the expense of the environment and the community. There was no stringent regulation in place that controlled, checked and sanctioned the companies for environmental misdemeanours. Against this backdrop, Swart (2003) asserted that *"mining companies used irresponsible mining methods with no regard for protecting the environment and often shirked their responsibility towards environmental rehabilitation by leaving an area unrehabilitated prior to their being liquidated or leaving the country. This negative legacy also relates to the long-term residual effects on the social, health and environmental well-being of communities residing in the vicinity of these unrehabilitated mining areas."*

During the apartheid era, legislation at that time focused primarily on surface rehabilitation and the primary emphasis of mining was focused

on its economic gains that supports and drives the apartheid agendas (Marschall 2010). Swart (2003) wrote that *"South Africa has, and still is, relying heavily on mining activities to generate wealth that could be translated into economic development, infrastructure and employment. Formal mining in South Africa is more than 100 years old. Early legislation focused on 'surface rehabilitation' and the primary emphasis of mining was on its economic gains."* Then, the ownership and control of all mineral resources were in the hands of apartheid rulers. The land and other means of productions were also in the exclusive hands and control of the apartheid regimes and their white cohorts (Southall 2003). The Black majority were oppressed and controlled with draconian statutes which disposed and deprived them of their land. The land was one of the primary means by which Black South Africans were oppressed (Marx 1998). Statutes like the Black Land Act 27 of 1913 and the Development Land and Trust Act 18 of 1936 were used to perpetrate deprivation and disposition. These statutes and other similar statutes were used to deprive Black people of their rights to own and administer their own land (Mitchell et al. 2012). Until relatively recently, "communities were able to own land only through a trust-like arrangement with a government official and were limited to ownership within geographical areas defined by statutes" (Silberberg and Schoeman 2006). During this period, Black majority "suffered a long history of colonisation, racial domination and land dispossession that resulted in the bulk of agricultural lands being owned by a white minority. Black people resisted being dispossessed but were defeated by the superior arms of the newcomers" (Rugege 2004).

The apartheid used effectively the common law principle that states that "the owner of land is owner not only of the surface but of everything legally adherent thereto, and also of everything contained in the soil below the surface." At that time, communities were denied the right to be consulted adequately, especially, with respect to transactions concerning their own land. The apartheid white continued with the oppression and denial of the Black people and community. Various measures were rolled out to isolate the majority Blacks in the control, ownership and beneficiation of mineral resources. Towards the time of attaining constitutional

democracy in 1994, situations and laws began to change, and in 1991, “*the Minerals Act 50 of 1991 was promulgated which commenced the process of exclusive private mineral rights ownership and a retreat from State interference with such rights, a policy which was quite unique in the global context*” (Swart 2003). In 1994, South Africa became a full constitutional democracy and in 1996, a constitution was initiated which made ample provision for Bill of Rights (Sarkin 1999). The constitution provided that the mineral resources belong to the people of South Africa. In 2002, the government promulgated the Mineral and Petroleum Resources Development Act., 2002 (MPRDA) which created more equal rights for all South Africans (Sorensen 2011). These days, Blacks have access to and can own and explore for mineral resources in the Republic within the ambit of the law (Hamann 2004). It is against the backdrop of this transformatory provision that “in South Africa, mining companies are increasingly referring to corporate social responsibility (CSR) and partnerships in terms of the business case, or the expectation that being responsible and collaborating with stakeholders is good for profit” (Hamann 2004).

The current mineral prospecting and ownership regimes recognise sustainable mining activities and the importance of mining that will not be injurious or damage the environment (West 2013). The Constitution, MPRDA and other laws on mineral resources take the issues surrounding how the environment, land are used when conducting mining operations seriously. Ample regulatory measures, plan, program that must be followed by the mining companies during the course of mining activities and business are now in place to control and regulate mining activities from the beginning to the end of the operations. In the same vein, various environmental principles and norms both national and international are being used to regulate and control how mining companies do business.

Undoubtedly, since 1994, mining has had tremendous impacts on the economic growth and development of South Africa (Rodrik 2008). The attainment of democratic government attracted a lot of people and businesses to South Africa (Chabane 2006). Chabane (2006) pointed out that “under the apartheid regime, South African business was marked by a high degree of concentration, both in terms of ownership and activities; indeed, it could be argued that this concentra-

tion was both created by and reinforced the exclusions linked to apartheid.”

This is against the backdrop that there is concentration of minerals deposits in the landscape of South Africa (McCarthy 2011). This is one of the factors for the opening up of the country and its rapid economic development. According to Kirkwood (2006), “South Africa is one of the world’s leading mineral producers along with Russia, Canada, Australia, Brazil and the USA. South Africa is very wealthy in terms of mineral deposits and accounts for a large number of the world’s reserves.” Further, “in 2006, South Africa’s Department of Minerals and Energy estimated there were a total of 118 separate mining or quarrying operations. These operations generate demand for domestic goods and services, earn foreign exchange, employ labour, attract foreign direct investment, impact local communities through healthcare investment, education and training and contribution to local municipalities while generating revenue for the state through direct and indirect taxation” (Kirkwood 2006).

The mining businesses in South Africa have different challenges. Azapagic (2004) pointed out that “*the mining and minerals industry faces some of the most difficult sustainability challenges of any industrial sector. To secure its continued ‘social licence’ to operate, the industry must respond to these challenges by engaging its many different stakeholders and addressing their sustainability concerns. The industry must also be able to measure and assess its sustainability performance and to demonstrate continuous improvements over long term. The mining and minerals sector has already started responding to some of the sustainability challenges, as demonstrated by the Mining, Minerals and Sustainable Development (MMSD) project.*”

It is pertinent to mention that the mining industry is still, however, vitally important in the contribution to the South African economy growth and development (Kirkwood 2006). Mining businesses are sources of employment in South Africa either directly or indirectly through support industries (Azapagic 2004). Although, the constant labour unrest and strikes are some of the factors that have led to job losses in the sector, despite this mining still represents up to 33% of total national exports and contributes up to 8% of GDP (Pollin et al. 2006). As part of the

restructuring and transformation agenda of the ruling African National Congress, ambitious legislation such as the MPRDA that transferred ownership of mineral rights from private companies to the state and the adoption of Black Economic Empowerment initiatives have been promulgated to drive radical and rapid transformation in the industry.

AN APPRAISAL OF THE SALIENT PROVISIONS IN THE MPRDA

By virtue of section 2 of the MPRDA which outlined the objects of the Act, all mineral resources in South Africa belongs to the Republic. The State has full custodianship of all the mineral resources and as such, exercises sovereignty over all the mineral and petroleum resources within the Republic in accordance with internationally accepted principles and laws. With regard to beneficiation, the MPRDA “promotes equitable access to the nation’s mineral and petroleum resources to all the people of South Africa.” Access to mineral resources is reinforced in section 3(1) of the MPRDA which provided that *“mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans. (2) As the custodian of the nation’s mineral and petroleum resources, the State, acting through the Minister, may— (a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and (b) in consultation with the Minister of Finance, determine and levy, any fee or consideration payable in terms of any relevant Act of Parliament. (3) The Minister must ensure the sustainable development of South Africa’s mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development.”*

The MPRDA created window of opportunities for historically disadvantaged people, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation’s mineral and petroleum resources. The MPRDA recognised the injustices of the past and takes steps to address them by

mainstreaming the previously denied and disadvantaged people and more importantly, the vulnerable-women. Sorensen (2010) asserts that *“the Mineral and Petroleum Development Act 28 of 2002 (MPRDA) that regulated the mining industry in South Africa requires undertakings to transfer 26% of ownership of existing mines to ‘Historically Disadvantaged South Africans’ (HDSAs) by 2014 before issuing ‘new order’ mining licences. It is clear that this target has yet to be met, although some may have benefitted. The MPRDA, its related Charter and Scorecard and the Mineral and Petroleum Resources Royalty Act 28 of 2008 are set in context. The government appears to have transferred the responsibility to provide the Constitution’s ‘right of access’ to housing, healthcare, food and water, to the mining industry who have to implement expensive labour and socio economic plans in addition to the loss of equity and the onerous tax burden.”*

By recognising gender, particularly women, the MPRDA purposes are to allow women take leading roles in the ownerships and management of mineral resources. Besides, of utmost importance is the focus on promotion of economic growth, employment and advancement of the social and economic welfare of all South Africans, provision for security of tenure in respect of prospecting, exploration, and mining and production operations and mineral and petroleum resources development.

While the issues surrounding the beneficiation of mineral resources are well articulated, the MPRDA explicitly provided for sustainable mineral exploration and exploitation. This is articulated in section 2(h) which provided that in exploiting for mineral resources effect should be given to “section 24 of the Constitution by ensuring that the nation’s mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.”

The MPRDA also imposes obligations and stipulates that holders of mining and production rights must contribute towards the socio-economic development of the areas in which they are operating.” This is related to corporate responsibility of the mining companies to the community, environment, the Republic, the land where the mining is taking place and the workers who go deep underground to bring out the minerals to the surface.

REGULATION OF MINING

Before the enactment of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA) and MPRDA, the Minerals Act, 1991 (Act 50 of 1991) (MA) was the legislative framework on which reliance was placed for the regulation and management of mining industry. The MA regulated and enforced “environmental protection, the management of environmental impacts and the rehabilitation of the affected environment of prospecting and mining in South Africa” (Swart 2003). Other applicable legislation also provide for control, management and remedial measures. Under this regime, there was consensus between government and the mining industry that the principle that “polluter must pay for pollution or the damage that prospecting or mining actions incur on the environment.”

The NEMA played an important role on how to regulate and manage impact of mining activities on the environment. More importantly, it highlights and promotes sustainable development for integrated environmental management and enjoins all spheres of government and all organs of State to co-operate, consult and support one another. It frowns against environmental damage hence imposes a duty of care and remediation on any person who causes, has caused or may cause significant pollution or degradation of the environment. The status and power to institute auctions in court to enforce environmental laws can be done by the government and the private prosecutor respectively.

The MPRDA contained radical provisions on transformation of mining industry. It provided for sustainable mining that will promote economic growth and prosperity. It provided for the application of integrated environmental management and the responsibility to remedy. More importantly, as part of close monitoring and imputation of responsibility, in terms of section 38(2) the directors of companies or members of closed corporations will be held liable for any damage, degradation or pollution caused by the company or closed corporation which they represent or represented.

The MPRDA prescribed legal regulations for the various rights such as prospecting right, mining right, exploration right or production right, and rights of holders in the mineral resources in the Republic. The MPRDA explains

the rights, responsibilities and liabilities of the holders of each right in the Act and also stipulated consequences for transgressing or violating the rights as the case may be.

In terms of section 5(1) of the MPRDA, it explained the nature of the right and limitation thereof “a prospecting right, mining right, exploration right or production right granted in terms of this Act is a limited real right in respect of the mineral or petroleum and the land to which such right relates.”

The holder of any of these rights is only entitled to the right granted in accordance to Act or other law. In exercising the right granted, the holder, by virtue of section 5(3) may “(a) enter the land to which such right relates together with his or her employees, and may bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of prospecting, mining, exploration or production, as the case may be; (b) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted; (c) remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be; (d) subject to the National Water Act, 1998 (Act No. 36 of 1998), use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land; and (e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act.”

Even though, the MPRDA gave ample rights to the holder, however, it also stipulated sanctions for violating or acting contrary to the conditions of grants. To this end, in terms of section 5(4) of the MPRDA, “no person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental, thereto, on any area without- (a) an approved

environmental management programme or approved environmental management plan, as the case may be; (b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and (c) notifying and consulting with the land owner or lawful occupier of the land in question.”

The MPRDA recognises the impact of mining on the environment and as such the whole of chapter 4 is devoted to the issues of rights, obligations, responsibilities, beneficitions remedial actions and all other administrative measures to mitigate impact of mining on the community, land, people and the environment.

CONCLUSION

The Ample and sufficient laws have been put in place to regulate the activities of the mining companies when they prospect for and exploit mineral resources in South Africa. These laws and measures articulated the importance of sustainable mining operations and the need to ensure that the land and environment where the operations are taking place are not degraded and damaged. This is why the law mandates and insists on environmental impact assessment and other necessary approvals prior to the commencement of any mining operation in any part of the country. These approvals stipulate the rights and liabilities of all the parties, especially, the applicant. The community and previously disadvantaged people are well catered for in these laws in order for all to have equal access to participate and take part in prospecting and mining of the mineral resources of South Africa.

RECOMMENDATIONS

The mining companies must take responsibility by ensuring that they take the lead in fostering sustainable mining exploration and exploitation. Effective and sufficient regulations and legislation on mining and environment are in place, however, there is need for institutions to be strengthened for purposes of effective and efficient monitoring, evaluation, implementation, compliance and enforcement of the laws against unsustainable mining activities.

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