

## Sustainable Prospecting for Natural Resources: Impacts and Implications

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**ABSTRACT** In South Africa, there are various legislative frameworks governing and regulating prospect for virtually all the natural resources spread across the landscape of the country. Compliance and tacit approval by the regulators at the appropriate institutions and government departments are mandatory before the commencement of any prospecting or mining activity and operation. Considering that, a lot of mining activities and natural resources exploration and exploitation are usually driven by profits; companies tend to downgrade the importance of protecting the land and environment. This research examined how the regulatory frameworks are being used and applied for the purposes of ensuring sustainable natural resources exploration and exploitation. It considered the importance of safeguarding and protecting of land, heritage sites and community where the activities are being conducted and the necessary measures that are in place to prevent land degradation and destruction to the environment. It concluded by elucidating that prospecting for natural resources in water, on land and anywhere in South Africa can be done in sustainable ways without destroying other useful components in the environment necessary for a healthy life.

### INTRODUCTION

In South Africa, before any prospecting, exploration, production and mining of any mineral can commence, the law in terms of sections 16 and 22 of National Environmental Management Act 107 of 1998 (NEMA 1998) mandated that an environmental management plan or program (EMP) must be submitted (Kihato 2013). Environmental planning is essential and needs to be integrated in for better and greater efficiency in exploitation of the natural environment (Blowers 2013). Under the Amendment Act to the NEMA 1998, the EMP is replaced with an environmental authorisation. The implication of this is that, before any prospecting, exploration, production and mining for any mineral can commence, two conditions must be fulfilled; an EMP or program must be submitted and authorisation for commencement given accordingly. Applicant will have to apply for both EMP and authorisation before any activity can commence. These legislative interventions have been put in place to guide the establishment and institution responsible for approving prospecting and

mining rights in reviewing and evaluating the impact mining activities will have on the environment, land, the community and the people. Assessment of the plan will assist the authority to make a decision whether to approve or disapprove the proposed mining venture depending on the outcome of the review, assessment and evaluation. The applicant needs to disclose all activities intended to be carried out prior to, during and after the prospecting rights is submitted, processed and granted as prescribed in the assessment instrument.

The essence of the plan and authorisation is to protect the environment from and degradation, destruction of community, and imminent health hazards in the proposed prospecting mining area (Mabiletsa and du Plessis 2001).

The overall objective of NEMA 1998 and the amendment was to ensure that the environmental rights are well protected (Kotze 2006) and harmful mining and prospecting activities are prevented from the onset (Hamann 2004). The case of *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (2011 (3) BCLR 229 (CC)) has reinforced the need to ensure that the nation's mineral and petroleum resources are developed in orderly and ecologically sustainable manners, while promoting justifiable social and economic development. Thus, the minister-in-charge of natural mineral resources, in exercising of his power, must ensure that section 17(1)(c)

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of the Act is strictly adhered to (Muzoroza 2010). To mitigate the unforeseen consequences that might occur during prospecting and mining, section 41(1) of the Act mandatorily requires that applicants provide financial provision for the rehabilitation or management of negative environmental impacts when requesting for prospecting rights. These are some of the conditions precedent that must be fulfilled by the applicant. These measures will ensure that the applicant prospect responsibly and reasonably and if he/she acts otherwise; there will be consequences as enshrined in the Act. Time is an important factor during the processing of mining and prospecting rights. The EMP must be submitted to the Regional Manager within 60 days from the date of notification of acceptance of the application. It is also incumbent on the applicant to have taken steps to investigate, assess and evaluate the possible impact of the proposed prospecting operation on the environment and the socio-economic conditions of any person who might be directly affected by the prospecting operation and make a full disclosure of this in the EMP. The EMP should contain information and comprehensive record of the public participation undertaken and the results, thereof, for it to be credible and acceptable by the authority. All issues and objections raised by the stakeholders and role players must be disclosed and the applicant must state categorically how to address them in order to prevent hazard and environmental degradation. If the minister is satisfied that the applicant has complied fully with all the requirements of the conditions of grant, the minister must approve the plan within 120 days of its lodgement.

#### **REGULATORY INTERVENTIONS ON MINING AND PROSPECTING RIGHTS**

South Africa has a lot of regulatory mechanisms that stipulated how natural resources should be explored and exploited (Chikozho 2014). South Africa is also actively involved in a number of international conventions which promote the preservation and protection of natural resources and heritage sites (Chape et al. 2008). Mining or prospecting on residential or government areas is not allowed in South Africa. The law disallows an approval to mine or prospect for natural resources in such designated areas in terms of section 48 of the National Environ-

mental Management: Protected Areas Act (NEM-APAA), and sub-section (2), which provided that *“no reconnaissance permission, prospecting right, mining right may be granted or mining permit be issued in respect of land comprising a residential area; any public road, railway or cemetery; any land being used for public or government purposes or reserved in terms of any other law; or areas identified by the minister by notice in the Gazette in terms of section 49.”* Even though, the minister has the power to grant prospecting right, mining right or mining permit in respect of the land contemplated in subsection (1) of the NEMAPAA, the minister only exercise this power if satisfied that having regarded to the sustainable development of the mineral resources involved and the national interest, it is desirable to issue it. Approvals of prospecting or mining activities have to be done in accordance with the framework of national environmental management policies, norms and standards (Strydom and King 2009). The framework clearly frowned against any activity that will be harmful to the environment and the people. The applicant must, therefore, strictly comply with the standard prescribed. The minister and the responsible officials play vital roles in ensuring that the applicant meets all the requirements before the right to prospect or mine is issued. They ensure that all activities are monitored during mining using the EMP as a guide to what must be done even after the termination of the activities.

#### **Responsibility to Preserve and Protect Heritage Resources**

During the course of prospecting and mining in a specific community or land, the applicant needs to be mindful of heritage sites that might be identified or discovered (Kruger 2006). Hence, the applicant has the responsibility not to destroy, but to protect and preserve such sites. The responsibility to protect and preserve heritage resources is not restricted to the government alone (Langholz and Lassoie 2001). Individuals also have the responsibility to protect and preserve. This is because, both government and individuals can identify heritage resources and as such preservation and protection become a common responsibility.

In South Africa, the National Heritage Resources Act 25 of 1999 (NHR) governs the res-

ervation, protection and preservation of all heritage resources. South African Heritage Resources Agency (SAHRA) is a designated agency that has the responsibility to identify places with qualities so exceptional that they are of special national significance in terms of statutory heritage assessment criteria as prescribed in terms of section 3 and 6 of the NHR. In terms of section 27(1), the NHR mandates that the SAHRA must investigate the desirability of any heritage resources before declaring them as national heritage sites. Section 27(2) of the NHR provides that in the provinces, the provincial heritage resources authorities must investigate and identify areas that are desirable to be classified as heritage sites or resources to declare them as provincial heritage sites. There is no restriction as to who has the capacity to identify that a place be declared as heritage site but such submission or nomination must be via SAHRA or the provincial heritage resources authority for the place to be under consideration as a provincial heritage site. Sometimes, the authority may prescribe the format of the nominations. However, if it is not prescribed, it is mandatory that there must be a written motivation that is submitted to the authority for the purpose of declaring a place as a heritage site. The motivation must be treated as a report and kept as record by the heritage resources authority. Such declaration must be done by publishing it in the relevant government and provincial gazettes. The authority, however, has the power to alter, amend or withdraw the gazette as it deem fit.

If a place is declared as a heritage site, the respective authority must, within 30 days of the declaration inform the provincial heritage resources authority, the provincial planning authority and the local authority within whose area of jurisdiction the national heritage site falls. However, the power to declare, amend or withdraw is to be exercised within the ambit of the law and not arbitrarily, hence the authority must notify the owner and allow the owner to make objections to that effect on why the declaration should sustain.

More importantly, the issue of existing interest and encumbrances on the heritage site is crucial and must be resolved before any declaration is approved. Hence, any person having any interest or rights regarding the site must be duly notified. This is also applicable to corpo-

rate entities and conservation bodies that had registered their interest in the geographical area in which the proposed heritage site is situated. They must be notified and given at least 60 days to make submissions regarding the proposed declaration, amendment or withdrawal of the notice. The heritage resources authority has to consider and analyse all submissions made before a final decision is made. During the course of consideration and analysis of the submissions, in the interim, the place under consideration is deemed to be a protected heritage site for six months from the date of service of the notice or until the notice is withdrawn whichever is the shorter period. All these cautious, measures and approaches have to be taken in order for the heritage authority to reach a just decision that will be acceptable to all without necessary going into contestations of any kind.

### **Participation by the Community**

The Mineral and Petroleum Resources Development Amendment Act 49 of 2009 (MPRDAA) was promulgated to “*amend the Mineral and Petroleum Resources Development Act 2002. so as to make the minister the responsible authority for implementing environmental matters in terms of National Environmental Management Act 1998 and specific environmental legislation as it relates to prospecting, mining, exploration, production and related activities incidental there to on prospecting, mining, exploration or production area; to align the Mineral and Petroleum Resources Development Act with the National Environmental Management Act 1998 in order to provide for one environmental management system; to remove ambiguities in certain definitions, to add functions to the Regional Mining Development Committee, to amend the transitional arrangements so as to further afford statutory protection to certain existing old order rights; and to provide for matters connected therewith.*” It is against this reform that the MPRDAA sought to facilitate transformation in the mining industry and broadened the definition of community to include the need to consult community. People must be consulted as a collective before any decision is taken on how any prospecting or mining activity would commence on their land or community. Hence, the

MPRDAA mandatorily provides that the requirement of reference to consultation must be unconditionally met before it can be said that a certain community has been engaged. Under the MPRDAA, the word community means “*a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have, or exercise communal rights in terms of an agreement, custom or law: Provided that, where a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affected by mining on land occupied by such members or part of the community.*” The definition is explicit on the need for ample engagement before any mining activity can commence in whatever form. The MPRDAA state that “the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community.” Inclusion means constructive inclusion and engagement where the community will have equal bargaining and negotiation power with the applicant. The community and the people are not supposed to make the number but should be actively involved and be allowed to make meaningful contribution at all stages till the end. Anything short of active inclusion and robust participation and engagement by the community with the applicant will undermine and devalue the spirit and content of the MPRDAA which mandates inclusion.

The inclusion and active engagement mandate in the MPRDAA clearly reinforced the key objective of the MPRDAA which provide in section 2(d) that the MPRDA is to “*substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation’s mineral and petroleum resources.*” This is against the backdrop of the unequal participation in the mineral resources of the country. Till date, a minority of monopolist liberal capitalists are benefiting from the mineral wealth of the country, while the Black majority are purely disadvantaged and still denied and deprived of the beneficiation and participation in the management and exploitation of the mineral wealth of their fatherland.

The MPRDAA also bring to the fore the issue of gender by explicitly mainstreaming women into the mineral management and exploitation of the natural resources. By specifically mentioning women, the MPRDAA has identified gender gap and as such made provision to close the gap and insisted that women should, substantially, equally and meaningfully enjoy and benefit from the opportunities presented by natural wealth of the country.

To give effect to, and realise the key objective provided in section 2(d) that the MPRDAA gives the minister discretionary power to impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community. Undoubtedly, in view of the inequality gap, the minister will promote social cohesion that fosters equal opportunity by closing the gap between the previously disadvantaged community and the mining company. Of importance is section 23 of the MPRDAA regarding mining rights which confers extensive discretionary powers to the minister when it comes to the issue of protection of the interests of the community, the people and women in particular.

The minister can exercise and enforce power to close the inequality gap in natural resources and mineral wealth so that it becomes beneficial to all people especially the previously disadvantaged communities and women. Windows of opportunities would have been said to be opened to these groups if the capitalist monopolists not only include the disadvantaged in benefiting from mining but also provide ample opportunity for them to acquire necessary skills that will assist them to attain positions of responsibilities in engineering, management and decision making. The objective of the Act will be defeated if the inclusion and participation continually reflect merely the rank and file. The rights and interests of the community will be protected when they are included and have the opportunity to improve their skills and improve the standard of education of their kids and kindred for better opportunities in life. Thus, sustainable and sustained education is important to achieving the objective of the Act. The children of the community members should be well educated in order to take over from wherever their parents have stopped. By so doing, the gap that has

been closed will not reopen. It will be a sustained venture where eventually, the community and people will be the major shareholders of the ventures and will be able to take responsibility for the exploration or exploitation of mineral resources found on their land and community.

#### **RELATING WITH THE COMMUNITIES: THE ROLE OF THE MPRDA**

The communities and the members are in the forefront of what the MPRDA sets out to achieve by recognising them and ensuring that their environment is protected from dangerous mining activities and practices. In the MPRDA, community is defined as “a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law.” The definition is wide enough to cover any dispute relating to the status of a community that relates to the mandate of the MPRDA. The MPRDA provides for various measures that the community can take in protecting their interest on their land and natural resources. Thus, in the event of an application for any prospecting right on a community’s land, the community interests needs to be addressed before the application can be approved. The applicant and all other interested parties must ensure that measures that show that the community’s interest is protected by proofs that consultation, social and preferent rights have been afforded to them. Additionally, existing royalty payments in certain circumstances must continue unabated and evidence to show that this will continue must be reflected in the EMP plan. The issue of Black Economic Empowerment (BEE) must reflect in all the transactions from the start to the end. These measures are very important toward bridging of the natural resources exploitation and beneficiation gap in the country.

#### **THE NEED FOR CONSTRUCTIVE CONSULTATION**

An important measure that needs to be used for a sustainable mining operation in the mining community is consultation. This is the most important aspect of community involvement in mining operations (Prno and Slocombe 2012). The significant role of constructive consulta-

tion is well articulated in the MPRDA as it serves as means of initial contact between the applicant for rights under the MPRDA and the community. Ample consultation with the community will lay a solid foundation upon which the applicant and the community can work together in order to achieve objectives set out in the MPRDA. It is pertinent to stress that consultation is a compulsory process under the MPRDA and must be achieved.

Thus, mining companies have corporate social responsibility to do everything that will diffuse tension in any community they find themselves. As Hamann (2003) puts it,

*“companies’ social and environmental responsibilities are increasing, due to global changes in the way the role of business is perceived, South African policy developments, as well as a strong ‘business case’ for companies to actively support sustainable development - beyond philanthropy and impact mitigation. Partnerships between companies, the government and civil society are introduced as a potentially effective and efficient strategy for CSR. They are no panacea, however, and require a commitment to local communities’ rights to informed prior consent and authentic participation.”*

The rights of the community and land owners are amplified in section 5(4) (c) which prohibits the commencement of mining or prospecting operations without notifying or consulting with the land owner or lawful occupier of the land in question. The applicant is mandated to consult with the landowner or occupier before the commencement of any mining operations. The Act also mandated that consultation must take place with the land owner or lawful occupier or other interested and or affected party prior to and after the application has been lodged.

The Act prescribed appropriate sanctions for non-compliance in terms of section 5(4) which provides for an offence in terms of section 98(a)(i) punishable by a fine not exceeding R100 000 or two years imprisonment or both (Section 99(1) (a) of Mineral and Petroleum Resources Development Act 28 of 2002).

During the course of consultations, the community is placed in a vantage position and can express itself through its members or collectively, and use the opportunity to negotiate compensation for use of the land in question and or damage to it. The community could also make

representations regarding the obligations that the applicant will undertake in terms of its social and labour plan. In some instances, the community enters into a full partnership with the applicant as a BEE partner for the beneficiation of all parties creating sustainable mining operation that is environmental friendly and grows the economy. In this regard, consultation is regarded as a powerful tool that the community can use to safeguard and protect their numerous interests in the land and the operation that will take place on it. Consultation discusses how the applicant is expected to provide robust reasons and actions that will be taken to mitigate any hazard or destruction to the land and the community. At this stage, the community is in a position to negotiate preventive measure or come up with an alternative mode of mining so as not to harm the land and the community. If the impact will not have permanent damage or destruction of the land and environment, the community can negotiate for compensation.

It is pertinent to reiterate that consultation must be constructive and holistic; hence, it cannot be a mere formal process. Consultation must show elements of credibility and trust. The community will have to be sure that it is genuine and credible and that all the deliberations will be formalised and concrete decisions must be collectively reached by all the parties. More importantly, all the parties must be on the same negotiation level. No one is expected to be intimidated or have their opinion suppressed. The engagement must be cordial, tension free and at the same time formal. Any measure short of this will make the process of consultation and engagement not credible and will undermine the process of consultation envisaged by the Act.

Thus, the applicant cannot rely on, or equate mere notification as meeting the obligations imposed in sections 5(4) and 16 or 22 of the Act. Mere consultation will be a situation where there is a deliberate getting together of more than one person or party to the exclusion of others. It becomes formal and meaningful where minds are applied to consider together the pros and cons of a matter by discussion or debate collectively. These are the dynamic of constructive consultations.

An aggrieved community may raise the issue of failure to consult or inadequate consultation has recourse to remedy, by virtue of sections 17(2) (a) and 23(3) whereby, the minister

may refuse to grant the prospecting right of the applicant or revoke it for failure to meet the requirements of sections 17(1) or 23(1) respectively.

The community can also approach the court to review and set aside a right if the minister grants such right where the consultation process was flawed and hence in contravention of the MPRDA.

There will be instances where there is no consultation at all hence, contravening sections 16 (4) (b) and 22(4) (b) which required a proof of consultation. There could also be a fraudulent misrepresentation on the part of the applicant showing that consultation has taken place, whereas there was none. The consultation may also be flawed if the applicant exhibits dishonesty by consulting with wrong community members instead of the formally recognised ones.

The landowners must be informed of all the processes until prospecting rights is granted. Sufficient detail of what the prospecting operation will entail on the land must also be disclosed in order for the landowners to assess what impact the prospecting will have on their land. The applicant must, therefore, consult with the landowners with a view to reach an agreement to the satisfaction of both parties regarding the impact of the proposed prospecting operation. The applicant need to go the extra mile by ensuring that consultation is credible by disclosing all merits and demerits of the discussions and deliberations, stating clearly how the interests of all parties will be addressed prior, during and after the operation so that irreparable damage is not caused to the land and the community.

### **INCENTIVES TO THE COMMUNITY**

The Act makes provisions for incentives to the communities and allows them opportunity to participate in, and benefit directly from proposed mining operations. Against the backdrop of this, it is expected that mining companies must ensure that by 2014, 26% ownership in the companies are in the hands of the historically disadvantaged citizens. To what extent this will be monitored, measured and evaluated in order to know whether the quest for transfer of the mining companies to previously disadvantage is another mind-boggling and a major concern to the government and the disadvantaged citizens. The reality on the ground is that those communities and their members only supply or work as

casual labours to the mining industries. They go underground and dig for the resources while the majority that work in the skills related and managerial sectors of the industries are still Whites. This is a socio-economic transformation dilemma that is facing the country and it is causing a lot of tensions and frictions among the previously disadvantaged and the White capitalist mines monopolists' owners. Mines ownerships are still concentrated in the hands of advantaged Whites and they do not want to transform despite different policy interventions that have been put in place to ensure swift and sustainable transformation of the industry. One of the interventions implementable in the circumstances is the provision of section 104 of the MPRDA which affords communities a preferential right to apply for a prospecting or mining rights ahead of other prospective applicants. Section 104(2) attached conditions to this preferential treatment aimed at the achievement of the socio-economic objectives of the Act. When applying for a right in terms of section 104, the community must prove that 'the right shall be used to contribute towards the development and the social uplift of the community concerned.

#### **CONSTITUTIONAL IMPERATIVES AND CHALLENGES**

The South Africa's Constitution and the environmental rights contained therein place obligations on the state to enforce and guarantee rights to socio economic rights including clean environment (Liebenberg 2010). The constitution also provides for sustainable development which includes sustainable exploitation of natural resources that will not damage the land and environment (Wynberg 2002). Obligations to protect and preserve the land and the environment are the responsibility of national and provisional governments (Kingsford et al. 2011) as the environment is an area of concurrent national and provincial competence and therefore both may make and administer laws affecting natural resources. The South African Constitution derives its environmental principles and norms from acceptable international conventions and laws. This is reflected in the way and manner natural resources is governed and managed. In the same vein, a lot of legislative instruments that govern resources management are derived from the principles of equity, the right to a healthy

environment, a commitment to land reform property-rights, the right to water and food, the right to access information and to turn to the courts regarding infringements of rights (Amechi 2009).

The Act makes a modest improvement to the plight of the community, especially, regarding the unequal access to mineral resources by providing in section 104 that community can obtain a preferential right to prospect on community land for an initial period not exceeding five years that can be renewed for further periods not exceeding five years. Nothing should, therefore, stall the attempt of the community to apply and obtain these rights especially if they have complied with all the conditions of grants. The opportunity afforded the community in section 104 is imperative and needs to be exploited to its fullest to close the mineral resources exploitation gaps that had, for years, hindered the communities and the Black majority to have equal access to the resources. Thus, the right of the community should supersede and be better protected against the rights of the mighty capital monopolists that have access to the means of production and wealth.

#### **CONCLUSION**

The Constitution of South Africa and other regulatory interventions have made ample provisions for the protection of property and environmental rights. The concern, however, is that there has been persistent conflicts between the rights of the mineral right holder on the one hand and the use of the surface and the rights of the surface owner on the other. To resolve this, the government has intervened by putting in place regulations that guide on how mining operations should be conducted and the safeguard and protection of the community and landowners are explicitly spelt out. Applicants need to meet all the conditions stipulated in the enabling laws before any prospecting rights can be granted. As part of transformation in the mining industry, communities equally have the right to apply to obtain prospecting rights. This is a good provision because it gives the community the opportunity to participate in the exploitation and beneficiation of the mineral resources.

#### **RECOMMENDATIONS**

As part of the measures to resolve the conflicts, in addition to the constitutional provisions that provide the right to environmental rights

and sustainable development and just socio-economic beneficitions, there are numerous regulatory interventions that are being used to diffuse the conflicts and tensions and these should be strengthened. The government should intensify the applications of these interventions to give equal access to the mineral control and exploitation to all. The White capitalist monopolists also need to come to the party. Presently, they are still in control of the majority of the mining companies because of their technical and managerial skills, while the Black majority form substantial part of the casual unskilled labourers. There is, therefore, the need to close the resources ownership, control and exploitation gaps by providing opportunities for the Black majority to acquire skills that will make them become managers and owners of the mining companies.

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