

WHEN MINES BREAK ENVIRONMENTAL LAWS:

HOW TO USE CRIMINAL PROSECUTION TO ENFORCE
ENVIRONMENTAL RIGHTS



Centre for
Environmental Rights

Advancing Environmental Rights in South Africa

While mines and mining operations can contribute to economic development and provide jobs, they can also bring about suffering for individuals and communities by causing damage to the land, water and air around them. Individuals and communities living with the negative impacts of mining can fight back by taking steps to protect themselves, their homes, their livelihoods and their neighbours. **This guide tells you how.**





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What is this guide about?

While mines and mining operations can contribute to economic development and provide jobs, they can also bring about suffering for individuals and communities by causing damage to the land, water and air around them. Dirty and toxic water, dust in the air, cracks in houses and infertile land are some of the most common problems experienced by those who live near mines.

Sometimes these problems (and the failure to fix them) are the result of criminal activity by a mining company, its employees or subcontractors. When a mining company commits a crime, community members and all those affected by the crime should report it to the South African Police Service (SAPS). This is an important way in which individuals and communities can fight back against illegal and non-compliant mining and can take steps to protect themselves, their homes, their livelihoods and their neighbours.

This guide aims to answer the following questions:

1. How do I know when a mining company has committed a crime?
2. How do I report the crime to the SAPS? What information do I need?
3. What happens after I have reported a crime?
4. What are the benefits and risks associated with reporting a crime?

Structure of the guide:

Section 1: Everyone has the right to an environment that is not harmful to their health

Section 2: When has a mine broken the law?

Section 3: Reporting to the SAPS

Section 4: Prosecution process

Section 5: Advantages and disadvantages of reporting to the SAPS

Section 6: What else can I do?

Important telephone numbers and websites

Definitions

Sometimes, we have needed to use legal terms in this guide. A list of legal and technical terms and their definitions can be found on page 22.

The law and rules governing environmental crimes can sometimes be difficult to understand or interpret without help. Help is available. See the list of government departments and agencies that can be contacted for assistance on page 21.

Everyone has the right to an environment that is not harmful to their health

1.1 The Constitution protects everyone's right to an environment that is not harmful to their health

The Bill of Rights in the Constitution¹ secures everyone the right to an environment that is not harmful to their health or wellbeing. The Constitution also states that everyone has the right to have the environment protected for future generations.

1.2 Companies that do not obey laws that protect the environment may be committing a crime

Mining companies have to obey the provisions in the Minerals and Petroleum Resources Development Act 2002 (MPRDA), the National Environmental Management Act 1998 (NEMA), the National Water Act 1998 (NWA) and other environmental legislation. If mining companies do not properly obey these Acts, they may be committing crimes.

If the environment in which you live is being harmed or damaged by mining, the mining companies responsible for the damage may be committing a crime. Crimes committed by mining companies that harm the environment, may result in harm to individuals and communities and cause poor health from dust or polluted water.

1.3 The public should report crimes to the SAPS

The State must protect environmental rights. One of the ways for the State to do this is through criminal enforcement. While this is a duty of the State, the public has a large role to play: the public must report crimes to the SAPS.

THE LIMPOPO COMMUNITY

A few years ago, a company took over a mine located next to a community in Limpopo. The company was required to rehabilitate the mining pits and stop erosion. This was stated in the Environmental Management Programme approved by the Department of Mineral Resources. The company didn't do anything about the erosion. After years of rain, the mining pits grew larger and larger. Now the mining pits are threatening the land and houses of the neighbouring community. By failing to obey the rules set out in the Environmental Management Programme, the company committed a CRIME.



¹ Act 108 of 1996

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When has a mine broken the law?

2.1 What are the clues that a mine may be committing a crime?

Have you noticed any of the following changes in your environment?

- The mine began operating near your community but your community was not notified or consulted.
- The mining company has been dumping waste or mining waste outside of the mining area or in sensitive areas (such as near rivers or wetlands). Remember that waste could include liquid waste.
- There has been an increase of dust in the air, bad smells or smoke.
- Dirty water is flowing or being piped directly into rivers, streams or dams.
- The water in the rivers, streams or dams has changed colour.
- The plants and trees around rivers, streams or dams are dying or have died.
- The fish in the rivers, streams or dams are dying or no longer breeding.
- A white or orange crust has started to form on the sides of the rivers, streams or dams.
- The birds in the area have stopped laying eggs, have stopped flying or are dying.
- Other wildlife in the area is showing signs of illness or early death.
- The crops and plants in the area are not growing or are not flowering or producing fruit and vegetables.
- Rare trees and plants have been removed.
- Mining is taking place inside a national park or a nature reserve.
- The permanent buildings in the area are showing signs of cracks.
- A mine has shut down and left the area without cleaning up the mining area or doing any rehabilitation.
- The health of people (and especially children) in the community has become worse, particularly problems with breathing, coughing and asthma, skin rashes, burning eyes, or stomach troubles.

If you have noticed any of these or other similar changes, it is possible that the mine operating in your area has committed a crime.

The mining company could be responsible for damaging the environment, using water illegally, ecological degradation, pollution, or illegally disposing of waste.

These are just a few examples, and there are many other signs that a mine may be committing an environmental crime. Some crimes will not be easily visible and you may come to know about them in different ways.

2.2 It is a crime to mine without a licence, or without obeying the rules in the licence or the Environmental Management Programme or Plan

Two common ways in which a company commits an environmental crime are by:

- conducting mining without the necessary licences or permits from government, or
- conducting mining without obeying the rules set out in the licence and Environmental Management Programme (EMPR) or Plan (EMP) (a programme or plan that ensures that activities cause the least harm possible to the environment as possible) approved by government.

For example, a mining company is usually required by its licence and EMPR to fence off the mining area to reduce the risk that someone might get hurt while walking too close to an open pit or to dangerous machinery. If the company mines without fencing the mining area, this may be in violation of the licence and is also a crime.

When a mining company mines or uses water without a licence or does not obey the terms of the licence, the company is breaking the laws contained in the MPRDA, the NEMA and/or the NWA. These are the most important pieces of legislation determining when a mining company has committed an offence.

2.3 To find out if a company has a licence and is obeying the licence and EMPR rules, ask for copies of its licences and EMPRs

The first step to finding out if a company has a licence that allows it to mine or use the water in the area is to ask the mining company for copies of all its licences. No mining may be done without an EMPR. Similarly, no prospecting may be done without an EMP. If you are uncertain about whether or not a mining company has permission to do things that are damaging to the environment, you can ask the company for copies of its EMPR or EMP.

You are entitled to copies of the licences, EMPRs and EMPs. These are not confidential documents.

However, if the mining company refuses to provide you with copies, ask the nearest offices of the Department of Mineral Resources (DMR) for copies of the EMPR or EMP, the Department of Environmental Affairs (DEA) for copies of any environmental authorisations and/or the Department of Water Affairs (DWA) for copies of the water use licence.

MINING COMPANIES WITHOUT WATER USE LICENCES

Most mining activities involve a water use that requires a licence. Many companies, however, are mining without a water use licence. In 2011 the Minister of Water Affairs, Ms Edna Molewa, released a list of over 100 mining companies that were operating without water use licences. In March 2012, the Minister released an updated list showing that 46 mining companies with applications pending with DWA did not have water use licences (see www.cer.org.za for copies of the lists). This is a crime. If you know that a mining company is using water (for example to wash coal or if water is being pumped out of a mining pit), ask to see a copy of the company's water use licence. If the mine does not have one it may be committing a crime.

You may be asked to make an application in terms of the Promotion of Access to Information Act 2000 (PAIA). More information about PAIA and making requests for information can be found at www.cer.org.za, www.saha.org.za and www.sahrc.org.za or call 021 447 1647 for assistance.

2.4 If the mining company did not consult landowners, occupiers and affected people before the mining began, it may have committed a crime

A mining company is required to consult landowners, lawful occupiers and other interested and affected people before it obtains a licence to begin mining, and again after it obtains a licence and wishes to start mining.

If a new mine suddenly begins operating near your community and your community has not been notified or consulted, this is a strong indication that the mine may be committing a crime. That is, it could indicate that that mine is operating without a licence or that the mine is misleading the DMR by telling it that a consultation process has taken place when, in fact, it has not taken place.

2.5 Nuisance, fraud, trespassing and theft

In addition to environmental crimes, a mining company may also break the common law.

A mine may be breaking the law if:

- it commits **fraud** by lying about its operations. If the mine begins mining and your community has not been notified or consulted, this is a strong indication that the mine may have lied to the DMR about the consultation process. This could be fraud; or
- its employees **trespass** on someone else's land in the course of their work.

It is important to remember these additional common law offences when laying a charge against a mining company, its directors and its employees.

THE FRYLINCK CASE

This case involved an environmental assessment practitioner (EAP). EAPs are the environmental and social experts required to investigate and assess the likely impact of an activity on the environment and the people who live close by. The EAP is required by both NEMA and the MPRDA to compile a series of reports (scoping reports, environmental impact assessments and environmental management plans) describing the impacts and recommending whether the activity should be permitted.

In this case, the EAP was appointed to assess the impact of the proposed building of the Pan African Parliament on a site. The EAP conducted the assessment but failed to advise the DEA that there was a wetland on the site that would be destroyed by the building.

When it became apparent that there was a wetland on the site after building had begun, the EAP, Mr Frylinck, was charged with a crime and found guilty of contravention of the applicable regulations based on the misrepresentation.

Although this is not a mining case, it is a useful example of a case where a contractor was charged with and found guilty of an environmental crime.

Where a crime is committed by a number of parties (including employees of the mining company and consultants) criminal charges can be laid against all the parties.



2.6 If the mining company is polluting the air or water or generally causing harm to the environment, it may have committed a crime

Over and above the need to obtain a permit or permits and comply with its EMP or EMPR, a mining company may be committing a crime if it pollutes the air with dust, pollutes rivers, dams or groundwater, or generally causes harm to the environment.

2.7 If you are unsure if a mining company is committing a crime, report it to the SAPS and they can investigate

It will sometimes be difficult for the public to know if a company is committing a crime. For example, it is often difficult to find out if a mining company is mining without a licence, if the company is not complying with the licence or if the company has given false information about its activities.

If you suspect that a mining company does not have a licence for using water, causing pollution, or disposing of waste, or that it is not complying with its licence, you should report this to the SAPS. The SAPS can then investigate whether or not the company has broken the law.

2.8 Employees of the mining company will not lose their jobs if they report crimes

If you work for the mining company and know that it is committing a crime, your job is protected by law if you report the crime. The mining company is not allowed to fire you, transfer you, harass you or discriminate against you in any other way because you reported the company to the SAPS or to Department of Mineral Resources.

A SHORT SUMMARY OF CRIMES RELATED TO MINING

The Mineral and Petroleum Resources Development Act 28 of 2002 (**MPRDA**) creates four broad categories of offences:

- Where mining activities are being conducted without approval (e.g. mining permits). For example, a company starts mining before their EMPR has been approved.
- Where activities are being conducted outside of the boundaries of authorisation. For example, a mining company begins mining across the road from its original mining operations. It has all the authorisations for the original mining, but not for the new mining. The company is committing a criminal offence.
- Where false information is presented regarding mining activities, permits or related matters. For example, if a mining company tells the DMR that it consulted the community affected by the mining when it did not do so, the company is giving the DMR false information. This is a criminal offence.
- The general offence related to non-compliance with the MPRDA. The MPRDA requires mining companies to comply with all of its sections.

This is a simple and broad summary of the offences in the MPRDA. The exact offences set out in the MPRDA and the regulations under the MPRDA can be found in an annexure to this guide available on www.cer.org.za.

THE NATIONAL WATER ACT

The National Water Act 36 of 1998 (**NWA**) also contains offences related to mining. The most important offences are:

- to use water without authorisation; and
- to pollute or cause harm to a water resource.

For example, if a mining company mines through a stream or a wetland without the DWA's permission, this is a criminal offence.

All offences related to water found in legislation are set out in an annexure to this guide available on www.cer.org.za.

THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT

Often mining activities include activities listed in the regulations to the National Environmental Management Act 1998 (**NEMA**). These activities include the construction of roads, the construction of buildings or infrastructure exceeding 50 square metres, and clearing of indigenous vegetation in an area of more than a hectare. Doing any of these things without a permit is a criminal offence.

NEMA also makes it a criminal offence to cause significant pollution or degradation of the environment, or to do something that has a detrimental impact on the environment.

OTHER LEGISLATION

As stated above, environmental legislation is very broad, and other offences that could relate to mining from various other pieces of legislation are set out in an annexure to this guide available on www.cer.org.za.

NUISANCE, FRAUD, TRESPASSING AND THEFT

As mentioned above, a mining company may also break the law by causing nuisance, committing fraud, theft and trespassing.

Because offences and penalties change from time to time, the schedules of offences and penalties related to the environmental impacts of mining will be updated and republished from time to time. Visit www.cer.org.za or email mining@cer.org.za for the latest version of the schedules.

Reporting a crime or offence to the SAPS

The roleplayers

Roleplayer	Function
Complainant	A complainant is the victim of or witness to a crime, and is the person who lays the charge with the SAPS. It could be any member of the public or a law enforcement official.
Accused	<p>The accused is the person who is charged with the crime.</p> <p>An accused may be an individual or a company. If you charge a mining company with a crime, the company will be the accused.</p> <p>Where a director or employee of the mine had personal involvement in the offence, they can also be prosecuted as individuals.</p> <p>There can be more than one accused for a single crime or offence, for example, the mining company and one of its directors.</p> <p>A director may be charged (even when not personally involved) when the legislation specifically provides for this.</p>
Charge Office Official	The charge office at the police station is where the complainant lays the charge(s). You will first speak to an official at the charge office about the crime you wish to report.
Investigating Officer	<p>The investigating officer will usually be a member of the SAPS who is assigned to handle the case.</p> <p>The investigation officers will not necessarily have experience in investigating mining or environmental matters. You are welcome to provide them with a copy of this guide, as it will assist them in understanding the legislation and in formulating the charges.</p>
Green Scorpions	The environmental management inspectors (EMIs) employed by the Department of Environmental Affairs, provincial environment departments and some municipalities are also referred to as the Green Scorpions. They can investigate certain environmental offences and handle dockets in criminal cases. These will be explained in more detail on the following page.

STEP 1: Write notes, take photographs and take a friend to see the pollution or other environmental damage

If you suspect that a crime has been, or is being committed by a mining company, the first thing you should do is try to observe and record the activity.

Written notes

Make written notes of what you see:

- **WHAT** did you see?
- **WHERE** did you see it? Write down the nearest street address or distance from a landmark like a shop or intersection.
- **WHEN** did you see it? Write down the date and the time (or dates and times).

Photographs

Take photographs of:

- the pollution or other environmental damage (e.g. dirty water in a dam or dangerous holes in the ground that has not been fenced off);
- where the pollution or other environmental damage is coming from (e.g. a pipe pouring dirt from the mine into a dam); and
- the problems the pollution or other environmental damage is causing (e.g. dead fish and birds).

Take a friend

Take a friend to come and see the problem that you suspect is a crime.

- This way, your friend can back up your story.
- This is not essential, but it may help the SAPS and your friend may notice details you missed.

This does not mean that you should investigate the crime. The SAPS must do this. By making notes and taking photographs, you are gathering evidence to support your complaint and to assist the SAPS with their investigation.

Do not trespass on mine property or other private property, where you are not authorised to enter, to gather any information.

STEP 2: Find a police station closest to where the crime is being committed

When reporting the crime, go to the police station. It is best to go to the station closest to where you saw the crime being committed. However, if that is too far away, you can go to the station closest to you.

STEP 3: When you go to the police station, take your evidence and your identity document

When reporting the crime, you should take all the evidence (the notes and the photographs) and your identity document with you.



STEP 4: Ask to speak to the station commander

Environmental law is a specialised area of law. Not all police officers will be familiar with environmental crimes.

If this is the case when you go to report the crime, ask if you can make your report to the station commander. He or she may have had more experience than a lower ranking official.

Reporting a crime to the police is **free** and you **do not need a lawyer**.

STEP 5: Interview and hand over evidence collected

The station commander will **interview** you to find out what happened.

Tell the SAPS what you observed and recorded

Remember to tell the SAPS:

- **WHAT** you saw (the pollution, where the pollution is coming from and the problems the pollution is causing)
- **WHERE** you saw it
- **WHEN** you saw it

Hand over evidence to the SAPS

If you have any photographs of the crime scene, or any other evidence, you can hand these over to the police. You should try to keep a copy of your photographs and other evidence.

Tell the SAPS of other people with useful information

Tell the police if there is anyone else they should speak to who might be able to give more evidence.

- If your friend (who came with you to see and photograph the pollution) comes to the police station with you, he or she can also speak to the station commander. If not, you can tell the station commander to contact your friend.
- Tell the station commander about anyone else who may have useful information.

STEP 6: Make a written statement to the SAPS

After the interview, the police will ask you to make a sworn statement, also referred to as an 'A1 statement'.

The police officer will write the statement with you.

Give lots of detail in the statement

Make sure that you include the following in your statement:

- **WHAT** you saw (the pollution, where the pollution is coming from and the problems the pollution is causing)
- **WHERE** you saw it
- **WHEN** you saw it
- Mention any evidence you brought with you to the police station, such as photographs of the pollution, the source of the pollution and the problems the pollution caused.
- If your friend came with you to the police station, mention that your friend's statement confirms what you are saying in your statement.

You can also state the crime you think the mining company may have committed. To help with identifying the crime that a mine might have committed, refer to the schedules of offences and penalties in the annexure to this guide which is available on www.cer.org.za.

The statement may later be used in court

The reason your statement is so important is because it forms the basis for the SAPS investigation. It may also later be used to refresh your memory, and in the trial. The statement will form part of the police docket. Your role as the complainant/witness will be made much easier if the statement you make when you first go to the SAPS is very detailed.

If the case goes to trial, you may be called to testify in court as a witness. The legal representative of the accused will then ask questions about what you wrote in your statement.

The statement must be completely truthful

You must be truthful when giving a statement. Lies or exaggerations reduce the value of your statement.

The statement is in your home language

You are entitled to write your statement in your home language. If you testify in court at a later stage, an interpreter will be present to translate your testimony.

STEP 7: The SAPS will open a docket

Your statement, photographs and evidence will be put in a police docket. All other statements and photographs are also put in the police docket along with additional evidence. Additional evidence may include scientific tests of polluted water, or radioactive dust, and so forth.

The docket will be given to the investigating officer, and he or she will undertake the investigation by gathering more evidence.

STEP 8: Get your CAS number and contact information

Once a statement has been taken, the case will be registered in the Crime Administration System (CAS). You should receive a CAS number.

It is important to make a note of this number so that at a later stage you can call and ask about the case using the CAS number.

The investigating officer is the person who should keep you up to date. When you lay charge, ask for the name and contact number of the investigating officer. You will also be asked to leave your contact details so that the investigating officer can contact you.

STEP 9: You may need to pay a visit to a State doctor, free of charge

If you were injured because of a crime committed by a mining company (for example, if an area was not properly fenced off when it should have been and you fell into a mining pit), the police should send you to a doctor to be assessed.

Seeing the doctor will be free.

The doctor will complete a J88 Form. The J88 Form will indicate all your injuries and state if you were injured because of the crime.



4

The prosecution process

4.1 The roleplayers

Roleplayer	Function
Investigating Officer	<p>The investigating officer will usually be a member of the SAPS who is assigned to handle the case.</p> <p>The investigating officer will not necessarily have experience in investigating mining or environmental matters. The public is welcome to provide the investigating officer with a copy of this guide, as it will assist him or her in understanding the legislation and in formulating the charges.</p>
Prosecutor or State Advocate	<p>A prosecutor decides whether or not to bring legal proceedings against the accused. If the prosecutor decides to prosecute the case, he or she will conduct the case against the accused.</p> <p>During the trial the prosecutor represents the State and should assist the complainant. He or she presents the evidence and asks the complainant, the accused and other witnesses questions and makes arguments for the State.</p> <p>They are usually referred to as prosecutors in magistrate's and regional courts and State advocates in the high court.</p>
Attorney or Advocate	<p>An attorney or advocate represents the accused. Their main task is to ensure that the accused gets a fair trial. They also present the evidence, ask the complainant, the accused and other witnesses questions and make arguments. They do this to assist the accused.</p> <p>If you are a complainant or a witness in a case, you must not communicate directly with the accused or the attorney or advocate for the accused.</p> <p>Any communications should be between the prosecutor and the accused's attorney or advocate.</p>
Magistrate	<p>A magistrate sits in the magistrates' court. Magistrates make decisions about the evidence, make sure that the trial is fair and make the final decision whether or not the accused is guilty.</p> <p>The magistrate also decides on the appropriate sentence if the accused is found guilty. In some matters they may be assisted by one or two assessors, who are members of the public.</p>

4.1 The roleplayers (continued)

Roleplayer	Function
Judge	<p>A judge sits in the high court. A high court generally hears more serious criminal cases or appeals from magistrate's courts. Judges have a similar role to magistrates.</p> <p>Only very serious mining-related cases will be heard in the high court.</p>

4.2 The investigation phase takes a long time

If you are the complainant, the investigating officer will usually provide feedback to you on the progress that is being made (without giving details of the investigation).

It is important to understand that the investigating officers often have a heavy caseload. They usually investigate a number of cases at the same time.

4.3 If you receive no feedback there are ways to follow up

If you do not receive any feedback after a reasonable amount of time, contact the investigating officer.

If this does not help, there are a number of other people you can contact:

- station commander;
- SAPS provincial commissioner;
- If there are clear reasons for being unhappy with the process, contact the local prosecutor, and if necessary, the office of the Director of Public Prosecutions (DPP). The contact number for the DPP can be found on page 21.

4.4 Sometimes the prosecutor decides not to prosecute the matter

Sometimes the prosecutor decides not to prosecute the case. This is also referred to as a '*nolle prosequi*'. They may decide not to prosecute for any number of reasons set out in the prescribed policies and directives.¹

If a prosecutor decides not to prosecute, and the complainant is convinced that it was a wrong decision, he or she can approach a senior prosecutor or the office of the provincial commissioner (DPP) with a request to review the decision.

¹ The three most important criteria are whether there is evidence under oath that establishes the elements of the offence and links the accused to it; whether there is enough admissible evidence to provide a reasonable prospect of a successful prosecution, and whether it is in the interest of the community to prosecute. In the context of environmental crime, there are two basic additional criteria in the decision to prosecute or not. These are the extent of the environmental harm caused and secondly, the conduct on the part of the accused. The more serious the harm, or potential harm, the bigger the possibility that the offender will be prosecuted. As far as the conduct of the accused is concerned, blatantly intentional or reckless conduct will usually play an important role in the decision to prosecute.



There is also the possibility of a private prosecution, but that is uncommon and costly.²

4.5 What happens if the case goes to court?

First, both sides make opening argument. The State, through the prosecutor, will make an argument that represents the complainant's side of the story and the accused's attorney or advocate will state the accused's side.

Then, the prosecutor will call all the State's witnesses to the stand, one by one, to give their evidence. Every State witness will be asked questions by the prosecutor and will usually be cross-examined by the accused's attorney or advocate.

Next, the accused's attorney or advocate may call the accused and other witnesses supporting the accused, to the stand. Again, every witness will be asked questions by the accused's attorney or advocate and may be cross-examined by the prosecutor. The accused's attorney may decide not to call any witnesses. Also, he or she may not call the accused if the accused decides to remain silent.

While questioning and cross-examining the witnesses, the prosecutor and the accused's attorney or advocate will show the magistrate or judge photographs, statements (this may include the complainant's statement) and other evidence gathered.

Finally, both sides will make closing arguments.

The magistrate or judge will take some time to consider the evidence placed before the court in the course of the trial and the arguments made. A decision will then be made about whether or not the accused is guilty.

4.6 Testifying in court

Testifying in court can be an intimidating experience, but if you are honest and give an accurate version of events, there is nothing to fear.

² Both the Criminal Procedure Act as well as section 33 of NEMA provide for private prosecutions in certain instances.

Your role as a complainant and witness is simply to tell the truth and give the court the facts of the case as you know them.

Before you give your evidence in court, you should read the detailed statement that you prepared when you first saw the crime, to ensure that you remember everything and are prepared.

4.7 The accused will not be found guilty if the magistrate has any reasonable doubt about the accused's guilt

The Constitution gives every accused the right to a fair trial. This includes the right to be presumed innocent until proven guilty. It is for the prosecutor to prove the guilt of the accused, and not for the accused to prove his or her innocence.

This means that the State must produce the evidence so that the judge or magistrate, at the end of the case, must have *no reasonable doubt* in his or her mind that the accused committed the crime. If there is any reasonable possibility that the accused did not commit the crime, he or she will be found 'not guilty'.

If the court finds the accused not guilty, there is very little chance of getting the decision reversed. While an accused has the right to request leave to appeal against a conviction, the State cannot appeal against an acquittal based on the facts and merits of the case. The State can only appeal on a question of law or against a sentence if it believes that the sentence handed down was too lenient.

4.8 Sometimes the matter is settled using a plea and sentence agreement

A 'plea and sentence agreement' is an agreement entered into between the prosecutor and the accused. Sometimes it is also called a plea bargain. The agreement will say that the accused admits that he or she committed the crime and that the prosecution and the accused agree on the sentence. The advantage of a plea and sentence agreement is that it is much quicker as there is no court hearing.

As the complainant, you must be consulted by the prosecutor about the contents of the agreement.

THE CASE OF ANKER COAL

Anker Coal began drilling holes next to a riverbank, a riverbed and a wetland on a farmer's land in Mpumalanga. The company left rock waste after it had drilled and didn't properly fill and close the holes. This caused damage to a sensitive environment and damaged a farmer's land. The company also lied to the DMR about the environment and how they would mine.

The farmer laid a criminal charge against both the company and the directors. The company pleaded guilty and entered into a plea and sentence agreement in terms of which it had to pay fines and fix the damage.

As part of that agreement, the company also had to pay R144 000 as compensation to the farmer as the victim of the crime.

This is an important case as it is an example of the role landowners and affected parties can play in catching and reporting mining companies that break the law. It also demonstrates that criminal charges can be used to make companies fix the damage they cause and compensate the people they harm.

5

Advantages and disadvantages of using prosecution

Advantages	Disadvantages
A criminal charge sends a powerful message to the mining company that it is being watched by the community affected by its operations and that those communities and individuals will not tolerate criminal mining. Laying a criminal charge against one company not only sends a powerful message to that company, but also to all the others breaking the law.	Investigations of alleged crimes and prosecution of mining companies can take a very long time.
You do not require a lawyer to lay a charge.	Often the people who know about a crime are the employees of the mining company. These people are least likely to lay charges because they depend on the mine for an income and believe that laying a criminal charge against a mining company may jeopardise their chances of working at that mine. It is important to remember that as an employee of the mine, the law protects you from any kind of discrimination (including being fired or disciplined) if you report a criminal act by the mining company. ¹
One can use criminal law to compel a mining company to clean up its mess.	Laying a criminal charge against a mining company may also make it difficult to use other strategies for engaging with the mine, like entering into informal discussions or even more formal negotiations.

¹ Section 95(1) of the MPRDA provides that a mining company may not subject any of his or her employees to an occupational detriment because the employee disclosed information to the Minister, the Director-General or any authorised person; (a) regarding the failure by such holder to comply with any provision of this Act; (b) to the effect that such holder is conducting his or her prospecting or mining operation as the case may be in a manner which is contrary to the objects contemplated in section 2(e) and (f) and contrary to the social and labour plan; or (c) that any activity or operation which is being conducted by such holder does not comply with any provision of his Act, any term or condition of such right or any other law.

This section in the MPRDA therefore protects employees from being disciplined, fired, suspended, harassed and transferred because she or he reported non-compliance to the authorities.

Advantages	Disadvantages
Many people and companies want to avoid a criminal record and the bad publicity that goes with being prosecuted. Companies will be encouraged to comply with environmental legislation if they know that by doing so they will avoid the possibility of being prosecuted.	None
It is the responsibility of the State to prosecute crimes and protect the environment. The State carries the cost of the investigation and prosecution process, and can even make the accused pay for these costs once convicted. The role of the public is to act as watch-dogs, and to report offences to the SAPS. This merely requires some time and energy.	None



6

What else can I do?

6.1 Reporting the crime to the DEA, the DWA and the DMR

In addition to reporting the matter to the police, you should also report it to the Department of Mineral Resources (DMR), the Department of Environmental Affairs (DEA) and/or the Department of Water Affairs (DWA).

6.2 Reporting the crime to the Green Scorpions

In some cases, you should report the crime to the Environmental Management Inspectorate (the EMI), also known as the Green Scorpions.

While offences under the mining legislation fall outside the mandate of the Green Scorpions, there are often offences that are committed within the environmental context that will fall within their mandate. The contact details for these departments are listed on page 21 of this guide.

6.3 Report the crime to the Catchment Management Agency

Offences related to the illegal use or pollution of fresh water resources are also quite common in the mining environment. These offences should also be reported to the relevant Catchment Management Agency, if such an agency is already operational in the area.

At this time, there are only two agencies that are fully functional: the Inkomati Catchment Management Agency, operating from its head office in Nelspruit, and the Breede-Overberg Catchment Management Agency in the Western Cape. If there is no Catchment Management Agency in your area, you can report the offence to the regional office of the Department of Water Affairs.

The contact information for the Catchment Management Agencies can be found on page 22 of this guide.

6.4 Encourage other community members to report as well

The more people who report the environmental crimes to the SAPS and the other authorities listed above, the more aware and familiar these authorities will become with environmental laws and their enforcement, and the more compliant mining companies will become with environmental laws. Encourage other members of the community to report environmental crimes.

Government telephone numbers and websites

Department	Telephone Number	Web-address
National Prosecuting Authority	(012) 845 6000	www.npa.gov.za
South African Police Service	08600 10 111	www.saps.gov.za
Environmental Management Inspectorate	086 111 2468	www.environment.gov.za/?q=content/environmental_management_inspectorate
Environmental Crimes and Incidents Hotline	0800 205 005	www.tip-offs.com
Department of Environmental Affairs Hotline	086 111 2468	www.environment.gov.za
Gauteng Province Agriculture and Rural Development	(011) 355 1900	www.gdard.gpg.gov.za/Pages/default.aspx
Free State Department of Economic Development, Tourism and Environmental Affairs	(051) 400 9589	www.detea.fs.gov.za
Western Cape Department of Environmental Affairs and Development Planning	(021) 483 4091	www.westerncape.gov.za/your_gov/406
KwaZulu-Natal Department of Agriculture and Environmental Affairs	(033) 355 9100	www.kzndae.gov.za/EnvironmentalServices.aspx
Limpopo Department of Economic Development, Environment and Tourism	(015) 293 8300	www.ledet.gov.za
Mpumalanga Department of Economic Development, Environment and Tourism	(013) 766 4004	www.mpumalanga.gov.za/dedet
Northern Cape Department of Environment and Nature Conservation	(053) 807 7300	www.denc.ncpg.gov.za
Northwest Department of Economic Development, Environment, Conservation and Tourism	(018) 387 7700	www.nwpg.gov.za/Economic%20Dev.%20&%20Tourism/Management.asp
Eastern Cape Department of Economic Development and Environmental Affairs	(043) 605 7000	www.dedea.gov.za/Lists/Environmental%20Management/AllItems.aspx
Department of Mineral Resources	(012) 444 3000	www.dmr.gov.za
Limpopo Regional Office, Polokwane	(015) 287 4700	www.dmr.gov.za
Mpumalanga Regional Office, Emalahleni	(013) 653 0500	www.dmr.gov.za
Gauteng Regional Office, Johannesburg	(011) 358 9700	www.dmr.gov.za
Northwest Regional Office, Klerksdorp	(018) 487 9830	www.dmr.gov.za
KwaZulu-Natal Regional Office, Durban	(031) 335 9600	www.dmr.gov.za
Eastern Cape Regional Office, Port Elizabeth	(041) 396 3900	www.dmr.gov.za

Department	Telephone Number	Web-address
Eastern Cape Regional Office, Umthata	(047) 532 4488	www.dmr.gov.za
Western Cape Regional Office, Cape Town	(021) 427 1000	www.dmr.gov.za
Northern Cape Regional Office, Kimberley	(053) 807 1700	www.dmr.gov.za
Northern Cape Regional Office, Springbok	(027) 712 8160	www.dmr.gov.za
Free State Regional Office, Welkom	(027) 391 1300	www.dmr.gov.za
Department of Water Affairs	0800 200 200	www.dwa.gov.za
Eastern Cape Regional Office	(043) 604 5402	www.dwa.gov.za
Free State Regional Office	(051) 405 9281	www.dwa.gov.za
Gauteng Regional Office	(012) 392 1303	www.dwa.gov.za
KwaZulu-Natal Regional Office	(031) 336 2700	www.dwa.gov.za
Mpumalanga Regional Office	(013) 759 7310	www.dwa.gov.za
Northwest Regional Office	(018) 397 9547	www.dwa.gov.za
Northern Cape Regional Office	(053) 830 8803	www.dwa.gov.za
Limpopo Regional Office	(015) 290 1215	www.dwa.gov.za
Western Cape Regional Office	(021) 941 6000	www.dwa.gov.za
Inkomati Catchment Management Agency	(013) 753 9000	www.inkomaticma.co.za
Breede-Overberg Catchment Management Agency	(023) 347 8131	www.bocma.co.za

Definitions

Listed below are some of the technical words and phrases used in this guide. In some cases, these words have particular definitions in the legislation. Where this is the case, the legislation has been identified in brackets at the end of the definition. Definitions in legislation are amended from time to time – for the purpose of prosecution, please check the latest version of the legislation before proceeding.

Activity, means any mining related process on the mine including the operation of washing plants, mineral processing facilities, mineral refineries and extraction plants, and the operation and the use of mineral loading and off-loading zones, transport facilities and mineral storage yards, whether situated at the mine or not, in which any substance is stockpiled, stored, accumulated or transported for use in such process; or out of which process any residue is derived, stored, stockpiled, accumulated, dumped, disposed of or transported (Mineral and Petroleum Resources Development Act 2002).

Clean water system, includes any dam, other form of impoundment, canal, works, pipeline and any other structure or facility constructed for the retention or conveyance (carrying) of unpolluted water (National Water Act 1998, Regulations on use of Water for Mining and Related Activities Aimed at the Protection of Water Resources).

A **crime** or an **offence** refers to conduct which is prohibited and defined by the law to be a crime. A person (or company) can be prosecuted for committing a crime and, if found guilty, that person will be given an appropriate penalty or sentence that includes a fine or imprisonment.

Dam includes any settling dam, slurry dam, evaporation dam, catchment or barrier dam and any other form of impoundment used for the storage of unpolluted water or water containing waste (National Water Act 1998, Regulations on Use of Water for Mining and Related Activities Aimed at the Protection of Water Resources).

Directives are administrative enforcement tools used by the government departments. They are often used in environmental enforcement. Directives and notices instruct persons to do or refrain from doing certain specific things. The legislation provides exactly who can issue these in each and every circumstance, and what the recipients of such notices may be directed, or notified to do.

Dirty area, means any area at a mine or activity which causes, has caused or is likely to cause pollution of a water resource. (National Water Act 1998, Regulations on Use of Water for Mining and Related Activities Aimed at the Protection of Water Resources).

Dirty water system, includes any dam, other form of impoundment, canal, works, pipeline, residue deposit and any other structure or facility constructed for the retention or conveyance of water containing waste (National Water Act 1998, Regulations on Use of Water for Mining and Related Activities Aimed at the Protection of Water Resources).

The **environment** refers to the surrounds in which humans exist made up of the land, water and atmosphere, plants, animals and micro-organisms. The environment also includes the physical, chemical, aesthetic and cultural aspects of these elements that influence human health and wellbeing.

An **environmental crime** means any offence that harms or negatively affects, or has the potential to harm or negatively affect, the environment.

An **Environmental Management Programme (EMPR)** is an environmental management tool used to ensure that undue or reasonably avoidable adverse impacts of the construction, operation and/or decommissioning phases of a project are prevented, and that the positive benefits of the project are enhanced.

Legislation refers to national acts passed by parliament, as well as regulations passed in terms of these acts. Regulations usually contain more detailed rules on specific aspects covered by the act. Provincial government can also pass legislation (known as provincial acts, or ordinances) and municipalities can pass bylaws. While both provincial legislation and municipal bylaws cover some aspects of the environment, the legislation dealing directly with mining is almost exclusively contained in national acts.

Mine means any operation or activity for the purposes of winning any mineral on, in or under the earth or water (Mineral and Petroleum Resources Development Act 2002).

Mineral means any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or water and specifically includes sand, stone, rock, gravel and soil. Water, petroleum and peat are excluded from the definition but are governed by their own legislation (Mineral and Petroleum Resources Development Act 2002).

Notices – See Directives

Occupational detriment – in relation to the working environment of an employee, means:

- (a) being subjected to any disciplinary action;
- (b) being dismissed, suspended, demoted, harassed or intimidated;
- (c) being transferred against his or her will;
- (d) being refused transfer or promotion;
- (e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
- (f) being refused a reference, or
- (g) being provided with an adverse reference, from his or her employer;
- (h) being denied appointment to any employment, profession or office;
being threatened with any of the actions referred to paragraphs (a) to (g) above, or
- (i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security
(Protected Disclosures Act 2000).

Offence – see Crime

Open cast mining is also commonly referred to as 'open pit mining'. This method is used usually to remove rock from an open pit, and is a mining method used for rock or minerals near the surface of the earth, such as coal. It is therefore similar to a quarry. If water is not controlled, it often dams in open cast mines.

Person in control of a mine or activity, in relation to a particular mine or activity, includes the owner of such mine or activity, the lessee and any other lawful occupier of the mine, activity or any part thereof; a tributary for the working of the mine, activity or any part thereof; the holder of a mining authorisation or prospecting permit and if such authorisation or permit does not exist, the last person who worked the mine or his or her successors-in-title or the owner of such mine or activity; and if such person is not resident in or not a citizen of the Republic of South Africa, an agent or representative other than the manager of such a mine or activity must be appointed to be responsible on behalf of the person in control of such a mine or activity (National Water Act 1998, Regulations on Use of Water for Mining and Related Activities Aimed at the Protection of Water Resources).

Prospecting means intentionally searching for any mineral by means of any method which:

- disturbs the surface or subsurface of the earth including any portion of the earth that is under the sea or other water, or

- in or on any residue stockpile or residue deposit in order to establish the existence of any mineral to determine the extent and economic value thereof, or
 - in the sea or other water on land.
- (Mineral and Petroleum Resources Development Act 2002).

Residue includes any debris, discard, tailings, slimes, screenings, slurry, waste rock, foundry sand, beneficiation plant waste, ash and any other waste product derived from or incidental to the operation of a mine or activity and which is stockpiled, stored or accumulated for potential re-use or recycling or which is disposed of (National Water Act 1998, Regulations on Use of Water for Mining and Related Activities Aimed at the Protection of Water Resources).

Water system includes any dam, any other form of impoundment, canal, works, pipeline and any other structure or facility constructed for the retention or conveyance of water (National Water Act 1998, Regulations on Use of Water for Mining and Related Activities Aimed at the Protection of Water Resources).

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