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TITLE OF DISSERTATION

Towards a One Environmental System in the Extractive Industries in South Africa: A critical analysis of its implementation date, which may disturb its successful facilitation and exacerbate legal uncertainty in the industry

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KEA LBOGA

ABSTRACT

The One Environmental System (OES) is an agreement in terms of S 50 A (2) of NEMA and S 163 of NWA, between the Ministers in the DEA, DMR and DWS with respect to mining. It stated that NEMA is the principal Act in terms of which all the environment related aspects would be regulated; and the DMR will be the Competent Authority to issue environmental authorisations relating to all the mining activities and that DEA will be the appeal authority in relation to these authorisations. These departments agreed to synchronise and fix their periods for the approval of mining licenses to 300 days and that should there be an appeal it should be disposed of within 90 days. It was introduced to eliminate the duplication of processes that were fragmented between the three departments as required by the relevant provisions of NEMA, MPRDA and NWA.

DEA announced the “8 December 2014”, as its implementation date, whereas the Act, which introduced it (NEMLAA Act 25 of 2014), commenced on 2 September 2014. This contradiction regarding the implementation date of the OES has the unintended consequences of hindering the effective implementation of the OES Agreement in the mining industry; and is incongruous with the rule of law, and consequently the IIBP. These contradictions exacerbate the preposterous situation anent to legal and policy uncertainty in the extractive industry, hence SA is ranking low on the Fraiser Institute Annual Survey for Mining Companies on the Policy Perception Index and Investment Attractive Index. The DMR should urgently promulgate into law the MPRD Bill of 2013 in order to improve legal certainty because mining is quintessence and backbone of the South African economy. SA’s total value of known mineral reserves is estimated at approximately R20.3-trillion; and it is the world’s fifth largest mining sector in terms of GDP value.

The improvement of the approval process for an EA is congruent to the ambit of sustainable development, which was advocated by the apex court in the famous Fuel Retailers Association case, which promoted the adherence to S (24) of the Constitution. The successful implementation of the OES will amongst others achieve Environmental Justice to the mining induced communities who are exposed to unhealthy and hazardous environments because of the mining activities and consequently, their rights to a healthy environment are violated.

The ultimate aim of this study is to contribute towards improving legal and policy certainty in the industry, because there is a correlation between the two and low inflow of Foreign Direct Investments in the SA mining sector.

This study recommends that the presidency should ameliorate this situation by directly accessing the apex court in terms of S (167) (6) of the Constitution to seek an order to declare invalid and set aside the NEMALA regarding the OES'S date of implementation. The CC will exercise its powers in terms of S 172 (1) (b) of the Constitution and grant the presidency an order to rectify the anomaly by promulgating the relevant regulations and then properly amend NEMLAA to rectify the implementation date of the OES. President Ramapohosa will be emulating his predecessor and icon Madiba, who acted accordingly regarding the date of implementation of the South African Medicines and Medical Devices Regulatory Authority Act, 132 of 1998. By so doing, the president will be putting into actions his Presidential slogan of "Thuma mina/ Send me."

The study will recommend that the DEA and not the DMR should be the competent authority to approve the EA in the mining industry. This is due to the patent evidence of competency and capacity deficit at DMR to deal with intricate environmental related issues. It will conclude by professing a further study regarding the introduction of Strategic Environmental Authorisations for the mining industry as well as an OES National Policy and Act.

KEYWORDS

Rectification; Duty of Care; NEMA Principles; Environmental Justice; Sovereignty on Natural resources; Treaties; Sustainable Economic development; One Environmental System; Anthropocentrism; Legal Certainty.

ACRONYMS AND ABBREVIATIONS

BPEO	Best Practicable Environmental Option
CA	Competent Authority
CC	Constitutional Court
DE	Department of Environmental Affairs
DMR	Department of Mineral Resources
DWS	Department of Water and Sanitation
EA	Environmental Authorisations
EI	Extractive Industries
EIA	Environmental Impact Assessment
EJ	Environmental Justice
EMP	Environmental Management Plan
FIASMC	Fraser Institute Annual Survey of Mining Companies
IAP's	Interested and Affected Parties
LUPO	Land Use Planning Ordinance 15 of 1985
MCSA	Minerals Council of South Africa
MPRDA	Mineral Petroleum Resource Development Act 28 of 2002
NEMA	National Management Environmental Act 107 of 1998
NEMLAA	National Environmental Laws Amendment Act 25 of 2014
NEMPA	National Environmental Management Protected Areas Act 57 of 2003
NWA	National Water Act 36 of 1996
OES	One Environmental System
PPP	Public Participation Process
SA	South Africa

SEA	Strategic Environmental Authorisations
SED	Sustainable Economic developments
SEMA	Strategic Environmental Management Act

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CHAPTER 1: INTRODUCTION

1.1. Background to the study

The OES is an agreement in terms of S 50 (2) National Environmental Management Act (NEMA),¹ and S 163 of National Water Act (NWA),² between the Ministers in the departments of Water Affairs (DWS), Environmental Affairs (DEA) and Mineral Resources (DMR) with respect to mining, which stated that NEMA is the principal Act in terms of which all the environment related aspects of mining would be regulated. The DMR will issue environmental authorisations,³ and the DEA will be the appeal authority in relation to these authorisations. DEA, DMR and DWS agreed to synchronise and fix their periods for the consideration and issuing of the authorisations in their respective legislations so that a mining license application will be adjudicated within 300 days, and should there be an appeal, it will be disposed of, within 90 days.⁴ It was introduced on 8 December 2014, in terms of The National Environmental Management Laws Amendments Act (NEMLAA).⁵

The OES was introduced for to the following reasons:

- To eliminate the duplication of processes that are fragmented as required by the relevant provisions of NEMA,⁶ the National Water Act (NWA),⁷ and the Minerals and Petroleum Resources Development Act (MPRDA);⁸
- To introduce an integrated permitting system with a view to create legal certainty in the industry regarding the approval process for a mining license.⁹ SA mining industry is suffering from regulatory duplication. “Regulatory overlap between various government

¹ Act 107 of 1998 (NEMA), as inserted i.t.o S 17 of NEMLA Act 25 of 2014.

² As inserted i.t.o S 5 of National Water Amendment Act 27 of 2014.

³ “Authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act” S (1) (b) of NEMA.

⁴ <https://www.mining-technology.com/news/newssouth-africa-announces-new-streamlined-mining-licencing-process-4464885>. (Accessed on 2017-09-16).

⁵ Act 25 of 2014.

⁶ Act 107 of 1998.

⁷ Act 36 of 1996.

⁸ Act 28 of 2002; Humby T; One Environmental System (JENRL 2015 (33)2)) 121.

⁹ Jeffery A; Finding the right balance between mining and the environment (IRR 2018) 3.38) 5.

departments (often Energy/Resources/Mining and Environment) may result in unclear lines of authority (...). Regulatory overlap (...) [i]s a significant investment deterrent".¹⁰

SA is ranking low on the Fraser Institute Annual Survey of Mining Companies (FIASMC). In 2017, SA ranked 12 out of 15 in Africa and 81 out of 91 globally both for Investment Attractive (IAI), and Policy Perception Indexes (PPI) respectively.¹¹ These poor rankings are prophylactic for SA to meet the Industry International Best Practices (IIBP) or Good Industry Practice which is "the exercise of that degree of skill, diligence, prudence and foresight (...) [a]ppplied (...) [i]n the international mining industry (...) [b]y the International Council on Mining and Metals, by the IFC Performance Standards, and by ISO 14001."¹² This study will use the term IIBP.

The paradox of this situation is that the President promulgated three suites of legislations on 2 June 2014, with the intention to introduce the OES, yet the three signatory departments are incongruous pertaining to their dates of implementation. The vicissitudes regarding the implementation date of the OES is the provenance of the hypothesis of this study.

The improvement of the approval process for an EA is in line with objectives of the right to a healthy environment, which is enshrined in terms of S (24) of the Constitution.¹³ This section encourages that economic developments in the mining industry should be executed in a sustainable manner, which is defined as "the integration of social, economic and environmental factors into planning, (...) [t]o ensure that mineral and petroleum resources development serves present and future generations".¹⁴ The enabling legislation that gives effect to S (24) of the Constitution is NEMA. One of the directive principles contained in S (24) (b) of the Constitution is to impose duties on the State to protect the environment for the benefit of the current and future generations. This directive was confirmed in the *obiter dictum* in the case of Director: M D, Gauteng Region & another v Save the Vaal Environment (Pty) Ltd (Save the Vaal), which stated, "[d]evelopment which meets present needs will take place without compromising the ability of future generations to meet their own needs"¹⁵

Should mining operations be executed in a sustainable manner, the precipitative impact on the environment in the areas surrounding the mining operations will be immensely mitigated.

¹⁰ Vivoda V; Determinants of Foreign Direct Investment in the Mining Industry (CSRMSMI 2017) 25.

¹¹ Jeffery (2018) *supra*; n9 at 11.

¹² IBA; MMDA (2011-04-11) at p3.

¹³ The Constitution of the Republic of South Africa; 1996.

¹⁴ S 1 (a) of MPRDA 2002 of 2004; S 1(1) of NEMA, definitions.

¹⁵ M D, Gauteng Region & another v Save the Vaal Environment (Pty) Ltd [1996] 1 All SA 2004 (T) Par [20].

Mine induced communities (MIC) who are mostly poor and historically disadvantaged individuals (HDI), are exposed to unhealthy and hazardous environment and consequently their rights to a healthy environment are violated. One of the objectives the OES is that the MIC should enjoy Environmental Justice (EJ); which is defined as “Environmental justice is about social transformation directed towards meeting human need and enhancing the quality of life (...) [u]sing resources sustainably”.¹⁶ At the centre of this definition, is the mammoth task of undoing the environmental injustices which the majority of poor and HDI’s have been experiencing in the past. It is for this reason that S (24) of the Constitution is a welcomed relief in the pursuit for environmental justice in South Africa. Accordingly, the study will embark on the following:

- Erudite how the confusion created by contradictions regarding the implementation date of the OES manifested into contradictions in many sections of MPRDA that may have the unintended consequences of hindering the efficacy of the OES in approving the EA’s in the mining industry.
- The extent to which these contradictions exacerbate policy uncertainty in the industry. Bryan JL advocates “(...) [l]end empirical support to the notion that policy-related uncertainty can depress economic growth through a decrease in corporate investment”.¹⁷
- The interplay between the provisions of S 24G and S 28 of NEMA.

1.2. Epistemological stand-point of this study

This study is based on the Doctrinal legal theory, which is defined as ‘[a] synthesis of various rules, principles, (...) [l]arger system of law’.¹⁸ This theory will guide the aim of this study. The genesis of this study is about the poor legislative design in the legislations that introduced the OES. The study is also based on the philosophical approach of Anthropocentrism, which is described as “(...) [h]olds that our moral duties regarding the world are determined by the duties we owe one another as humans”.¹⁹ It is deeply rooted in the Biblical injunction according to the book of Genesis 1:28, which “exhorts human to subdue the earth and to rule over living creatures”.²⁰

¹⁶ Hofrichter R; *Toxic Struggles: The Theory and Practice of Environmental Practice* (1993) (Phil. N.S) 4; Peek S “Doublespeak in Durban” 2002 EJS 202.

¹⁷ Bryan JL; *The Impact of Government Policy on Economic Growth* (MFP 2013) at 142.

¹⁸ Hutchinson T and N Duncan; *Doctrinal legal research* (DLR 2012(17.1) 83.

¹⁹ Glazewski J., *Environmental Law in SA* 2nd Ed (Juta 2005) 7.

²⁰ *Ibid.*

1.3. Aims and objectives of the study

1.3.1. Hypothesis

The hypothesis in this study is that there are glaring discrepancies regarding the implementation date of the OES, which manifested the confusions in some sections of MPRDA and NEMA relating to the legislative process of applying for a mining license. These discrepancies have the unintended consequences of derailing the successful implementation of the OES and decimate SA's efforts to meet the requirements of the IIBP.

1.3.2. Aim

The aim of the study is to enunciate the discrepancies regarding the date of implementation of the OES and the contradictions that have manifested in some sections of the MPRDA regarding the applications for a mining license, which prevent SA to meet the requirements of the IIBP.

1.3.3. Objectives

The objectives of this study are:

- To analyse the extent to which the invalid "8 December 2014" date has created legal and policy uncertainty in the industry.
- Elucidate the correlation between policy uncertainty in the SA mining industry and the shrinking of Foreign Direct Investments. This is because (...) [i]ncreased policy uncertainty leads to diminished investment, employment (...).²¹
- Profess, the legislative steps to be taken by the Presidency to ameliorate the precipitate brought by the glaring discords enunciated in some sections of MPRDA, NEMA, NEMLAA, NWAA and NEMWA, relating to the OES.
- Strike a balance between promotion of economic developments through mining and protecting the environment.²²It will juxtapose the State's position as a Permanent Sovereignty having the right "to use natural resources for national development",²³ and contrast it with "The Principle of the State sovereignty and responsibility not to cause environmental harm".²⁴

²¹ Hlatshwayo S and Saxegaard M; The Consequences of Policy Uncertainty (IMF Working Paper 2016 (113) 6.

²² Jeffery (2018) *supra*; n 9 at 13.

²³ Schrijver N; Sovereignty over Natural Resources (Cambridge 1997) 269.

²⁴ Kidd M, *Environmental Law* 2nd Ed. (2008) at 53.

- Unpack the importance of implementing the OES with intention to align all the milestones in the process of acquiring a mining license. This is because in practice “It may thus be difficult to obtain all the necessary permissions at the same time”.²⁵

1.4. Research questions

1.4.1 Primary research question

Are there discrepancies regarding the date of implementation of the OES as contained in the legislations that introduced it, and if so, what are the consequences of such discrepancies, particularly as it applies to the facilitation of the OES and the requirements of the IIBP.

1.4.2. Secondary research questions

- (i) What is a ‘One Environment System’ in relation to the mining industry?
- (ii) What is the importance of mining to macro-economy of South Africa?
- (iii) What are the current legislative requirements regarding the application of mining license, with specific reference to the environmental authorisations and how do the legislative arrangements relates to the IIBP?
- (iv) Are there contradictions between S 24 G and S 28 of NEMA that will compound legal uncertainty in the mining industry?
- (v) Which legislative steps should be taken to germinate the development of the OES?

1.4. Methodology

Given the theoretical nature of this research, the study will be conducted via a desktop qualitative method utilising content analysis of primary documents, consisting of existing South African legislation, case law and journal articles and books.

1.4.1. Research parameters

This study will be confined to the following:

- The contradictions in the legislations that introduced the OES relating to its implementation date.
- All the sections in the MPRDA that deals with the approval of Environmental Authorisations required for mining licenses and their relations to IIBP.

²⁵ Warren Beech and Nicholas Veltman, Hogan Lovells (South Africa) Inc. ‘Environmental law and practice in South Africa: overview’, in Practical Law Country Q&A, 2018, pp1-2, as cited in Jeffery (2018); *supra* n.9 at 5.

- The interplay between S 28 and S 24G of NEMA; which exacerbate legal uncertainty in the mining industry.
- Sources will be limited to relevant primary and secondary resources, which were published on or before 30 June 2018.

1.4.2. *Limitations of the research*

The OES is a relatively new concept in SA, and was introduced on the 8 December 2014. Its limitations are:

- Most of the South African academic materials on this topic are relatively new.
- The ideologies and the theoretical approaches in these recently published materials have not yet been sufficiently tested in the Mining or Environmental Management industries.
- There is very little jurisprudence regarding this topic and there may be court cases that are still at trial stages, and their decisions may have an impact on the conclusions of this study.
- Due to word count constraints, this study will be confined to the adverse impact of mining activities on the environment affecting water resources. SA is water scarce country,²⁶ and that “Water is an integral part in survival of the living being (...)”.²⁷

1.6. **Relevance of the proposed study**

This study seeks to erudite the confusion regarding the implementation date of the OES, which will hinder its successful facilitation; and potentially disturb the implementation of sustainable economic developments through mining. It will also seek to find the justifications for the mining industry to enjoy the enclave treatment to an extent that some of the defects in the legislative texts like S 24G of NEMA were so poorly drafted in order to accommodate this industry at the expense of the environment. Turok B buttress this statement when he said, “Mining in South Africa has always been an enclave industry, (...)”.²⁸ The Bench Mark Foundation lamented the royal treatment of mining by government that “It is seen as the holy cow of

²⁶ Hedden S and Celliers J; The emerging water crisis in SA (2014 AFP (11)) 1.

²⁷ Karmakar HN and Das PK; Impacts of mining on ground and water surface (IMWA 2012) 187.

²⁸ Turok B; SA’s minerals are under-exploited. Cape Times / 18 January 2013. See <https://www.iol.co.za/capetimes/sas-minerals-are-under-exploited-1454542>. (Accessed on 2017-11-05).

economics and sacrosanct, neither to be questioned or challenged”.²⁹ Stats SA reported that for the year 2017, the mining industry, contributed approximately 8% of the GDP.³⁰

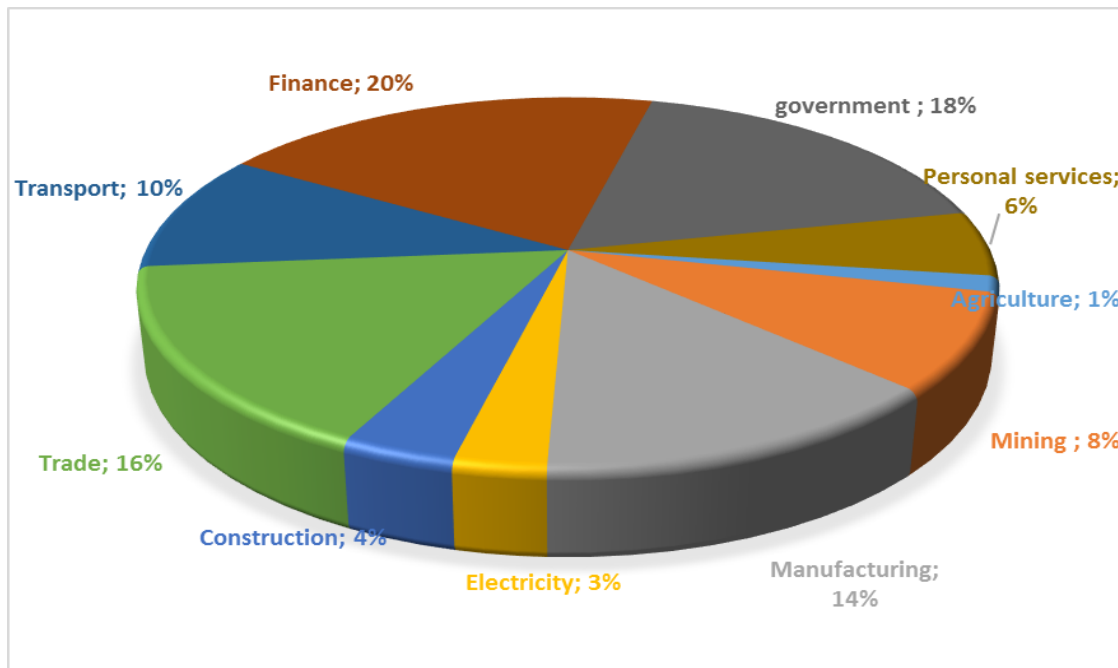


Figure 1. SA GDP Quarter 4 2017

Source:<http://www.statssa.gov.za/wp-content/uploads/2018/03/image.png>

The study will enrich the body of knowledge in Environmental Law and the Mining Industry as follows:

- It will erudite the importance of the OES with its objective of facilitating the synchronisation of the time lines for the various approvals in the three mentioned departments when acquiring a mining license in SA.
- Its conclusion will recommend legislative steps that will contribute towards efforts to enhance legal certainty in this industry, more so because “The MPRDA, the backbone of this regime, is fraught with vague provisions (...)”.³¹

1.7. Chapter overview

This research is divided into six chapters. The epistemological standpoint will be its guiding principle. A Literature Review of the relevant materials in Chapter II will follow this Chapter. It will explicate the contribution of mining to the growth of the SA macro-economy and then

²⁹ http://www.bench-marks.org.za/annual_reports/annual_report_2016.pdf, at p 6 (Accessed on 2017-11-15).

³⁰ <http://www.statssa.gov.za/wp-content/uploads/2018/03/image.png>. (Accessed on 2018-01-29).

³¹ Leon P; SA’s Mining industry on the decline. Available on www.politicsweb.co.za/documents/sas-mining-industry-in-decline-an-analysis (2010-09-01) at p 5. Accessed on (2017-09-01).

elucidate the One Environmental System. Chapter III will exegete the applicable legislations regarding the application of mining licenses .Chapter IV will embark on the perceived contradictions between the provisions of S 24G and S (28) of NEMA. Chapter V will evaluate the materials that were in the previous chapters and recommend steps to ameliorate the contradictions regarding the implementation date of the OES. Chapter VI will give a summative conclusion of this study.

The following chapter will embark on the Literature Review regarding the contribution of the mining industry to the South African economy, and cogently dissect the One Environmental System.

CHAPTER II: LITERATURE REVIEW: MINING INDUSTRY AND THE OES

2.1. Introduction & Purpose

This chapter will review relevant materials in order to explicate the importance of the mining industry to the growth of the macro-economy of South Africa, and to determine whether this industry is still the backbone of the SA economy, which explains its enclave treatment by the government.³² It will unpack the OES. The gaps and inconsistencies that have been identified by this study will be dealt with by way of Theory based research due to its importance.³³

2.2. Relevant Treaties

Treaties are one of the sources of International Law which countries bind themselves to one another to deliver specific performances as per the signed agreements.³⁴ They are defined, as “a written agreement (...) [b]etween states and international organisations, (...) [i]nternational law”.³⁵ SA is a signatory to more than 50 Conventions.³⁶ Mining activities may cause SA to violate some of these treaties if their operations are executed in a sustainable manner. This study will be limited to discuss Conventions that are related to protected areas (especially water resources),³⁷ and those relating Permanent Sovereignty over natural resources.³⁸ “Acid mine drainage is (...) [t]hreat to South Africa’s environment”.³⁹ Water is a stochastic commodity and the ADM can flow into the mainstream rivers that feed into the resources for human consumptions and agricultural needs. SA is the world’s 30th driest country.⁴⁰ While the mining sector consumes approximately 5% of the total useable water in SA,⁴¹ it remains high on the list of the industries that deadly contaminate water resource,⁴² hence the need to obtain the water use license approval prior to commencing with a mining operation.

³² Murray N and Beglar D; Inside Track Writing Dissertations and Theses (2009) 158.

³³ Wacker “A definition of theory” (JOP 1998) 361.

³⁴ Kidd (2008), *supra* n 34 at 45.

³⁵ *Ibid.*

³⁶ Glazewski (2005), *supra* n 25 at 39.

³⁷ Glazewski (2005), *supra* n 25 at 53.

³⁸ Schrijver (1997), *supra* n 33 at 270.

³⁹ Younger PL (2001) cited in Ochieng GM et al; Impacts of mining on water resources (SRE (5) (22) 3352.

⁴⁰ World Cup Legacy Report; South Africa: a water scarce country (2014-04-11) at 60.

⁴¹ Green Peace; Water Market Intelligence Report (2017) at 17.

⁴² Feris L and Kotze LJ; The Regulation of AMD in SA: Law and Governance Perspectives (PELJ 2014(17)5) 2105.

Some of the Conventions that are relevant to this study are The Ramsar Convention of 1971, which was adopted with the intentions to provide the framework for the International Co-operation for the conservation and protection of wetlands, which are very important sources of water. SA domesticated this convention with the promulgation of the National Environmental Management: Protected Areas.⁴³ The Rio Convention of 1992, and one of its highlights particularly Principle 4 is that environmental protection should form the integral part of any sustainable development.⁴⁴ The Permanent Sovereignty over natural resources, which states that every Sovereign State owns the natural resources within its borders and that it, can freely exploit them for purpose of national economic development.⁴⁵ Walser advocates in a World Bank report that "... [m]ining is a crucial element of the economic development of many countries".⁴⁶

2.3. Relationship between the South African Economy and the SA Mining Industry

George Harrison is credited for the discovery of gold in the reef. His findings on the farm Langlaagte were made in July 1886, through either accident or systematic prospecting.⁴⁷ "Prior to (...) [m]ining, South Africa was a largely farming country (...) [a]gricultural products".⁴⁸ "One of the consequences of the gold rush was the construction of the first railway lines (...).⁴⁹This industry was at its peak between 1970 to 1990 whereby it has contributed an average of 21% of the country's GDP.⁵⁰ It created other sectors like manufacturing and financial services.⁵¹ These activities further contributed towards the GDP of the country. Mining gave birth to the electricity industries that supported the mines until the formation of the Electricity Supply Commission in 1922.⁵²

"South Africa's total reserves (...) [o]f R20.3-trillion, (...) [w]orld's fifth-largest mining sector in terms of GDP value."⁵³ According to the US Geological Survey, SA has the world's largest

⁴³ Act 57 of 2003.

⁴⁴ <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>. (Accessed on 2018-06-20).

⁴⁵ General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources".

⁴⁶ G Walser; World Bank Group Mining Development. Washington DC (USA) at 86.

⁴⁷ <http://www.sahistory.org.za/article/discovery-gold-1884>. (Accessed on 2018-07-04).

⁴⁸ Kane-Berman J; Mining in SA: Then, now, and into the future – IRR (2017-02-17) at 2.

⁴⁹ Holland, D.F. (1971). Steam Locomotives of the South African Railways, Volume 1: 1859-1910 (1st Ed.).

⁵⁰ McMillan H; Mining in S A in the last 30 years – an overview (2017-07-11) at 2.

⁵¹ Harrison P and Zack T; The power of mining. (JCS 2012(30)4) at 557.

⁵² *Ibid.*

⁵³ <https://www.brandsouthafrica.com/investments-immigration/business/economy/mining-and-minerals-in-south-africa> (2012-08-16). (Accessed on 2018-07-04).

reserves of manganese and platinum group metals (PGMs), and among the largest reserves of gold, diamonds, chromite ore and vanadium. SA's diamond industry was declared the fourth largest in the world. SA is the world's third largest exporter of coal, a resource that is crucial to generate electricity, fuels industrialisation and is used in the production of steel and manufacturing of cement.⁵⁴ SA is the leading producer of iron ore in Africa and the seventh largest in the world.⁵⁵

"The Mining sector is a cornerstone of (...) [e]conomy and (...) (JSE).⁵⁶ It is not a coincidence that Section 3(1) of the MPRDA stipulates that "Mineral (...) [f]or the benefits of all South Africans".⁵⁷ This section is hermetically connected to the sentiments that are echoed in the Freedom Charter. It stated that "The mineral wealth beneath, (...) [s]hall be transferred to the ownership of the people (...)".⁵⁸ Due to its resilience, mining together with the agriculture industries, extricated the South African economy out of technical recession by contributing 12.8 % and 22.2% to the GDP growth of 2.5% respectively.⁵⁹

It is not surprising that in his 2018 State of the Nation address, President Ramaphosa said "(...) [s]ee mining as a sunrise industry".⁶⁰ His statement buttresses the submission of this study in explicating one of the secondary questions, that mining is indeed the backbone and quintessence to the South African economy, hence the enclave treatment that it enjoys.

Following can be extrapolated:

The Ramsar and Rio Conventions are closely related to S (28) of NEMA while the Permanent Sovereignty over Natural Resources Convention is warming up to S (24) (G) of NEMA. That the discovery gold and other natural resources transformed the SA economy from being agriculture reliant to a mining dependent economy, especially the creation of the solid infrastructure networks, manufacturing, financial sectors and there-by diversifying the economy, is eloquently articulated. "Mining in South Africa has always been an enclave industry, (...)".⁶¹ The impact of

⁵⁴ MINNAAR N; South Africa's most commonly mined minerals. See <http://www.living-lifestyle.co.za/south-africas-commonly-mined-minerals/> (2016-09-06). (Accessed on 2018-07-04).

⁵⁵ *Ibid.*

⁵⁶ Chinhamu K et al; Empirical Analysis of SA Mining Index (SAJE 2017(3)1) 41.

⁵⁷ MPRDA 2002 of 2002.

⁵⁸ Mitchell G; Making sense of transformation claims in the S A mining industry (SAIMM (2013)113) 39.

⁵⁹ https://www.huffingtonpost.co.za/hamlet-hlomendlini/agriculture-has-pulled-the-south-african-economy-out-of-recession_a_23198376/ (Sep 7, 2017) (Accessed on 2017-11-30).

⁶⁰ <https://www.gov.za/speeches/president-cyril-ramaphosa-2018-state-nation-address-16-feb-2018-0000> at 11. (Accessed on 2018-03-31).

⁶¹ Turok (2013), *supra* n.30.

this industry on the environment, especially the scared water resources is very serious and a source of environmental injustices to many historically disadvantaged people who reside around the mining areas.

The next section in this Chapter espouses on the newly introduced “One Environmental System”.

2.4. The One Environmental System (OES) in the Extractive Industry

2.4.1. Synopsis of the OES

The OES is an agreement between the ministers in DEA, DMR and DWS which is contained in Sections 50A (2) of NEMA and 163A of the National Water Act, both having similar terms.⁶² It was introduced on 8 December 2014.⁶³ S 32 of NEMLAA,⁶⁴ prescribes that the OES shall be operational three months (i.e. 2 September 2014) from date of its promulgation on the 2 June 2014, upon the proclamation of the necessary Regulations by the DEA. The “December 8 “date has constitutional deficiency in that it did not meet the provisions of S 32 of NEMLAA. The vicissitudes following the discrepancy around the implementation date of the OES was also lamented in the legal fraternity as per an article by Norton-Rose Inc. published on the 6 February 2017 which stated that “ (...) [a]s soon as it had started, it stumbled: (...) [t]he implementation of the OES would be delayed until 8 December 2014.”⁶⁵ The confusion regarding this date is that DEA confirmed the “8 of December 2014” as the implementation date,⁶⁶ while the DMR consistently stated that the OES was effective from 1 September 2014.⁶⁷ DWA took a cautious approach by indicating the NWAA,⁶⁸ will come into operation “on the same date as the NEMLAA 25 of 2014”;⁶⁹ however the other legislation from DWA which introduced the OES, being the National Environmental Management Waste Act (NEMWA),⁷⁰ is clear regarding its date of commencement being the 2 June 2014.⁷¹

⁶² OES, *supra* n.1.

⁶³ *Supra* n.5.

⁶⁴ GG No. 37713 dated (2 June 2014) at 30.

⁶⁵ Norton Rose Fulbright; Mine residue stockpiles and deposits. See <http://www.nortonrosefulbright.com/knowledge/publications/147632/mine-residue-stockpiles-and-deposits-reforming-requirements-for-pollution-control-barrier-systems-under-the-n>. (Accessed on 2018-08-03).

⁶⁶ Reg. No. 982 found in GG No.38282 published on 2014-12-04.

⁶⁷ S 22(1), S 22 (5), S 23 (1d), S 24 (2b) of MPRDA as amended by MPRDAA 49 of 2008, to name a few.

⁶⁸ Act 27 of 2014.

⁶⁹ S 7 of NWAA 27 of 2014.

⁷⁰ Act 26 of 2014.

⁷¹ S 19 of NEMWA 26 of 2014.

In efforts to clear this confusion, DEA has commenced with a process to amend the NEMLAA of 2014, by publishing the explanatory summary of the National Environmental Management Laws Amendment Bill (NEMLA), 2017.⁷² One of the objectives of the bill, relevant to this study is to provide for simultaneous submission of NEMA and other SEMA's for purposes of the OES; in order to enable simultaneous environmental authorisation, to provide for a trigger for the simultaneous submission of NEMA and SEMA's after acceptance of a mining right.⁷³ It is concerning that DEA lost an opportunity through this legislative process to rectify its error relating to the "8 December 2014" as the implementation date of the OES. Should the NEMLA bill be promulgated into law in this current format, the vicissitudes arising out of this date will remain.

The harmonization of environmental and mining legislations in the Extractive Industry is a well-developed phenomenon globally in countries that are blessed with mineral deposits. In Peru, the environmental legislations and enforcements were fragmented in various ministries. The competing interests between economic developments and environmental and human rights protections were harmonized by the "Streamlining Environmental Policy-Making and Enforcement Mechanisms".⁷⁴ The Ministry of Energy and Mines was receiving enclave treatment from the Peruvian government the same way as DMR in South Africa. In the SADAC region, countries aligned their policies and legislations in order to mitigate the impact of cross-border environmental degradations by mining activities especially water resources, due to its stochastic nature. Their Policy document emphasised the objective of "4. Achieving sustainable utilization of mineral resources and protection of the environment".⁷⁵

In the USA, the fragmented authority over Energy and Environment is identical to the situation in SA, and this would be ameliorated as professed by scholars and experts in energy and environmental law by integrating the two fields.⁷⁶ In the Nordic regions, countries that are rich in mineral reserves also harmonized their mining and environmental legislations. Their

⁷² GG No. 40733, published on 31 March 2017.

⁷³ GG No.40733 at 157.

⁷⁴ Barretto R et al; Harmonizing Growth & Environmentalism in the Peruvian Mining Sector at 32. See [http://www.umich.edu/~ipolicy/IEDP/2007peru/4\)%20Harmonizing%20Growth%20&%20Environmen%20talism%20in%20the%20Peruvian%20Min.pdf](http://www.umich.edu/~ipolicy/IEDP/2007peru/4)%20Harmonizing%20Growth%20&%20Environmen%20talism%20in%20the%20Peruvian%20Min.pdf). (Accessed on 2018-07-23).

⁷⁵ Harmonisation of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa; See <https://www.uneca.org/sites/default/files/PublicationFiles/harmonisation-study-sro-sa.pdf>. At p16 (Accessed on 2018-07-30).

⁷⁶ Freeman J; The Uncomfortable Convergence of Energy and Environmental Law (HWLR (2017 (41) 420).

initiatives are similar with the OES as expressed as follows “(...) [w]ill give extra attention to the permitting phase of mining, and especially mineral and mining laws (...).⁷⁷

South Africa is congruent with established international practices by introducing the OES in the mining industry.

2.4.2. *Litigations involving the OES*

The importance of the OES was espoused in the following cases where the conduct of officials from DMR and DEA was the focal point of discussion.

- Maccsand (Pty) Ltd V City of Cape Town and Others ⁷⁸

In 2007, DMR granted Maccsand (Pty) Ltd a mining permit to mine sand dunes in terms of S 23 of the MPRDA over two properties that were zoned public space and are owned by the City of Cape Town. In 2009, the City successfully interdicted Maccsand from continuing with their mining operations because it did not obtain the rezoning approval as required by Land Use Provincial Ordinance (LUPO).⁷⁹

The City argued that Maccsand had to apply for rezoning the land to mining or alternatively apply for an exemption to rezone prior to them commencing with their mining activities. Maccsand and DMR argued that the mining permit was issued in terms of the MPRDA, which is a national legislation, and therefore Maccsand did not have to meet the provisions of a Provincial legislation. “Therefore, the question is which legislation should prevail – the MPRDA (national legislation) or LUPO (provincial legislation)”.⁸⁰

The CC dismissed the appeal because no legislation is superior to the others irrespective of which sphere of government would have promulgated it. It encouraged organs of State to work together as per the provisions of the Intergovernmental Relationship Framework.⁸¹ The overlaps of the two legislations did not constitute an impermissible intrusion of one sphere of government into the other, as submitted by the appellants. The court rejected the submission by the MEC, which sought a declaratory order regarding the constitutional validity of the MPRDA on the DMR’s role in approving the EMP’s.

⁷⁷ Hojem P; Mining in the Nordic Countries. See <http://norden.diva-portal.org/smash/get/diva2:842595/FULLTEXT01.pdf>. at 12. (Accessed on 2018-07-30).

⁷⁸ Maccsand (Pty) Ltd V City of Cape Town and Others 2012 (4) SA 181 (CC).

⁷⁹ Ordinance 15 of 1985.

⁸⁰ Botha C & Bekink B; ‘Maccsand v City of Cape Town (2015 De Jure) 459.

⁸¹ Act 13 of 2005.

- Academic commentary

Humby T supported this decision in rejecting the argument by the appellants regarding MPRDA being superior to LUPO. She also buttressed the doctrine of usurpation, “meaning is the concurrency of national, provincial and local powers (...), [i]ntergovernmental relations (...).⁸² She concluded by indicating that this doctrine will not only be applied in Western Cape, but anywhere in the country where authorities over different spheres of government overlap. She however, expostulated with the CC for refusing to grant a declaratory relief to declare that Environmental Authorisations (EA’s) in terms of NEMA should have been required in the same manner that Maccsand was ordered to apply for a zoning certificate in terms of LUPO.⁸³

- Minister for Environmental Affairs & Another v Aquarius Platinum (SA) (Pty) Ltd and Others⁸⁴

This case aroused out of the three applications by Aquarius to obtain a water use license, an EA and a ministerial approval from DMR to build and operate the new tailing dam. It was granted both the EA from DEA and permission to operate from DMR. Aquarius followed a very fragmented process because it had to apply to three departments. Because DWS failed to pronounce on Aquarius’s application, Aquarius approached the High Court (HC) to seek a mandamus regarding the DWS’s failure to make a decision. The new process in terms of the OES brought in changes to the manner in which the tailing dams should be operated. The necessary regulations that were supposed to have been promulgated prior to the said Amendment Laws being implemented were not promulgated at the time when the case was before the HC.

Aquarius argued that the absence of promulgated regulations to determine how tailing dams should be operated rendered the implementations of the amendment laws impossible and created a lacuna (gap) regarding how tailing dams should be operated,⁸⁵ the President acted irrationally when he exercised his duties in terms of Section 81 of the Constitution by assenting and signing the bills into law without ascertaining that the required regulations were promulgated before doing so. The HC accepted this submission and declared that the President’s actions of assenting into law the Amendment Laws were irrational then set aside the Amendments Laws.

⁸² Humby T; Maccsand: The doctrine of usurpation (SAPL (2012(27)) 635.

⁸³ Humby T; Maccsand: Dodging the NEMA issue (STELL LR (2013) (1) 62; Olivier NJJ et al; Maccsand v City of CT (PER 2012 (15)5) 559.

⁸⁴ Minister for Environmental Affairs & Another v Aquarius Platinum (SA) (Pty) Ltd and Others [2016] ZACC 4.

⁸⁵ *Id* at Para23.

The Con-court set aside the order of the HC and dismissed the application for the confirmation of HC's decision because S (81) of the Constitution does not prescribe that the President should ascertain that all the necessary pre-promulgations steps have been taken before the bill is brought to him to assent and to sign into law. The only step, which is peremptory in terms of S (81), is publication of the bill in a government gazette, of which the President has done. The Court placed the fault solely on the Minister's failure to promulgate the necessary regulations within the prescribed time.

This decision was buttressed by CDH Inc. in their article named "Con-Court hands down judgement in the Aquarius Platinum case,"⁸⁶ by indicating that the argument advanced by Aquarius that the absence of new regulations will create a "Lacuna" in the industry regarding management of tailing dams was flawed. Tailing dams could still be operated in terms of the Regulations set by the NEMWA.⁸⁷

▪ Mineral Sand Resources v Magistrate for the District of Vredendal and others⁸⁸

This is a classic case of a situation where-by mining companies can exploit the convoluted and interchangeability use of words in different sections of NEMA and MPRDA regarding the implementation of the OES. These would most probably result in the manifestation of contradictions amongst some sections in the legislations.

Officials from DEA, acting on suspicions that the applicant was committing illegal activities applied for a search warrant from the Magistrates court of Vredendal. It was obtained on 26 September 2016. In their Ex parte application for a search warrant, the officials did not disclose to the magistrate that DMR and not DEA; now has the authority to issue EA's in the mining industry since the introduction of the OES. From June 2014, inspectors from both DEA and DMR separately inspected the MSR mine where-by they found that MSR have contravened the conditions of its EMP in many ways. An environmental consultant of MSR confessed to Mr. Scheepers an inspector from DMR on 23 October 2014, that MSR has already exceeded the area, which was covered by the approved EMP by 1.3 hectares. Mr. Scheepers's response was that MSR should rather apply for a Section 24G *Ex post facto* EMP approval.⁸⁹ This simple option, which was offered by Mr. Scheepers, is the basis of one of the secondary questions of this study,

⁸⁶<https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2016/environmental/downloads/Environmental-Alert-24-February-2016.pdf> (Accessed on 2018-03-28)

⁸⁷ Act 59 of 2008.

⁸⁸ Mineral Sand Resources v Magistrate for the District of Vredendal and others (18701/16) [2017] ZAWCHC 25.

⁸⁹ *Id* at para 7.

which is elucidated in Chapter IV. It is noteworthy to indicate that when executing their duties, the actions of officials from DEA and DMR tilted more towards S (28) and S 24G of NEMA respectively.

MSR's argument was that DEA did not disclose to the Magistrate in their Ex Parte application for a search warrant that they no longer have the authority to issue the EA as from the 8 December 2014, and as such, the search and seizer conducted by its officials was unlawful. The court agreed with MSR's submission and set aside the search warrant because of the "None disclosure" of all the facts by DEA officials. This internationally recognized principle is one of the pre-requisites for a successful Ex parte application.⁹⁰

2.5. Conclusion

The introduction of the OES is a welcomed step change in the application for an EA in the mining industry. What is glaringly outstanding is the manner in which the texts and words regarding the responsibility of DMR and DEA are used interchangeably in NEMA, MPRDA and NEMA: Waste Act. These contradictions compromise the quality of the legislative designs that is aimed at ushering in the OES. The other concern is the frequency in which the relevant Acts and Regulations are being amended and or repealed which compound the confusion around these legislations. The court in the MSR case confirmed the confusion regarding the date of implementation of the OES by stating "Despite some uncertainty on this, the legislation giving effect to the One Environmental System can for present purposes be taken to have come into force on 8 December 2014".⁹¹ This study will recommend legislative steps that will remedy this confusion.⁹²

This Chapter has explicated the importance of the mining industry being the backbone of the SA economy. Legal and Policy certainty in this industry will help elevate SA's ranking on the FIASMC (on IAI and PPI). Moffat P advocates that "Among the key actions (...) [w]ill be those aimed at creating an enabling and investor-friendly environment by: • establishing clear and predictable "rules of the game" (...) [a]nd laws to ensure environmental protection and sustainable development".⁹³ It is submitted that once the uncertainty regarding the implementation date of the OES is remedied, the SA mining industry will be in the same path as advocated by Moffatt.

⁹⁰ Powell NO & Others v Van der Merwe NO & Others 2005 (5) SA 62 (SCA) at para 4.

⁹¹ MSR *supra*, n 84 at para 1.

⁹² This will be elucidated in Chapter 5. See *infra* 5.2. 1.

⁹³ Moffatt P; Sustainable Development and the Extractive Sector (LITJ 2016) 38.

The next Chapter exegetes the applicable sections of MPRDA regarding the applications for mining licenses, as well as the water use license approval process considering that SA is an arid country.

CHAPTER III: LEGISLATIVE PROCEDURE FOR OBTAINING A MINING LICENSE

3.1. Introduction

This Chapter will highlight the importance of the OES in the mining industry; especially the synchronisation of the approval dates for mining and water use licenses; because these will bring the much-needed legal certainty. It will enunciate the sections of MPDRA that are relevant in the application for mining licenses. The court in *Fuel Retailers Association of SA v DG: Environmental Management & Others*,⁹⁴ laid the basis for sustainable developments by indicating that “(...) [i]nterrelationship between the environment and development; (...) [t]he protection of the environment (...) [t]he need for social and economic development”.⁹⁵ This judgement laid a solid foundation for the understanding of sustainable development and crystallised the need to intertwine the environment and economic development,⁹⁶ consider the vulnerability of ecological system and yet its giving nature for allowing socio-developments.⁹⁷

3.2. Comments on the Relevant Sections of MPRDA regarding applications for mining license.

3.2.1. *Relevant objectives of MPRDA to this study*

The MPRDA objectives promote equal access to the nation’s mineral resources to all South Africans,⁹⁸ sustainable economic development through mineral exploitation,⁹⁹ advocate for the socio-economic development of the areas in which mining is operating and give preference to communities that stay around mining areas in terms of jobs and business opportunities.¹⁰⁰ These objectives mirror the provisions S 24 of the Constitution, being the environmental rights (ER);

⁹⁴ *Fuel Retailers Association of SA v DG: Environmental Management & Others* 2007 (6) SA 4 (CC).

⁹⁵ *Id* at para 45.

⁹⁶ Humby T; Doughnut Jurisprudence. See https://www.academia.edu/17123386/Doughnut_jurisprudence_-_Delimiting_the_right_to_enviroments_ecological_and_developmental_thresholds.at 15.(Accessed on 2018-06-20)

⁹⁷ Humby T; The right to development-in-environment and its ecological and developmental thresholds (SAJHR 2016 (32.2) 230.

⁹⁸ S (2) (c) of MPRDA.

⁹⁹ S (2) (h) of MPRA.

¹⁰⁰ S (2) (i) of MPRDA.

which on International level, is hermetically connected to the Rio Declaration of 1992.¹⁰¹ It was at this Summit where-by the concept of Sustainable Development (SD),¹⁰² was concretised. Environmental rights are part of the Bill of Rights, and subsequently part of Human Rights.

3.2.2. *Application for a Prospecting rights*

S (16.1) and S (16.4) are applicable to an application for prospecting rights by an applicant of foreign origin. S (17) (4A) applies if the applicant is a community who stays on the land where the mineral resources are to be mined,¹⁰³ and such a community should be given preferential treatment even if there is already another applicant that would have applied for the same rights on the community owned land.¹⁰⁴

This study will concentrate more on the subsections, which deal with the importance of the submission of relevant reports for purposes of environmental studies,¹⁰⁵ consultation with the landowner, lawful occupier and any interested and affected parties (IAP's).

3.2.3. *Granting of mining right*

S (23) stipulates that mining rights will be granted subject to an approved mining EMP,¹⁰⁶(which is part of an Environmental Impact Assessment (EIA)) and prescribed social and labour plan.¹⁰⁷ The applicant must substantially engage HDI's and women in that transaction,¹⁰⁸ promote employment and social economic development in that area,¹⁰⁹ taking into account the provision of the mining charter,¹¹⁰ and subject to S 23 (6) of MPRDA.

This is one of the advantages of the Open System Regime (OSR) of granting mining licenses, which follows a ([n]on-competitive approach, the first applicant to submit a compliant application, which meets all specified technical and financial requirements, and has paid the requisite fees, will normally be awarded the mineral right over the area applied for.¹¹¹

¹⁰¹ Soto MV; General Principle of International Environmental Law (ILSA) 1996(3)193) 204.

¹⁰² S (1) (d) of MPRDA.

¹⁰³ S (104) of MPRDA.

¹⁰⁴ PJ Badenhorst PJ et al; The final judgment. TSAR (2012.1) 128.

¹⁰⁵ S (16(4) (a) & (b) of MPRDA.

¹⁰⁶ S (23) (1) (4) (a) of MPRDA.

¹⁰⁷ S (23) (1) (4) (e) of MPRDA.

¹⁰⁸ S (2) (d) of MPRDA.

¹⁰⁹ S (2) (f) of MPRDA.

¹¹⁰ S (100) of MPRDA.

¹¹¹ Stephens CI; The International Comparative Legal Guide to: Mining Law 2017. See (https://www.werksmans.com/wp-content/.../05/ML17_Chapter-26_South-Africa.pdf) at p177. (Accessed on 2018-07-31).

3.3. Application for a Water use license and Waste disposal license in mining.

3.3.1. Application for a Water Use license for a mining project

Water use for mining operations is espoused in S 21 of the National Water Act (NWA),¹¹² read with S1 of the Water Use License Application and Appeals Regulations of 2017(WULAAR).¹¹³ S 19 of NWA, which echoes S 28 of NEMA, imposes a heavy responsibility on mining companies to ensure that when using water for its operations, they must take reasonable measures to address the acid mining drainage. Mining companies can apply for a water use license as per the provisions of S 41 of NWA read with S 3 of the WULAAR. One of the positive developments introduced by the WULAAR, which is in line with the principles of sustainable developments; is that Consultation with the Interested and Affected Parties (IAP's) during a water use license application is compulsory.¹¹⁴ These positive developments came after the decisions of the courts in *Bengwenyama Others v Genorah and Others*,¹¹⁵ and *Escarpment Environment Protection Group v Department of Water Affairs*,¹¹⁶ regarding the failure of the applicants to consult with IAP's for a prospecting and water use license respectively. The court in *Bengwenyama* explicated the importance of consultation as follows "The consultation process and its result is an integral part of the fairness (...) [t]o render the grant of the application procedurally fair".¹¹⁷ This fact was also confirmed during a briefing session of the NCOP Land and Mineral Resources by officials from the DMR by stating that the "The outcome of the *Bengwenyama* Constitutional Court case was utilised to strengthen the guidelines and templates used for consultation".¹¹⁸ In both cases, the licenses were set aside by the courts. This study supports the two judgements, which also echoed the decision in the *Save the Vaal* case,¹¹⁹ with regard to the principle of *audi alteram partem* rule, regarding the issuing of mining and water use licences. The Interested and Affected Parties must be engaged during a decision making process that would have affected their lives.¹²⁰ Consultation should be open and transparent.¹²¹

¹¹² Act 36 of 1998.

¹¹³ GN 267 in GG 40713 dated 24 March 2017.

¹¹⁴ Regulation 17 -19 of the WULAAR.

¹¹⁵ *Bengwenyama Others v Genorah and Others* 2011 (4) SA 113 (CC).

¹¹⁶ *Escarpment Environment Protection Group v Department of Water Affairs*, 2013 ZAGPPHC 505, par 65.

¹¹⁷ *Bengwenyama*, *supra* n.22 at para.62.

¹¹⁸ DMR presentation in Parliament; Application and Consultation process for mining rights: Department of Mineral Resources performance and challenges. Presented on 2nd June 2015. See (<https://pmg.org.za/committee-meeting/20987/>) (Accessed on 2018-09-14).

¹¹⁹ *Save the Vaal*, *supra* n.22.

¹²⁰ *King P & Reddell C; Public Participation and Water Rights* (PELJ 2015(18)4) 947.

The other problem with regard to the water use license application is the discretionary powers that have been conferred to the Minister of Water and Sanitation in terms of S 3 of the Regulations on Use of Water for Mining and Related Activities Aimed at the Protection of Water Resources.¹²² S 3 amongst others grant the Minister discretionary powers to exempt applicants from complying with the following provisions: S 5 i.e. Restrictions on use of materials, S 6 i.e. Capacity Requirements to Clean Water systems, S 7 i.e. Protection of Water resources, S 10 i.e. Additional regulations relating to winning sand and alluvial minerals from water resources or estuary, S 11 i.e. Additional regulations for rehabilitations of coal stockpile residues.

These discretionary powers conferred to a Minister are incongruous with some of the requirements of the Industry International Best Practice i.e. an effective legal and regulatory framework and limited administrative discretion.¹²³ The other gap in the application for a mining license is that the application for a water use license is not a legal requirement in terms of MPRDA.¹²⁴ This study will recommend that a WULA should be part of the application of a mining license in terms of the MPRDA.

3.3.2. Application for a Waste Management license for mining residue or stockpile.

A Waste Management license (WML) is applied for in terms of S 45 of NEMWA,¹²⁵ however, the precise definition of mine waste, for which a WML is applied, was brought in terms Schedule 3 of the NEMWA.¹²⁶ The provisions of NEMWA of 2008 and the NEMWA of 2014 are clear with regard to the requirement for a Consultation by way of Public Participation,¹²⁷ and their date of implementation.¹²⁸ The procedure for an exemption from any section of the Act is clearly stated,¹²⁹ and the affected parties must be consulted regarding this kind of an application.¹³⁰ DWA introduced the Regulations Regarding the Planning and Management of Residue Stockpiles and Residue deposits from a prospecting, mining, exploration or production operation,¹³¹ in order to strengthen the management of mine wastes.

¹²¹ Morrison-Saunders A & Bailey J (2000) Transparency in EIA decision-making (IAPA 2000(18)4) 260.

¹²² No.R.77, found in GG No.32935 published on 12 February 2010.

¹²³ Leon PSG; International best practice and resource nationalism (SAMM 2011 (111)) 519.

¹²⁴ Corruption watch; Mining for Sustainable Development Research Report (2017 October) at p13.

¹²⁵ Act 59 of 2008.

¹²⁶ Act 27 of 2014.

¹²⁷ S 47 (2) of NWA.

¹²⁸ S 19 of NEMWA Act 27 of 2014 clearly states 2 June 2014 as the commencement date.

¹²⁹ S 74 of NEMWA Act 59 of 2008.

¹³⁰ S 75 of NEMWA Act 59 of 2008.

¹³¹ R 602, published in GG No. 39020 on 24 July 2015.

The 2015 regulations were viewed to be very onerous and stringent as compared to the similar Regulations under the MPRDA. Some of the changes introduced by the NEMWA regulations are that for a mine to be authorised to operate stockpiles and deposit, it must conduct a full EIA in terms of NEMA,¹³² and that the designs of “stockpiles and deposits” must be drafted by a registered civil or mine engineer rather than a competent person, which was the requirements under the MPRDA, as well as with the national norms and standards for the assessment of waste for landfill disposal and for the disposal of waste to landfill.¹³³ The mining industry viewed the three processes as time consuming and prohibitively expensive, due to the number of professional consultants that they would have to employ to perform the required services.

The 2015 NEMWA regulations were meritoriously buttressed with compelling submission that tilted towards sustainable developments in many ways because AMD that manifested from tailing facilities of abandoned mines threaten food security and the quality of lives in most mine-affected communities.¹³⁴

3.4. The 2015 Financial Provisioning Regulations in the Mining industry.

These Regulations were promulgated by the DEA on the 20 November 2015.¹³⁵ They were issued after the promulgation of the NEMWA of 2014, which defined Mine Residue Deposit and Stockpiles as hazardous waste. They were introduced in order to regulate a mine’s financial provisions for rehabilitation and remediation of environmental impacts from prospecting to mine-closure as well as latent or residual environmental impacts flowing from that operation,¹³⁶ and to better manage the manner in which mining companies shut down their operations and also to avoid the reoccurrence of the previous mistakes.¹³⁷

¹³² Oliveira D; New mining-residue stockpile regulations stricter than under MPRDA. See (<http://www.miningweekly.com/article/nemwa-requires-more-detailed-mine-waste-classifications-2015-11-06>) (Accessed on 2018-08-06).

¹³³ *Ibid.*

¹³⁴ Poswa TT and Davies TC; The Nature and Articulation of Ethical Codes on Tailings Management in SA. (Geoscience 2017 (7)101) 5.

¹³⁵ GG No.39425.

¹³⁶ S 2 of Financial Provisioning Regulations.

¹³⁷ Krause R. D & Snyman LG; Rehabilitation and Mine Closure Liability at p1. See <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/Rehabilitation%20and%20mine%20closure%20liability.pdf> (Accessed on 2018-08-31).

The Minerals Council of South Africa (MCSA) expostulated the Regulations because they did not give mining companies sufficient time to comply with them; and that they were riddled with legislative uncertainties and a myriad of contradictions.¹³⁸ They added substantial financial burden to the costs of mining operations, especially because they were relating to the environmental aspects of mining.¹³⁹ They were making a mining operation to be so costly that it was no longer going to be financially viable and profitable. The mining industry viewed these Regulations as a hindrance to the facilitation of the OES.

DEA, after being legally challenged by some mining companies, decided to propose the amendments of the 2015 Regulations in order to bring clarity to these Regulations. The mining industry seems to be comfortable with the 2017 proposed amendments; however, the reality is that they will have to comply with the 2015 Regulations until the 2017 Regulations are promulgated.

3.5. Biodiversity & Land Use rights.

3.5.1. Mining and Biodiversity

Mining and biodiversity should be intertwined in order to promote sustainable economic development. Biodiversity means “the variability among living organisms from all sources (...) [a]nd the ecological complexes of which they are part and also includes diversity within species, between species, and of ecosystems”.¹⁴⁰ S 37 of MPRDA, prescribes that all the NEMA principles as laid down in S 2 of NEMA must be observed as a yardstick in dealing with application for mining licenses in the country. S 49 of MPRDA confers the Minister of MR with power to prohibit or restrict prospecting or mining in areas that would have been declared protected areas against mining.

3.5.2. Application for a mining Zoning

S 23 (6) of MPRDA stipulates that an applicant for a mining license should further meet the requirements of other relevant laws. The importance of acquiring an approval for a mining zoning before commencing with mining activities was crystalized by the apex court in the

¹³⁸ Gore S and Pienaar A; Overhaul of Financial Provision Regime takes a step in the direction of legal certainty (CDH MMA (2018-02-05) P 6.

¹³⁹ Jackson L; Financial provisioning regulations increase strain on indigent miners. See <http://www.miningweekly.com/article/new-environmental-financial-provisioning-regulations-increase-strain-on-cash-strapped-miners-2016-03-18>. (Accessed on 2018-08-25).

¹⁴⁰ S 1 of National Environmental Management: Biodiversity Act 10 of 2004.

Maccsand case.¹⁴¹ Mining is included in Schedule 2 (1) (j) of the Spatial Planning and Land Use Management Act,¹⁴² as one of the land use types that is governed by it. The apex court confirmed the famous Maccsand decision in the case of Minister for Mineral Resources v Swartland Municipality & others,¹⁴³ and ruled that “(...) [L]UPO operates alongside the MPRDA (...) [a] party is granted a mining right (...) [m]ay not commence mining operations (...) [a]ppropriately zoned in terms of LUPO”.¹⁴⁴

It is concerning that, the DMR lost this case after insisting that a mining license holder does not need to apply for a mining zoning before commencing with mining operations.

3.6. Consequences for operating a mine without Water use license.

Considering the arid nature of SA, it is concerning to learn that 36 mining companies run their operations without water use licences.¹⁴⁵ S 151 of NWA read with and S 28 (14) of NEMA criminalises any unlawful and intentional or negligent commission or omission that causes (or is likely to cause) significant pollution or degradation of the environment. Upon conviction the accused will be sanctioned to imprisonment not exceeding one year or a fine not exceeding R1M; in terms of S 28 (14) of NEMA, and for contravening S 151(2) of the NWA; the sentence is a fine or imprisonment for up to five years or both and up to ten years or for a first and second conviction respectively. In *Mostert v The State*,¹⁴⁶ the Mosterts were convicted of their fraudulent and unauthorised use of water.

The court in the *Harmony Gold Mining Co. Ltd v Regional Director: Free State DWA*,¹⁴⁷ held that a mining company which is issued a Directive in terms of S 19 (3) of the NWA, will still be liable to comply with that directive even after it shall have sold that land, until it executes its liability in terms of the said Directive. This decision is in line with the principle of legality, in that Harmony’s obligation to discharge its obligations, which were contained in the Directives that were issued to it before it sold the mine, was reasonable and was not an obligation in perpetuity against it.¹⁴⁸ In order to strengthen the enforcement of S 19 (3) Directives, government

¹⁴¹ Maccsand, *supra* n.76 at par 18.

¹⁴² Act 16 Of 2013.

¹⁴³ Mineral Resources v Swartland Municipality & others ,CCT 102/11 [2012] ZACC

¹⁴⁴ *Id* at para. 11.

¹⁴⁵ <https://www.dfa.co.za/news/nc-mines-operating-without-water-licences/> (2017-11-21). (Accessed on 2018-08-29).

¹⁴⁶ *Mostert v The State* (338/2009) [2009] ZASCA 171.

¹⁴⁷ *Harmony Gold Mining Co. Ltd v Regional Director: Free State DWA* (971/12) [2013] ZASCA 206.Par 26.

¹⁴⁸ *Humby T; The Spectre of Perpetuity Liability for Treating Acid Water on SA’s Goldfields* (JENNRL 2013(31)4) 462.

empowered Environmental Management Inspectorates (EMI) to issue compliance notices.¹⁴⁹ The interpretation of S 19 (3) by the courts was elucidated by academics regarding general obligation on how mines must abide the S 19 (3) directives to prevent, minimise or remediate water pollution.¹⁵⁰

3.7. Conclusion.

Sustainable economic developments by mineral exploitations are encouraged so that the current generation can preserve the environment for future generation. The inclusion of water use license in the application for a mining license is very much encouraged due to the arid nature of South Africa and the fact that mining operations are very much water intensive. The 2017 WULAAR are a welcome relieve in favour of sustainable developments because consultation which IPA's is now compulsory when applying for a water use license application. The MPRD Bill of 2013 should be promulgated as a matter of urgency. This will ensure that all the related and crucial approvals like water use license application, waste disposal licenses, rezoning applications and licenses that regulate the impact of mining on protected areas and biodiversity should be in the application for a mining license in order to enhance the smooth implementation of the OES. This will help to create legal and policy certainty in the industry and enhance its chances to meet the requirements of the IIBP.

The DEA should also expedite the revision of the 2015 Financial Regulations, because they are seen as hindrance for the facilitation of the OES and also render mining operations not be financial viable and profitable. The MCSA also view these Regulations as gatekeepers for new mining companies due enter the industry due its onerous financial burden the companies should carry. It is submitted that mining is capital intensive by nature,¹⁵¹ and the financial implications that comes with the 2015 Regulations compounds the situation even further.

The thorny issue of the wide discretionary powers conferred to a Minister in terms S 3 of the Regulations on Use of Water for Mining and Related Activities Aimed at the Protection of Water Resources; and S 49 of MPRDA will be dealt with in Chapter V.

The next Chapter will erudite the hard core contradictions between the provisions of S 24 (G) and 28 of NEMA.

¹⁴⁹ Feris L; Compliance Notices (PER 2006 (9)3) 54.

¹⁵⁰ Kotze LJ and Lubbe N; How (Not) to Silence a Spring: The Stilfontein Saga in three parts (SAJELP 2006(1)) 51.

¹⁵¹ Mothomogolo J; Development of Innovative Funding Mechanisms for Mining start-ups: A South African case (SAIMM 2012) 953.

CHAPTER IV: CONTRADICTIONS BETWEEN S (24) (G) AND S (28) OF NEMA

4.1. Introduction

This Chapter will explicate the glaring contradictions between the two sections of NEMA and further elucidate the vicissitudes that are brought by the anomalous retrofitting of S 24G into NEMA. The importance of this Chapter is because this study supports sustainable developments through the lens of the OES; and more because S 24 (G) in its current form will decimate the gains that yielded out implementing the Environmental Impact Assessment processes. It will deal with these contradictions based on statutory interpretation, which promotes that legislation should deal with in its wholeness and not focusing on a single provision to the exclusion of other sections.¹⁵²

It will juxtapose the importance of S 28 and the constitutional status of S 24 G, and conclude by showing how these contradictions aggravates the legal and policy uncertainty in the SA mining industry S 28 Duty of care and remediation of environmental damage.

4.1.1. *Due care for the environment and precautionary action*

The principles of 'due diligence' or 'due care' with regard to the environment and natural wealth and resources are among the first basic principles of environmental protection and preservation law. The Duty of Care is [m]oral and a legal concept that encapsulates the ethical principle of non-maleficence—the duty to do no harm”.¹⁵³ In South Africa, these principles, referred to as the ‘National Environmental Management Principles’ are encapsulated in Section 2 of NEMA.¹⁵⁴ This Principle is cogently covered in S 28 of NEMA, which states that “*Section 28 (...) [a] duty of care (...) [o]n any person, who causes, has caused or may cause significant pollution or degradation of the environment*”.¹⁵⁵

S 28 is also applied retrospectively when dealing with environmental violations that were committed prior to the promulgation of NEMA because mostly large multinational companies committed the environmental violations in the extractive industry during pre1994 era, while

¹⁵² S v Looij (1975) 4 SA 703 (RA) 705C-D; Botha C; Statutory Interpretation (Juta 2016 2nd edition) 61.

¹⁵³ Greiner R et al; Explaining the concept of “Environmental Duty of Care” in the context of the Northern Gulf region (Queensland) discussion paper (4 December 2007) P1.

¹⁵⁴ S 2 (4) (a) (i) (II) (v) (vii).

¹⁵⁵ Swart E; The South African Legislative Framework for Mine Closure (SAIMM) (2003) P.490.

most of the victims of those Environmental Injustices were poor, vulnerable and historically disadvantaged individuals.¹⁵⁶ This is one of the efforts of addressing some of the legacies of the apartheid government. This principle was espoused in the matter of *Chief Pule Shadrack VII Bareki NO and Another v Gencor Limited and Others*.¹⁵⁷ The plaintiff relied on the provisions of S 28 of NEMA to claim for damages regarding environmental violation that preceded NEMA, and regrettably, the court failed to apply the rule of exceptions i.e. that of applying our laws with retrospective effect when it comes to environmental issues. The court's egregious interpretation of S 28 was also aptly espoused in the academia.¹⁵⁸ The department reacted to this judgement by inserting sub-s (1A).¹⁵⁹ Other international jurisdictions also apply this principle regarding Environmental Management.¹⁶⁰

In order to encourage the protection of the environment, the Apex court has taken a view to encourage co-operative and intergovernmental teamwork amongst all spheres of government when deciding on matters that are related to environmental protection,¹⁶¹ a move that tilts towards the duty of care.¹⁶²

4.1.2. *The Precautionary approach*

This Principle, which is incorporated in Principles 15 of the Rio Declaration, is implemented in many countries.¹⁶³ Domestically, it is contained in S 2 (4) (p); and S (4) (P) of NEMA refers to the Best Practicable Environmental Option (BPEO) as “[o]ption that provides the most benefit or causes the least damage to the environment (...).¹⁶⁴ It is for this reason that the principle of using resources within their carrying capacity and determining the BPEO are extremely importance to mitigate the scarce water resources from the impacts of pollution. The MPRDA also supports provision of the NWA and NEMA in that it makes the holders of prospecting and mining rights responsible for ‘any environmental damage, pollution or ecological degradation’ arising from his or her mining operations that may occur inside and outside the area to which the mining

¹⁵⁶ Dulsy N; There is a presumption in South African common law against the retrospective application of legislation; but the September 2009 amendments to the National Environmental Management Act (NEMA) created an exception to this rule. See www.dingleymarshall.co.za/retrospective-liability-for-environmental-offences/ Mar 13, 2015 -. (Accessed on 2018-08-24).

¹⁵⁷ *Bareki NO and Another v Gencor Limited and Others*.2006 (8) BCLR 920 (T).

¹⁵⁸ Kidd (2008) *supra* n34 at 153.

¹⁵⁹ S (12) (a) of the National Environmental Management Amendment 14 of 2009.

¹⁶⁰ Gemmell J.C; Environmental regulation, sustainability and risk (*SAMPJ 2013 (4)2*) p133.

¹⁶¹ S (41) of the Constitution.

¹⁶² Kotze A; Legal Framework (SAJELP 1999(1) 56.

¹⁶³ Glazewski (2005), *supra* n 25 at 18.

¹⁶⁴ S 1 (1) (definitions).

authorisation relates.¹⁶⁵ Its downside is that it has not yet being crystallized.¹⁶⁶ A more careful way to implement this approach is that if you are not sure that what you are going to implement will not harm the environment, then do not do it. Glazewski J & Posnik advocate that this”... include consideration of the “no-go option”, i.e. that no further development takes place.¹⁶⁷ It is also closed linked with the Principle, which promotes integrated Environmental Management, which stresses the importance of conducting an EIA prior to the commencement of any mining activity.¹⁶⁸ This is also in line with the guidelines in S 3.3.2, called Project alternatives, of the proposed minimum requirements for an EIA for a mining project as per S 24 (j) of NEMA.¹⁶⁹

4.1.3. Polluter Pays Principle

This Principle amongst others dictates that any person, who causes any environmental harm through their commercial activities, should carry the financial burden to mitigate any harm caused.¹⁷⁰ This Principle was domesticated in S (2) (4) and S (28) (8) of NEMA. The Competent Authority will accordingly issue directives to the Polluter.¹⁷¹ This will discourage prospective polluters; knowing that should they contravene any environmental legislation, they will be liable for a hefty fine in order to rehabilitate the environment. Should there be more than one polluter; liability should be apportioned amongst the polluters.¹⁷²

The next section in this Chapter deals with a retrograde section of NEMA, that potentially decimated the gains achieved with the implementations of the Environmental laws.

4.2. S 24G Rectification

S 24G was retrofitted into NEMA in terms of S (3) of the National Environmental Management Amendment (NEMAA).¹⁷³ It was introduced on 6 January 2005 as published by Proclamation 63 of 2005. It was introduced in order to remedy the *lacunae* which was created

¹⁶⁵ S 28 (1) (d) of MRDA.

¹⁶⁶ Trinate AAC; Principle 15 cited in Viñuales JE; *The Rio Declaration* (Oxford Press) (2013) 411

¹⁶⁷ Glazewski J & Posnik S; *Compliance with International Environmental Standards and expectations* :(SAMM) (200) 215.

¹⁶⁸ S (2)(4) (b) & S 23 of NEMA.

¹⁶⁹ GG No. 41432 published on 9 February 2018.

¹⁷⁰ Glazewski J & Posnik S (2005), *supra* n 165 at 215. See also Schwartz P; *The Polluter-Pays Principle* cited in Viñuales JE; *The Rio Declaration* (Oxford Press) (2013) 437.

¹⁷¹ S (28) (4) of NEMA.

¹⁷² S (28) (11) of NEMA.

¹⁷³ Act 8 of 2004.

by the silent nature of the original S (24) of NEMA and The Environment Conservation Act,¹⁷⁴ pertaining to how to deal with situations where-by developers would have commenced with their operations without prior EA as required in terms of S (24) (F)(2) of NEMA.¹⁷⁵ The original administrative fine which was sealed at a mere R1m was not sufficiently deterrent to discourage developers to commence with construction without an EA. Some of the academics who deprecated the abnormal introduction of S 24G by DEA without considering the precipitate consequences that came with S 24G.¹⁷⁶ Regrettably, many mining companies took advantage of this anomalous section and commenced with their operations without an EA, as indicated by Kohn L that “ [t]he latest two National Compliance and Enforcement Reports¹³ – provide patent evidence of the abuse of section 24G”.¹⁷⁷ Many of these companies thereafter apply for Rectification. This precipitative situation validated the accuracy of the expostulation of the academia against this section.¹⁷⁸

Although the intentions of the Legislature could have been good, the text of this section was not properly arranged and this shows that not much effort was put in during drafting phase.¹⁷⁹ The section does not even prescribe the cut-off stage at which a developer should submit the Rectification application. The developer can even submit a Rectification application when the construction activity is completed. Considering the capital-intensive nature of mining operations, the administrative fine of R5m as proposed in terms of S 5(f) of the National Environmental Management Laws Amendment Bill,¹⁸⁰ is not high enough to deter mining companies to commence with their construction without an EA. Suggestions on how to strengthen the provisions of S 24 (G) will be proffered in Chapter V of this study.

4.2.1. *The precipitation of S 24G v the importance of an EIA*

An Environmental Impact Assessment (EIA) is a planning tool, which serves to assess any environmental damages that may be caused by the implementation of any development; as such, it supports the objectives of sustainable development as part of the objectives of the

¹⁷⁴ Act 73 of 1989.

¹⁷⁵ Erasmus G.J., *An Analysis of Section 24G of the National Environmental Management Act*, (Parliamentary Monitoring Group, 2011) at 4. See http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/120828analysis_0.pdf. (Accessed 2018-09-13).

¹⁷⁶ Kohn, L ‘The Anomaly that is Section 24G of NEMA: An Impediment to Sustainable Development’ (SAJELP 2012(19.1) 3.

¹⁷⁷ *Ibid.*

¹⁷⁸ Kohn (2012); *supra* n 176 at 11-12.

¹⁷⁹ Paschke R and Glazewski J; Ex post facto Authorisation in SA EAL (PELJ 2006(9)1) 121.

¹⁸⁰ GN 245 in GG 40733 of 31 March 2017.

MPRDA.¹⁸¹ These risk anticipatory system is a well-established practice internationally.¹⁸² An EIA is part of the Integrated Environment Management (IEM), which is encapsulated in the Principles that are found in S 2 of NEMA. The IEM is explicated in S 3 of NEMA. It contradicts the provisions of S (24) (F) (1) and S 23 (2) (d) of NEMA, which is the nerve center of IEM. It is for these reasons that neither developer nor a person should commence with mining activities without prior EA. The retrofitting of S 24 G into NEMA by DEA is benefiting the mining industry at the expenses of the welfare of the environment.

The one ground of Rectification that is environmentally friendly is when it is applied in case of emergencies in order to save the environment from being contaminated.¹⁸³ The application can even be done verbally and DEA can give a verbal authorisation for the applicant to commence with operations without obtaining an EA. Each case will be dealt with on its merits.

4.2.2. *Litigations Pre-S 24 G period*

Due to the legislations in the environmental industry being silent on this matter, courts gave conflicting judgements with regard to developers who commenced with their construction activities without an EA. The court in Sivermine Valley Coalition v Sybrand van der Spuy Boerderye and Others¹⁸⁴ ruled that ex post facto EA is not allowed because it considered S 24 (F) to be a planning stage at which the Competent Authorities should adjudicate over an EIA application and consider whether it is environmentally safe to grant an EA before construction could commence.

This decision was buttressed by Kidd M,¹⁸⁵ because it will be difficult to deal with issues if listed activities are not identified and cleared prior to the commencement of the construction activities so that an EA can be granted with caution.

In Eagles Landing Body Corporate v Molewa and Others,¹⁸⁶ the court ruled that ex post facto EA of unlawful activities could be approved for as long as the objectives of the environmental legislation are upheld and implemented.

The glaring contradictions of the two cases persuaded DEA to introduce S 24G to NEMA.

¹⁸¹ Sect.2 (h) of MPRDA 28 of 2002.

¹⁸² Paschke and Glazewski (2006); *supra* n177, at 146.

¹⁸³ S 30 A of NEMA.

¹⁸⁴ Sivermine Valley Coalition v Sybrand van der Spuy Boerderye and Others 2002(1) SA 478 C.

¹⁸⁵ Kidd (2008), *supra* n.24 at 197.

¹⁸⁶ Eagles Landing Body Corporate v Molewa and Others 2003 (1) SA 412 (T).

4.2.3. *Litigation Post S 24G*

In their efforts to promote the implementation of S 24 of the Constitution, courts handed down heavy sentences in the following cases where-by S 24 G was applied for:

- **S v Blue Platinum Ventures 16 (Pty) Ltd & Matome Samuel Maponya.**¹⁸⁷

This case is a game changer, because it is the first case in SA where perpetrators of environmental crimes were criminally convicted for an offence under the NEMA.¹⁸⁸ The accused where granted a mining permit to operate clay mining in Bathlabine Village, but only commenced with mining activities during 2007, after the permit already expired. When applying for an EA and a Rectification, the accused supplied his consultants with incomplete documents, hence both applications failed. The accused was sentenced to a five year suspended sentence on conditions that they rehabilitate the contaminated area at a cost of R8.6m, and not repeat the offence during the suspension period. The accused further got a R200 000.00 confiscation order in terms in terms of S 18(2) of the Prevention of Organized Crime Act.¹⁸⁹ Truter J opined that one of the significant implications of that judgment is that company executives will place greater emphasis on having environmental management systems put in place and ensuring that they are strictly monitored and enforced.¹⁹⁰

- **S v Nkomati Anthracite (Pty) Ltd.**¹⁹¹

In this case, the accused was sentenced to R1m suspended for five years on condition that it is not convicted of contravening S 24(F) of NEMA and S 21, S 151(1) (a) and S 151 (2) of NWA during the suspension period; and R4m towards the rehabilitation of the contaminated area in terms of S 34 (3) (b) of NEMA. The CER expostulated the fact that no directors were prosecuted in their personal capacities for authorising or participating in those illegal activities, as it was the

¹⁸⁷ S v Blue Platinum Ventures 16 (Pty) Ltd & Matome Samuel Maponya Unreported, Naphuno Regional Magistrates' Court Case No. RN126/13 9 January 2014.

¹⁸⁸ <https://cer.org.za/virtual-library/judgments/magcourt/s-v-blue-platinum-ventures-16-pty-ltd-and-others>. (Accessed on 2018-09-15).

¹⁸⁹ Act 121 of 1998.

¹⁹⁰ <https://www.werksmans.com/legal-briefs-view/environmental-law-compliance-noose-tightening/> (2014-06-03) (Accessed on 2018-09-16).

¹⁹¹ S v Nkomati Anthracite (Pty) Ltd. SH 412/13 dated 28 August 2013.

case in the Blue Platinum Ventures case.¹⁹² This study buttresses the CER's position in this regard.

In the Mapungubwe incident, DEA ordered CoA to pay R9, 25-million as an administration penalty as part of a precondition relating rectification application", in line with Section 24G.¹⁹³

▪ **Interwaste (Pty) Ltd and others v Ian Coetzee and others.**¹⁹⁴

This case dealt with the relationship between S 24 G and criminal prosecution. The court also confirmed that S 24 (G) of NEMA is also applicable to the Waste Act of 2008. The applicants approached the court to obtain an interdict relief so that the respondents should not proceed with their waste management business. The court dismissed the application because the applicant failed to show a clear right. Regarding the second requirement for an interdict, the respondent submitted very credible evidence rebutting the applicant's evidence.

Unlike many developers, the respondents did not hide behind the veil of S 24 G and abuse it. The judgement is supported by this study because the applicant's case was vexatious and of frivolous nature.

4.3. Conclusion

The discord between S 24G and S 28 has been eloquently elucidated, as well as the poorly designed texts of S 24G, which resulted in DEA being inundated with applications for Retrospective EA from many developers.¹⁹⁵ S 24 G was used as a quick fix by some developers to avoid the lengthy but crucial process of the EIA. It also negates the wins achieved by the Environmental regime regarding the strict adherence to the process of EIA, which is a central figure of the Duty of Care and the Precautionary principle. Even if S 24 G can be viewed as promoting the Polluter Pay Principle, the amount for administrative fines is very low to be a deterrent to the prospective Polluters to comment with construction without an EA; and neither is the R5m administrative fine, which is part of the proposed amendments of S 24G. The contradiction between the two sections makes NEMA to be inconsistent with one of the

¹⁹² CER, *Response to recent cases of enforcement action against mining companies for environmental violations*, published 4 September 2013. See: <https://cer.org.za/news/media-release-response-recent-cases-enforcement-action-mining-companies-environmental-violations> (Accessed on 2018-09-13).

¹⁹³ <http://www.miningweekly.com/article/coal-pays-r925m-vele-rectification-application-penalty-2011-05-11>(Accessed on 2018-09-13).

¹⁹⁴ *Interwaste (Pty) Ltd and others v Ian Coetzee and others* [2013] ZAGPJ 89.

¹⁹⁵ Kohn (2012); *supra* n 176 at 11.

dimensions of legal interpretation, and exacerbates the legal and policy uncertainty that is eroding investor confidence in the mining industry. This study will profess suggestions to ameliorate the untenable situation in Chapter V.

The next Chapter of this study will embark on Reviving legal certainty in the mining industry by evaluating the literature that has been covered in the previous Chapters as well as additional crucial literature that will enrich the proposed solutions. It will recapitulate recommendations regarding legislative steps to remedy the confusion regarding the implementation date of the OES and profess measures to strengthen its implementation.

CHAPTER V: REVIVING LEGAL CERTAINTY IN THE SA MINING INDUSTRY

5.1. Introduction

The literatures reviewed in Chapter 3;¹⁹⁶ have shown that the introduction of the OES in the acquisition of a mining license is congruent with principles of sustainable economic developments through exploitation of mineral resources. This study has explicated patent evidence to the fact that mining is quintessence and the bedrock of the SA economy.¹⁹⁷ The value of the known mineral reserves in SA is estimated to be approximately R20.3 trillion,¹⁹⁸ and the mining industry still has a lot to contribute towards the growth of the SA economy. SA government should expedite efforts to improve both legal and policy certainty in the mining sector in order to improve investor confidence in the sector. Government and mining companies have the obligation to extract minerals in a sustainable manner because the current generation is holding the world in trust for future generations to inherit a healthy and livable environment. This study has meritoriously illustrated its objectives by elucidating the vicissitudes, which followed the date of implementation of the OES in Chapter 3 above. It will proffer legislative steps to be taken in order to remedy these contradictions to legal and policy certainty as required by the IIBP.

5.2. Towards Legal and Policy Certainty in the extractive industry.

5.2.1. *Amelioration of the "8 Dec.2014" Confusion.*

The OES is a new regime in the mining industry with regard to the acquisition of an EA, being an integral part of obtaining mining licenses. It is important that the legislations that introduced it should be clear regarding their effective dates so that mining companies will know when their liabilities commence in terms of the OES. The rule of law dictates that, "rules should be stated in a clear and accessible manner".¹⁹⁹ The Acts, which introduced the OES, will fail this test, and consequently are unconstitutional and invalid, pertaining to the date of implementation of the OES. The two cases that dealt with the OES buttressed this statement. Jafta J said, "Had these regulations being in place on or before 2 September 2014, the Act would have been properly brought into force."²⁰⁰ Rogers J said "Despite some uncertainty (...) [f]or present purposes be

¹⁹⁶ Humby (2016), *supra* n. 94 at 230.

¹⁹⁷ See n.53 *supra*.

¹⁹⁸ Chinhamu (2017), *supra* n. 60 at 41.

¹⁹⁹ Dawood and Another V Minister of Home Affairs & Others 2000 (1) SA 997 CC, at par 47.

²⁰⁰ Minister for Environmental Affairs, *supra* n.82 at par.38.

taken to have come into force on 8 December 2014”.²⁰¹ The issue of the implementation date lacks “clarity and it is inconsistent with the rule of law”.²⁰² The convoluted nature of this Act regarding the date of implementation is congruous to those rules which Llewellyn KN describes as “(...) [n]ot all the rules are as clear as this, even to lawyers or to judges and administrators”.²⁰³ The Centre for Environmental Rights (CER) also echoed the confusion regarding the date of implementing the OES in their document called “As new environmental laws for mines start coming into effect, confusion reigns”,²⁰⁴ by indicating that “[t]he legislative process (...) [a]bsurdly convoluted (...) [n]ot even the government departments (...) [m]ake sense of the current state of the law”. DEA also conceded to this point in its media statement dated 4 September 2014.²⁰⁵

The DMR indicates that the implementation date of NEMLA Act 25 of 2014 is the 1 September 2014,²⁰⁶ while DEA indicate that OES commenced on the 8 December 2014.²⁰⁷ The misalignment between the approval period for a mining license (MPRDA), water use license (NWA), environmental authorisation (NEMA) create a big legal uncertainty in the mining sector.” Environmental legislation also ‘remained mired in confusion’.²⁰⁸ This is incongruous with one of the requirements of the IIBP, i.e. “an effective legal and regulatory framework”²⁰⁹

This study, suggest that this precipitation which has exacerbated legal uncertainty in the extractive industry must be ameliorated urgently. The only competent authority to do this is President Ramaphosa,²¹⁰ more so because the president promised to bring legal and policy certainty in this sector, hence his war cry of “Thuma mina /Send me”.²¹¹ He has the opportunity

²⁰¹ MSR, *supra* n.86 at para 1.

²⁰² Affordable Medicines Trust and Others V Minister of Health and Others [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at paras 108-9.

²⁰³ Llewellyn KN; *Theories of Rules* (Uni. Of Chicago Press 2011) 41.

²⁰⁴ <https://cer.org.za/news/as-new-environmental-laws-for-mines-start-coming-into-effect-confusion-reigns> (2014-09-04). (Accessed on 2018-08-20).

²⁰⁵ [https://www.environment.gov.za/mediarelease/oneenvironmentalsystem-miningindustry\(2014-09-04\)](https://www.environment.gov.za/mediarelease/oneenvironmentalsystem-miningindustry(2014-09-04)) (Accessed on 2018-08-22).

²⁰⁶ S 16(1), S17 (1) (c), S 18(2) (c), S 19 (2) (e), S 23 (d), S 24 (b) of MPRDA.

²⁰⁷ GG No. 38282, published on the 4 December 2014.

²⁰⁸ Jeffery (2018), *supra* n.9 at 11.

²⁰⁹ Leon (2011), *supra* n.120 at 51.

²¹⁰ In re: Constitutionality of the Mpumalanga Petitions Bill, 2003 [2001] ZACC 10; 2002 (1) SA 447 (CC); 2001 (11) BCLR 1126 (CC).

²¹¹ See n.64 *supra*.

to emulate his predecessor and icon, Madiba who approached the Apex Court,²¹² in order to seek relief to correct, “*an error made in good faith*”, with regard to the date of implementation of the South African Medicines and Medical Devices Regulatory Authority Act.²¹³ Former President Mbeki also took the same action by directly approaching the same court seeking an order to invalidate and set aside the two proclamations, which put into implementation some of the sections of the Road Accident Fund.²¹⁴ “*He made a genuine and bona fide error*”²¹⁵ The presidency should directly approach the apex court in terms of S 167(6) of the Constitution, to seek an order to declare invalid and setting aside the NELAA 25 of 2014 with regard to the date of implementation, in terms of S 172 (1)(a).²¹⁶

The president cannot even seek an order to amend the NELAA of 2014 because only a valid Act can be amended, more so if that Act is already in operation, as Skweyiya J said, “I cannot see that a nullity can be amended”.²¹⁷ The presidency should act timeously to rectify the anomalous situation that was caused by the incorrect date of implementation of the OES. This will ensure that the “Doctrine of objectivity” is being observed should the president seeks an order to have the “invalid implementation date of the 8 December 2014 be rectified.”²¹⁸ His actions will be in line with the “Doctrine of legal certainty”.²¹⁹ The court should give the presidency 60 days to promulgate the necessary Regulations, and during those 60 days, the “8 December 2014” should be regarded as the proper date of implementation of the OES until the new Regulations are being promulgated and the date of implementation of the Act will be constitutionally declared.²²⁰ All policy and legal decisions made based on this date should remain valid. An invalid administrative action like the “8 December 2014” announcement, is legally binding until it is set aside.²²¹ The apex court has the power to make this kind of order in terms of S 172 (1) (b) of the

²¹² Pharmaceutical Manufacturing Association of S A and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000).

²¹³ Act 132 of 1998.

²¹⁴ Act 56 of 1996.

²¹⁵ Kruger V The President of the RSA [2008] ZACC 17 para 48.

²¹⁶ *Id* at para 2.

²¹⁷ *Id* at para 61.

²¹⁸ *Id* at para 52.

²¹⁹ *Id* at para 67.

²²⁰ *Id* at para 74.

²²¹ Oodekraal Estates V City of Cape Town [2004] 3 ALL SA 1 SCA, Par 46.

Constitution where-by legislation can be implemented with retrospective effect,²²² because this will be in the interest of the country.

5.2.2. Regulation of Discretionary powers bestowed on Ministers and certain officials

The unfettered discretionary powers bestowed on Ministers are too vague and consequently inconsistent with the rule of law and the requirements of the IIBP,²²³ because “the law must indicate with reasonable certainty to those who are bound by it (...)”.²²⁴ These relate to the transferability and encumbrance of prospecting and mining rights,²²⁵ the prohibition of mining in protected areas.²²⁶ It is also recommended that all the sections in the relevant Acts which give the Minister and the delegated officials wide and vague discretionary powers with regard to exempting applicants to disregard certain sections of the Regulations on Use of Water for Mining and Related Activities Aimed at the Protection of Water Resources,²²⁷ prohibition of mining in certain areas,²²⁸ should be accordingly amended. Bestowing wide discretionary powers to few individuals is inconsistent with the IIBP rule, which promotes “limited administrative discretion.”²²⁹ DMR can follow the example already being set by DEA in NEMWA,²³⁰ regarding the guidelines for executing discretionary powers. It is submitted that these sections of NEMWA are in line with the rule of law and meet the requirements of the IIBP.

5.2.3. The impact of legal and policy uncertainty on potential mining Foreign Direct Investments

A clear economic policy can be a catalyst to attracting Foreign Direct Investment in any country. The problem of unclear economic policies is rampant in developing countries and it perverts investor confidence in them.²³¹ This is corroborated as follows “[p]olicy uncertainty

²²² Botha (2016), *supra* n.152 at 61.

²²³ Leon (2011), *supra* n.123 at 519.

²²⁴ Affordable Medicines Trust, *supra* n.198 at par. 108.

²²⁵ S 11 of MPRDA.

²²⁶ S 49 of MPRDA.

²²⁷ S 3 of the Regulations of Water use for mines.

²²⁸ S 49 of MPRDA.

²²⁹ Clause 2.4.5 of the MMDA: Compliance with law; which amongst others states that “The use of such language explicitly limits the discretion of the relevant administrator”.

²³⁰ S 74 to 76 of NEMWA. Part 3: Exemptions and Appeals.

²³¹ Vivoda V; Assessment of the Governance Performance of the Regulatory Regime Governing Foreign Mining Investment in the Philippines. See https://www.researchgate.net/publication/48381587_Assessment_of_the_Governance_Performance_of_the_Regulatory_Regime_Governing_Foreign_Mining_Investment_in_the_Philippines (Accessed

generated by the South African government (...). As in other African countries, government policy decisions are impeding economic growth (...).²³² This prohibitive situation in the mining sector prevailed in the study case of the Mexican Peso. The government wanted to open its doors for FDI, but regulatory clarity remained an impediment.²³³ Investors prefer to understand the policies of any foreign country before they commit their finances to that country, and therefore “Foreign investment is likely to increase when regulations and procedures are clear (...).”²³⁴ This study is congruent to this statement because there is a correlation between policy uncertainty and poor FDI in the mining industry, which leads to economic contraction and rise unemployment amongst other vicissitudes. The OES is like a “One stop shop” in the mining industry where-by a mining company can submit one application and obtain all the related approvals in order to commence with its operations.²³⁵ Although some mining companies may complain that, the SA environmental legislations are stringent, a recent study has found that “[s]tringent environmental regulations either have no effect informing investment location decisions by mining firms, or in more cases, that stringent environmental regulations attract mining firms”.²³⁶ The problem with the SA legislations that introduced the OES is that they are riddled with contradictions that hinder its facilitation and consequently compound policy uncertainty in the mining industry, hence the hypothesis of this study.²³⁷ The National Treasury has confirmed this preposterous situation by indicating, “Policy uncertainty hinders investment in the mining sector”.²³⁸ A WTO Policy Brief Series also reiterated this problem is ranking third on the list of “The most problematic factors for doing business in South Africa”,²³⁹ which are

on 2018-10-15); Kasatuka C and Minnitt R.C.A; Investment and non-commercial risks in developing countries (SAIMM 2006)106) 849.

²³² Davis J; South Africa needs to attract domestic and foreign investment for economic growth. See <http://www.ee.co.za/article/need-south-africa-attract-domestic-foreign-direct-investment-policy-change-reuniting-country-focussing-economic-growth.html> (2016-03-23) (Accessed on 2018-10-20).

²³³ Hill CW; International Business (Mc Graw Hill 2014 10 Ed.) 223.

²³⁴ Vivoda V; Determinants of foreign direct investment in the mining sector in Asia (Resources Policy (2011) 36) 52.

²³⁵ *Ibid.*

²³⁶ Toole and Koop (2010); as cited in Vivoda (2011), n.23 at 56.

²³⁷ See 1.3.1, *supra*.

²³⁸ National Treasury; 2018 Budget Review at 23. See <http://www.treasury.gov.za/documents/national%20budget/2018/review/Chapter%202.pdf> (Accessed on 2018-09-30).

²³⁹ Policy uncertainty: how it affects South Africa’s growth and development prospects (North West University) at p 6. Available at: http://commerce.nwu.ac.za/sites/commerce.nwu.ac.za/files/files/TRADE/Media/News%20Print/WTO-Trade%20Policy%20Brief%20Series_1.pdf. (Accessed on 2018-10-24).

sixteen in total. This observation was corroborated as follows “2016 marked another challenging year for SA’s mining industry in the wake of (...) [r]egulatory uncertainty”.²⁴⁰

These pluralities of voices by academics and industry practitioners all lament the fact that legal and policy uncertainty in the mining sector is prophylactic to the inflow of FDI’s into the SA mining sector. South Africa should follow the example of Botswana regarding its clear and investor friendly mining regulations so that SA mining industry can be convalescent within a reasonably near future. “The regulatory framework for investment has been strengthened through a series of laws which (...) [c]ater to investor protection [a]nd clarify modalities for investment (...)”.²⁴¹ It is for this reason that “FDI inflows to Botswana increased by 3.1 times between 2016 and 2017”,²⁴² hence it was ranked No.1 in Africa as an investment destination from 2013 to 2017.²⁴³

5.2.4. *Recommendation to Strengthening the efficacy of S 24G.*

The R5m maximum administrative fine, which is proposed as part of the OES regime,²⁴⁴ is not deterrent to the prospective polluters. It is professed that administrative fine payable should be equivalent to at least 1% of the total project value in order to create a deterrent. DEA can follow the principles stipulated in terms of S (175) of Companies Act,²⁴⁵ or S (175) the Competition Act.²⁴⁶ It is also proposed that when a developer applies for a Rectification, the mining activities must be completely stopped until an approval is granted. It should not be left to the discretion of the Minister or his/her delegated official to decide whether the construction activities should be ceased or not, because this ambiguous discretionary powers are inconsistent with the rule of law.²⁴⁷

²⁴⁰ Kotzé M; SA’s mining industry continues to face tough times. See <https://www.pwc.co.za/en/press-room/sa-mining-face-tough-time.html> Accessed on 2018-10-15).

²⁴¹ Botswana OECD Investment Policy Reviews (2013) at 23. See <http://www.oecd.org/countries/botswana/oecd-investment-policy-reviews-botswana-2014-9789264203365-en.htm> (Accessed on 2018-10-24).

²⁴² Santander, *Botswana: Foreign Investment*. Available at: <https://en.portal.santandertrade.com/establish-overseas/botswana/investing-3> (Accessed on 2018-10-24).

²⁴³ <https://www.fraserinstitute.org/sites/default/files/survey-of-mining-companies-2017.pdf> at 11. (Accessed on 2018-10-25).

²⁴⁴ GN 245 in GG 40733 of 31 March 2017.

²⁴⁵ Act 71 of 2008.

²⁴⁶ Act 89 of 1998.

²⁴⁷ See 206 above.

This study submits that S 24 G will fail the constitutional test because its provisions are inconsistent with those of S 24 of the Constitution. S 24 G is more pro-development at all costs irrespective of the potential damage to the environment,²⁴⁸ while S 24 of the constitution tilts towards sustainable economic developments. It is also inconsistent with S 233 of the Constitution, because internationally ex post facto EA are not supported. It contradicts other sections like S (2) and S (23) (2) (d), which deals with the NEMA principles and the Integrated Environmental Management respectively, as well as S 28, and this will cause NEMA to be non-compliant to one of the dimensions of interpretation that “legislation must be construed within the total legal picture”.²⁴⁹ An approval of an ex post facto EA is an administrative action, and therefore cannot be implemented with retrospective effects because this will be inconsistent with the interpretation presumption that “legislation applies only to the future”.²⁵⁰ No decision that would have been taken in terms of S 24 (G) will comply with S 33 of the Constitution because it violates on the IAP’s rights to a just administrative action.²⁵¹

5.2.5. *Promulgating the MPRD Bill of 2013 into law to meet the requirements of the IIBP.*

The misalignment of crucial approval milestones in acquiring a mining license in SA cannot be overstated. DMR should expedite the clearance of legal issues that hinders the promulgation of the MPRD-bill of 2013 into law as soon as possible. One of the objectives of this Bill is streamlining and integrating administrative processes relating to the licensing of rights to provide regulatory certainty.²⁵² This bill was introduced with a view to synchronise the delivery dates of all approvals that are related to the acquisition of a mining license, and consequently clear the legal and policy uncertainties in the mining industry. One of the current dilemmas in the industry is that a water use license is on average approved after three years,²⁵³ while the mining license holder is obliged to commence with mining activities within 120 days for prospecting,²⁵⁴ one year for mining activities,²⁵⁵ and two years for a mining permit,²⁵⁶ from the date of approval of the mining license. It will be difficult for a mining license holder to meet the commencement date as per the relevant provisions of the MPRDA, if the license holder does not

²⁴⁸ Only in the case of emergency as stated in S 30 (A) of NEMA.

²⁴⁹ Botha (2016), *supra* n.152 at 129.

²⁵⁰ Botha (2016), *supra* n.152 at 55.

²⁵¹ Erasmus (2011), *supra* n. 173 at 19.

²⁵² 1.1. Memorandum on the objects of the Bill.

²⁵³ <http://www.miningne.ws/2014/05/12/guideline-for-water-use-licensing/#>. (Accessed on 2018-09-01).

²⁵⁴ S 19 (2) (b) of MPRDA.

²⁵⁵ S 25 (2) (b) of MPRDA.

²⁵⁶ S 27 (8) (a) of MPRDA.

have the approved water use license. Mining operations need a lot of water, and should a mining license holder commence with its operations without a water use license, it will be guilty of contravening S 151 of the NWA, which carries a criminal sentence. The alignment of the two processes cannot be overstated. This will help improve the negative policy perceptions against SA mining industry and improve SA's ranking on the Fraser Institute Annual Survey of Mining Companies and boost the much needed investor confidence in the industry. This study recommends that the DMR should expedite the promulgation of this Bill, more so because it is now four years since the bill was published,²⁵⁷ and this delay does not augur well for legal certainty in the industry. It is encouraging that the new minister of Mineral Resources is prioritising the finalization of the MPRDA Amendment Bill.²⁵⁸

5.3. Strengthening the implementation of OES.

5.3.1. OES National Policy and Act

This study further recommends that a propaedeutic be embarked on in order to strengthen the streamlining of the approval process in the application for a mining license. It also professes that the human capital at DEA should be adequately capacitated so that they meet the demands that came with government's commitment that under the OES, applications for mining licenses will be approved within 300 days. It further recommends that the Appeal Authority at DEA that is formed in terms of the OES Agreement should be capacitated with people with relevant qualifications and experience; so that it can handle the volumes of appeal applications from applicants in the industry. DEA should also increase the capacity of the of the EMIS in order to implement the issuing of S 19 of NWA directives.²⁵⁹ It further professes that a National OES Policy be compiled with the intention to introduce an OES Bill to parliament and subsequently promulgate OES Act. The development team of the proposed policy document should be under the leadership of DEA. It should comprise of stake holders like Mineral Council of SA, Agri SA, Environmental activists like CER, Earth life Africa, EWT, VEJA etc, academics, DMR, DWS and IAP's.

²⁵⁷ GG No. 36523 published on 31 May 2013.

²⁵⁸ <https://www.pressreader.com/south-africa/the-sunday-independent/20180527/282071982572844> (2018-05-27). (Accessed on 2018-09-04).

²⁵⁹ CER; Zero Hour 2016 at p73. See file:///C:/Users/u17391335/Desktop/DMR%20cannot%20be%20the%20CA%20Zero-Hour-May-2016.pdf.(Accessed on 2018-09-16). (Accessed on 2018-09-21).

5.4. The appropriateness of the DMR as the CA for mining EA's and EMP's.

The OES, being implemented as a One Stop shop in the acquisitions of the mining license, has a great potential to usher in a new dawn in the industry that will restore legal and policy certainty. Its efficacy will be enhanced by having the appropriate body as the Competent Authority (CA) to approve the EMP's for mining operations. There has been a plurality of voices on this issue from members of civil society, academics and Environmental activists.²⁶⁰ They abhorred DMR as the competent authority to approve the EA's for mining licenses because the mandate of DMR is to promote economic developments through the exploitation of non-renewable mineral resources and not the management of environmental policies and legislations. Mpinga argues that the DMR used its political power to persuade other political leaders; hence, the DMR has been appointed by the CA to approve the EMP's for mining even though it lacks the adequate human capital to execute this important function.²⁶¹ CER formally wrote a letter to Acting Chairperson of the Portfolio Committee on Mineral Resources,²⁶² whereby it pleaded with the department to review its stance of appointing the DMR to approve the EMP's in the mining industry primarily due to DMR's mandate; and also due to DMR's poor track record in dealing with environmental issues and the fact that DEA is sufficiently capacitated, this move will create a duplication of functions in the two departments.²⁶³ This study submits that the DMR will be conflicted in discharging the mandate to approve EA's in the mining industry.²⁶⁴ Currently the authority to approve all EIA's and EMP's with regard to all sectors except mining developments, lies with DEA because it has the expertise to carry out its duties impartially and supports the principle of sustainable development.

The other source of concern regarding DMR's conduct is its seemingly misinterpretation of the OES Agreement; which clearly stated that only DEA has the authority to promulgate all the Environmental Regulations regarding mining. By promulgating the Hydraulic Fracture

²⁶⁰ <https://cer.org.za/.../Joint-Submission-on-MPRDA-Amendment-Bill-6-Sept-2013-App...> (2013-09-06) (Accessed on 2018-03-20).

²⁶¹ Mpinga S; The OES for the mining industry (2017-12-05) p.1. <http://www.mlia.uct.ac.za/news/one-environmental-system-mining-industry-has-it-given-rise-intra-governmental-conflict-interest>. (Accessed on 2018-03-20).

²⁶² <https://cer.org.za/.../2013/.../Joint-Submission-on-MPRDA-Amendment-Bill-6-Sept-20...> (Accessed on 2018-03-20).

²⁶³ <https://cer.org.za/news/media-release-response-recent-cases-enforcement-action-mining-companies-environmental-violations> (2013-09-04) (Accessed on 2018-03-30).

²⁶⁴ <https://www.businesslive.co.za/bd/opinion/2017-03-30-conflict-of-interest-in-monitori>, Mar 30, 2017. (Accessed on 2018-08-30).

Regulations,²⁶⁵ the DMR's action were in consistence with the OES Agreement, as the court said "The making of the Petroleum Regulations by the Minister of Mineral Resources, as opposed to the Minister of Environmental Affairs, contravened the provisions of sections 44 (1C) and 50A (2) (b) of NEMA and section 163A (2) (b) of the National Water Act or was not authorised by those sections.²⁶⁶ This study, like most respectable Environmental organisations buttressed this ruling.²⁶⁷

Given the conduct of the officials of DMR, which played out in the following five well-published cases, this study recommends that government should consider appointing DEA as the Competent Authority to approve all EIA's and EMP's for mining developments:

In the Maccsand case, the DMR approved the mining permit of Maccsand, despite the landowner, the City objecting to the commencement of mining operations until Maccsand obtain approval for mining rezoning.²⁶⁸ In the Bengwenyama case, the DMR granted prospecting rights to Genorah, despite the fact that no public participation took place when the EMP was compiled, which rendered it invalid.²⁶⁹ In the MSR case, an official of DMR advised MSR to apply for a S (24G) rectification after MRS confessed that it has exceeded the area that was covered by its EMP by 1.3 ha.²⁷⁰ In the Mapungubwe case, the DMR approved a mining EMP of Coal of Africa in an area very closed to Mapungubwe World Heritage Site,²⁷¹ an area with abundant biodiversity and of great significance historically and archeologically, despite objections from many respected and credible environmental activists and specialists.²⁷² In the Mabola case, DMR made a preposterous decision by approving the mining rights in favour of Atha-Africa on 14 April 2015,²⁷³ despite the fact that the Mabola area was declared a protected area by DEA on 22 January 2014.²⁷⁴

²⁶⁵ Gov. Notice R 466 published in GG 38855-dated 3 June 2015.

²⁶⁶ John Douglas Stern N.O and Others V Minister of Mineral Resources (Stern NO and Others V Minister of. Mineral Resources (5762/2015) [2017] ZAECGHC 109.Par 38.

²⁶⁷ Centre for Environmental Rights (2015). Lawfulness of Regulations for Petroleum Exploration and Production, p. 1-16.

²⁶⁸ Maccsand *supra*; n 75 para 22.

²⁶⁹ S 19 (2) (e) of MPRDA.

²⁷⁰ MSR, *supra* n86 at para 57.

²⁷¹ GN No. 71 of 30 January 2009 (GN 31832) as prescribed by the World Heritage Convention Act 49 of 1999.

²⁷² Humby T; The Environmental Management Programme ((2013) 130 SALJ) 72.

²⁷³ <http://www.miningmx.com/news/energy/31135-cer-appeal-atha-africas-mabola-coal-project-dismissed> (5th Dec.2017). (Accessed on 2018-09-22).

²⁷⁴ Government Gazette NO. 2251. Vol 21.

In all the five cases, the DMR has confuted to be the competent authority to approve mining EIA's and EMP's. It has shown very little consideration for sustainable development and support for Environmental Justice. It approved mining EMP's at all cost regardless of the possible irreparable damage to the environment.

5.5. Conclusion

This study recommends that the following steps should be taken with a view to facilitate the smooth implementation of the OES and eventually revive legal certainty in the industry:

The presidency should directly approach the apex court in terms of S 167(6) of the Constitution, to seek an order to declare invalid and setting aside the NELAA 25 of 2014 with regard to the date of implementation. The DMR should expedite the promulgation of the MPRDA Amendment Bill so that the synchronisation of all the approval dates in terms of the legislations that formed the basis of the OES Agreement should be facilitated. This will help ease the approval for a mining license and enhance legal certainty in the industry. All the sections in the legislations covering the OES Agreement that confer vague discretionary powers to the Ministers and delegated officials should be amended accordingly so that they should be consistent with the rule of law. SA should make concerted efforts to improve its mining legislations, by clearing all the contradictions in the MPRDA, NEMA and other SEMA legislations. DEA should develop National OES Policy be compiled with the intention to introduce an OES Bill to parliament and subsequently promulgate OES Act.

This study highly recommends that government should consider appointing DEA as the Competent Authority to approve all EIA's and EMP's for mining developments.

The next Chapter outlines the conclusions of this study.

CHAPTER VI: CONCLUSION

6.1. Introduction

The introduction of the OES is a step in the right direction towards sustainable economic developments through the exploitation of mineral resources. This study has meticulously articulated its aims and objectives by enunciating the discrepancies regarding the date of implementation of the OES. It has erudite the importance of the mining industry being the backbone of the South African economy has been explicated in this chapter. It is imperative that the legislations and policies in this industry that are aimed at nurturing the OES are clearly drafted and have no contradictions. This was confirmed by two separate courts when dealing with matters relating to the OES.²⁷⁵ Sustainable economic developments by mineral exploitations are encouraged because mine induced communities will ultimately enjoy environmental justice. The current generation has an obligation to preserve the environment for the benefit of future generations. The inclusion of water use license in the application for a mining license is very much encouraged due to the arid nature of South Africa and the fact that mining operations are very much water intensive. The 2017 WULAAR are a welcome relieve in favour of sustainable developments because consultation with IPA's is now compulsory when applying for a water use license.

The DEA should also expedite the revision of the 2015 Financial Regulations, because they are seen as hindrance for the facilitation of the OES and also render mining operations not be financial viable and profitable. The MCSA also view these Regulations as gatekeepers for new mining companies due enter the industry due its onerous financial burden the companies should carry. The broad and vague discretionary powers that have been conferred to Ministers and delegated officials wide discretionary powers conferred to a Minister in terms S 3 of the Regulations on Use of Water for Mining and Related Activities Aimed at the Protection of Water Resources; and S 49 of MPRDA should be limited as per and the guidance that is contained in the provisions of NEMWA should be followed.²⁷⁶ This will help the amended sections to be consistent with the rule of law.

The 2017 amendments to S 24G of NEMA should be in line with the provisions of S (175) of the Companies Act or S (175) the Competition Act with regard to the penalties to be sanctioned in

²⁷⁵ *supra* n.84 at para 1.

²⁷⁶ *supra* n.230.

order to deter mining companies from commencing with operations without an EA. It is encouraging that the courts in *S v Blue Platinum Ventures 16 (Pty) Ltd & Matome Samuel Maponya* and *S v Nkomati Anthracite (Pty) Ltd* criminally convicted the accuseds for committing environmental offences under the NEMA.

In order to ameliorate the precipitative situation regarding the “8 December 2018” date, the presidency should directly approach the apex court in terms of S 167(6) of the Constitution, to seek an order to declare invalid and setting aside the NELAA 25 of 2014 with regard to the date of implementation. The DMR should expedite the promulgation of the MPRDA Amendment Bill so that the synchronisation of all the approval dates in terms of the legislations that formed the basis of the OES Agreement should be facilitated. This will help ease the approval process for a mining license and help revive legal certainty in the industry and enhance its chances to meet the requirements of the IIBP. SA should make concerted efforts to improve its mining legislations, by clearing all the contradictions in the MPRDA, NEMA and other SEMA legislations so that legal certain should be revived in this sector. These efforts will yield in the attraction of inflow of FDI’s in SA.²⁷⁷ SA can learn from Botswana on how streamline its mining and environmental legislations, who obtained the No.1 position in Africa for the past five years regarding PPI and IAPI. DEA should develop National OES Policy be compiled with the intention to introduce an OES Bill to parliament and subsequently promulgate OES Act.

This study further professes that the DEA should comments (if not yet started) with studies to look at the possibility of identifying area for future mining developments and demarcate them as Mining Development Zones(MDZ) and then commission environmental practitioners to comments with applications for Strategic Environmental Authorisations (SEA’s) for mining projects well in advance.²⁷⁸ The DMR and DEA can join forces with the Council for Geoscience and update the data regarding the mapping of places that can demarcated as MDZ. DEA can replicate the similar process that they recently started to do SEA’s for Eskom transmission power-lines and for Independent Power Producers (IPP’s). During the 2016 IAIA conference, Mabin M et al presented a proposal for such the SEA for Eskom.²⁷⁹ During the 2015 annual Africa Utility Conference Kibido M, also advocated the SEA’s for the Transmission Grid and the IPP’s.²⁸⁰

²⁷⁷ Vivoda (2011) *supra*, n.234 at 57.

²⁷⁸ Dusik J and Xie J; Developing Practice and Capacity of SEA in East Asia and Pacific Region” (Worldbank-2007-06) at p51. See <http://siteresources.worldbank.org/INTEAPREGTOPENVIRONMENT/Resources/SEAprgressreviewinEAPFINAL.pdf> (Accessed on 2018-09-27).

²⁷⁹ Mabin M; SEA for Strategic Grid Planning in SA (IAIA Conference 11-14 05-2016) at p1.

²⁸⁰ Kibido M; SEA for Strategic Grid Planning in SA (AUW Conference 12-14 May 2015) at p12.

Should SEA for mining be successfully implemented, the SA government will be on the right path to strike a balance between promoting socio-economic developments through mining and protecting the environment on the one hand.²⁸¹ It could also be at step in the direction of converting the allocation of mine licenses from the Open Mineral Access (License regime), which refers to the award of mineral rights on a First come First serve basis (FIFA) to the Competitive Resource Tender System (Concession regime), which requires mineral rights to be effectively auctioned to the best prospective concessionaire who meets a set of minimum requirements.²⁸² This regime is preferred in many countries internationally because its “advantages are the potential for rent maximisation, addressing the information problem and greater transparency”.²⁸³

This study highly recommends that government should consider appointing DEA as the Competent Authority to approve all EIA’s and EMP’s for mining developments. By ensuring that mining economic developments are being executed in a sustainable manner, SA would have learned from the words of wisdom from former Chief Justice Ncobo who said that:

“[D]evelopment cannot subsist upon a deteriorating environmental base”.²⁸⁴

²⁸¹ Jeffery A (2018); *supra* n.9 at 30.

²⁸² Booyesen M and Veeran J; License Based Regulatory Regime V Mining Concession Based Regulatory Regime (Presented at EILA Class at University of Pretoria on 2018-06-19).

²⁸³ Bello A et al: Assessing Competitive Resource Tenders as an Option for Mining Rights Allocation in S A. (SIIA 2013 Occasional Paper No.159) at p 8-9.

²⁸⁴ Fuel Retailers Association (2012), *supra* n.94 at para 44.

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