



# IN GOOD COMPANY?

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CONVERSATIONS  
AROUND TRANSPARENCY  
AND ACCOUNTABILITY  
IN SOUTH AFRICA'S  
EXTRACTIVE SECTOR



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AND ACCOUNTABILITY IN SOUTH AFRICA'S  
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# CONTENTS

Abbreviations and acronyms	vi
Introduction	1
The coalition is king! Perspectives on the Publish What You Pay coalition model Carol Kiangura	5
Silicosis: The hidden legacy of gold mining in South Africa Georgina Jephson	11
Do social and labour plans belong to communities? Clarity, accountability and responsiveness in the legislative framework Louis Snyman and Robert Krause	17
How increased transparency in the mining sector would facilitate the realisation of environmental rights Li-Fen Chien and Tracey Davies	25
Who's afraid of transparency? A critical appraisal of transparency as an investment imperative for the South African mining industry Dr Fola Adeleke and Rachel Ward	31
How mining authorities' failure to invest in environmental compliance monitoring and enforcement capacity violates fundamental rights Catherine Horsfield, Marthán Theart, Ayesha Motala, Matome Kapa and Melissa Fourie	39
The political economy of sustainable mining transition in South Africa Saliem Fakir, Manisha Gulati and MB Ting	49
Harnessing mobile technology for improved worker engagement in South Africa's mining industry Antoine Heuty	57
Alternative Mining Indaba and Investing in Africa Mining Indaba: Reflection Piece Baone Twala	71

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# ABBREVIATIONS AND ACRONYMS







<b>AMI</b>	Alternative Mining Indaba
<b>AMSA</b>	ArcelorMittal South Africa
<b>BBBEE</b>	Broad-Based Black Economic Empowerment
<b>CAL</b>	Centre for Applied Legal Studies
<b>CER</b>	Centre for Environmental Rights
<b>COIDA</b>	Compensation for Occupational Injuries and Diseases Act
<b>DEA</b>	Department of Environmental Affairs
<b>DMR</b>	Department of Mineral Resources
<b>DWS</b>	Department of Water and Sanitation
<b>EIA</b>	environmental impact assessment
<b>EITI</b>	Extractive Industries Transparency Initiative
<b>EMRI</b>	environmental mineral resource inspector
<b>ENE</b>	Estimates of National Expenditure
<b>ESMA</b>	European Securities and Markets Authority
<b>FDI</b>	foreign direct investment
<b>GDP</b>	gross domestic product
<b>HSRC</b>	Human Sciences Research Council
<b>ICT</b>	information and communications technology
<b>ICT4D</b>	ICT for development
<b>IDP</b>	Integrated Development Plan
<b>IMF</b>	International Monetary Fund
<b>IMI</b>	Investing in Africa Mining Indaba
<b>JSE</b>	Johannesburg Stock Exchange
<b>MBOD</b>	Medical Bureau for Occupational Diseases
<b>MEC</b>	Minerals–Energy Complex
<b>MIGDETT</b>	Mining Industry Growth, Development and Employment Task Team
<b>MoU</b>	Memorandum of Understanding
<b>MPRDA</b>	Mineral and Petroleum Resources Development Act
<b>NEMA</b>	National Environmental Management Act
<b>NEMBA</b>	National Environmental Management: Biodiversity Act
<b>NGO</b>	non-governmental organisation
<b>NPA</b>	National Prosecuting Authority
<b>ODIMWA</b>	Occupational Diseases in Mines and Works Act
<b>OSF-SA</b>	Open Society Foundation for South Africa
<b>PAIA</b>	Promotion of Access to Information Act
<b>PWYP</b>	Publish What You Pay
<b>SAMRAD</b>	South African Mineral Resources Administration System
<b>SAWIS</b>	South African Waste Information System
<b>SCA</b>	Supreme Court of Appeal
<b>SLP</b>	Social and Labour Plan
<b>SRI</b>	socially responsible investment
<b>TB</b>	tuberculosis
<b>VEJA</b>	Vaal Environmental Justice Alliance

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## Conversations around Transparency and Accountability in South Africa's Extractive Sector

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### Introduction

On 16 August 2012, over three years ago, 34 mine workers were killed at Marikana (near Rustenburg) following a stand-off with the South African Police and as a direct result of a wage negotiation and dispute with a multinational platinum-mining company, Lonmin plc. Ever since then, the extractive sector in South Africa and the South African government have had to confront and attend to intense local, regional and global scrutiny in respect of the sector's operations, profits and policies.

The deaths of those 34 men is still something that haunts South African society, because they bear an eerie resemblance to the apartheid government's heavy-handedness with regard to industrial disputes and often in collusion with private companies.

Since then, the nature of community and civil society engagement in relation to the extractive sector (mining industry) has changed significantly and become more robust. Throughout the last three years, the widows and partners of those killed and injured on that fateful day have sought to establish the truth about the events leading up to the deaths by trying, by way of various efforts, to hold both state and private power accountable. Their investment in 'truth-finding' is not uniquely South African, as communities across the region and in the rest of Africa face similar struggles. With the assistance of many of our own grantees and partners, these formidable women have also attempted to interrogate the specific nexus between private and political power in the extractive sector and have catalysed civil society to look beyond just mine licensing and black economic empowerment deals. Given the prevalence of mining operations in Africa, and the particular role that the extractive industry plays in shaping several regional economies (and state policy frameworks generally), the issue of transparency in the extractive sector is a cross-cutting theme across the Open Society Foundations. It is an area of work that we are jointly concentrating on together with our colleagues in both our Southern and West African offices.

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When we established our in-house Research and Advocacy Unit (RAU) in early 2014, we mandated its inaugural head, Alan Wallis, to, inter alia, identify several projects that could complement the work of our grantees and also encourage new thinking in this sector, so that we would be able to respond to several emerging issues in the sector with useful, timely and thorough research and evidence. One such project is *In Good Company? Conversations around Transparency and Accountability in South Africa's Extractive Sector*.

We hope that this collection of work and research will begin to assist communities in their demands for increased engagement, collaboration, transparency and accountability in the sector.

I want to thank Alan in particular for the vision and commitment he showed in initiating *In Good Company? Conversations around Transparency and Accountability in South Africa's Extractive Sector*, which we officially launched at the Alternative Mining Indaba in Cape Town in early 2015. Ichumile Gqada, Alan's successor, and the new head of our Research and Advocacy Unit, completed the project together with Popo Mfubu, and I am very proud to finally present the inaugural edition. This is a valuable collection of different perspectives on several issues affecting South Africa's extractive industry, a collection that documents both positive and negative trends and developments in the sector. It is a resource, a guide, and, potentially, an advocacy tool that includes profiles of the work being undertaken by organisations and communities affected by mining operations, including key challenges affecting resource governance in South Africa, and it offers some possible solutions. The inaugural edition features contributions from authors representing eight organisations working in South Africa's extractive sector, some of whom we also fund and are our grantees. It covers a broad range of themes, including sustainable mining, transparency, illicit financial flows, mine-worker health and compensation, environmental sustainability, and opportunities for using mobile technology to improve engagement in the mining industry. This edition deliberately attempts to cover a set of broad and diverse themes, but future editions will have a thematic focus in order to deepen our collective understanding and engagement concerning specific issues that affect the sector.

The release of the inaugural edition is especially relevant because the Marikana Commission of Inquiry has now completed its work and has presented its Final Report to the President, prompting several communities affected by mining operations, as well as civil society organisations, to seek a range of changes in the sector, including greater accountability. A new mining minister has been appointed in South Africa, albeit under questionable circumstances, and communities are increasingly taking action to demand a greater share in mining revenues. The gold-mining industry, however, is experiencing a global decline in employment and locally is itself facing one of the largest class-action suits pertaining to silicosis liability in respect of former gold-mine workers in the region. For these reasons, conversations about the role of the mining sector in the South African economy are becoming increasingly polarised. It is therefore critical that the experiences, expertise and insights of affected communities, mine workers, public-interest organisations and lawyers, academics, development experts, economists, government ministries, and mining houses are widely shared and heard. Inclusive, honest and multistakeholder conversations about our industry are consequently essential. I am hopeful that the inaugural edition of *In Good Company? Conversations around Transparency and Accountability in South Africa's Extractive Sector* will encourage such conversations.

THE GOLD-MINING INDUSTRY, HOWEVER, IS EXPERIENCING A GLOBAL DECLINE IN EMPLOYMENT AND LOCALLY IS ITSELF FACING ONE OF THE LARGEST CLASS-ACTION SUITS PERTAINING TO SILICOSIS LIABILITY IN RESPECT OF FORMER GOLD-MINE WORKERS IN THE REGION.



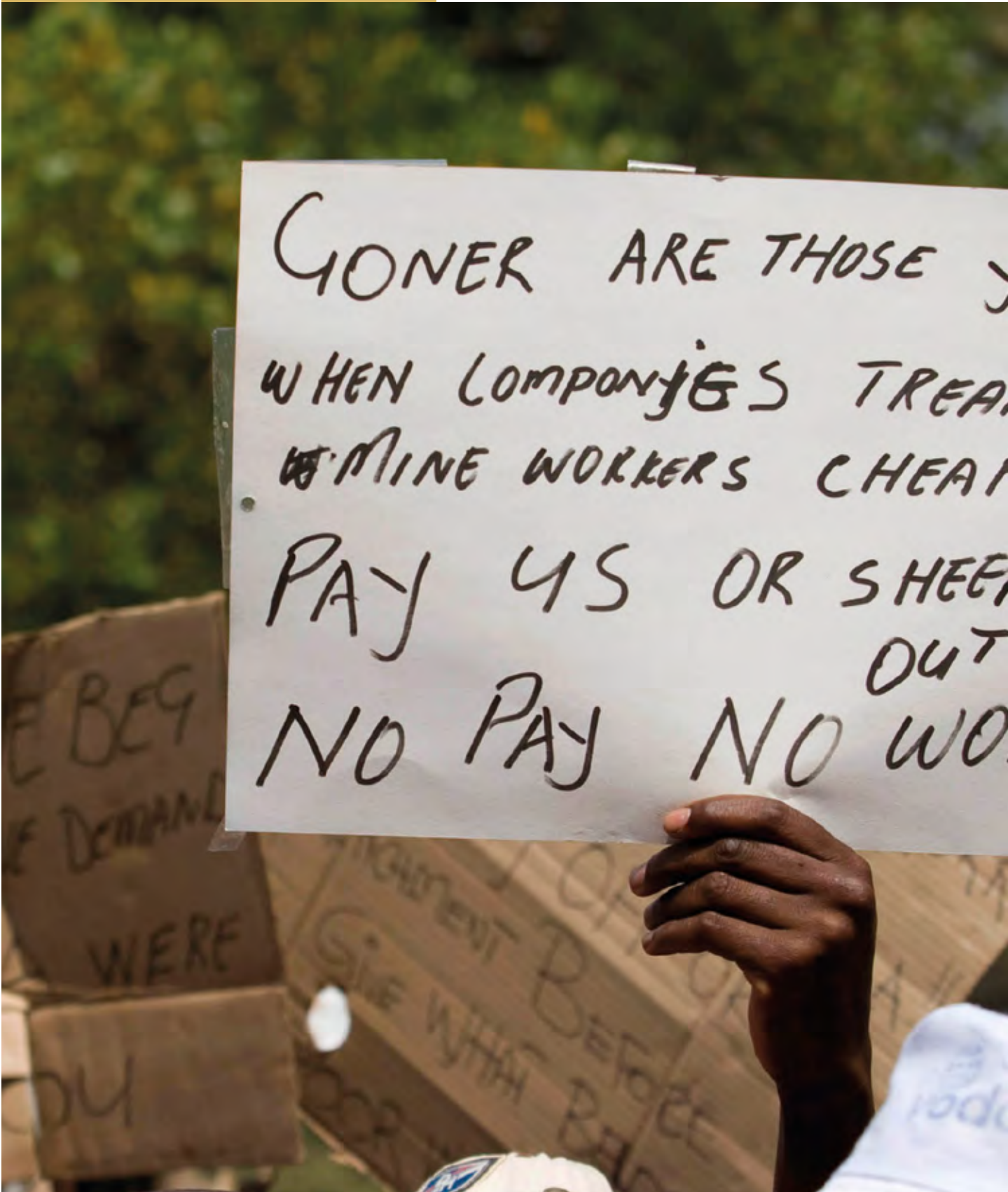
MINING IS A CATALYST FOR LOCAL ECONOMIC DEVELOPMENT AND JOB CREATION. HOWEVER, WEAK GOVERNANCE AND A LACK OF SUFFICIENT TRANSPARENCY, IN AN INDUSTRY ON WHICH MILLIONS OF SOUTH AFRICANS DEPEND FOR SURVIVAL, CAN FUEL POVERTY AND INEQUALITY.

Our inaugural edition is dedicated to the women of Marikana for their collective and admirable passion for justice and accountability, which continues to motivate our own work aimed at meaningful engagement, rights protection, openness, accountability and transparency in South Africa's extractive sector. The attainment of such objectives cannot but have a meaningful impact on the lives of those most affected by the extractive sector in our country.

**Fatima Hassan**

Executive Director: OSF-SA  
Cape Town, September 2015







By Carol Kiangura

# THE COALITION IS KING!

## Perspectives on the Publish What You Pay coalition model

**Publish What You Pay (PWYP)** is a global network of civil society organisations that are united in their call for an open and accountable extractives sector so that oil, gas and mining revenues improve the lives of women, men and the youth in resource-rich countries and extraction is carried out in a responsible manner that benefits countries and their citizens. Our global network is made up of more than 800 member organisations across the world, including human rights, development, environmental and faith-based organisations. Organisations can be members on an individual level, but, in several countries (more than 35), network members have joined forces to create national coalitions. In Africa alone, we have about 21 coalitions.

Our coalition model is based on the belief that the coordinated and collective actions of a diverse coalition of organisations will be most effective in influencing key stakeholders and driving policy change towards greater transparency in the extractives industries.

Since our formation in 2002, we have had considerable successes in our quest to ensure that our natural resources benefit the generations of today and tomorrow. The majority of the work undertaken by national coalitions and members is defined by the context. Hence, as a movement, the global PWYP coalition is engaged in a wide variety of activities based on diverse needs and interests. Some of the objectives and priorities that our national coalitions have achieved and focus on include the following:

- The Extractive Industries Transparency Initiative (EITI) now being implemented by 48 countries was launched in response to 'PWYP asks'. PWYP has supported the initiative throughout its growth, recently ensuring that the EITI standard (adopted in 2013) is both robust and ambitious.
- In Niger, coalition advocacy efforts led to extractives transparency being embedded in the 2010 national constitution.
- The coalition in Côte d'Ivoire successfully influenced the revision of the country's mining code to include a provision for communities to directly receive a percentage of profits.

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- In Congo-Brazzaville, the coalition tracked how oil money was being spent on health projects in order to ensure that revenues were not being lost or wasted.
- The coalition in Uganda is ensuring, through PWYP local chapters, that communities are more involved and have a larger role in issues related to extraction.

But what is a coalition? How is it that a coalition can work together to achieve such results? Who owns coalitions?

Mizrahi, Terry and Beth B Rosenthal (2001)' describe a coalition as 'an organisation or organisations whose members commit to an agreed-on purpose and shared decision-making to influence an external institution or target, while each member organisation maintains its own autonomy.'

The above definition reflects the ethos of the PWYP philosophy, as it mentions key words that are critical in realising an effective coalition: members, commitment, agreed-on purpose, shared decision-making, influence, and autonomy. Coalitions are formed when like-minded organisations come together to pursue a common cause. Coalitions believe in the motto, 'We are stronger together'. Most importantly, and fundamentally, the strength of coalitions lies in their membership. And, indeed, when the strengths of individual member organisations are combined and coordinated with a view to a common goal, success is almost inevitable. However, this is not as easy and straightforward as we would like it to be. Often, the most challenging aspect in realising a successful coalition lies in the governing processes of the coalition.

The lessons of previous coalition efforts seem to be that, in order for a coalition to be successful – with a good governance structure and motivated members – three areas need to be clearly elaborated: expectations, leadership and direction.

Expectations could be defined through developing and agreeing on the coalition's Memorandum of Understanding (MoU). The MoU is a document signed by partners willing to be part of a collaborative agreement – in this case, through a coalition. Among other things, the MoU defines the coalition's purpose and scope, member roles and responsibilities, decision-making mechanisms, publicity and external communication, conflict management, and member validity and termination.

Leadership can make or break a coalition. Not all members can take up active leadership positions in the coalition. Good practice within PWYP coalitions has been to have in place a steering committee of five or so organisations. It is important to note that selection is based on the quality of the organisations, rather than the individuals within them. PWYP coalitions have used gatherings such as annual general meetings to elect the steering committee. In some coalitions, we have had the steering committee select/elect the chairperson, vice chairperson and secretary, while, in other coalitions, the annual general meeting is used to elect people to the above three positions within the steering committee. Our PWYP coalition model does not intend for coalitions to be registered and to operate as independent organisations. Thus, there is usually a need for a host organisation that will physically house the coalition and provide administrative support. It is equally important that the members are involved in selecting the host organisation and that this role, much like the others, is not a permanent arrangement, but can be rotated among eligible members and organisations.

Most of the PWYP coalitions have gone a step further and have appointed a PWYP national coordinator. Where funding has been available, this has been a full-time, paid

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THE PWYP COALITION MODEL HAS BEEN HERALDED AS ONE OF THE MOST SUCCESSFUL GLOBAL COALITIONS OF THE PAST DECADE.

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position with the person appointed being recruited externally. In PWYP coalitions that do not have specific funding for a national coordinator, this role is often taken on by the host organisation.

Direction deals with the question of why a coalition is being formed and what its objectives are. Direction gives members of a coalition purpose for working together – after all, a coalition only exists because a group of actors has a common objective and has decided that it is most likely to realise this objective by working together. In 2012, the Publish What You Pay Global Assembly (the ultimate owners/governing body of PWYP) met to define PWYP's global strategy in the form of Vision 20/20.<sup>2</sup> National coalitions also agreed to develop national strategies that are, as far as possible or desirable, aligned to Vision 20/20, which outlines the global coalition's priority areas and advocacy strategies.

With expectations, leadership and direction defined, the challenge becomes one of ensuring that the coalition operates effectively. There are cases where coalitions have focused on perfecting the areas of leadership and expectations, but not on the direction the coalition should take. In such instances, coalitions have risked losing relevance in their operational environment, as external parties do not see the need for a coalition or its potential impact. In other instances, there has been a lot of focus on direction, but less attention has been paid to defining expectations and leadership structures. This is both good and bad. It is good in the sense that the coalition is doing what it was set up to do; but it is bad because the coalition could find itself bogged down by structural issues (leadership and expectations) – especially when it begins to grow – which would hinder its growth and effectiveness. It is important for coalitions to ensure a healthy balance between the three areas, and the need to re-evaluate and adjust or adapt will always be important.

Experience has shown that, even when coalitions put considerable effort into defining the above, they will experience ups and downs – much like any organisation or person. There is no question that working through and with coalitions is an immensely useful and powerful vehicle for realising change. The PWYP coalition model has been heralded as one of the most successful global coalitions of the past decade, championing the call for transparency and accountability in the extractives sector. I am hoping that civil society organisations in South Africa will want to be part of the PWYP global movement. In closing, the following five reasons could provide a stronger rationale for why working together through a global coalition can lead to more effective results nationally and locally:

- The extractives agenda remains a battle that is largely fought on the national level, but, for it to succeed, it must also have an international or global dimension. Companies operating in the extractives sector are multinationals and, through PWYP's global campaign, we have been able to engage with, and influence, leading extractives companies. For example, the PWYP coalitions in Niger and France were able to work together to lobby for Areva (a French mining company operating in Niger) to respect the terms of the country's mining code in its contract renegotiation.
- We are a solidarity movement and protecting our activists is always paramount. We have drawn on our local and international networks to protect PWYP campaigners who were subject to arrest and intimidation, and will continue to fulfil this role.
- The PWYP movement provides a rich platform for civil society organisations to gain experience and build on existing knowledge of extractives. We constantly encourage our coalitions to share their experiences on our innovative PWYP platforms. This



**THE PWYP MOVEMENT PROVIDES A RICH PLATFORM FOR CIVIL SOCIETY ORGANISATIONS TO GAIN EXPERIENCE AND BUILD ON EXISTING KNOWLEDGE OF EXTRACTIVES.**



ensures that the global movement is always up to date on issues happening on the ground that are related to the extractives sector.

- PWYP has a strong brand reputation – we are known regionally, nationally and globally as a credible and effective network and as a useful network with which to be associated.
- Our approach is to work with all actors in the extractives sector – government, the private sector and civil society. We do not believe in working in silos.

Campaigning to ensure that citizens benefit from their natural resources is no small task – and it is not one that any group could do alone. By combining our forces, we can become more than the sum of our parts and strong enough to effect lasting change for generations to come.

#### **ENDNOTES**

- 1 Mizrahi, Terry and Beth B Rosenthal (2001). "Complexities of Coalition Building: Leaders' Successes, Strategies, Struggles, and Solutions." *Social Work* 46(1): 63–78.
- 2 For more information, see [www.extractingthetruth.org](http://www.extractingthetruth.org).





By Georgina Jephson

# SILICOSIS:

## The hidden legacy of gold mining in South Africa

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### Silicosis

Silicosis is an occupational disease of the lungs which is caused by the inhalation of crystalline silica dust. This dust is generated by the processes associated with mining gold on the Witwatersrand and Free State goldfields. When crystalline silica dust is inhaled, the smallest dust particles may be deposited in the lung, causing damage to the lung tissue. After long-term exposure to silica dust, silicosis develops in the lungs, which reduces lung function and causes difficulty in breathing.

Silicosis is an irreversible and incurable disease. Silicotic mine workers are at much higher risk of developing tuberculosis (TB). Silicosis accompanied by TB (silicotuberculosis) is a progressive disease and, in its later stages, can be disabling and fatal. Owing to its progressive nature, silicosis may take many years to develop in the lungs – it can, for instance, take up to 20 years after having left work on the mines to appear on a lung X-ray.

The mining industry has known about the risk of exposure to silica dust for over 100 years. In 1902, the Weldon Miners' Phthisis Commission found that silica dust was the primary underlying cause of 'phthisis' ('miners' phthisis' is an antiquated term for 'silicotuberculosis'). Further, in 1912, South Africa became the first state to regard silicosis as an occupational disease of the lungs, entitling workers to compensation.

Silicosis is preventable through proper mine ventilation and the control of dust underground. However, despite laws and regulations that oblige mining companies to minimise exposure to unsafe levels of dust underground, the prevalence rates of silicosis and silicotuberculosis among former South African gold-mine workers are very high, among the highest in the world. Research shows that between 22 and 36% of former gold-mine workers are likely to develop silicosis. Silicosis and silicotuberculosis have had a devastating impact on the health of South African gold-mine workers.

## Gold mining in South Africa

In its heyday in the 1980s, the South African gold-mining industry employed hundreds of thousands of mine workers. The industry recruited mine workers from throughout rural southern Africa, including the former Transkei, Lesotho, Swaziland, Botswana, Mozambique and Malawi.

Very few gold-mine workers are able to work a full working life (40 years). Many leave work on the mines early (long before the normal age of retirement), either because they are dismissed as a result of medical incapacity or because they do not feel able to continue working in the difficult and dangerous conditions underground. A significant proportion of these mine workers are suffering from an occupational injury or disease. Of those with occupational diseases of the lungs, only a minority are ever diagnosed with these diseases while employed on the mines.

Regardless of the reason for the termination of work underground, most mine workers return to their homes in the labour-sending areas in rural southern Africa.

The latency periods and progressive nature of silicosis mean that many mine workers develop silicosis after having returned to their homes. Diagnosis of silicosis requires an X-ray and lung-function test. However, owing to limited access to adequate healthcare and occupational-health facilities in these areas, the facilities required for the diagnosis of silicosis are often not available. As a result, there is significant underdiagnosis of the disease. If silicosis is diagnosed, access to ongoing treatment and care for the disease is either lacking or too expensive.

No research has been conducted on the demographics of silicotic mine workers living in southern Africa. However, given the high prevalence rates of silicosis and silico-tuberculosis among former gold-mine workers, it is clear that a large number of men have been injured through no fault of their own in the advancement of a significantly profitable industry. However, these men have been forgotten by their former employers and by society, as they are not generally living in urban communities. There is, as a result, a 'hidden epidemic' of silicotic former mine workers throughout the region.

The costs of the silicosis and TB epidemics have been externalised. The epidemics place a significant burden on the communities in which former gold-mine workers live. As already mentioned, local healthcare systems have scarce capacity to diagnose and manage occupational diseases associated with the lungs. Families and family structures are similarly placed under pressure – the role of both caregiver and breadwinner falls primarily on women, resulting in a significant physical, psychological and financial burden being placed on them.

## Compensation for mine workers with occupational diseases of the lungs

Mine workers with occupational diseases of the lungs do not fall under the general workman's compensation scheme governed by the Compensation for Occupational Injuries and Diseases Act<sup>1</sup> (COIDA). A separate compensation scheme for mine workers who contract occupational diseases of the lungs is governed by the Occupational Diseases in Mines and Works Act<sup>2</sup> (ODIMWA). The compensation payable under the ODIMWA scheme is significantly lower and less comprehensive than the compensation payable under the COIDA scheme, in that the ODIMWA scheme does not provide for the payment of pensions or medical aid. Under the ODIMWA, a maximum of just over

**GIVEN THE HIGH PREVALENCE RATES OF SILICOSIS AND SILICOTUBERCULOSIS AMONG FORMER GOLD-MINE WORKERS, IT IS CLEAR THAT A LARGE NUMBER OF MEN HAVE BEEN INJURED THROUGH NO FAULT OF THEIR OWN IN THE ADVANCEMENT OF A SIGNIFICANTLY PROFITABLE INDUSTRY.**



R100 000 is payable for contracting silicosis, which is an incurable and debilitating lung disease.

Apart from providing inferior compensation compared with what is provided in terms of the COIDA, the ODIMWA compensation scheme is riddled with problems. The claims process is outdated and complicated (it takes an average of three years for a claim to be processed), the Medical Bureau for Occupational Diseases (MBOD) (the organisation responsible for the administration and assessment of claims) has significant incapacity to perform its role, and, despite the spread of former mine workers throughout southern Africa, there are no MBOD medical testing centres beyond South Africa's borders. Theoretically, when a mine worker dies, his cardiorespiratory organs should be removed and sent to the MBOD to be examined for signs of lung disease. If the disease is found, the deceased mine worker's widow is entitled to receive the benefit. Very few mine workers know about this procedure, and their families are often unable to comply with the requirements in order to claim compensation.

The ODIMWA and its compensation scheme is outdated and in great need of reform. It does not incentivise employers to create and maintain a safe and healthy work environment.

The COIDA specifically precludes beneficiaries of the scheme from suing their employers for damages (in addition to compensation received under that scheme). There is no similar provision in the ODIMWA. However, the ODIMWA beneficiaries are specifically precluded from claiming benefits under the COIDA.

### ***Mankayi v AngloGold Ashanti Ltd***

Mr Mankayi worked at AngloGold Ashanti and contracted silicosis. As a result of the disease, he could no longer work on the gold mines. Mr Mankayi received R16 000 in compensation under the ODIMWA scheme. Given his ill health and limited skills, he had little hope of finding any alternative employment. Accordingly, he sought to sue AngloGold Ashanti, his former employer, for damages suffered as a result of contracting silicosis. AngloGold Ashanti objected to Mr Mankayi's claim on the basis that the ODIMWA precluded him from instituting a damages claim against his former employer.

Mr Mankayi had to fight his case all the way to the Constitutional Court. In March 2011 (sadly, just a few days after he had passed away), that court handed down a landmark judgment in which it found that Mr Mankayi had a right to sue his former employer for damages suffered as a result of the occupational disease of the lungs that he had contracted whilst working underground on AngloGold Ashanti's gold mines.<sup>3</sup>

It was a groundbreaking ruling, because, prior to that, mine workers with occupational diseases of the lungs could not bring damages claims against their former employers for exposure to harmful levels of dust whilst working on the mines. Their only recourse was to the ODIMWA compensation scheme which, as the Constitutional Court found, was 'seemingly paltry and inadequate' in comparison with the compensation payable in terms of the COIDA. The court recognised the important role of gold mining in South Africa and acknowledged the significant dangers and risks faced by mine workers.

As a result of the Constitutional Court's decision in *Mankayi v AngloGold Ashanti Ltd*, all former gold-mine workers with silicosis have the right to institute civil damages claims against their former employers.

THEORETICALLY, WHEN  
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TO THE MBOD TO BE  
EXAMINED FOR SIGNS  
OF LUNG DISEASE.

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## Class actions in South Africa

A class action is a procedural mechanism that allows the claims of a number of persons to be brought against the same defendant/s in a single lawsuit. The action is brought by a class representative/s on their own behalf, as well as on behalf of the other class members who have a claim arising out of the same or a similar alleged cause of action. The class representative's claim shares common questions of law and/or fact with the claims of the other class members.

South African law is familiar with the concept of a number of plaintiffs joining an action to pursue claims against one or more defendants on the basis that their claims share common issues of law and fact. The notion of a representative plaintiff is also familiar, as curators and/or guardians are empowered to represent persons of certain categories in litigation. However, the concept of persons benefitting from, and being bound by, a judgment in a matter to which they have not been formally joined was (until fairly recently) a relatively foreign one in South African law.

Prior to the enactment of the Constitution, only persons who had a personal interest in a matter and who had been adversely affected by an alleged wrong had standing to approach a court for relief. The common law rules of standing accordingly only accommodated the adjudication of primarily private disputes between persons who were directly affected by the alleged wrong.

Section 38 of the Constitution introduced significant changes to the common law rules of standing, in that it created the possibility of litigating in the public interest (section 38(d)) and on behalf of a class (section 38(c)) in our law.

Section 38 provides:

**F** *Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –*

- a) *anyone acting in their own interest;*
- b) *anyone acting on behalf of another person who cannot act in their own name;*
- c) *anyone acting as a member of, or in the interests of, a group or class of persons;*
- d) *anyone acting in the public interest; and*
- e) *an association acting in the interest of its members.*

While public-interest litigation has been used extensively in the last 20 years of South Africa's constitutionalism, there has been significantly less use of the class-action mechanism as a tool to place disputes before a court.

The South African population comprises many large groups of people who are, for various reasons, marginalised members of society. These people live in primarily rural areas with little (if any) access to justice. Section 34 of the Constitution guarantees everyone the right of access to justice. It provides:

**F** *Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*



APART FROM THE PROCEDURAL CONVENIENCE OF CLASS ACTIONS ... THEY ALSO ASSIST IN 'LEVELLING THE PLAYING FIELD' FOR POOR OR ECONOMICALLY LESS POWERFUL INDIVIDUALS WHO WOULD NOT ORDINARILY HAVE ACCESS TO JUSTICE.

However, the section 34 right of access to justice is of little use to a potential litigant who has a small claim that would not be worth pursuing on an individual basis, or to a litigant who seeks the enforcement of a right but who cannot afford to instruct an attorney. The inclusion of class actions as an option for the enforcement of rights in terms of section 38 of the Constitution significantly enhances a poor litigant's right of access to justice. Apart from the procedural convenience of class actions – which allow multiple claims to be determined in one action – they also assist in 'levelling the playing field' for poor or economically less powerful individuals who would not ordinarily have access to justice.

### The silicosis class action

As discussed, most former mine workers who have silicosis live in rural areas throughout southern Africa, both within and beyond South Africa's borders. They are largely very poor and have little access to justice. In our view, given the potentially large numbers of silicotic mine workers in southern Africa, their limited resources and their expansive geographical location, the class action is an appropriate mechanism for the adjudication of the multiple damages claims of silicotic mine workers. We have, accordingly, instituted class-action proceedings on behalf of all former gold-mine workers with silicosis and the dependants of those who have died as a result of silicosis, against 32 South African gold-mining companies.

Very few class actions have been litigated in South Africa and our laws on class actions are accordingly still in the early stages of development. The Constitutional Court has only had one opportunity to date to consider the class-action mechanism. In *Mukadam and Others v Pioneer Food (Pty) Ltd and Others*, the court clarified primarily two issues of the law governing class actions: it held that prior certification is a requirement for plaintiffs seeking to institute a class action, and that the test for certification is the interests of justice. The court discussed the important relationship between the class-action mechanism and its enhancement of the right of access to justice, and encouraged our courts to embrace class actions as an option for litigants to place disputes before a court.

Accordingly, the first step in the silicosis class action is to approach the court for prior certification, which is essentially an application for leave to institute an action on behalf of the class. The application for class certification will be heard in October 2015 in the South Gauteng High Court.

The silicosis class-action litigation is one aspect of a much broader need to address the legacy of the South African gold-mining industry and the silicosis and TB epidemics among former gold-mine workers. It is crucial that other initiatives are introduced (e.g. appropriate reforms to the ODIMWA compensation scheme) to ensure that mining companies fulfil their health and safety obligations going forward so as to prevent the continuation of high levels of disease among former gold-mine workers.

### ENDNOTES

- 1 130 of 1993.
- 2 78 of 1973.
- 3 *Mankayi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC).



IN GOOD COMPANY?





By Louis Snyman and  
Robert Krause

# DO SOCIAL AND LABOUR PLANS BELONG TO COMMUNITIES?

## Clarity, accountability and responsiveness in the legislative framework

### Introduction

The Marikana tragedy and the recent prolonged strike action in the platinum sector have highlighted the abject poverty suffered by mining-affected communities, something that remains a disturbing feature of the South African mining landscape. The promises of a 'better life' made by mining companies remain largely unfulfilled, with the consequence that many communities live in barren and polluted environments blighted by crime, unemployment and failing infrastructure.<sup>1</sup> The Social and Labour Plan (SLP) system, together with Broad-Based Black Economic Empowerment (BBBEE) schemes under the Mining Charter, is the main mechanism by means of which the mines are to channel the proceeds of mining into benefits for the community.<sup>2</sup> The SLP contains proposed programmes directed at the mine-affected communities and labour-sending areas that should offset the negative impacts of the mines and improve the quality of life for both mine employees and mine-affected communities.

In practice, however, the benefits from the mineral wealth extracted are still primarily enjoyed by investors and mining companies and not by the workers and communities, who remain poor. When the communities receive benefits, they are often insufficient, unsuitable or are usurped by the traditional leadership structures that are designated as the community representatives.

This article will, in drawing on the Centre for Applied Legal Studies' (CALSS) experience in partnering with mining communities and on our preliminary research on SLPs, begin exploring the reasons for this stark disjuncture between aspirations and the lived reality of communities. This is a complex terrain in which issues of migrant labour, customary land rights, government capacity and project financing are all implicated. The focus of the article will, however, be on the structural features of SLPs as a regulatory system contained in legislation and which partially transfers government's responsibility for local economic development to mining companies. In particular, it will engage with questions of accountability and participation, including the apportionment of responsi-

bilities between government and companies, the extent that this facilitates participation by affected communities, and whether it does enough to foster transparency.

### The SLP regulatory model

Before examining the legislation, it is useful to describe the essence of the regulatory model. The 'mischief' that the system is designed to address is clearly the deep-set inequalities that have remained a defining feature of the South African sociopolitical landscape.<sup>3</sup> The basic problem is not unique to South Africa, though its close relationship to South Africa's particular racial and other hierarchies gives it a distinct character.<sup>4</sup> Neither is the existence of interventions to address these inequalities unique. Instead, what is unique to the SLP system is the particular manner in which obligations arise and the manner in which responsibilities between role players are apportioned.

The purpose of the SLP model is to make it a statutory licensing requirement for mining companies to develop a range of human resources development and local economic development programmes. These programmes, which are contained in the SLP document, become binding on the company on the granting of a mining right by the Department of Mineral Resources (DMR).<sup>5</sup> The system therefore uses the licensing process to compel mining companies to provide benefits for workers and communities. While the 'carrot' is the right to mine, the 'stick' is the department's power to suspend or revoke the mining right if these binding obligations are not honoured. There are several countries, including Nigeria and Australia, which instead require mining companies to enter into agreements with local communities regarding local economic development.<sup>6</sup> Supporters of this model have argued that it provides communities with some leverage concerning the content of the developmental initiatives which, if implemented in good faith, can enable greater community ownership and awareness of the programmes.<sup>7</sup> This, in turn, may enable communities to hold companies accountable for their obligations.

The second salient feature of South Africa's SLP system is that a subset of the initiatives that companies are required to undertake falls within the local economic development and service provision roles of government. These are the local economic development initiatives focused on infrastructure and government services.<sup>8</sup>

### Detail and clarity of legislation, regulations and guidelines

One of the most striking features of the regulatory framework is that the primary legislative source of the SLP system, the Mineral and Petroleum Resources Development Act (MPRDA), says very little about the definition, objectives and content of SLPs.<sup>9</sup> All that is stated is that the submission of an SLP is a prerequisite for the issuing of a mining right, that applicants must provide 'financially and otherwise' for SLPs, and that rights holders have a duty to comply with the approved SLP and to report annually on their compliance.<sup>10</sup> More clarity is provided in the MPRDA Regulations and the departmental SLP Guidelines.<sup>11</sup> It can be questioned whether it is appropriate for the legislator to leave even the broad content of one of the most important planks of reformist legislation to determination by the executive. This lack of specificity unfortunately sets the tone for the entire system.

There are many unanswered, or partially answered, questions that remain after looking at the legislation and guidelines, including:

THE PURPOSE OF THE SLP MODEL IS TO MAKE IT A STATUTORY LICENSING REQUIREMENT FOR MINING COMPANIES TO DEVELOP A RANGE OF HUMAN RESOURCES DEVELOPMENT AND LOCAL ECONOMIC DEVELOPMENT PROGRAMMES.



- What is the role of employees and communities in the design of SLPs?
- Do communities need to be consulted on material amendments to SLP programmes?
- What is the required expenditure, and is this to be calculated against the wealth (or revenue) of the company or at project level?
- Do feasibility studies need to be conducted on projects prior to the approval of SLPs?

### **Roles and responsibilities of business and government**

In addition to programmes that fall closer to the traditional domain of companies, the SLP system requires companies to undertake initiatives that fall within government's core responsibilities of local economic development and basic service provision.<sup>12</sup> Companies must adopt infrastructure and income-generating projects that align with municipalities' Integrated Development Plans (IDPs).<sup>13</sup> This legislative choice not only reflects an acknowledgement that mining communities have not benefited from the mineral wealth, but also recognises the challenges faced by sparsely populated and poorly resourced municipalities in scaling up to address the population influx associated with large-scale mining developments.

However, this partial transfer of public functions to private companies creates the risk of a confusion of roles and responsibilities that allows both companies and government to shift responsibility for non-delivery on commitments made. Even the SLP Guidelines, which provide the most detail, do not clearly delineate what the respective responsibilities in relation to these projects should be. It would make sense, with regard to infrastructure projects, to require the mining company to provide the capital and the contractors and to ensure that construction takes place, with the municipality remaining responsible for granting the necessary zoning and other approvals and for providing other services necessary for the viability of the service. For example, in relation to a project involving the building of housing, the municipality would need to provide permission for the establishment of the township, and the company would then need to ensure that the houses are built.

The framework allows for vague commitments with numerous caveats. The result can sometimes be a breakdown in accountability. For example, company commitments contained in SLPs are sometimes subject to funding from lending institutions, which, if not forthcoming, can subsequently be used as a reason for non-delivery on the commitments. This is contrary to the statutory requirement that the applicant for a mining right must provide financially for an SLP.

### **The role of community participation at each stage of the SLP life cycle**

It is critical that communities are afforded the opportunity to participate at each stage of the SLP life cycle. Firstly, it should be remembered that SLPs are meant to confer benefits on mining communities.<sup>14</sup> It is these communities that will invariably be best placed to identify their needs. Therefore, if communities do not play a role in the design of the SLP, it will be unlikely to address their needs properly. Secondly, SLP initiatives will only be successful if tailored to local social and economic realities, realities that cannot be meaningfully understood without consulting local knowledge. Local knowledge is particularly important for the category of SLP programmes known as 'income-generating projects'.<sup>15</sup> These involve supporting existing community businesses, or starting a business that is subsequently handed over to the community. Sustainability requires that they draw on existing initiatives in the community and are informed by factors such as the potential for growth of various industries and services in the local economy. Thirdly, it is communities and workers that ultimately have the

IT IS CRITICAL THAT COMMUNITIES ARE AFFORDED THE OPPORTUNITY TO PARTICIPATE AT EACH STAGE OF THE SLP LIFE CYCLE.



## IN GOOD COMPANY?

greatest interest in the plans being implemented, since they are the beneficiaries. It is therefore crucial that the system enables the parties with the most invested in the success of the SLP to play a commensurate role.

We have, in a number of our engagements with communities, found evidence of a lack of meaningful consultation in the design and implementation of SLPs. In one instance, community representatives were only able to obtain the SLP shortly before it was submitted by the mining company to the DMR. This resulted in considerable anger and frustration on the part of the community members present at the meeting.

Understanding how this fundamental failure arises is a complex exercise involving multiple variables, including cultures of top-down decision-making in company management and government, and limited capacity for community engagement in mining companies. However, the design of the regulatory system also has an important role to play insofar as the rules and processes address – or fail to address – the barriers to participation.

At the initial design phase of the SLP, there is little guidance on how consultation should take place. In fact, consultation on SLPs is not discussed at all in the MPRDA and its Regulations. It is only the SLP Guidelines that refer to any obligation to consult on the SLP, and this is phrased in very general terms by simply stating that the company should consult the community in the process of drawing up the SLP.<sup>16</sup> The DMR's Guidelines for Consultation with Communities and Interested and Affected Parties (Consultation Guidelines) do not expressly refer to SLPs, but provide an open list of the categories of persons to be consulted and define consultation as a two-way process requiring the applicant to listen and consider the representations of the people being consulted.<sup>17</sup> Considered as a whole, this body of legislation and guidelines leaves open a number of important questions regarding the role of communities in the design of SLPs, including:

- Whether SLP consultations can be incorporated into the consultation meetings required for the environmental impact assessment process or whether such consultations require separate meetings;
- Whether meetings need to be in the vernacular of the community;
- Which information should be provided at, and prior to, the meeting; and
- How the comments made by community members should inform the design of the document.

The situation following approval of the SLP is even worse. While companies are required to report annually to the DMR on their SLP compliance, there is no mechanism for reporting to communities.<sup>18</sup> Those seeking to obtain these reports are, in many cases, met with resistance to disclosure. Whereas the National Environmental Management Act's (NEMA's) Environmental Impact Assessment Regulations require consultation with interested and affected parties on substantive amendments, there are no requirements for consultation or even notification in relation to amendments to the SLP, and this has not been addressed in the proposed MPRDA amendments.<sup>19</sup> This allows companies to dilute programmes significantly without consulting the beneficiaries. There is also no provision in current and proposed legislation for consultation in the review of SLPs that occurs every five years.<sup>20</sup>

The effect of this legislative silence needs to be understood in the context of existing relationships between communities and both the private and public sector. The mining industry, in particular, does not have a tradition of meaningful engagement with communities. The South African state was, until 1994, an authoritarian enforcer of racial

WE HAVE, IN A NUMBER OF OUR ENGAGEMENTS WITH COMMUNITIES, FOUND EVIDENCE OF A LACK OF MEANINGFUL CONSULTATION IN THE DESIGN AND IMPLEMENTATION OF SLPs.



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capitalism. There is thus a need for clear parameters to guide company management and government officials and to remove present barriers faced by communities seeking to play a more meaningful role in SLPs. The legislative provisions therefore do not go far enough to enable communities to shape the content of plans ostensibly designed for their benefit and to hold mining companies to their obligations.

### Transparency and access to information

An essential prerequisite for meaningful participation is access to information. SLPs are often not readily available to many communities. Even during the consultations that precede the decision on the mining right, communities often struggle to obtain a draft.<sup>21</sup> The same difficulties apply to annual reports and amendments authorised to the SLP.<sup>22</sup>

The effects of this information blockage are significant. Communities seeking to assess whether companies have met their commitments are often compelled to use the Promotion of Access to Information Act's (PAIA's) process, which is often a protracted one that saps limited resources. It can also erode trust between the community and mining company and therefore lead to growing tensions. For example, there were conflicting accounts between one of our partner communities and the relevant mining company regarding the content of the company's social-development undertakings, which was exacerbated by verbal promises made by the company.

The legislation is particularly unclear about whether SLPs, approved amendments to SLPs, and annual compliance reports are to be publicly available as a matter of right. This allows the perpetuation of the status quo outlined above.

### Conclusion

While ostensibly designed to ensure a more equitable sharing of the burdens and benefits of mining development, the many lacunae in the SLP legislative framework allow mining companies considerable discretion on key matters such as public participation and the dissemination of information. The result is that, in practice, SLPs seem to belong more to mining companies than to the intended beneficiaries of the system.

### ENDNOTES

- 1 Examples of the growing body of literature on conditions in mining communities include: the ongoing Policy Gap series of reports available on the Benchmarks Foundation's website <http://www.bench-marks.org.za/>; Centre for Applied Legal Studies and School of Law of the University of the Witwatersrand, Coal Mining and Communities – an Environmental Rights Perspective (December 2009); T Murombo, Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation (2013) 9 (1) *Law Environment and Development Journal* 31.
- 2 Section 100 (2) of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) requires the minister to develop a 'broad-based socio-economic empowerment charter' for the purpose of redressing historical inequalities and enabling historically disadvantaged South Africans to participate in the mining industry. The current version of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (Mining Charter) is dated September 2010.
- 3 The objects of the MPRDA include expanding the opportunities for historically disadvantaged persons so that they may benefit from the exploitation of the country's mineral wealth – section 2 of the MPRDA.
- 4 There is a large body of comparative and country-specific literature engaging with inequality in the extractives sector. See, for example: G Hilson & J Haselip, *The Environmental*



**WHILE OSTENSIBLY DESIGNED TO ENSURE A MORE EQUITABLE SHARING OF THE BURDENS AND BENEFITS OF MINING DEVELOPMENT, THE MANY LACUNAE IN THE SLP LEGISLATIVE FRAMEWORK ALLOW MINING COMPANIES CONSIDERABLE DISCRETION ON KEY MATTERS SUCH AS PUBLIC PARTICIPATION AND THE DISSEMINATION OF INFORMATION.**





- and Socioeconomic Performance of Multinational Mining Companies in the Developing World Economy (2004) 19 (3) *Minerals and Energy* 25; A Bebbington et al. Contention and Ambiguity: Mining and the Possibilities of Development (2008) 39 (6) *Development and Change* 965; D Brereton & J Parmenter, Indigenous Employment in the Australian Mining Industry (2008) 26 *Journal of Energy and Natural Resources Law* 66; WoMin, Women, Gender and Extractivism in Africa – a Collection of Papers, available at <http://womin.org.za/papers.html>.
- 5 Sections 22(1)(e) and 25(2)(f) of the Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002.
  - 6 In Australia, these agreements must be concluded with the indigenous communities that hold title over the land in question. See Ci O'Faircheallaigh & T Corbett, Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements (2005) 14 *Environmental Politics* 629–647; and D Brereton & J Parmenter, Indigenous Employment in the Australian Mining Industry (2008) 26 *Journal of Energy and Natural Resources Law* 66. In Nigeria, mining companies are required to enter into an agreement with the 'host community' that provides for the 'transfer of social and economic benefits to the community' – sections 116 and 117 of the Nigerian Mine and Minerals Act 20 of 2007.
  - 7 See, for example, P Leon, Why BEE in the Mining Industry Isn't Working and How to Fix It (14 November 2012), available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=340296&sn=Detail&pid=71619>.
  - 8 Regulation 46(c) of the MPRDA Regulations, Gn. No. R. 527 in GG 26275 of 23 April 2004.
  - 9 Ibid.
  - 10 Ibid., sections 22(1)(e), 25(2)(f) and 25(2)(h).
  - 11 Regulations 40–46 of the MPRDA Regulations; Revised Social and Labour Plan Guidelines (October 2010).
  - 12 These functions are conferred by section 156, read with Part B of Schedules 4 and 5 of the Constitution of the Republic of South Africa, 1996.
  - 13 Regulation 46(c) of the MPRDA Regulations; section 3 of the SLP Guidelines. 'IDP' refers to a strategic plan for the development of a municipality required in terms of section 25(1) of the Municipal Systems Act 32 of 2000.
  - 14 And mine workers. However, for the purpose of this article, we focus on the role of the broader community affected by the mining operation.
  - 15 Section 5.5.2 of the SLP Guidelines.
  - 16 Clause 17(f) of the MPRDA Amendment Bill, which Bill is still awaiting presidential signature, would make consultation on SLPs an express legislative requirement – Mineral and Petroleum Resources Development Amendment Bill [B 15 – 2013] in GG 36523 of 31 May 2013.
  - 17 Guideline for Consultation with Communities and Interested and Affected Parties – as required in terms of section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA.
  - 18 Section 28(2)(c) of the MPRDA.
  - 19 Regulation 46(5)(a), read with 46(5)(b) of the National Environmental Management Act's Environmental Impact Assessment (EIA) Regulations, Gn. No. R. 543 in GG 33306 of 18 June 2010.
  - 20 This five-year SLP cycle is not expressly provided for in the legislation but is implicit in the SLP Guidelines as the suggested format for SLP programmes covering five years. Clause 18(a) of the MPRDA Amendment Bill expressly provides for a review every five years to align legislation with practice.
  - 21 Required in terms of sections 10(1) and 22(4)(a) of the MPRDA.
  - 22 A study by the Centre for Environmental Rights shows that the lack of access to SLPs is mirrored in the reluctance of companies in South Africa to publish their environmental licences and permits, as well as detailed and specific information regarding their environmental compliance – Centre for Environmental Rights, Turn on the Floodlights: Trends in Disclosure of Environmental Licences and Compliance Data (March 2013) 24–27, available at <http://cer.org.za/publications>.



**MINING COMPANIES DO NOT HAVE AN EXPRESS STATUTORY DUTY TO PUBLICLY DISCLOSE THE ENVIRONMENTAL PERMITS THAT THEY REQUIRE TO OPERATE LAWFULLY IN SOUTH AFRICA.**



By Li-Fen Chien and  
Tracey Davies

# How **INCREASED TRANSPARENCY** in the mining sector would facilitate the realisation of environmental rights

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## Introduction

In March 2013, the Centre for Environmental Rights (CER) published a report entitled *Turn on the Floodlights: Trends in Disclosure of Environmental Licences and Compliance Data.*<sup>1</sup> *Turn on the Floodlights* provided an overview and comparison of the levels of disclosure of environmental permits and associated documentation by companies, including mining companies, operating in both South Africa and other jurisdictions.

The report powerfully demonstrated how disclosure of such documents by private companies is tailored according to jurisdiction. Even though companies conducted essentially the same operations in each jurisdiction – operations that, in many cases, caused severe environmental degradation – most of these companies only disclosed environmental permits where they were legally mandated to do so. That is to say a company conducting essentially the same operations in South Africa and in another jurisdiction that requires disclosure of permits would disclose its permits in the other jurisdiction, but not in South Africa. The report also highlighted the absence of publicly accessible registers of environmental permits in South Africa that would assist in improving and facilitating the realisation of environmental rights.

In this article, we describe the challenges that we face in accessing basic environmental information about mining operations, including the permits required by mining companies to allow them to operate lawfully in South Africa. These challenges have a significant detrimental impact on our ability to advise affected communities and other civil society organisations with regard to their attempts to realise their environmental rights. We also discuss the benefits of establishing public registers of environmental permits within the sector.

## Levels of disclosure and challenges experienced

Mining companies do not have an express statutory duty to publicly disclose the environmental permits that they require to operate lawfully in South Africa.

## IN GOOD COMPANY?

In Turn on the Floodlights, we carefully examined and compared the levels of disclosure of several multinational companies, including mining giants like Anglo American and De Beers.<sup>2</sup> While many of these companies disclosed environmental permits for their operations in countries like Australia and Canada, where a legal obligation exists to do so, the same companies were simply unwilling to voluntarily disclose the same types of documents here in South Africa.

A study conducted by the CER in 2011 in collaboration with the Open Democracy Advice Centre examined the responses (or lack thereof) from 30 of the largest mining companies in South Africa to a request to make all their environmental permits available on their websites.<sup>3</sup> Some of the reasons provided by those companies that refused our request (28 of the 30 companies to whom the request was made either refused or ignored the request) included, among others:

- Concerns about the financial burden of uploading records onto their websites; and
- That the information should be obtained from regulators.<sup>4</sup>

The cost concerns raised by these companies were not convincing: firstly, because such costs were arguably negligible for companies of this size; and, secondly, it was difficult to understand why it was affordable for some companies to comply with our request but not for others.<sup>5</sup>

In addition, the suggestion that the records requested should be obtained from regulators was equally problematic, because, in our experience, national departments have been known to refer requestors to private bodies and vice versa, resulting in a confusing and frustrating process for requestors (this is discussed in more detail below).<sup>6</sup>

The CER's ongoing work concerning access to information clearly demonstrates that the Promotion of Access to Information Act of 2000 (PAIA), promulgated to improve transparency and access to information, continues to be misinterpreted and poorly implemented by government bodies, especially those responsible for overseeing the proper management of operations by mining companies, such as the Department of Mineral Resources (DMR) and the Department of Water and Sanitation (DWS).

Officials are often unfamiliar with the PAIA and, due to limited capacity, requests and deadlines are ignored. The CER's most recent report on its transparency work, entitled Money Talks: Commercial Interests and Transparency in Environmental Governance,<sup>7</sup> highlights the difficulties experienced by the CER in our interactions with public bodies, including the DMR and the DWS. Both these departments not only habitually fail to respond properly to requests, but also, when requests are acceded to, release records that are often either incomplete or incorrect.<sup>8</sup> At times, it appears that misinterpretation and poor implementation are deliberately utilised to frustrate requests for access to information. In some instances, documents initially refused on the basis that they do not exist (or any of the other grounds for refusal as prescribed by the PAIA) have, following the filing of an internal appeal and then the instigation of litigation, been found to exist and have later been made available to us.<sup>9</sup> This, unfortunately, thwarts the ability of members of the public and civil society organisations to access the records required for monitoring the conduct of mining companies and thereby assisting government to identify areas of non-compliance.

In a recent judgment by the Supreme Court of Appeal (SCA), the importance of transparency and accountability on the part of private bodies in relation to their

**AT TIMES, IT APPEARS THAT MISINTERPRETATION AND POOR IMPLEMENTATION ARE DELIBERATELY UTILISED TO FRUSTRATE REQUESTS FOR ACCESS TO INFORMATION.**



UNTIL BARRIERS TO ACCESSING THESE RECORDS ARE REMOVED, MEMBERS OF THE PUBLIC, COMMUNITIES AND CIVIL SOCIETY ORGANISATIONS WILL CONTINUE TO STRUGGLE TO EXERCISE THEIR ENVIRONMENTAL RIGHT TO HOLD MINING COMPANIES ACCOUNTABLE FOR THE EXTRAORDINARY ENVIRONMENTAL DAMAGE THAT THEY CAUSE.

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environmental impact was emphasised.<sup>10</sup> The appeal was brought by ArcelorMittal South Africa (AMSA) against a High Court decision ordering AMSA to provide the Vaal Environmental Justice Alliance (VEJA) with access to certain environmental records. The SCA dismissed the appeal and highlighted the ‘dangers of a culture of secrecy and unresponsiveness’, in the process confirming that ‘corporations operating within our borders, whether local or international, must be left in no doubt that, in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced.’<sup>11</sup> The SCA further held that the VEJA, as an advocate for environmental justice, was entitled to access the records requested in order to monitor the operations of AMSA and their effect on the environment.<sup>12</sup> This judgment therefore confirms that members of the public and civil society organisations are entitled to protect and exercise the right to a healthy environment by seeking information in order to enable them to assess environmental impacts and to exercise a watchdog role.

Furthermore, there is an apparent lack of communication and cohesion within government bodies regarding access to information. Some government bodies, such as the DWS, have taken the approach that documents that have been prepared by private companies and submitted to the DWS should be requested from the relevant companies themselves, despite the DWS being the party responsible for granting licences and maintaining such records.<sup>13</sup> On the other hand, mining companies have refused to grant access to environmental records on the basis of an alleged instruction from the DMR regional offices not to release such information, and that the DMR is required to be approached by the requestor instead.<sup>14</sup> Thus, requestors continue to be sent from pillar to post, in violation of the PAIA, thereby limiting the public’s access to these vital records.

Despite our best efforts to assist authorities to better understand and comply with their PAIA obligations, our communications log recounts a pitiable saga of our interaction with public bodies in this regard, including lack of responses, unfulfilled undertakings, a manifest lack of capacity and, at times, gross ineptitude.

Based on the CER’s research and experience over the years, we believe that disclosure and transparency could be largely improved if companies are legally compelled to publish all of their environmental permits on publicly accessible websites.

### **Need for public registers**

Our Turn on the Floodlights report highlighted the absence of public registers of environmental permits on publicly accessible websites, including, in particular, those permits required by mining companies in order to operate lawfully in South Africa. Such permits include those relating to prospecting and mining rights, water-use licences, and environmental management programmes, among others. These constitute vital records, as they set out the rules under which mining companies operate: they regulate the enormous impacts that these companies have on the environment and on surrounding communities. As long as companies and government continue to refuse to release such records, the companies’ compliance with applicable environmental laws will remain doubtful. Until barriers to accessing these records are removed, members of the public, communities and civil society organisations will continue to struggle to exercise their environmental right to hold mining companies accountable for the extraordinary environmental damage that they cause.

Whilst a number of databases for environmental licences already exist, such as the South African Mineral Resources Administration System (SAMRAD)<sup>15</sup> hosted by

## IN GOOD COMPANY?

the DMR, and the South African Waste Information System (SAWIS)<sup>6</sup> hosted by the Department of Environmental Affairs, only the SAWIS is publicly accessible, while the remaining databases are designed to give access only to authorities (and occasionally also to licence applicants or holders themselves).

Despite the SAMRAD being advertised as a portal 'where the general public can view the locality of applications, rights and permits made or held in terms of the [Mineral and Petroleum Resources Development Act]', the SAMRAD has never functioned in a way that allows the public to access copies of mining licences or any other regulatory information relating to mining operations. This is in stark contrast to less developed countries like Mozambique, for which prospecting and mining right application information is easily available online and accessible to the general public.<sup>17</sup>

In addition, there were various references in the media during the launch of the SAMRAD to the inclusion of existing GIS data in the system so that

**F** *officials of the department processing the application will be able to, at the press of a button, establish the environment-sensitivity status of an area applied for before even beginning to process the application. This will obviate the possibility of mining rights being granted for ecologically sensitive areas.<sup>18</sup>*

The CER addressed a letter to the Minister of Mineral Resources in 2011 for confirmation that these features would indeed be incorporated into the SAMRAD. We had received no response at the time of writing. The ability of the SAMRAD to provide vital GIS data to assist the DMR in making informed decisions when granting mining rights and, more importantly, to prevent the granting of mining rights in environmentally sensitive areas, therefore remains unclear. However, based on the number of prospecting and mining rights that are regularly granted in sensitive environments, it seems clear that either this system is not working, or that it is not utilised by DMR officials.

## Recommendations

Providing the public with access to all environmental permits through online databases that already exist, such as the SAMRAD, is a simple, cost-effective and immediate way of ensuring public access to records that are readily accessible in other jurisdictions where many mining companies with operations in South Africa also operate. The SAWIS, which is already available online to the general public (and not only to licence holders or applicants) and is very user-friendly, should serve as a blueprint for future public registers that could be developed by other government departments, such as the DWS. The manner in which the SAWIS has operated and succeeded in improving transparency in environmental governance in relation to waste management, without any of the dire consequences predicted by companies when resisting access to environmental management programmes, atmospheric emissions licences and other key environmental permits, also reinforces the argument that government has the ability and power to make such records accessible to the public. In addition, this would largely reduce the administrative costs incurred by departments such as the DMR and the DWS in responding to requests for records, while improving transparency and accountability in environmental governance.

We also suggest the inclusion of mandatory conditions in all environmental permits required by mining companies, which will require the licence holder to publicly disclose those permits as well as reports evidencing compliance with all conditions contained

THE SAWIS, WHICH IS ALREADY AVAILABLE ONLINE TO THE GENERAL PUBLIC (AND NOT ONLY TO LICENCE HOLDERS OR APPLICANTS) AND IS VERY USER-FRIENDLY, SHOULD SERVE AS A BLUEPRINT FOR FUTURE PUBLIC REGISTERS.

therein. Once disclosure is mandatory, the administrative and financial burden on government to respond to requests for records will be reduced substantially.

Mining companies are, in general, unwilling to disclose information about their operations and, particularly, their compliance with environmental law. In some cases, they are wilfully obstructive in their efforts to prevent such information from becoming public. In this situation, government intervention is essential to eradicate the secrecy surrounding the mining industry and to enable mining-affected communities and public-interest organisations to realise constitutionally enshrined rights to a healthy environment, access to information, and just administrative action. Greater transparency and civil society oversight can only serve to promote compliance with environmental laws and the realisation of environmental rights.

#### ENDNOTES

- 1 Published with the support of the Open Society Foundation for South Africa (the report can be accessed at <http://cer.org.za/wp-content/uploads/2013/03/Turn-on-the-Floodlights.pdf>).
- 2 Turn on the Floodlights: Trends in Disclosure of Environmental Licences and Compliance Data, pp. 23–27.
- 3 Unlock the Doors: How Greater Transparency by Public and Private Bodies Can Improve the Realisation of Environmental Rights, published in April 2012 (the report can be accessed at <http://cer.org.za/wp-content/uploads/2012/04/Unlock-the-Doors.pdf>) (hereafter 'Unlock the Doors').
- 4 Unlock the Doors, p. 13.
- 5 Ibid.
- 6 Ibid., p. 14.
- 7 Published in November 2014 (the report can be accessed at <http://cer.org.za/wp-content/uploads/2014/11/CER-Money-Talks-Nov-2014.pdf>).
- 8 Money Talks: Commercial Interests and Transparency in Environmental Governance, p. 8.
- 9 See *Earthlife Africa Johannesburg v DRDGold and the Department of Mineral Resources and Conservation South Africa v Director General: Department of Mineral Resources and five others* (both applicants were represented by the CER).
- 10 *Company Secretary of ArcelorMittal South Africa and ArcelorMittal South Africa Limited v Vaal Environmental Justice Alliance* (case number 69/2014), judgment delivered on 28 November 2014.
- 11 Paras 1, 80.
- 12 Para 80.
- 13 Unlock the Doors, p. 14.
- 14 Ibid.
- 15 SAMRAD can be viewed at <http://portal.samradonline.co.za/forms/login.aspx?ReturnUrl=%2fdefault.aspx>; however, only registered users (i.e. applicants and holders of rights under the mining laws) are able to access the information contained in SAMRAD.
- 16 The SAWIC can be accessed at [www.sawic.environment.gov.za](http://www.sawic.environment.gov.za).
- 17 Mozambique's online portal can be accessed at <http://portals.flexicadastre.com/Mozambique/EN/>.
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**THE SOUTH AFRICAN MINING INDUSTRY HAS HISTORICALLY BEEN AT THE CENTRE OF POLICY DISCUSSIONS RELATING TO REFORMS AROUND TRANSPARENCY AND CORPORATE SOCIAL RESPONSIBILITY.**





By Dr Fola Adeleke  
and Rachel Ward

# WHO'S AFRAID OF TRANSPARENCY?

## A critical appraisal of transparency as an investment imperative for the South African mining industry

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### Introduction

The South African mining industry has historically been at the centre of policy discussions relating to reforms around transparency and corporate social responsibility. Mining has been the driving force behind the development and advancement of South Africa's economy and remains crucial to the national strategic interest that is concretised in the objectives of the National Development Plan. Indeed, the narrative emerging from the transparency discourse is that transparency should be a primary imperative of both the state and mining companies in order to push economic development, largely through increasing investments and the stability of the investment market. However, despite the glaring business case for strengthening transparency practices within the mining sector, the state has shied away from signing on to various initiatives that currently represent the global norm for extractive-industry transparency, and mining companies themselves rarely go beyond a compliance-based approach to transparency.

Against this backdrop, this article will assess the history of, and relationship between, private-sector transparency and the financial markets, and particularly investments, as well as the extent to which this relationship is reflected within the South African context. In doing so, the article will explore the nuances between information disclosure and the understanding of transparency; will examine the stability of the investment market resting on information disclosure and transparency – as reflected in the Johannesburg Stock Exchange's listing requirements and general principles; and will look at the business case for South African mining companies to increase transparency efforts for increased investment. Lastly, this article will assess what is lost through this narrow understanding of transparency as an investment imperative, particularly in relation to local mining communities, which are the most fundamentally affected by the closed nature of mining operations.

## Transparency, financial crises and financial markets: From the global to the South African context

Transparency is a term and concept that has application for both the public and private sectors. The extent to which this application overlaps in the collusion of public and private interests is not within the scope of this article. Rather, the focus here will be on the understandings and applications of transparency to the private sector and mining companies, with references to the public sector only as a corollary to private-sector transparency through its regulatory functions. To offer a distinction: with regard to the public sector, it is typical that transparency is semantically associated with open democracy, state accountability and even public participation as a value through which to achieve these ideals. However, with regard to the private sector, transparency has been conceived by corporate practitioners and regulators as, in the words of the chair of the European Securities and Markets Authority (ESMA), 'the basic solution to ensuring good functioning of financial markets'.<sup>1</sup> The distinction regarding who understands transparency as a kind of balancing agent for market stability is an important one, and will receive further attention later in the article. For the time being, however, it is worth providing some historical context to the development of the idea of transparency in relation to the financial sector, market stability and investments.

Numerous scholars and historians have traced the upsurge in the language and practice of transparency within the financial sector to the industry's restructuring that occurred in the wake of the financial crises of the 1990s:

**F** *In the aftermath of the Asian financial crisis of 1997–1998, there has been renewed concern about the fragility [of] the current financial international system. Although a few economists have warned that financial crises are the inevitable product of a monetary regime that has given the market and its volatilities free rein, many have argued that the problem was not too much liberalization but too little. Among these are the many scholars and policy makers who, in the wake of the Asian financial crisis, have argued that the problem was too much government involvement and that the solution is greater financial transparency.<sup>2</sup>*

For Garry Rodan, this upsurge in the acclaim with regard to transparency was part and parcel of the neo-liberal reform that was taking place at the turn of the century and which was concerned with 'building institutions to support sustainable market systems'.<sup>3</sup> Indeed, transparency was itself the vehicle through which to push the neo-liberal agenda that was concerned with the monitoring, measuring and evaluation of the performance of products and capital. Within the financial and investment sector specifically, increased transparency meant the availability of more information with which to make smarter and more worthwhile investments. The chair of the ESMA speaks about developing a new European Union directive focused specifically on ensuring the 'availability of information to investors, including information that will allow investors to better assess the risk profile of the fund'.<sup>4</sup> This sentiment is echoed by Robert Schulzinger, who claims that 'stock markets thrive on transparency – open information, equally available to all. The rise of financial capital depended on expanding norms of transparency'.<sup>5</sup> It is hardly surprising, then, that the increased transparency efforts within the financial market have been pushed by industry players themselves, as well as international organisations such as the International Monetary Fund (IMF), the World Trade Organization and the World Bank, as such efforts are self-beneficial to the expansion and stability of this market.

In South Africa, the current transparency regime regulating the private sector, including the mining industry, is focused largely on enhancing information disclosures to share-

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holders or investors, rather than more broadly to all stakeholders, which would include the public and local communities. The Companies Act of 2008, for example, provides for the creation of social and ethics committees with reporting functions in relation to the board and information disclosure requirements in respect of shareholders and not necessarily all stakeholders and the general public. As a result, an opportunity is lost to improve public trust and accountability, as information disclosure to stakeholders and the general public is not a specific legislative provision.

Aside from prescribed legislation, the Johannesburg Stock Exchange (JSE) has introduced various disclosure requirements that are applicable to listed companies – including the extractive industries – relating to financial, operational and ownership information. The JSE listing requirements in fact constitute South Africa’s most concrete and expansive regulations relating to information disclosure by private companies. The emphasis placed by the JSE on the availability of information for potential investors is surely demonstrative of the value of information to the investment and financial markets. As a result of this, it is worthwhile to examine the claim that transparency developed as a response to financial crises where a lack of information about companies prevented investors from making worthwhile investments.

The JSE listing requirements now form part of the regulatory environment that governs the activities of the extractive industry,<sup>6</sup> together with other voluntary requirements to produce integrated reports under the King III Code, the United Nations Guiding Principles on Business and Human Rights, and the Socially Responsible Investment (SRI) index that is compiled by the JSE and aids the social licence to operate of corporations.

However, where rules and guidance governing transparency become overwhelming for a company, this may result in compliance with the minimum requirements of these rules without consideration for the substantive outcomes that could be achieved if transparency were conceived in terms of accountability to stakeholders and affected groups.

### **The business case for transparency in the mining industry**

If the premise is taken that private-sector transparency holds a tautology with efforts to ensure the stability and growth of the financial and investment market, then the business case for transparency within the South African mining industry is relatively apparent. This section will therefore map out the direct connection between the availability of relevant information and increased investment (including foreign direct investment (FDI)), as well as examine the private sector’s interpretation of the right of access to information.

Investment and FDI constitute a significant aspect of South Africa’s overarching development plans, as represented in the NDP and in the Medium Term Strategic Framework released in August 2014.<sup>7</sup> As such, FDI holds a significant place within the politics and economy of South Africa, and particularly with regard to the growth of the mining industry, whose potential to contribute to the economy is, according to the National Treasury, contingent on higher rates of investment.<sup>8</sup> Given that any investment decision relies on the availability of information and the quality of such information, the business case for transparency is directly related to the extent to which it can bring about financial growth.



The recent Global Reporting Initiative and the G4 guidelines<sup>9</sup> suggest practical approaches to disclosing information that is relevant to users and can be used to hold companies accountable. These include the operational information of corporations, the applicable policies and standards, the values and principles guiding the operation of corporations, and disclosures demonstrating the implementation of stated objectives. Stated guidelines for integrated reporting are honesty, completeness, timeliness, accessibility and accuracy. The extent to which integrated reporting does not serve the propaganda agenda of corporations will be dependent on a further need to revisit the way in which consultation, participation and the delivery of information are packaged that makes it relevant to the specific audience that requires it or seeks to be engaged.

The constitutional recognition of everyone's right of access to information extended to the private sector, provided that the information requested was necessary for the exercise and protection of a right, was an attempt to fundamentally change the way in which the private sector has been immune to public scrutiny and accountability. However, 20 years on, private institutions continue to violate the right of access to information by not granting access where it ought to be granted in terms of the Promotion of Access to Information Act (PAIA), the enabling law for the constitutional right to information.

South Africa's PAIA led the global shift in the last 20 years to remove the liberal distinction between public and private spheres of activity. Early PAIA cases in South Africa suggested the potential usefulness of the extension of the right of access to information to the private sector. For instance a mining company, Anglo American, as a result of the threat of litigation, disclosed its financial contributions to major political parties in South Africa. This was done on the basis of the claim by the former non-governmental organisation (NGO), the Institute for Democracy and Accountability, that the information was needed for the exercise of the right to vote.<sup>10</sup> The conditionality attached to the right of access to information from the private sector – that is, the requirement that the information be necessary for the protection of another right – is subject to the liberal or narrow interpretation of rights adopted by the courts. As a result, the Constitution itself has opened the debate about our understanding of the right of access to information as a basic human right or a derivative right that protects other basic interests. As a matter of practice in South Africa, though the Constitution and the PAIA have attempted to provide a sensible way of thinking about transparency in the private sector,<sup>11</sup> recent legislative developments suggest that the modest attempts and successes of 20 years ago have been reversed not only regarding the manner in which reliance on the PAIA has been curtailed in the private sector, but also through the manner in which transparency is understood as being monolithic and universal, as well as the narrow understanding of transparency as an investment imperative without consideration for its importance for local mining communities.

### **Nuances between transparency and information disclosure**

There is a marked difference between information disclosure or reporting on the one hand and transparency on the other. Information disclosure in and of itself does not necessarily amount to transparency as a result of the vested interests at play that see information disclosure as a means to advance the social capital of companies and to increase their social licence to operate, rather than seeing transparency through information disclosure as a matter of strategic importance that contributes to the national strategic interest of South Africa, in which the private sector is central. The conception of information disclosure by private companies can therefore amount to what can be regarded as an act of pseudo-transparency where, in certain instances,


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there are efforts to mislead with what is disclosed without achieving the ideals of openness and accountability.

Transparency has an instrumental value, which makes it a means to an end. Consequently, the emphasis in respect of transparency imperatives in the mining sector should be on what transparency can actually achieve. Transparency is often perceived as a reactive logic that is used in seeking redress of wrongs. However, it is important that the running narrative moves towards a proactive approach to transparency, where this approach translates into good business decisions for corporations and embracing transparency initiatives becomes an issue of strategic importance.

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The question to consider, then, is not how to achieve transparency, but what we want mining corporations to be transparent about, and how the availability of information can lead to more informed oversight in holding corporations accountable for their actions as well as in supporting economic and social development. An example of this is the social and labour plan, which is a prerequisite for the granting of mining or production rights under the Mineral and Petroleum Resources Development Act, and which requires applicants for mining and production rights to develop and implement comprehensive programmes to, among other things, promote employment and the advancement of the social and economic welfare of all South Africans whilst ensuring economic growth and socio-economic development of the areas in which they are operating, as well as the areas from which the majority of the mining workforce is sourced. However, most mining companies are criticised for the exclusion of communities in the development of their social and labour plans. Within the extractive industry, the state as the custodian of natural resources, investors, mining corporations and the workforce are integral to the operations of such industry. All players are essential to the effective functioning of the extractive industry and an integrated consultative and public-participation process ensures that interested stakeholders can play an effective oversight role once mining corporations are transparent about how their social and labour plans are determined.

### **Conclusion: What is lost?**

This article has sought to demonstrate the relationship between the development of, and incentive for, private-sector transparency and the financial markets, and particularly investments. Although the business case for increasing transparency practices leading to financial growth through investment is certainly significant, transparency efforts also need to be sustainable, equitable and accountable to local communities in order to ensure that South Africa's development targets are met and are in line with the Constitution. Indeed, while the existence of FDI is not a necessary condition for development, it contributes to more equitable development that can be facilitated through policy interventions with a particular focus on transparency in the extractive industry, a concurrent focus on civil society empowerment, and the use of transparency initiatives by local stakeholders for environmental and resource governance agendas aimed at poverty reduction and sustainable development outcomes at the local level.<sup>12</sup> The recently introduced Regulation 28 of the Pension Funds Act goes some way towards ensuring this by providing that pension funds must consider the social and environmental impact of their potential investment.<sup>13</sup>

However, what is lost is the human rights understanding of transparency, which has a specific content and reference within South Africa. As mentioned above, section 32 of the South African Constitution enshrines the right of access to information from both public and private bodies, and one of the objectives of its enabling legislation – the



**ALTHOUGH THE BUSINESS CASE FOR INCREASING TRANSPARENCY PRACTICES LEADING TO FINANCIAL GROWTH THROUGH INVESTMENT IS CERTAINLY SIGNIFICANT, TRANSPARENCY EFFORTS ALSO NEED TO BE SUSTAINABLE, EQUITABLE AND ACCOUNTABLE TO LOCAL COMMUNITIES IN ORDER TO ENSURE THAT SOUTH AFRICA'S DEVELOPMENT TARGETS ARE MET AND ARE IN LINE WITH THE CONSTITUTION.**



PAIA – is the promotion of a transparent and accountable society. In addition, the first stated purpose of the Companies Act of 2008 is the promotion of compliance with the Bill of Rights. With social and ethics committees, the Companies Act introduces human rights compliance into the legislation and also specifically incorporates access to information. The Constitution is therefore well embedded in the Companies Act and provides a solid legislative platform for corporate accountability and transparency. Transparency, therefore, has a constitutional and human rights grounding within South Africa and needs primarily to be understood as emanating from this particular framework in order to ensure that its purpose is mainly directed towards justice and equality (through accountability) for the people of South Africa.

#### ENDNOTES

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- 2 J Best (2005), *The Limits of Transparency: Ambiguity and the History of International Finance*, Cornell University Press, Cornell Studies in Money p. 10.
- 3 G Rodan (2004), Neoliberalism and Transparency: Political versus Economic Liberalism, Working Paper no. 112, Asia Research Centre, p. 1.
- 4 Supra at fn 2.
- 5 R Schulzinger (2001), Presidential Address: Transparency, Secrecy and Citizenship, *Diplomatic History*, 25(2): 166.
- 6 See chapter 12 of the JSE listing requirements.
- 7 In terms of the Medium Term Strategic Framework 2014–2018, 'more rapid private sector investment is critical for higher growth, as the private sector accounts for 70 percent of production and employment. The NDP indicates that South Africa needs to increase its level of investment to at least 25 percent of GDP. To achieve this level of investment, the levels of savings must also increase coupled with creating conditions favourable to foreign direct investment.' See the media statement on the strategy, p. 5.
- 8 National Treasury 2013 Budget Review, p. 18.
- 9 These are the global reporting initiative sustainability reports that disclose the governance approach of institutions and their environmental, social and economic performance and impact.
- 10 See A Roberts (2006), *Blacked out: Government Secrecy in the Information Age*, Cambridge University Press, p. 163.
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- 12 See G Razzano (2012), Corruption and Private Capital Inflow, conference paper presented at the Highway Africa Conference, Rhodes University.
- 13 See Regulation 28 of the Pensions Fund Act 24 of 1956.

IN GOOD COMPANY?







By Catherine Horsfield,  
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Ayesha Motala,  
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Melissa Fourie

# How mining authorities' **FAILURE TO INVEST IN ENVIRONMENTAL COMPLIANCE MONITORING AND ENFORCEMENT CAPACITY** violates fundamental rights

## Compliance enforcement

The enforcement of compliance with South African environmental laws by the extractives industry is in a state of disarray. Despite rampant environmental degradation caused by mining companies, with dramatic consequences for the environment and affected communities, there is negligible evidence that the Department of Mineral Resources (DMR) is monitoring compliance with, and enforcing, the environmental provisions of the Mineral and Petroleum Resources Development Act (MPRDA) – which, until recent legislative amendments, governed the environmental impacts of mining. The DMR's annual reports reveal a negligible compliance-monitoring effort by a small number of 'environmental protection' officials in the DMR. Where evidence exists of directives issued to recalcitrant rights holders, there is little evidence that compliance with these directives has been enforced.

In the past two years, only four cases of criminal prosecution for violations of environmental laws or environmental provisions in the MPRDA by mines have been reported in the media. The criminal complaints in all four of these cases were initiated by communities and civil society organisations and were investigated by the Department of Environmental Affairs (DEA) and the Department of Water and Sanitation (DWS), with the DMR making no voluntary attempts to assist the National Prosecuting Authority (NPA) in the prosecution of these cases. One of these cases was *S v Blue Platinum Ventures 16 (Pty) Ltd and Others* (unreported) (Naphuno Regional Court, case no. RN126/2013) in which an affected community-based organisation, frustrated by the failure of the DMR to take effective action, successfully achieved the prosecution of the managing director of a mining company that had mined illegally outside of its authorised area and had caused widespread environmental degradation.

After a long-fought political battle, legislative amendments that took effect in December 2014 transferred the environmental regulation of mining from the MPRDA to the National Environmental Management Act (NEMA). Under this new regime, however, the mandate to enforce environmental regulation remains with the DMR, with compliance

and enforcement to be undertaken by environmental mineral resource inspectors (EMRIs) designated under the NEMA, but employed by the DMR.

Civil society concerns about this legislative change are exacerbated by the fact that, to date, the DMR appears to have failed to invest appropriately in compliance monitoring and enforcement capacity under the new legislative regime. Information about the DMR's actual investment and preparation has been a challenge to access. All indications are that there is no serious attempt being made to build meaningful compliance monitoring and enforcement capacity within the DMR.

Section 24 of the Constitution of the Republic of South Africa ('the Constitution') provides that everyone has the right to an environment that is not harmful to their health or well-being.<sup>1</sup> To realise this right, the state must take reasonable legislative and other measures to, among other things, prevent pollution and ecological degradation and to secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.<sup>2</sup> This duty entails monitoring compliance with, and enforcement of, South African environmental laws in the extractives industry, a function over which the DMR controversially has jurisdiction.<sup>3</sup>

In this article, we argue that the DMR's apparent failure – in the past, and possibly for the future – to invest adequately in environmental compliance monitoring and enforcement capacity likely constitutes a violation of section 24 of the Constitution.

### **Compliance monitoring and enforcement under the current legislative regime**

Under the MPRDA, the competent authority with regard to the environmental regulation of mining operations was the DMR. Despite manifest consequences of the environmental degradation caused by mining – for both the environment<sup>4</sup> and affected communities<sup>5</sup> – there is negligible evidence that the DMR indeed monitored compliance with, and enforced, the environmental provisions of the MPRDA. In the 2009/2010 financial year, the DMR's predecessor, the Department of Minerals and Energy, had a total of 65 'environmental protection officials'<sup>6</sup> in its employ who conducted 3 449 compliance inspections during this time period.<sup>7</sup> The number of inspections dropped to 1 898 in the 2011/2012 financial year<sup>8</sup> and to 1 751 in the 2013/2014 financial year.<sup>9</sup> It is not clear whether any of these inspections resulted in enforcement action. By contrast, the latest National Environmental Compliance Enforcement Report of the DEA states that 1 915 EMRIs have been designated in terms of the NEMA<sup>10</sup> and that these officials conducted 2 849 inspections in the 2013/2014 financial year.<sup>11</sup> This is a strong indication that the number of 'environmental protection officials' in the DMR is profoundly inadequate, that they are probably inadequately prepared and resourced, and that significant investment needs to be made to ensure the effective implementation of their compliance-monitoring and enforcement mandate.

The transfer of the environmental regulation of mining from the MPRDA to the NEMA with effect from 8 December 2014 sees the DMR's mandate extended to all activities that are not strictly speaking part of the operation, but which fall within the mining area. If the DMR's capacity to carry out an environmental compliance monitoring and enforcement function was extremely compromised in an MPRDA context, without significant additional investment, it is difficult to see that it will not be even more compromised after these amendments.

**ALL INDICATIONS ARE THAT THERE IS NO SERIOUS ATTEMPT BEING MADE TO BUILD MEANINGFUL COMPLIANCE MONITORING AND ENFORCEMENT CAPACITY WITHIN THE DMR.**



Even less information is available about actual criminal and administrative enforcement action taken by the DMR against violators of environmental provisions in the MPRDA or of obligations in environmental management plans and programmes. The DMR does not publish any compliance-monitoring and enforcement reports like the DEA. Former Minister of Mineral Resources Susan Shabangu was vague in her answers to parliamentary questions about enforcement of environmental laws in the extractives industry. In October 2009, for example, she advised Parliament that the DMR had found 215 cases of ‘transgression of environmental management requirements’ in the 2008–2009 financial year. In response to a question as to what action the DMR had taken as a result of these adverse findings, the minister stated: ‘Action was taken by the Department in accordance with the provisions of the [MPRDA]. In the past two years, only one case of successful criminal prosecution of a violation of the environmental provisions of the MPRDA has been reported in the media, namely *S v Anker Coal and Mineral Holdings SA (Pty) Ltd*.<sup>12</sup> This case was initiated by a community-based organisation, as assisted by civil society and investigated by the DEA’s Environmental Management Inspectorate, with the DMR making no voluntary attempts to assist the NPA in the prosecution of the case.

A more recent case illustrates the lack of will on the part of the DMR to enforce compliance with the environmental provisions of the MPRDA. In this case, a criminal complaint was laid against a mining company, Blue Platinum Ventures 16 (Pty) Ltd (Blue Platinum), by an affected community-based organisation, the Batlhabine Foundation, mainly in response to extensive environmental degradation, especially erosion, caused by Blue Platinum’s mining activities. With support from the Centre for Environmental Rights (CER), a compliance-monitoring report was commissioned by the community and conducted by environmental specialists. This report revealed that Blue Platinum was in contravention of at least 14 different environmental provisions of the MPRDA, the NEMA and the National Water Act of 1998. Blue Platinum was charged by the NPA with all 14 counts of non-compliance. However, partly as a result of the lack of assistance provided by the DMR to the NPA in the prosecution of this case, the NPA accepted a plea of guilty by the company and its executive director to only one contravention: the failure to obtain environmental authorisation for activities incidental to mining from the DEA in terms of the NEMA. The NPA was assisted by the Environmental Management Inspectorate in the prosecution of this charge, and not by the DMR.

The executive director of Blue Platinum, Matome Maponya, was sentenced to five years’ imprisonment by the Naphuno Regional Court, suspended for five years on condition that he rehabilitate the mining area within six months of the court order. However, the mining area remains unrehabilitated, despite the expiry of this time frame and despite numerous requests by the Batlhabine Foundation for the DMR to monitor compliance with the court order. Even if Maponya’s suspended sentence is put into operation, the Batlhabine community’s environmental rights will not be vindicated – the environmental damage caused by Blue Platinum’s mining operations continues to impact on the livelihoods of the people of Tlhabine.

When a request in terms of the Promotion of Access to Information Act of 2000 (PAIA) on behalf of the community finally resulted in the disclosure by DMR of all records relating to compliance monitoring and enforcement action it had taken against Blue Platinum, it appeared that the DMR had issued Blue Platinum with several directives ordering it to increase its financial provision, to amend its environmental management plans and programmes, and to rehabilitate the unlawful damage it had inflicted in the receiving environment. As a result of the failure by Blue Platinum to adhere to these

directives, Blue Platinum's mining right was ultimately cancelled by the Minister of Mineral Resources. Although the notice cancelling Blue Platinum's mining right explicitly provided that Blue Platinum was not absolved from fulfilling its environmental obligations, the DMR failed to enforce these obligations.

### **Compliance monitoring and enforcement under the new legislative regime**

As described above, in terms of a new legislative regime known as the 'One Environmental System',<sup>13</sup> which took effect on 8 December 2014, the NEMA governs the environmental regulation of the extractives industry for the first time. However, the system retains the DMR as the competent authority to administer environmental regulation of the industry – unlike other industries where environmental regulation is administered by our environmental authorities.<sup>14</sup> In the legislative process that led to the amendments to various mining and environmental statutes, civil society organisations opposed leaving this function with the DMR on the basis that there was little evidence to show that the DMR had the track record, the capacity or the institutional will to perform an environmental function. The DMR has conceded in the media that it lacks the capacity to carry out its mandated functions, including those related to compliance monitoring and enforcement of the environmental provisions of the MPRDA,<sup>15</sup> and that DMR officials designated to enforce the environmental provisions of the MPRDA are not required to have a legal background or compliance skills.<sup>16</sup>

Does the DMR have a plan to improve its track record and to fulfil its duties under section 24 of the Constitution in order to ensure that the environmental rights of extractives-affected communities and the South African public are realised?

According to the DMR's Annual Report for 2013/2014,<sup>17</sup> capacity is being put in place by the department in preparation for the legislative change.<sup>18</sup> The department has also acknowledged that there will be a fundamental shift in the way it operates in respect of monitoring and evaluating compliance in the mining sector.<sup>19</sup> However, little information has been provided as to how the DMR plans on implementing mechanisms to meet its legislative obligations. In an attempt to obtain more information on the DMR's plans to improve its capacity, the CER submitted a request for information from the DMR in terms of the PAIA. The information requested pertained to the total number of EMRIs that are to be appointed during the next two financial years and to the budget that has been allocated for this. Information on operational plans or strategies that are to be implemented by the EMRIs was also requested, as well as information on the target set by the DMR for the number of compliance inspections to be conducted during the next two financial years by EMRIs.

However, the DMR refused the CER's requests on the grounds that records of this information did not exist and that premature disclosure of a policy might frustrate the success of that policy. Nevertheless, it did convey limited information to the CER, namely that:

- A chief director within the DMR would be appointed to oversee the implementation of compliance monitoring and enforcement;
- 'In preparation for the enforcement function', 30 officials within the DMR would receive environmental compliance monitoring and enforcement training at the University of Pretoria (our understanding is that this training is scheduled for 2015) and seven officials have already received such training; and

**THE ENVIRONMENTAL DAMAGE CAUSED BY BLUE PLATINUM'S MINING OPERATIONS CONTINUES TO IMPACT ON THE LIVELIHOODS OF THE PEOPLE OF TLHABINE.**



- The present qualifications of the officials receiving training at the University of Pretoria range from bachelor's degrees to master's degrees in environmental science, environmental management, criminology and law.

If this information is correct, and assuming full employment, that means that a maximum of 37 officials will be responsible for monitoring and enforcing compliance with the NEMA at 1 700 authorised mines at least (i.e. 45 mines per official), not to mention the many more unauthorised mining operations that also require enforcement action. These 37 officials will be responsible for monitoring compliance on an ongoing basis, for preparing administrative notices and for civil litigation where required, and for undertaking criminal investigations with a view to prosecution.

When briefing the Parliamentary Portfolio Committee on Minerals on the One Environmental System on 12 November 2014, and in response to a question from the chair of that committee, the DMR relayed that all of the new appointees would be assistant directors. When questioned by the chair as to whether this was sufficient or whether it bloated management without regard to feet needed on the ground, the DMR replied that it deemed the position of assistant director to be the appropriate designation for the function. (The DMR also claimed that it was ready to implement the new system there and then.)

THE DEPARTMENT HAS ALSO ACKNOWLEDGED THAT THERE WILL BE A FUNDAMENTAL SHIFT IN THE WAY IT OPERATES IN RESPECT OF MONITORING AND EVALUATING COMPLIANCE IN THE MINING SECTOR.

The Estimates of National Expenditure (ENE) for the 2013 Budget<sup>20</sup> allocated R59 million to the DMR for functions that included the implementation of the NEMA.<sup>21</sup> In the 2014 ENE, the DMR stated that the focus of expenditure in its mineral regulation programme 'in the medium term' would be 'on improving the process of issuing mining rights and permits, and implementing mining environmental management practices in accordance with NEMA'<sup>22</sup> However, it is unclear from the latest estimates of medium-term expenditure whether this is indeed the case, and whether any of these funds will meaningfully be applied to enhance compliance and enforcement capacity. The budget for mineral regulation and expenditure is estimated to increase by only 6.4% in the medium term (between 2014/2015 and 2016/2017), with no indication of how much of these funds will be spent on environmental compliance management and enforcement.<sup>23</sup> While this is an improvement on the mere 1% increase in the budget for mineral regulation and administration between 2010/2011 and 2012/2013,<sup>24</sup> it is unlikely to be sufficient.

In contrast, the ENE for the 2014 Budget<sup>25</sup> shows that the DEA – which undertakes only a small portion of environmental regulation in relation to provincial environment departments – spent R41.7 million on its Integrated Environmental Authorisations sub-programme, and a further R29.0 million on compliance monitoring.<sup>26</sup> During 2012/2013, the DEA spent R52.2 million on the Integrated Environmental Authorisations sub-programme, R13.6 million on compliance monitoring, and an additional R19.3 million on enforcement.<sup>27</sup>

Taking into consideration the profound environmental impact associated with the extractives industry in South Africa, as well as the disregard by this industry for environmental laws, the DMR is required to make a far more serious attempt to build meaningful compliance monitoring and enforcement capacity within itself. The planned investment in the implementation of the NEMA by the DMR is negligible when considered against expenditure by the DEA, with its existing institutional memory and experience, for the enforcement of the NEMA.

## Inadequate compliance and enforcement as a constitutional violation

There is negligible capacity within the DMR for environmental compliance monitoring and enforcement. If it plans to achieve the realisation of environmental rights of communities such as the Batlhabine community and the South African public more broadly, it would have to invest significant resources in the recruitment and training of sufficient numbers of suitably qualified and experienced, incentivised and resourced officials to monitor compliance with environmental authorisations and with general obligations for responsible environmental management, as well as take both administrative and criminal enforcement action where violations are detected. The information relayed to the CER by the DMR suggests that the DMR plans to make no more than a token effort to improve compliance monitoring and enforcement capacity within the DMR and that insufficient funds will be spent in order to improve capacity.

In the recently decided matter of *Kloof Conservancy v Government of the Republic of South Africa and Others*,<sup>28</sup> The KwaZulu-Natal High Court ordered the Minister of Environmental Affairs to appoint sufficient numbers of environmental management inspectors to enforce the provisions of the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA) related to the management of alien and invasive species in KwaZulu-Natal. The court identified the DEA's failure to implement the NEMBA as a violation of section 24 of the Constitution,<sup>29</sup> including, by implication – by then ordering the appointment of inspectors to enforce the NEMBA – weak compliance monitoring and enforcement capacity in the finding of a constitutional violation:

*... given the [Minister's] prolonged dereliction of duty under chapter 5 – effectively nullifying chapter 5 to date – the [Kloof Conservancy] is entitled to the order that [it] seeks that the [Minister] appoint and mandate sufficient numbers of Environmental Management Inspectors under NEMA in order to properly implement and enforce the regulations and species lists that the [Minister] publishes. (at 29)*

In an analogous case in the education sector in South Africa, the Eastern Cape High Court was similarly willing to order the Eastern Cape Department of Basic Education to fill vacant posts at certain schools in the Eastern Cape to ensure that the right of the learners attending these schools to basic education could be realised.<sup>30</sup> The court ordered that the head of the Department of Basic Education in the Eastern Cape Province serve and file a report within 90 days of the court order detailing the Eastern Cape Department of Basic Education's compliance with the court order.

The jurisprudence referred to above gives credence to the notion espoused by the Constitutional Court that a fundamental right does not exist in the abstract – it must have a tangible and measurable impact on the lives of people. Those who have a duty to ensure the realisation of rights cannot simply pay lip service to these rights. What constitutes 'reasonable legislative and other measures' was determined by the Constitutional Court in the case of *Government of the Republic of South Africa and Others v Grootboom and Others*:<sup>31</sup>

*Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.<sup>32</sup>*

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The DMR fought a long political battle for the retention of the environmental mandate in respect of the extractives industry, but appears to be unable and/or unwilling to ensure that the constitutional right to an environment that is not harmful to health or well-being for those affected by that industry is realised. Unless remedied through meaningful and bold steps, this failure makes the DMR vulnerable to litigation asserting a violation of section 24 of the Constitution, as well as to court intervention to ensure that the necessary steps are taken. Needless to say, one of the many challenges facing a litigant seeking constitutional compliance from the DMR will be in formulating its relief in a manner that facilitates implementation of and compliance with a successfully obtained court order.

#### ENDNOTES

- 1 Section 24(a) of the Constitution of the Republic of South Africa, 1996 ('the Constitution').
- 2 Section 24(b) of the Constitution.
- 3 See, generally, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the National Environmental Management Act 107 of 1998 (NEMA).
- 4 See, for instance, the environmental impact of abandoned mines on the Witbank Coalfield described by FG Bell et al. in *Environmental Impacts Associated with an Abandoned Mine in the Witbank Coalfield, South Africa* *International Journal of Coal Geology* 45: (2001). 196–216.
- 5 See, for instance, the description of the plight suffered by the Silobela community as a result of its water supply having been polluted by mining activities in *Federation for a Sustainable Environment and Another v Minister of Water Affairs and Others* (unreported) (case no. 35672/12, High Court of South Africa, Gauteng Division, Pretoria; judgment delivered on 10 July 2012) at para 9.
- 6 It is unclear whether these officials are 'designated' as contemplated in section 91 of the MPRDA.
- 7 DMR Annual Report 2009/2010, p. 76.
- 8 DMR Annual Report 2011/2012, p. 68.
- 9 DMR Annual Report 2013/2014, p. 68.
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- 21 Ibid., p. 12.
- 22 Budget 2014: Estimates of National Expenditure – Vote 32 – available at <http://www.treasury.gov.za/documents/national%20budget/2014/enebooklets/Vote%2032%20Mineral%20Resources.pdf> at 13.



IN GOOD COMPANY?







- 23 Ibid., p. 11.
- 24 Ibid.
- 25 Budget 2014: Estimates of National Expenditure – Vote 30: Environmental Affairs – available at [http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0C-CkQFjAD&url=http%3A%2F%2Fwww.treasury.gov.za%2Fdocuments%2Fnational%2520budget%2F2014%2Fenebooklets%2FVote%252030%2520Environmental%2520Affairs.pdf&ei=Rh9rVO6II3LaKKSgIgM&usg=AFQjCNH7XlZvbeR2N\\_p9MzyTBZZkSPY9sg](http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0C-CkQFjAD&url=http%3A%2F%2Fwww.treasury.gov.za%2Fdocuments%2Fnational%2520budget%2F2014%2Fenebooklets%2FVote%252030%2520Environmental%2520Affairs.pdf&ei=Rh9rVO6II3LaKKSgIgM&usg=AFQjCNH7XlZvbeR2N_p9MzyTBZZkSPY9sg).
- 26 Ibid., p. 11.
- 27 Ibid.
- 28 Unreported; case no. 12667/2012; KwaZulu-Natal Local Division, Durban; judgment delivered on 22 October 2014.
- 29 Ibid. at paras 115–119 and para 129.
- 30 See the court order in the matter of *Linkside and Others v Minister of Basic Education and Others* (unreported; case no. 3844/2013; Eastern Cape High Court, Grahamstown).
- 31 *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19.
- 32 Ibid., at para 42.





By Saliem Fakir,  
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MB Ting

# The political economy of **SUSTAINABLE MINING TRANSITION** in South Africa



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## Introduction

South Africa has built its economy on two major primary sectors: mining and agriculture. Mining has been the mainstay of South Africa's industrialisation and, later, of the financialisation of the economy. Over time, mining, energy and industrial development have been key to unlocking growth and development in South Africa. These inter-relationships have been defined as the 'Minerals–Energy Complex' (MEC).<sup>1</sup> Despite the recent years of poor performance of the mining sector, mining continues to be an important part of the South African economy, and this is unlikely to change for a few decades. South Africa has many strategic minerals of global importance.

Natural resources can be a bane or boon for developing economies. Predatory rent-seeking by political and business elites can undermine the use of resource rents in order to further developmental goals. Therefore, how mineral-revenue issues relating to mining and new extractives, such as oil and gas, are governed, as well as the conflicts between the revenue-capture objectives of governments and investors on the one hand and the interests of communities on the other, can make or break the future of South Africa's economy and political system. While minerals will continue to be an important economic anchor, South Africa needs to build other forms of capital. It should enhance its human capital, diversify its exports base, and develop new economic sectors so it is not so reliant on mining. Economic policy planning and political governance in the next ten years will be crucial deciding factors in determining such prospects. Without a strategic plan for converting mineral wealth into other forms of capital, South Africa's economy is likely to be less resilient and more vulnerable to external shocks.

South Africa's mining history and its relevance to its economy can be traced as far back as 1871 with the discovery of diamonds in Kimberley and the Witwatersrand main gold reef in 1886. The wealth of its mineral resources is evident from one of the largest reserves of platinum group metals (PGMs), chromium, gold, manganese (high-grade ore), aluminosilicates, vanadium and other minerals in the world (Table 1). In addition, the

mining sector has been a source of other competencies such as engineering, technical and production expertise, as well as broad research and development activities.

TABLE 1: A summary of South Africa's mineral reserves and their relative global production percentages<sup>2</sup>

MINERAL	UNIT	RESERVES			PRODUCTION 2009			LIFE
		Mass	% World	Rank	Mass	% World	Rank	Years
Aluminosilicates	Mt	51	•	•	0.265	60.2	1	192
Antimony	kt	350	16.7	3	3	1.6	3	117
Chromium ore	Mt	5 600	72.4	1	6.762	•	1	813
Coal	Mt	30 408	7.4	6	250.6	3.6	7	121
Copper	Mt	13	2.4	6	0.089	•	•	146
Fluorspar	Mt	80	17	2	0.18	3.5	5	444
Gold	t	6 000	12.7	1	197	7.8	5	30
Iron ore	Mt	1 500	0.8	13	55.4	3.5	6	27
Iron ore – including BC	Mt	25 000	10	•	55.4	3.5	6	451
Lead	kt	3 000	2.1	6	49	1.2	10	61
Manganese ore	Mt	4 000	80	1	4.576	17.1	2	874
Nickel	Mt	3.7	5.2	8	0.0346	2.4	12	107
PGMs	t	70 000	87.7	1	271	58.7	1	258
Phosphate rock	Mt	2 500	5.3	4	2.237	1.4	11	1 118
Titanium minerals	Mt	71	9.8	2	1.1	19.2	2	65
Titanium – including BC	Mt	400	65	1	1.1	19.2	2	364
Uranium	kt	435	8	4	0.623	1.3	10	698
Vanadium	kt	12 000	32	2	11.6	25.4	1	1 034
Vermiculite	Mt	80	40	2	0.1943	35	1	412
Zinc	Mt	15	3.3	8	0.029	0.2	25	517
Zirconium	Mt	14	25	2	0.395	32	2	35

Most of South Africa's mineral wealth is exported worldwide as ores, concentrates, alloys or metals, with some degree of beneficiation downstream. The exception is iron and steel, as well as polymers from oil and coal, which are used as inputs into the manufacturing sectors.<sup>3</sup> As depicted in Table 1, the mineral-wealth reserves in the country have a long lifespan and are expected to continue to play an important role in the country. However, these primary resources are finite and unsustainable.

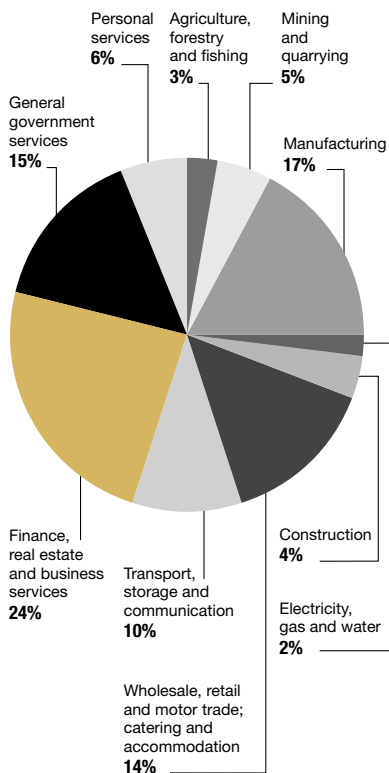
Furthermore, the mining model of low wages and high labour intensity has probably reached its peak and the trend will be towards greater mechanisation in the future. At present, the country is at the heart of an escalating need for systemic transformation as reflected by societal desires for a 'better life for all'. The unemployment rate remains persistently high at 25 to 36%,<sup>4</sup> or at 40% if one includes discouraged workers,<sup>5</sup>

WHILE MINERALS WILL CONTINUE TO BE AN IMPORTANT ECONOMIC ANCHOR, SOUTH AFRICA NEEDS TO BUILD OTHER FORMS OF CAPITAL – IT SHOULD ENHANCE ITS HUMAN CAPITAL, DIVERSIFY ITS EXPORTS BASE, AND DEVELOP NEW ECONOMIC SECTORS SO IT IS NOT SO RELIANT ON MINING.



**FIGURE 1**

Key sectors in South Africa's economy and their contribution to GDP in 2014 (Stats SA)



and inequality reflects a two-world economy with a Gini co-efficient of 0.6. Mining is at the centre of these challenges, not only because it highlights issues on labour inequality, but also because it illustrates the requirement for structural changes in the economy.

## Mining and the economy

In line with trends for emerging economies, the country has seen a decline in the primary sector and growth in the secondary and tertiary sectors. At present, mining contributes about 5% to the country's gross domestic product (GDP), with finance and manufacturing dominating the economy (Figure 1). However, with its interlinkages with finance, manufacturing, service industries and other sectors, the MEC collectively accounts for close to 20% of South Africa's GDP. The most important impact on the economy is mining's 60% contribution to exports and its 37% contribution to government revenue through taxes. Furthermore, the latest employment statistics for mining show employment at around 490 000 workers. However, this figure is a 6.5% decrease compared with the previous year (according to Stats SA). This was primarily due to the five-month platinum strike that resulted in the economy contracting in the first quarter of 2014 by as much as 0.6%.

In the light of the urgent need to create labour-intensive industries that generate employment, the key question is whether mining is still relevant. Furthermore, economic models are moving towards high wages–low labour intensity, particularly around trends that seek to rely on greater use of specialised knowledge and skills. Where does mining fit into all of this? What do the recent platinum strikes demonstrate about the macroeconomic structure of the economy and the increasing inequality gap? Is the economy inclusive or does legislating for 26% black economic empowerment under the Mineral and Petroleum Resources Development Act, for example, actually target and empower the intended groups? Or does it privilege a few and elite connected groups? What are the underlying issues that cause inertia and block systemic transformation?

## Financialisation

A way of providing some insights into these issues could be the use of transition studies. Although mining is a historically important sector in the country, it is important to understand that, over time, it has also grown and entrenched economic activities that have linkages to energy, chemicals, finances and retail – the MEC to which we referred earlier. In fact, it is as a result of the MEC that the contribution of mining is as high as 20%. The MEC has historically favoured a more exclusive model – at first, the development and wealth creation of a white minority and, later, over the last 20 years, the new black elite as well as international capital. The political economy of the MEC itself in turn has a significant influence on the structure, texture and ethos of other parts of the economy as the interlinkages between elites within the economy are strengthened.

As South Africa's financial sector and system has matured (it is rated one of the strongest in Africa), so the financialisation of the MEC has become a dominant feature of the mining sector.<sup>6</sup> These developments have favoured short-term, portfolio-based capital inflows rather than forms of foreign direct investment that are long term in nature where investments are directed at the real economy.<sup>7</sup> The extent to which this has evolved is demonstrated by the size of stock portfolios the mining companies have on the Johannesburg Stock Exchange (JSE) (Table 2).

TABLE 2: The biggest mining companies on the Johannesburg Stock Exchange and their market capital

Company	Market capital (ZAR) rounded off (as of 2012)
BHP Billiton	1.6 trillion
Anglo American	376 billion
Kumba Iron Ore	180 billion
AngloGold Ashanti	111 billion
Anglo American Platinum	108 billion
Impala Platinum Holdings	99 billion
Gold Fields	79 billion
Exxaro Resources	63 billion

The JSE market capitalisation is more than double the size of the actual economy and is part of the global speculative commodity markets, which results in prices that are often not matched by production costs and demand.<sup>8</sup> These portfolio inflows that favour short-term capital flows render capital flows volatile and dependent on global capital and commodity markets. South Africa also has a high current account deficit (6% of GDP), low economic growth and continued labour friction.

What is essential for transformative change in the country is less focus on short-term shareholder value, addressing MEC dependency, and identifying new areas of the economy that can be de-linked from the MEC. Furthermore, profits from the MEC need to be structured in a way that addresses long-term investment in the country and ensures that these are used appropriately to achieve development objectives. Such are the fundamental issues that require deliberation in the country, as mismatch ideologies can cause inertia with regard to coherent implementation and practices.

### Low carbon growth

South Africa is well known for its energy-intensive economy that rivals the greenhouse gas emissions of developed countries. Historically, this is primarily due to having one of the cheapest electricity systems in the world as a result of the utilisation of abundant coal reserves, thereby allowing energy-intensive mining activities to flourish. Furthermore, the country has also been reliant in the past on the conversion of coal to liquid fuels as a means of energy security in respect of its fuel supply.

Decoupling economic growth with carbon emissions, particularly from the 'dirty' MEC, is often seen as a threat to 'business as usual'. There is the view that renewable energy is expensive, or that carbon taxes disrupt profits, or that environmental sustainability should continue to be an externality. Such a misconception is ignorant of reality – the mineral resources will deplete at some time in the future. So, it would be foolish to keep on building the country's future welfare on these depleting resources alone. Nonetheless, apart from new, cleaner energy sources, a closer look should be taken at structural reforms that allow knowledge-based service economies to develop.

Decarbonisation should actually be used as a lens to see how things can be done differently. It should be viewed as an opportunity to build an economic model that allows stronger linkages to be created between the old mining-dependent economy and a more resilient economy that is less dependent on finite resources and is more focused on diversifying the economic base. This can tie into the increasing trend of a circular

AT PRESENT, MINING CONTRIBUTES ABOUT 5% TO THE COUNTRY'S GROSS DOMESTIC PRODUCT (GDP), WITH FINANCE AND MANUFACTURING DOMINATING THE ECONOMY.

**GIVEN THAT SOUTH AFRICA IS FORTUNATE TO HAVE ABUNDANT LOW-CARBON SOURCES OF ENERGY ... THERE ARE OPPORTUNITIES FOR RENEWABLE TECHNOLOGIES TO PROVIDE NEW SOURCES OF ECONOMIC GROWTH.**



economy that focuses on more efficiency and less waste and does more with the least resources.

These opportunities can be found in the treatment of tailings and the recycling of metals, in minimising material use, in stimulating the multiple use of products through the design of products with more than one function, and in replacing fossil-fuel-based electricity and liquid fuels as well as heat with renewable alternatives. Given that South Africa is fortunate to have abundant low-carbon sources of energy such as wind and sun, there are opportunities for renewable technologies to provide new sources of economic growth. Many of these activities are already happening in one form or another. A focused approach to decarbonisation would only require developing these activities at scale – by introducing policies that further encourage them – in order to provide for investment, industrial activity and job creation.

Decarbonisation can also mean a process of enhancing development by responding more effectively to vulnerabilities to price shocks and geopolitical risks. Thus, in essence, decarbonisation or a low-carbon economy is a means of enhancing how things can be done in a way that is robust in areas such as markets and technology. This, in turn, can stimulate innovation and competitiveness that are less reliant on primary resources. The country already has a well-developed industrial base that can be used as a foundation to redefine the competitive advantage towards low-carbon technologies and systems. This would enhance industrial growth by generating new sources of economic activity, thereby helping to achieve broader social and economic developmental objectives.

In the light of the above, the following issues are important to address:

- The high levels of dependence on foreign capital;
- A BEE model that consumes capital rather than generates new sources of wealth;
- The increasing danger that mining is becoming an enclave economy with weakening linkages with the rest of the economy;
- The fact that mining is explicitly becoming more export-oriented and, as a result, vulnerable to changing global prices for minerals (often referred to as 'commodity volatility') and exchange rate changes (the rand, for instance, has seen rapid strengthening and weakening, all within a short space of time);
- An economic model of mining that is ownership-focused, rather than income-focused, where the state is able to extract its appropriate share of income from the mining sector;
- Poor linkages between mining and the development objectives of the country, with too much reliance placed on the failed Mining Charter and on social and labour plans;
- The threat that mining will become increasingly mechanised and that mining in the next 20 years will see more low-skilled jobs shared than created (we thus have to look at creating other labour-intensive sectors outside of mining to ensure sustainable employment growth); and
- The need for new economic models that can provide linkages to the old mining-dependent economy and to the realities for low-carbon growth.

## **Conclusion**

The current economic crisis is an opportune time to revisit the country's economic policy on mining. As a way of de-linking its dependency on the MEC, South Africa should look to opening up opportunities for a knowledge-based economy. This is a way of not only positioning itself as more resilient to volatile commodity markets, but also, more importantly, of ensuring competitive growth in an economy that is becoming less reliant



**GOOD ECONOMIC POLICY AND PLANNING THAT HAVE CLEAR GROWTH AND DEVELOPMENT OBJECTIVES SHOULD DICTATE HOW MINING INVESTMENTS FLOW AND HOW REVENUES OR INCOME GENERATED FROM THE MINING SECTOR ARE MANAGED.**





on primary resources. South Africa should also look to build on its experience with the mining industry, particularly on the knowledge base that it includes (such as production or process engineering, research and development) and diversify towards competitive sectors in the economy. An important consideration is not only to focus on the continuous output of mining resources and seeing the minerals as an end in themselves. Rather, South Africa needs to consider utilising the knowledge underlying the processes of obtaining these minerals to diversify or enhance other sectors of the economy. Examples could include technological innovation in mechanisation processes, machinery, parts/tools and equipment, all of which could spill over into important sectors such as transportation, information technology, construction and manufacturing.

Good economic policy and planning that have clear growth and development objectives should dictate how mining investments flow and how revenues or income generated from the mining sector are managed. The economic model for mining – because of the high dependence on foreign investments and BEE ownership – suggests that economic development issues and national interests are things that happen by accident rather than by purposeful engagement in the mining sector. The lack of focus of economic policy on the various income options in respect of mining, which is presently focused on growth in investment and capital spend, will lead to a continued hollowing out of value and further leakage of wealth from the country. The domestic-rootedness of mining companies, their assets and capital has weakened increasing de-linking of mining from the rest of the economy so that the transfer of the full value of mining to the economy is being diluted.

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By Antoine Heuty

# HARNESSING MOBILE TECHNOLOGY

## for improved worker engagement in South Africa's mining industry

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### Introduction

The rising frequency, severity and cost of labour-related conflicts in South Africa's mining sector call for significant changes in worker-engagement systems in order to better respond to the real challenges workers are facing while creating shared value for companies, labour and government. In this article, we analyse worker-engagement challenges faced by South Africa's mining industry and show how mobile technology can be leveraged to create a two-way communication platform for both workers and companies. We illustrate how data generated by the mobile-enabled engagement platform can help to create shared value by managing occupational health and safety, creating effective grievance mechanisms and facilitating job creation, while taking into account the complex relationships between companies, governments and workers. Finally, we address the potential challenges and opportunities that arise when adopting a technology-based solution to social issues.

### The growing risk in South African mining

In 2013, mining in South Africa accounted for 20% of all investment in the country and for 18% of gross domestic product (GDP), representing 38% of all South African exports.<sup>1</sup> The mining sector is the country's major employer, with more than one million people in mining-related employment, and the largest contributor by value to broad-based black economic empowerment in the economy.<sup>2</sup> Anglo American alone, a British multinational mining company, is the single-largest private-sector employer, with more than 82 000 full-time employees and contractors in South Africa.<sup>3</sup> At the same time, the unemployment rate is currently at 24.7%, with youth unemployment (i.e. 15- to 34-year-olds) at 50%, and the country has one of the highest percentages of actively disengaged<sup>4</sup> employees in the world.<sup>5</sup>

The development of the mineral sector, therefore, and concomitant labour relations are an unquestionable feature of the overall social and economic well-being of the country and for business success in the mining sector.

Today, South Africa faces significant challenges in labour relations in the mining sector. This is confirmed by the increasing severity, duration and frequency of strikes, which are resulting in considerable lost productivity and financial loss for both workers and companies (see Table 1).

**TABLE 1: Cost of one day of industrial action in South Africa's gold-mining industry**

The Chamber of Mines of South Africa has calculated that the cost of one day of industrial action in the South African gold-mining industry results in:

- Loss of taxes per day: ZAR45 million (USD4 million);
- Loss of wages and salaries per day: ZAR100 million (USD10 million);
- Loss of sales by suppliers to the mining industry per day: ZAR10 million (USD1 million); and
- Loss of revenue per day: ZAR350 million (USD32 million).

*Source: Ernst & Young (2013), Cost Control and Margin Protection in the South African Mining and Metals Industries*

Worker strikes are, and have been, a common feature of South Africa's mining industry. In Europe, between 2005 and 2009, an average of 30.6 working days/1 000 employees were lost, compared with an average of 507 working days/1 000 employees in South Africa between 2006 and 2011 – a figure that is among the highest in the world.<sup>6</sup>

The year 2012 was a case in point, due largely to the Marikana incident and the subsequent widespread wildcat strikes. With over 75 000 miners on strike from various gold and platinum mines across the country that year, South Africa recorded a loss of 3 million working hours, 57.5% of which were in the mining sector, and R6.7 billion in lost wages.<sup>7</sup> Most agree that the social unrest experienced in 2012 was by far the most violent since the end of apartheid.<sup>8</sup>

In 2014, South Africa experienced a new record for the longest and most expensive mining strike, which lasted for five months and resulted in 7.5 million lost working days, a loss of R10 billion (47%) in workers' yearly wages, and in a combined \$2.25 billion loss of revenue<sup>9</sup> for Lonmin, Anglo American Platinum and Impala Platinum.

Recent analysis<sup>10</sup> of South Africa's mining trends shows that strikes and negative community sentiment towards mining companies are only expected to increase as companies look at ways to contain costs through labour retrenchment.<sup>11</sup> As a percentage of total mining operating costs, South Africa's labour costs are among the highest globally and are coupled with low productivity.<sup>12</sup> Labour costs currently range from 20 to 25% of total production costs for modern, mechanised and open-cast mines, and 50 to 60% for the mature, deep-level underground mines.<sup>13</sup> Research by the Labour Market Intelligence Partnership<sup>14</sup> reveals that, for the majority of mineral ores since 2005, productivity per worker has been falling along with rising labour costs.<sup>15</sup> For example, between 1999 and 2011, the labour productivity per kilogram of platinum declined by 38% and real labour costs increased by over 176%.<sup>16</sup> As a result of rising costs and falling productivity, experts in the mining sector are suggesting a move towards a new model of mining that is more productive and requires fewer workers.<sup>17</sup>

What emerges is that worker relations and employment productivity in the mining sector are clearly becoming a concern for businesses, labour and the government in South Africa. In fact, four out of the nine identified top risks currently faced by the mining industry are directly related to workers and worker relations (see Annexe 1).<sup>18</sup>

In response to negative trends regarding worker-related issues in the mining sector, the South African Department of Mineral Resources and the Chamber of Mines have jointly

**WHAT EMERGES IS THAT WORKER RELATIONS AND EMPLOYMENT PRODUCTIVITY IN THE MINING SECTOR ARE CLEARLY BECOMING A CONCERN FOR BUSINESSES, LABOUR AND THE GOVERNMENT IN SOUTH AFRICA.**



ASIDE FROM THE ACCIDENTAL FAILURE OF EARLY-WARNING EQUIPMENT OR THE USE OF OLD AND FAULTY MACHINERY, MOST ACCIDENTS ARE A RESULT OF BEHAVIOURAL PRACTICES.

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established the Mining Industry Growth, Development and Employment Task Team (MIGDETT) with the objective, among other things, of finding solutions that tackle labour-related issues and the sustainability of the mining sector. Furthermore, the establishment of the Framework Agreement for a Sustainable Mining Industry (June 2013), signed by several stakeholders, offers an important window of opportunity for all stakeholders to improve the stability of the sector.

Improving worker relations in a way that creates shared value and addresses national health and safety and employment issues necessarily requires a comprehensive and coordinated effort that also introduces legal, political and industry-wide reforms. In the context of this understanding, our contribution is limited to offering a pragmatic solution that tackles worker-related challenges by managing health and safety, creating effective grievance platforms, giving workers a voice, and facilitating job creation while taking into account, as much as possible, the complex relationships between companies, government and workers.

The next section identifies three changes needed in current company-worker engagement systems in order to create shared value for the mining industry, workers and the national government in South Africa. In the section thereafter, we propose a mobile technology-based platform that responds to these three 'needs' and enhances worker engagement efficiently and at scale. In addition, we explicitly show how data generated from the mobile platform can help to create shared value for companies, the government and workers. In the final section we address the potential challenges and opportunities that arise when adopting a technology-based solution.

### **Addressing worker-engagement strategies for the mining sector in South Africa**

An analysis of current worker-related challenges faced in South Africa (see Annexe 2) highlights three primary needs: a worker-engagement system that manages expectations, that induces 'good' behaviour in the sphere of health and safety, and that contains social risk quickly.

#### *Worker-engagement systems that create incentives and encourage good behaviour*

The mining sector in South Africa is particularly challenged by persistent workplace fatalities, as well as the repercussions<sup>19</sup> of mining-related chronic diseases such as silicosis, tuberculosis (TB) and HIV (with the three often being related).<sup>20</sup> Occupational diseases of the lungs, as well as related compensation and costs,<sup>21</sup> are high on the list as being some of the most pervasive health-related challenges faced by the industry. In fact, five of South Africa's biggest gold-mining companies recently formed an industry working group dedicated to tackling the 'mining industry legacy issue' of lung disease by engaging stakeholders to design and implement a comprehensive solution that focuses on compensation and medical treatment that is fair and sustainable for the sector.<sup>22</sup>

An analysis of the recorded challenges conducted by the South African Mine Health and Safety Inspectorate<sup>23</sup> shows that, aside from the accidental failure of early-warning equipment or the use of old and faulty machinery, most accidents are a result of behavioural practices, such as failure to check and test equipment periodically, a lack of knowledge of mine standards, standard procedures not being updated, personnel not using personal protective equipment such as safety belts, or the improper use of early-warning devices such as gas-measuring instruments by workers. Similarly,

## IN GOOD COMPANY?

occupation-related diseases are primarily due to substandard conditions at the workplace, which diseases can also be avoided by changing behavioural practices that expose workers to high levels of heat, dust and gases.

Traditional approaches to behavioural safety that employ management-led observations, feedback and goal-setting to reinforce safer work practices have had an inconsistent track record. Research and experience confirm that, despite the introduction of training programmes and safe work practices, unsafe acts are still hard to control.<sup>24</sup> Part of the reason is simply that people forget – either because of the workload or because, as time passes, material covered during training, even if understood well, tends to be forgotten.

Lack of communication at the workplace and behavioural tendencies that undermine health and safety can be avoided through improved content and a methodology of engaging with workers on health and safety-related issues. Reminders, tips and methodologies that provide incentives, directing human behaviour towards positive outcomes, need to be incorporated in worker-engagement systems.

### *Worker-engagement systems that are inclusive and foster a culture of trust*

Globally, existing worker-engagement systems typically suffer from lack of trust, from capture by local elites and from weak user feedback.<sup>25</sup> These challenges are widespread in South African mines, where pervasive site-level corruption in the form of bribes and the misuse of power relations among miners and administrative staff frequently cultivates an environment of mistrust.<sup>26</sup> For example, in an assessment of workplace engagement by Gallup, a global performance management consulting company, it was found that there was a fundamental breakdown of trust between employees and organisational leadership in South Africa, with fewer than one in five South African employees strongly agreeing that their opinions counted at work or that their supervisors encouraged their development.<sup>27</sup>

The following case study exemplifies the kind of relationship difficulties that miners may encounter in the workplace.

#### **CASE STUDY 1: Showcasing possible workplace relationship dynamics in mining**

*Mining companies are often required to meet a quota of female employees. The tough and predominantly male-centred work environment makes it challenging for women to voice their issues at the workplace.*

*'There is no-one to tell about my problems. And I can't trust anyone: You never know who is good and who is wrong.'* – Anne

*'Anne', a 27-year-old miner, has been working underground for three years fixing ventilation pipes. Anne is one of the very few female miners working on site and has encountered gender-based abuse several times in the workplace.*

*'The people in the positions of power are the same people oppressing women,' she says, and 'women are afraid to report [attacks] because they don't want to lose their jobs or be alienated by other workers.'*

*'If you want something at work, you have to love the supervisor or chibaas [chief boss] or the kaptein [captain],' she says. 'It is hard to get a promotion, because guys take advantage – they just say "love me".'*

*Alternatively, she says she could pay a bribe, also known as chocho, of as much as R5 000 (470 USD) to her captain. She says that she cannot talk to the staff in the human resources department as 'they are all men'.*

Source: R Ilham (2014), *Mining while Female: The Perils of Marikana*, available at <http://www.aljazeera.com/indepth/features/2014/01/mining-while-female-perils-marikana-20141582421339881.html>.

THE COMPLEXITY OF OPPOSING INTERESTS AND THE LACK OF TRANSPARENT AND CLEAR COMMUNICATION STRATEGIES DURING AND PRIOR TO MARIKANA'S STRIKES CONTRIBUTED TO OBFUSCATING THE REAL 'NEEDS' AND 'WANTS' OF MINERS, THUS HINDERING RESOLUTION.

This case study showcases the difficult and complex relationship dynamics that can result in workers failing to provide feedback due to information asymmetries, fear of retribution, high perceived costs relative to benefits, and inaccessible channels of participation. At the same time, current worker-engagement systems do not always respond to challenges regarding representational questions of who speaks for whom or manage perceptions around the engagement system *at scale*.

Overcoming such perceived and real issues necessarily requires a truly confidential and anonymous mechanism that circumvents certain complex human relationships, inducing feedback and allowing for workplace gender violence or health and safety issues to be *managed* methodically at the initial stages before practices destructive to human relations are normalised, thereby further attracting 'bad' behaviour and snowballing into unmanageable dynamics in the workplace.

#### *Worker-engagement systems that help to manage conflict in a timely manner*

There are important lessons to be learnt from the 2012 Marikana incident and the subsequent wildcat strikes that point to the necessity of establishing a solid worker-engagement system that facilitates conflict management in emergency situations. The complexity of opposing interests and the lack of transparent and clear communication strategies during and prior to Marikana's strikes contributed to obfuscating the real 'needs' and 'wants' of miners, thus hindering resolution.<sup>28</sup> Looking back on Marikana, some suggest that this particularly delicate event called for negotiation mechanisms outside of the existing norms.<sup>29</sup> Eventually, there was some innovation in the negotiation process when radio advertisements, public meetings and cell phones were temporarily used to facilitate communication between involved parties, without an intermediary.<sup>30 31 32</sup> Yet the introduction of temporary, ad hoc communication platforms cannot provide the level of accessibility and inclusiveness needed to reach sustainable solutions, particularly when complex conflict dynamics exist. Furthermore, temporary communication platforms cannot generate a responsive mechanism that can measure trends and impact over time.

Direct communication between mining companies and their workers can help to manage expectations and inform negotiation processes based on real, rather than perceived, needs and wants. However, the platform needs to be well established and must ensure accessibility, inclusiveness and user-centricity.

#### **Enhancing worker engagement using mobile technology**

In order to reach the level of scale needed to create significant and lasting impacts in worker-engagement systems, mobile technology is identified as a promising tool thanks to its ubiquity in South Africa. The challenge lies in designing a human-centred mobile platform that ensures participation, transparency and accountability, while collecting frequent and timely data at relatively low marginal costs.

Experience of the growing ICT for development (ICT4D) sector has shown that, even with its own challenges regarding accessibility and privacy issues, information and communications technology (ICT) can be an important enabler in respect of social development, political participation and good governance.<sup>33 34</sup> For example, agricultural programmes that use mobile technology to promote access to price information have helped to increase farmers' incomes by up to 24%, with an increase of up to 36% in income for traders and price reductions of around 4% for consumers (depending on the crop, country and year of study).<sup>35</sup>



## IN GOOD COMPANY?

In South Africa, cell phone usage has increased considerably in the last decade and it is currently the most-used media in the country. SMS text messaging, for instance, is used 2.9 times more than email.<sup>36</sup> Between 2000 and 2010, mobile subscriptions increased from 17 to 76% of adults, while mobile networks in South Africa collectively reached over 90% of the country, with 64.6% unique subscribers.<sup>37</sup>

The widespread ubiquity and accessibility of mobile technology means that there are new opportunities in the corporate sector to measure and improve corporate impact through innovative worker-engagement systems. Simple, free, anonymous and easy-to-use SMS messaging services and Interactive Voice Response can be used to ‘push’ and ‘pull’ data or information to or from workers. The mobile platform can help to institute direct two-way communication between workers and company staff, for example by allowing companies to follow up directly and communicate results to workers by closing the feedback loop, thereby demonstrating the value of using such a platform to workers and establishing a solid relationship with them.

A centralised information dashboard facilitates the *management and analysis* of the feedback received. For example, grievance feedback on work-related issues is managed by prioritising response tasks and tracking the status of grievances. At the same time, the dashboard can be used to ‘push’ information out, like SMS reminders that encourage behavioural change<sup>38</sup> in health and safety practices, thus avoiding occupational fatalities.

As data is received, the dashboard can be used to automatically aggregate and analyse near-real-time information, thereby creating tailored reports and functioning as an early-warning mechanism. For example, data emerging from perception polls that assess worker satisfaction can be periodically aggregated and used to detect ‘spikes’ or anomalies in perceived satisfaction levels. Specific reasons for dissatisfaction can then be tracked and verified.

Table 2 summarises how the mobile platform can improve worker conditions, specifically by encouraging good behaviour, fostering a culture of trust and managing conflict. The expected results in terms of creating shared benefits for workers, companies and governments alike are also outlined.

**TABLE 2: How mobile platforms can improve worker conditions**

Products	Functionalities	Data collected	Expected shared value creation or risk mitigation
Workplace health and safety (HS) feedback	Collecting workplace-related health and safety grievances Providing complementary training tools	Health and safety grievances; early-warning system identification of anomalies Training information and quiz results	<b>Worker:</b> Trustworthy, anonymous platform for voicing concerns, thus circumventing difficult site-level human relations <b>Company:</b> Reduction in workplace corruption (through bribes) and risk minimisation through early detection of workplace health and safety issues
Encouraging behavioural change in HS	Dissemination of health and safety information tailored for illiterate miners Dissemination of training materials and assessing workers and contractors’ understanding through quizzes SMS reminders on health or safety practices	N/A	<b>Worker:</b> Reduction in avoidable workplace fatalities or incidents <b>Company:</b> Reduction in workplace injury and fatalities and related costs (including legal costs); risk minimisation related to worker strikes as a result of occupational fatalities; improved workforce productivity



Products	Functionalities	Data collected	Expected shared value creation or risk mitigation
Managing HS	<p>SMS checklist reminder of daily tasks for health and safety monitoring staff</p> <p>Notification of updated health and safety procedures</p> <p>Regular feedback on site-level health and safety results to help staff monitor successes and failures</p>	N/A	<p><b>Worker:</b> Reduction in avoidable workplace fatalities or incidents</p> <p><b>Company:</b> Reduction in workplace injury and fatalities as well as related costs (including legal costs)</p>
Community HS and environment monitoring	<p>Collecting community-wide health, safety and environment-related grievances</p> <p>Dissemination of health, safety and environment-related information</p> <p>Closing the feedback loop in respect of actions taken</p>	<p>Health and safety grievances</p> <p>Hot-spotting environmental disasters</p> <p>Using crowd-sourced data to verify validity of other grievances</p> <p>Integrating worker-level data with site/community-level data to facilitate early-warning systems</p>	<p><b>Community:</b> Creates a 'neighbourhood watch' culture, thereby helping to prevent environmental disasters relating to company operations</p> <p><b>Company:</b> Risk minimisation related to community conflict as a result of preventing environmental issues; early detection of community-wide health and safety-related issues</p>
Job-matching	<p>Disseminating job-tendering procedures</p> <p>Matching job seekers and employees</p>	<p>Tracking of service use (searches, match requests, job alerts)</p> <p>Statistics on 'matched' job seekers and employers</p> <p>Institutional-partner surveys on satisfaction with platform performance</p>	<p><b>Worker:</b> Improved employment opportunities free from elite capture</p> <p><b>Company:</b> Cost-saving opportunities (reduction in hiring costs and time) in respect of labour and improved transparency with regard to tendering procedures</p> <p><b>Government:</b> Improved job-market flexibility and possibilities of increasing average wages as a result of greater competition, thereby reducing practice of hiring an informal labour force</p>
Payroll	<p>Payroll payments through mobile money</p> <p>SMS reminders about savings</p>	N/A	<p><b>Worker:</b> Improved transparency regarding pay (e.g. deductions) and improved financial literacy</p> <p><b>Company:</b> Reduced cash-handling costs and security concerns when paying workers; reduced risk of late payments and fewer practical issues concerning those who do not have bank accounts</p>
Negotiation platform	<p>Building on existing platform – an additional, easily deployed, temporary platform for community-wide negotiation on specific disputes through polling</p> <p>Inform about settled disputes to avoid miscommunication about negotiation outcomes</p>	<p>Tracking trends and needs of workers in 'emergency' situations</p>	<p><b>Worker:</b> Provides an opportunity to voice opinions and needs on specific issues (e.g. pay rises) anonymously</p> <p><b>Company:</b> Provides relevant information quickly, which helps with making informed decisions during the negotiation process, thus avoiding strikes as well as reducing negotiation times and costs</p>
Compensation	<p>Payment of compensation through mobile money</p>	<p>Keeps a record of compensation transactions</p>	<p><b>Worker:</b> Does not require a bank account to receive payments</p> <p><b>Company:</b> Expedites compensation procedures; allows for safe delivery of compensation directly to beneficiaries; reduced paperwork related to compensation</p>

## Challenges and opportunities

There are critical lessons to be learnt from ICT4D projects, specifically regarding access to technology, ensuring stakeholder participation in the two-way flow of information, and privacy. The success of using technology to create meaningful and sustainable worker-engagement systems and feedback loops ultimately depends on how workers

## IN GOOD COMPANY?

use the technology and on the culture of trust and utility generated through the mobile platform. It is important to realise that a simple 'technology fix' will not suffice in improving worker engagement *sustainably*. As several ICT4D projects have shown, closing the feedback loop and ensuring privacy help to foster a culture of trust and encourage participation, while a multi-stakeholder approach to the design of the platform creates a user-centric technology, which also ensures participation.

### *Fostering a culture of trust by closing the feedback loop and ensuring privacy*

The trustworthiness, and therefore the degree of participation and sustainability, of the system is tackled on two fronts: on the user side and on the agency side.

On the user side, it has, for example, been found that, in ICT4D projects, 'the critical factor [in ensuring high participation] is building a system that enables beneficiaries to see or hear that their voices are being heard and acted upon'.<sup>39</sup> Closing the feedback loop is critical in motivating citizens to participate and in fostering trust. This action has been found to be far more instrumental in motivating participation than providing financial incentives (such as free telephone credit). For example, polling results completed through the mobile platform can be communicated through community radios and workers can be notified via SMS once feedback is received, once data has been analysed and, finally, once it has been acted upon, thereby creating feedback flows.

On the agency side, safeguarding privacy and anonymity and ensuring that workers have fully understood how privacy through the platform works are also fundamental in fostering user trustworthiness. Workers' identities are safeguarded from mining companies, as the mobile platform anonymises each interaction by allowing for a representative to respond to SMS messages without revealing the phone number or names of the individual who sent the original message. Senior management interacts with the system through data visualisations and dashboards that provide an aggregate business intelligence perspective of the data, further shielding individuals from corporate decision-making. Finally, data is stored in secure cloud-hosted servers, not client locations, where privacy policy explicitly forbids the sale of raw and anonymised data to any partner or third party.

### *Increased participation by co-designing with multiple stakeholders*

It is important that the mobile platform is not seen as replacing other existing engagement systems or agents, but as empowering them. In the case of South Africa, labour unions play a critical role in engaging workers with mining companies. Adopting a coordinated, multi-stakeholder approach and forming partnerships ensure that trust and responsiveness are built around the engagement process, thus enhancing the usefulness and sustainability of the platform. Co-designing the platform with labour unions, for example, serves to elucidate the purpose of the platform and what and how worker-relevant data can be collected to empower labour unions and other stakeholders so as to improve labour conditions and have a better-informed, data-driven dialogue with industry.

Co-designing the platform also serves to design a user-centric stakeholder-engagement system that will highly influence the technology and non-technology mix needed to ensure maximum uptake. The user-centricity of the platform is a determining factor in its comprehensiveness and level of assimilation: for example, in cases where the

**IT IS IMPORTANT THAT THE MOBILE PLATFORM IS NOT SEEN AS REPLACING OTHER EXISTING ENGAGEMENT SYSTEMS OR AGENTS, BUT AS EMPOWERING THEM.**



accessibility and universality of mobile technology are scarce, possible solutions could range from promoting the use of community phones, adopting a call-centre approach to minimise the need to be technologically literate, and selecting local intermediaries to help facilitate access to bottom-of-the-pyramid users, to adapting more innovative solutions such as using 'Virtual SIMs'<sup>40</sup> to help transform virtually any mobile phone owner into a community phone operator.

## Conclusion

South Africa's recent government and industry-wide commitments to improving the stability of the mining sector by addressing worker-related challenges, for example through MIGDETT or the Framework Agreement for a Sustainable Mining Industry (June 2013), create an important window of opportunity for companies and other stakeholders to improve labour relations and reduce costly conflict.

Our contribution in this article lies in offering practical, scalable and site-level solutions that respond to current worker-engagement challenges, while creating shared value for the industry, government and labour. Aspects of these worker-engagement challenges, such as building relationships of trust, improving health and safety behaviour, and managing perceptions and expectations in order to reduce conflict, can be addressed by leveraging the ubiquity of mobile phones in South Africa. We have shown how a mobile platform can be used to develop local content, manage occupational health and safety issues, and implement conflict remediation by collecting data and fostering two-way communication between workers and companies. However, a simple 'technology fix' will not suffice in ensuring the sustainability of the worker-engagement platform. Technology-related challenges need to be addressed by co-designing the platform, ensuring privacy, and forming partnership with other stakeholders.

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  - Miners have twice the risk of contracting TB – 80% of miners in South Africa have latent TB;
  - Miners with HIV, which is widespread due to the high levels of casual sex, are three times more prone to contract TB – 60% of miners with active TB are HIV+; and
  - Miners with silicosis are six times more at risk of contracting TB – silicosis risk rises at 1% per year, even after retirement.
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**TECHNOLOGY-RELATED CHALLENGES NEED TO BE ADDRESSED BY CO-DESIGNING THE PLATFORM, ENSURING PRIVACY, AND FORMING PARTNERSHIP WITH OTHER STAKEHOLDERS.**

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- 38 There is increasing evidence in the development sector that knowledge is not equal to behaviour. For example, even if HIV-infected adults know that initiating antiretroviral therapy is potentially lifesaving, many still do not do it.
- Encouraging behavioural change through mobile technology by sending SMSs about, for example, treatment support at the point of care, about education awareness and about training support for health workers is increasingly being experimented with in the development sector. Although measuring the impact of such systems is still in its infancy, initial evidence suggests improved behaviour. For example, patients who received SMS support had significantly improved antiretroviral adherence and rates of viral suppression compared with the control individuals.
- Similarly, in the microfinance sector, the implementation of SMS reminders has been piloted in a number of countries to test its effectiveness as a tool to encourage savings among the poorest households, and results indicate increased savings deposits into formal accounts by 4 to 15%.
- For more information on mobile persuasion and encouraging behavioural change through technology, see <http://captology.stanford.edu/projects/mobile-persuasion.html>; <http://www.ncbi.nlm.nih.gov/pubmed/21071074>; and <http://wbi.worldbank.org/wbi/content/behavioral-change-using-technology>.
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- 40 The Virtual SIM functions just like a traditional SIM card, except that it is cloud-based and is virtually transferred from phone to phone with a code. Companies such as Comviva and Movirtu have developed Virtual SIM platforms that allow phone sharing on any handset. Virtual SIM users can use a borrowed handset to input a code to 'flash' the handset and access their own information. Privacy is protected, as they cannot access the phone's original phonebook and call log.



## ANNEXES

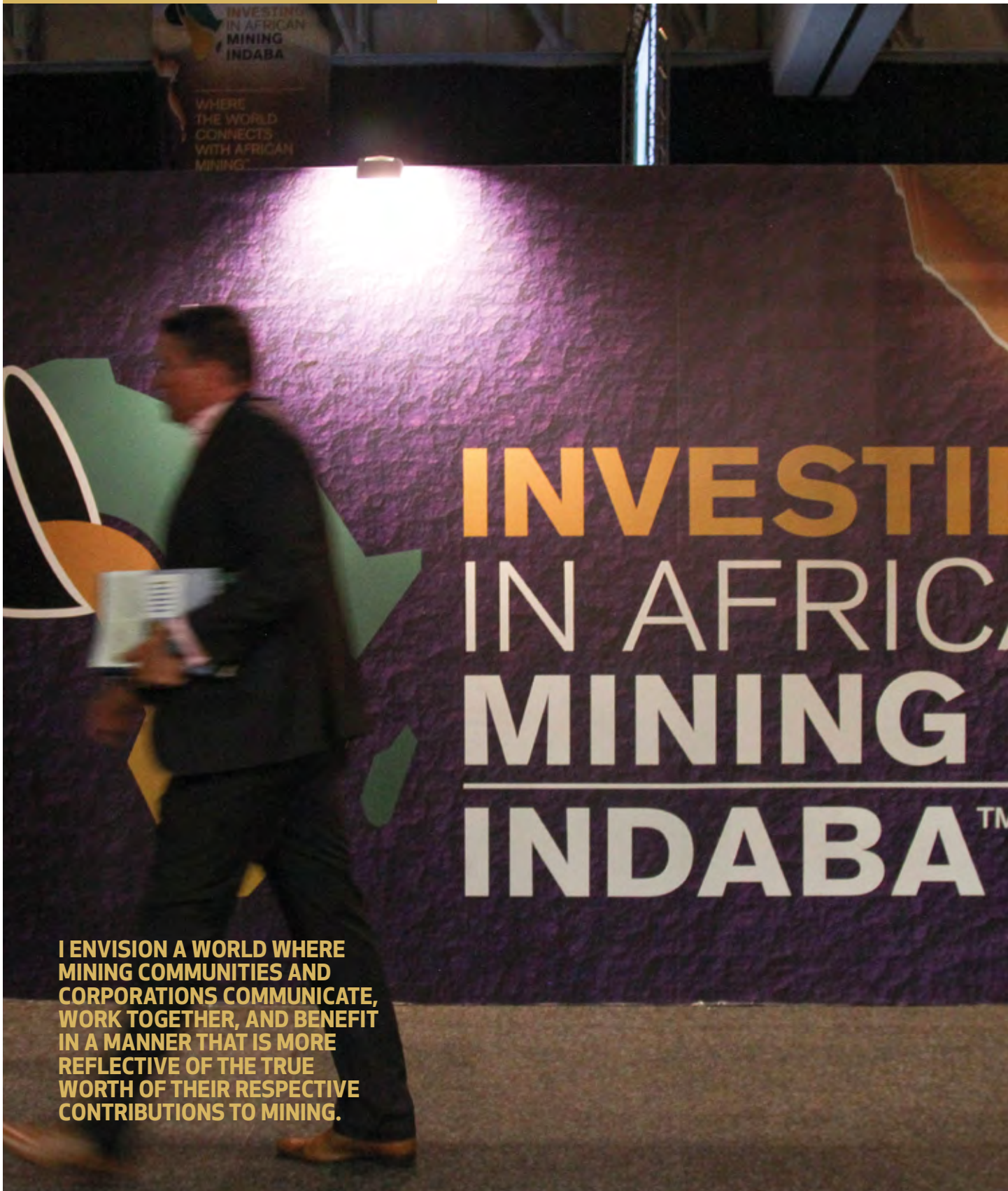
### Annexe 1: Major risks and mitigation strategies for South Africa's mining sector (adapted from PwC (2013), Highlighting Trends in the South African Mining Industry)

Risks	Mitigation
<b>Labour unrest</b>	
<p>The industry has seen an increase in labour unrest and violent strike action over increased wages and employment conditions. Inter-union rivalries have exacerbated already difficult wage negotiations.</p> <p>Ongoing business disruptions and work stoppages have led to significant production and other losses.</p>	<p>Formalising relations with trade unions. Increased focus on direct communication with employees.</p> <p>Engagement with stakeholders, including the Chamber of Mines, government and labour representatives to find sustainable solutions to industrial relations challenges.</p>
<b>Socio-economic impact</b>	
<p>Mining developments have led to an influx of workers to surrounding communities, attracted by the prospect of direct or indirect employment.</p> <p>The scale of the influx combined with a lack of service delivery, the use of housing benefits for other purposes, and slow progress with social-upliftment projects have resulted in a reality that falls well short of community expectations.</p>	<p>Implementing comprehensive stakeholder-engagement programmes to improve understanding of socio-economic problems, integrating solutions into social and labour plans, and maintaining open communication in order to address expectation gaps.</p> <p>Better coordination of social-upliftment programmes by stakeholders.</p>
<b>Safety and employee health</b>	
<p>Failure to achieve high safety levels may result in safety stoppages in terms of section 54 of the Mine Health and Safety Act. This impacts employee welfare, production and a company's licence to operate.</p> <p>Exposure to noise and dust is a significant occupational health risk, especially given historical silicosis claims in the industry.</p>	<p>Regular safety-awareness campaigns and implementation of safety-transformation programmes.</p> <p>Linking of safety results to remuneration. Enhanced reporting systems.</p> <p>Medical surveillance performed in compliance with legislation.</p>

### Annexe 2: Analysis of key worker-related challenges faced in South Africa's mining industry

Type of worker challenges	Consequence	Source
<b>Access to work</b>		
<p>Low literacy levels among subcontracted labour and different languages spoken among migrant labourers.</p>	<p>Workers are unable to read and understand health and safety signage.</p> <p>Lack of communication between miners and mine managers due to a lack of a common language.</p>	<p>F Cronjé (2013), Local Communities and Health Disaster Management in the Mining Sector, <i>Jambá: Journal of Disaster Risk Studies</i>, 5(2).</p>
<p>Significant migration and high local youth unemployment.</p> <p>The proportion of non-South African miners in the workforce remained constant at around 40% for most of the 1980s and has recently risen to 50%.</p>	<p>Mining communities are characterised by high unemployment levels among local community members and a large number of undocumented migrants seeking work. The result is conflictual tendencies between communities as well as youth protests.</p>	<p>F Cronjé (2013), Local Communities and Health Disaster Management in the Mining Sector, <i>Jambá: Journal of Disaster Risk Studies</i>, 5(2).</p>

Type of worker challenges	Consequence	Source
Growth of subcontracting into core activities. Large informal labour force, and significant 'invisible' labour force with no rights	Contractors' labour tends to be temporary, favouring migrant labour that is not unionised and which is exempted from wage rates negotiated between the National Union of Mineworkers and the Chamber of Mines. (The average wage difference between migrant and native is considerable. In early 2000, Zimbabwean mine workers were paid USD80 per month as against USD174 for South Africans.)  Contracted migrant employees tend not to be covered by benefit schemes and retirement savings schemes.  The employment of low-wage contractors to undertake core production functions has led to conflict with regular miners who are extremely vulnerable to retrenchment.	A Minaar, S Pretorius & M Wentzel (1995), Who Goes There? Illegals in South Africa, Indicator SA, 12, at 33–40.  J Crush (2005), Migration in Southern Africa, <i>Journal of Southern African Studies</i> , 27(1): 3–5.
<b>Work quality</b>		
High levels of corruption at site-level mines.	Compromises merit-based job placement, thus reducing productivity, work quality and work safety.  Erodes trust between workers and managers.	F Cronjé (2013), Local Communities and Health Disaster Management in the Mining Sector, <i>Jambá: Journal of Disaster Risk Studies</i> , 5(2).
Significant workplace health, safety and security challenges due to the nature of mining in South Africa (deep-level mining).		A Létourneau (2014), South African Mines Too Deep, Root of the Platinum Strikes Issue, available at <a href="http://www.kitco.com/news/2014-03-19/South-African-Mines-Too-Deep-Root-Of-The-Platinum-Strikes-Issue.html">http://www.kitco.com/news/2014-03-19/South-African-Mines-Too-Deep-Root-Of-The-Platinum-Strikes-Issue.html</a> .
Silicosis, HIV and tuberculosis continue to be important health concerns.		
Among the lowest levels of worker engagement worldwide, resulting in perceived unhappiness, as well as in reduced well-being and productivity.		Gallup (2013), State of the Global Workplace: Employee Engagement Insights for Business Leaders, available at <a href="http://www.ihrim.org/Pubonline/Wire/Dec13/GlobalWorkplaceReport_2013.pdf">http://www.ihrim.org/Pubonline/Wire/Dec13/GlobalWorkplaceReport_2013.pdf</a> .
<b>Financial security</b>		
Many employees not formally 'waged' and few receive wages into a bank account.  Security concerns with regard to paying workers.		
Complex labour union dynamics/politics that compromise the financial stability of workers.		J Brand (10 October 2012), Marikana and its Lessons for Corporate South Africa, presentation: Conflict Dynamics, available at <a href="http://www.conflictdynamics.co.za/NewsArticle/Marikana-and-its-lessons-for-corporate-South-Africa">http://www.conflictdynamics.co.za/NewsArticle/Marikana-and-its-lessons-for-corporate-South-Africa</a> .



**I ENVISION A WORLD WHERE MINING COMMUNITIES AND CORPORATIONS COMMUNICATE, WORK TOGETHER, AND BENEFIT IN A MANNER THAT IS MORE REFLECTIVE OF THE TRUE WORTH OF THEIR RESPECTIVE CONTRIBUTIONS TO MINING.**





By Baone Twala

## Alternative Mining Indaba and Investing in Africa Mining Indaba: **REFLECTION PIECE**



The annual Alternative Mining Indaba (AMI) and the Investing in Africa Mining Indaba (IMI) recently took place in Cape Town and I had the privilege of attending both. Attending the indabas has been invaluable in contributing to, and shaping, my perspective on the issues currently plaguing the mining industry and on possible strategies for resolving them. I have also come to see how I, as a member of civil society, can contribute to building a society that protects, promotes and respects human rights, particularly in the mining sector.

The AMI provided a space for mine-affected communities to share their lived experiences. It also allowed these communities to share the challenges they face in their struggles with the different players in mining, not only corporations but also non-governmental organisations (NGOs).

On the one hand, civil society seeks to achieve various organisational objectives, such as dismantling systemic harm. On the other, communities seek to realise various objectives such as respect for their rights. There is thus an overlap between the objectives of these two entities and both therefore need to work together to achieve mutual goals.

Some general frustrations with NGOs, and law clinics in particular, were expressed by communities at the AMI. Although this to some extent cast a shadow on the work of law clinics specifically, it was encouraging that communities were able to confront NGOs and voice their frustrations. This is the kind of action that self-empowered, responsible and independent communities take. Communities standing up for themselves in such a way is a victory towards working ourselves as human rights lawyers 'out of a job'.

I envision a world where mining communities and corporations communicate, work together, and benefit in a manner that is more reflective of the true worth of their respective contributions to mining. However, that vision is not yet a reality.

My attendance at the IMI allowed me to take the human rights perspective to the IMI. The IMI allows us to have investors, corporations and government 'go on record' as

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to what their plans are concerning issues such as human development and respect for human rights. It was an opportunity to engage corporations and government on the issues identified at the AMI, as well as to challenge them to incorporate and/or implement the strategies identified at forums like the AMI. This kind of tactical strategy makes a worthwhile contribution to social-justice work in the mining sector.

Having attended the indabas a mere three weeks into my articles, the information and skills sharing at the AMI and IMI provided a crash course in mining in South Africa, as well as in the issues and the players pertinent to my practice area as a human rights and public-interest lawyer.

I was pleasantly surprised that the discussions held by the human rights lawyers and communities included topics such as illicit financial flows. Despite the fact that human rights ideals are enshrined in our Constitution, human rights legal practice is often criticised as idealistic and impractical, especially the less litigious aspects of such practice. Yet, at the AMI, I worked together with a group of lawyers and members of civil society and communities who did not just identify issues, but desired eventual outcomes and ideas about how these outcomes may be achieved. We critically analysed and challenged methods, decisions and reasons for corporations and governments using alternative strategies for mining that would be sustainable, while being respectful of human rights and benefiting mine-affected communities, not just mining companies, investors and government.

As a crucial part of mining, communities need to engage with one another and with other contributors in the sector. My understanding is that one of the reasons for the introduction of the AMI was that the unique financial situations of mine-affected communities did not allow for the high cost of attending the IMI. Albeit expected, it was nevertheless disappointing that community representatives were not more visible and were not included as panellists or presenters at the IMI. However, as the week progressed, I became aware that I was not the only AMI participant attending the IMI across town.

In all, I could not help but get the sense that something was changing in human rights legal practice. The delineation of 'us' (human rights and social justice) and 'them' (business and corporates) was, in my opinion, becoming refreshingly blurred. We, as civil society, are daring to venture into uncharted territory in order to engage the perpetrators of human rights violations on their own corporate turf and in their own language. This is reflective of a diversification of strategies in human rights and social-justice practice. This diversification broadens the avenues of engagement, recourse and justice.

Although the IMI is considered the 'corporate' indaba, civil society's attendance at the IMI allows for the exploitation of the rare opportunity that the IMI provides. Once a year, all the major participants in mining descend on the City of Cape Town. Communities and civil society share issues and solutions at the AMI, whilst corporations and government make plans and promises at the IMI. These plans and promises include human rights considerations – specifically regarding mine-affected communities – to a larger degree than I anticipated.

My understanding of human rights legal practice is that it aims to work for a society in which the ideals of the Constitution are realised in the lives of all, but especially those who are considered least by society. As well as holding perpetrators of human rights violations accountable through hard strategies such as litigation, softer strategies

**AS A CRUCIAL PART OF MINING, COMMUNITIES NEED TO ENGAGE WITH ONE ANOTHER AND WITH OTHER CONTRIBUTORS IN THE SECTOR.**

of infiltration and negotiation are necessary to succour the work necessary for the achievement of constitutional ideals. These two – the soft and the hard strategies – will hopefully work together to eventually eliminate the need for either of them.

I extend my sincere thanks to the Open Society Foundation for its role in these important lessons in my very young legal career.







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**OPEN SOCIETY FOUNDATION**  
FOR SOUTH AFRICA



On 16 August 2012, over three years ago, 34 mine workers were killed at Marikana (near Rustenburg) following a stand-off with the South African Police and as a direct result of a wage negotiation and dispute with a multinational platinum-mining company, Lonmin plc. Ever since then, the extractive sector in South Africa and the South African government have had to confront and attend to intense local, regional and global scrutiny in respect of operations, profits and policies.

Given the prevalence of mining operations in Africa, and the particular role that the extractive industry plays in shaping several regional economies (and state policy frameworks generally), the issue of transparency in the extractive sector is a cross-cutting theme across the Open Society Foundations.

We hope that this collection of work and research will begin to assist communities in their demands for increased engagement, collaboration, transparency and accountability in the sector.

