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**AN ANALYSIS OF THE LEGAL NATURE OF THE NATIONAL POLICY ON PROSPECTING AND MINING IN
PROTECTED AREAS IN NAMIBIA**

By

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ABSTRACT

Mining has been the biggest contributor to GDP after government services since the earliest discoveries of minerals in Namibia. The mining industry has played a significant role in the social and economic development of Namibia since independence in 1990. After Namibia gained independence in 1990, the country undertook to develop enabling mining laws to govern its mining industry. Namibia's mining industry developed relatively early, based mostly on diamonds that were discovered at the turn of the century. The country is well known for its rich biodiversity and plentiful mineral reserves. The country's economic growth is largely dependent on the mining sector such as the exploration and processing of mineral resources for export purposes to sustain its economy.

The need to establish mining laws was derived from the fact that the country's economy relies heavily on mineral resources for national wealth. The mining industry is governed by among other laws, the Namibian Constitution, the Minerals Prospecting and Mining Act 33 of 1999, the Diamond Act 13 of 1999 and the Minerals Development Fund of Namibia, Act 19 of 1996. Additionally to the enabling legislation, in 2003, the Namibian government unveiled its minerals policy with the aim to supplement the available mining laws. The enactment of the minerals policy was aimed at boosting the potential of the mining industry of the country. The main Act which governs the mining sector in Namibia has failed to incorporate in itself laws to govern mining in protected areas. Premised on this omission, the National Policy on Prospecting and Mining in Protected Areas (NPPMPA) was born. The purpose of the NPPMPA is to regulate mining activities in protected areas.

This study argues that a policy has no legal power to compel compliance with its provisions as opposed to the rule of law. The study recommends that a mature and modern legislative regime for the mining sector (in particular mining in protected areas) to provide a clear line of responsibility and accountability for both the government and mining companies is required. The government should therefore look at incorporating most of the guidelines under the NPPMPA into law to enable the government to achieve the desired environmental protection and maintenance of the ecosystem.

LIST OF ACRONYMS

EA	Environmental Assessment
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
EPL	Exclusive Prospecting License
ERL	Exclusive Reconnaissance License
IAP	Implementation Action Plan
MC	Mining Claim
MDRL	Mineral Deposit Retention License
MET	Ministry of Environment and Tourism
ML	Mining License
MME	Ministry of Mines and Energy
MPMRC	Minerals (Prospecting and Mining Rights) Committee
NPPMPA	National Policy on Prospecting and Mining in Protected Areas
NA	National Assembly
NEPL	Non-Exclusive Prospecting License
NPC	National Planning Commission
O/M/A	Offices Ministries and Agencies
TOR	Terms of Reference

KEYWORDS

Protected areas, Prospecting, Namibia, Policy, Legal, Mining, National

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CHAPTER 1: INTRODUCTION

1.1. Background to the research

Mining is a critical sector of the Namibian economy and mineral assets form a major source of national wealth.¹ The main laws governing the Namibian mining industry are derived from the Namibian Constitution, the Minerals Prospecting and Mining Act 33 of 1999, the Diamond Act 13 of 1999 and the Minerals Development Fund of Namibia, Act 19 of 1996. Additionally to the enabling legislation, in 2003, the Namibian government unveiled its Minerals Policy, aimed at boosting the potential of the mining industry.² This Minerals Policy was formulated in the spirit of wide and extensive consultations with all stakeholders in a process that was spearheaded by the Minerals Policy Committee of the Ministry of Mines and Energy.³ The policy sets out to achieve a number of different objectives in line with the country's national development goals.⁴ Through the implementation of the policy, the government hopes to create an enabling environment for private sector investment in the sector, facilitated by competitive policy and regulatory frameworks, security of tenure, and the provision of national geo-scientific data to stimulate exploration.⁵

The Republic of Namibia is a vast but sparsely populated country situated along the south Atlantic coast of Africa. It is the first country in the world that has incorporated the protection of the environment into its constitution.⁶ The country has a population of about 2.3 million.⁷ Namibia is one of the world's most sparsely populated countries, second only to Mongolia: 2.5 million people are spread across an area of 825,615 km².⁸ Namibia's mining industry developed relatively early, based mostly on diamonds discovered at the turn of the century.⁹ The country is well known for its rich biodiversity and plentiful mineral reserves. Its economic growth is largely dependent on the mining sector such as the exploration and processing of mineral resources for export purposes to sustain its economy.¹⁰

Mining has been the biggest contributor to GDP after government services since the earliest discoveries of minerals in Namibia.¹¹ It is thus safe to say that the mining industry has played a significant role in the

¹ L Glenn-Marie, "The contribution of minerals to sustainable economic development": *Mineral resource accounts in Namibia*. No. 54. Directorate of Environmental Affairs, Ministry of Environment and Tourism, 2003 at 5.

² F L Sem. "Implementing a sound minerals policy in Namibia": *key challenges and opportunities*. Diss. 2017 at 2.

³ Minerals Policy Committee of the Ministry of Mines and Energy. *Minerals policy of Namibia*, 2003, at p.ii

⁴ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF). (2018). *IGF Mining Policy Framework Assessment: Namibia*. Winnipeg: IISD at 10.

⁵ *Ibid.*

⁶ One World Nations Online, *Republic of Namibia Country profile*. Available at: <https://www.nationsonline.org/oneworld/namibia.htm> (last assessed 09 November 2019).

⁷ *Ibid.*

⁸ See IGF (2018) *Supra* n.4 at 1.

⁹ See Glenn-Marie (2003) *Supra* n.1 at 5.

¹⁰ *Ibid.*

¹¹ Ministry of Environment and Tourism, Ministry of Mines and Energy : *National policy on prospecting and mining protected areas*. June 2018 at 3.

social and economic development of Namibia since independence in 1990. That being the case, for the mining sector to make a strong and positive contribution towards Namibia's sustainable development, a strong legal and policy framework that maximises the benefits accrued to the nation and to communities is required. Such a framework should promote the development benefits of mining, while upholding strong environmental and social standards.¹²

The Namibian mining sector is governed by the Ministry of Mines and Energy (MME).¹³ The MME's mandate is to attract private investment in resource exploration and development through the provision of geological and geochemical information on minerals and energy resources, as well as through the management of an equitable and secure system of licenses for the mining, energy and geothermal industries.¹⁴ In addition, the MME regulates these industries and ensures that health, safety and environmental standards are in place and consistent with other Namibian legislation, policies and regulations. Finally, the MME is responsible for the collection of royalties from the mining and energy sectors; upon collection, the royalties are transferred to the national treasury.¹⁵

1.2. Problem statement

While mining activities can be conducted at any site that is found to be suitable for the purpose, protected areas are at risk of potentially being negatively impacted by mining and other land uses.¹⁶ Adverse environmental impacts from mining can range from permanent landscape alteration to soil contamination and erosion, water contamination, the loss of critical habitats for sensitive plant and animal species, and ultimately, the loss and extinction of species.¹⁷ Because Namibia's protected areas include environmentally sensitive desert and dry land regions where the rate of ecological recovery is extremely slow, the potential for regeneration is very low.¹⁸ The central challenge, therefore, is planning and managing the best suite of land uses that will allow for economic development while simultaneously ensuring that environmental health, including the conservation of biological diversity, fragile ecosystems, and landscape integrity, is maintained.¹⁹

The scale and urgency of this matter has led the Government to develop as of 2018, an integrated, flexible and comprehensive policy to deal with mining and prospecting in protected areas. The aim is to provide a framework for all stakeholders and to meet the country's national and international commitments to biodiversity conservation, while taking into account the rights and developmental needs of its people.²⁰

¹² See IGF (2018) *Supra* n.8 at 1.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Idem* at 8.

¹⁶ See MME and MET (2018) *Supra* n.11 at 8.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ See MME and MET (2018) *Supra* n.16 at 5.

The *National Policy on Prospecting and Mining in Protected Areas* (NPPMPA) was developed jointly by the Ministry of Environment and Tourism and the Ministry of Mines and Energy. The Ministry of Mines and Energy (MME), and the Ministry of Environment and Tourism (MET) developed this Policy to guide decision making with regards to exploration and mining in protected areas.²¹

The vision of the Policy is to develop integrated and sustainable prospecting and mining in Namibia to support economic growth, whilst maintaining the integrity of ecosystems and natural resources, and avoiding the degradation of areas that are highly sensitive for their ecological, social and/or cultural heritage value.²² This is to be achieved through the identification of key ecological and culturally sensitive areas within Namibia's protected areas, the development of a Decision Support Tool, and improvement in the procedures for granting different exploration and mining licenses.²³

The Policy for Prospecting and Mining in Protected Areas and National Monuments and the Environmental Assessment Policy both establish a procedure that asks for an environmental assessment and it does appear to be common practice to require an Environmental Assessment to accompany any application for a mining license.²⁴

Nonetheless, unlike an act of parliament, a policy has less binding power, and therefore it cannot be presumed that an environmental impact assessment will be required of every applicant for a mining license.²⁵ As it stands, there is no act that, for example, differentiates procedurally between mining in the Namib-Naukluft National Park and mining next to a toxic waste dump.²⁶

While implementation is desirable and must be exercised efficiently, failure thereto must come with consequences. Accordingly, this paper aims to identify the legal basis for the enforcement of the NPPMPA.

1.3. Aim and objectives

1.3.1. Aim

The aim of this research is to understand and determine the legal nature of the NPPMPA in terms of litigation procedures, particularly to identify and understand the National Policy with regards to its application and implementation from a legal perspective.

1.3.2. Objectives

From the main objective, three subsidiary objectives emerge;

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ S Carpenter, *Mining and the environment: Do our Protected Areas need more protection?* (2015) Available at: <https://www.namibian.com.na/index.php?id=13337&page=archive-read> (last assessed 01 July 2019).

²⁵ *Ibid.*

²⁶ *Ibid.*

- a) To explain how the NPPMPA came about and the progress it has made to become what it is today,
- b) To analyse the implementation process of the NPPMPA,
- c) To provide a clear understanding of the distinction between law and policy, and
- d) To develop a strong understanding of the NPPMPA from a legal perspective.

1.4. Research Questions

1.4.1. Primary question

Is failure to comply with a policy, in particular the NPPMPA, enforceable in any court of law?

NPPMPA

1.4.2. Secondary questions

In pursuit of this agenda, the following questions were answered;

- a) How did the NPPMPA come about and how has it progressed to what it is today?
- b) How is the NPPMPA's implementation being enforced?
- c) How does the NPPMPA as a policy differ from law?
- d) What is the legal nature of policies in general?

1.5. Methodology

The approach to the study was library and desk-based research. The primary source to the study is the NPPMPA. Secondary sources to the study are mining Acts and other relevant books on the topic including journals, academic writings, and newspaper articles.

1.6. Limitation of the research

The limitation in this study is the challenge in obtaining information for the purpose of writing this mini dissertation. There are limited resources on the topic. The researcher visited the MME, MET as well as the National Planning Commission archives for additional information on the topic.

1.7. Chapter overview

Chapter 1 introduces the study, which primarily consists of the background to the research, identifying the research problem, the aims and objectives of the study, formulating research questions, and outlining the research chapters.

Chapter 2: The chapter seeks to explore some features of the NPPMPA and the context in which it unfolds. The chapter's objective is to explain how the NPPMPA came about and the progress it has made to become what it is today.

Chapter 3: The NPPMPA - This chapter analyses and evaluates the procedures in place pertaining to the application for a mining license in protected areas as prescribed by the NPPMPA. Furthermore, the

chapter explores the conditions attached to the issuance of such licenses and the implications arising from non-compliance with such conditions. The implementation of the NPPMPA is also evaluated.

Chapter 4 brings to light how policies in general differ from laws, taking into consideration the procedures pertaining to the formulation of laws and policies.

Chapter 5: The study evaluates decided judgments on the topic, focusing on the outcomes of the proposed legal nature of the policy and the concerns, benefits, and lessons to be drawn from the legal perspective of the NPPMPA.

Chapter 6: Summary, conclusion and recommendations - The summary of the findings of the study is presented and recommendations made.

CHAPTER 2: THE LEGAL REGIME GOVERNING MINING LICENSES IN NAMIBIA

2.1. Introduction

In Namibia, the allocation of mineral rights is vested in the state.²⁷ The Minerals Prospecting and Mining Act is one of the very important instrument that have assisted in administering the mining sector in Namibia.²⁸ Applications for, or for renewal or transfer of mineral licenses, or for approval for granting, cession or assignment of interests in mineral licenses or to be joined as joint holders of such mineral licenses or interests, are governed under the Act.²⁹

The Minerals Prospecting and Mining Act of 1992 also grants the MME the authority to appoint a person who shall exercise and or perform at the direction of the Minister, the powers, duties and functions conferred under the Act by the Minister through the commissioner.³⁰ The Minerals Act enables the Ministry of Mines and Energy to control the reconnaissance, prospecting and mining of all categories of minerals in Namibia.³¹ This is done through a Minerals Board, established in terms of the Act, which is responsible for maintaining the policy in terms of which the provisions of the Act are to be implemented. Applications for prospecting, reconnaissance and mining work are made to the Ministry in terms of this Act.³²

2.2. The procedure for acquiring a mineral license in Namibia

Namibia's state protected area network (PAN) covers 13.8% of the country's land area, but this is seriously inadequate as a basis for effective biodiversity conservation.³³ This is as a result of the early parks system which was not designed with biological diversity in mind, and this reflects instead a history of ideological, economic and veterinary considerations.³⁴ Protected areas in Namibia were established under the Nature Conservation Ordinance (No. 4 of 1975).³⁵ The Ordinance provides the Minister of Environment and Tourism with the power to manage protected areas, including the establishment of tourism facilities and to allow other parties to provide certain tourism services within a protected area.³⁶ The ordinance has conferred powers upon the Minister to control entry to protected areas and to

²⁷ Section 2 of Act 33 of 1992.

²⁸ LW Sipiwe. A legal overview of Namibia's mining industry. Diss. University of Pretoria, 2014 at 45.

²⁹ Section 47 of Act 33 of 1992.

³⁰ Section 4 of Act 33 of 1992.

³¹ T Shadrack, and W Odendaal. "A review of environmentally sustainable land use practices and their benefit to Namibia's communal communities".(LEAD Project) (2005) at 6.

³² Section 9 of Act 33 of 1992.

³³ B Phoebe, et al. "Extending the Namibian protected area network to safeguard hotspots of endemism and diversity." *Biodiversity & Conservation* 7.4 (1998): at 531-547.

³⁴ *Ibid.*

³⁵ J Brian, "Legislation and policies relating to protected areas, wildlife conservation, and community rights to natural resources in countries being partner in the Kavango Zambezi Transfrontier Conservation Area." *African Wildlife Foundation and Swiss Agency for Development and Cooperation* (2008). at 33.

³⁶ *Ibid.*

charge fees to visitors as part of their income generating strategy. For maintenance of the ecosystem, the ordinance prescribes activities which are prohibited in protected areas.³⁷

The Minerals Prospecting and Mining Act 33 of 1992 oversees the regulation and operation of mining activities in Namibia by regulating the mining and prospecting of minerals in the country. The process is administered by the Mineral Rights and Resources Development Division of the Ministry of Mines and Energy, and it is overseen by the Mining Commissioner.³⁸ The Act provides for the issuance of Mining Claims, Non-Exclusive Prospecting Licenses and Mineral Licenses. In short, mining claims are claims that are available to Namibians only and provide mineral rights to small scale operators as well as those with limited financial resources.

Different from mining claims, a Non-Exclusive Prospecting License (NEPL) allows a person to prospect anywhere in the country including privately owned farms, with the sole exclusion being closed areas such as game reserves.³⁹ An NEPL lasts for one year, and holders often peg a mining claim onto the NEPL in order to continue prospecting for mining activities.⁴⁰ Both a Mining Claim and an NEPL are registered with the Mining Commissioner upon payment of a nominal fee.⁴¹

On the other hand, a Mineral License is a license that allows a company or an individual the exclusive right to mine an area for a maximum initial period of 25 years or life-of-mine (renewable for a maximum period of 15 years at a time).⁴² The Minerals (Prospecting and Mining Rights) Committee (MPMRAC) considers the applications for mining licenses, which usually includes a feasibility study, EA, financial statements and other safeguards, and makes its recommendations to the Minister of MME, who either grants or refuses the application.⁴³

Section 91 of the Minerals (Prospecting and Mining) Act 33 of 1992 (hereinafter referred to as The Act), governs the procedure pertaining to the acquisition of a mineral license in Namibia. The Act requires that an application for a mining license shall contain a detailed geological description of the area of land to which the application relates;

- a) in which the mineral or group of minerals to which such application relates is set out;
- b) which includes an estimate, substantiated by documentary proof or such other proof as may be required by the Commissioner, of the mineral reserves in such mining area and properly illustrated by way of plans and maps drawn according to scale; and

³⁷ See Brian (2008) *Supra* n.35 at 33.

³⁸ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF). (2018). *IGF Mining Policy Framework Assessment: Namibia*. Winnipeg: IISD. at 13.

³⁹ Legal Assistance Centre of Namibia / Mills International Human Rights Clinic, Stanford Law School. "Striking a better balance: An investigation of mining practices in protected Areas in Namibia" (2009) at 6.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Ministry of Environment and Tourism, Ministry of Mines and Energy: *National policy on prospecting and mining protected areas*. June 2018 at 12.

⁴³ *Ibid.*

- c) which, in the case of an application made consequent upon prospecting operations or mining operations carried on in terms of an exclusive prospecting license, mineral deposit retention license or on a mining claim of which the person applying for the mining license was the holder, the report and the separate report, if any, referred to in section 45(1)(f)(i), 76(1)(e)(i) or 89(1)(d)(i), as the case may be.⁴⁴

To safeguard the environment, it is a requirement under the Act that any application for a mining license shall contain particulars of –

- a) the condition of, and any existing damage to, the environment in the area to which the application relates;
- b) an estimate of the effect which the proposed prospecting operations and mining operations may have on the environment and the proposed steps to be taken in order to minimise or prevent any such effect; and
- c) the manner in which it is intended to prevent pollution, to deal with any waste, to safeguard the mineral resources, to reclaim and rehabilitate land disturbed by way of the prospecting operations and mining operations and to minimise the effect of such operations on land adjoining the mining area.⁴⁵

2.3. An Overview of the NPPMPA

Namibia's laws and policies provide for a number of environmental safeguards for prospecting and mining within protected areas. Article 100 of the Namibian Constitution provides for ownership over all mineral resources in Namibia. This article further states that natural resources below and above the surface of the land belong to the state unless if they are otherwise lawfully owned. Additionally, the Constitution of Namibia in terms of article 95(1) provides for the maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and the utilisation of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, it provides that the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.⁴⁶

Although the mining Act is the main law which regulates mining activities in the country, the Act is, however, silent on any separate procedures required for the acquisition of a mining license in protected areas. That being the case, Section 52 of the Act would potentially restrict the acquisition of a mining license in a protected area. It reads;

“The holder of a mineral license shall not exercise any rights conferred upon such holder by this Act or under any terms and conditions of such mineral license –

⁴⁴ Section 91(d) of Act 33 of 1992.

⁴⁵ *Ibid.*

⁴⁶ The Constitution of the Republic of Namibia, 1990 (Act No. 1 of 1990).

land used or reserved for any governmental or public purpose, and otherwise in conflict with any law, if any, in terms of which such town, village, road, aerodrome, harbour, railway, cemetery or land has been established, erected, constructed or is otherwise regulated, without the prior permission of the Minister granted, upon an application to the Minister in such form as may be determined in writing by the Commissioner, by notice in writing and subject to such conditions as may be specified in such notice".⁴⁷

In the absence of any laws regulating prospecting and mining in protected lands, and with the increase of such activities, the first **Policy for Prospecting and Mining in Protected Areas and National Monuments (1999)** (Mining Policy) was established.⁴⁸ The policy was developed jointly by the Ministry of Environment and Tourism and the Ministry of Mines and Energy. The NPPMPA is revised after every 5 years with the latest revision having been made in June 2018. Protected areas have been explained to refer to a protected area that is proclaimed in the Government Gazette according to the Nature Conservation Ordinance number 4 of 1975, as amended.⁴⁹

Through NPPMPA the MET has implemented a far-reaching policy and legislative reforms in the environmental sphere in an attempt to alleviate many of the constraints that the environment places upon people and vice versa.⁵⁰ Namibia's Policy for Prospecting and Mining in protected Areas and National Monuments aims to promote sustainable development in Namibia by allowing prospecting and mining in protected areas with strict environmental management.⁵¹

In Namibia, there are major overlaps in the location of rare species, critical biodiversity areas and the presence of minerals in Namibia.⁵² The potential negative impacts of exploration and mining activities can be devastating to biodiversity and ecosystems. Landscape alteration, soil and water contamination and the loss of critical habitats can lead to the loss of important and endemic plant and animal species, which can compromise ecosystems and reduce tourism potential. In formulating the NPPMPA, the two ministries had determinations in mind, which amongst other things, were to guard against the negative impacts that could result from mining activities in protected areas. This is in line with the ideology that Namibia's mineral endowment implies that mining and the environment will continue to interact and hence the need to work together to achieve prosperity in a sustainable manner.⁵³

It is on this basis that the Ministry of Mines and Energy (MME), and the Ministry of Environment and Tourism (MET) developed the National Policy on Prospecting and Mining in Protected Areas (NPPMPA) to guide decision making with regards to exploration and mining in protected areas.⁵⁴ This is with the

⁴⁷ section 52(1)(b)(iii) of Act 33 of 1992.

⁴⁸ See Brian (2008) *Supra* n.35 at 33 at 7.

⁴⁹ See MME and MET (2018) *Supra* n.42 at 12.

⁵⁰ M, Harmony K, D Tesh, and G Dzinomwa. "Sustainable water management: implications for mining in environmentally sensitive areas." *Geo-Resources Environment and Engineering (GREE)* 2 (2017) at 131.

⁵¹ *Ibid.*

⁵² See MME and MET (2018) *Supra* n.49 at 3.

⁵³ *Ibid.*

⁵⁴ *Idem* at 15.

aim to protect and maintain a healthy environment in accordance with Article 95 of the Namibian Constitution, section 91 of the Minerals Act and the NPPMPA's vision itself.

Additionally, the Policy is aimed at providing a basis for guidance and decision making on exploration and mining activities in protected areas by identifying ecologically and culturally sensitive areas to enable more sustainable development planning and management while providing strategies on the process and restoration of impacted areas.⁵⁵

The NPPMPA is cognisant of the need to protect the environment as stipulated in article 95(1) of the Namibian Constitution. The NPPMPA provides direction in terms of where mining and exploration related impacts are legally prohibited and where biodiversity priority areas may present high risks for mining projects.⁵⁶ Therefore, the NPPMPA's scope provides a framework for integrating relevant biodiversity information into decision making about exploration and mining options and how best to avoid, minimise or remedy biodiversity impacts caused by mining, and in so doing support sustainable development.⁵⁷ With the primary purpose of improving consistency in decision making in dealing with biodiversity aspects, the NPPMPA provides a framework to decision makers and regulators in implementing and enforcing the law, and assists companies in complying with the law, implementing good practise and reducing business risk.⁵⁸

Mining is a critical sector of the Namibian economy and mineral assets form a major source of national wealth.⁵⁹ The NPPMPA has adopted a mission which is to conduct, where necessary, sustainable prospecting and mining in protected areas that support economic growth, whilst avoiding areas highly sensitive for their ecological, social and cultural heritage values and this is based on the following fundamental principles:⁶⁰

- a) Protected areas are the cornerstone of Namibia's conservation programme and will continue to play an important role in the conservation of ecosystems, essential ecological processes and biological diversity;
- b) Protected areas also have the potential to provide important economic benefits, locally, regionally and nationally;
- c) This Policy also recognises the importance of mining to the national economy; and
- d) Prospecting for and mining of minerals and rocks will be considered in protected areas, provided that such development is in the national interest and in accordance with the appropriate legislation and that the environmental requirements are adhered to.

The overarching goal of the NPPMPA is to provide a framework for decision making on the issuance of exploration and mining licenses in protected areas, including strategies and guidance on procedures in

⁵⁵ *Idem* at 21.

⁵⁶ *Idem* at 15.

⁵⁷ *Ibid.*

⁵⁸ See MET and MME (2018) *Supra* n.52 at 15.

⁵⁹ L Glenn-Marie, "The contribution of minerals to sustainable economic development": *Mineral resource accounts in Namibia*. No. 54. Directorate of Environmental Affairs, Ministry of Environment and Tourism, 2003 at 6.

⁶⁰ See MME and MET (2018) *Supra* n.58 at 20.

relation to different exploration and mining tenets.⁶¹ This goal is complemented by the following objectives;⁶²

- a) To ensure that prospecting and mining activities do not cause any negative impacts to biodiversity, ecology and the tourism potential of protected areas;
- b) To identify areas in protected areas that should not be exposed to prospecting or mining activities, due to their high conservation, aesthetic and tourism value;
- c) To provide clarity on the different exploration and mining tenets that may be granted in protected areas; and
- d) To facilitate the sustainable development of mineral resources in protected areas while minimising the impacts on biodiversity and ecosystem services.

2.4. Areas excluded from mining in terms of the NPMPPA

The NPPMPA outlines different procedures relating to different exploration and mining tenements pertaining to mining in protected areas. According to the NPMPPA, protected areas or areas within protected areas that have the following characteristics will be excluded from prospecting and mining.⁶³

- a) **“Biodiversity Priority Areas:** These are areas that are important for conserving biodiversity, and play an important role in the protection of biodiversity, environmental sustainability, and human wellbeing. Areas in this category include areas with high species endemism, unique and/or protected habitats, caves and sinkholes, inland wetlands (perennial and ephemeral), certain mountains and inselbergs with high biodiversity, World Heritage Sites, and migratory corridors”.
- b) **“High value tourism areas:** These are areas recognised as tourism hotspots based on current visitor numbers or areas zoned and demarcated in protected area tourism plans as having high potential for tourism as approved by the Ministry of Environment and Tourism, if it can be shown that the economic benefit from tourism outweighs the economic benefit from mining in the long term”.
- c) **“Known breeding areas of certain species, including marine species:** These are areas recognised as such based on scientific evidence and long-term monitoring data of specific breeding areas. This criterion will apply to breeding areas of known rare and endemic species as well as range-restricted species”.
- d) **“Important wetland areas:** These include flowing or *lotic* systems such as rivers and their floodplains and estuaries, including river mouths and freshwater lagoons that are recognised as important biodiversity or tourism areas, based on the best available information. This includes wetlands of international importance as registered through the RAMSAR Convention”.

⁶¹ *Idem* at 21.

⁶² *Idem* at 48.

⁶³ See MET and MME (2018) *Supra* n.60 at 23.

- e) **“Areas with existing economic activities that would be compromised by prospecting and/or mining:** These areas will be determined by the extent of the economic activities in terms of investment, contribution to the economy, employment as well as poverty alleviation”.
- f) **“Areas with the potential to be developed into economically viable tourist or other compatible operations:** These are areas zoned as such by tourism and management plans of protected areas as approved by the Ministry of Environment and Tourism, if it can be shown that the economic benefit from tourism outweighs the economic benefit from mining”.
- g) **“Sites of high and/or unique cultural, historic and/or archaeological value:** These are areas zoned as such through appropriate culture or heritage legislation”

It is now common cause a mining license is equally a prerequisite for one to conduct mining activities in protected areas. That being the case, the discretion to grant a mining license lies with the Minister of Mines and Energy. If the mining is to take place in a protected area, written permission from the Minister of Mines and Energy is needed in addition to a license.⁶⁴ Presumably, if the proposed area was fully enclosed within an existing protected area, the permission to mine in that area would be granted simultaneously with the mining license.⁶⁵ If the protected area in question is located within a game reserve or nature reserve, the prospector would also need to obtain permission from the Directorate of Parks and Wildlife Management, which is the modern day equivalent of the Executive Committee referred to in the Nature Conservation Ordinance of 1975.⁶⁶

2.5. Conclusion

In terms of the law, a discretion to grant or refuse an application for a mining license lies solely with the Minister of Mines and Energy who, together with the Minister of Environment and Tourism are the custodians of the NPPMPA policy. When regard is had to the goals and objectives of the NPPMPA, it is apparent that the policy has been developed to complement article 95 of the Namibian Constitution and other various legislations. This is with the purpose to guard against environmental degradation and, ultimately manage mining operations in protected areas while at the same time preventing potential adverse impacts as a result of mining activities on the environment, the community and wildlife. It is noticeable that the laws in place that govern the application and procedure of obtaining a mining license are quiet few with no specific laws in place to govern mining activities in protected areas. It is against this backdrop that the NPPMPA was born to protect the environment by regulating mining activities in protected areas.

⁶⁴ C Stefan. "Mining vs. the Environment: Does Namibia need another Uranium Mine." *Land, Environment, and Development Project (LEAD)*. Legal Assistance Centre (2009) at 6.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

CHAPTER 3: A CONCEPTUAL FRAMEWORK FOR THE APPLICATION PROCEDURE IN TERMS OF THE NPPMPA AND IMPLEMENTATION PROCESS OF THE NPPMPA

3.1. Introduction

The MME is the custodian of Namibia's rich endowment of mineral and energy resources.⁶⁷ The Ministry facilitates and regulates the responsible development and sustainable utilisation of these resources for the benefit of all Namibians.⁶⁸ This makes the MME the most powerful Ministry that is involved in any mining related decision. In fulfilling its duties, the MME appoints, subject to the laws governing the public service, a person to be known as the Mining Commissioner.⁶⁹ The Commissioner shall exercise or perform, subject to the direction and control of the Minister, the powers, duties and functions as may be imposed upon the Commissioner by the Minister.⁷⁰ An application for a mining license, along with any required submissions (EA, EMP, etc.) is reviewed by both the Minerals (Prospecting and Mining Rights) Committee (MPMRC) and the Mining Commission, which is headed by the Mining Commissioner him/herself.⁷¹ These two entities then make a recommendation to the Minister of Mines regarding the mining application, and the Minister then makes the final decision.⁷² This chapter analyses and evaluates the procedures in place pertaining to the abovementioned application. Moreover, the chapter identifies the implications arising from the implementation of NPPMPA. The chapter further looks at the implementation mechanisms in place for the NPPMPA.

3.2. Application procedure for prospecting and mining in protected areas

The Nature Conservation Ordinance No. 4 of 1975, as amended, provides for the declaration of protected areas and for the specific protection of scheduled species where they occur.⁷³ All of Namibia's national protected areas were proclaimed under the Ordinance, enacted by the previous South African colonial administration.⁷⁴ Although the Ordinance sets a framework for establishing state-protected areas, and for regulating hunting and other wildlife uses, both within and outside conservation areas, it is outdated and suffers from shortcomings such as unclear management objectives and harmonized management objectives with adjacent land units.⁷⁵

⁶⁷ Minerals Policy Committee of the Ministry of Mines and Energy. *Minerals policy of Namibia*, 2003, at 8.

⁶⁸ *Ibid.*

⁶⁹ Section 4(1) of Act 33 of 1992.

⁷⁰ *Ibid.*

⁷¹ C Stefan. "Mining vs. the Environment: Does Namibia need another Uranium Mine." *Land, Environment, and Development Project (LEAD)*. Legal Assistance Centre (2009) at 10.

⁷² *Ibid.*

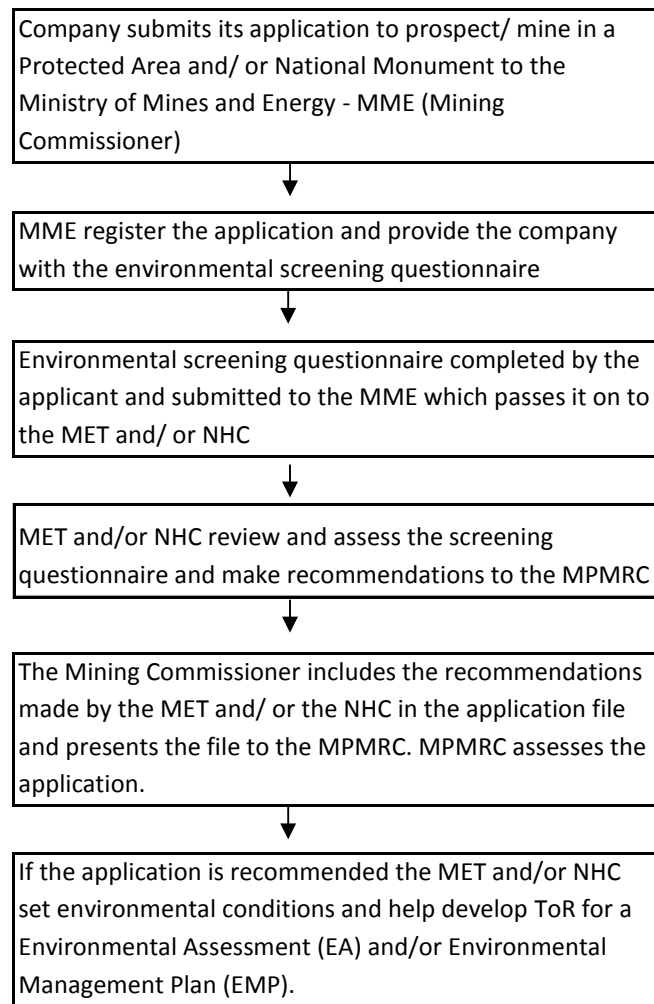
⁷³ Chamber of Mines (CoM), the Namibian Chamber of Environment (NCE), the Namibian Government, and members of the Namibian mining industry; *"ENVIRONMENTAL PRINCIPLES FOR MINING IN NAMIBIA A BEST PRACTICE GUIDE"* (2019) at 25.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

Approximately 13.6% of the land surface area of Namibia has been gazetted as so-called “Protected Areas”.⁷⁶ Namibia’s parks are the foundation of the country’s fastest growing industry, namely the Tourism industry.⁷⁷ The Government is duty bound to ensure that short to medium term projects such as mining do not jeopardise the potential for long-term sustainable development in tourism.⁷⁸

In their commitment to environment protection and sustainable development, the custodians of the NPPMPA have developed different application stages to be complied with by a miner who undertakes to carry out mining activities in PAs. A detailed application procedure is laid down in Table 1 below.⁷⁹ This procedure is the heart of the NPPMPA as it sets out the prescribed conditions and requirements for obtaining different types of mining licenses in protected areas which has a great impact on the MME’s decision making process.



⁷⁶ See Minerals Policy Committee (2003) *Supra* n.67 at 16.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ See MET and MME (2018) *Supra* n.63 at 64.

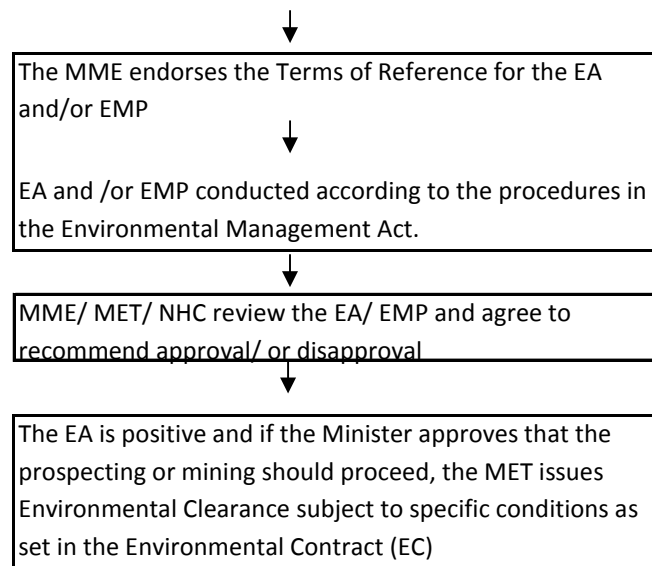


Table 1: Application Procedure for prospecting/mining in protected areas

The NPPMPA states that no mining claim may be pegged in a park or on national monument terrain, but that it is permissible for an exclusive prospecting license and a mining license to be granted.⁸⁰ It allows mining of all minerals defined in Schedule 1 26 of the Minerals Act, except dimension stone.⁸¹

Notwithstanding the procedure in table 1 above, the granting of Exclusive Reconnaissance License/s(ERL) may be permitted in some protected areas only.⁸² The policy defines the various types of licenses required for mining and the conditions of operation within protected areas.⁸³ Similar to ordinary mining licenses, applications for an ERL must be submitted to the Mining Commissioner in the Ministry of Mines and Energy who will refer such applications to the Minerals (Prospecting and Mining Rights) Committee (MPMRC).⁸⁴ In considering an application, the MPMRC assesses the applicant's financial resources, technical expertise and proven track record of mineral exploration and development.⁸⁵ The proposed prospecting or mining programme, schedule and budget, and its suitability to the geology, geomorphology and ecology of the area under evaluation is also critically reviewed.⁸⁶

The conditions of an ERL vary according to the circumstances, but generally most of the work will be borne for an ERL.⁸⁷ Any 'on-the-ground' work in protected areas must be minimised and will be strictly

⁸⁰ C. Mansfeld, *Environmental Impacts of Prospecting and Mining in Namibian National Parks: Implications for Legislative Compliance*. University of Stellenbosch, Department of Geography and Environmental Studies. South Africa: University of Stellenbosch. (2006) at 121.

⁸¹ *Ibid.*

⁸² See MET and MME (2018) *Supra* n.79 at 24.

⁸³ See Mansfeld (2006) *Supra* n.80 at 121.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

controlled.⁸⁸ Should the ERL be granted, an agreement with the MET specifying all conditions, including an Environmental Impact Assessment (EIA) and/or Environmental Management Plan(EMP) if necessary and Environmental Contract) will be finalised before any work commences.⁸⁹

Environmental Impact Assessments can be defined as scientific and social studies carried out before a proposed development takes place, to establish what affect the development will have.⁹⁰ Their purpose is to ensure that environmental consequences of development proposals are understood and adequately considered in the planning and decision-making process.⁹¹

Unlike ERL, granting of Mineral Deposit Retention Licenses (MDLRs) will be permitted in all protected areas apart from 'no go areas'.⁹² Applications must be submitted to the Mining Commissioner who will refer such applications to the MPMRAC.⁹³ In considering such applications, the MPMRAC assesses the applicant's reasons.⁹⁴ Should the MDRL be granted, an agreement with the MET specifying all conditions (including an EIA and/or EMP if necessary and Environmental Contract) will be finalised.⁹⁵

Granting of an Exclusive Prospecting License/s (EPLs) will be permitted in all protected areas except in 'no go areas', including protected areas that are excluded from prospecting and mining as per the map below. EPL applications must be submitted to the Mining Commissioner who refers such applications to the MPMRAC; the MME registers the application and provides the company with an environmental screening questionnaire.⁹⁶

In considering an application for mining in protected areas, the MPMRC assesses the applicant's financial resources, technical expertise and proven track record of mineral exploration and development.⁹⁷ The proposed prospecting programme, schedule and budget and its suitability to the geology, geomorphology and ecology of the area under application are critically reviewed.⁹⁸ Documented proof of this must be furnished with the screening questionnaire for consideration by the MPMRAC.⁹⁹ Financial resources are required to cover the direct and indirect costs associated with PAs, but the overarching aim of raising and allocating financial resources for PAs is to contribute towards effective biodiversity conservation.¹⁰⁰

⁸⁸ *Ibid.*

⁸⁹ See MME and MME (2018) *Supra* n.82 at 25.

⁹⁰ See Mansfeld (2006) *Supra* n.83 at 124.

⁹¹ *Ibid.*

⁹² See MME and MME (2018) *Supra* n.89 at 25.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ See MME and MME (2018) *Supra* n.92 at 26.

⁹⁹ *Ibid.*

¹⁰⁰ E, Lucy, J Bishop, and L Thomas. *Sustainable Financing of Protected Areas: A global review of challenges and options*. No. 13. IUCN, 2006. At 17

The Mining Commissioner notifies the applicant on whether he/she has been successful and if so the MET sets environmental conditions (Table 1 below) and helps to compile the Terms of Reference (ToR) for the EIA and/or EMP. The MET reviews the ToR for the EIA prior to commencement of the EIA.¹⁰¹ In the EMP, mitigation measures are based on the risks assessed in the EIA—when applied these measures can ensure minimal environmental damage during the exploration phase.¹⁰²

Granting of Mining Licenses will be permitted in all protected areas except in ‘no go areas’ including protected areas excluded from prospecting and mining as per Table 1.¹⁰³ When considering the mining license application, the MPMRAC and the MET must be convinced of the viability and national economic importance of the proposed mining activity before it will be considered within a protected area.¹⁰⁴ The environmental screening questionnaire is completed by the applicant and submitted to the MME.¹⁰⁵ The MET reviews and assesses the screening questionnaire and provides recommendations to the Mining Commissioner.¹⁰⁶

Currently there are no legal requirements for the submission and approval of Environmental Impact Assessment (EIAs) and Environmental Management Programme Reports (EMPRs) relating to the value adding industry.¹⁰⁷ Nevertheless, environmental specifications can be a constraint in specific cases and can create problems for developing countries, as they attempt to comply with international standards.¹⁰⁸

The NPPMPA provides a detailed EIA procedure which is compulsory and will always be required for any prospecting or mining or any activities associated therewith in a protected area.¹⁰⁹ The EIA shall be conducted according to the procedures as stated in the Environmental Management Act.¹¹⁰ Should the MPMRAC agree to recommend approval (after reviewing the EIA), an Environmental Management Plan and an Environmental Contract shall be concluded before the prospecting or mining may commence.¹¹¹

Any EIA/EMP that is conducted in Namibia needs to consider the possibility of archaeological finds.¹¹² However, on both State and privately owned land, full EIAs in adherence to the policy are hardly ever undertaken. EIAs undertaken are more often than not of a desktop nature.¹¹³ Little information is

¹⁰¹ *Ibid.*

¹⁰² See Chamber of Mines (CoM), the Namibian Chamber of Environment (NCE), the Namibian Government, and members of the Namibian mining industry(2019) *Supra* n.73 at 14.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ See Minerals Policy Committee (2003) *Supra* n.76,at 25.

¹⁰⁸ *Ibid.*

¹⁰⁹ See MME and MME (2018) *Supra* n.98 at 26.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² See Mansfeld (2006) *Supra* n.83 at 122.

¹¹³ *Ibid.*

available on the distribution of artefacts, given the shortage of expert knowledge on this matter, and therefore desktop studies are severely limited and inadequate.¹¹⁴

A full EIA is compulsory and will always be required for any prospecting or mining or any activities associated therewith in a protected area.¹¹⁵ The EIA shall be conducted according to the procedures as stated in the Environmental Management Act.¹¹⁶ Should the MPMRAC agree to recommend approval (after reviewing the EIA), an Environmental Management Plan and an Environmental Contract shall be concluded before the prospecting or mining may commence.¹¹⁷

3.3. The conditions accompanying the approval and issuance of mining licenses in protected areas in terms of the NPPMPA

Protected areas are essential to conserve biodiversity, their existence and the quality of their management are indicators of society's commitment to conservation.¹¹⁸ Mining companies are required to comply with a range of other laws which regulate mining impacts on the environment.¹¹⁹ The Constitution of the Republic of Namibia enshrines the right 'to an environment that is not harmful to health or well-being' of people.¹²⁰ The Environmental Management Act (EMA) sets out environmental management principles that support this, and other Specific acts that should guide decision-making throughout the mining life cycle.¹²¹ Disturbance of ecosystems, loss of biodiversity, pollution or degradation of the environment, as well as sites that constitute the nation's cultural heritage, should be avoided, minimised, rehabilitated, or as a last option offset.¹²²

The Minister of MET, being the responsible ministry for environmental management and conservation of biodiversity, has through the NPPMPA prescribed specific general conditions and environmental conditions to be complied with when conducting mining activities in protected areas as follows;¹²³ This is with the aim to prevent and mitigate the significant effects of mining activities on the environment . The prescribed conditions are in line with the objectives of the Environmental Act, the Government's commitment to environmental protection, and socio-economic and sustainable development as per article 95 of the Constitution.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Section 35 of the Environmental Management Act 7 of 2007.

¹¹⁷ *Ibid.*

¹¹⁸ P Adrian. "Mining and protected areas." *World Business Council for Sustainable Development and International Institute for environment and development* 62 (2001) at 4.

¹¹⁹ See MME and MME (2018) *Supra* n.109 at 32.

¹²⁰ Article 95(1) of the Constitution of the Republic of Namibia, 1990 (Act No. 1 of 1990).

¹²¹ Section 3(2) of the Environmental Management Act 7 of 2007.

¹²² See MME and MME (2018) *Supra* n.119 at 33.

¹²³ *Idem* at 65.

It is a general condition in terms of the NPPMPA that a list of company personnel, including ID/Passport numbers, nationality and position, authorised to enter or work on the company's tenements within a PA, must be supplied to the MET officer in charge of the area.¹²⁴ There has to be an employee and personnel list which must be updated on a regular basis (when any changes happen).¹²⁵

As the Convention on Biological Diversity (CBD) recognises, protected areas are essential to conserve biodiversity; their existence and the quality of their management are indicators of society's commitment to conservation.¹²⁶

As a stringent measure to control mining activities in protected areas, additional to the general conditions, the MET has compiled environmental conditions to be complied with. For all mining activities in protected areas, a six monthly progress report and environmental management report must be submitted to the MET starting from date of commencement of operations.¹²⁷ All provisions of the Nature Conservation Ordinance, Ordinance 4 of 1975 and all amendments to this ordinance and Regulations Relating to Nature Conservation, GN 240 of 1976, with all amendments or any legislation that replaces it must be complied with. All provisions of the Environmental Management Act, Act 7 of 2007, must also be complied with.¹²⁸ Provisions of any other legislation pertaining to any aspect of the environment must be complied with and strict compliance with all conditions in the Environmental Contract and appendices.¹²⁹

It is a known fact that if mining investment could be achieved in situations of strong governance allowing for biodiversity protection, ecosystem services, and sustainability concerns, then there could potentially be win wins for society and conservation.¹³⁰

Over the years, the mining industry has generated a considerable amount of guidance on how mining practices must evolve for the sector to responsibly fulfil its role in society's transition to sustainability.¹³¹ The NPPMPA demands that a detailed site inspection be carried out in conjunction with MET staff prior to commencement of any prospecting activities to establish access routes to target

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ See Adrian (2001) *Supra* n.107 at 4

¹²⁷ See MME and MME (2018) *Supra* n.122 at 65.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ E David, et al. "Mining and the African environment." *Conservation Letters* 7.3 (2014) at 307.

¹³¹ R Brantes, and G. Olivares. "Best practices and efficient use of water in the mining industry." *Cochilco (Chilean Copper Commission)* (2008) at 17.

areas.¹³² All waste must be removed from the license area to a waste disposal unit and no waste is to be disposed of within the PA.¹³³

Uncontrolled prospecting and mining activities can seriously undermine the character, ecology and tourism potential of parks and monument areas with a resultant increase in opportunity costs for developing this potential.¹³⁴ In order to reconcile the objectives of mineral exploitation and environmental protection, it is essential that the negative impacts of prospecting or mining activities on the environment be minimised.¹³⁵ If protected areas are set-asides and are well managed, they may help to balance resource extraction with conservation, particularly in endemic-rich locales that lack formal protection.¹³⁶

The NPPMPA stipulates that any mining developments in a National Park must be balanced against the risk that it could negatively interfere with the potential for long-term sustainable development.¹³⁷ Additionally, the policy requires that waste may be burnt on site and the ash and non-burn-able residue must be removed as described above.¹³⁸ Under no circumstances may any waste material of any nature be disposed of in any water body or river.¹³⁹ Harvesting of reeds or other natural materials for construction or other purposes will not be allowed. Transgressions of any provisions of the Nature Conservation Ordinance or its amendments will be dealt with severely. Second time offenders will be asked to leave the park.¹⁴⁰

The MET's stance is that its general opposition to mining in protected areas must be balanced against demands for development.¹⁴¹ As such, the MET will allow mining to take place subject to certain conditions as outlined in an environmental contract with the licensee.¹⁴² Should the licensee fail to fulfil the requirements of the contract, the MET can, with agreement from the MME, terminate the license.¹⁴³

Involvement in prospecting and mining in protected areas requires those involved to take full responsibility of carrying out appropriate rehabilitation and restoration, during and upon closure of the mining activities. On completion of operations, prospecting or mining, the MET will issue a final closure

¹³² See MME and MME (2018) *Supra* n.127 at 65.

¹³³ *Ibid.*

¹³⁴ See Minerals Policy Committee (2003) *Supra* n.107 at 8.

¹³⁵ *Ibid.*

¹³⁶ E David, et al. "Mining and the African environment." *Conservation Letters* 7.3 (2014) at 307.

¹³⁷ See M, Harmony K, D Tesh, and G Dzinomwa (2017) *Supra* n.38 at 131.

¹³⁸ See MME and MME (2018) *Supra* n.132 at 65.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ C Stefan. "Mining vs. the Environment: Does Namibia need another Uranium Mine." *Land, Environment, and Development Project (LEAD)*. Legal Assistance Centre (2009). at 8

¹⁴² *ibid*

¹⁴³ *ibid*

report stating that restoration has been completed in accordance with the Rehabilitation and Restoration Guidelines.¹⁴⁴

The operating company will be responsible to restore areas damaged by historic mining and prospecting within the license area, provided that these have not been designated as industrial heritage in the meantime.¹⁴⁵ Scars to be rehabilitated will be agreed to in writing and indicated on a map in conjunction with the operator and the MET, and taking into consideration provisions of the National Heritage Act as well as other associated legislation.¹⁴⁶

The MET and MME in consultation with relevant stakeholders shall develop National Rehabilitation and Restoration Guidelines for sites impacted by prospecting and mining in Protected Areas. These guidelines shall serve as a framework to assess rehabilitated and restored sites and hence approval of completion of rehabilitation and restoration work by the relevant authorities.¹⁴⁷

3.4. Implementation process of the NPPMPA

The implementation of a public policy is the carrying out of a basic policy decision, usually made in a statute (although also possible through important executive orders or court decisions).¹⁴⁸ Ideally, that decision identifies the problem(s) to be addressed, stipulates the objective(s) to be pursued, and, in a variety of ways, "structures" the implementation process.¹⁴⁹

Once a policy is formulated and legitimised at the appropriate strategic levels of an organisation, it is handed over to the administrative department for execution or implementation.¹⁵⁰

In the case of a statute, the statute structures the implementation process.¹⁵¹ The process normally runs through a number of stages beginning with passage of the basic statute, followed by the policy outputs (decisions) of the implementing agencies, the compliance of target groups with those decisions, the

¹⁴⁴ See MME and MME (2018) *Supra* n.138 At 29

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ S Paul, and D Mazmanian. "The implementation of public policy: A framework of analysis." *Policy studies journal* 8.4 (1980): at 538-560.

¹⁴⁹ *Ibid.*

¹⁵⁰ B Susan M. "Implementation studies: time for a revival? Personal reflections on 20 years of implementation studies." *Public administration* 82.2 (2004): at 249-262.

¹⁵¹ Sabatier, Paul, and Daniel Mazmanian. "The implementation of public policy: A framework of analysis." *Policy studies journal* 8.4 (1980): 538-560.

actual impact of those outputs, the impacts of agency decisions, and, finally, important revisions in the basic statute.¹⁵²

In principle, there are a number of mechanisms available to statutory framers to reasonably assure that implementing officials have the requisite commitment to statutory objectives. First, the responsibility for implementation can be assigned to agencies whose policy orientation is consistent with the statute and which will accord the new programme high priority.¹⁵³ Second, the statute can often stipulate that top implementing officials be selected from social sectors which generally support the legislation's objectives.¹⁵⁴

Sabatiel (1980) has identified the following factors as factors that can either assure or impede the implementation process; a) policy standards and resources, b) support for those policies in the political environment, c) economic and social conditions, d) characteristics of the implementing agencies, e) communication of policy standards and other decisions within and among implementing agencies, f) incentives to promote compliance with policy decisions, and g) the policy dispositions of implementing officials.¹⁵⁵

While the above-mentioned factors can go either way, the following factors are deemed to contribute to public policy implementation failure;¹⁵⁶

- a) Lack of clear objectives; leaving room for differential interpretation and discretion in action;
- b) Multiplicity of actors and agencies involved in implementation; problems of communication and co-ordination between the 'links in the chain';
- c) Inter- and value and interest differences between actors and agencies; problems of perspectives and priorities affecting policy interpretations and motivation for implementation;
- d) Relative autonomies among implementing agencies; limits of administrative control.

Governments need to find ways to co-ordinate policy implementation effectively if they are to meet the challenges posed by sustainability.¹⁵⁷ The government of Namibia recognizes that increased resource mobilization is needed to maximize Policy implementation to achieve the objectives.¹⁵⁸

The implementation of the NPPMPA is coordinated by a Technical Committee composed of different stakeholders led by the two ministries.¹⁵⁹ The two ministries will also, with the support of the Technical

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ See Sabatiel (1980) *Supra* n.151 at 251.

¹⁵⁷ United Nations. Economic Commission for Africa. *Managing mineral wealth: training materials on "Management of Mineral Wealth and the Role of Mineral Wealth in Socio-economic Development"*. UNECA, 2004 at 330.

¹⁵⁸ See MME and MME (2018) *Supra* n.144 at 33.

¹⁵⁹ *Idem* at 30.

Committee, take the lead to coordinate the regular monitoring and evaluation of progress with regards to the implementation of the Policy.¹⁶⁰ The effectiveness of the Policy implementation largely depends upon raising awareness among key stakeholders, and allocation of resources dedicated to the implementation of the Policy.¹⁶¹ The MET and MME will jointly seek resources to ensure effective implementation of the Policy.¹⁶² Additionally, the NPPMPA has established a procedure to mobilise resource in order to maximize policy implementation.¹⁶³

The MET and MME will jointly seek resources to ensure that the Action Plan is implemented and will identify focal point persons within their respective ministries to facilitate implementation of the Policy.¹⁶⁴ The NPPMPA has an implementation plan in place which incorporates key objectives. The effectiveness of the Implementation Action Plan largely depends upon raising awareness among key stakeholders and the resources allocated.¹⁶⁵

Through its implementation plan, the NPPMPA desires that by 2019, the general public, especially key¹⁶⁶ target groups are aware of the Policy implications and its implementation.¹⁶⁷ This will be achieved through identifying key target groups and select sectoral champions to drive awareness of mining and biodiversity issues among specific sectors.

By 2022, the NPPMPA's expectations are that the policy has been implemented in an effective, transparent and participatory manner with adequate monitoring and evaluation undertaken.¹⁶⁸ This will be through conducting inspections at any time during the year to monitor compliance with the Environmental Contract, EIA, EMP and/or any other conditions that are stipulated.¹⁶⁹

3.5. Conclusion

Despite having an implementation plan in place, the NPPMPA has no regulatory framework in place to safeguard compliance with the different conditions of different licenses. Further, there are no stringent measures in place for failure to implement the NPPMPA. Although the policy makes reference to cancellation of a mining license in instances of breach of conditions, the policy is silent on the procedure pertaining to such termination which makes it difficult to determine the finer points of the process

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Idem* at 33.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *See* MME AND MET (2018) n.158 at 39.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

regarding the termination of a mining license. Notwithstanding that the policy provides that the operating company restores areas damaged by mining activities, the policy is again silent on the possible ramifications for failure to comply with this condition.

CHAPTER 4: THE DUTY OF A POLICY AND HOW IT DIFFERS FROM THE LAW

4.1. Introduction

For the Government to effectively govern, it needs instruments through which it can pursue public purposes and defined objectives.¹⁷⁰ Generally, laws (legislation/by-laws) and policies have been identified, inter alia, as some of the types of instruments used by the Government to govern.¹⁷¹ In general, governance instruments (including policies) are used to allocate resources, to regulate people's behaviour (inter alia by creating incentives, rights and duties) and to communicate the Government's understanding of society's collective problems and its vision for the future to the public.¹⁷²

Mining is a central pillar of Namibia's economy and its future development. The country is heavily dependent on the extraction and processing of minerals for export: as such, mining accounted for 12.2 per cent of gross domestic product (GDP) in 2017, and it provides more than 50 per cent of foreign exchange earnings (Chamber of Mines, 2017; CIA, 2018).¹⁷³ For the mining sector to make a strong and positive contribution to Namibia's sustainable development, a strong legal and policy framework that maximises the benefits accrued to the nation and to communities is required; a framework that promotes the development benefits of mining while upholding strong environmental and social standards.¹⁷⁴ Given this enormous potential of both tourism and mining to contribute to Namibia's economic development and poverty alleviation, the Government needed to ensure that prospecting and mining activities do not jeopardise the potential for long-term and sustainable development opportunities in protected areas.¹⁷⁵ This Policy has therefore been developed to ensure that the sectors continue to co-exist in a sustainable way to achieve prosperity and sustainability in perpetuity.¹⁷⁶

The chapter lays down in detail the legal background as well as the legal nature of the NPPMPA by reviewing applicable laws on the topic. The chapter seeks to explain the NPPMPA from a legal perspective, taking into account the applicable laws identified.

4.2. The legal background of the NPPMPA

Article 95 of the Constitution of the Republic of Namibia, 1990 (Act No. 1 of 1990), states that the State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following:

¹⁷⁰ F Njuh. "Constitutional basis for the enforcement of "executive" policies that give effect to socio-economic rights in South Africa." *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 16.4 (2013): 1-44.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF). (2018). *IGF Mining Policy Framework Assessment: Namibia*. Winnipeg: IISD. at 1.

¹⁷⁴ *Ibid.*

¹⁷⁵ See MME AND MET (2018) n.166 at 6.

¹⁷⁶ *Ibid.*

*“maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory”.*¹⁷⁷

Article 101 of the Constitution continues;

*“principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them”*¹⁷⁸

The MME regulates the mining industries and ensures that health, safety and environmental standards are in place and consistent with other Namibian legislation, policies and regulations.¹⁷⁹ Additionally, the Ministry of Environment and Tourism (MET) is responsible for the protection and management of Namibia’s natural environment.¹⁸⁰ In order to effectively regulate against the environmental impacts due to mining activity alluded to in this above, this policy instrument are was formulated

The MET develops, administers and enforces environmental legislation and policy through three departments: Department of Environmental Affairs (DEA); Department of Natural Resources Management; and Department of Tourism, Planning and Administration.¹⁸¹

A policy is described as a broad guideline of actions designed to achieve some objective(s) of goal(s).¹⁸² A policy can be transmitted into several programmes or projects in order to realise the broader objectives as envisaged in the policy¹⁸³. A policy is said to be ‘public’ when it is concerned with public interest and formulated by legal government machinery.¹⁸⁴

The NPPMPA is a policy and like any other policy, it does not override the laws in place pertaining to mining. Legally, the applications for mining licenses are handled by the MME in terms of the Minerals (Prospecting And Mining) Act 33 of 1992. If the mining is to take place in a protected area, written permission from the Minister of Mines and Energy is needed in addition to a license.¹⁸⁵ Presumably, if the proposed area was fully enclosed within an existing protected area, the permission to mine in that area would be granted simultaneously with the mining license.¹⁸⁶ If the protected area in question is

¹⁷⁷ Article 95(1).

¹⁷⁸ Article 101.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ P Kumar. "Policy implementation in urban Bangladesh: Role of intra-organizational coordination." *Public Organization Review* 7.3 (2007): 237-259.

¹⁸⁴ *Ibid.*

¹⁸⁵ C Stefan. "Mining vs. the Environment: Does Namibia need another Uranium Mine." *Land, Environment, and Development Project (LEAD). Legal Assistance Centre* (2009). at 9.

¹⁸⁶ *Ibid.*

located within a game reserve or nature reserve, the prospector would also need to obtain permission from the Directorate of Parks and Wildlife Management, which is the modern day equivalent of the Executive Committee referred to in Nature Conservation Ordinance of 1975.¹⁸⁷

Notwithstanding the governing mining policies, Mining companies still need to comply with a range of other laws which regulate mining impacts on the environment.¹⁸⁸ These laws include the Constitution of the Republic of Namibia which provides for the right 'to an environment that is not harmful to health or well-being' of people.¹⁸⁹ The Environmental Management Act (EMA) sets out environmental management principles that support article 95(I).¹⁹⁰ Additionally, there are many other Acts to guide decision making throughout the mining life cycle.

Unlike an Act of parliament, policies differ from rules of law in that a policy has less binding powers. It is crucial to recognise that the Minerals Act of 1992 is the only truly binding law governing the awarding of mining licenses in any area, whether protected or otherwise.¹⁹¹ What the NPPMPA does is that it creates additional requirements to supplement the Minerals Act; however, these additions lack the binding force of an act. While law can compel or prohibit behaviours (e.g. a law requiring permits for specific actions), a policy merely guides actions to achieve a desired outcome.¹⁹² A policy is basically a deliberate plan of action to guide decisions and achieve rational outcomes.¹⁹³

As the supreme law of the country, the Constitution of the country sets the tone of the policy environment.¹⁹⁴ The Constitution defines general trends of national policy, which must conform to it.¹⁹⁵ Given the supremacy of the Constitution of Namibia as the supreme law of the land, all legislations are to be consistent with the provisions of the Constitution. These legislations are supported by guiding policies which must support the principles of the Constitution. The Minerals Act is, amongst other policies, supported by a sound policy direction regarding sustainable development of mineral resources, the NPPMPA.

¹⁸⁷ *Ibid.*

¹⁸⁸ See MME AND MET (2018) n.175 at 32.

¹⁸⁹ Article 95(I).

¹⁹⁰ Act 7 of 2007. The preamble of the Act reads as follows: *To promote the sustainable management of the environment and the use of natural resources by establishing principles for decision making on matters affecting the environment; to establish the Sustainable Development Advisory Council; to provide for the appointment of the Environmental Commissioner and environmental officers; to provide for a process of assessment and control of activities which may have significant effects on the environment; and to provide for incidental matters.*

¹⁹¹ C Stefan. "Mining vs. the Environment: Does Namibia need another Uranium Mine." *Land, Environment, and Development Project (LEAD). Legal Assistance Centre* (2009). at 7.

¹⁹² R Christian, and K Ruppel-Schlichting, eds. *Environmental law and policy in Namibia*. Hanns Seidel Foundation, 2011. at 97.

¹⁹³ *Ibid.*

¹⁹⁴ United Nations report, Economic Commissions for Africa, *Managing Mineral Wealth* (2002) at 159 – 185.

¹⁹⁵ *Ibid.*

4.3. The role of a policy

Article 129 (Section 1, Chapter 17) of the Constitution of Namibia tasks the National Planning Commission (NPC) to plan the priorities and direction of national development, while the NPC Act (Act No.2 of 2013, Section 4, sub-section (d) and (e)) mandates the NPC to coordinate the development of the Government's socio-economic policies to ensure consistency, and to evaluate the existing Government's socio-economic policies to establish their effectiveness.¹⁹⁶

A Policy is usually formulated to communicate societal values. It provides guidelines for decisions and actions that are taken in the day-to-day administration of the Government.¹⁹⁷ In this way it provides certainty and expectations. Additionally, a Policy allows for planning by both the Government and the affected entities.¹⁹⁸ The absence of Policy leads to decisions and actions that may be reactive, contradictory, random and arbitrary.¹⁹⁹ A Policy thus becomes the basis of planned work, accountability and evaluation. In government, policies are regarded as the enabling and guiding framework in all sectors and at all levels.²⁰⁰

A further aspect of the role of law in the process of development of an acceptable mineral policy is that legislation is needed to implement the Policy. Mining laws that are developed have to be aligned with policy statements and specific regulations covering discretionary legal aspects.²⁰¹ Thus, these laws and regulations must also be consistent with those in other sectors of the economy.²⁰²

Article 101 states that the Principles of State Policy are not legally enforceable, but merely serve as societal goals in making and applying laws to give effect to the fundamental objectives of the different principles.²⁰³ The principles must also be employed in the interpretation of Namibian laws and they guide the state in its decision-making processes.²⁰⁴ Constitutional Principles of State Policy serve as a stimulus for new initiatives or endeavours – especially where existing policy, law or programmes seem inadequate to attain the principles' objectives.²⁰⁵ The principles must similarly be employed as direction indicators in setting Government priorities. Also, the judiciary should apply the Principles of State Policy in constitutional interpretation and use them to fill gaps in the legislative framework when and where necessary.²⁰⁶

¹⁹⁶ National Planning Commission, (June 2018). Guidelines for the Structure of a Public Policy Document. Government of the Republic OF Namibia: Windhoek. at 1.

¹⁹⁷ M Dikamfwiri. *Towards a minerals policy for the Southern African Development Community (SADC)*. Diss. 2005. At 79.

¹⁹⁸ See United Nations report (2002) *Supra* n.194 at 159 – 185.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ R Christian, and K Ruppel-Schlichting, eds. *Environmental law and policy in Namibia*. Hanns Seidel Foundation, 2011. at 225.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

4.4. How do policies differ from laws?

A policy outlines what a Government Ministry hopes to achieve and the methods and principles it will use to achieve them.²⁰⁷ It states the goals of the Ministry. A Policy document is not a law but it will often identify new laws that are needed to achieve its goals.²⁰⁸ Laws on the other hand set out standards, procedures and principles that must be followed. If a law is not followed, those responsible for breaking them can be prosecuted in court.²⁰⁹

In Namibia, the Principal/Primary laws are initiated and tabled in the National Assembly by the Executive in the form of Bills; however, a member of the National Assembly may also initiate a Bill called a private member's Bill.²¹⁰

Not only that, the formulation of policies and laws in Namibia takes absolutely different directions;

4.4.1. Formulation of laws in Namibia takes the following process to come into effect;²¹¹

The Bill is first introduced in the National Assembly (NA) in what is known as a First Reading Stage. It then becomes a public document that is available to any member of the public who is interested in it.²¹²

During the Second Reading Stage the Minister or the Private Member who tabled (sponsored) the Bill explains why the Bill is needed.²¹³ Members then discuss the principle of the Bill and may approve or reject the Bill in principle, that is whether the Bill is necessary or not.²¹⁴ If rejected by a majority of the Members, the Bill is taken 'off the table' and may be re-introduced within 30 days with or without changes.²¹⁵

If its principle is approved, the details of the Bill are then discussed during what is called the Committee Stage by the Committee of the Whole Assembly where all MPs consider it clause by clause.²¹⁶ During the Committee Stage, any Member may propose an amendment to a clause which is then discussed and voted on.²¹⁷ If there are serious objections, the Bill can either be voted on or be referred to a Standing

²⁰⁷ *The Policy and law making process*: Available at <http://etu.org.za/toolbox/docs/govern/policy.html> (last assessed 15 September 2019).

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ Ministry of Justice Available (1993) at: <http://www.moj.gov.na/documents/154647/416674/Law+making+latest/f28a2082-e5de-4e90-bbd2-cdd425536806> (last assessed 15 September 2019).

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *ibid*

²¹⁵ *ibid*

²¹⁶ *ibid*

²¹⁷ *Ibid.*

Committee.²¹⁸ Standing Committees are smaller groups of Members of Parliament elected from all political parties to examine Bills and other documents in detail.²¹⁹

Following approval, Standing Committees are appointed for specific subject matters such as economics, human resources and International Relations or any subject matter necessary or required.²²⁰ Committees seek input from experts and the broader public by calling in individual persons or by holding public hearings.²²¹ Based on its findings, a Committee may recommend changes on specific aspects of the Bill to the House.²²²

Once the National Assembly adopts the recommendations, the Bill goes to the Third Reading Stage.²²³ At this stage a majority vote of the House is necessary to approve the Bill and no further debate is allowed.²²⁴

The Bill is thereafter referred to the National Council for review follows which the Bill must be signed by the President of the Republic before it becomes a law.²²⁵ The Bill is then published in the official Government newspaper – the Government Gazette – as an Act of Parliament.²²⁶

The enacted law comes into force either on the date of its publication in the Government Gazette or a specific date to be published in the Government Gazette by the Minister responsible for that Act of Parliament.²²⁷

The National Planning Commission has developed the Guidelines on the Public Policy Making Process in order to improve the process of policy making in Namibia. The Guidelines have stipulated stages that should be followed by Offices, Ministries and Agencies in the process of making policies.²²⁸

4.4.2. Policy making process

The Policy making process starts with the identification of the problem, that stakeholders such as Cabinet, Parliament, Communities, mass media, political parties, interest groups or civic organisations, raise concerns regarding existing or foreseeable problems that can affect the public at large. After identification of the problem, stakeholders must then identify the relevant custodian of the policy to be

²¹⁸ Ministry of Justice Available (1993) at: <http://www.moj.gov.na/documents/154647/416674/Law+making+latest/f28a2082-e5de-4e90-bbd2-cdd425536806> (last assessed 15 September 2019).

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ National Planning Commission, (June 2018). Guidelines for the Structure of a Public Policy Document. Government of the Republic OF Namibia: Windhoek.

developed / revised.²²⁹ This process requires time and government must provide an enabling environment.²³⁰ In addition, it requires allocation of adequate financial resources and capacity building of stakeholders for their effective engagement.²³¹ It is now standard practice to expect engagement by all stakeholders in minerals policy development.²³²

In a nutshell, a policy sets out the goals and planned activities of a ministry and department but it may be necessary to pass a law to enable the Government to put in place the necessary institutional and legal frameworks to achieve their aims.²³³ Laws must be guided by current Government policy.

Once a policy has been properly debated, the Department and Ministry look at the issues and options and draw up a final policy which is published as a White Paper.²³⁴ The White Paper is a statement of intent and a detailed policy plan which often forms the basis of legislation. It is debated and adopted by Parliament and approved by Cabinet.²³⁵ An effective mineral policy is formulated with the view that the mining sector is a major engine of economic reconstruction and growth, even for those countries that do not have a tradition in mining.²³⁶

4.5. Conclusion

Policies are construct subordinates of the law; they are fulfilments of the law. Policies are anchored on the law and they cannot stand on their own.

The NPPMPA is a state policy formulated in accordance with the provisions of the Minerals Act. The NPPMPA is a statement of intent which is implemented as a procedure or protocol in terms of the Minerals Act to assist in both subjective and objective decision making. Notwithstanding that NPPMPA is not law; the duty still lies with the NPPMPA to add value to the existing legislation governing the mining industry in Namibia. That being the case, the NPPMPA is cognisant of its duty towards sustainable development; as such it has strategies in place to help achieve its goals and objective. For a policy to achieve its goals and objectives there needs to be an effective implementation mechanism; however, this does not appear to be the case with NPPMPA. There is no provision for an implementation plan in the NPPMPA.

²²⁹ National Planning Commission, (June 2018). Guidelines for the Structure of a Public Policy Document. Government of the Republic OF Namibia: Windhoek. at 6.

²³⁰ United Nations. Economic Commission for Africa. *Managing mineral wealth: training materials on "Management of Mineral Wealth and the Role of Mineral Wealth in Socio-economic Development"*. UNECA, 2004. at 342.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *The Policy and law making process*: Available at <http://etu.org.za/toolbox/docs/govern/policy.html> (last assessed 15 September 2019).

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ See United Nations (2004) *Supra* n 230 at 342.

CHAPTER 5: JUDICIARY REVIEW OF A POLICY

5.1. Introduction

The Namibian court system retains Roman Dutch elements inherited from South Africa along with elements of the African traditional (community) court system.²³⁷ The formal court system comprises the magistrates' courts, the High Court, and the Supreme Court.²³⁸ The Supreme Court serves as the highest court of appeal and also exercises constitutional review of legislation.²³⁹ Prior to the attainment of nationhood in 1990 and the promulgation of the Constitution of the Republic of Namibia, which created an independent judiciary and a Supreme Court for the sovereign nation; the courts of Namibia were an extension of the judiciary system of South Africa.²⁴⁰

In Namibia, the judicial powers are vested in the Courts of Namibia, which consist of:

- a) a Supreme Court of Namibia;
- b) a High Court of Namibia;
- c) Lower Courts of Namibia.

Article 80(2) of the Constitution reads as follows;

"The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The High Court shall also have jurisdiction to hear and adjudicate upon appeals from Lower Courts".²⁴¹

The chapter evaluates decided judgments on the legal nature of a policy, focusing on the outcomes of the proposed legal nature of the policy, concerns, and lessons to be drawn from the legal perspective of the NPPMPA.

5.2. Decided judgments relating to the legal nature of policies

Policies are guidelines and when regard is had to article 95 of the Constitution, certainly, once the Government through Parliament has enacted a law based on or inspired by article 95, it will have to implement that law. Once the law is made based on article 95, the provisions of article 95 shall

²³⁷ S.K. Amoo 2008b. *"The Structure of the Namibian Judicial System and its Relevance for an Independent Judiciary,"* In Horn, N. & A. Bösl (Eds.). *The Independence of the Judiciary in Namibia*. Windhoek: Macmillan Education, at 69-98.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ The Constitution of the Republic of Namibia, 1990 (Act No. 1 of 1990).

nevertheless guide the government in applying such laws to give effect to the fundamental objectives of the said principles.

In article 101 under the heading, “Application of the principles contained in this Chapter” the “application of the principles” is described as follows:

“The principles of State policy contained in this chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.”²⁴²

For a state policy to guide the court in applying the laws, such policy has to have been incorporated into the law which it seeks to guide. This principle is stated in the matter of *Government of the Republic of Namibia and Others v Mwilima and Others*²⁴³ where the court held the following

“As to the qualification “with due regard to the resources of the State,” this remained a policy guideline not incorporated in the Legal Aid Act or any other legislation. So there is no legislation that can be said to be based on this part of the policy guideline. Although the Government may still be guided by this part of the policy guideline in applying laws to give effect to the “fundamental objectives”, it will not qualify for the Courts to have regard to it in its interpretation, because there is no law based upon it which could be interpreted by the Courts”.

The distinction between policies and laws has been clearly established in the matter of *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* where it was held that;

“laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise, the separation between Legislature and Executive will disappear.”²⁴⁴

On appeal, the Full Court in *Akani Garden Route* supra held that the quoted provision was not a “policy determination”; the word “policy” bears the meaning of a course or principle of action; “policy” sets standards, is of a general nature and does not encompass specific rules.

A policy has to be cognisant of the operative legislative framework by being supportive to that legislative framework. It serves as a guide to decision-making and may not bind the decision-maker inflexibly.²⁴⁵

The following remark on policy documents in the *Booth* case is worth noting:

²⁴² The Constitution of the Republic of Namibia, 1990 (Act No. 1 of 1990).

²⁴³ (SA29/01) 2002 NASC 2002 NR 235 (SC) at 67.

²⁴⁴ *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA).

²⁴⁵ *MEC for Education, Gauteng Province, and Others v Governing Body, Rivonia Primary School and Others* [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) at paras 54-6.

“The formulation and adoption of policy documents, particularly after a process of public participation and with external expert assistance, is a valuable tool of government. This is especially true in the sphere of land use and planning. A properly researched and formulated policy aids rational, coherent and consistent decision-making. It provides a large measure of useful predictability to the public. It avoids the need for time-consuming investigations into the history and character of an area each time a planning application is made – ‘reinventing the wheel’ as Prof Hoexter puts it.”²⁴⁶

The Court in *Aruni* held the following with regards to the nature and enforceability of a policy document:

“Policy is not legislation but a general and future guideline for the exercise of public power by executive government. Often, but not always, its formulation is required by legislation. The primary objects of a policy are to achieve reasonable and consistent decision-making; to provide a guide and a measure of certainty to the public and to avoid case by case and fresh enquiry into every identical request or need for the exercise of public power.”²⁴⁷

5.3. Conclusion

Although policies are developed in terms of the governing legislation, they are mere guidelines and not laws. What policies do is that they set out guiding principles and direction while communicating the values of the people in pursuit of the development of the mining sector. Unlike an Act of parliament, one cannot be held liable for contravening a provision in the NPPMPA as there are no penalty provisions for non-compliance. There are no measures in place to strengthen compliance. Additionally, there is a lack of guidelines for strengthening compliance with and implementation of the NPPMPA which creates loopholes. Given that a policy is not law and guaranteeing implementation might prove to be challenging, there ought to be measures in place to facilitate effective implementation and mechanisms to encourage compliance and enforcement which is not the case with the NPPMPA.

²⁴⁶ *Booth and Others NNO v Minister of Local Government, Environmental Affairs and Development Planning and Another* [2013] ZAWCHC 47; 2013 (4) SA 519 (C) at para 29.

²⁴⁷ *Arun Property Development (Pty) Ltd v City of Cape Town* (CCT78/14) [2014] ZACC 37; 2015 (3) BCLR 243 (CC); 2015 (2) SA 584 (CC) (15 December 2014) at para 47.

CHAPTER 6 – SUMMARY AND CONCLUSIONS

6.1 SUMMARY

The aim of this research was to understand and determine the legal nature of the NPPMPA in terms of litigation procedure, particularly to identify and understand the National Policy with regards to its application and implementation from a legal perspective.

In terms of the law, a discretion to grant or refuse an application for a mining license lies solely with the Minister of Mines and Energy who, together with the Minister of Environment and Tourism, who are the custodians of the NPPMPA policy. When regard is had to the goals and objectives of the NPPMPA, it is apparent that the policy has been developed to complement article 95 of the Namibian Constitution and other various legislations. This is with the purpose to guard against environmental degradation and, ultimately manage mining operations in protected areas, while at the same time preventing potential adverse impacts as a result of mining activities on the environment, the community and wildlife. It is noticeable that the laws in place that govern the application and procedure of obtaining a mining license are quite few with no specific laws in place to govern mining activities in protected areas. It is against this backdrop that the NPPMPA was born to protect the environment by regulating mining activities in protected areas.

Despite having an implementation plan in place, the policy has no regulatory framework in place to safeguard compliance with the different conditions of different licenses. Furthermore, there are no stringent measures in place for failure to implement the NPPMPA. Although the policy makes reference to cancellation of a mining license in instances of breach of conditions, the policy is silent on the procedures pertaining to such termination which makes it difficult to determine the finer points of the process regarding the termination of a mining license. Although the policy provides that the operating company has to restore areas damaged by mining activities, the policy is again silent on the possible ramifications for failure to comply with this condition.

Policies are construct subordinates of the law; they are fulfilments of the law. Policies are anchored on the law and they cannot stand on their own.

NPPMPA is a state policy formulated in accordance with the provisions of the Minerals Act. The NPPMPA is a statement of intent which is implemented as a procedure or protocol in terms of the Minerals Act to assist in both subjective and objective decision making. Notwithstanding that NPPMPA is not law; the duty still lies with the NPPMPA to add value to the existing legislation governing the mining industry in Namibia. That being the case, the NPPMPA is cognisant of its duty towards sustainable development and as such it has strategies in place to help achieve its goals and objective. For a policy to achieve its goals and objectives, there needs to be an effective implementation mechanism; however, this does not appear to be the case with NPPMPA. There is no provision for an implementation plan in the NPPMPA.

Although policies are developed in terms of the governing legislation, they are mere guidelines and not laws. What policies do is that they set out guiding principles and direction while communicating the values of the people in pursuit of the development of the mining sector. Unlike an Act of parliament, one cannot be held liable for contravening a provision in the NPPMPA as there are no penalty provisions for non-compliance. Moreover, there are no measures in place to strengthen compliance. Additionally, there is a lack of guidelines for strengthening compliance with and implementation of the NPPMPA which therefore creates loopholes. Given that a policy is not law and guaranteeing implementation might prove to be challenging, there ought to be measures in place to facilitate effective implementation and mechanisms to encourage compliance and enforcement which is not the case with the NPPMPA.

6.2 CONCLUSION

The mining sector is a vital component of the Namibian economy. The proper management of this sector is a matter of national policy and extant laws. The MME provides full administrative support in terms of mining in protected areas, in conjunction with relevant laws to give full effect to the provisions of the Minerals Policy. There is much to be desired as regards the national policy on prospecting and mining in protected areas and enabling extant laws as it has not fully achieved many results as expected.

The analysis of the legal nature of the national policy on prospecting and mining in protected areas clearly reveals the inability of the NPPMPA to give desired results. This is so because the National Policy on Mining and Prospecting in Protected Areas is not a legal document, as such its degree of binding is somehow impotent. Policies are developed in terms of the governing legislation, not laws but they are mere guidelines and as such they do not have the binding effects of legislation. A Policy is a deliberate plan of action to guide decisions and to achieve rational outcomes. While laws can compel or prohibit specific behaviours (e.g. a law requiring permits for specific actions), a policy merely guides actions to achieve the desired outcome.

Unlike an Act of parliament, for one to institute legal proceedings against a mining company for non-compliance with the national policy or for contravening a provision in the NPPMPA is not possible. This is so because the NPPMPA does not translate into laws and cannot be enforceable by a court of law.

The NPPMPA has to develop integrated and sustainable prospecting and mining in Namibia to support economic growth, whilst maintaining the integrity of ecosystems and natural resources, and avoiding degradation of areas highly sensitive for their ecological, social and/or cultural heritage value. It is evident that the policy merely compliments various regulations and policies relevant to prospecting and mining, in order to ensure minimal negative impacts on the environment.

6.3 RECOMMENDATIONS

The Prospecting and Mining Act is the most controlling legislation in Namibia when it comes to mining. The Environmental Act in its vow to contribute towards sustainable development and maintenance of an all time healthy environment supplements the mining legislation. With all the negative

environmental impacts that could result from mining in protected areas, there is a need for a mature and modern legislative regime for the mining sector (in particular mining in protected areas) to provide a clear line of responsibility for mining in those areas. This is of course given the fact that policies have no binding legal effect. There's a need for environmentally responsible mining laws in protected areas.

There is a need for guidelines pertaining to compliance and implementation of the NPPMPA. Such guidelines should be accompanied by possible sanctions for non-compliance. Accountability for both governments and companies is required in the current NPPMPA. Such a system will provide the basis for good governance which will lead to sustainable development in all facets of the social and economic life of the nation. The Government should look at incorporating most of the guidelines under the NPPMPA into law.

The NPPMPA has a statement of intent which is implemented as a procedure or protocol in terms of the Minerals Act to assist in both subjective and objective decision making and this should be made part of the new mining laws and regulations. The new legislations would guide the operational practices of mining companies, corporate agencies and individuals in protected areas of the country's mining sector.

There's a need for a review of the NPPMPA with a view to emphasise the need for inter-sectoral collaboration where prospecting and mining is allowed in protected areas. The review should incorporate the need to improve knowledge and technical skills amongst decision makers to ensure the implementation of quality environmental assessments and strategic assessments.

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