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A comparative analysis of Swaziland's Environmental Impact Assessment (EIA) laws

A research paper submitted in partial fulfillment of the requirements of the LLM Degree in Environmental Law, University of Pretoria, South Africa

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DECLARATION

I, Mehluko Venessa Dlamini, declare that this dissertation is my own unaided work. It is submitted in fulfillment of the requirements for the degree of Master of Law (by dissertation) at the University of Pretoria. It has not been submitted before for any degree or examination in this or any other university.

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TABLE OF CONTENTS

DECLARATION……………………………………………………………………....2

TABLE OF CONTENTS ……………………………………………………………3

LIST OF ABBREVIATIONS…………………………………………………………5

CHAPTER ONE

1. Background to the mining industry in Swaziland…………………………………6

1.2 Key Terms

Sustainable Development…………………………………………………..….8

Environmental Impact Assessment………………………………………….....11

Conclusion…………………………………………………………………………….15

CHAPTER TWO

2. Swaziland's EIA Regime…………………………………………………………16

The Constitution……………………………….…..……………………....16

Environmental Legislation……………………..………………………………17

Activities requiring an EIA……………………………………………….……......18

Role Players………………………………………………………………….......19

Application process -Project brief…………………………………………….......19

Application process -Screening…………….……………………………..……....20

Application process –Scoping and Assessment……………………………...21

Assessment process -EIA Report Preparation………………………………..21

Consultation and Participation………………………………………………23

Application process -Decisions on Category 3 Projects……………………...25

Penalties………………………………………………………………………..…...25

2.2 Ngwenya Mine EIA

Environmental Assessment Practitioner………………….……………………26

Public Participation…………………………………………………………30

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Penalties……………………………………………………………………31

Conclusion…………………………………………………………………...32

CHAPTER THREE

3.1 South Africa's EIA Regime……………………………………………..34

Constitution of the Republic of South Africa……………………...…….34

South Africa's Environmental legislation……………………………….35

Activities Requiring an EIA…………………………….……………...38

Role Players…………………..………………………………………39

Application………………………………………………………………42

Application process -Screening…………………………….................42

Application process - Scoping……………………………….................42

Application process -EIA Report Preparation…………………….……........44

Consultation and Participation…………………………………………...45

Penalties……………………………………………………………………...47

Conclusion…………………………………………………………………48

CHAPTER FOUR

Conclusion and Recommendations

Activities requiring an EIA………………………………………………51

Environmental Assessment Practitioner……………………………………52

Public Participation………………………………………………….....52

Notice Period/Time frames……………………………….…………..........54

Penalties…………………………………………………………….........55

Lack of Rectification Procedure……………………………………..….55

Conclusion……………………………………………………………….....56

BIBLIOGRAPHY…………………………………………………………………58

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LIST OF ABBREVIATIONS

Authority	Swaziland Environmental Authority (or SEA)
CMP	Comprehensive Mitigation Plan
DEA	Department of Environmental Affairs
DEAT	Department of Environmental Affairs and Tourism
DWA	Department of Water Affairs
EAARR	Environmental Audit, Assessment and Review Regulations
ECA	Environmental Conservation Act
ECC	Environmental Compliance Certificate
EIA	Environmental impact assessment
EMA	Environmental Management Act
EAP	Environmental Assessment Practitioner
EAR	Environmental Assessment Report
IEE	Initial Environmental Evaluation
MEC	Member of Executive Council
NEMA	National Environmental Management Act
NEPA	National Environmental Policy Act
SADC	Southern African Development Community
SIODC	Swaziland Iron Ore Development Company

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CHAPTER 1

INTRODUCTION

1. Background to the Mining industry in Swaziland

Swaziland is rich in natural resources and biological diversity. It is a developing state in dire need of socio-economic development. The Swaziland economy is dominated by agriculture and related value added manufacturing production.[1]

Mining's role in Swaziland's economy has varied over time.[2] A methane gas explosion caused Swaziland's only coal producer to close down in 2001, asbestos mining ceased in 2000, diamond mining ceased in 1996 and mining of the once major export iron ore stopped in the late 1970's.[3] In order to diversify sources of economic development the government of Swaziland recently announced that it wished to foster development of a thriving mining industry that will contribute to sustainable economic development.[4] The government is aiming at generating economic growth by augmenting the country's agriculture and value-added manufacturing production with inflows from mining industry.[5] The Lufafa gold mine located at Hhelehhele around Piggs Peak was opened on the 26 February 2016.[6]

The country also revived its iron ore mine in 2011 by granting a mining licence to SG Iron (Pty) Ltd (SG Iron) to mine iron ore from Ngwenya mine. Ngwenya Mine is located on Bomvu Ridge, northwest of Mbabane and near the northwestern border of Swaziland.[7] Its iron ore deposits constitute one of the oldest geological formations in the world, and also have the distinction of being the site of the world's earliest mining activity.[8] Deposits at Ngwenya were worked at least 42 000 years BP (Before Present) for the extraction of red haematite and specularite (sparkling ores). The haematite iron ore with the iron content of up to 60 per cent was prospected in the middle of the 19th century.[9] The Swaziland Iron Ore Development Company (SIODC), owned by Anglo-American Cooperation, began mining deposits in 1964.[10]

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1 Anonymous The world bank, Swaziland overview www.worldbank.organic/en.country/swaziland/overview (accessed on 23 February 2016).
2 PM Mobbs The mineral industry of Swaziland (2013). 42.1
3 Anonymous 'Swaziland-Mining' http://www.nationsencyclopedia.com/Africa/Swaziland-MINING.html (accessed 12 May 2016).
4 RM Maphalala & SS Ntshalintshali Geological survey and mines department: Mineral Resources of Swaziland (2006).
T Gwebu 'King revives gold mining in Swaziland' The Swazi Observer 23 February 2016.
5 MK Mbeko 'the challenges of enforcing environmental impact assessment (EIA) in Malawi: lessons from the Kayelekera uranium mine'.
6 B Makhubu 'Plenty gold at Lufafa could see more jobs-King' The Times of Swaziland Report, 27 February 2016, 6 & 7.
7 Anonymous 'Iron mines' www.sntc.org/sz/cultural/ironmine.html (accessed on the 26 September 2015).
8 Note 7 above.
9 Note 7 above.
10 Biyela Mining Inspector (consultation conducted on the 11 September 2015 at Mining Department, Mbabane, Swaziland).

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A ten year contract with a Japanese company made it the largest producer of the iron ore.[11] Open pit mining took place between 1964 and 1977, temporarily boosting the economic development of the area by establishing a railway line connecting the mine with the railway line from KaDake to Kagoba in Mozambique railway system and an electricity network.[12] The opening of the Ngwenya mine came with lots of other short-term and medium term economic and social benefits including the birth of Ngwenya Village which in turn attracted the establishment of schools, a clinic and accommodation for middle earning senior management.[13]

A decline in the iron ore content at Ngwenya resulted in the cessation of the mining operations in 1977. At the time of closure, the average grade of the iron content was about 54 per cent.[14] During the periods 1977 to 2011 the mine remained dormant. It is the EIA process pursuant to which mining activities were revived at Ngwenya when a permit was granted to SG Iron that forms a case study for this research.

Although mining is likely to ensure a short-term boost to the economy, unchecked and unsustainable exploitation of finite natural resources could inflict irreparable adverse impacts on the environment and local communities, if the necessary regulatory framework to assess and manage the impacts thereof is not effective.[15]

The primary objective of this study is to interrogate whether the environmental laws in Swaziland, particularly the EIA process, suffice in the fight against environmental harm and the negative impacts on communities who depend on natural resources depleted by mining to meet their basic needs. An EIA is one of the available environmental management tools used to facilitate sound integrated decision making whereby environmental considerations are explicitly and systematically taken into account in the planning and development process.[16] Through a case study approach of Ngwenya mine, the research investigates the laws and practices associated with EIA process in Swaziland, pursuant to which mining rights are granted. The granting of a mining licence to SG Iron received a lot of criticism. In particular, ostensibly in response to economic crisis, the government of Swaziland was accused of fast tracking the mining project at Ngwenya mine without a proper EIA having been conducted.[17] Reports indicate that mining at Ngwenya was underway before an EIA had been submitted.[18] Implications of proceeding with mining without having conducted an EIA were grave. Site inspection reports collected from the Swaziland Environmental Authority (SEA or the Authority)[19] reveal that nearby water sources

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11 Note 7 above.
12 Biyela (note 10 above).
13 Biyela (note 10 above).
14 Biyela (note 10 above).
15 Mbeko (note 5 above).
16 L Roux & W du Plessis 'EIA legislation and the importance of transboundary application' in NJ Chalifour; P Kameri-Mbote; LH Lye & JR Nolon (eds) Land use law for sustainable development (2007) 89 89.
17 C Bruessow Extractive industries: opportunities for environmental funds (C Bruessow-redlac 10.earthmind.net at googlescholar.com (accessed on the 15 February 2016) 45.
18 N Bowles 'Swaziland's Ngwenya mine extracts its ore and exacts its price' (mg.co.za/article/2012-08-31-00-swazilands-ngwenya-mine-extracts-its-iron-ore-and-exacts-its-price) accessed on 26 September 2015.
19 SEA is referred to as the Authority throughout this paper.

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like dams and rivers were contaminated and boreholes spewed dark-red waste into a stream.[20] In addition, water from Motshane River was found to be red in colour and the source of the colour was traced back to SG Iron beneficiation plant where it was found that a discharge point had been created and effluent was flowing into the stream.[21]

I intend to show how an EIA carried out in breach of legislative requirements or pursuant to weak and/or insufficient legislative control leads to adverse environmental impacts, which threaten the livelihoods of local communities, as in the Ngwenya mine. A properly regulated and carried out EIA has the benefit of predicting problems, finding ways to avoid them and enhancing positive effects.[22]

The granting of the mining licence to SG Iron to mine iron ore at Ngwenya mine is of particular importance for the purpose of this research because it is the biggest environmentally relevant undertaking in Swaziland since the promulgation of its environmental laws. SG Iron was thus testing the effectiveness of the environmental laws in Swaziland. This study seeks to contribute to the EIA jurisprudence in Swaziland by exposing the gaps in the EIA legislation. This is important especially in the aftermath of the controversial Ngwenya mine EIA process.

The secondary objective of this study is to compare Swaziland's EIA legislation with South Africa's EIA legislation and to establish the shortcomings of the Swaziland EIA legislation and further determine how the EIA legislation in Swaziland can be improved with reference to South African law.

This chapter defines key terms that will be used throughout the research paper, specifically the concepts of sustainable development and EIA, including the nature of EIA and its purpose. In order to give a base understanding of mining in Swaziland, a historic background of the problematic mining industry in Swaziland has been discussed above, which illustrates the importance of research on how to improve the regulatory framework for managing the impacts of mining.

1.2 Key terms

Sustainable Development

The balance between economic growth, human development and the conservation of natural resources and the environment lies at the heart of sustainable development.[23] The notion of sustainable development was introduced into the global environment debate in the 1980's as an expression of the interdependence

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20 Site inspection report collected from the Swaziland Environmental Authority dated 14 April 2014.

21 Site inspection report collected from the Swaziland Environmental Authority dated 14 April 2014.

22 J Giliomee 'The implementation of environmental impact assessment in South Africa' (1980) *Town and Regional Planning Journal* 9 12.

23 TL Field 'Sustainable development versus environmentalism: competing paradigms for the South African EIA regime' *South African Law Journal* (2006) 123 409 413.

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between economic development, the natural environment and people.[24] The most commonly accepted and cited definition of sustainable development is that of the Brundtland commission on environment and development, which stated in its 1987 report, 'Our Common Future' that sustainable development is development that meets the needs of the present without compromising the ability of the future generations to meet their own needs. In this articulation, sustainable development seeks to establish a path along which development can progress while enhancing the quality of life of people and ensuring the viability of the natural systems on which that development depends.[25]

Generally understood, sustainable development requires environmental protection to be an integral part of the development process.[26] Economic development and social development must be placed in their environmental contexts.[27]

There is, however, a danger that sustainable development may become a weak catch-all phrase and that it is a good idea which cannot sensibly be put into practice.[28] Brown-Weiss argues that we cannot predict the values and needs of future generations.[29] However, she goes on to state that we have to provide them with the options and quality to satisfy their own values and needs.[30] Sustainable development therefore means, handing down to future generations not only man-made capital such as roads, schools and historic buildings and human capital such as knowledge and skills, but also natural environmental capital, such as clean air, fresh water, rain forests, the ozone layer and biological diversity.[31]

The parameters of sustainable development are clarified in the United Nations Conference on Environment and Development (1992), Agenda 21[32] and the 1992

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24 J Glazewski *Environmental law in South Africa* (2000) 14.

25 A Weaver EIA and sustainable development: key concepts and tools.

26 J Howley 'The Gabcikovo-Nagymaros case: the influence of the international court of justice on the law of sustainable development' *Queensland Law Student Review* (2009) 2 1 5. See also Rio Declaration on Environment and Development, Report on the United Nations Conference on Environment and Development, Principle 4.

27 J Glasson (et al) *Introduction to environmental impact assessment: principles and procedures, process, practice and prospects (1999)* 9. See also M Kidd *Environmental law* (2011) 16-17.
There are three interdependent and mutually reinforcing pillars of sustainable development — economic development, social development and environmental protection and cognisance should be taken of this fact in all decision-making. Challenges in all three of these areas must be addressed in order for the new 'global community' to last.

28 Glasson (note 27 above) 11.

29 E Brown-Weiss 'Climate change, intergenerational equity and international law' *Vermont Journal of Environmental Law* (2008) 9 615 617.

30 Brown-Weiss (note 29 above) 617.

31 Glasson (note 27 above) 11.

32 Chapter 1, Preamble 1.1 Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. However, integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. No nation can achieve this on its own; but together we can - in a global partnership for sustainable development.

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Rio Declaration on Environment and Development (Rio Declaration).[33] These instruments identify the need to attain sustainable development through the integration of environmental protection in the development process and decision making. They recognize the need to balance the competing needs of development on the environment.

Principles and concepts formulated in these instruments have been incorporated into municipal environmental laws in Swaziland. First section 217(d) of the Constitution of Swaziland Act 1 of 2005 provides that Parliament may make laws for the protection of the environment including the management of natural resources on a sustainable basis.[34] Secondly, section 4 of the Environmental Management Act 5 of 2002 (EMA), which contains an Environmental Impact Assessment (EIA) regime,[35] provides that its purpose is to provide for the enhancement and protection of the environment and where appropriate, the sustainable management of natural resources.

The South African EIA regime is also grounded on a sustainable development paradigm.[36] An environmental right is included in the Bill of Rights in Chapter 2 of the Constitution of the Republic of South Africa, 1996 (the 1996 Constitution). In terms of section 24 of the 1996 Constitution:

> Everyone has the right -
>
> (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation;(ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Acting on its duty imposed by section 24(b) to put in place legislative and other measures to promote, among other things, ecologically sustainable development, the government of South Africa enacted the National Environmental Management Act 107 of 1998 (NEMA), an overarching environmental statute which applies generally to environmental governance.[37] The preamble states that:

> Sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to

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http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf (accessed on 10 August 2016).

33 Principle 4 states that In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

34 The Constitution of Swaziland is the supreme law of the land. The King and all citizens have the right and duty to uphold and defend the constitution at all times. See S 2 of the Constitution of Swaziland (The Constitution).

35 Part IV of the Environmental Management Act No 5 of 2002.

36 Field (note 23 above) 428. See also the National Environmental Management Act 107 of 1998.

37 T Murombo 'Beyond public participation: the disjuncture between South Africa's environmental impact assessment (EIA) law and sustainable development' (2008) 11 *Potchefstroom Electronic Law Journal* 107.

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ensure that development serves present and future generations, and further includes sustainable development among key principles of environmental management that must guide government policy and decision-making.

Further, the principles set out in section 2 of Chapter 1 of NEMA form the basis for sustainable development and require that all development must be socially, economically and environmentally sustainable.[38]

Environmental Impact Assessment

With the goal of sustainable development, an EIA is an environmental management tools that seeks to facilitate sound integrated decision making through which environmental impacts and considerations are explicitly and systematically anticipated and taken into account in the planning and development process.[39] EIA has been defined as the evaluation of the effects likely to arise from a major project (or action) significantly affecting the environment.[40] It is a systematic process for considering possible impacts prior to a decision being taken on whether or not a proposal should be given approval to proceed.[41] EIA requires, among other things, the publication of an EIA report describing the likely significant impacts in detail.[42] Consultation with and public participation of affected communities and other stakeholders are integral to this evaluation. EIA is thus an anticipatory, participatory environmental management tool.[43]

The overall purpose of an EIA is to assist in shaping the development process to ensure sustainability, not to prevent development from taking place.[44] Despite this, many developers see EIA as just another hurdle to jump before they can proceed with their various activities. The process can be seen as yet another costly and time consuming activity in the permission process.[45] EIA can, however, be of great benefit to developers since it can provide a framework for considering location, design

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[38] S 2(2) Environmental management must place people and their needs at thefore front of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably. 2(3) Development must be socially, environmentally and economically sustainable. 2(4) (a) Sustainable development requires the consideration of: i). the avoidance or minimisation and remediation of disturbance to biological diversity; ii). The avoidance or minimisation and remediation of pollution of the environment; iii). The avoidance or minimisation and remediation of disturbance of landscapes and sites that constitute the nation's cultural heritage; iv). The avoidance of waste, or where it cannot be avoided, consideration of minimization, re-use or recycling; v). That the use and exploitation of non-renewable resources is responsible and equitable; vi). That the development use and exploitation of renewable resources is within sustainable limits; vii). That a risk-averse and cautious approach is applied; viii). That negative impacts on the environment and on people's environmental rights should be anticipated and prevented or minimised and remedied.

[39] Roux (note 16 above) 89.

[40] S Jay (et al) 'Environmental impact assessment: retrospect and prospect' (2007) 27 *Environmental Impact Assessment Review* 287. See also C Wood *Environmental impact assessment: a comparative review* (1995) 1.

[41] Jay (note 40 above) 287.

[42] Jay (note 40 above) 287-288.

[43] Jay (note 40 above) 288.

[44] N Lee & C George 'Introduction' in N Lee & C George (eds) *Environmental assessment in developing and transitional countries: principles, methods and practice* (2000) 1 7.

[45] Glasson (note 27 above) 9.

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issues and environmental issues in parallel.[46] In addition, there may be economic benefits from using EIA. Mitigating measures identified during EIA may be incorporated more economically at the design stage than subsequently.[47] Effective EIA ensures that the environmental consequences of development proposals are systematically assessed and taken into account, in conjunction with their likely economic, social and other consequences, when determining development strategies and, later, when approving individual development projects.[48]

Another function of EIA is to provide decision makers with an indication of the environmental consequences of a development, and how best to manage them. Environmental issues, however, rarely form the sole basis for a decision related to the implementation of a particular set of proposals.[49] Politicians may perceive a pressing need for economic development, jobs and revenue generation or for remedying some social ill as an overriding consideration despite consequent environmental degradation.[50] Thus, the case for development often seems overwhelming. Even when sanctioning a development appears the only decision to be countenanced, applying EIA may still yield benefits. An EIA may reveal other ways of achieving the same objectives, but with less environmental disruption.[51]

The consideration of environmental impacts early in the planning life of development can lead to environmentally sensitive development that is sustainable in the long-term; to improved relations between the developer, planning authority and local communities; and, to a smoother planning permission process.[52]

In recent years there has been a remarkable growth of interest in environmental issues, in sustainability and the better management of development in harmony with the environment.[53] Associated with this growth of interest has been the introduction of new legislation emanating from national and international sources that seeks to influence the relationship between development and the environment.[54]

EIA is believed to have first been developed in the United States as a result of the National Environmental Policy Act of 1969 (NEPA), for considering possible impacts prior to decision being taken on whether or not a proposal should be given approval to proceed.[55] The surge of environmental concern[56] that lay behind the enactment of

46 Glasson (note 27 above) 9.
47 P Wathern 'An introductory guide to EIA' in P Wathern (ed) *Environmental impact assessment theory and practice* (2004) 3 28-29
48 Lee (note 44 above) 7.
49 Wathern (note 47 above) 28-29.
50 Wathern (note 47 above) 29.
51 Wathern (note 47 above) 29.
52 Glasson (note 27 above) 8.
53 Glasson (note 27 above) 3.
54 Glasson (note 27 above) 3.
55 R Boden 'An introduction to environmental impact assessment' (1980) 76 *South African Journal of Science* 252.
56 NEPA was enacted by the US Congress at a time when the serious environmental damage caused by a wide range of human activities was becoming increasingly apparent and the object of growing public concern and political activism, especially in western democracies. NEPA became law because of an undeniable groundswell of public demand in the late 1960s for government to do something about the environment. See Boden (note 47 above) 252.

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NEPA also had wider international ramifications. Several countries have implemented EIA systems.[57] Over the years, EIA has become the most common environmental policy and planning tool used to determine allowable development and conditions of operation for proposed development projects.[58]

Many countries in Africa have either already adopted EIA legislation or are in the process of doing so.[59] Over the last few years, Swaziland has made considerable progress in the development of environmental law and EIA in particular. Until 1996, when the EAARR were developed, EIA was not a legal requirement in Swaziland.[60] Prior to 1996, EIAs were done only for donor funded projects. At that time, the national understanding of the EIA and its significance to sustainable development was poor.[61] During this period, the requirements for understanding EIAs were not based on local experience, but were imported from donor experiences elsewhere.[62] Since 1996, the use of EIA has been increasing. EIA in the context of Swaziland is defined as the process of predicting and evaluating the likely impacts of a proposed project where the scale, extent and significance of the environmental impacts cannot be easily determined.[63]

The EMA and the Environmental Audit, Assessment and Review Regulations, 2000 (EAARR) regulate the use of EIA in the country. Section 32 (4) of EMA provides:

> A person proposing to undertake a project referred to in subsection (1) shall submit a project brief to the Authority containing sufficient information to enable the Authority to determine the potential impacts of the project of the environment.

Subsection (5) provides:

> If after reviewing the project brief the Authority is satisfied that:
>
> the potential effect of the project on the environment is likely to be minimal or insignificant, it may approve the project; (b) the potential effect on the environment is likely to be more than minimal or insignificant, it may require the applicant:(i) to conduct an environmental impact assessment in relation to the project, with or without a public hearing; (ii) to submit to the Authority an environmental impact statement in accordance with subsection (7); and (iii) to submit to the Authority a comprehensive mitigation plan in accordance with subsection (8).

The EAARR establishes guidelines and requirements for EIA and environmental assessment (EAR) reports. A proponent of a project classified under category 3[64] (mining falls under category 3) is required before preparing an EIA report and

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57 J Glasson (et al) *introduction to environmental impact assessment* (2012) 4th Edition 3.

58 K Keatimilwe & J Mlangeni Country chapter on Swaziland in EIA in Southern Africa (2003) (accessed from www.saiea.com/saiea.book/swaziland1.pdf on the 23 September 2015).

59 Roux (note 16 above) 89.

60 Keatimilwe (note 58 above)

61 Keatimilwe (note 58 above).

62 Keatimilwe (note 58 above).

63 Part A, Regulation 3 of the Environmental Audit, Assessment and Review Regulations 2000 (EAARR).

64 Projects under category 3 are those that are likely to have adverse impacts on whose scale, extent and significance cannot be determined without an in-depth study. These are large scale projects which include mining, soil excavation, reservoirs and dams.

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comprehensive mitigation plan (CMP), to effect a consultation process to involve and include all affected parties.[65] After the Authority[66] has approved the terms of reference of the consultation, the proponent must prepare an EIA report and CMP.[67] The EAARR requires any new projects that are deemed to have an impact on the environment, to ultimately obtain an Environmental Compliance Certificate (ECC) from the Authority.[68] Notwithstanding the existence of legal framework on EIA in Swaziland, effective implementation still proves to be a difficulty. Moreover, as this study seeks to establish, the framework requires strengthening, in order to better achieve sustainable development in Swaziland. In chapter 2, I will outline the legislative framework for EIA in Swaziland and how in the Ngwenya mine this framework proved ineffective. In order to make recommendations to improve Swaziland's EIA, it is necessary to recognize the current gaps.

South Africa has enacted an array of impressive environmental legislation not only aimed at conserving natural resources, but also more importantly targeting sustainable use of the few resources available to the ever-increasing population.[69] An important development within this trend towards sustainable development is the development and implementation of laws and policies providing for EIA.[70] The EIA process in South Africa is primarily governed by NEMA, the overarching environmental statute, which operates in conjunction with several other pieces of legislation relevant to environmental management.[71] An environmental authorisation is required in order to undertake activities listed under NEMA that may have an impact on the environment.[72]

A third set of EIA regulations was published under NEMA in 2014, which brought about changes to the listed activities for which authorization is required in terms of NEMA.[73] While all the activities listed in the regulations require an environmental authorisation, the lists distinguish between two classes of activities: those requiring a basic assessment (a process for what one can term minor projects, where the

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65 Regulation 9 (1) of EAARR.
66 The Authority means the Swaziland Environmental Authority established under section 9 of the Environmental Management Act 5 of 2002.
67 Regulation 9 (4) (a) of EAARR.
68 Part E.
69 Murombo (note 37 above) 107.
70 Murombo (note 37 above) 107.
71 M Kidd & F Retief 'Environmental Assessment' in HA Strydom & ND King (eds) *Fuggle and Rabie's Environmental management in South Africa* (2009) 971 1018.
Other pieces of legislation include but not limited to: Mineral and Petroleum Resources Development Act 28 of 2002; National Water Act 107 of 1998; and, the National Environmental Management: Biodiversity Act 10 of 2004.
72 S 24 (1) of NEMA. See also Kidd (note 27 above) 239.
73 Kidd (note 27 above) 244. S 24 (2) of NEMA states that the Minister or an MEC may identify activities which may not commence without environmental authorization from the competent authority. S 24D of NEMA provides for the publication of list of activities or areas identified in terms of S 24(2) of NEMA. See also National Environmental Management Act: Environmental Impact Assessment Regulations GNR.982 published in the Government Gazette 38282 of 4 December 2014 (2014 EIA Regulations). The first two sets of EIA regulations were: National Environmental Management Act: Environmental Impact Assessment Regulations GNR.385 GG 28753 of 21 April 2006 and National Environmental Management Act: Environmental Impact Assessment Regulations GNR.543 in GG 33411 of 18 June 2010 which came into effect on 2 August 2010.

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impacts will be minimal or are relatively certain), and those requiring a full scoping and environmental impact report (projects which are major, complex or where the impacts are uncertain).[74] The EIA regulations stipulate who may conduct EIAs, what EIAs must consist of, the decision-making criteria and timelines, public participation requirements and the procedure for lodging appeals against decisions taken.[75]

Through a comparison with the South African EIA legislation, in chapter 3, I will examine some of the gaps that hamper the effective carrying out of an EIA in Swaziland. Swaziland and South Africa are neighbouring countries and are both members of the Southern African Development Community (SADC). At the legal level, South Africa has enacted an array of impressive environmental legislation,[76] and Swaziland can learn from, and attempt to align some of its laws with those of South Africa as the countries share natural resources and many companies undertake projects that exceed the countries' national boundaries.[77] It is particularly important that environmental legislation and policies are aligned across borders to allow better integration of the economies plus improvement of environmental protection. Lastly, in chapter 4, I will make recommendations to help address some of the challenges and gaps in the EIA laws in Swaziland. These recommendations will be directed at improving the current EIA legislation by calling for amendments.

Conclusion

In this chapter I have set the scene for my study: a problematic mining industry in Swaziland, which offers a valuable context in which to study the effectiveness of Swaziland's relatively new EIA laws. I have explained that an EIA is intended to be an anticipatory and participatory environmental management tool so as to ensure sustainable development, a concept entrenched in Swaziland's environmental law. I have further introduced South African laws concerning EIA as a basis for comparison with Swaziland's laws. Next, in chapter 2, I will consider the Swaziland EIA regime in more detail.

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74 See 2014 EIA Regulations.

75 See 2014 EIA Regulations.

76 Murombo (note 37 above) 107

77 Example of a recent project is the Swazi Rail Link project between Swaziland Railway and Transnet South Africa for development of a 146 kilometre railway line between Lothair (Mpumalanga) and Sidvokodvo (Swaziland). See www.swazirail.co.sz/projects/swaziraillink/ (accessed on 22 April 2016).

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CHAPTER 2

SWAZILAND'S EIA REGIME

In this chapter I outline the requirements of an EIA regime in Swaziland. Before doing so, I locate the regime within the broader context of environmental law in Swaziland. I discuss the extent to which the Constitution of Swaziland provides for environmental protection, relevant provisions of the Environment Management Act No. 5 (EMA) and the EARR. This legislation reveals that the EIA regime in Swaziland provides for activities requiring an EIA, defines the role players, and sets out the process for application for an ECC, which includes submitting a project brief, screening, scoping, EIA report preparation, and consultation and participation. In addition, it provides for penalties in the event of non-compliance with the requirements. I will discuss each of these aspects of the regime below.

Having outlined the EIA regime in Swaziland, the second part of this chapter I discuss the EIA conducted by SG Iron at the Ngwenya mine in 2011, when mining activities were revived in the area. I do so to illustrate the weakness in the EIA regime.

2.1 Swaziland's EIA Regime

The Swaziland EIA regime is grounded in the Constitution of Swaziland, which demands the enactment of legislation protecting the environment. The EMA operates as framework environmental legislation, and establishes and empowers the SEA, whilst the EAARR sets out the detailed requirements for EIA. I will discuss each of these components of Swaziland's EIA regime in turn.

Constitution

The Constitution of Swaziland does not grant individuals a fundamental right to a clean, healthful or favourable environment.[78] There is no fundamental right to an environment of a certain quality or standard, nor a right to have the environment protected for one's own purpose or interest.[79] Instead, the Constitution of Swaziland imposes a duty on every person to promote the protection of the environment for present and future generations; requires that urbanisation or industrialisation must be undertaken with due respect for the environment; and demands that the government ensures a holistic and comprehensive approach to environmental preservation and puts in place an appropriate environmental regulatory framework.[80]

[78] Fundamental environmental rights empower individuals to protect an inalienable human right to a healthy environment. See JR May 'Constituting fundamental Environmental rights worldwide' *Pace Environmental Law Review* (2006) 113 115-116.

[79] E Bray 'Development and balancing of interests in environmental law: Swaziland' in M Faure & W du Plessis (eds) *The balancing of interests in environmental law in Africa* (2011) 459 464 445.

[80] S 216 & 217 of the Constitution. In sum the Constitution underlines the obligations (duty) of the state and citizens regarding the protection of the environment. There is no environmental right (entitlement. See also Bray (note 68 above) 445.

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Moreover, the Constitution of Swaziland states that all fundamental rights and freedoms are subject to respect for the rights and freedoms of others and for the public interest, illustrating that rights are not absolute and may be limited by corresponding duties towards the environment as a public interest matter.[81] These duties implicitly recognise the concept of sustainable development by requiring the protection of the environment for the benefit of both present and future generations.

The Constitution further refers to the management of the environment and natural resources, which should be interpreted as managing the use of the environment or the management of human behaviour or activities in the environment.[82] Thus not only does it acknowledge the impact of human actions on the environment, it also acknowledges human dependence on the environment. In this sense it recognises the need for the sustainable use of natural resources to protect both human beings and the environment.[83] Sustainable development is thus recognised in the Constitution of Swaziland.[84]

Environmental Legislation

The EMA No. 5 was passed into law in November 2002 and replaced the Swaziland Environment Authority Act of 1992.[85] The EMA is intended to provide and promote the enhancement, protection and conservation of the environment, sustainable management of natural resources and matters incidental thereto.[86] Its main objectives is to establish a framework for environmental protection and the integrated management of natural resources on a sustainable basis. It also seeks to transform the Swaziland Environment Authority into a body corporate and establish the Swaziland Environment Fund.

The Act is arranged in eleven parts. Section 5 of EMA identifies certain general principles for sustainable environmental management. A duty is placed on the state and all persons or bodies acting in terms of EMA (the government and its officials, the private sector and civil society) exercising powers or functions or making decisions under EMA to give effect to the principles and purpose of the EMA.[87] The environmental principles underlined in the Act include: the environment is the common heritage of present and future generations and adverse effects to it must be

81 S 14 (3) of the Constitution. See also. The nature of environmental interests is uniquely public interest, placing an obligation on the government and citizens to protect the environment.
82 S 221 (2) & 217 (1) of the Constitution.
83 P Sands *Principles of international environmental law* (2003) 2nd Edition, 253,266.
84 S 4 of the EMA provides for the protection and conservation of the environment and the sustainable management of natural resources. S 5 states that the environment is the common heritage of present and future generation.
In sum, balancing interests in the Swazi context means that human actions, driven by socio-economic and cultural interests, must be aligned with environmental protection (environmental interests) in order to achieve sustainable development as long-term welfare and development in Swaziland. This interrelation and interdependence between the environment, socio-economic, cultural and political affairs have been formally recognized in the Constitution. See E Bray 'Environmental law reform in Swaziland' (2006) *Comparative and International Law Journal of Southern Africa* 466.
85 Bray (note 84 above) 536.
86 S 4 of the EMA.
87 S 6 of EMA.

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prevented and minimised through long-term integrated planning taking into consideration the entire environment as a whole entity; the prudent use of non-renewable natural resources taking into account the consequences for present and future generations and the use of renewable resources and ecosystems sustainably without prejudicing their viability and integrity.[88]

The provisions relating to EIA are found in part IV under Integrated Environmental Management. The EAARR establishes guidelines and requirements for environmental impact assessments and environmental audit reports. The EAARR requires proponents of any new projects, that are deemed to have an impact on the environment, to obtain an Environmental Compliance Certificate (ECC) from the Authority through the receipt of an Initial Environmental Evaluation (IEE) report and a Comprehensive Mitigation Plan (CMP), or an EIA report which contains a description of the mitigation measures to be implemented to reduce the environmental impacts of the proposed project. The EAARR identifies which activities require an EIA, who the role players are, and the application process for obtaining an ECC.

Activities requiring an EIA

The First Schedule of the EAARR contains lists of projects divided into three categories, depending on the likely impact on the environment. It is up to the Authority to determine whether a proposed project will have any significant impact on the environment and to determine into which category the project falls.[89]

Category 1 projects are described as unlikely to cause any significant environmental impacts and therefore do not require an EIA. These include for example, small-scale developments and renovations.[90] Projects under Category 2 are those projects likely to cause some significant environmental impacts, but whose scale and magnitude are relatively easy to predict without a detailed EIA. Such projects require an initial environmental evaluation (IEE) and not full EIA. Examples include medium-scale projects, including those located near environmentally sensitive areas. Large scale projects are allocated under Category 3. These projects, which include mining and those located in environmentally sensitive areas, are likely to have significant adverse impacts whose scale, extent and significance cannot be determined without an in depth EIA study.

Swaziland thus follows the approach of listing actions that require an EIA. The EMA and EAARR indicate in most cases thresholds in order to eliminate minor activities and also provide criteria to determine which actions should be assessed.[91] The Authority does not have the power to decide that activities may not be undertaken without his/her prior consent even when they are not listed.

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88 S 5 of EMA.

89 S 32 (4) & (5) of the EMA.

90 S 32 (5) of EMA. If the Authority is satisfied that the project falls under category 1, an Environmental Compliance Certificate will be issued and the project can proceed.

91 First schedule of the EAARR and S 32 (5) of the EMA.

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Role players

There are three key role players in an EIA process in Swaziland: a proponent or applicant who wishes to embark upon a project and must apply for authorisation, a competent authority in the form of the Minister of Tourism and Environmental Affairs (the Minister) and the Swaziland Environmental Authority (SEA or the Authority) and the public (or interested and affected parties) who may participate in the EIA process and comment on the application. [92] The EIA legislation does not mention environmental consultants as role players in the EIA process.[93] The duty is placed on the proponent to carry out the EIA process under EMA and there is no legislated requirement to appoint experts to assist the proponent with technical aspects related to the social, environmental or economic impacts of its proposed project.[94]

A person undertaking any project that may have an effect on the environment shall not undertake such project without approval of the Authority. [95] The Authority operates as an independent body but in a relationship of decentralisation with the Minister and the Government to whom it must report on a regular basis.[96] It consists of a Management Board (the Board),[97] which is the governing body, and consists of members representative of the different role players in environmental management in Swaziland.[98] The basic function of the Authority is 'to promote the protection, conservation and enhancement of the environment and sustainable management of natural resource'.[99] The environmental impact assessment process presents a good example of co-operation between the Minister and the Authority in that, the Minister on the advice of the Authority considers that all environmental concerns are addressed in the EIA process, and grants approval subject to terms the Minister considers appropriate.[100]

Application process - Project brief

If a project in Swaziland requires a permit, licence, approval or other form of consent from an Authorising agency, the proponent of the project is required to submit to the Authority a project brief which incorporates a brief plan and/or outline proposal for a project and which contains sufficient information to enable the Authority to determine to which category the proposed project should be assigned.[101] These project briefs

92 Roux (note 16 above) 98. S 32, 52 & 53 of the EMA. If a consultation is used, the responsibility of the proponent of the project is to ensure that the EIA is properly done in accordance with the legislation and regulations. In the final instance, the proponent will be the liable person.

93 Roux (note 16 above) 98.

94 S 32 of the EMA.

95 S 32 (1) of the EMA.

96 S 10 & 11 of the EMA provides for the powers, constitution and proceedings of the Authority.

97 Members are: principal secretaries in charge of government departments of environmental affairs, agriculture, finance, natural resources and energy; a representative of the traditional authorities and NGOs, business and industry; an environmental expert. The Director is the chief executive of the Authority but may not vote. S 13(2) (i) & 17 of the EMA.

98 The Minister appoints members of the Board and its chairperson; the Director is appointed by the Minister in consultation with the Board. S 13, 15 & 17 of the EMA.

99 S 12 (1) of the EMA.

100 S 32 (12) (13).

101 Regulation 5(1) (b) of the EAARR.

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are then reviewed and categorised by the Authority or proposing ministry in order to determine if an ECC can be issued.[102]

The EMA contains a similar provision that the proponent must submit a project brief to the Authority containing sufficient information to determine the potential impacts of the project on the environment.[103] It is evident from this discussion that all projects must go through a screening process in order to determine if an EIA report is necessary for the particular action. There is no provision in the EIA legislation for the registration of new projects however.

Application process - Screening

The process of screening narrows the application of EIA to those projects that may have significant environmental impacts.[104] In this process the Authority determines whether or not an EIA report must be prepared for a particular action.[105]

The Swaziland EIA legislation does not use the term screening but both the EMA and the EAARR contain, provisions which require that the Authority make a preliminary determination as to the significance of the impacts of project on the environment based on the project brief submitted by the proponent.[106] The legislation also empowers the Minister, on advice of the Authority, to promulgate regulations to prescribe categories of projects deemed not to have an effect,[107] projects which will have an effect [108] and projects, deemed to have a significant effect on the environment.[109] These categorisations can be regarded as screening as they will narrow down the activities that may have a significant effect on the environment. In deciding which category a proposed project should be assigned, the Authority is required to take into consideration all relevant factors including the scale of the proposed project and its location in relation to environmentally sensitive areas.[110]

The screening process does not make provision for public participation to take place where comments from interested and affected parties are taken into consideration. The legislation also does not provide for specified period of time when decision must be reached by the Authority upon receipt of the project brief. Providing for such would ensure that time and resources are efficiently used and the EIA process would be more streamlined.

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102 Regulation 5 of the EAARR.
103 Regulation 5 of the EAARR.
104 Roux (note 16 above) 99.
105 Roux (note 16 above) 99. The purpose of screening process is, on the one hand, to prevent unnecessary assessments of a large number of actions that will not have significant environmental impacts and, on the other hand, to ensure that actions with significant adverse environmental impact will be assessed.
106 S 32 (5) of the EMA. See also Regulation 6 of the EAARR.
107 S 33 (b) of the EMA.
108 S 33 (a) of the EMA.
109 S 33 (c) of the EMA.
110 Regulation 6 (2) of the EAARR. The Minister by notice in the Gazette may designate areas as environmentally sensitive areas.

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Application process – Scoping and assessment

After screening, the Authority can either issue an ECC or require that a scoping process takes place. Scoping entails determining the range of issues to be addressed in an EIA report, as well as identifying the significant issues relating to a proposed action.[111] One of the purposes of an EIA is to focus on the most important issues, while ensuring that indirect and secondary effects are not overlooked and irrelevant impacts are eliminated.[112] The scoping process can vary considerably from case to case, depending on numerous factors such as complexity of the proposal and the potential effect on the public.[113]

The assessment of category 3 projects begins with a consultation process (scoping meeting) to involve or include concerned government agencies, local authorities and any other interested and affected persons to help determine the scope and effect of the project or work to be carried out.[114] The proponent must then prepare and submit to the Authority a draft of the terms of reference for the project which must take into account the results of the consultation and it must contain sufficient information to enable the Authority to determine the potential impacts of the project on the environment.[115] The EIA legislation does not however, require that the proponent must include the description of the public participation process. The Authority must within five days determine whether or not the terms of reference are acceptable.[116] After approval of the terms of reference, if the Authority is satisfied with the categorisation of the project as an impact likely to be more than minimum or insignificant, it may require the proponent to conduct an EIA with or without a public hearing[117] and to submit the EIA report and a CMP.[118]

Application process - EIA report preparation

The preparation of an EIA report can be regarded as the step that makes the EIA process meaningful because it contains the findings related to the predicted impacts of a proposed project on the environment.[119]

An in-depth EIA is required for category 3 projects, or for those projects located in environmentally sensitive areas.[120] Since mining is falls under category 3 projects, it requires an EIA to be conducted. The contents of the EIA report are prescribed in the

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111 Roux (note 16 above) 99.
112 Roux (note 16 above) 99.
113 Roux (note 16 above) 100.
114 Regulation 9 (1) of EAARR.
115 Regulation 9 (2) of EAARR & S 32 (4) and (5) of the EMA. The Authority will approve a project which is likely to have only minimal or insignificant effects on the environment. However, where the potential effect is more significant, an EIA must be prepared and submitted with a CMP.
116 Regulation 9 (3) of the EAARR.
117 S 32 (5) (b) (i) of the EMA & Regulation 9 (4) (a) of the EAARR. A public hearing is held if the Authority decides that the project is of sensitive or significant nature and that the public should have the opportunity to make submissions or comments at the hearing. Example, where more than 10 substantiated objections were submitted during review.
118 S 32 (5) (b) (ii) and (iii) of the EMA. See also Regulation 9 (4) of EAARR.
119 Wood (note 40 above) 143.
120 Regulation 9 of the EAARR.

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second schedule of the EAARR. The EIA report must contain: an executive summary,[121] an introduction outlining the purpose of the EIA,[122] description of the environment, prediction and evaluation of impacts,[123] an analysis of alternatives and selection of preferred option, [124] an impact management plan (for preferred alternative), and a schedule for implementation[125] and details of consultations. The EIA report must be prepared by the proponent and it must be accompanied by a CMP, which should focus on the significant impacts identified in the EIA report.[126] The contents of the CMP are set out in the second schedule of the EAARR and must contain details relating to: impacts to be prevented or reduced in severity, mitigation measures, monitoring programmes to track project related impacts and implementation of mitigation measures.

However, there is nothing in the EIA legislation addressing the quality of the content of the of the EIA report.[127] There are no guidelines in the EMA or EAARR specifying EIA methods or techniques to be employed during the preparation of an EIA report. This is problematic as the Ngwenya mine case study will illustrate below, because it lives it to the discretion of the proponent to use whichever methods or techniques that they deem fit. This may lead to uncertainty. A proponent may use a technique or method that is not adequate to meet the standards of the EIA laws, or a method or technique which is not adequate to ensure the protection of the environment. Provision of methods and techniques to be used creates a more uniform standard for EIA report preparation.

Another potential problematic area in this regard is the lack of time framework for conducting and completing an EIA. The lack of timeframe means that there is no legal certainty. There is no specific and straightforward provision in the EIA legislation providing for a specific timeline in which an EIA report should be conducted and completed. An EIA report may either be conducted and finished within a relatively short space of time. The problem with this is that not all relevant and technical issues pertinent to the EIA study would be investigated and assessed. On the other hand, the EIA study may be conducted in an unreasonably long time. This may have direct financial consequence for the proponent and the state and can also reduce overall confidence in a project

On completion of the EIA and CMP reports, the proponent must submit them to the Authority and the Authority then has 20 days to decide whether the EIA report and the CMP conform to the prescribed reporting requirements or guidelines specified in the second schedule of the EAARR, and whether these documents contain the

121 This is a brief account (no more than 10 pages) of the findings of the EIA with the emphasis on the key issues for consideration by decision makers in the Swaziland Environmental Authority, the authorizing agencies and members of the public.

122 Boundary of the study area and time horizon for which the impacts will be predicted.

123 Which includes inter alia: Identifying irreversible impacts, distinguish between significant, adverse and beneficial impacts, identifying significant data deficiencies and assumptions.

124 Selection of preferred alternatives on the basis of the comparison of the environmental impacts of each option.

125 These are technical and institutional requirements for successful implementation.

126 S 32 (5) of the EMA.

127 Roux (note 16 above) 101.

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necessary breadth, depth and types of analysis to allow for informed decision-making.[128] If the documents do not conform with the specified requirements, the project proponent is requested to resubmit an amended set of documents for consideration by the Authority and if the documents do conform, the Authority shall issue a notice of acceptance to the proponent.[129]

Consultation and Participation

Consultation and participation are integral to the EIA process.[130] They provide a forum for ensuring that the view of interested and affected parties have are taken into account in project preparation.[131] Consultation and participation can produce significant benefits for the public and for the proponent of actions and for those affected.[132] Local knowledge often provides valuable information that might be missed by outside experts. It improves the chances of legitimacy of a project, thereby reducing the costs emanating from the social tensions that can result from an externally-imposed project.[133] However, it will not be possible to meaningfully engage, as the Ngwenya mine case study illustrates, unless consultation processes, reports, and notices are offered in a language that affected communities can understand. In Swaziland this is siSwati.

In respect of category 3 projects there is a duty on the proponent to pursue a consultation process before preparing an EIA report and CMP in order to include concerned and affected parties to help determine the scope and effect of the project to be carried out.[134] This consultation process takes the form of a scoping meeting.

In addition to the scoping meeting, immediately after the Authority has issued notice of acceptance of EIA report and CMP,[135] the Authority is required to distribute copies of these documents to affected ministries, local authorities, parastatals, non-governmental organisations and any other stakeholders. The Authority must display conspicuously such copies in public places or such places in the vicinity of the site of the proposed project and also place a notification in the Government Gazette, on the Swaziland Broadcasting Service and in a newspaper circulating in Swaziland twice a week and for two consecutive weeks.[136] Such notification must specify the place and the times where copies may be available for inspection and the procedure for the

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128 Regulation 9 (4) of EAARR.
129 Regulation 9 (4) (b)(i)&(ii)
130 Wood (note 40 above) 225.
131 Roux (note 16 above) 103.
132 Roux (note 16 above) 103.
133 Anonymous 'Improving Public Participation in the Sustainable Development of Mineral Resources in Africa' 12.
134 Regulation 9 (1) of EAARR. The proponent is required to take this consultation process into account in drafting the terms of reference which must be submitted to the authority.
135 A notice of acceptance constitutes confirmation by the Authority that the EIA document is acceptable to the Authority and will be made public and evaluated for the purposes of deciding whether or not to grant an ECC. See Regulation 10 of EAARR. This is done during the EIA report preparation stage.
136 Regulation 11 of the EAARR.

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submission of comments and objections.[137] However, these documents are not required to be published in siSwati.

The public is allowed 20 days[138] to submit comments on Category 3 projects, but this period can be extended by the Authority for a period not exceeding 10 days if the project is considered to be sensitive.[139]

Following the public review period, the Authority has 5 days to decide whether or not a public hearing is necessary.[140] If after examining the documents and the reports, the Authority is of the opinion that the project is of such a sensitive nature or if the public concern over the project is great and the number of written and substantiated objections exceeds ten, then the proponent or applicant must hold a formal public hearing.[141] There is no need to hold a public hearing if comments are not received and if the Authority does not deem it necessary. Surprisingly, despite the significance of the project, as will be discussed below, this was the case in Ngwenya, suggesting a problem with the EIA regime in Swaziland.

Notice of the public hearing is to be given by the Authority, which has to ensure that:[142]

> (a) A notice is published at least once a week for two consecutive weeks, in a newspaper circulating in Swaziland stating the date and place where the public hearing is to be held at least 15 days before the public hearing is held and the expenses in respect of the publication of the notice shall be borne by the proponent; (b) All reports, documents, written comments and objections during and after the period of public review are displayed and made available until the public hearing is finalised; and (c) Any party who has an interest in the outcome of the public hearing, including the project proponent, the authorising agency, the commenting agency and any other person, must be called upon to attend the public hearing or solicit in writing comments from other government agencies or offices with expertise or regulatory power over the proposed project.

A tribunal is appointed by the Authority to conduct the public hearing.[143] The chairperson of the tribunal presents the findings to the Authority (a public hearing report) which is made available for public inspection.

The interested and affected parties are afforded an opportunity to engage in the decision making process concerning approval of development projects. However, this aspect of the EIA regime does not make provision for engaging in the language of the community concerned and this is a potential problematic area. The EIA legislation should provide for alternative language use in order to accommodate all interested and affected parties.

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137 Regulation 11 of EAARR.

138 The period for public review must be calculated from the date of the last notification in the newspaper. The EAARR do not specify whether the 20 days is business days or whether Saturdays, Sundays or public holidays must be excluded in the 20 days.

139 Regulation 11 (3) of the EAARR.

140 Regulation 12 (1) of the EAARR.

141 Regulation 12 of the EAARR.

142 Regulation 12 (2) of the EAARR.

143 Regulation 13& 14 of the EAARR. Its members consist of different professional persons including a law and environmental management professional.

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Application process - Decisions on Category 3 projects

Regulation 15 states that the Authority shall, within 20 days of receipt of the public hearing or inquiry report, or within 20 days after a public hearing or inquiry is judged not to be warranted, make a decision allowing the proponent to proceed with the project and issue the proponent with an ECC; or disallow the proponent from proceeding with the project if it would bring about unacceptable environmental impacts, or if the mitigation measures are inadequate. In the latter instance, the proponent is allowed to submit revised documents for the Authority's consideration. The Authority must communicate its decision in writing to any authorising agency,[144] by publishing the decision in detail and in a medium to be decided by the Authority to enable all key stakeholders and interested and affected parties to inspect the decision and by sending a copy of the decision to any persons who have in writing submitted comments or lodged an objection to the Authority in terms of the Regulations.[145] Any person may after the granting or refusal of the approval lodge an appeal to the Board.[146]

Penalties

A person who undertakes any project that may have an effect on the environment without the written approval of the Authority commits an offense and shall, on conviction be liable to imprisonment to a term not exceeding two years or a fine not exceeding one hundred thousand Emalangeni or to both.[147] This provision is arguably not sufficient to effectively deter offenders of environmental legislation. The penalty provision does not extend liability to consultants completing EIAs. Severe penalties for environmental crimes would create an incentive for companies undertaking a project such as SG Iron not to breach or commit environmental crimes.

2.2 The Ngwenya Mine EIA

An examination of the EIA process resulting in the granting of a mining licence to SG Iron in 2011 reveals that the EIA was loosely carried out according to the EIA legislative requirements in Swaziland. The various stages of the EIA process such as scoping, EIA preparation and public involvement appear to have been conducted. Nonetheless, a number of environmental harms ensued, which ought to have been addressed through the EIA process so as to prevent or manage them. These harms suggest that the EIA process was not sufficiently rigorous.

The project proponent, SG Iron appointed MTK Sustainable Technologies (Pty) Ltd (MTK), a local environmental consulting firm in Swaziland, to apply for the ECC on its behalf. In its project brief, SG Iron proposed to rehabilitate the iron ore mine dumps that were left when iron ore mining stopped at Ngwenya in 1977, as the mine was not rehabilitated at that point. Its application thus contained a proposal to

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[144] The Authority must give reasons for its decision, conditions and comments on its decision.
[145] Regulation 15 of the EAARR.
[146] S 32 (14) of the EMA.
[147] S 32 (1) & (2) of the EMA. 1 Lilangeni (SZL) is equal to 1 Rand (ZAR), one hundred thousand Emalangeni is equal to one hundred thousand Rands. www.coinmill.com/szl_zar.html (accessed on 10 May 2016).

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process the dumps to recover some of the iron ore left in the dumps and rehabilitate the site by leveling, application of topsoil and vegetation.[148]

A project brief was submitted to the Authority and the project brief was reviewed by the Authority in accordance with the EAARR the project was classified as a category 3 project.[149] As a result, a consultation (scoping meeting) with interested and affected parties had to occur. A scoping meeting was held on 20 June 2011, which involved the public and concerned stakeholders, government departments and parastatals.[150] A report of the scoping meeting was submitted and the terms of reference were approved by the Authority on the 20 July 2011. After approval of the terms of reference, the EIA had to be conducted.

The EIA was conducted by MTK whose report was accompanied by a CMP. These documents were submitted to the Authority in August 2011. In other words, the report and CMP were prepared in less than a month. The EIA report was made available to all interested and affected parties in accordance with regulation 11 of the EAARR.[151] There is no record of public review of the EIA report or of a public hearing ever taking place, however. On enquiry on whether there was any public hearing conducted, I was informed by an SEA official that the public did not make any comments on the EIA document, so it was deemed unnecessary to convene a hearing [152] The EIA report was subsequently approved by the Authority and SG Iron was given an ECC to proceed with the project. There is also no record of the date of the approval of the EIA report and the granting of the ECC. Mining operations began in October 2011.[153]

The EIA process conducted in respect of Ngwenya reveals three flaws. First, there is a failure to require an EAP as a matter of law and a failure to impose clear duties on the EAP or the proponent as to the veracity of the report. Secondly, there exists a weakness in the public participation process. Thirdly, the consequences for failing to conduct a proper EIA process that upholds sustainable development are minimal. I will address each of these below.

Environmental assessment practitioner

Although the Ngwenya mine EIA was conducted by an environmental consultant, MTK, there is no legal requirement for a proponent to appoint a consultant, nor is there a requirement for the qualifications that the consultant must possess. There are two major problems associated with not having proper regulation of EAP in the EIA law in Swaziland. First is that the EIA report may be prepared quickly without full

148 SG Iron (Pty) Ltd EIA document page 1.
149 SG Iron (Pty) Ltd EIA document page 8.
150 SG Iron (Pty) Ltd EIA document page 10 & 12.
151 The EIA document was made available in places such as the SEA offices, National Libraries and the University of Swaziland. The EIA document was made available for public inspection in August 2011.
152 Mr. Ndumiso Shongwe consultation at the Swaziland Environmental Authority, Mbabane Swaziland in September 2015.
153 Anonymous 'How Swazi king destroyed iron mine' Swazi media commentary 9 February 2015 (accessed on the 28 April 2016).

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consideration of relevant issues. Secondly, that the EIA report may be of poor quality.

In Ngwenya, terms of reference were prepared for the scoping meeting on the 20 July 2011 and less than a month later, by 11 August 2011, the EIA report was made available for public inspection. This illustrates that the EIA report for the Ngwenya project was prepared in less than 30 days. EIA report preparation is supposed to be a systematic and consultative process that gathers comprehensive and detailed information on the social, economic and environmental consequences of a proposed development.[154] A good EIA report takes into consideration all relevant issues including evaluations, investigations and consultations with experts. A considerable amount of time is needed to conduct a proper EIA which will take into consideration not only economic factors but also the social and environmental factors as well. Clearly, this approach was not adopted in Ngwenya. Swaziland's EIA regime does nothing to curtail the fast-tracking of an EIA report.

Before finding the environmental consultant appointed to carry out the environmental impact assessment, SG Iron approached a University of Swaziland biologist. He explained the procedure for a proper assessment. SG Iron responded that it did not have that kind of time and asked for a list of the people who would not be a problem.[155] The EIA legislation is silent on timeframe for conducting and completing an EIA study. If the EMA or EAARR provided for a minimum timeframe for the preparation of an EIA report, the EIA process may have been more comprehensive. The EIA report would have considered and investigated all of the important issues, and threats to environmental and human health could have been minimised. The EIA legislation ought to specify how long an EIA should be carried out in order to avoid the process being fast tracked for major projects like that at Ngwenya mine without investigating and assessing all relevant issues.

As a result of MTK rushing the EIA process without conducting a proper EIA study, the EIA report was of poor quality. An EIA report ought to deal with all relevant and technical issues such as seasons, rain, wind matter and location. It has to address mitigation measures as well. The Ngwenya EIA report did not take into account issues like seasons, rain, wind matter and location. It failed to make it clear how the project would avoid or mitigate the pollution impacts.[156] The EIA was said to be further flawed as it did not provide critical information including how the site tailing dams would be built and managed, how waste would be disposed of and what would be the emergency response plan for environmental incidents.[157] MTK ignored completely, without providing for mitigation measures, the fact that the mining project would take place within a game reserve, and this was not addressed on the EIA report.[158]

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154 Roux (note 16 above) 100.

155 MC Hlophe 'Challenges faced by the Swaziland National Environmental Fund on Ngwenya mine' 4.

156 A Zwane 'Salgaocar not diverting from iron ore dumps' The Swazi Observer, 14 June 2014.

157 Zwane (note 156 above).

158 SG Iron EIA Report page 21, 48, 54.

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Addressing all relevant and technical issues would mean that key issues like changes that are likely to result from the proposed project, its alternatives, the implications of these changes for the social and ecological environment would be dealt with. Addressing mitigation issues involves introducing measurements to avoid, reduce, remedy or compensate any significant impact.[159] In this case it would mean finding ways to prevent mining from impacting negatively on the game reserve. The EIA regime requires this, but seems not to include any penalty for failure to address impacts fully and comprehensively. One of the main purposes of an EIA after all is to prevent unsustainable development when indicated that certain impacts cannot be mitigated in order to be acceptable.[160]

The weakness of not having an obligation to appoint an EAP is that there is no duty with which the EAP must comply in performing the EIA or preparing the report and that is what leads to the EIA report being of poor quality and no one having to take responsibility for it. MTK did not do a proper job, but neither the proponent or MTK would face any consequence under the EIA regime as a result. The EIA legislation does not include any penalty for failure to address impacts fully and comprehensively. This is a weakness in law because had there been clear obligations to appoint a qualified EAP, and for the EAP to prepare a report of a certain quality subject to a fiduciary duty to the government and the environment, and had there been consequences for non-compliance it would be possible to hold MTK accountable and MTK would likely have done a better job.

This is because an EAP who will face consequences for failing to prepare a good EIA report is more likely to prepare a proper report and then in turn to empower the authority to make better environmental decisions. It is possible that the MTK has some background on environmental sciences, or natural or social sciences, but this is not apparent from the EIA Report.[161] Be that as it may, the lack of such a provision is bad law.

The implications of a poor quality EIA document resulted in the failure to identify and address mitigation or prevention measures for a number of adverse impacts on the environment (water contamination, air pollution, road destruction). In particular reference to water contamination, EIA report lacked clearly defined measurable mitigation targets which would result in thousands of people's water supply at risk. It gave a shallow description of the waste water treatment process. It also did not make mention what would become of the disposal facilities post factory. In addition, the possible chemical composition of the waste water was not described in the EIA report despite the use of a range of chemicals and flocculants and additives to separate the haematite from the soil mass.[162]

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[159] Wood (note 40 above) 212.
[160] Wood (note 40 above) 212.
[161] The EIA Report only states that NTK Sustainable Technologies (Pty) Ltd, a local consulting firm was appointed to undertake the EIA. Page 8 of the SG Iron EIA report.
[162] M Phakathi 'Swaziland: processing plant threatens water in capital' www.ipsnews.net/2011/12/swaziland-processing-plant-threatens-water-in-capital/ (accessed on 28 April 2016).

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The EIA report on impacts on water quality indicates that the project would result in increase in metal content in water, effluent from processing and other activities would pollute ground and surface water, and decrease of water supply to downstream communities.[163] Proposed mitigation measures included waste water being recycled back into the system in the beneficiation process, run-off from concentrate stock yard would be avoided by putting in place bunds around stockpiles.[164] Any chemicals used would be handled and disposed of in accordance with material safety data sheets (MSDS) and national health safety standards and all areas containing chemicals to be bunded and access restricted at all times. It seems that some mitigation measures were included, but perhaps not followed, judging from the resultant environmental degradation. [165]

In spite of this, site inspection reports collected from the Authority show that nearby water sources like dams and rivers were contaminated, boreholes spewed dark-red waste into a stream resulting from SG Iron beneficiation plant discharging effluent into the stream.[166] Not only were the impacts on water sources but also air pollution which was a result of the high levels of dust derived from the exposed ore stockpiles.[167] This indicates that the mitigation measures were insufficient or were not followed.

Most people around the area at Ngwenya and in Mbabane which is the neighbouring city, complained bitterly about the water contamination and the Swaziland Environmental Fund had to provide emergency clean water supply using tanks.[168] SG Iron refused to acknowledge wrong doing and let alone pay associated costs. An important component of sound environmental legislation is the ability to hold polluters accountable.[169]

The Malolotja Nature Reserve is the only place in the world where the endemic orchid Disa intermedia is protected. Linda Loffler, a leading local botanist, wrote to SG Iron, pleading that it remember the orchid and its critical habitat and sole pollinator. It wrote back that an “alternative habitat would be established”. But by the time it wrote back mining had already started and there was no orchid habitat.[170] This shows that the MTK failed to address all pertinent issues hence resulting in an EIA report which was not of good quality.

The challenge here is firstly that the law is silent on timeframe for conducting and completing an EIA. It is accepted that the only plausible reason for such is due to the fact that EIAs differ widely in scope, content and level of technicality, thus it can reasonably be expected that the time needed to conduct, evaluate the reports and to

163 SG Iron EIA report, page 34-37 & 56.
164 SG Iron EIA report.
165 SG Iron EIA report.
166 Site inspection report from SEA.
167 Hlophe (note 155 above) 1.
168 Hlophe (note 155 above) 1.
169 S 5 (d) of EMA provides that those causing adverse effects on the environment shall be required to pay the full social and environmental costs of avoiding, mitigating and/ or remedying those adverse effects.
170 Hlophe (note 155 above) 7.

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make responsible decisions on these matters will also vary.[171] However, not providing for timeframes, the vague provisions of the EIA legislation do not promote legal certainty. The response given by SG Iron on the concern raised about the quick EIA study was that it did not have the kind of time to conduct a proper EIA study.[172] A concern raised over the hurried EIA study was that it did not take into account the seasons, the rain and wind matter and the location which needed to be observed for at least a year.[173] The result of rushing the EIA process was that the EIA study was inadequately conducted, the contamination of water clearly indicate that impact on water quality was not properly investigated. If carried out well and planned carefully it could have helped to safely navigate these risks. Timeframes should be determined on a project to project basis and not leave the duty at the sole discretion of the proponent.[174]

Public participation

Consultation and participation are integral appendages of the EIA process because they lie at the centre of studies to establish social and economic sustainability.[175] Development activities are not only supposed to be sustainable in the eyes of the proponent, but also in the view of the public, especially local communities affected by the activities. The socio-economic assessment of a proposal is an assessment of the impact of the proposal on the public's livelihood.[176]

An effective public participation must be robust and meaningful.[177] There must be proper communication which will deal with the range of cultural and language requirements of the interested and affected parties. The interested and affected parties must also be afforded enough time to participate to enable them to make meaningful and well informed contributions. The inclusion of the views of the interested and affected parties helps to ensure that the EIA process is open, transparent and robust.[178] The EIA process for Ngwenya mine failed on both counts. First there was no effective communication because of a language barrier and second, the public participation failed at Ngwenya because the time periods are too short for public review of the EIA report. As a result, there was no public hearing on the EIA report. Despite the possibility that a public hearing was conducted for the EIA report, it would have been a waste of time because the EIA report was of poor quality and the EIA report was in English.

The scoping meeting was held on the 20 June 2011 and the scoping report was submitted and approved by the Authority. The public was informed about the project

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[171] LJ Kotze & AJ van de Walt 'Just administrative action and the issue of unreasonable delay in the environmental impact assessment process: a South African perspective' South African Journal of Environmental Law and Policy (2003) 39-48.

[172] Hlophe (note 155 above) 4.

[173] Hlophe (note 155 above) 3.

[174] LJ Kotze & AJ van de Walt (note 169 above) 49.

[175] Murombo (note 37 above) 111.

[176] Murombo (note 37 above) 109.

[177] In *Earthlife Africa v Director-General: Department of Environmental Affairs and Tourism and Another 2005 (3) SA 156 (C)* para 79 it was held that an 'interested party must be placed in a position to present and controvert evidence in a meaningful way…'

[178] Roux (note 16 above) 104.

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at the scoping meeting. During the scoping phase, a language barrier hindered effective communication.[179] A language barrier caused problems for some of the people who attended the scoping meeting held by SG Iron. It was reported that members of the local community could not follow the proceedings properly because English was the communication medium being used.[180] The language used in Swaziland is siSwati. If people cannot understand they cannot participate meaningfully in the process and they cannot raise concerns. This defeats the purpose of the scoping or consultation process. As a result of this, there will not be proper engagement between proponent and the interested and affected community. The participation procedure as provided for in the legislation was followed. The legislation is however, silent on the issue of language which then poses a challenge a language barrier became a problem especially for those people in the community that do not understand English.

With regard to timeframes, the concerns raised over the EIA report were that it was carried out over a short period of time and that it was not possible for some interested parties to make meaningful contributions. The EAARR regulations require the public to make substantial comments within a 20-day period. This is done during the consultation and participation stage in the EIA process. This timeframe is provided for the consultation and participation process. During this short timeframe, the public is required to review bulky EIA documents littered with scientific jargon and achieving this in the stipulated timeframe may prove difficult as was the case with the Ngwenya mine EIA where the interested and affected parties were not able to review the document and make comments due to the short time period allowed for review and comments. Taking into consideration the technicality and volume of EIA documents it becomes a problem for the interested and affected parties to make comments within such a short period.

Penalties

The current provision on penalties for environmental crime are insufficient. A person who undertakes any project that may have an effect on the environment without the written approval of the Authority commits an offense and shall, on conviction be liable to imprisonment to a term not exceeding two years or a fine not exceeding one hundred thousand Emalangeni or to both.[181]

If the law is insufficient and ineffective it has the potential of not only affecting the environment through environmental harm e.g. water pollution, it also has the potential of negatively affecting people's health. The importance of a healthy environment to future generations is recognized as the pillar of sustainable development. In Ngwenya, no one was required to pay any penalties, despite the poor quality of the report and environmental impacts that ensued, which could have been managed through a better EIA process. Further, there is no provision for managing or rectifying the consequences of commencing with projects without

[179] W Dlamini 'English proves to be a problem during meet' The Times of Swaziland Report, 21 June 2011.
[180] Dlamini (note 179 above).
[181] S 32 (1) & (2) of the EMA.

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authorisation in Swaziland. There is no provision to make unlawful developments lawful from the date the environmental authorisation is granted. The legislature will be well advised to amend existing penalty provisions in order to address this concern.

Conclusion

While EIA has been successfully introduced in Swaziland, some significant shortcomings remain. Some of the factors militating against sound environmental management and protection are the lack of EAPs, poor participation process, lack of provision on timeframes and insufficient penalty provisions.

Firstly, there is no legal requirement for a proponent to appoint an EAP, nor is there a requirement for the qualification that the EAP must possess. This is a problem because it will lead to EIA reports being prepared quickly without full consideration of all relevant issues. Such blindness will also result in the EIA reports being of poor quality. The EIA report prepared for the Ngwenya mine project suffered from some gaps in vital information relating to seasons, rain, wind matter and location. It also failed among other things, to make clear how the project would avoid or mitigate pollution impacts. Secondly, EIA review and public hearing (consultation and participation) are critical stages in the EIA process and need the input from all interested and affected parties who are well informed. Unfortunately, most of these EIA reports are bulky and written in scientific jargon which proves difficult for most affected members of the communities. Also, these reports and consultations are written and conducted in English and there is no provision in the law to accommodate those that do not understand the English language. This has the potential of causing language barriers between proponent and the interested and affected parties as was seen in Ngwenya during the scoping meeting. Moreover, the period allowed for public review and comment of 20 days is insufficient particularly for complex projects like mining.

Thirdly, the law is silent on timeframe for conducting and completing an EIA. Not providing for timeframes, the vague provisions of the EIA legislation do not promote legal certainty. A provision on timeframe would enable transparent and accurate EIA report preparation and comprehensive analysis. Lastly, the provisions on penalties are insufficient. The penalties are not necessarily proportional to or reflective of the damage caused by the offence. The penalty provisions do not extend liability to consultants completing environmental impact assessments, nor do these penalty provisions include any penalty for failure to address impacts fully and comprehensively.

There is still room for improvement and the need to develop more comprehensive and sustainable approaches to EIA that will ensure that the environment is not degraded and the livelihoods of the people are not put in harm's way. This will require that the three pillars of sustainable development be taken into serious consideration for every developmental activity. It is important that all development projects must be tested whether they are sustainable or meet the objectives of sustainable development. This will require establishment of a provision for the appointment of an EAP. By failing to have such a provision on the appointment of an

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EAP, the EIA legislation fails to facilitate the taking into account of environmental concerns in decision making and this undermines the sustainability of proposed development. It is important to make provision for an EAP and the necessary qualifications that are required for an EAP in order to perform an EIA effectively. This is important in order to control the standard of work the EAP does and to prevent consultants who lack necessary knowledge or expertise to give themselves out as environmental consultants. Had there been such a provision in the EIA legislation in Swaziland, the outcome would have been different.

The public participation problem can be redressed through community empowerment to enable the members of the community that are affected by the project to understand and assess information. Further, the legislation should provide for alternative language use, in order to accommodate all interested and affected parties. This is important because it will ensure more meaningful contribution between proponent and the interested and affected parties. Provision of timeframe will enable transparent and accurate EIA report preparation and comprehensive analysis. Lastly, sufficient penalty provisions help to effectively deter polluters or violators of the EIA legislation. This prevents a situation where the cost of abiding by environmental legislation becomes greater than the cost of violating the same law.

In considering the harm caused on the environment by Ngwenya mine, this illustrates that the development was not a sustainable one. It unduly harmed the environment for the sake of short-term economic gain. While the benefits of environmental protection are often less evident and immediate, they are important as natural resources continue to become scarce and threats to environmental and human health are ever-present.[182] Better management of the use and conservation of all natural resources through the EIA process must be emphasized because future development and future generations depend on the conservation of natural resources.[183]

The analysis has raised some doubts in the adequacy of the legislation and process due to some gaps in the law. When the enabling EIA legislation is lacking or limited, the proponent’s ability to fulfill the requirements for development which is sustainable is weakened. In chapter 3, I undertake a comparative analysis of Swaziland’s EIA legislation with South Africa’s EIA legislation. This will help establish the shortcomings of the Swaziland EIA legislation. These findings can be used to determine how the EIA legislation in Swaziland can be improved.

182 M Edwards ‘Environmental impact analysis http://www.loc.wisc.edu/shapingdane/facilitation/all_resources/impacts/analysis_intro.htm (accessed on 28 May 2016).

183 A Gilpin *Environmental Impact Assessment (EIA) cutting edge for the twenty-first century* (1994) 10.

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CHAPTER 3

A COMPARATIVE ANALYSIS OF THE SOUTH AFRICAN EIA REGIME

EIA legislation differs from country to country, and different countries use different approaches. South Africa and Swaziland are neighbouring but their EIA legislation differs.[184] In South Africa, environmental assessment has been practiced extensively, particularly for large projects, since the 1970s.[185] The EIA process has emerged as a well-developed legislative and policy framework, which has attempted to strengthen environmental governance and the sustainability of South Africa's developmental growth path.[186] South Africa and Swaziland share natural resources and development opportunities. Many projects and programmes transcend national boundaries. Lack of knowledge concerning the different countries' EIA legislation and their different application can hamper development projects and conservation of the environment.

This chapter therefore, seeks to examine some of the gaps in the EIA legislation in Swaziland by discussing and comparing it to the EIA legislation of South Africa. The purpose of identifying the gaps is to identify possible learning points for Swaziland from the South African EIA regime. This is because South Africa is one of the many countries worldwide that has taken steps to implement the global call to take sustainable development seriously and mainstream this concept in all development activities and policies.[187] An important aspect of this trend towards sustainable development is the growth and implementation of laws and policies providing for EIA procedures.[188]

3.1 South African EIA Regime

The Constitution of the Republic of South Africa

The foundational provision relating to the environment is section 24 of the 1996 Constitution, which contains the right to an environment not harmful to health or well-being. All persons in South Africa are entitled to have the environment protected and managed in such a way that it does not impact detrimentally on their or future generations health and well-being.[189] A duty is placed not only on the Government but also on every person in South Africa to manage the environment appropriately.

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184 Roux (note 16 above) 90.
185 Glazweski (note 24 above) 279.
186 Kidd & Retief (note 71 above) 1047.
187 Murombo (note 37 above) 106. S 24(b) of the 1996 Constitution imposes a positive duty on the state to take legislative and other measures to achieve sustainable development. The legislature's commitment to sustainable development is clearly espoused in the NEMA principles that development must be socially, environmentally and economically sustainable and that sustainable development requires the consideration of all relevant factors. See s 2(3) & (4) of NEMA.
188 Murombo (note 37 above) 106.
189 S 24 of the 1996 Constitution has led to the enactment of several key pieces of environmental legislation in South Africa, example NEMA.

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This provision stipulates that everyone has the right to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[190]

South African Environmental legislation

In South Africa, environmental assessment was practised on a voluntary basis since the early 1980s, but from 1996 was given legislative momentum by the incorporation of section 24 in the Constitution.[191] Arguably, one of the most practically important of these legislative measures to protect the environment arising from the right to an environment is that activities which are potentially detrimental to the environment may not commence without an environmental authorisation from a competent authority.[192] The procedure that must be followed in order to obtain an authorisation is an EIA.

Legal provisions for EIA in South Africa were first incorporated in the Environment Conservation Act 73 of 1989 (ECA). Part V of this Act is headed 'control of activities which may have detrimental effects on the environment'. This provision enabled the Minister of Environmental Affairs and Tourism to determine the triggers for environmental assessment and the procedures that are to be carried out in conducting environmental assessment. Regulations for EIA were promulgated in terms of Sections 21[193] and 26[194] of the ECA in 1997 identifying a list of activities and setting out the procedure to be followed by developers seeking authorisation for their activities.[195] This initial regime was replaced by the procedure required by NEMA.[196]

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190 R Paschke & J Glazewski 'Ex post facto authorisation in South Africa environmental assessment legislation: a critical review' *Potchefstroom Electronic Law Journal* (2006) 9 120,122

191 Paschke & Glazewiski (note 190 above) *122.*

192 Paschke & Glazewski (note 190 above) 122.

193 Section 21 of the ECA read as follows-
(1) The Minister may by notice in the Gazette identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.
(2) ……
(3) The Minister identifies an activity in terms of subsection (1) after consultation with-
(a) the Minister of each department of State responsible for the execution, approval or control of such activity;
(b) the Minister of State Expenditure; and
(c) the competent authority of the province concerned.'

194 States that the Minister is empowered to make regulations relating to environmental impact reports, including the scope and contents of the reports and the relevant procedure to be followed.

195 Kidd (note 27 above) 235-236. These regulations set out a list of activities in respect of which environmental impact reports and authorisations were required before one could commence the listed activity.

196 Chapter 5 of NEMA headed Integrated Environmental Management (IEM), sets out the general objectives of IEM and provides for implementation in s 24.

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The EIA process in South Africa is now primarily governed by NEMA, which is an umbrella Act that operates in conjunction with several other pieces of legislation relevant to environmental management.[197] The aim of NEMA is to promote cooperative environmental governance by establishing principles for decision making on matters affecting the environment. The principles set out in section 2 of NEMA elaborate on what sustainable development means in South African environmental governance. They apply to all organs of state that may have a significant effect on the environment through their actions and decisions. One of the key principles of NEMA is that it requires development to be socially, economically and environmentally sustainable.[198]

Section 2(4)[199] lists the factors that should be taken into consideration when sustainable development is considered. These factors include environmental factors,[200] environmental management,[201] and the fact that EIAs should address the social, economic and environmental impacts of activities.[202] Pollution and degradation of the environment must be avoided,[203] and a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.[204] Public participation must also be promoted, as well as building capacity among the most vulnerable and disadvantaged so that they can have meaningful participation.[205]

Authorities in making development decisions must consider sustainable development inclusively. Socio-economic considerations are an integral part of environmental decision making.[206] The importance of the principle of sustainable development was given emphasis in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Limited and Bright Suns Development* where the court held:

> …of particular importance is NEMA's injunction that the interpretation of any law concerned with the protection and management of the environment must be guided

[197] Kidd & Retief (note 71 above) 971 1018.

[198] S 2(3) of NEMA.

[199] S 2(4)(a) Sustainable development requires the consideration of all relevant factors including the following:
(i) ….
(ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
(iii)…
(vi) ……..
(vii) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
(viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

[200] S 2(4)(a) of NEMA.

[201] S 2(4)(b) of NEMA. Environmental management must place people and their needs at the forefront of its concern.

[202] S 2(4)(i) of NEMA.

[203] S 2(4)(a)(ii) of NEMA.

[204] S 2(4)(a) (vii) of NEMA.

[205] S 2(4)(f) of NEMA.

[206] *BP Southern Africa v MEC for Agriculture, Conservation, Environment and Land Affairs 2004 5 SA 124 (T). (Hereinafter BP v MEC).*

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by its principles. At the heart of these is the principle of 'sustainable development' which requires organs of state to evaluate the social, economic and environmental impacts of activities.[207]

Promotion of sustainable development requires consideration of all relevant factors, including minimisation of degradation of the environment if it cannot altogether be avoided, a risk averse and cautious approach about the future consequences of decisions and taking account of the limits of current knowledge.[208]

In Swaziland, section 5 of EMA identifies certain general principles for sustainable environmental management.[209] A duty is placed on the state and all persons or bodies acting in terms of EMA (the government and its officials, the private sector and civil society) exercising powers or functions or making decisions under EMA to give effect to the principles and purpose of the EMA.[210]

Sustainable environmental management in Swaziland encompasses socio-economic, political and environmental interests that must be managed and used in a balanced (sustainable) way to avoid non-sustainability and ensure long-term welfare.[211] It is clear that the principle that socio-economic development and environmental protection are interdependent is recognised both in Swaziland and in South Africa. Weak public participation in Swaziland seems to undermine the principle, however. It is submitted that the environmental principles could be enhanced to make better reference to public participation.

In South Africa, three sets of EIA regulations have been promulgated in terms of chapter 5 of NEMA, replacing the regulations promulgated in terms of ECA and introducing new provisions regarding EIAs. The first of these regulations came into effect in 2006, followed by the 2010 EIA Regulations. Currently, the 2014 EIA regulations are in force.[212] The 2014 EIA Regulations stipulate who may conduct EIAs,[213] what EIAs consist of,[214] the decision-making criteria and timelines,[215] public participation requirements and the procedure for lodging appeals against decisions taken.[216]

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207 *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol (Pty) Limited & Bright Suns Development CC Case No 368/04 (SCA)* at para 15 (hereinafter *MEC v Sasol)*

208 *BP v MEC* (note 206 above) 35.

209 S 2 of EMA describes sustainable management as protecting and managing the use of natural resources, in a manner that, while enabling people and communities to provide for their health, safety, and social, cultural and economic well-being; safeguards the life-supporting capacity of air, water, soil and ecosystems; maintains the life-supporting capacity and quality of air, water, soil, and ecosystems, including living organisms, to enable future generations to meet their reasonably foreseeable needs; and avoids the creation of adverse effects wherever practicable, and where adverse effects cannot be avoided, mitigates and remedies adverse effects as far as practicable.

210 S 6 (1) of EMA.

211 Bray (note 79 above) 539.

212 The 2014 EIA Regulations and its listing notices replace the 2006 and 2010 EIA Regulations.

213 Regulation 5, 12 & 13 of 2014 EIA Regulations.

214 Appendix 3 of 2014 EIA Regulations.

215 Regulation 3, 18, 20, 24 & 25 of 2014 EIA Regulations.

216 Chapter 6 of 2014 EIA regulations.

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The 2014 EIA Regulations list activities that require an environmental authorisation and the list distinguish between two classes of activities, those requiring a basic assessment[217] and those requiring a full scoping and environmental impact report.[218] Certain types of activities are governed by separate legislation.

Activities requiring an EIA

In South Africa, an EIA must be conducted for all listed activities that may have an impact on the environment.[219] Section 24 (4) of NEMA provides for mandatory requirements for the assessment process.[220] The Minister is empowered to identify activities which may not commence without an environmental authorisation.[221] In the case where activities have been declared as listed activities which may have an impact on the environment, these activities cannot be undertaken unless a written authorisation has been obtained from the Minister.[222] In the process to obtain an authorisation, an EIA may be required.

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217 Regulation 19-20 of 2014 EIA Regulations.

218 Regulation 21-24 of 2014 EIA Regulations.

219 S 24 (1) of NEMA. See also Kidd (note 27 above) 239.

220 Kidd (note 27 above) 240.
Procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment –
(a) must ensure, with respect to every application for an environmental authorisation—
(i) coordination and cooperation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state; (ii) that the findings and recommendations flowing from an investigation, the general objectives of integrated environmental management laid down in this Act and the principles of environmental management set out in section 2 are taken into account in any decision made by an organ of state in relation to any proposed policy, programme, process, plan or project; (iii) that a description of the environment likely to be significantly affected by the proposed activity is contained in such application; (iv) investigation of the potential consequences for or impacts on the environment of the activity and assessment of the significance of those potential consequences or impacts; and (v) public information and participation procedures which provide all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in those information and participation procedures; and (b) must include, with respect to every application for an environmental authorisation and where applicable— (i) investigation of the potential consequences or impacts of the alternatives to the activity on the environment and assessment of the significance of those potential consequences or impacts, including the option of not implementing the activity; (ii) investigation of mitigation measures to keep adverse consequences or impacts to a minimum; (iii) investigation, assessment and evaluation of the impact of any proposed listed or specified activity on any national estate referred to in section 3(2) of the National Heritage Resources Act, 1999 (Act No. 25 of 1999), excluding the national estate contemplated in section 3(2)(i)(vi) and (vii) of that Act; reporting on gaps in knowledge, the adequacy of predictive methods and underlying assumptions, and uncertainties encountered in compiling the required information; (v) Investigation and formulation of arrangements for the monitoring and management of consequences for or impacts on the environment, and the assessment of the effectiveness of such arrangements after their implementation;
(vi) consideration of environmental attributes identified in the compilation of information and maps contemplated in subsection (3); and (vii) provision for the adherence to requirements that are prescribed in a specific environmental management Act relevant to the listed or specified activity in question.

221 S 24 (2) of NEMA.

222 S 24A of NEMA. The Minister must publish through the Government Gazette a list of activities requiring an authorization.

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The 2014 EIA Regulations distinguish between two types of assessment, either a Basic Assessment (a process for what one can term minor projects) or a scoping and EIA (projects which are major or complex). The schedule of activities requiring a Basic assessment is contained in Listing Notice 1 and the schedule of activities that must go through the full EIA process is prescribed in Listing Notice 2 of the Regulations.[223]

South Africa lists activities for which an EIA needs to be undertaken. In Swaziland, project categories are distinguished. Swaziland's approach to categorization of projects according to scale and allocation in both the EMA and EAARR implies that from an early stage it is clear that EIAs are not required for small insignificant projects.[224] A problem with the system in Swaziland, however, is that there is no definite standard against which unlisted activities can be measured in order to determine the scale of the activity.[225] In South Africa, the competent authority has the power to decide that activities may not be undertaken without his/her prior consent, even when they are not listed.[226] The Swaziland authority has no similar power under the EMA and EAARR.

Role players

The key role players in South Africa are the competent authority, applicant, consultant and the public. The competent authority is the decision-making official which is the Government.[227] The Government has a mandate to make decisions on applications for environmental authorisations in accordance with the 2014 EIA regulations,[228] unless another sphere of governance is requested to make the decision.[229] The government of South Africa is constituted as having national, provincial and local spheres that are distinct but interdependent and interrelated. The 1996 Constitution allocates legislative and administrative functions to all three spheres of government, giving a wide range of government agencies responsibility for environmental management.[230]

The former Department of Environmental Affairs and Tourism (DEAT) has been split and the environmental affairs component has been joined with water under the direction of the Minister of Water and Environmental Affairs. Within this new

223 Kidd (note 27 above) 244. S 24 (2) of NEMA states that the Minister or an MEC may identify activities which may not commence without environmental authorization from the competent authority. S 24D of NEMA provides for the publication of list of activities or areas identified in terms of S 24(2) of NEMA.

224 Roux (note 16 above) 97.

225 Roux (note 16 above) 97.

226 S 24(2) of NEMA.

227 The DEA is responsible for EIA authorisations at both national and provincial levels. The Minister of mineral resources is the competent authority for authorisations relating to prospecting, mining or exploration. Applications for atmospheric emissions licences are dealt with at the municipal level. See s 36 of the National Environmental Management: Air Quality Act 39 of 2004 (NEMAQA).

228 Regulation 6 of the 2014 EIA Regulations.

229 Approvals of an EIA can be granted either by the DEA, a Member of the Executive Council of a province, or a local authority depending on the circumstances. See s 24 of NEMA and regulation 6 of 2014 EIA regulations.

230 Chapters 5, 6 & 7 of the 1996 Constitution.

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ministerial function, there are two autonomous departments, namely, the Department of Water Affairs (DWA) and the Department of Environmental Affairs (DEA).[231] The DEA remains primarily responsible for EIA authorisations at both national and provincial levels. However, the Minister of mineral resources is the competent authority for EIA authorisations relating to prospecting, mining, exploration or production.[232] Local authorities play a role in granting licences in respect of air pollution and water use. They are also responsible for zoning under the auspices of their competence in municipal planning.[233]

The applicant, who is the person that wants to undertake a listed activity, must obtain an environmental authorisation from the competent authority. Before applying for an environmental authorization, the applicant must appoint an Environmental Assessment Practitioner (EAP) at his or her own cost to manage the application.[234] The EAP will conduct and manage an EIA on behalf of the applicant. Lastly, the public or interested parties are also role players in the EIA process. The public may participate in the application process and may comment on the application.[235]

It is the responsibility of the EAP to assess any particular project and determine whether it should be assessed using the basic assessment or scoping and EIA.[236] EAPs are bound in terms of the 2014 EIA Regulations to be independent, have knowledge of the relevant laws and be objective even though they are retained and paid by the person seeking authorization.[237] If at any stage the competent authority considering the application has reason to believe that the EAP is not complying or has not complied with the requirements set out in regulation 13, the competent authority must inform the affected party and the EAP in writing. The applicant may among other things: refuse to accept any further reports, plans, documents from the EAP, appoint another EAP, and take such steps, as the competent authority requires to remedy the defects.[238]

An EAP can face criminal punishment for contravening the legislation relating to EIA. In *S v Frylinck*[239] an EAP was held criminally liable for providing incorrect and misleading information in a basic environmental impact assessment (BAR) report to

231 Anonymous ‘South Africa’ 316-317 www.saiea.com/dbsa_handbook_update2012/pdf/chapter12.pdf
232 TL Humby ‘One environmental system’: aligning the laws on environmental management on mining in *South Africa Journal of Energy and Natural Resources Law* (2015) 110 115.
233 The 1996 Constitution provides for the following three spheres of government responsibilities: (i) functional area of concurrent national and provincial competence; (ii) functional areas of exclusive provincial competence; and (iii) certain executive and administrative authority at municipal level. Co-operation between these three spheres of government is important. See Chapters 5, 6 & 7 of the 1996 Constitution.
234 Regulation 12 of the 2014 EIA Regulations.
235 Regulation 41 of 2014 EIA Regulations. See also Roux (note 16 above) 9.
236 Regulation 12 & 13 of 2014 EIA Regulations. An Environmental assessment practitioner must be appointed by the proponent to manage the EIA application.
237 Regulation 12 & 13 of 2014 EIA Regulations. See also Murombo (note 37 above) 117.
238 Regulation 14 of the 2014 EIA Regulations.
239 *S v Stefan Frylinck and Another, case number, 14/1740/2010, judgment granted on 6 April 2011 per Magistrate Patterson in the Regional Division of North Gauteng (hereinafter S v Frylinck*).

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the DEA.[240] In *S v Frylinck*, the accused was employed by Mpofu Environmental Solutions CC, and was appointed by the Department of Public Works to conduct a BAR for the proposed development of the Pan African Parliament buildings.[241] In the BAR, the accused indicated that there was no wetland present within a 500m radius of the site and had informed the relevant officer at the DEA that a wetland delineation study was not necessary.[242] However once construction had commenced, concerns were raised by national and local government departments regarding the existence of a wetland on the site. An investigation was initiated and the presence of a wetland in the area was confirmed.[243] Frylinck's conviction highlights the important fiduciary role that EAPs play in the EIA process and the need for the EAP to ensure that he or she presents accurate information in the EIA process and to understand the extent of his or her legal duties under NEMA and the regulations promulgated there under.

The EIA legislation in South Africa has led to the creation of many professional EAPs. EAPs are required to be independent and to express their conclusions regardless of whether or not they favour the application. A failure to do so can lead to severe consequences, as illustrated in *S v Frylinck*. Requiring independent EAPs ensures that all stakeholders participate fairly in the EIA process and contribute equally to the outcome. It also ensures that consultants involved in the EIA process are adequately qualified and do not merely promote the interests of the developer (applicant).

The Swaziland EIA legislation does not mention the consultant or EAP as a role player in the EIA process. The duty is placed on the proponent to carry out the EIA process. If a consultant is used, the responsibility of the proponent of the project is to ensure that the EIA is properly done in accordance with the legislation and regulations.[244] In the final instance, the proponent may face liability for non-compliance, not its consultant.[245]

The EIA legislation provides no obligation on the proponent to appoint an EAP and because there is no obligation to appoint an EAP there is no duty within which the EAP must comply in performing the EIA or preparing the EIA report. The absence of obligations around EAP means that there are no consequences for anyone if the EIA process and the EIA report are not of good quality. When the enabling EIA legislation is lacking or is limited, the proponent's responsibility to fulfill the requirements for development which is sustainable is weakened.

[240] *S v Frylinck* (note 239 above) para 2. Frylinck was charged with fraud and a contravention of regulation 81 of the 2006 EIA Regulations under NEMA.
[241] *S v Frylinck* (note 239 above) para 5, 6.
[242] *S v Frylinck* (note 239 above) para 7.
[243] *S v Frylinck* (note 239 above) para 7, 44.
[244] Roux (note 16 above) 98.
[245] Making use of consultants is not compulsory by law as is the case in South Africa, where the Regulations require the appointment of an independent consultant.

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Application

In South Africa, the applicant must apply to undertake an activity on a prescribed form.[246] This application must be submitted to the relevant provincial or local authority for consideration[247] and in some cases to the Minister.[248] The relevant authority must keep a register of all applications received.[249] The Swaziland EAARR does not explicitly require an application form. There is no provision for registration of the new project.[250] This can lead to poor control over new projects requiring approval from the relevant authority.[251]

Application process - Screening

The South African 2014 EIA Regulations do not specifically refer to a screening procedure. An EIA must be conducted for all activities that may have an impact on the environment.[252] The regulations specify activities subject to EIA. The regulations distinguish between two types of assessments, either a basic assessment or a scoping and environmental impact assessment.[253] Basic assessments are those projects contained in Listing Notice 1[254] that are perceived as not likely to have significant impacts on the environment. The anticipated impacts are easily foreseeable, miniscule and manageable, and therefore it is deemed unnecessary to delay project implementation by requiring an extensive assessment.[255] Scoping and EIA is the thorough environment assessment required for activities contained in Listing Notice 2.[256] The activities listed in Listing Notice 2 are activities that due to their nature and /or extent are likely to have significant impacts that cannot be easily predicted and therefore require detailed assessment through the scoping process.[257] In South Africa, the approach of listing actions is used and in Swaziland categorisation of projects is used.[258]

Application process - Scoping

If the proposed activity is contained in Listing Notice 2, the applicant must follow the full EIA process, which comprises a scoping phase, an EIA report, specialist studies,

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246 Regulations 9 & 10 of 2014 EIA Regulations.
247 Regulation 6 of 2014 EIA Regulations.
248 Regulation 6 of 2014 EIA Regulations.
249 Regulation 5 (3) of 2014 EIA Regulations.
250 The EAARR however makes provision that a person proposing to undertake a project must submit a project brief to the authority containing sufficient information to determine the potential impacts of the project on the environment. See regulation 5.
251 Roux (note 16 above) 99.
252 S 24 (1) of NEMA. See also Kidd (note 27 above) 239.
253 Regulations 19, 20 & 21 of 2014 EIA Regulations.
254 Listing Notice 1 (No 983).
255 Appendix 1 of the 2014 EIA Regulations. Examples include: development of canals exceeding 100 square meters in size, development of buildings exceeding 100 square meters in size & development of facilities or infrastructure for the off-stream storage of water including dams and reservoirs.
256 Listing Notice (No. R 984).
257 Listing Notice 2 activities are therefore higher risk activities that potentially cause higher levels of pollution, waste and environmental degradation. Examples include: development of airports, development and related operation of facilities or infrastructure for the treatment of effluent, wastewater or sewage.
258 Wood (note 40 above) 115.

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public participation and an environmental management plan.[259] After having submitted the application for environmental authorisation, the EAP managing the application must submit to the competent authority a scoping report which has been subjected to a public participation process of at least 30 days and which reflects the incorporation of comments received, including any comments of the competent authority.[260]

The scoping report, including a plan of study for EIA requires inter alia, a description of the proposed activity and any feasible and reasonable alternatives, description of the property and environment that may be affected, description of environmental issues and potential impacts.[261] The scoping report must contain a roadmap for the EIA referred to as the plan of study for the EIA,[262] specifying the methodology to be used to assess the potential impacts, and specialists or specialist report that are required.[263] The applicant may only proceed with the EIA after a competent authority has approved the scoping report and plan of study for EIA.[264]

The South African regulations require that the scoping report must include a description of the public participation process, including a list of interested and affected parties and their comments.[265] The Swaziland EMA provides for consultation with the relevant authorities after the project brief is accepted.[266] After the project brief has been submitted, interested and affected parties have the opportunity to issue their objections, comments or submissions. The EIA legislation in Swaziland does not, however, require that the proponent must include the description of the public participation process. It merely states that the draft of terms of reference must include the results of the consultation. The problem with this is that there is no way of telling whether the public participation was thoroughly and thoughtfully planned and carried out. Whether the proponent or consultant effectively committed to the process and whether all relevant information needed by the interested and affected parties was provided. At Ngwenya for instance, the issue of a language barrier suggests that the public participation process was not thoroughly planned and carried out.

According to the South African regulations, the consultant (EAP) that conducts, among other things, the scoping process must have the appropriate levels of knowledge and expertise.[267] In Swaziland, there is no provision for the requirement of appropriate levels of knowledge or expertise for the proponent or consultant in the process of conducting scoping.[268] In addition, the scoping report in the South African context must be subjected to public participation process of at least 30 days. In Swaziland, scoping must be subjected to public participation in the form of a scoping

259 Regulation 21 of the 2014 EIA Regulations.
260 Regulation 21 of the 2014 EIA Regulations. See also Roux (note 16 above) 99-100.
261 Appendix 2 of the 2014 EIA Regulations.
262 Appendix 2, s 2 (i) of the 2014 EIA Regulations.
263 Appendix 2, s 2 (i) of the 2014 EIA Regulations.
264 Regulation 22 & 23 of the 2014 EIA Regulations.
265 Regulation 21 of the 2014 EIA Regulation.
266 S 32 of the EMA.
267 Regulation 13 & appendix 2, s 2(a) of the 2014 EIA Regulations.
268 Roux (note 16 above) 100.

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meeting, but the EIA regulations and the EMA do not specify any fixed time period for conducting the consultation process.

This is a weakness in law. The scoping process (scoping meeting) at Ngwenya only took one day. It was held on the 20 June 2011. For big projects such as mining, it is important that interested and affected parties are given enough time to engage and make representations. The overarching objective of environmental decision making is the promotion of sustainable development which requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions.[269] It is therefore important that the interested and affected parties understand the implications of the project, voice out their opinions and this requires sufficient time. One day is not enough for all relevant issues to be addressed, understood and meaningful feedback by the interested and affected parties to be given.

Application process - EIA report preparation

If a competent authority accepts a scoping report and advises the EAP to proceed with the tasks contemplated in the plan of study for the EIA, the EAP must proceed with those tasks, including the required public participation process and prepare an EIA report for the proposed activity.[270] The competent authority must within 43 days of receipt of the scoping report accept the scoping report, with or without conditions and advise the applicant to proceed or continue with the tasks contemplated in the plan of study for EIA or refuse environmental authorisation if the proposed activity is in conflict with a prohibition contained in the legislation.[271]

An EIA report must contain all information that is necessary for the competent authority to consider the application and to reach an informed decision.[272] The applicant must within 106 days of acceptance of the scoping report submit to the authority an EIA report. In addition to the information contained in the scoping report, the EIA must inter alia set out the methodology used in assessing the impact, detailed reporting on the manner in which the physical, biological, social, economic and cultural aspects of the environment may be affected an assessment of each identified potential significant impacts and details of the public participation process.[273] NEMA also sets out certain minimum procedures, which must be complied with in investigating assessing and communicating the potential impacts of activities.[274] The competent authority shall within 107 days of receipt of the EIA report, in writing, grant or refuse to grant the environmental authorisation.[275]

In Swaziland, there are no set procedures in the EIA legislation which must be complied with in investigating, assessing or communicating the potential impacts of the project. The EIA legislation does not specify an EIA method or technique to be

[269] P King & C Reddell 'Public participation and water use rights' *Potchefsroom Electronic Law Journal (2015)* 18.
[270] Regulation 22 of the 2014 EIA Regulations.
[271] Regulation 22 of the 2014 EIA Regulations.
[272] Regulation 23 of the 2014 EIA Regulations.
[273] Appendix 3 of the 2014 EIA Regulations.
[274] S 24 (4) of NEMA.
[275] Regulation 24(1) of the 2014 EIA Regulations.

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employed during the preparation of an EIA report. Remarkably, there is no timeframe for conducting and completing an EIA. This is a gap in the legislation. This gap has the potential of negatively affecting the quality of EIA reports, which in turn would defeat the purpose of the EIA process. It is astonishing to note the difference in the legislation in this regard. In South Africa an applicant is given 106 days to submit an EIA report and in Swaziland there is absolutely no timeframe. This obviously favours applicants who would ordinarily be in a hurry get their projects going. The legislation fails to guard against the crossing of t's and doting of i's in the EIA process. For example, the Ngwenya EIA report was conducted in three weeks. Approval of the terms of reference for the scoping meeting was on the 20 July 2011 and by 11 August 2011, the EIA report was made available for public inspection. This is clearly not adequate to conduct a proper EIA especially of such a big project like mining.

Consultation and Participation

The public participation process is intended to ensure that all interested and affected parties are made aware of a proposed activity, have access to information about the activity and its potential impacts and are given the opportunity to voice their opinions and concerns about the proposed activity.[276] Provisions are made under the general objectives of NEMA for adequate and appropriate opportunities for public participation in making of decisions concerning matters affecting the environment.[277]

The 2014 EIA Regulations emphasize the need for public participation as do the NEMA principles. The person conducting a public participation process (EAP) must take into account any guidelines applicable to public participation and must give notice to all potential interested and affected parties of the application which is subject to public participation.[278] This is done by putting up notices,[279] placing advertisements in various newspapers[280] and giving written notice to identified individuals and officials (in particular written notice must be given to the owners and occupiers of the land where the activity will happen, and adjacent landowners and

[276] Glazewski (note 24 above) 270.

[277] S 23 (2) (d) of NEMA. See also s 2 of NEMA which contains a list of national environmental management principles, which are binding on actions of all organs of state that may significantly affect the environment. The first principle provides that environmental management must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental cultural and social interests equitably.

[278] Regulation 13 (c) & 41 (2) of the 2014 EIA Regulations.

[279] Regulation 41 (2) (a) of the 2014 EIA Regulations. Fixing a notice board at a place conspicuous to the public at the boundary or on the fence of the site where the activity to which the application relates and any alternative site mentioned in the application.
A notice, notice board or advertisement referred to in sub regulation (2) must-
(a) give details of the application or proposed application which is subjected to
public participation; and (b) state-
(I) whether basic assessment or S&EIR procedures are being applied to the application;
(ii) the nature and location of the activity to which the application relates;
(iii) where further information on the application or proposed application can be obtained; and the manner in which and the person to whom representations in respect of the application or proposed application may be made. S 41(4) provides that a notice board referred to in sub regulation (2) must-
(a) be of a size at least 60cm by 42cm; and (b) display the required information in lettering and in a format as may be determined by the competent authority

[280] Regulation 41 (2) (c) of the 2014 EIA Regulations

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occupiers, the municipality and any other relevant organ of state).[281] The EAP must also use alternative methods as agreed to by the competent authority in those instances where a person is desirous of but unable to participate in the process due to illiteracy, disability or any other disadvantage.[282]

Interested and affected parties must be given at least 30 days to submit comments on the EIA report.[283] The EAP must keep a list of interested and affected parties and all interested and affected parties must be given an opportunity to comment on all written submissions, including draft reports made to the competent authority by the EAP or applicant.[284] The EAP must ensure that all comments are recorded and submitted to the competent authority.[285]

Interested and affected parties are required to have adequate input in the decision making process concerning the approval of development projects in both countries. South Africa thus provides for an extensive notification procedure. The same cannot be said for Swaziland where the law provides for notification of the publication of EIA report, information as to where the copies of the EIA reports will be made available and a limited period within which to submit any comments.[286]

As already mentioned above, the South African regulations require that an independent EAP must be appointed by the proponent to manage the whole EIA process. He or she must have the necessary skills to manage the public participation process. There is no obligation on the proponent to appoint specifically skilled people to conduct the public participation process in Swaziland.[287]

The provisions on public participation in Swaziland are insufficient in so far as they do not provide for the illiteracy levels of the public. The provision as it stands presupposes that the reader is a person who understands not only the English language, but also technical environmental language. The South African EIA legislation provides for alternative means to be made for members of the public who are one way or the other disadvantaged.[288] This is in line with the principles as set out in NEMA.[289] In particular, the NEMA principles require that decisions must consider the interests, needs and values of all interested and affected parties,[290] and public participation must be promoted, as well as building capacity among the most vulnerable and disadvantaged so that they can have meaningful participation.[291]

This can be seen as helpful to those members of the public who are disadvantaged and Swaziland can learn from South Africa in this regard, in that it can facilitate other

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281 Regulation 41 (2) (b) of the 2014 EIA Regulations
282 Regulation 41 (2) (e) of the 2014 EIA Regulations
283 Regulation 40 (1) of the 2014 EIA Regulations.
284 Regulation 42, 43 of the 2014 EIA Regulations.
285 Regulation 44 of the 2014 EIA Regulations.
286 Regulation 11 of the EAARR.
287 Roux (note 16 above) 103.
288 Regulation 41(2) (e) & 44(2) of the 2014 EIA Regulations.
289 S 2 of NEMA.
290 S 2 (4) (g) of NEMA.
291 S 2 (4) (f) of NEMA.

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means of participation for the disadvantaged members of the public. What can be seen as a challenge to both Swaziland and South Africa is the lack of provision for EIA reports to be written in a manner and language understandable to the ordinary member of the community.[292] The 2014 EIA Regulations do not clearly require the EIA reports and documents to be made available in a language of choice of the interested and affected parties, this being discretion of the EAP.

Penalties

Regulation 48 of the 2014 EIA Regulations states that:

> a person is guilty of an offence if that person provides incorrect or misleading information in any document submitted in terms of the regulations to the competent authority; fails to disclose information to the competent authority;[293] fails to disclose information to the proponent or applicant, registered interested and affected parties and the competent authority all material information in the possession of the EAP;[294] or continues with an activity where the environmental authorisation was withdrawn or suspended.[295]

A person convicted of an offence in terms of these regulations is liable to a fine not exceeding 10 million or to imprisonment not exceeding 10 years or to both such fine and imprisonment.[296]

In terms of section 24F,[297] commencement or continuation of an unauthorised activity is a criminal offence. It is also an offence under section 24F to comply with or contravene the conditions applicable to any environmental authorisation granted for listed activity or specified activity.[298] The maximum penalty for contravention of this is a R5 million fine or 10 years imprisonment or both.[299] Section 24F is augmented by section 24G. Section 24G provides for a procedure whereby the offender (in terms of s 24F) makes an application to the Minister or MEC who may direct the applicant to:

> a) compile a report containing-
>
> (i) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects; (ii) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity; (iii) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how issues raised have been addressed; (iv) an environmental management programme; and (b) provide such other information or undertake such further studies as the Minister or MEC, as the case may be, may deem necessary.

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292 Murombo (note 37 above) 126.
293 Regulation 10 (c) of the 2014 EIA Regulations.
294 Regulation 13(1) (f) of the 2014 EIA Regulations.
295 Regulation 38 of the 2014 EIA Regulations.
296 S 49B of NEMA.
297 National Environmental Management Act: Amendment Act 8 of 2004 (NEMA Amendment Act).
298 S 24F (4) of NEMA Amendment Act.
299 S 24F (4) of NEMA Amendment Act.

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The Minister or MEC considers the report submitted, but only upon payment by the person concerned of an administrative fine not exceeding R5 million (this is in addition to the criminal fine provided for in s 24F, which is a penalty imposed by the court).[300] Upon consideration of the report, the Minister or MEC may direct the person to cease the activity, either wholly or in part, and to rehabilitate the environment within such time and subject to such conditions as the Minister or MEC may deem necessary. The Minister or MEC may also issue an environmental authorisation to such person subject to such conditions as the Minister or MEC may deem necessary.[301]

In Swaziland, a person who undertakes a project that may have an effect on the environment without the approval of the Authority is liable to imprisonment not exceeding two years or a fine not exceeding one hundred thousand Emalangeni or to both. It is markedly cheaper for big mining companies like SG Iron to violate environmental impact assessment laws in Swaziland than it would be in South Africa. The penalties imposed in Swaziland are simply not sufficient. It is not enough to deter environmental crime or to make companies like SG Iron to act in a diligent manner and guard against contravening environmental laws if they will only be fined one hundred thousand Emalangeni (equal to R100, 000). On the contrary, they will simply ignore the legislation and contravene environmental provisions in turn defeat the purpose of the EIA legislation. These companies have immense financial backing so if the penalty is simply to pay one hundred thousand Emalangeni then for them it is quicker to just pay the penalty and do the work.

Further, there is no provision for managing or rectifying the consequences of commencing with projects without authorisation in Swaziland, as is in South Africa with section 24G. There is no provision to make unlawful developments lawful from the date the environmental authorisation is granted. The nature of section 32 of the EMA creates the impression that once a proponent pays the fine it is all systems go in that the proponent may continue with it project regardless of the environmental harm caused. This provision does not state what the powers of the Authority or the Minister are. It does not state whether the proponent will be ordered to cease operations or continue, whether the proponent will be ordered to carry out an EIA subject to public participation or whether the state can proceed with criminal charges against the proponent who committed the offence. Section 32 of EMA is insufficient because the harm the EIA legislation seeks to prevent will occur anyway. It is a gap in law, a gap that will surely be utilised by recalcitrant proponents.

Conclusion

The comparative analysis indicates that the EIA systems of Swaziland and South Africa are comparable in terms of identification of role players, list or categorization of activities for which an EIA should be undertaken, screening and consultation and participation. However, South Africa's EIA legislation is more advanced in terms of provision of EAP's, scoping, EIA report preparation, consultation and participation and penalty provisions.

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[300] S 24G (4) of NEMA. See also Kidd (note 27 above) 245

[301] S 24G (2) of NEMA. See also Kidd (note 27 above) 246.

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The analysis has revealed that for activities requiring an EIA, South Africa lists activities for which an EIA needs to be undertaken and in Swaziland, project categories are distinguished. In South Africa, the competent Authority has the power to decide that activities may not be undertaken without his/her prior consent even when they are not listed. The Authority in Swaziland has no similar power under EMA. Secondly, in Swaziland, the EIA legislation does not have a provision for the appointment of an EAP. In South Africa an Applicant must appoint an EAP to conduct and manage an EIA on behalf of the applicant.

Thirdly, for the application process in South Africa, the applicant must apply to undertake an activity on a prescribed form and a register of all applications received must be kept by the relevant authority. The Swaziland EAARR does not explicitly require an application form. There is also no provision for registration of the new project. Fourthly, the scoping report in South Africa which must be subjected to public participation of at least 30 days must include a description of the public participation process including a list of interested and affected parties and their comments. The Swaziland EIA legislation does not require the proponent to include the description of the public participation process in its project brief. Further, in Swaziland scoping must be subjected to public participation in the form of scoping meeting but the EIA regulations and EMA do not specify fixed time period for conducting the consultation process. Fifthly, with regard to EIA report preparation, an Applicant in South Africa is given 106 days to prepare and submit an EIA report. In Swaziland, there is absolutely no timeframe in which an EIA report should be prepared and submitted.

Sixthly, the South Africa regulations require that an independent EAP must be appointed by the proponent to manage the whole EIA process and he/she must have the necessary skills to manage the public participation process. In Swaziland there is no obligation in the EIA legislation to appoint specifically skilled people to conduct the public participation process. A further challenge to the public participation process in Swaziland is that, the provisions do not provide for the illiteracy levels of the public, whereas the South African EIA legislation provides for alternative means to be made for members of the public who are in one way or the other disadvantaged. Conversely, both Swaziland and South Africa lack provision in their EIA legislation for EIA reports to be written in a manner and language understandable to the ordinary member of the community. Public participation is important to the success of EIA and subsequently to the achievement of sustainable development.

Lastly, compared with South Africa, the penalty provisions in Swaziland are insufficient to deter environmental crime. Further there is no provision for managing or rectifying the consequences of commencing with projects without authorization in Swaziland as is in South Africa with section 24G.

I have shown that the current provisions relating to EIAs in the EMA and EAARR are not appropriate and sufficient to deal with proper environmental preservation and protection and, such flaws may hamper the effective carrying out of an EIA and result in environmental degradation. South Africa has one of the world's most

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advanced environmental legal frameworks entrenched with the environmental right to ecologically sustainable development.[302] EIAs have proven useful tools towards achieving sustainability principles as enshrined in section 2 of NEMA as well as contributing towards sustainable development. Further, the courts in South Africa have played a role in promoting the balancing of socio-economic and environmental concerns using EIA to achieve sustainable development.[303]

Swaziland can learn from South Africa and attempt to align some of its legislative provisions with that of South Africa in order to achieve effective EIA system and improvement of environmental protection. In its EIA legislation, Swaziland can make provision for the appointment of an EAP to conduct the EIA process. It can make provision for timeframe for conducting the screening process and for the preparation of an EIA report and also make the time period for public review of the EIA report longer than the 20 days. It can impose severe penalty provisions for violators of the EIA laws. In chapter 4, I make conclusions and recommendations. These conclusions and recommendations can be used to strengthen the EIA procedure and practices in Swaziland.

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302 S van Wyk 'the role that EIAs are presently playing and can potentially play in promoting sustainability in South Africa'.

303 *BP v MEC (*note 206 above*). See also* *MEC v Sasol* (note 207 above*).*

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CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

This study has in chapter one, discussed the meaning and importance of EIA and sustainable development. The motivation for this study was that the granting of the mining licence to SG Iron to mine iron ore at Ngwenya mine was the biggest environmentally relevant undertaking in Swaziland since the promulgation of the environmental laws. The study has examined the effectiveness and has exposed the gaps in the EIA legislation in Swaziland.

In chapter two, the legislative framework for EIA in Swaziland was discussed. This enabled me to analyse the EIA which was conducted for the Ngwenya mine project. This analysis revealed some inadequacies in the EIA legislation in Swaziland. The inadequacies concern the failure to require an EAP as a matter of law and failure to impose clear duties on the EAP in the EIA law. Further, the analysis revealed a weakness in the law concerning the public participation process. The consequences of the inadequate EIA legislation in Swaziland, resulted in some environmental harm.

In chapter three, a comparison of the Swaziland and South Africa EIA legislation was discussed. The purpose was to establish the shortcomings of the Swaziland EIA legislation. The discussion of Swaziland and South Africa EIA legislation reveals some similarities and differences. Some of the similarities are the identification of role players, list or categorization of activities for which an EIA should be undertaken, consultation and participation is provided. Differences are in regards to penalty provisions, application and the role players. The comparison between these two jurisdictions offers numerous potential opportunities for Swaziland to improve its current EIA legislation. In this chapter, I seek to make conclusions and recommendations for the Swaziland EIA legislation.

In sum, a number of gaps are evident from the above discussion. The provisions in the EMA and EAARR suffer from the following problems:

Activities requiring an EIA

South Africa lists activities for which an EIA needs to be undertaken. In Swaziland, project categories are distinguished. The competent authority in South Africa has the power to decide that activities may not be undertaken without his/her prior consent, even when they are not listed. This means that the activities that are listed are not the only activities subject to compulsory EIA but the competent authority has the discretionary power to decide whether an EIA is required for non-listed activities. The Swaziland authority has no similar power under the EMA and EAARR. If no authorization is required in terms of the EIAL legislation, an activity that may have a significant impact on the environment may be implemented without an EIA. Swaziland would benefit from implementing a similar provision. Swaziland should revise its provision on the scope of activities that require an EIA and those activities that are not listed under the First Schedule of the EAARR.

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The Swaziland EIA legislation does not provide for the appointment of an EAP. The absence of a provision on the appointment of a qualified, independent EAP to conduct an EIA on behalf of the proponent can be viewed as a major gap in the legal framework and subsequently, the realization of the EIA process. It is also a weakness in the EIA law because since there is no obligation to appoint an EAP and obligations around the EAP or consultants, there are no consequences for the EAP or consultant if the EIA report is not of good quality as they cannot be held accountable. The provisions in the EMA and EAARR in this respect are insufficient to deal with proper environmental preservation and protection.

There should be a provision for the appointment of a dispassionate professional to deal with EIAs in Swaziland. Had the EIA laws provided for an EAP, the environmental issues that arose as a result of the project would have been fully addressed. The quality of the EIA report would likely have been better, the environmental harms would have been predicted and prevented. The Minister must also register and maintain a register of EAPs and consulting companies qualified to conduct EIAs. EAPs undertaking EIAs must be civilly and criminally accountable for information furnished on the environmental impact study.

Public Participation

The problem with public participation can be attributable to the following factors: the complex, technical form in which the EIA reports are presented; language barriers; illiteracy among the affected community; no requirement for description of the public participation process and no obligation on the proponent to appoint specifically skilled people to conduct the public participation process.

EIAs relating to complex technical or scientific projects (i.e. those in mining extraction industries) are commonly presented in hefty tomes that are largely drafted in nearly impenetrable scientific jargon.[304] The presentation of EIAs in such a technical form prevents their message from being communicated to readers who are not specialists. They prevent interested and affected parties who are by no means specialists from making meaningful contributions in the form of comments to these EIA documents. In Swaziland, there is no formal requirement for the systematic communication of EIA findings and recommendations to stakeholders and to the public.[305] The public is merely notified of the publication of the EIA by the proponent, informed of where the copies of the EIA reports will be made available for public inspection, and given a short period within which to submit any comments to the relevant environmental authority. There is no legal obligation placed on the proponent to educate the public or to break down the report into digestible pieces of information for members of the community.[306]

304 JO Kakonge 'Communicating the findings and recommendations of environmental impact assessment (EIA) reports in Africa: some observations *Global Media Journal 2013 (7) 1 4.*
305 Kakonge (note 304 above) 5.
306 Kakonge (note 304 above) 5.

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The EIA legislation in Swaziland and in South Africa should make a provision for EIA documents to be made in simple language and the information contained therein be disseminated to the interested affected parties and communities especially to those readers who are not specialists. Project proponents and environmental consultants should also endeavour to break this information down into simple, easily understandable parts that can be absorbed by stakeholders and the public.[307] Further, the EIA legislation should require that local leaders and experts should be used to communicate the EIA findings and recommendations to stakeholders and to the public. Local leaders and experts have a better appreciation of the cultural and linguistic barriers to effective communication of EIA findings and recommendations to affected communities.[308]

Whilst public participation is inadequately addressed in the legislation in Swaziland, environmental awareness and education does not feature.[309] The EAARR provides opportunities for the public to participate, however, attendance at meetings is usually poor and active participation is usually limited to a few individuals such as environmental consultants who have read the documents.[310] This can be attributable to lack of awareness of the roles and benefits of an EIA process. This obviously, waters down the effectiveness of public participation. Government needs to provide education opportunities to all, specifically in environmental education. Without an informed and environmental conscious Swazi community, the ideals of sustainable environmental management will remain but a pipe dream.[311]

The NEMA 2014 EIA Regulations do not clearly require reports and documents to be made available in the language of choice of the interested and affected parties, this being a matter at the discretion of the EAP. The Swazi EIA legislation also suffers from such a defect. The language used by interested and affected parties must be taken into account when serving a notice, holding a public meeting and writing an EIA report. South Africa and Swaziland will be well advised to amend its EIA legislation to include language used by interested and affected parties for all EIA processes.

The Swaziland legislation does not provide for alternative means to be made for members of the public who are in one way or the other disadvantaged from taking part in public participation, as is the case in South Africa. Rowan-Robinson[312] argues that this goal can be achieved in a variety of ways such as using print media, newsletters and leaflets or booklets to explain the main elements of the EIA to literate stakeholders and members of the public. In order to reach illiterate members of the community other means of communication can be used: public debates and public enquiries into the project and its impacts, visual aids and billboards, television and radio programmes. Swaziland can incorporate these various ways and can also

307 Kakonge (note 304 above) 7.
308 Kakonge (note 304 above) 7.
309 Bray (note 84 above) 527 548.
310 Kaetimilwe (note 58 above).
311 Bray (note 84 above) 548.
312 J Rowan-Robinson (et al) 'Public access to environmental information: a means to what end?' *Journal of Environmental Law* (1996) 8 (1) 19-42.

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learn from South Africa in this regard and provide in its EIA legislation reasonable alternative means of participation and recording comments of the members of the public who are in one way or the other disadvantaged. Such a provision will be helpful to those members of the public who are disadvantaged and this will lead to an effective public participation process.

Further, the EIA legislation in Swaziland does not require that the proponent must include a description of the public participation process in its scoping report. The South African regulations require that the scoping report must include a description of the public participation process, including a list of interested and affected parties and their comments. There is a need for the EIA legislation in Swaziland to require that the project brief must include a description of the public participation process, including a list of interested and affected parties and their comments. This will enable the Authority determine whether the public participation was thoroughly and thoughtfully planned and carried out.

Moreover, there is no obligation under the EIA legislation in Swaziland for the proponent to appoint skilled people to conduct the public participation process. The NEMA 2014 EIA regulations require that an independent EAP must be appointed by the proponent to manage the whole EIA. The EAP must have the necessary skills to manage the public participation process. Swaziland can benefit from implementing a similar provision. The EIA legislation must make a provision for the appointment of an independent and skilled EAP to manage the public participation process.

Notice period/ time frames

The public participation timeframes, in the Swaziland context, are short to have a meaningful participation in environmental decision. During this short timeframe, the public is required to among other things, review bulky EIA documents with complex scientific jargon and make meaningful comments. Achieving this in 20 days may prove difficult. This can be addressed by making the time period for participation longer. Time given for public participation should be increased from 20 days particularly for complex projects.

Some provisions do not stipulate the time period at all. For instance, there is no period within which an EIA should be prepared. Also, the scoping must be subjected to public participation in the form of a scoping meeting but the EIA regulations and EMA do not specify fixed time period for conducting the consultation process. Timeframes for the EIA report preparation should be provided for in the EIA legislation as this will promote legal certainty. While it is accepted that EIAs differ widely in scope, content and level of technicality and the time needed to conduct, evaluate the reports and to make responsible decisions on these matters will also vary, providing for some form of timeframe on a project-to-project basis is important. This will avoid cases of having poor quality EIAs because of the EIA study being rushed without being properly investigated and all relevant issues being considered as it was seen with the Ngwenya mine EIA. Setting target timelines for conducting and concluding an EIA report will enable transparent and accurate report preparation and comprehensive analysis.

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One of the concerns as seen in chapter two was that the Ngwenya mine EIA was conducted over a short period and thus it was not possible for some interested parties to make meaningful contribution. In addition, the legislation is silent on whether the days given for participation include or exclude weekends and public holidays. The legislation must be clear on the participation days, whether they include or exclude weekends and public holidays.

Penalties

Environmental harms are serious harms and deliberate contraventions of environmental laws and those that cause significant harm ought to be punished with serious penalties. The current regulatory sanctions for contravening environmental laws are not sufficient to deter offenders of environmental legislation. The current provisions provide that an offender will be liable to pay a fine not exceeding one hundred thousand Emalangeni or imprisonment not exceeding two years or to both. This is not sufficient. Compared with the South African EIA legislation, it seems like it may be markedly cheaper for big mining companies like SG Iron (Pty) Ltd to violate environmental impact assessment laws in Swaziland. As a result, the purpose and aim of the EIA legislation is not served as the penalty provisions are not enough to deter environmental offenders from causing environmental harm.

The EIA legislation in Swaziland should provide for severe penalties for environmental crimes. If the EIA laws imposed a greater punishment for companies like SG Iron, it would have been more incentivized to carry out a proper EIA.

The penalty provisions must extend liability to consultants carrying out an EIA. To accompany the responsibility of the consultants to carry out an EIA, they should be held liable for the information they provide in the EIA reports. Such a provision may help deter consultants from minimizing the risk of harm to the environment that they report on their work.[313]

The penalty provision should also expand liability to cover social, cultural, economic and environmental impacts. Liability should be broadly expanded to explicitly hold proponents financially responsible for damage they cause to indigenous knowledge systems, local economies, livelihoods of the local community and damage to biological diversity (air, water or soil contamination).[314]

Lack of a rectification procedure

There is no uncertainty in Swaziland about the wrongfulness of the unlawful commencement of an activity that may have an effect on the environment without prior authorisation. However, it is not clear what the most environmentally accountable response to such commencement of unlawful activities should be. Criminal prosecution is not an ideal way to address a development that has

313 Anonymous 'Environmental assessment for mining activities' http://www.fairmining.ca/guide/environmental-assessment-for-mining-activities/ (accessed on 29 September 2016).

314 Anonymous (note 313 above).

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commenced without authority, since it is not aimed at remediation of any damage done or at assessment of the project subsequent to its commencement.[315]

The absence of any provision in the EMA for managing or rectifying the consequences of listed or classified activities that have been unlawfully commenced creates a lacuna in the EIA legislation. Although *ex post facto* environmental authorisations undermine key principles of environmental management, for example, preventative and precautionary principles,[316] one of the fundamental purposes of EIA is to provide for measures of mitigation of environmental damage caused by the activity, where necessary. Far from being a pointless exercise to require an EIA after the development has commenced, an EIA could identify mitigation measures that ought to be taken prospectively.[317]

A rectification provision provides a remedy that is tailor-made for the situation in which a proponent commences an activity without necessary authorisation and empowers the relevant Authority in effect, to require the proponent to submit an EIA report, albeit after commencement of the project.[318]

Swaziland should consider including a provision for rectification in its EIA legislation. The provision in section 32 of EMA as it stands suggests that commencement of categorised activities without authorisation is a possibility. Such provision needs to be augmented by rectification provision to the effect that if a proponent commences an activity without authorisation that proponent may apply to the relevant Authority for authorisation. This will make the unlawful activity lawful going forward.

The Minister or Authority should be given power to decide on what levels of impact assessment and public participation are required from the proponent. The proponent should before being granted an authorisation be made to pay an administration fine which will be decided upon by the Minister. Even if a proponent has applied for an authorisation and paid the administration fine, criminal charges should still be levelled against such proponent who commits the offence of undertaking a project without authorisation. Such a provision will be a disincentive.

Conclusion

I have shown in this paper how EIA as a tool can be used to facilitate informed and environmentally sound decision making on environmental consequences of a proposed activity and promote sound and sustainable development through identification of appropriate enhancement and mitigation measures. I have also highlighted how the EIA provides benefits in the process to promote sustainable development. However, as I have shown in chapters 2 and 3, when the enabling legislation is lacking or is limited the proponent's responsibility to fulfill the requirements for development that is sustainable is weakened. Moreover, such gaps in the EIA legislation limit the ability of decision makers to keep track of development

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[315] M Kidd 'EIA and the four Ps: some observations from South Africa' in NJ Chalifour; P Kameri-Mbote; LH Lye & JR Nolon (eds*) Land use for sustainable development* (2007) 181 191.
[316] Paschke (note 190 above) 141.
[317] Kidd (note 315 above) 192.
[318] Kidd (note 315 above) 192.

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activities that have the potential to cause significant adverse impacts on the environment, and to ensure that adequate mitigating measures are integrated into the planning of the project.[319] Given the difficulties in the scope for activities requiring an EIA, communication, the period allowed for public review and comments, lack of provision for appointment of an EAP, lack of provision on timeframes, lack of rectification provisions and, insufficient penalty provisions it is clear that these undermine the achievement of sustainable development in Swaziland. It is therefore imperative that the EIA legislation in Swaziland develop more comprehensive and sustainable approaches to EIA that will ensure that the environment is not degraded and that the livelihoods of the people are taken into full consideration.

[319] Murombo (note 37 above 29) 108.

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