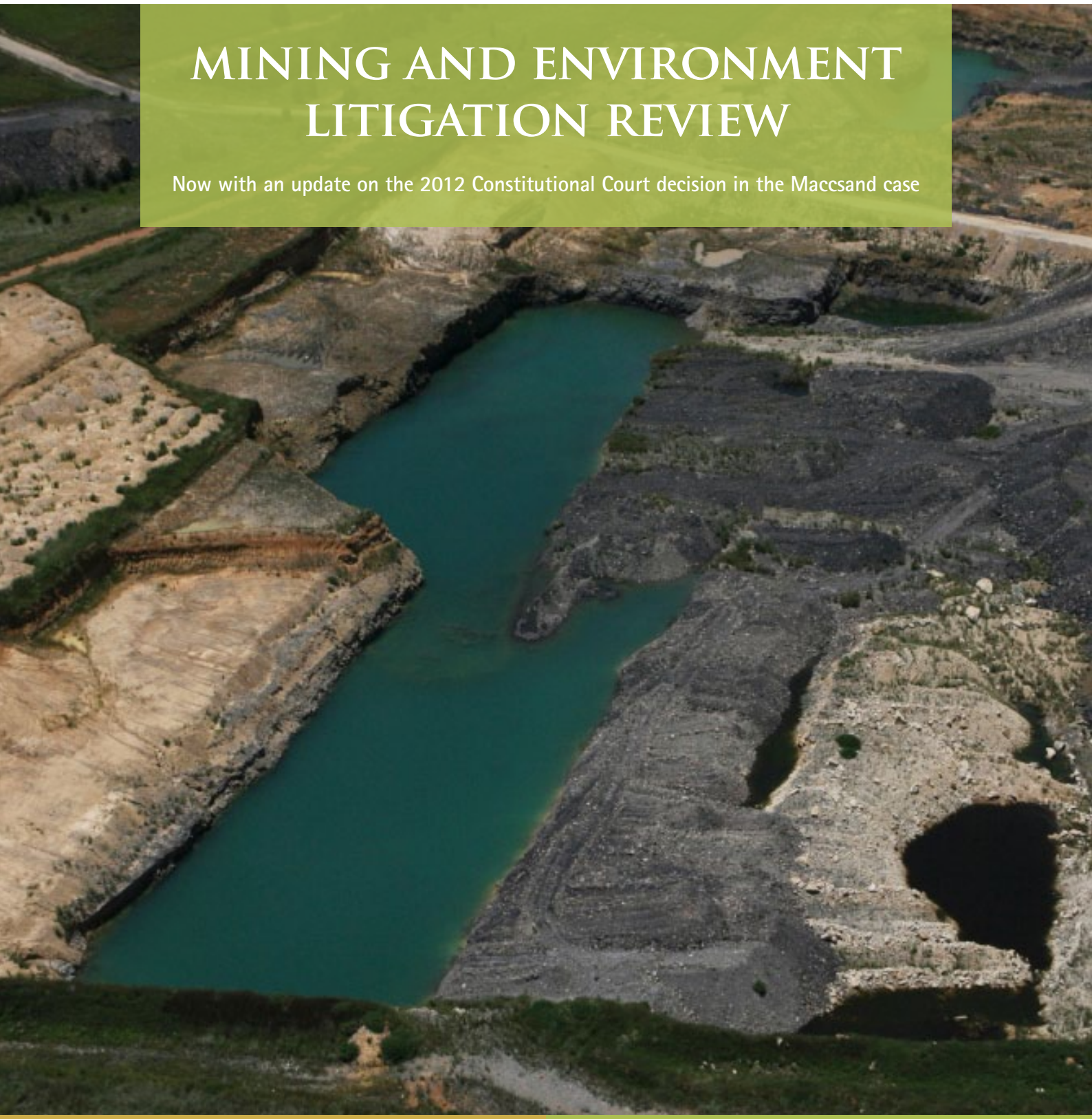
MINING AND ENVIRONMENT LITIGATION REVIEW

Now with an update on the 2012 Constitutional Court decision in the Maccsand case



UNIVERSITY OF THE WITWATERSRAND JOHANNESBURG

Centre *for* Environmental Rights
Advancing Environmental Rights in South Africa

MINING AND ENVIRONMENT LITIGATION REVIEW

A review of administrative appeals and litigation pertaining to prospecting and mining, with a particular focus on environmental issues in mineral rights decision-making, environmental compliance, public consultation and access to information.

UPDATE INCLUDED

Now with an update on the 2012 Constitutional Court decision in the Maccsand case.

JUNE 2012

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The Centre for Environmental Rights commissioned and the Wits School of Law carried out this project in an attempt to collate information on jurisprudential trends in finalised cases, and arguments put forward by appellants and respondents in pending or 'live' cases. In relation to the latter, the summaries and report may contain and repeat allegations made by parties which are disputed by other parties, and in relation to which no finding has been made.

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ABBREVIATIONS

CER	Centre for Environmental Rights
DEAT	Department of Environmental Affairs and Tourism
DME/DMR	Department of Minerals and Energy/Department of Mineral Resources
DWAE	Department of Water and Environmental Affairs
EMP	Environmental Management Plan/Programme
MPRDA	Mineral and Petroleum Resources Development Act
NEMA	National Environmental Management Act
NWA	National Water Act
PAJA	Promotion of Administrative Justice Act
RMDEC	Regional Mining Development and Environment Committee
WUL	Water Use Licence

CHAPTER 1

BACKGROUND

Background to the project

Over the past two years, the Centre for Environmental Rights (CER) has collaborated with a number of civil society organisations to develop the *Civil Society Legal Strategy to Promote Environmental Compliance, Transparency and Accountability in Mining*. The present project has its origin in this broad-based, dynamic initiative. Specifically, it was articulated as 'Intervention 3: Review of Litigation on Inappropriate and Unlawful Mining and Prospecting Right Decisions and Environmental Compliance'. The problem to which this intervention pointed was that while legal proceedings about mining and prospecting rights decisions had been instituted in different forums by civil society organisations, government departments, landowners and even mining companies themselves, this information had not been collated anywhere. This made it difficult to learn lessons from these experiences. The objective of the litigation review was therefore to compile a comprehensive inventory of litigation about mining and prospecting rights cases and to review such cases in order to ascertain trends, successes, failures, lessons learnt, and where amicus and other legal interventions may be effective.

In order to ensure as wide a possible dissemination of the results of the review, a decision was taken to develop an electronic database which would be held and managed by the CER, comprising the following:

1. An **index** of all cases that fell within the scope of the project in the form of an excel spreadsheet.

2. **Case fact sheets:** Each case was to be analysed in order to produce a short and accessible account of the facts of the case and the legal issues to which it had given rise. Where possible, the fact sheets were to be supported by legal documentation.

3. **Narrative review:** The database will include a narrative review of the cases as a whole organised under particular headings – much like a database such as *Butterworths* includes reviews of areas of law in addition to containing the primary sources of such law. The narrative would provide civil society organisations with a birds-eye view of litigation against mining companies which could then be supplemented by their reading of particular cases.

The index and fact-sheets for the project were delivered to the CER during the course of 2011 and are available on the organisations website at www.cer.org.za. This report constitutes the third deliverable for the project, i.e. the narrative review. It therefore draws upon the cases that were identified as falling within the project's scope and subsequently analysed and described in the case fact sheets.

The purpose of this deliverable is to provide an account of the systemic issues that emerged from a review of all the cases – the 'trends, successes, failures and lessons learnt' – and to suggest possible avenues for future litigation, advocacy and research.

Methodology

Central to the success and legitimacy of the project was the identification of a relevant set of cases. It was decided to focus both on **judicial precedent**; i.e. the 'finding' of the outcome of a judicial inquiry and so-called **live cases** – being cases where the prospecting or mining decision had been challenged (through a variety of forms) but the challenge had not yet culminated in a precedent. This broadened the scope of the review considerably. The principal criterion used to narrow the work was to focus only on those cases that involved either prospecting and mining and its impact *either* upon the environment *and/or* interested and affected parties. Issues of public participation and consultation and access to information featured prominently in the latter. The review thus excluded, for example, cases dealing with principles of environmental law which could be applied to the context of prospecting or mining but which did not involve these two activities *per se*, or cases dealing with the principles of administrative justice in other contexts.

THE OBJECTIVE OF THE LITIGATION REVIEW WAS TO COMPILE A COMPREHENSIVE INVENTORY OF LITIGATION ABOUT MINING AND PROSPECTING RIGHTS CASES AND TO REVIEW SUCH CASES IN ORDER TO ASCERTAIN TRENDS, SUCCESSES, FAILURES, LESSONS LEARNT, AND WHERE AMICUS AND OTHER LEGAL INTERVENTIONS MAY BE EFFECTIVE.

Different methodologies were subsequently employed for the identification and analysis of judicial precedent and live cases respectively.

In order to identify appropriate **judicial precedents**, the project researchers conducted an exhaustive electronic search of the two primary legal databases of precedents in South Africa, being those held by the publishers Juta and LexisNexis respectively. The Juta database extends back to 1947 whilst the LexisNexis database of South African law reports extends back to the 1890s. No limitation was set on the date on which the precedent was decided. The researchers took account of both reported and, where these were available, unreported decisions. In this regard, the holdings of the South African Legal Information Institute (SAFLII) were also searched. Whilst conducting the search the researchers kept a separate list of cases which were tangentially relevant to but did not meet strictly the criterion of relating to prospecting or mining and the effect thereof on the environment and/or interested and affected parties. One-hundred-and-twenty-four cases were included in such list and the reasons for not including them in the review were articulated. The analysis of the precedents that were finally included in the review – 32 in number – entailed reading through and analysing the written judgment in the case. These judgments are available electronically on either the Juta, LexisNexis or SAFLII databases. The first level of analysis entailed categorising each case in terms of a variety of parameters, including the nature of the proceedings themselves, the identity of the parties, the aspects of the environment impacted upon, the laws used in the decision and the outcome. These parameters provide a summary overview of the nature of the case and are captured in the excel spreadsheet for the judicial precedents. The second level of analysis entailed the production of the relevant case fact sheet. This entailed reading each judgment in greater depth in order to provide a comprehensive and accessible account of the facts of the case, and an identification of the full range of legal issues considered in the case and the decision of the court thereon. Important *obiter dicta* were also identified.

In order to identify appropriate **live cases**, a call for cases was published in the email newsletter *Legalbrief* over a number of days and sent out to existing networks of civil society organisations. In addition to identifying each case, respondents provided the researchers with relevant original documentation in the form of letters, objections, appeals, and court documents drafted by civil society organisations; correspondence between civil society organisations and government departments and mining companies respectively; environmental reports compiled by consultants; minutes of public meetings; and official documents such as environmental authorisations and prospecting and mining rights. The first level of analysis entailed compiling an excel spread-sheet according to parameters largely similar to those employed for judicial precedent. The second level of analysis entailed constructing a narrative for each case based on the original documentation provided. This entailed recounting the alleged facts of each case and identifying the primary issues which emerged from those facts. In every instance, therefore, the fact sheets for the live cases are supported by original documentation which is also now held by the CER.

The synthesis which the narrative report represents is therefore based on a thorough, transparent and extremely rigorous analytical process.

Regarding the structure of the narrative report, Chapter 2 commences with the findings related to judicial precedent, while Chapter 3 details the findings that flowed from the analysis of live cases. In both cases, the content of the chapter outlines the relevant trends, successes, failures and lessons learnt in accordance with a number of themes. Each theme (or sub-theme in some instances) concludes with a number of 'strategic observations' which point to further avenues for litigation, advocacy and research. A summary of such observations is provided in Chapter 4 of this document.

CHAPTER 2

REVIEW OF JUDICIAL PRECEDENT

2.1 Introduction

A total of 32 cases were identified in which the precedent related to some aspect of mining and the environment and/or public participation and consultation in prospecting and mining authorisations. While they range in date from 1890 to 2011, 20 cases (62,5%) have been decided since 2004 (the year of entry into force of the Mineral and Petroleum Resources Development Act) pointing to a significant increase in such cases being brought before the courts. The Gauteng-based High Courts (the North and South Gauteng High Courts and their predecessors, the Transvaal Provincial Division and Witwatersrand Local Division) and the Supreme Court of Appeal (and its predecessor, the Appellate Division), dominate the fora in which the cases have been heard with nine cases apiece. One case stems from the Constitutional Court, three from the (now defunct) Supreme Court of the Cape of Good Hope, four from the Water Tribunal, one from the Land Claims Court and the remainder from the other High Courts. The cases were brought both by and against a range of mining companies and involved landowners, communities, local, provincial and national government, and environmental organisations in different permutations as initiating or defending party. For this reason, and also for the reason that the 'successful party' in each case may be split according to the legal issues in a case (e.g. the mining company may have been successful on one legal point but unsuccessful on another), it is potentially misleading to provide statistics on the extent to which landowners, communities and environmental organisations have been successful in such cases. In this chapter, the precedents are discussed according to the sources of law to which they relate. In addition to the Constitution, a distinction has been made between statutory law and common law, and then, within statutory law, between statutes currently in force and statutes repealed. The range of current statutory law to which the precedents relate include the Constitution, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA); the National Water Act 36 of 1998 (NWA); the National Environmental Management Act 107 of 1998 (NEMA); the Restitution of Land Rights Act 22 of 1994; and Land Use Planning Ordinance 15 of 1985; and the Income Tax Act 52 of 1962.

2.2 Precedents relating to the Constitution

The Constitution is the supreme law of South Africa. Apart from defining the structure of the State, it defines the values toward which the body politic is intended to aspire. The Bill of Rights, contained in Chapter 2 is the cornerstone of the Constitution's value framework and binds the legislature, the executive, the judiciary and all organs of state. Rights which are of particular relevance to the relationship between prospecting or mining and the environment include the right to environment (s. 24), the right to property (s. 25), the right of access to sufficient food and water (s. 27(1)(b)), the right of access to information (s. 32), and the right to just administrative action (s. 33). All of these constitutional rights have been fleshed out in legislation aimed at giving effect to the rights and the transformational ethos of the Constitution[1]. In accordance with the principle of subsidiarity, where legislation has been passed to give effect to a constitutional right, a litigant must make a claim in terms of such legislation rather than relying directly on the right. Alternatively, the litigant may challenge the legislation as unconstitutional.

This principle is well-illustrated in the Constitutional Court decision in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2010 JDR 1446 (CC). This case was essentially concerned with **the lawfulness of the grant of a prospecting right to a black empowerment company on communally-owned land, with particular emphasis on the process of consultation that had been followed**. Lawfulness was construed to incorporate alignment with the constitutional rights to equality (para 3), environment, and just administrative action (para 42) in addition to the norm of equitable redress of access to the natural resources of South Africa (paras 3, 42).

1 Thus, the National Environmental Management Act 107 of 1998 – and the suite of environmental legislation which has ensued – was enacted to give effect to s. 24; the Restitution of Land Rights Act 22 of 1994, amongst others, to give effect to s. 25; the National Water Act 36 of 1998 to give effect to s. 24; the Promotion of Access to Information Act 2 of 2000 to give effect to s. 32; and the Promotion of Administrative Justice Act 3 of 2000, to give effect to s. 33.

Although these over arching values constituted the yardstick against which the court evaluated the lawfulness of the conduct of the empowerment company and the National Department of Mineral Resources, the judgment does not comprise an interpretation and elaboration of such rights *per se* but is rather concerned with the interpretation of the MPRDA which, the court recognised, is aimed at giving effect thereto. The *Bengwenyama* decision is therefore illustrative of the manner in which the courts can apply the constitutional normative framework to progressively interpret the MPRDA. This approach is appropriate to the evaluation of the constitutionality of conduct. If the legislation relates to the constitutionality of the MPRDA itself, then the relevant constitutional rights upon which the challenge is based will require more detailed elaboration and consideration and the precedent will thus involve more direct interpretation of the Constitution.

Apart from the Constitutional Court's decision in the *Bengwenyama* matter, the Constitution featured in the decisions of *City of Cape Town v Maccsand (Pty) Ltd & others* 2010 (6) SA 63 (WC) and *Maccsand*[2] *(Pty) Ltd & another v City of Cape Town & others* (*Chamber of Mines* as *amicus curiae*) ([2011] ZASCA 141, decided 23 September 2011)) where one of the legal questions the courts had to consider was **whether land-use planning legislation is superceded or 'trumped' by the MPRDA**[3]. The courts approached this issue in terms of the framing provisions of the Constitution, in this instance, the allocation of powers between national, provincial and local spheres of government in terms of Schedule 4. In order to resolve the dispute, the courts had to interpret the meaning of 'municipal planning', found in Part A of Schedule 4. Both the High Court and the Supreme Court of Appeal held that the meaning of 'municipal planning' includes the control and regulation of the use of land which falls within the jurisdiction of the municipality (and is thus not confined to the sense of being 'forward planning'). The fit between the national power relating to mining and municipal planning is such that the national and provincial spheres of government cannot by legislation arrogate to themselves the power to exercise executive municipal powers (thus to control and regulate the use of land) or to administer municipal affairs. Their mandate was limited to *regulating* the exercise of these powers. Accordingly, the MPRDA could not trump the relevant land-use planning legislation.

The last case in which the Constitution's framing provisions featured was *CA Visser Delwerye (Edms) Bpk v Du Plooy & others*; In re: *Du Plooy & another v Minister of Minerals and Energy & others* 2006 2 All SA 614 (NC) in which the court was principally concerned with the common law relating to costs orders (see further below). In reaching its decision that a party whose misrepresentation or withholding of information causes litigation may be burdened with the costs of the unsuccessful party, the Court remarked *obiter* that **the conduct of the Department of Minerals and Energy fell short of the principles of public administration set forth in s. 195(1) of the Constitution**. While this remark was made *obiter*, there seems to be nothing that mitigates against s. 195 being used as a framing norm in litigation that seeks to evaluate the constitutionality of the conduct of the (now) Department of Mineral Resource more directly.

A different legal issue – one which is situated at the intersection of constitutional law and the common law – was **whether contempt of court proceedings could be used to enforce constitutional rights, and the environmental right in particular**. This issue arose in two cases concerned with the obligation of the Stilfontein Gold Mining Company (SGM) to maintain water pumping at its operations. In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited & others* 2006 (5) SA 333 (W) Hussain J answered this question in the affirmative by granting an order holding the Stilfontein Gold Mining Company (Ltd) (SGM) and its four directors guilty of contempt of court for failing to comply with a previous court order. That order had in turn compelled them to comply with

2 See update on the 2012 Constitutional Court decision in the Maccsand case on page 37.
3 See update on the 2012 Constitutional Court decision in the Maccsand case on page 37.

directives, issued by the Regional Director of Water Affairs and Forestry for the Free State, relating to the pumping of underground water. The court dispensed with the numerous technical arguments put forward by the respondents, holding that the directives were intelligible, that contempt proceedings were an appropriate method of enforcement of their obligations and that the financial position of the SGM and the mass resignation of its directors constituted no defence to non-compliance with the previous court order. As in the Constitutional Court case of *Bannatyne v Bannatyne* (*Commission for Gender Equality* as *amicus curiae*) the court held that contempt proceedings were an appropriate method for enforcing constitutional imperatives. The novelty of this case is that the court extended this principle to the environmental imperatives in s. 24 of the Constitution. Unfortunately, the contempt order granted by this court was set aside on appeal in *Kebble v The Minister of Water Affairs and Forestry* 2007 JDR 0872 (SCA) – a case which probably constitutes one of the all time lows for those interested in ensuring the moral and legal accountability of mining companies for their environmental obligations. The main precedent that emerges from the case is that a person can only be held liable for contempt of court where the court order is capable of implementation. In this instance, the court found that the directives issued by the Regional Director of the Department of Water Affairs and Forestry in the Free State were unclear, unintelligible and unenforceable in a number of respects. The court's evaluation of the clarity, intelligibility and enforceability of the directive can be critiqued on a variety of points, most importantly, on a complete blindness to the context in which the directives were issued. Firstly, that since April 2000 the remaining mines in the KOSH basin had participated in an inter-mine forum relating to the pumping of underground water and that the directives assumed that they would thus be able to reach agreement amongst themselves. As the respondent pointed out, no mine other than the SGM had trouble in understanding what was required. Secondly, the court's emphasis on SGM only being in non-compliance by a certain date (30 June 2005), failed to take into account the environmental impacts of SGM's *daily* non-compliance to extract and treat a specified amount of litres of underground water; i.e. the filling of the basin with water, and thus the creation of conditions conducive to the generation of acid mine drainage. Linking due performance to one specific date in these circumstances was thus wholly inappropriate. Thirdly, the court's unwillingness to determine a standard of accountability in regard to the pumping of underground mine water, against which the directors' mass resignation could have been evaluated, is highly disappointing. Nevertheless, the precedent that contempt proceedings *can* be used to enforce constitutional rights stands subject to the proviso that the court order must be capable of implementation.

STRATEGIC OBSERVATIONS

The Maccsand[4] decisions and the Bengwenyama judgment constitute solid, progressive developments in the jurisprudence relating to mining and the environment. They also illustrate how the Constitution can be used as a broad, over-arching normative framework to challenge the status of the MPRDA in relation to other legislation (the Maccsand decisions) or the conduct of the DMR and the prospecting/mining rights applicant (Bengwenyama decision). They indicate how conduct or even legislation, broadly, may be challenged on the basis of the concept of 'lawfulness' where this concept is conceived as requiring compliance with all the Constitution's norms. The rights articulated in the Bill of Rights and the constitutional allocation of functions in Schedules 4 and 5 were employed rather loosely in this type of challenge to establish the normative framework. Other parts of the Constitution – for instance, the articulation of principles of public administration or the principles of cooperative government – have not yet been employed in this manner. The result of this type of challenge is that the MPRDA is progressively interpreted in line with the Constitution.

There is as yet no case where the MPRDA or environmental legislation has itself been challenged as unconstitutional and in which application is made for a reading in or striking out of certain provisions. However, given that the MPRDA accommodates issues such as public consultation and participation, and the integration of environmental issues into decision-making, amongst others – i.e. the issue is the quality or degree of such consultation – such a challenge could prove difficult.

Civil society organisations should take note of the precedents in the Stilfontein Gold Mining Company and Kebble cases regarding the use of contempt of court proceedings to enforce the environmental right. Further research on the issue of directors' responsibilities in the face of an inability to comply with environmental obligations would be beneficial, given the conflicting stances on director's responsibilities in these two particular cases.

2.3 Precedents relating to legislation currently in force

2.3.1 Mineral and Petroleum Resources Development Act (MPRDA)

The MPRDA is the principal legislation regulating the prospecting and mining of minerals in South Africa. It defines the objectives of the regulatory regime and the norms, institutions and processes relevant to public participation and consultation, the management of environmental impacts, and the exercise of the Minister's regulatory discretion, amongst others. The provisions relevant to these themes are outlined in greater detail in Chapter 3, which deals with the review of live cases, below.

Finalised judicial precedent relates to the following aspects of the MPRDA:

- The MPRDA's status relevant to land-use planning legislation and the NEMA.
- The nature of consultation with interested and affected parties.
- Solidification of the right of access to land for purposes of prospecting or mining.
- The integration of environmental considerations in the decision to grant a prospecting right.
- Availability of an internal appeal.
- Preferent rights for communities.

4 See update on the 2012 Constitutional Court decision in the Maccsand case on page 37.

(a) Status in relation to land-use planning legislation and the NEMA

The status of the MPRDA relevant to both the Land Use Planning Ordinance 15 of 1985 and the NEMA was considered in *Swartland Municipality v Louw NO & others* 2010 (5) SA 314 (WC), *City of Cape Town v Maccsand[4] (Pty) Ltd & others* 2010 (6) SA 63 (WC) and *Maccsand (Pty) Ltd & another v City of Cape Town & others* (*Chamber of Mines* as *amicus curiae*) ([2011] ZASCA 141, decided 23 September 2011)). Regarding the question whether the MPRDA 'trumped' legislation such as LUPO, in all three cases the courts affirmed that the MPRDA cannot override the power of municipal authorities to regulate land uses in their areas of jurisdiction. As such, compliance with the provisions of land-use legislation is required when seeking to commence with prospecting or mining operations. This should require, on the part of the Department of Minerals, consultation with the relevant local authority in terms of s. 40 of the MPRDA prior to issuing a prospecting or mining right. On the part of the applicant it may require an application for a change in land use or rezoning of the land in question. In the *Swartland* case, interestingly, the court dispensed with the argument that the municipality was not competent to approach the court on the basis of the provisions in the Inter-governmental Relations Framework Act 13 of 2005 (IGRFA).

The status of the MPRDA relevant to NEMA has been considered in the two *Maccsand* decisions. The Western Cape High Court found that obtaining an environmental authorisation under NEMA was required on the basis of the text in s. 24F(1), 24(8)(a) and s. 24L. Taken together, these provisions made it clear that activities which require an environmental authorisation under NEMA may also be regulated by other legislation requiring similar authorisations (at 77G). There was accordingly no basis to the argument that the MPRDA had 'incorporated' the environmental provisions of NEMA. However, the Supreme Court of Appeal subsequently upheld an appeal in respect of this aspect of the decision – essentially on a technicality, because the listing notices in respect of which the interdict was granted had been repealed 18 days before the judgment was handed down in the Western Cape High Court. As a result, there is still uncertainty whether mining operations can commence or continue without having obtained the necessary environmental authorisations in terms of NEMA.

(b) Nature of consultation with interested and affected parties

There are two precedents in this regard, relevant to ss. 5(4)(c) and 16(4)(b) of the MPRDA respectively.

In *Meepo v Kotze* 2008 (1) SA 104 (NC) the court held that the process of consultation envisaged in s. 5(4)(c) occurs *after* a prospecting right has been granted. Such consultation amounts to more than notice – the prospecting rights holder must attempt to obtain the consent of the landowner as regards entry upon the land for the purposes of prospecting. The case is also significant for articulating an important general principle of interpretation in relation to the MPRDA, namely that when there is uncertainty the interpretation to be preferred is the one that gives effect to the most *rational balance* between the holder of mineral rights and the landowner respectively.

This progressive judgment was taken further in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2010 JDR 1446 (CC) where the Constitutional Court indicated that the consultation process envisaged by s. 16(4)(b) (the prospecting right applicant's obligation to consult with interested and affected parties) requires of the applicant: (a) to inform the landowner in writing that his application for prospecting rights on the land has been accepted; (b) to inform the landowner *in sufficient detail* of what the prospecting operation will entail on the land, *in order for the landowner to assess what impact the prospecting will have on the landowner's use of land*; (c) to consult with the landowner with a view to reaching an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and (d) to submit the result of the consultation process to the Regional Manager (para 67). (The court made no comment about all this needing to be done within 30 days of receiving the notification to consult.) The Constitutional Court's stance on consultation was influenced in no small measure by the significant observation that the granting and execution of a prospecting right 'represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen' (para 63) and that the consultation requirements in the MPRDA were accordingly 'indicative of a serious concern' for the rights and interests of landowners and lawful occupiers in the process of granting prospecting rights.

(c) Solidification of the right of access to land for purposes of prospecting or mining

Joubert & others v Maranda Mining Co (Pty) Ltd 2010 (1) SA 198 (SCA) provides guidance on when a mining rights holder acquires a right of access to the land upon which the relevant minerals are located. It is clear that this right only 'solidifies' once there has been compliance with all the provisions relating to public participation (which includes consultation with interested and affected parties in the lead-up to the granting of the right and after a mining authorisation is granted, but before operations commence).

The issue of access to land arising out of the landowner's refusal to grant such access was also raised in the case of *Katz v Beneprops Two (Pty) Ltd* 1998 JDR 0052 (O). In this case, the court found that the prospecting contract between the miners and the previous landowner had been validly extended and the miners accordingly still had a right of access to the land.

(d) Integration of environmental considerations in the decision to grant a prospecting right

In the same case, it was argued that the approval of the Environmental Management Programme (EMP) is unrelated to the granting of a prospecting right, the Constitutional Court made it clear that a decision-maker must satisfy himself that prospecting operations will not result in unacceptable pollution, ecological degradation or damage to the environment; i.e. environmental satisfaction is a prerequisite or jurisdictional fact to the approval of a prospecting right (para 77). This issue is considered in greater depth in the review of live cases below.

(e) Availability of an internal appeal

In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (formerly Tropical Paradise 427 (Pty) Ltd) and others (Bengwenyama-ye-Maswazi Royal Council intervening) [2010] 3 All SA 577 (SCA), the Supreme Court of Appeal affirmed that s. 96 of the MPRDA provides

for a process of internal appeal. It also strongly suggested that exhausting this internal remedy constituted a necessary precondition for bringing a review application, as well as for relying on the 180-day period for bringing a review application in terms of the PAJA.

In the Constitutional Court's hearing of this matter, it confirmed that s. 96 provides for a process of internal appeal but more importantly held that an internal appeal can only be regarded as 'concluded' once the DMR responds to an application for appeal in the sense of *deciding* the appeal and *notifying* the appellants of its decision (in the instant case this occurred after four months had elapsed). This is significant for purposes of bringing a review within the 180-day period allowed by the Promotion of Administrative Justice Act 3 of 2002 (PAJA). The Court did not offer any guidance on the reasonableness of the time taken to decide an appeal.

The issue of whether the lodging of an internal appeal suspends the operation of an administrative decision authorising prospecting or mining was considered in the case of *Katz v Beneprops Two (Pty) Ltd* 1998 JDR 0052 (0). This case is primarily of historical interest because s. 96(2) of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) currently clearly provides that the lodging of an internal appeal against the decision to grant a prospecting or mining right does not suspend the administrative decision unless it is so suspended by the Director-General or the Minister, as the case may be. This case illustrates the manner in which the issue was dealt with prior to the MPRDA, with the court holding that the common law rule that suspends the execution of a judgment of the court upon the lodging of an appeal does not similarly apply to administrative decisions.

In *Meepo v Kotze* 2008 (1) SA 104 (NC) the court raised the question whether a party can, on the basis of s. 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) apply for an exemption from the requirement to exhaust internal remedies in s. 96 of the MPRDA. For purposes of this case it was not necessary to decide this question as the court found that the appeal had already been finalised by the time the matter was heard.

(f) Preferent rights for communities

In the *Bengwenyama* matter, the Constitutional Court held that s. 104 of the MPRDA accorded communities a preferent right to prospect on community land. The key implication of preferent rights was that the DMR was obligated to notify such communities *and afford them a hearing* in the event of another prospecting application in respect of the same land.

STRATEGIC OBSERVATIONS

The import of the Maccsand[5] decisions in both the High Court and Supreme Court of Appeal is that compliance with land-use planning legislation is not obviated by the grant of a prospecting or mining right. This should also mean that local authorities are one of the State Departments consulted prior to the issuing of a prospecting or mining right. Failing this, the lawfulness of the prospecting or mining right may be compromised. While it was reported that the Maccsand case would go on appeal to the Constitutional Court, there seems to be little chance of success on the issue of the relationship between the MPRDA and land-use planning legislation – because the reasoning employed by the High Court and the SCA in the Maccsand decisions was based on the Constitutional Court's own reasoning in City of Johannesburg v Gauteng Development Tribunal. A number of civil society initiatives – not necessarily litigious in nature – could flow from the affirmation of the local authority land-use planning mandate. There is firstly a need for awareness-raising of these decisions amongst local authorities. Secondly, district and local spatial development frameworks may be used as a form of strategic environmental assessment to ensure that prospecting and mining takes place in appropriate areas. This points to the need for environmental civil society organisations to become more involved in the integrated development planning process mandated by municipal legislation. Finally, while it is clear that mining constitutes a 'land use' for purposes of the LUPO, research is needed to determine whether this is also the case in terms of other land-use planning instruments currently in force.

Whether the MPRDA trumps NEMA is not clear at this stage, nor is it certain that this particular point will be considered if the matter is taken to the Constitutional Court. Given the extensive changes to the environmental impact assessment framework which are currently being planned, it is recommended that action upon this point is not desirable at present.

As regards public participation and consultation, in drafting their RMDEC objections and MPRDA appeals civil society players must now mention the Bengwenyama, Meepo and Joubert decisions, all of which strengthen their hand as regards the proper quality of consultation. In their advocacy, civil society organisations should also underline the Constitutional Court's significant obiter remark in the Bengwenyama case that prospecting represents a 'grave and considerable invasion' of the rights of the landowner – and underline that this is even more true for mining rights.

The integration of environmental considerations into the decision to grant a prospecting or mining right is considered in greater detail in Chapter 3 below. A 'lawfulness' challenge that argues that the current legislative and administrative arrangements for consideration of the EMP are inadequate to ensure enforcement of (amongst others) the environmental right could be pursued. However, this would not be a clear-cut case given that some consideration of environmental impacts does take place.

Civil society organisations should take note that the issue of the existence of an internal appeal in terms of the MPRDA has now been settled in the affirmative. Following Bengwenyama, they should be informed that the 180-day deadline in which to bring a review in terms of the PAJA commences only once the DMR responds to the appeal. The issue of the delays experienced in the DMR deciding appeals is considered further in Chapter 3 below.

Finally, the Constitutional Court's stance on the need to provide communities who hold preferent rights in terms of s. 104 of the MPRDA a hearing prior to the granting of a prospecting or mining

5 See update on the 2012 Constitutional Court decision in the Maccsand case on page 37.

right in respect of their land provides another ground upon which a 'lawfulness' challenge may be brought; i.e. where a hearing has not been held the granting of the right may be unlawful and subject to being set aside. Like the decision on the mandate of local authorities regarding land-use planning legislation, there is need for awareness raising of this precedent in relevant communities and, preceding this, the identification of such communities. This points to the need for a research and advocacy focus on mining and historically-disadvantaged communities.

2.3.2 National Environmental Management Act (NEMA)

The NEMA is the 'framework' environmental legislation in South Africa, defining the environmental management approach that should be integrated across all sectors. It contains a statement of environmental principles which incorporate many key principles of international environmental law such as the polluter pays principle, the precautionary approach, the principle of sustainable use and the principle of public participation, amongst others. The NEMA also establishes a regulatory framework for the conduct of environmental impact assessments (Chapter 4 on 'integrated environmental management') – though currently the listed activities in force apply only to activities ancillary to prospecting and mining and not to these activities *per se*; a duty of care in relation to pollution and degradation of the environment (s. 28); private prosecution for environmental offences (s. 33) and innovative provisions on *locus standi* (s. 32).

The only judicial precedent associated with NEMA in the prospecting/mining contexts is *Bareki v Gencor* 2006 (1) SA 432 (T). This case is notorious in environmental circles for being the judgment that failed to confirm the retrospective application of s. 28 dealing with the duty of care. The basis for the court's finding was the common law presumption against retrospectivity, linked to the nature of the obligations set out in s. 28. The court found that the obligation to take reasonable corrective measures in relation to pollution were strict (i.e. fault in the form of negligence or intention was not a requirement to establish liability) and possibly even absolute (lawfulness was not a requirement). For this reason the court held that the legislature could not have intended the obligations to apply retrospectively. This ratio, however, has been largely rendered obsolete by legislative amendments to NEMA by Act 14 of 2009. A new s. 28(1A) has been inserted which indicates that the duty defined in s. 28(1) – which applies to the actual polluter – applies to significant pollution and degradation of the environment that occurred before the commencement of NEMA; that arises or is likely to arise at a different time from the actual activity that caused the contamination; or that arises through an act or activity of a person that results in a change to pre-existing contamination. This can be taken as an expression of clear legislative intent that s. 28(1) does apply retrospectively. There is no such express qualification attached to s. 28(2) (which indicates that the owner or person in control of the land on which the pollution or degradation occurred also has a duty to take reasonable corrective measures), however, which could suggest that the obligation does not apply retrospectively in this instance. There is also a new s. 28(14) and (15) which criminalise an act or omission that causes significant pollution or degradation or is likely to affect the environment in a significant manner. Unlawfulness and fault (in the form of negligence or intention) are clearly specified as requirements here. It is not clear whether the nature of the offence defined here also means that the obligation in s. 28(1) requires fault.

What is less well-known and possibly more important about this case, however, are the court's findings regarding the continuity of legal obligations pertaining to rehabilitation of the environment. Statutory prescriptions defining obligations in this regard have been on the statute books since the twentieth century, but have been 'interrupted' by the repeal first of the Mining and Works Act, 1957 and its attendant regulations and then the Minerals Act 50 of 1991. This allows the mining companies to claim that the obligations are no longer applicable since the statutes or regulations in terms of which they were prescribed are no longer in effect. In *Bareki* the plaintiffs succeeded in establishing the continuity of such legal obligations by referring to s. 12(2)(c) and (e) of the Interpretation Act, 1957. However the court's ratio on the effect of s. 12(c) is problematic and does not clearly indicate that the obligations are continuous. The court also rejected a 'continuity by content' argument

advanced by the plaintiff – which holds that the obligations applicable to mining companies have been largely similar across the various regulatory regimes.

Finally, this case is relevant for showing the importance of absolute accuracy in the pleadings put forward by those wishing to protect the environment. In at least three instances the court's decision was based on technical inconsistencies or inaccuracies in the plaintiff (community) pleadings – see for instance the discussion on the linkage of s. 49(b) to the nature of the duty in s. 28(1) and (2), and the manner in which the court dealt with the plaintiff's third and fourth claims.

STRATEGIC OBSERVATIONS

The decision in Bareki is arguably less of a failure for civil society interventions in the mining context than is commonly believed. What is needed now is greater clarity on the nature of the obligations established by s. 28(1) and s. 28(2) of NEMA in the context of s. 28(14) and (15). There needs to be greater certainty in respect of which persons such obligations can be applied retrospectively and whether unlawfulness and fault are required prior to regulatory action and/or a criminal prosecution being initiated. Further, it is not immediately evident that s. 28(1) or (2) constitute a cause of action for civil society to approach the court, if the object of that action is to ask the court to order the person causing pollution to take corrective measures or to demand compensation where such measures have not been instituted. Based on s. 28(12), for instance, it would seem that the only form of relief to which civil society organisations would be entitled is an order directing the State to direct the person causing pollution to take some form of action. This may well be a worthwhile type of case to pursue as it would be helpful to obtain a precedent that outlined in greater detail the State's duties to ensure that private and public entities fulfill their environmental duty of care.

As a general observation, the precedents relating to NEMA in the context of mining are clearly underdeveloped. A focus on developing some jurisprudence around s. 28 or possibly the private prosecution provision in s. 33 could start to remedy this.

2.3.3 National Water Act (NWA)

The NWA establishes a regulatory framework for water resources in South Africa. 'Water resource' is widely defined to include watercourses, surface water, aquifers and wetlands, amongst others. The provisions of the Act relevant to a prospecting/mining context include the requirements relating to the licensing of 'water use' (Chapter 4); the establishment of a duty of care in relation to pollution of water resources (s. 19, similar in content to s. 28 of the NEMA); and the provisions dealing with appeals and dispute resolution (Chapter 15). Some of these provisions are outlined in greater detail in Chapter 3 of this publication.

The judicial precedents associated with the NWA in a mining context fall into two groups: There are two judgments dealing with s. 19, on the one hand, and then four – heard in the Water Tribunal – dealing with the issue of *locus standi* to bring an appeal against the granting of a water use licence (WUL).

Regarding s. 19, in *Harmony Gold Mining Company Limited v Free State Department of Water Affairs and Forestry* 2005 JDR 0465 (SCA) it was established that **the obligation to take 'reasonable measures' to prevent pollution in terms of s. 19(1) is not confined to reasonable measures that can be effected on one's own land, but extends to land owned, controlled or used by another**. However, the court also introduced an interesting distinction between measures that are *preventative* (which the court held is the focus of s. 19(1) and (2) of the NWA) and measures which are *necessary* (which were associated with s. 28(6) of NEMA). The implications of this distinction have not been fully explored in the literature. In *Kebble v Minister of Water Affairs* (2007) JDR 0872 (SCA), as noted above, the court found that the directives issued by the Regional Director of the Department of Water Affairs and Forestry in the Free State in terms of s. 19(3) were unclear, unintelligible and unenforceable in a number of respects. This however, is simply a finding on the facts.

This issue of *locus standi* to appeal against the granting of a WUL to the Water Tribunal was considered in the cases of:

- Escarpment Environment Protection Group & Wonderfontein Environmental Committee v Department of Water Affairs & Exarro Coal (Pty) Ltd (unreported, WT 03/08/2010);
- Escarpment Environment Protection Group & Langkloof Environmental Committee v Department of Water Affairs & WER Mining (unreported, WT 25/11/2009);
- Escarpment Environment Protection Group & Wonderfontein Environmental Committee v Department of Water Affairs & Xstrata Mining (unreported, WT 24/11/2009); and
- Gideon Anderson T/A Zonnebloem Boerdery v Department of Water and Environmental Affairs and another (unreported, WT 24/02/2010).

All cases dealt with the Water Tribunal's interpretation of s. 148(1) of the NWA read with s. 41(4). Whilst there are small variations in the Tribunal's reasoning in each case, essentially the logic of the Tribunal's finding is that ***locus standi* to bring an appeal is restricted to persons who have lodged objections in terms of a public participation process initiated by the water regulator**. Where the water regulator exercises a discretion *not* to allow for public participation in the granting of a WUL, then no appeal against the licence can be brought by interested and affected parties. The Tribunal pointed out that appeals against the issue of a water use licence may only be lodged by persons mentioned in s. 148(1) of the NWA. Section 148(1)(f) indicates that an appeal may be lodged by the applicant and 'any other person who has timeously lodged a written objection against the application'. Section 41(4) of the NWA indicates that the responsible authority *may* require the applicant for a water use licence to publish a notice in newspapers and 'other media' stating that written objections may be lodged against the application within a specific time. This issue is considered further in Chapter 3 of this publication.

STRATEGIC OBSERVATIONS

The decision in the Harmony Gold case is a positive one which could be of use by civil society organisations in attempting to enforce obligations relating to the protection of water resources. Other than this, the jurisprudence relating to s. 19 of the NWA is underdeveloped.

The legal position on the question of locus standi to bring an appeal before the Water Tribunal seems to have crystallised. The time is now ripe for the stance taken by the Tribunal to be either affirmed or negated by the higher courts and a judicial review of such decisions should therefore be considered.

2.3.4 Restitution of Land Rights Act 22 of 1994

The Restitution of Land Rights Act is constitutionally-mandated legislation to allow for the restitution of land to individuals and groups of people dispossessed of such land by racially-discriminatory laws post-1913. In *Richtersveld Community v Alexkor & another* [2004] 3 All SA 244 (LCC), the Land Claims Court held that it was competent, in making an order for restitution of land and/or equitable redress in terms of the Restitution of Land Rights Act to make an order compelling the defendant to (a) compensate the land claimant for environmental damage done to the land; and/or (b) repair environmental damage done to the land.

STRATEGIC OBSERVATIONS

The Richtersveld Community decision is a positive one for ensuring greater accountability on the part of mining companies for the environmental obligations. Promoting greater awareness of this decision should be incorporated, as with the issue of preferent rights, into a broader focus on mining and historically-disadvantaged communities.

2.3.5 Land Use Planning Ordinance 15 of 1985 (LUPO)

The LUPO is the land-use planning legislation applicable to the area of the former Cape Province. In *City of Cape Town v Maccsand*[6] *(Pty) Ltd & others* 2010 (6) SA 63 (WC) the court's finding that the MPRDA does not trump LUPO, and that the LUPO was accordingly applicable to the land upon which prospecting or mining would be conducted, was contingent upon the court finding that mining constituted a 'land use' for purposes of the LUPO. It held that mining did constitute 'land use' – this being clear from the scheme regulations promulgated in terms of s. 8 of LUPO. This precedent is of potential use in establishing the mining constitutes a 'land use' in terms of the other land use planning ordinances still in effect.

STRATEGIC OBSERVATIONS

As noted above, there is a need to determine whether the notion of 'land use' in other land-use planning instruments currently in force encompasses the activities of prospecting and mining.

2.3.6 Income Tax Act 52 of 1962

The Income Tax Act sets out the rules applicable to the levying of income tax against individuals and companies. Fiscal measures may serve to influence behaviour one way or another – for example, in preparing land adequately for the receipt of mining waste. If such expenditure is deductible, the company may be incentivised to spend more. In *Commissioner for Inland Revenue v Manganese Metal Company (Pty) Ltd* [1996] 1 All SA 204 (T) the court found that expenditure aimed at improving land operating as a dumping facility for mining waste is of a capital and not a revenue nature but is nevertheless deductible in terms of s. 11(g) of the Income Tax Act, 1962.

STRATEGIC OBSERVATIONS

The tax implications of pollution-control measures on the part of prospecting and mining companies is deserving of further research.

2.4 Precedents relating to repealed legislation

Whilst the laws to which they relate are no longer in force, precedents relating to repealed legislation may nevertheless be valuable for purposes of advocacy. The two precedents discussed in this section, for instance, were used in a submission to the Parliamentary Portfolio Committee hearings on acid mine drainage, held during June 2011, to establish both the existence *and enforcement* of laws prohibiting the release of water from mine workings unless it had been rendered 'innocuous'; i.e. unless the acid mine water had been treated.

The case of *Rex v Marshall & another* [1951] 2 All SA 440 (A) was concerned with the interpretation of reg. 7(2) of the Mines and Works Regulations, 1937 (published in GG 1124 of 1937 and promulgated by virtue of Act 12 of 1911). Regulation 7(2) provided that: 'In no case may water containing any injurious matter in suspension or solution be permitted to escape without having been previously rendered innocuous'. An important case for historical purposes therefore as it clearly demonstrates that authorities were holding mines criminally liable for the release of acid mine drainage as early as the 1950s. Significantly, the court found that reg. 7(2) was neither void for vagueness, nor unreasonable nor *ultra vires* the empowering provision. The court did not shy away from dealing with the difficulties arising in relation to the causal effect of the mining activities on the water but offered a pragmatic response to each technical point raised by the counsel for the accused.

Lascon Properties (Pty) Ltd v Wadeville Investment Co. (Pty) Ltd & another 1997 (4) SA 578 (W) interpreted reg. 5.9.2 of the regulations promulgated under the Mines and Works Act 27 of 1956 (which was similar in content to reg. 7.2 of the 1937 regulations outlined above). Similarly to *Rex v Marshall* it demonstrates the existence of litigation pertaining to acid mine drainage prior to the issue gaining prominence. The case is important for the court's interpretation of the duty to render water containing harmful or injurious matter in suspension or solution innocuous as involving strict liability, and establishing a ground for compensation where damage has occurred as a result of the release of acidic mine water independent of the Aquilian action. It was thus not necessary for the plaintiffs to allege and prove fault. (The court's reference to the duty being absolute is possibly wrong as an absolute liability would exclude wrongfulness in addition to fault and this was not explicitly discussed in the case.) While regulation 5.9.2 has of course since been repealed, the court's approach to interpretation, and its finding that the regulation was *prima facie* enacted for the benefit of landowners whose property is damaged through the release of acidic mine water, could be relevant to an interpretation of s. 28(1) of the NEMA, s. 19(1) of the NWA and s. 38(1)(e) of the MPRDA.

6 See update on the 2012 Constitutional Court decision in the Maccsand case on page 37.

STRATEGIC OBSERVATIONS

The historical continuity of obligations relating to the environment or aspects thereof on the part of the mining industry should be constructed. In this regard there is a need for historical research into the statutory framework and the implementation thereof from the start of mining in the late 1800s.

As the decision in Lascon Properties, a statutory duty of care in relation to the environment does not necessarily translate into a cause of action on the part of private parties to claim compensation from the person breaching such statutory duty. Further research and/or a test case is needed to determine whether the statutory duties articled in ss. 28 of NEMA and 19 of the NWA establish a cause of action for compensation based on (possibly) strict liability for environmental pollution and degradation. Affirmation of such a cause of action (and thereby affirmation of an increased risk on the part of mining companies) may go a long way to ensuring better implementation of the duty of care.

2.5 Precedents relating to the common law

A number of the cases reviewed, rather than interpreting legislation, established precedents in terms of the common law. The utility of these precedents, however, must be read together with s. 4(2) of the MPRDA which provides that '[i]n so far as the common law is inconsistent with this Act, this Act prevails.' This does not mean that common law is excluded out of hand. Firstly, this provision itself may be interpreted expansively or restrictively. It is not clear, for instance, whether the legislature intended the MPRDA override to apply to the whole of the common law, or only those aspects of the common law dealing with the proprietary nature and consequences of prospecting and mineral rights (it is well-known that the MPRDA replaced the common law proprietary regime in this regard, substituting it with a notion of State custodianship of mineral resources). Secondly, the interpretation of the MPRDA, including its relationship to the common law, is subject to s. 4(1) which indicates that any reasonable interpretation that is consistent with the objects of the Act must be preferred over any other interpretation which is inconsistent with such objects. Importantly, the objects of the MPRDA include giving effect to s. 24 of the Constitution 'by ensuring that the nation's mineral ... resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development' (s. 2(h)).

Three of the judgments relating to the common law are clearly not inconsistent with the MPRDA as they deal with matters which are simply not regulated by this Act:

The first precedent articulates a rule relating to the **award of costs**. The facts in *CA Visser Delwerye (Edms) Bpk v Du Plooy & others; In re: Du Plooy & another v Minister of Minerals and Energy & others* [2006] 2 All SA 614 (NC) highlight the numerous errors and inconsistencies made by the Department in the issue of a certain mining permit. This case is significant for clarifying the obligation of the DMR to provide information to parties that would prevent them from needing to resort to court proceedings. The court held that the Department is not entitled to 'sit on the fence' and that where it had information relevant to resolving a dispute between two third parties, it was under an obligation to provide that information to prevent the matter from going to court. Because the Department had in this particular case failed to make the information available timeously, it was burdened with 75% of the costs of the losing party and the full costs of the party that succeeded. The dispute in this case was between two mining rights holders. It is an interesting question whether the ratio in this case could also apply where the dispute is between a non-rights holder, such as a community or environmental interest group, and a mining rights holder, with regard to an issue such as access to information.

The second precedent, *Van Eck v Clyde Brickfields (Pty) Ltd* 2006 JDR 0312 (T), relates to the **common law of nuisance**. In this case, the court articulated **nine criteria to determine whether the nuisance was 'actionable'** (i.e. worthy of action on the part of the court), as follows:

- The gravity of harm or potential harm to the neighbours.
- The locality or neighbourhood in which the alleged nuisance occurred.
- The personality of the plaintiff.
- The motive with which the landowner carried out the activity.
- The benefit of the activity to the landowner.
- The social utility of the activity or its utility to the general public.
- Whether the landowner could have achieved the same goal by employing measures less harmful to the applicants.
- The practicability of preventing the alleged nuisance and whether the respondent had taken measures to abate the nuisance.
- Whether the applicants had 'come to the nuisance'.

The applicants in this case also seem to have made a number of key errors which civil society organisations may wish in future to avoid, as follows: (a) The form of relief they requested (an interdict related to the abatement of *noise* pollution) did not correlate with the scope of the forms of annoyance alleged (e.g. water pollution, dust pollution, increased traffic). The court accordingly simply ignored the non noise-related claims. It is important, therefore to align the relief sought with the claims being made. (b) The applicants supporting Van Eck's application had submitted identical affidavits supporting his claim. The court was interested in but was therefore unable to determine the detailed impact of the noise on these specific applicants. Specifics are therefore important. (c) The applicants had failed to submit an expert's report on the noise levels in their own homes. Where the test for determining whether a claim is actionable or not is objective (and not based solely on the plaintiff's subjective experience), it is important to back this up with expert evidence. (d) The applicants made a number of subjective claims regarding the first respondent's motives (e.g. he was only interested in making money, he laughed off all legal regulation) which were not helpful or relevant to the court's deliberations. These kinds of allegations – while they may be significant in a non-legal context – should be eschewed in favour of allegations that establish the motive of the person causing the nuisance more objectively.

Thirdly, *Simmer & Jack Mines Ltd v GF Industrial Property Co (Pty) Ltd & others* 1978 (2) SA 654 (W) is useful in that it articulated the criteria relevant to determining the ownership of mine dumps. One of the arguments raised in the case was that the dump had acceded to the soil and thereby become an immovable form of property.

THE RICHTERSVELD COMMUNITY DECISION IS A POSITIVE ONE FOR ENSURING GREATER ACCOUNTABILITY ON THE PART OF MINING COMPANIES FOR THE ENVIRONMENTAL OBLIGATIONS. PROMOTING GREATER AWARENESS OF THIS DECISION SHOULD BE INCORPORATED, AS WITH THE ISSUE OF PREFERENT RIGHTS, INTO A BROADER FOCUS ON MINING AND HISTORICALLY DISADVANTAGED COMMUNITIES.

The court did not rule out the possibility of dumps being regarded as immovables but held that the test lay with the intention of the parties. The legal position of mine dumps as movable or immovable forms of property could have important implications in the application of environmental law, particularly where statutes establish a duty of care on the landowner.

One key recent precedent, relating to the **right of lateral support**, is however probably inconsistent with the MPRDA. In *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* (2006) 1 All SA 230 (T), the court considered the relationship between the mineral rights holder and the surface owner as regards 'lateral support', which encompasses adjacent (implicating land uses that affect neighbouring properties) and subjacent support (implicating land uses that affect the surface). This right was definitively affirmed for the first time in a South African court in the case of *London and SA Exploration Company v Rouliot* (1890 – 91) 8 SC 74, but this case involved adjacent support. In Anglo Operations, Anglo's claim that it had an 'ancillary right' to conduct open-cast mining operations on the respondent's property was conceived as impacting upon subjacent support. The case is significant for affirming that the doctrine of lateral support is recognised in South African law and that the surface owner's renunciation to such support (in both its adjacent and subjacent aspects) is not 'implied by the law' into the granting of a mineral right – *it has to be expressly or tacitly agreed upon by the mineral rights holder and surface owner*. Recognition of this capacity on the part of surface owners is potentially hugely significant because it means that – at common law – a landholder cannot be deprived of their use of the surface simply by operation of the law, *some form of agreement has to be in place*. The court also went on to hold that any law that *did* imply such a term into the granting of mineral rights would constitute a violation of s. 25(1) of the Constitution and that it would not be saved by the limitation clause. What immediately comes to mind therefore, is the rule, based on s. 5(4)(c) and other provisions of the MPRDA, that potential mineral rights holders need only consult with landowners, and need not obtain their *consent* to mine. However, the 'framing law' for this case was the Minerals Act 50 of 1991, which still recognised common law bases for obtaining mineral rights. It is not clear how the rules and principles affirmed in this case would apply in the context of the MPRDA and s. 4(2) of that Act in particular. The key questions would therefore be whether the legislature intended that the duty to consult in terms of the MPRDA override the common law position that express or implied agreement to renounce lateral support be obtained, and, if so, whether this violates s. 25(1) of the Constitution.

The remaining common law precedents are primarily of historical (*New Heriot Gold Mining Company Limited v Union Government (Minister of Railways and Harbours*) 1916 AD 415 and *Reid v De Beers Consolidated Mines* (1891—2) 9 SC 333, dealing with damage caused by water that had collected on a certain claim) or sociological (*Grand Mines (Pty) Ltd v Giddey* NO 1999 (1) SA 960 (SCA), dealing with a contractual obligation to rehabilitate a mining site) interest; or have been superceded by other legislative developments (for instance, *Walker's Fruit Farms Ltd & another v Hopkins & others* [1955] 1 All SA 165 (T) dealing with the extent to which conditions of title can constrain mining operations; and *Director: Mineral Development, Gauteng Region & Another v Save the Vaal Environment* [1996] 1 All SA 2004 (T) which dealt with the *audi alteram partem* rule).

STRATEGIC OBSERVATIONS

Civil society organisations should take note of the favourable precedent in C.A. Visser Delwerye and consider the implications of the decisions in Van Eck and Simmer & Jack. The focus of work regarding common law precedents, however, should possibly be on the right of lateral support. In this regard a test case could be identified in order to obtain a precedent on the question whether the right to lateral support is inconsistent with the MPRDA. If so, the question is whether such override is constitutional given the right to property (and possibly also the freedom of trade) in the Constitution.

CHAPTER 3

REVIEW OF LIVE CASES

3.1 Introduction

In addition to an overview of precedent, the review sought to identify and analyse so-called 'live' cases – being instances where a civil society challenge to the granting of a prospecting or mining right had not yet crystallised in judicial precedent. Such a challenge could take on one or more of the following forms:

- An objection against the granting of a prospecting right submitted to the Regional Mining Development and Environmental Committee (RMDEC) (a form of committee which must be established by the Minerals and Mining Development Board for each region, s. 64, MPRDA).
- An administrative (internal) appeal against the granting of a prospecting or mining right submitted in terms of s. 96 of the MPRDA.
- An administrative appeal against the granting of an environmental authorisation submitted in terms of s. 43 of NEMA.
- An administrative appeal against a decision made in terms of s. 24G of NEMA to retrospectively authorise an activity requiring an environmental authorisation.
- An administrative appeal to the Water Tribunal against the granting of a water use licence, submitted in terms of s. 148 of the NWA.
- An application to the High Court interdicting a mining company from carrying on with operations pending the resolution of an appeal or the granting of a particular authorisation.
- Other applications to the High Court (spoliation proceedings, judicial review of lease agreement, declaratory order).
- An application to the High Court for judicial review of the decision to grant a prospecting or mining right, made in terms of the PAJA.
- A criminal prosecution based on the various statutory crimes identified in mining or environmental legislation and/or the common law.

Following a call for cases to be brought to the attention of the research team, a total of 77 live cases were identified. Of these, 61 were cases in which an objection had been submitted to the relevant RMDEC, while in the remaining 16 civil society interventions had been carried further. Given the limited time available to complete the project, and wishing to analyse the cases in depth, a decision was taken by the research team in consultation with the Centre for Environmental Rights to focus only on the 16 cases which involved processes other than or in addition to RMDEC objections. These cases were identified on the basis of the mining company involved and the farm or area where prospecting or mining was being conducted.

Fact sheets, which are available on the website of the Centre for Environmental Rights, were compiled for each of these cases together with a 'paper trail' of key documentation. Based on a review of the cases, a number of systemic issues were identified, revolving around the following five themes:

- The form of civil society intervention.
- Public participation and consultation.
- The integrity of the Environmental Management Plan/ Programme (EMP).
- Regulatory discretion to grant a prospecting/mining right.
- Principles of public administration.

A discussion of the issues relating to each of these themes follows.

3.2 Form of civil society intervention

Table 3.1 below provides a summary overview of the extent to which the processes outlined in section 3.1 above featured in the 16 cases reviewed.

CASE	PROCESS 1	PROCESS 2	PROCESS 3	PROCESS 4	PROCESS 5	PROCESS 6	PROCESS 7	PROCESS 8
Angloplatinum-Blinkwater						X		
Anker Coal-Steenkoolspruit								X
Benicon-Bankfontein		X						
BHP Billiton-Schoonoord	X							
Bright Coal-Commissiekraal	X							
Eyesizwe Coal-Paardeplaats	X							
Eyesize Coal-Zoekop[7]							X	
Golfview-Leliesfontein								X
Khulile-Witkranz	X							
Limpopo Coal-Mapungubwe	X		X	X	X			
Mashala Resources-Witbank	X			X		X		
Mine Waste Solutions-Stilfontein		X		X				
Transworld Energy and Mineral Resources (TEM)-Xolobeni	X							
Trollope Mining-Elandskloof	X							
Umcebo-Klippan	X	X		X				
Xstrata-Verkeerdepan	X							

7 The challenge in this case was targeted against both the granting of a prospecting and then a mining right.

Summary view of live cases and civil society-initiated processes challenging the granting of a prospecting or mining right

Process 1: MPRDA appeal
Process 2: NEMA appeal
Process 3: NEMA appeal (s. 24G rectification)
Process 4: NWA appeal to Water Tribunal or objection to grant of WUL
Process 5: High Court interdict
Process 6: Other High Court application (e.g. spoliation proceedings, judicial review of lease agreement, declaratory order)
Process 7: Judicial review of decision to grant prospecting/mining right
Process 8: Criminal prosecution

Yellow fill: Challenge of prospecting right
Blue fill: Challenge of mining right
Green fill: Challenge relates to construction of tailings facilities

From the table on page 17, it is apparent that, apart from RMDEC objections, the most common form of civil society challenge to the grant of a prospecting or mining right is an administrative appeal in terms of the MPRDA, followed by objections and/or appeals relating to the grant of a WUL, and then appeals in terms of NEMA. Interestingly, there is only one case where the challenge took the form of judicial review of the administrative action, being the granting of a prospecting right to Eyesizwe Coal in respect of certain portions of the farms Zoekop, Blyvooruitzicht and Leewbank. The high prevalence of administrative appeals in terms of the MPRDA is understandable and indeed appropriate given that the PAJA requires exhaustion of internal remedies prior to the institution of review proceedings. Further, s. 96(3) of the MPRDA specifically states that no person may apply to the court for the review of an administrative decision pertaining to the granting of a prospecting or mining authorisation until the appeal procedure in s. 96(1) has been exhausted. However, the fact that only one of these cases to date has been taken on judicial review means that problematic aspects of the prospecting/mining authorisation process associated with public participation, the exercise of the DMR's discretion, and the integrity of the EMP, amongst others (as detailed below) are not coming under the courts' scrutiny. A body of jurisprudence that would clarify some of the ambiguities in the statutory framework is thus not being developed.

The case studies provide insight into some of the problems associated with these different forms of challenge. The remainder of this subsection discusses systemic problems associated with MPRDA appeals, applications for judicial review, and objections/appeals in terms of the NWA.

3.2.1 MPRDA appeals

There is no statutory guideline on the time within which the Minister must finalise an appeal in terms of s. 96 of the MPRDA. Two of the case studies in the review indicate the extent to which the appeal process has dragged on. In the Limpopo Coal-Mapungubwe case, appeals in terms of s. 96 of the MPRDA against the granting of the mining right were lodged by a number of civil society organisations between 15 and 26 March 2010, whilst a consolidated separate appeal against the approval of the EMP was lodged on 28 April 2010. At the time of writing this report – *more than 18 months later* – the Minister's decision on the appeal is still awaited. In the TEM-Xolobeni case, the Amadiba Crisis Committee (ACC) submitted an MPRDA appeal against the granting of a mining right in respect of titanium-rich sands on the Wild Coast on 2 September 2008. A committee and then a task team were appointed by the Minerals and Mining Development Board and the Minister respectively during the course of 2010 and 2011. The ACC, frustrated by the lengthy delay in a decision being made, submitted a complaint to the Public Protector in 2011. On 6 June 2011, nearly *three years* after the appeal was submitted, the Minister finally notified the affected parties that she had upheld the appeal. However, even this decision was not finally conclusive of the matter as TEM was directed to address, within a period of 90 days of 6 June 2011, the environmental issues raised by the Regional Manager of the Eastern Cape Region, as well as those raised by DEAT in a letter dated 20 December 2007[8]. The Regional Manager: Eastern Cape Region was directed to submit a recommendation to the Minister after re-evaluation of the information submitted by TEM. The MPRDA does not disallow the Minister from upholding an appeal conditionally in this fashion – it is silent on how the Minister must exercise her appeal discretion. This puts the civil society appellants at a significant disadvantage: Preparing an appeal is a time and labour-intensive process that ties up scarce financial and human resources, but the civil society appellant has (a) no certainty as to when an appeal will be finalised; and (b) even where the appeal is upheld – and is thus apparently a success – there is nothing to stop the Minister from establishing conditions that will allow prospecting or mining to nevertheless proceed if the conditions are satisfied.

The second major problem with MPRDA appeals is that **the lodging of an appeal does not suspend the administrative decision**. A discretion to suspend the decision – and thus to halt the commencement of prospecting or mining operations – vests in the Director-General or the Minister, as the case may be (s. 96(2), MPRDA). Even though civil society players routinely request that the decision be suspended, in the cases reviewed this was never done. This is a highly problematic feature of the MPRDA for civil society roleplayers as it means that the environment which their appeal desires to protect may be altered and possibly irreversibly degraded prior to the appeal being decided, thus rendering the whole internal appeal process nugatory. In the Limpopo Coal-Mapungubwe case, the Minister refused to exercise her discretion to suspend the decision to grant Limpopo Coal a mining right. The civil society applicants subsequently attempted to use interdict proceedings to secure a suspension of mining and related operations on the site pointing to, amongst others, the strength of their arguments in the internal appeal process. However, the interdict proceedings have also dragged on: The initial application was launched by a number of civil society organisations on 3 August 2010. The first respondents, being Limpopo Coal, filed an answering affidavit on 24 November 2010. The civil society applicants filed a replying affidavit during early 2011 but the respondents then requested permission to file a replicating affidavit and this is currently awaited. More than a year after initiation of court action to suspend mining operations, therefore, the matter has yet to even be heard and significant civil society resources are being tied up in managing the interdict proceedings.

STRATEGIC OBSERVATIONS

The lengthy delays in the time it takes the Minister to decide an appeal, coupled with her decision not to suspend the operation of a prospecting/mining right while the appeal is being decided, mean that environmental pollution and degradation may be perpetuated to the extent that the appeal becomes moot. Principles of administrative law indicate that where a period of time for deciding an appeal has not been specified, the appeal should be decided within a reasonable time. However, what is reasonable depends upon the facts of each case. Judicial review proceedings could be instituted (or threatened) where the Minister has taken an inordinately long time to decide the appeal, with a request to waive the requirement

8 This raises the additional issue of why the inputs of the provincial and national environmental departments were not taken into consideration when a decision was made to grant the mining right. On the extent to which the prospecting/mining authorisation process as administered by the DME ignores or disregards the inputs of other departments, see further below.

to exhaust internal remedies. However, the strategy employed in the TEM-Xolobeni case – laying a complaint with the Public Protector – seems to have been effective and is far less resource-intensive than initiating court proceedings. As regards the Minister's consistent refusal to suspend the operation of prospecting/mining licences pending appeal, an appropriate test case should be identified and the Minister's refusal to suspend the licence should be taken on review in order to obtain a judicial precedent on this point.

3.2.2 Judicial review of an administrative decision to grant a prospecting/mining right

The Eyesizwe-Zoekop case is illustrative of the problems encountered in bringing an application for judicial review. It is not clear whether an administrative appeal in terms of the MPRDA was submitted in the Eyesizwe-Zoekop case prior to the launch of such proceedings and, if not, that may constitute a fairly straightforward ground on which to dismiss the case. This however, as apparent from the discussion above, might have taken a considerable length of time.

In this case the prospecting right was granted to Eyesizwe Coal on 30 October 2006. The civil society applicants were not notified of the grant of the right. Review proceedings were launched more than a year later on 23 January 2008. The respondents, which included the DMR, indicated their intention to defend but did not deliver any answering affidavits. In a surprising move, Eyesizwe then withdrew its opposition on 22 July 2009 and agreed to pay costs on the opposed scale to the date of withdrawal and on the unopposed scale thereafter, contingent upon the court granting the order to set aside the prospecting right and approval of the EMP. Sometime between 12 and 16 August 2009 it appears that the other respondents withdrew their defence as well. Documentation available, however, indicates that while this battle was playing out Exarro Coal Mpumalanga (with which Eyesizwe Coal had in the meantime merged) had already for some time been preparing for submission of a mining right in respect of the same properties. In August 2008 consultants had been appointed to conduct baseline water studies for the proposed mine. Another set of consultants was appointed subsequent to this to prepare the scoping and environmental impact report for the EMP. A background information document, dated 21 July 2009, had already been prepared by these consultants for the scoping phase of the project. This report in turn indicates that a mining right application for the proposed Belfast coal mine had been submitted during June 2009 and accepted by the DMR on 10 July 2009. This suggests that while the civil society applicants were engaged in launching and managing the review proceedings for the prospecting right, the DMR and the mining company concerned were simply gearing up to obtain the more far-reaching mining right.

STRATEGIC OBSERVATIONS

The worrying aspect of this case is the length it takes for judicial review proceedings to be initiated and heard. This appears to be inherent in any court process. Where judicial review proceedings relate to a prospecting right, the right may have lapsed before the case is heard, which raises the question whether the court will then be able to grant appropriate relief. While the civil society applicant has its head down in managing the review process the mining company may simply be gearing up to obtain a mining right. Given limited resources, this suggests that interdict and judicial review proceedings on various points of law should perhaps be reserved for challenging mining rights, rather than their more time-limited and less far-reaching prospecting counterparts.

3.2.3 Objections/appeals in terms of the NWA

As noted in the overview of the decisions of the Water Tribunal in section 2.3.3, neither the water regulator (being, principally, the Department of Water and Environmental Affairs), nor the applicant for a WUL is legally obliged to conduct a process of public participation. The responsible authority may invite written comments from any organ of state which or person who has an interest in the matter (s. 41(2)(c), NWA). The responsible authority *may*, further, require the applicant to give notice of the WUL application and call for the lodging of written objections thereto; take other steps to bring the application to the attention of relevant organs of state, interested persons and the general public; and, satisfy the responsible authority that the interests of any other person having an interest in the land will not be adversely affected (s. 41(4), NWA). The extent to which public participation is accommodated in the decision-making process – either in the form of making comments or submitting formal objections – is therefore entirely within the discretion of the water regulator. In some of the cases reviewed, this discretion was exercised in favour of allowing comments and objections (e.g. Limpopo-Mapungubwe), but in others it was not (e.g. Mashala Resources–Witbank; Umcebo-Klippan). Nevertheless, it appears that even in the latter cases civil society roleplayers expended a significant amount of resources on commenting/objecting anyway.

In contrast to the lodging of an appeal in terms of the MPRDA lodging an appeal with the Water Tribunal against the decision to grant a WUL suspends that decision. The Minister has, however, a discretion to direct otherwise (s. 148(2)(b), NWA). In the Limpopo Coal-Mapungubwe case, a coalition of civil society organisations launched an appeal in the Water Tribunal on 28 July 2011. Despite representations to the contrary, the Minister of Water and Environmental Affairs lifted the suspension on 17 October 2011. Even though the suspension was lifted, the lodging of the appeal did serve to delay mining operations by more than two months.

The option of initiating mediation/negotiation proceedings in terms of s. 150 of the NWA was not pursued in any of the cases reviewed.

STRATEGIC OBSERVATIONS

Because the NWA at present clearly indicates that public participation in the granting of water use licences is discretionary, where comments/objections are submitted in the absence of a call for such, they can only serve to prove that civil society roleplayers wish to be involved – they have no other legal weight. A minimal amount of resources should perhaps be expended on lodging comments or objections in these circumstances. A strategy which to date does not seem to have been pursued, is to challenge the water regulator's decision not to exercise their discretion in favour of public participation. Review proceedings in this regard would seemingly fall within the grounds of review set out in the PAJA. However, the problem associated with judicial review proceedings noted above – the tendency for these to drag on – would also need to be considered in launching such an application.

WHERE JUDICIAL REVIEW PROCEEDINGS RELATE TO A PROSPECTING RIGHT, THE RIGHT MAY HAVE LAPSED BEFORE THE CASE IS HEARD, WHICH RAISES THE QUESTION WHETHER THE COURT WILL THEN BE ABLE TO GRANT APPROPRIATE RELIEF. WHILE THE CIVIL SOCIETY APPLICANT HAS ITS HEAD DOWN IN MANAGING THE REVIEW PROCESS THE MINING COMPANY MAY SIMPLY BE GEARING UP TO OBTAIN A MINING RIGHT.

The suspension of a water use licence while an appeal is being decided – where this is possible following a call for public participation – is a potentially valuable strategic tool. The retention of this particular provision in the current legislative review of the NWA must be monitored and advocacy on this issue may be needed.

Test cases for the use of mediation/negotiation proceedings in disputes relating to WULs should be identified and best practices identified and disseminated.

3.3 Public participation and consultation

The MPRDA's explicit provisions regarding public participation and consultation are located in ss. 5(4)(c), 10, 16(4)(b) and 22(4)(b) respectively. These provisions indicate that:

- Within 14 days of accepting a prospecting or mining rights application, the Regional Manager must make known that an application has been received in respect of certain land and call upon 'interested and affected persons' to submit comments regarding the application within 30 days of the date of notice (s. 10(1)). In terms of the MPRDA regulations, a notice in this regard *must* be placed on a notice board accessible to the public at the office of the Regional Manager (reg. 3(2)). The Regional Manager must also make the application known by at least one of the following additional methods: Publication in the official *Provincial Gazette*; notice in the Magistrate's Court in the magisterial district applicable to the land in question; or an advert in a local or national newspaper circulating in the area where the land to which the application relates is situated (reg. 3(3)). The prescribed contents of such a notice include an invitation to members of the public to submit comments in writing on or before a date specified in the notice (which date may not be earlier than 30 days from the date of the notice's publication), the name and official title of the person to whom any comments must be submitted, together with their contact details (reg. 3(4)). Significantly, the regulations do not require that a copy of the prospecting or mining work programme or any other information be made available to the public. According to the MPRDA regulations such programmes must be submitted as part of a prospecting or mining rights application (regs 5(1)(g) and 10(1)(f)), respectively) and would therefore be in the possession of both the applicant and the Regional Manager at the time publication of the notice for public comment.

- Section 10(2) of the MPRDA provides that if any person objects to the granting of a prospecting or mining right, the Regional Manager must refer the objection to the RMDEC which must consider the objection(s) and advise the Minister thereon. The Minister *may not* approve the EMP unless she has considered any recommendation by the RMDEC (s. 39(4)(b)(i)).

- In addition to the opportunity to comment/object via a notice published by the Regional Manager, the MPRDA indicates that a prospecting or mining rights applicant must also carry out consultation processes. The applicant for a prospecting right must consult with 'the land owner or lawful occupier and any other affected party' and submit the results of such consultation within 30 days of being notified of the requirement to consult by the Regional Manager (s. 16(4)(b)). The applicant for a mining right must notify and consult with 'interested and affected parties' within 180 days of being notified of the requirement to consult by the Regional Manager (s. 22(4)(b)). This consultation appears to be linked to the preparation of the environmental reports required in order to obtain a prospecting or mining right. The environmental management plan – which must be submitted in order to obtain a prospecting right – must include a record of the public participation undertaken and the results thereof (reg. 52(2)(g)). In the case of a mining right, the environmental reports include a scoping report followed by an environmental impact assessment report (reg. 48). Public participation is required in respect of *both* reports: The scoping report must describe the process of engagement of identified interested and affected persons, including their views and concerns (reg. 49(1)(f)), while the environmental impact assess-

ment reports must similarly include details of the engagement process with interested and affected persons but must additionally indicate how the issues raised by them have been addressed (reg. 50(f)).

- After obtaining a prospecting or mining right and prior to commencing prospecting or mining operations, the holder of the right must consult with the landowner or lawful occupier of the land in question (s. 5(4)(c)), MPRDA, as confirmed in *Meepo v Kotze* 2008 (1) SA 104 (NC) in which, as noted above, it was also held that such consultation amounts to more than notice – the prospecting (and by analogy, mining) rights holder must attempt to obtain the consent of the landowner as regards entry upon the land for the purposes of prospecting (or mining). Interestingly, failure to comply with s. 5(4) is a criminal offence (s. 98(a)(i), MPRDA) for which the penalty is a fine not exceeding R100 000 or a period of imprisonment not exceeding two years, or both (s. 99(1)(a), MPRDA).

These provisions provide little in the way of guidance as to the *quality* of public participation and consultation, but they must at least be read together with ss. 37(1) and 38(1)(a) of the MPRDA respectively. The former provides that the principles set out in s. 2 of the NEMA apply to all prospecting and mining operations and serve as guidelines for the interpretation, administration and implementation of the environmental requirements of the MPRDA. The most pertinent NEMA principles in this regard include the following: Environmental management must take into account 'the effects of decisions on... all people in the environment by pursuing the best practicable environmental option' (s. 2(4)(b)); the 'participation of all interested and affected parties in environmental governance must be promoted ... and participation by vulnerable and disadvantaged persons must be ensured' (s. 2(4)(f)); and '[decisions must take into account the interests, needs and values of all interested and affected parties and this includes recognising all forms of knowledge, including traditional and ordinary knowledge' (s. 2(4)(g)). The latter indicates that the holder of a prospecting or mining right must at all times give effect to the general objectives of integrated environmental management laid down in Chapter 5 of the NEMA. As stated here, the general objectives of integrated environmental management include ensuring 'adequate and appropriate' opportunity for public participation in decisions that may affect the environment (s. 23(2)(d), NEMA).

The Constitutional Court decision in the *Bengwenyama* matter (*Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2010 JDR 1446 (CC)) however, should now serve as a significant additional authority to argue for the quality of public participation and consultation that should occur. To recap, the court noted in this case that the granting and execution of a prospecting right represents a 'grave and considerable invasion' of the use and enjoyment of the land on which the prospecting is to take place (para 63)[9]. While the consultation requirements in the MPRDA did not require the consent of the landowners or lawful occupiers, they were indicative of a 'serious concern' for their rights and interests (ibid). As such, the court indicated that the consultation process envisaged by s. 16(4)(b) requires of the applicant: (a) to inform the landowner in writing that his application for prospecting rights on the land has been accepted; (b) to inform the landowner in *sufficient detail* of what the prospecting operation will entail on the land, *in order for the landowner to assess what impact the prospecting will have on the landowner's use of land*; (c) to consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and (d) to submit the result of the consultation process to the Regional Manager (para 67).

In the cases reviewed, the inadequacy and inappropriateness of public participation and consultation was frequently raised as a ground for appeal. It should be noted that the MPRDA does not explicitly mention the adequacy or appropriateness of public participation and consultation as a basis upon which the Minister may refuse to grant a prospecting or mining right (ss. 17and 23, respectively). The only way in which this aspect of the authorisation process features as a ground for refusing the grant of the right is by way of ss. 17 (1)(e) and 23(1)(g) read with ss. 17(2) and 23(2), respectively. These provisions indicate, in convoluted fashion, that the Minister must refuse the granting of a prospecting or mining right if the applicant is in contravention of any provision of the MPRDA. This would seemingly encompass the explicit provisions on public participation and consultation together with the contextual provisions in ss. 37 and 38, and now taking into account the interpretation of at least s. 16(4)(b) by the Constitutional Court. The ground for appeal, therefore, is that the right has been granted even though the applicant is in contravention of the provisions of the MPRDA dealing with public participation and consultation.

In light of this overview, the review of live cases revealed numerous problems associated with the public participation and consultation process as it is being managed by both applicants for prospecting and mining rights and officials of the DMR. The main issues in this regard include:

- Failure to provide landowners, lawful occupiers and other interested parties with proper notice.
- Lack of access to information.
- Failure to consult interested and affected parties during the scoping phase of the EMP.
- Failure to meet the proper requirements of consultation.
- Failure to consider objections submitted to the RMDEC.
- Lack of consultation in the amendment of key reports or authorisations.

3.3.1 Failure to provide proper notice

The problems associated with the MPRDA's provisions relating to notice of prospecting and mining applications have already been noted elsewhere[10]. To reiterate, the prescribed methods of notification are completely impractical and unworkable in rural contexts where the land – and thus the affected landowners and lawful occupiers – are located more than 100 km from the urban centres in which the DMR's regional offices or the magistrate's courts are located

9 While this decision thus relates to the granting of a prospecting right only, it is arguable that the court's observations and findings in respect of public participation are all the more applicable to the granting of a mining right, where the invasion of the use and enjoyment of the land is much more extensive.

10 See Centre for Applied Legal Studies and Wits Law School *Coal Mining and Communities: An Environmental Rights Perspective* (December 2009) at 58. This report was also funded by the Ford Foundation.

(notification by way of a notice put up at the magistrate's court being the additional method of communication which is almost exclusively relied upon by DMR officials – the other two require some form of payment). This problem was also noted in this particular review, in addition to lapses in implementing the basic requirements set out in the MPRDA and its regulations. In the Eyesizwe-Zoekop case, for instance, where a number of civil society players challenged the grant of the prospecting right by way of a judicial review, the mining company withdrew its defence on the basis of the concession that notice of the prospecting application was in all likelihood never displayed at the Magistrate's Court, Bethal [11]. **A further problem encountered in almost all cases was that interested and affected parties are not notified of the outcome of the process; i.e. of the actual granting of the prospecting or mining right and copies of such documentation are not made available to them**.

In cases where interested and affected parties do not receive notice via the channel of publication on the part of the Regional Manager, then they should at least be receiving notice from the applicant in terms of ss. 16(4)(b) or 22(4)(b), for how else would consultation be initiated? **This particular review highlighted two additional problems with the way in which prospecting and mining rights applicants are interpreting their obligations in this regard. The first is the trend of selective consultation while the second is an attempt on the part of applicants to restrict, contractually, the range of issues on which landowners, in particular, 'agree' to be consulted**.

The Eyesizwe-Zoekop case serves as an illustrative study of the first trend. This case originated in a series of four meetings held during 2002/2003 between representatives of Eyesizwe and the persons who were members of the Escarpment Environment Protection Group (EEPOG). Representatives of Eyesizwe met with representatives of the EEPOG concerning the former's intention to mine coal on the affected farms, in an area which it termed the 'Belfast Block' (this area being considerably smaller than the area in respect of which the prospecting right was ultimately granted). Eyesizwe's application for a prospecting right was submitted some two years later during 2004. Despite both Eyesizwe and the office of the Regional Manager of the Department of Minerals being aware of EEPOG's interest in the matter, EEPOG received no notification of the prospecting application (EEPOG made a PAIA application for all documents constituting the application for the prospecting right on 30 January 2008 but received no reply). From the EMP submitted to the Department it appears that Eyesizwe notified and consulted with *certain* land-owners and lawful occupiers during February and March 2005, but apparently deliberately avoided consulting with most authorised representatives of EEPOG. The raises the question of the adequacy of the extent of participation. In this particular case, where landowners were not consulted it would seem that the mining company was clearly in contravention of s. 16(4)(b), but what of the situation where *landowners* have been notified and consulted and the excluded parties are only those who are 'affected' or 'interested' in less direct ways? The Bright-Coal-Commissiekraal case serves to illustrate this difficulty. The owner of the property in respect of which a prospecting right for coal had been granted appears to *have* been keen to facilitate prospecting on his property (in contrast to most other case studies where landowners have been resistant to allowing prospecting to commence on their land). The interested and affected parties in opposition to the prospecting are primarily downstream users of the Pongola River system. Such users found out about the proposed prospecting operations by chance when a consultant/contractor of the mining company visited one of the guest houses in the region and informed them that the company he represented was about to commence with prospecting in the area. According to the crude, 'tick-the-boxes' approach which seems to be mostly followed by the DMR in evaluating EMPs, public participation and consultation occurred in this case, the problem is with the adequacy of the extent of the consultation process.

Turning to the second problematic trend – the attempt to contractually bind landowners/lawful occupiers to consult on only certain issues – in the Eyesizwe-Paardeplaats case the 'consultation' process that did take place between the mining company and landowners/lawful occupiers who were consulted appears to have consisted in the signing of a form indicating awareness of Eyesizwe's intention to prospect and agreeing to limit the consultation process to various aspects of the project. One of the landowners of the properties affected by the application was given a 'notification form' to sign by representatives of Eyesizwe. The notification form in effect sought to obtain the landowner's consensus that consultation would be limited to the time frame and location of the prospective drilling holes. When asked for more information he was simply informed that consultation could only happen after he signed the notification form. The landowner, however, was never again contacted and no consultation took place. Given that the signing of the form was done in the absence of relevant information such as the prospecting/mining work programme, the contract was potentially *contra bonos mores*.

STRATEGIC OBSERVATIONS

Given the favourable decision in Bengwenyama, a case could be identified to challenge, amongst others, the constitutionality of the MPRDA and its regulations regarding notification of interested and affected parties. The challenge should request the reading in of provisions that specify: (a) The interested and affected parties with whom it is mandatory to consult – this will assist in preventing 'selective' notification and consultation; (b) appropriate methods to be employed in notifying interested and affected parties in rural areas; and (c) an obligation to notify interested and affected parties of the outcome of the authorisation process. However, given that the MPRDA is under review and will likely be amended by the end of 2012, the initiation of a court process at this stage is probably not desirable. Instead there should be extended advocacy to try and ensure that the amended MPRDA incorporates provisions such as these. If not, then litigation would be an appropriate strategy to employ.

The attempt to restrict the consultation process by contractual means appears to be completely opposed to the ethos of consultation espoused in Bengwenyama. In this regard awareness-raising amongst potentially affected parties should be conducted. The consultants employing these strategies should also be identified and a process of engagement over such tactics should be initiated.

11 See the letter directed to the Escarpment Environment Protection Group from Eben Griffiths and Partners regarding this matter, dated 22 July 2009.

IN THE CASES REVIEWED, THE INADEQUACY AND INAPPROPRIATENESS OF PUBLIC PARTICIPATION AND CONSULTATION WAS FREQUENTLY RAISED AS A GROUND FOR APPEAL.

3.3.2 Lack of access to information

Lack of access to information necessary for landowners, lawful occupiers and other affected and interested parties to assess the impact prospecting or mining may have on their interests was a common theme in the cases under review. The fact that the detailed prospecting or mining work programme is available at the time that public participation is initiated – but not made available to interested and affected parties – has already been noted above. The chronology of the documentation available for some of the cases, however, indicates that in numerous instances prospecting and mining applicants commence with and complete the EMP for the project long before the public participation process commences, and yet this document is also not made available to interested and affected parties during the ensuing consultation phase. In the Khulile Mines–Witkranz case, for instance, Khulile Mines' application for a prospecting right for coal on portions 4, 7, 11 and the remaining extent of the Farm Witkranz 53 IT (Ermelo, Mpumlanga) was accepted by the DME on 8 May 2008. The EMP for the project was dated 20 March 2008 and was in final draft form two months *before* applicants were notified for the first time of the prospecting application. The Mpumalanga Lakes District Protection Group (MLDPG), one of the interested parties in the case, failed to receive adequate notification of the prospecting application and adequate information to be meaningfully consulted. Apart from an initial notification which appears to have been sent to two of the landowners, no response was received from either Khulile Mines or the DMR regarding the MLDPG's requests for further information. The initial notification provided no information on the technical details of the operation or its environmental impacts.

There also appears to be inconsistency in the manner in which the DMR deals with requests for information brought in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA). In the Trollope Mining Services-Elandskloof case, for instance, the landowners requested the consultant appointed by the mining company to provide them with access to information, but these requests were refused. In January 2007, attorneys acting for two of the landowners received instructions to obtain access to information relating to the prospecting application in terms of the PAIA. The request was partially granted, but the DME failed to indicate the reasons for not granting the request fully or the provisions of PAIA on which it relied to refuse access. The DME's response also failed to specify an internal appeal procedure available to the applicants. The DME did not respond to a request from the acting attorneys to furnish this outstanding information and, moreover, by the time the appeal was granted the information to which the applicants had partially been granted access was still not made available. Another landowner applied for access to the EMP in terms of PAIA in his own capacity and was granted full access. He received a copy of the documentation on 24 April 2007 (but some six months after the documents had been submitted to the DME).

STRATEGIC OBSERVATIONS

Given the DMR's inconsistency in deciding PAIA applications, coupled with the extremely lengthy delays in such requests being processed, it might be better to tackle the issue of lack of access to information less on a case-by-case and more on a systemic basis. Following again from the favourable decision in Bengwenyama, a case could be identified to challenge the constitutionality of the MPRDA and its regulations regarding their failure to specify the information to which interested and affected parties are automatically entitled. Preceding this, there should be extensive advocacy to try and ensure that a provision of automatic access to certain categories of information is incorporated into the amended MPRDA. In the meantime, the DMR should be alerted to the precedent in CA Visser Delwerye (Edms) Bpk v Du Plooy & others; In re: Du Plooy & another v Minister of Minerals and Energy & others [2006] 2 All SA 614 (NC) whereby failure to provide information where this may be used to resolve a dispute between two parties can be used to justify granting an unfavourable costs order against the State if litigation ensues.

3.3.3 Failure to consult interested and affected parties during the scoping phase of the EMP

In the case of mining rights, s. 22(4)(b) of the MPRDA does not specifically state that consultation with interested and affected parties must occur both in the preparation of the scoping report and the environmental impact assessment report, though the need for such consultation is clear from the regulations. In practice, it appears that consultation frequently only takes place in respect of the latter – by which time the issues upon which consultation is required have already been delineated.

The Benicon-Bankfontein case illustrates the problematic outworking of this trend. Benicon Mining (Pty) Ltd applied for a mining right to mine coal on 513 ha of the farm Bankfontein (situated near Breyton in Mpumalanga). The project proposal entailed the use of open-cast methods, which included the need to blast the overburden. The mining application was submitted on 22 October 2008 and accepted by the DME on 20 November 2008. A scoping report for the EMP was subsequently submitted to the DME on 17 December 2008 (i.e. just prior to the December break). The land in question is owned by Benicon Mining and leased to an adjacent farmer for grazing. Two hydro-geomorphic (HGM) types of natural wetland systems occurred within the area assessed. The hill slope seepage wetland connected to the pan was determined to be the largest and dominant wetland unit in the area. Numerous ecological services from both wetland units were determined to be of intermediate to moderately high importance. On the basis of the scoping report, however, wetland delineation was only conducted on the pan and associated hill slope seepage areas connected to the pan. No ecological assessments were conducted for the additional wetland areas. Comments submitted by civil society on the impact of the proposed mine on the excluded wetland were accordingly ignored on the basis that the wetland did not form part of the delineated study.

Similarly, in the TEM-Xolobeni case, the single meeting held with the traditional authority – Queen MaSobhuza – on 21 June 2007 occurred after the production of the scoping report. This meeting was described in the environmental impact assessment report as one of 'a series of discussion sessions held with the rural community in order to explain the contents of the [Environmental Scoping Report]' (my emphasis). This is illustrative of a fundamental misconception on the part of the consultants who prepared the report, as public participation in *framing* and *determining* the issues in the scoping report is required.

STRATEGIC OBSERVATIONS

The law is clear that public participation and consultation is required during the scoping phase of an application for a mining right. If this does not occur, this constitutes a solid ground for appeal on the basis of non-compliance with the provisions of the MPRDA.

3.3.4 Failure to meet the proper requirements of consultation

The ethos of the consultation process, captured in the Constitutional Court's dictum in the *Bengwenyama* case that there should be an attempt in good faith to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed operations, was not reflected in any of the case studies. **Instead, there is a deep-seated perception on the part of civil society players that the consultation process is conducted merely for the sake of appearances with no serious commitment on the part of the consultants managing the process for the mining company to take into account comments and objections received**. An analysis of documentation available for the case studies tends to affirm this perception.

In the Eyesizwe-Zoekop case, for instance, a background information document (BID), dated 21 July 2009, had already been prepared by the consultant for the scoping phase of the project. A mining right application for the proposed new coal mine had been submitted during June 2009 and accepted by the DME on 10 July 2009. A meeting relating to the proposed project was held on 4 August 2009 in order to publicly consult on the scoping report for the EMP. The final submission of the scoping report, however, was planned for 10 August 2009 – a mere week after this meeting. In effect, the scoping report was finalised even earlier – a mere two days later. It is doubtful whether the concerns raised by interested and affected parties at the meeting could have been substantively addressed in a mere two days.

Further, in the Limpopo Coal-Mapungubwe case, apart from the fact that not all direct neighbours of the proposed mine appear to have been consulted, the only difference between the first version (May 2009, pre-consultation) and the final version of the EMP (November 2009, post-consultation) is a change to the distance between the proposed mine and Mapungubwe on p. 45 of the 180 page document – this notwithstanding the numerous comments and contributions made by interested and affected parties during the consultation process. As such it points to formulaic and superficial compliance with the provisions relating to public participation and consultation.

STRATEGIC OBSERVATIONS

Given the favourable precedent in the Bengwenyama matter, it is clear that 'consultation' in terms of the MPRDA requires more than 'going through the motions' of public participation. There should be evidence of a serious attempt to accommodate the comments and

concerns of interested and affected parties. This should ensure some 'give and take' on the part of both interested and affected parties and the project proponent. If not, this constitutes a ground for appeal on the basis of non-compliance with the provisions of the MPRDA.

3.3.5 Failure to consider objections submitted to the RMDEC

The review also highlighted numerous problems relating to the submission of objections to the RMDEC. These included failure on the part of the DMR to confirm that the objection had been referred to the relevant RMDEC (Khulile–Witkranz) or to notify the civil society objectors of the RDMEC meeting at which the objections would be considered (Xstrata–Verkeerdepan). In the Limpopo Coal–Mapungubwe case, a number of objections to the project were submitted in terms of s. 10 of the MPRDA. By law the RMDEC was obliged to consider these and submit recommendations to the Minister. Although the Endangered Wildlife Trust was granted an opportunity to address the RMDEC of its concerns, the RMDEC meeting at which this was to occur was postponed. No further notice of a RMDEC meeting at which objections to the Vele colliery were considered was received by the appellants and to the best of their knowledge none took place prior to the approval of the EMP. This points to either a procedural flaw in the functioning of the RMDEC and/or in the exercise of the Minister's discretion to approve the EMP (as, in terms of s. 39(4)(b)(i) of the MPRDA, she *may not* approve the EMP until she has considered any recommendation of the RMDEC).

STRATEGIC OBSERVATIONS

The systemic problem in this regard is that the functioning of the RMDEC is under-legislated. There is nothing in the MPRDA or its regulations specifying how the RMDEC considers objections and what the rights and interests of objecting parties are in relation to such proceedings. Indeed the constitution of the RMDEC is inadequately specified – the law should guard against these committees being 'packed' by DMR officials. This should also constitute a focus area in advocacy relating to the MPRDA amendment process.

3.3.6 Lack of consultation in the amendment of key reports or authorisations

In the Limpopo Coal-Mapungubwe case, the properties constituting the mining area fall within the quaternary catchment of the Limpopo River (a shared watercourse with Botswana, Zimbabwe and Mozambique). Limpopo Coal had submitted a water use licence application to the DWA in November 2009. Notwithstanding that objections were lodged by a number of NGOs and other affected parties, the DWA granted a WUL for the proposed colliery on 29 March 2011. In a bilateral process which subsequently unfolded between the mining company and the regulator, a month after it was granted the WUL Coal of Africa wrote to the DWA requesting an amendment thereof. Certain amendments were proposed by the DWA on 15 July 2011 and were accepted by Coal of Africa on 18 July 2011. **The amendment of the WUL a month after it was granted raises the issue of the lack of public participation in the amendment process and the extent to which this may be used to strategically avoid submitting key issues to scrutiny by interested and affected parties**.

The AngloPlatinum–Blinkwater case – a dispute between Potgietersrust Platinums Ltd (PPL, a wholly-owned subsidiary of Anglo Platinum) and a section of the Sekuruwe Community regarding the construction of a tailings dam on the farm Blinkwater 820 LR in the Limpopo province – is also a case in point. PPL held an old order mining right for minerals in the platinum group in respect of a number of farms adjacent to the Blinkwater property. Conversion of this old order right was granted (date unknown) and notarially executed on 23 July 2010. The mining area for the converted right does not include the farm Blinkwater 820 LR. The inclusion of this farm in the overall mining complex originates in an amendment to the approved Environmental Management Programme for the PPL Mine approved on 6 November 2003 in terms of s. 39 of the Minerals Act 50 of 1991. In terms of the amendment, PPL was authorised to construct a tailings dam complex with a footprint of approximately 270 ha on the farm Blinkwater 820 LR. It was envisaged that the tailings dam would be constructed over a period of 45 years with an initial capacity of 600 ktpm for the first 25 years and 1 000 000 tpm for a further 20 years. The amendment to the EMP provides for a number of mitigation measures aimed at the impact of the tailings dam in terms of water quality and dust generation. An integrated water use licence for the PPL mine (which includes the use on Blinkwater 820 LR) was granted on 23 March 2007. This licence lays down a number of additional conditions relating to the construction, operation and maintenance of the tailings dam complex (in Appendices I and II). Construction of the tailings dam commenced in January 2009 and pumping of tailings into the dam commenced on 15 July 2010.

The Sekuruwe community resides in a village located on the farm Blinkwater. It appears that the community were aware of the proposed construction of the tailings dam since at least January 2009 when they attempted to bring an urgent application against PPL and the Minister of Rural Development and Land Reform preventing the latter from concluding a lease agreement with PPL in respect of the portion of Blinkwater which was to be utilised for the construction of the tailings dam. The lease agreement between the then Minister and PPL was signed on 19 January 2009. Review proceedings relating to the granting of this lease were subsequently launched (case number 78195/09, North Gauteng High Court) against the signing of this lease (documentation for this process is unavailable). According to PPL, however, a consultation process with the Sekuruwe community commenced in early 2005 when it became evident that their mining operations would require expansion into the Blinkwater property. These consultations notwithstanding, the issue in this case – and perhaps the reason for PPL experiencing such opposition to their plans – is that there was no consultation around the amendment to the EMP. When PPL thus approached the community in 2005 they were essentially presenting them with a *fait accompli*. There was thus apparently no consultation on whether the farm Blinkwater would be used for the construction of a tailings dam, but only on how this could be done in a manner that best accommodated the community.

STRATEGIC OBSERVATIONS

The process for amending the EMP is at the moment under-legislated in the MPRDA. The Sekuruwe case points to the problems that can arise where a substantive amendment is authorised in the absence of public participation and consultation. It is therefore in the interests of everyone for amendments to the EMP to be subject to some form of participation and consultation requirement. This should be an additional focus area in advocacy relating to the proposed MPRDA amendment.

3.4 Integrity of the Environmental Management Plan/Programme (EMP)

The extent to which prospecting and mining projects meet the environmental sustainability objectives articulated in both the MPRDA and NEMA is largely dependent on the integrity of the EMP and the processes associated therewith. The integrity of the EMP is in turn linked to both procedural and substantive safeguards. Procedural safeguards include robust processes of public consultation and participation as well as effective integration of the results of the environmental assessment into the decision whether or not to authorise prospecting or mining. Substantive safeguards entail compliance with the prescribed contents of the EMP as set out in the MPRDA and its regulations. Problems associated with public participation and consultation have been considered in section 3.3 above. This section accordingly focuses on issues relating to the substantive content of EMPs as well as the integration of the environmental reports in the decision to grant a prospecting or mining right.

An applicant for a prospecting right must submit an environmental management plan (s. 39(2), MPRDA), while an applicant for a mining right must conduct an environmental impact assessment and submit an environmental management programme (s. 39(1), MPRDA). Both the plan and the programme must, *inter alia*:

- establish baseline information concerning the affected environment in order to determine protection and remedial measures and environmental management objectives;
- investigate, assess and evaluate the impact of the proposed prospecting and mining operations on the environment, the socio-economic conditions of any person who might be *directly affected*, and any national estate referred to in s. 3(2) of the National Heritage Resources Act 25 of 1999[11]; and
- describe the manner in which any action, activity or process which causes pollution or environmental degradation will be modified, remedied, controlled or stopped.

The MPRDA regulations expand upon these requirements. As noted above, while an environmental management plan must be submitted in order to obtain a prospecting right (reg. 52(2)), a mining right's applicant must submit a scoping report as well as an environmental impact assessment report (reg. 48). The prescribed contents of the scoping report indicate that the applicant must also identify and describe *cumulative* environmental, social and cultural impacts (reg. 49(1)(c)), as well as *reasonable land use or development alternatives* to the proposed operation, alternative means of carrying out the proposed operation and the consequences of not proceeding with the proposed operations (the so-called '*no-go option*') (reg. 49(1)(d)). The prescribed contents of the environmental impact assessment report expand upon the requirement to situate the mining operation in the context of other land uses in that the applicant must provide a *comparative assessment* of the environmental, social and cultural impacts of the mining operation as compared to the impacts of the

11 The list of the national estate in s. 3(2) of the National Heritage Resources Act includes places, buildings, structures and equipment of cultural significance; places to which oral traditions are attached or which are associated with living heritage; historical settlements and townscapes; landscapes and natural features of cultural significance; geological sites of scientific or cultural importance; archaeological and palaeontological sites; graves and burial grounds; sites of significance relating to the history of slavery in South Africa; and a variety of categories of movable objects.

identified alternative land uses or developments (reg. 50(d)). The applicant must additionally determine the appropriate mitigatory measures for each significant impact of the proposed mining operation (reg. 50(e)).

It is a criminal offence, in terms of the MPRDA, to submit inaccurate, incorrect or misleading information in connection with any matter required to be submitted under the Act (s. 98(b), MPRDA). Clearly, this would include information submitted in the prescribed environmental reports. The penalty associated with this offence is not explicitly prescribed, which means that a fine may be imposed or a period of imprisonment not exceeding six months, or both (s. 99(1)(g)).

The submission of the various environmental reports is subject to prescribed time limits: The applicant must submit the environmental management plan within 60 days of the date of notification to submit by the Regional Manager (reg. 52(1)). The environmental reports for the mining right – which culminates in the environmental impact assessment and the environmental management programme – must be submitted within 180 days of the date of notification by the Regional Manager (s. 39(1), MPRDA).

The MPRDA provides that the Minister must approve the environmental management plan/programme within 120 days from the lodgment thereof provided that (a) the requirements as specified in s. 39(3) have been complied with (the content regarding baseline environmental information, an identification, assessment and evaluation of socio-cultural impacts, etc.); (b) the applicant has made financial provision for the rehabilitation or management of negative environmental impacts, as required by s. 41(4); and (c) the applicant has the capacity, or has provided for the capacity, to rehabilitate and manage negative environmental impacts (s. 39(4)(a)). The 120-day deadline on the making of a decision is, however, subject to the proviso that the Minister *may not* approve the environmental management plan/programme unless she has considered, firstly, any recommendation by the relevant RMDEC and, secondly, the comments of any State department charged with the administration of any law which relates to matters affecting the environment (s. 39(4)(b)). The latter obligation is associated with the Minister's obligation, in terms of s. 40(1) of the MPRDA, to consult with such departments when considering an environmental management plan/programme. In this regard the Minister must request, in writing, the head of a department being consulted to submit the comments of that department within 60 days of the date of request. The MPRDA does not specify what assumptions may be inferred or action may be taken if such department fails to reply within 60 days.

The jurisprudence regarding this statutory scheme is limited, but not insignificant. Following the Maccsand[12] decisions (*City of Cape Town v Maccsand (Pty) Ltd & others* 2010 (6) SA 63 (WC) and *Maccsand (Pty) Ltd & another v City of Cape Town & others* (*Chamber of Mines* as *amicus curiae*) ([2011] ZASCA 141, decided 23 September 2011)) the State departments with which the Minister must consult when considering an environmental management plan/programme must now clearly include the relevant local authority (which may be a metropolitan, district or local municipality or a combination of district and local municipalities). The Constitutional Court's decision in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2010 JDR 1446 (CC) has also made it clear that environmental satisfaction is a prerequisite or jurisdictional fact to the approval of a prospecting right. This relates to the question of the integration of environmental reports in the decision to authorise prospecting or mining.

The review of live cases, however, revealed numerous problems associated with the integrity of the EMP, namely:

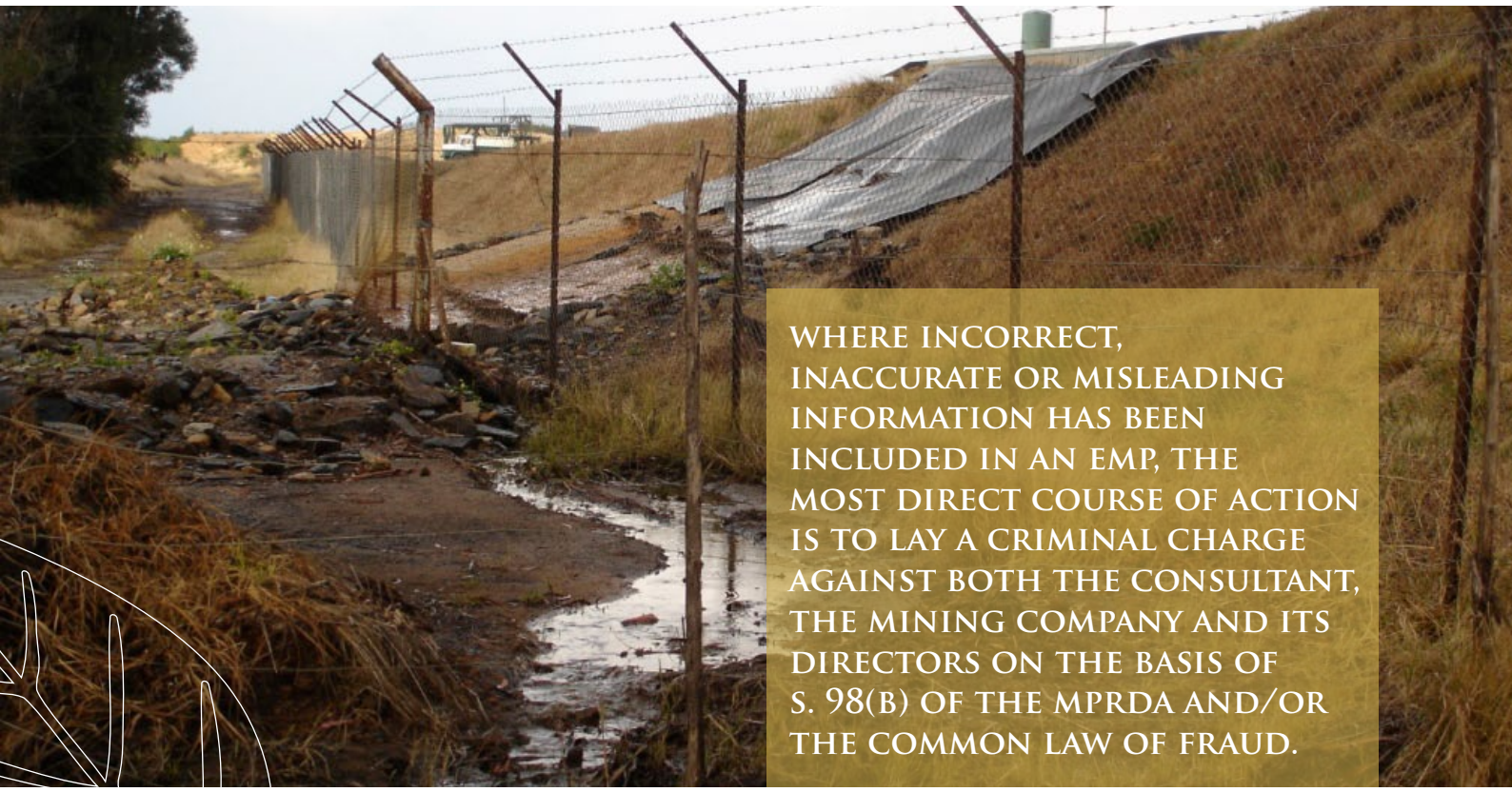
- Stakeholder dissatisfaction with the content of the EMPs.
- DMR overriding the inputs of other State departments concerned with the environment.
- Approval of the EMP after granting of the prospecting or mining right.

3.4.1 Stakeholder dissatisfaction with the content of EMPs

In addition to concerns relating to the rigour of processes of public participation and consultation, civil society objections and appeals under the MPRDA most frequently related to dissatisfaction with the content of the EMP. Such dissatisfaction can be categorised in terms of the following kinds of claim: (a) claims that the EMP contained materially false information; or (b) claims that particular categories of information were omitted or treated inadequately.

The Golfview Mining/Anker Coal – Leliesfontein case is illustrative of the prosecuting authorities taking action against the mine, its holding company and its director for submitting inaccurate, incorrect or misleading information in the EMP. In the EMP it had been stated that there were no wetlands on the property to which the mining right pertained and that no wetland or river would be mined. In fact, the mining company had allegedly diverted the Holbankspruit as well as an unnamed tributary, mined within 100m as well as within the 1:100 year flood line of such water resources, and mined in a wetland, in addition to other alleged infractions of relevant law. The charges had been laid by the Highveld Waters Protection Group. It is not known whether a consultant prepared the EMP and, if so, why charges were not also laid against the consultant. **While this case serves as an example where substantive information relating to the environment or the impacts of the operations on the environment as incorrectly stated; incorrect, inaccurate or misleading information can also take the form of an inaccurate representation of the views of interested and affected parties as obtained during the process of public participation and consultation**. In the Xstrata-Verkeerdepan case, for example, interested and affected parties had raised concerns regarding the impact of the mining operations on water resources in the context of the whole river system. These included the considerations that the relatively underdeveloped upper catchment of the Inkomati River delivers good quality water which is transferred out of the catchment to support the national power generation system; that vast, intact wetland systems are very important in groundwater – surface water interactions; and that livelihoods in the catchment are inextricably tied to the health of the rivers and their tributaries through an economy based largely on tourism, irrigation agriculture, forestry, mining and government. Interested and affected parties had also requested the consultants to examine the impact of the proposed

12 See update on the 2012 Constitutional Court decision in the Maccsand case on page 37.



WHERE INCORRECT, INACCURATE OR MISLEADING INFORMATION HAS BEEN INCLUDED IN AN EMP, THE MOST DIRECT COURSE OF ACTION IS TO LAY A CRIMINAL CHARGE AGAINST BOTH THE CONSULTANT, THE MINING COMPANY AND ITS DIRECTORS ON THE BASIS OF S. 98(B) OF THE MPRDA AND/OR THE COMMON LAW OF FRAUD.

mine on water resources in the context of other mines whose operations were already causing water pollution in the catchment. In part 13 of the EMP, however, it was incorrectly stated that these issues were not of concern to interested and affected parties.

Claims regarding information omitted from inclusion in the EMP or treated inadequately most commonly related to the need to consider the cumulative effects of operations, the need to properly assess alternative land uses and the 'no-go option', and the need to consider the impact of prospecting/mining operations on the socio-economic conditions of any affected person. As regards cumulative impacts, in the Xstrata-Verkeerdepan case referred to above, for instance, it was alleged that the irreparable destruction of certain wetlands by the mining project had not been assessed in the context of other wetlands affected by mining or proposed mining in the catchment. In the Mine Waste Solutions-Stilfontein case, the appellants alleged (in an appeal against a NEMA authorisation) that the impacts of the Central Tailings Deposit Facility had not been adequately assessed in conjunction with the impacts of past activities conducted on the Vaal River. As regards the comparative assessment of different land uses, the appeal submitted in the TEM-Xolobeni case provides a good explanation of why the comparative assessment of mining and tourism in this case fell short of the requirements of reg. 50(d) of the MPRDA regulations (see para 140). Instead of comparing a range of impacts associated with different land uses, the environmental impact assessment simply compared the financial benefits of mining versus tourism. This was done in a slanted manner without due regard to the costs and benefits not so easily quantifiable in financial terms (see also the Umcebo–Klippan; Mashala Resources–Witbank; Khulile–Witkranz; Xstrata–Verkeerdepan; and Optimum–Schoonoord cases). As regards consideration of the impact of prospecting/mining operations on the socio-economic conditions of any affected person, in the TEM-Xolobeni case, for instance it was clear from minutes of a public participation meeting that attendees were assured that the land rights of local residents would be protected and that, in any event, there were only a handful of people living in the affected area. It was therefore unlikely that people would be forced to relocate. It was not disclosed that there were 335 huts, 28 cottages and 25 ruins in the tenement area and that 15 kraals occurred within the Kwanyana block. Accordingly, 62 huts were estimated to be directly affected by the proposed mining, of which 43 were located on the area demarcated as the mining area. More commonly, however, failure to assess the impact of the socio-economic conditions of affected persons relates more to the effect on livelihoods where the impact of mining on the economic activities of affected parties is not easily quantifiable (see the Umcebo–Klippan; Trollope–Elandskloof; Xstrata–Verkeerdepan, Eyesizwe–Zoekop, Limpopo Coal–Mapungubwe; Optimum–Schoonoord cases).

In some cases, however, the omission related simply to the establishment of baseline information concerning the affected environment or the investigation, assessment and evaluation of the significant impacts of the proposed prospecting or mining operations. In the Khulile-Witkranz case, for instance, the civil society appellants alleged that the mining company, or the consultants they employed, conducted absolutely no site–specific or any other study of fauna or flora. The EMP evades the question as to what animals occur naturally in the area by stating that *'due to the current land uses activities in the area, some naturally occurring animals have fled the area.*' In their appeal the appellants responded: 'The sheep farmers would have been very glad had all the jackals and caracal fled. The fact is that they have not. If we had been consulted we would have

requested an investigation of the impact of prospecting on the following fauna we have encountered in the prospecting area, some which are listed red data species: serval, aardvark, genet, caracal, otter, blackbacked jackal, duiker, steenbok, bushpig, warthog, both blue and crested cranes. This list is not exhaustive.' (para 45, appeal submitted by Environment Escarpment Protection Group). In the Trollope Mining Services-Elandskloof case, the entire description of the environment likely to be affected by the operations comprised one page only, leading to the inference that no proper survey of the property, including site visits for this purpose, was carried out. In the Limpopo Coal-Mapungubwe case the appellants argued that the EMP submitted by Limpopo Coal and approved by the DMR insufficiently described the nature of the impacts, alternately the significance thereof on archeological and heritage resources, biodiversity, water, ambient air quality, and existing socio-economic dynamics in the area.

Although not always stated, the objections and appeals submitted by civil society players regarding the inadequate content of EMPs points to potential violation of South Africa's obligations in terms of international environmental law. In the Trollope Mining Services–Elandskloof case, for example, it was pointed out in the appeal that the prospecting activities would clearly impact negatively on wetland bird breeding sites. According to a report compiled by the Mpumalanga Tourism and Parks Agency (MTPA), the affected property lay within close proximity of a lake and wetland system. This system is known for all three South African crane species which breed and feed in the most pristine and undisturbed wetland habitats in South Africa. At a bordering property, there was one of very few wetlands where white-winged flufftails had been recorded. Regular immigration of Red Data species from the wetland systems also took place, which species included the critically endangered wattled crane (see para 10.2.1 of appeal). Such impacts had not been mentioned in the EMP but they additionally raise questions regarding the effect on South Africa's compliance with, *inter alia*, the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat (1971), the Bonn Convention on the Conservation of Migratory Species of Wild Animals (1979) (under which the Agreement in the Conservation of African-Eurasian Migratory Waterbirds has also been concluded), the Convention on Biological Diversity, the SADC Protocol on Wildlife and Law Enforcement, the SADC Revised Protocol on the Use of Shared Watercourse Systems and the SADC Protocol on Mining. The 180-day limit on the preparation of an EMP for a mining right is potentially inherently in conflict with South Africa's obligations in terms of the Bonn Convention in that this period of time may be too short to assess the impact of proposed mining operations on migratory species (regarding non-compliance with international obligations see also the TEM-Xolobeni; Khulile-Witkranz; and Limpopo Coal–Mapungubwe cases).

Civil society appellants also complained that some EMPs failed to provide for monitoring of the project throughout the project life-cycle (Umcebo–Klippan) and to properly budget for post-closure effects (Umcebo–Klippan; Trollope-Elandskloof; Xstrata–Verkeerdepan).

STRATEGIC OBSERVATIONS

Where incorrect, inaccurate or misleading information has been included in an EMP, the most direct course of action is to lay a criminal charge against both the consultant, the mining company and its directors on the basis of s. 98(b) of the MPRDA and/or the common law of fraud. Where dissatisfaction relates to the omission of prescribed categories of information, the first course of action is to lodge an appeal on the basis of non-compliance with the provisions of the MPRDA. Regarding South Africa's non-compliance with international obligations, a complaint may, in the first instance, be directed toward the designated national authority for the relevant convention. Following on from this, a complaint or 'shadow report' may be formulated and submitted to the relevant convention secretariat. In this regard the Ramsar, Bonn and World Heritage Conventions would seem to be the conventions most commonly violated.

3.4.2 DMR overriding the inputs of other State departments concerned with the environment

While it appears that the DMR does request the input of other State departments concerned with the environment as per s. 40 of the MPRDA, in all the cases under review a prospecting or mining right was granted notwithstanding differences of opinion or objections voiced by such departments. Thus, in a number of cases the grant of the prospecting or mining right conflicted with land uses defined in existing spatial development instruments such as the MTPA's Conservation Plan (C-plan) (Umcebo–Klippan; Khulile–Witkranz) or Spatial Development Frameworks (SDF) compiled in terms of municipal legislation. In the TEM–Xolobeni case, in granting the mining right, the DMR failed to take into account the SDF developed by DEAT in conjunction with the Eastern Cape Department of Economic Affairs, Environment and Tourism which had designated the area as a 'Nature Tourism Site'. This SDF was also incorporated into the Mbizana Municipality's Integrated Development Plan. DEAT also objected strongly to the application. The failure to take these inputs into account constituted the basis for the Minister upholding the appeal against the granting of the right.

Further, in a number of cases, other State departments submitted objections to the granting of a prospecting or mining right. Such objections did not apparently affect the decision to grant the prospecting or mining right in any of the cases reviewed. In Trollope Mining Services–Elandskloof, the concerns expressed by the MPTA were ignored and the conditions they proposed for mitigating the effects of the prospecting operations were not included in the prospecting right. In Eyesizwe–Paardeplats, the MTPA, in particular, maintained that 24 of the proposed boreholes would be in wetlands or natural grasslands and that mining would affect the community and have a negative impact on tourism as the driving economic activity in the area. The RMDEC in fact concluded that the EMP should not be approved since it did not comply with the provisions of s. 39(3) of the MPRDA or reg. 52 of the MPRDA regulations. This decision was based on Eyesizwe's failure to submit the results of a public participation process requested by the RMDEC. Despite this recommendation the prospecting right was granted and the EMP approved by the Minister or delegated officials. In the Eyesizwe–Zoekop case, the MTPA stated in their letter of objection to the RMDEC that '[f]arming is a more sustainable option in this extremely fertile area *and coal mining is not an option*' (my emphasis). In the answering affidavit submitted by a DMR official in the litigation which subsequently ensued, it was stated that 'although the letter from the MBP [*sic*, referring to the Mpumalanga Park's Board] 'objected' to the grant of the prospecting right, the objection, merely

on the unsubstantiated basis that the area concerned was more suited to agriculture than mining, did not preclude the approval of the EMP or the grant of the prospecting right. It appeared that the writer of the letter had misconstrued his mandate, to provide comment regarding a proposed environmental management plan, preceding proposed prospecting operations; as opposed to the more rigorous environmental management programme and impact assessment preceding mining operations.' **This response speaks volumes about the DMR's apparently condescending attitude to other State departments concerned with the environment and raises the issue of the value of consultation when the power to override inputs vests completely with the DMR**.

STRATEGIC OBSERVATIONS

From the TEM–Xolobeni case, it is evident that failure to consult with other State departments has been successful as a ground to (albeit conditionally) set aside the grant of a prospecting or mining right. Where relevant, this should be highlighted prominently in the submission of any MPRDA objection or appeal.

3.4.3 Approval of the EMP after granting of the prospecting or mining right

In a number of cases, the chronology of documentation shows that the EMP was approved *after* the grant of the prospecting or mining right (see for instance, Umcebo–Klippan; TEM–Xolobeni; Khulile–Witkranz, Limpopo Coal–Mapungubwe). This appears to run contrary to the dictum laid down in the Constitutional Court's decision in the *Bengwenyama* case that environmental satisfaction is a prerequisite or jurisdictional fact to the approval of a prospecting (and by extension, mining) right. The administrative practice that has developed in order to implement the legislative provisions regarding the approval of the EMP (s. 39) in relation to the granting of the prospecting or mining right (ss. 17 and 23) were set out in the answering affidavit of a DMR official in the Eyesizwe–Zoekop case as follows:

> 'The procedure generally followed in the office of the Regional Manager in dealing with a [prospecting] application … is that, once the various sub-directorates in the Office of the Regional Manager have considered the application and the EMP, the Regional Manager compiles a document, containing a discussion of the compliance, or otherwise, by the applicant with the provisions of section 17(1) of the MPRDA, in form substantially similar to the memorandum in the instant matter. As is evident from the memorandum, various line functionaries at DME Head Office also consider the regional manager's recommendation and add their own, until the document reaches the DDG [Deputy Director-General]. The latter considers the recommendations and any comments by the functionaries in Head Office, and makes his decision to grant or refuse the application concerned. If the application is granted without further comment, the DDG's reasons are those contained in the recommendation document.'

From this explanation, it is therefore clear that the documentation constituting the EMP – which incorporates comments received during the public participation and consultation process – is considered at the level of the regional offices. Following consideration by the various environmental officers which are based in the regional offices, a new document – the 'memorandum' is compiled by the Regional Manager. It is not clear whether this document is forwarded alone or together with the documentation constituting the EMP to the DMR's Head Office in Tshwane (Pretoria), but clearly the memorandum constitutes the centerpiece. The extent to which the officials at Head Office take the EMP documentation itself into account or rely only upon the recommendation when formulating their own recommendations (which are not based on environmental grounds but incorporate other considerations such as the DMR's economic strategy) is not known. What this shows, therefore, is that there is *some* integration of environmental concerns in the decision to grant or refuse a prospecting or mining right. The question is whether such integration is *adequate* given the discursive additions, deletions and modifications that undoubtedly occur as the EMP is recontextualised in the form of a departmental memorandum.

From interaction which the author has had with DMR officials in other contexts, the reasons given for the 'approval' of the EMP *after* the grant of a prospecting or mining right relates to the requirement, specified in s. 41(1) of the MPRDA, that the applicant make the prescribed financial provision for the rehabilitation or management of negative environmental impacts. In practice, it appears that the relevant financial instruments are only made available by the applicants after the grant of the prospecting or mining right – thus necessitating the later approval of the EMP, even though the contents thereof have been considered in the granting of the right. This raises at least two legal questions: Firstly, whether the person granting the right can validly exercise their discretion to determine whether prospecting or mining will not result in 'unacceptable pollution, ecological degradation or damage to the environment' if the applicant has *not* conclusively demonstrated its capacity to rehabilitate negative environmental effects by making the prescribed financial provision available. This, however, would seem to be accommodated by the provisions of ss. 17(5) and 23(5) respectively which provide that the prospecting or mining right, as the case may be, 'becomes effective' or 'comes into effect' on the date on which the EMP is approved. Secondly, whether the granting of the prospecting/mining right and the approval of the EMP are part and parcel of the same administrative action, or are separate administrative actions. In most of the MPRDA appeals submitted by civil society organisations (with the Limpopo–Mapungubwe case being the one exception) the appeal is brought against both the grant of the relevant right and the approval of the EMP. If, however, they are separate administrative actions, then the possibility exists for the granting of the right to be challenged independently of the approval of the EMP and *vice versa*. This may allow greater scope for civil society interventions.

STRATEGIC OBSERVATIONS

The question whether approval of the EMP constitutes a separate administrative action requires further research, taking into account the principles and jurisprudence of administrative law more generally. Regarding the integration of the EMP into the decision to grant a prospecting or mining right, it is necessary to have more information on the practice; i.e. what documentation is before the decision-maker and how decision-makers engage with this.

Thereafter, a study of how the concerns of interested and affected parties are modified or omitted in the documentation comprising the EMP and then the memorandum should be conducted.

3.5 Regulatory discretion to grant a prospecting/mining right

The MPRDA guides the Minister in the exercise of her discretion to grant a prospecting or mining right. In the cases under review, the following issues were raised regarding the exercise of the Minister's discretion:

- The Minister's power to delegate the decision to grant a prospecting or mining right.
- Failure to comply with the jurisdictional facts for the granting of a prospecting or mining right.
- Authorising prospecting or mining where commencement leads to non-compliance in terms of other relevant laws.

3.5.1 The Minister's power to delegate the decision to grant a prospecting or mining right

In terms of the Act it is the Minister who exercises the decision to grant a prospecting/mining right or not. In terms of s. 103 the Minister may delegate any power and assign any duty conferred upon her by the Act (with the exception of the power to make regulations and to deal with any appeal in terms of s. 96), to the Director-General, a Regional Manager or any other officer (s. 103(1)). The delegation must be in writing and may be subject to conditions (ibid). The Minister may also authorise the sub-delegation of such powers/duties (s. 103(2)) and, if so, the Director-General, Regional Manager or any other officer may do so (s. 103(3)). Significantly though, the Director-General, Regional Manager or other officer's authority to sub-delegate powers and duties in s. 103(3) is not made subject to s. 103(2) – thus it appears from an isolated reading of the Act that the Director-General, etc. may sub-delegate powers and duties even where this has not been expressly authorised by the Minister. This however, would render s. 103(2) nugatory and thus go against established presumptions of statutory interpretation.

This poor legislative drafting of s. 103 may be at the root of disputes regarding the delegation of the Minister's power to grant prospecting or mining. In the TEM–Xolobeni case, for instance, it appears that the Regional Manager of the Eastern Cape Department signed the mining right. In justifying his authority to do so, the Department pointed to a power of attorney, signed by the Director-General, which purportedly authorised the Regional Manager to sign the document. The Amadiba Crisis Committee, however, pointed out in their appeal that the Minister delegated several of the powers conferred on her by the MPRDA to the Director-General on 12 May 2004 and then again on 7 July 2004. Importantly, however, she did not delegate the power to grant a mining right, nor did she expressly allow for these powers to be sub-delegated. In the event that the decision to grant or refuse the mining right had been taken by the Regional Manager in this case, it therefore fell to be set aside on this ground alone (see also Mashala Resources–Witbank).

STRATEGIC OBSERVATIONS

Further research on the delegation of the Minister's power to grant prospecting/mining rights is required, together with a collation of the delegating documentation. If the Director-General has been sub-delegating the authority to grant prospecting and mining right to the regions without having the authority to sub-delegate, this would constitute a fairly straight-forward ground for setting aside the relevant right.

3.5.2 Failure to comply with the jurisdictional facts for the granting of a prospecting or mining right

The criteria which guide the Minister (or her delegatee) in the granting of a prospecting or mining right, and which thus constitute the jurisdictional facts for the exercise of her discretion, are set out in s. 17(1) and (2) and 23(1) and (2) of the MPRDA respectively. Whilst the legislative drafting is clumsy, these provisions establish

that a prospecting or mining right may be refused for a variety of technical, economic, social and environmental reasons. The two most pertinent for purposes of this review, are that the prospecting or mining 'will not result in unacceptable pollution, ecological degradation or damage to the environment' (s. 17(1)(c) and s. 23(1)(d)) respectively, and that the applicant 'must not be in contravention' *of any relevant provision of the MPRDA* (s. 17(1)(e) and s. 23(1)(g), my emphasis).

The first of these criteria draws upon the assessment and evaluation of the *significance* of environmental impacts, as well as an *evaluation* of the likely success of mitigation measures. **In almost all the cases reviewed civil society appellants held opinions on the acceptability of pollution, ecological degradation and environmental damage different to that of the DMR officials granting the prospecting or mining rights**. For reasons outlined below, however, challenging the Minister's discretion on this particular ground – whilst not impossible – may be difficult because it calls for the generation and evaluation of scientific evidence. Generating such evidence is costly for civil society organisations and the courts seem to shy away from such evaluations, preferring to dispense of an issue on technical and procedural grounds.

The second relevant criterion – compliance with all the provisions of the MPRDA – allows for the possibility of challenging the grant of a prospecting or mining right where, as noted above, there has not been compliance either with the MPRDA provisions on public participation and consultation and/or in compiling the EMP. It also accommodates a challenge where the applicant has been mining illegally in terms of the MPRDA prior to the granting of the relevant right. **In at least one case reviewed, a mining right was granted notwithstanding the applicant's alleged non-compliance with the MPRDA**. In the Mashala Resources–Witbank case, Mashala Resources' (MR) application for a mining right in respect of the afore-mentioned property was accepted on 10 October 2008. A mining right in respect of the afore-mentioned property was granted in favour of MR to mine coal (DME Reference No. *F2008/08/25/003*), ostensibly by the Regional Manager. It was notarially executed on 19 May 2010 at which time it seems the EMPR was also approved. However, according to the testimony of the civil society appellants in the case mining activities had allegedly already commenced on the site in October 2008. Although this had been brought to the attention of the DMR, it did not seem to impact on the decision to grant the mining right.

STRATEGIC OBSERVATIONS

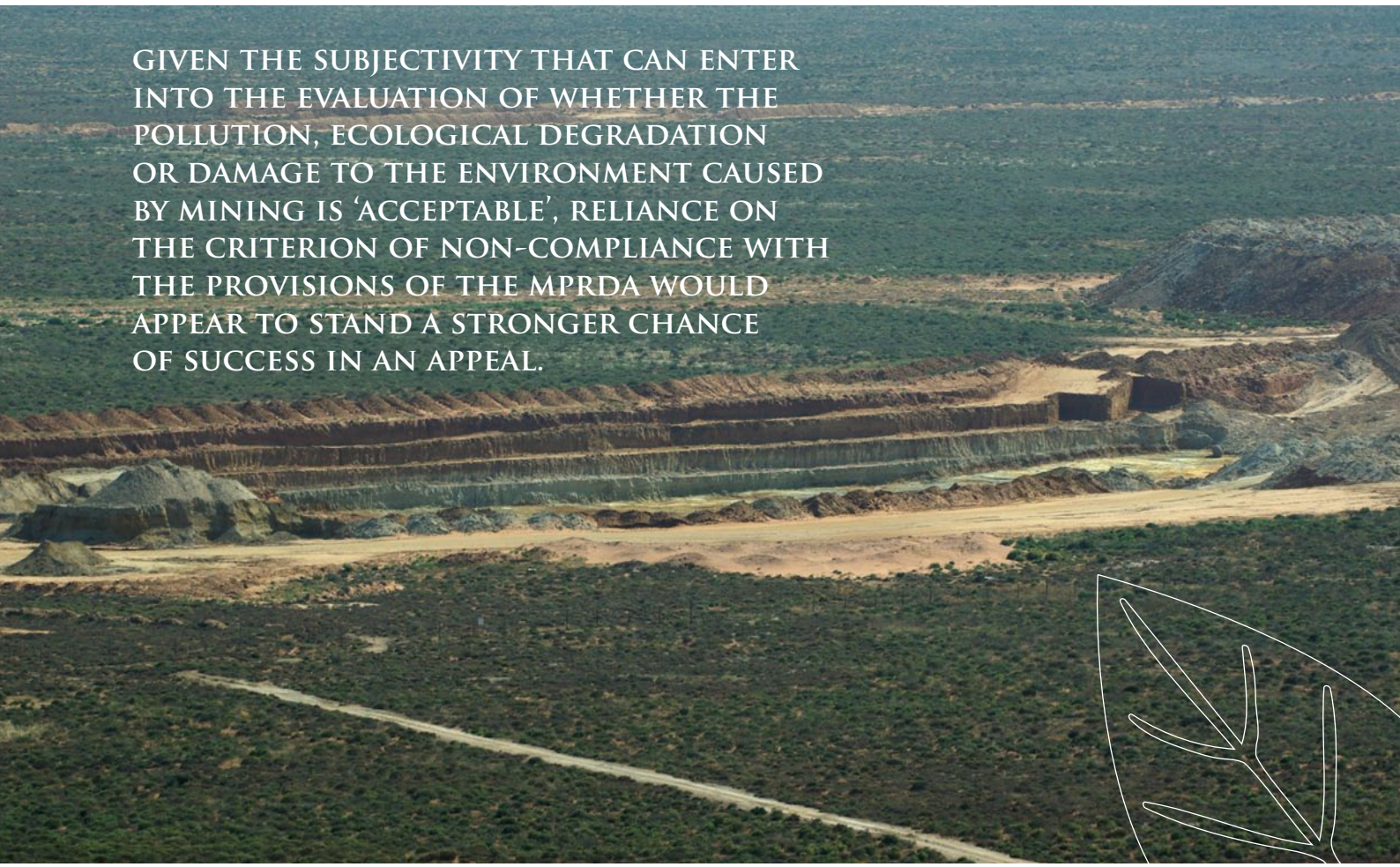
Given the subjectivity that can enter into the evaluation of whether the pollution, ecological degradation or damage to the environment caused by mining is 'acceptable', reliance on the criterion of non-compliance with the provisions of the MPRDA would appear to stand a stronger chance of success in an appeal.

3.5.3 Authorising prospecting or mining where commencement leads to non-compliance in terms of other relevant laws

An applicant's non-compliance with legislation *other than* the MPRDA raises different issues and invokes different provisions of the MPRDA. In particular, ss. 17(6) and 23(6) respectively, hold that a prospecting or mining right is 'subject to … any relevant law'.

Such non-compliance most commonly arises in the context of mines operating without WULs (alleged in the cases of Umcebo–Klippan; Trollope Mining Services–Elandskloof; Mashala–Witbank; and Limpopo Coal–Mapungubwe). In these cases, a prospecting or mining right is granted and the applicant commences with prospecting or mining operations without the relevant water use licence being in place. This particular illegality is justified on the basis that the Department of Water Affairs has a significant backlog of water use licence applications. If applicants were to wait for the WUL to be granted, they would not comply with their duty to commence prospecting or mining within a certain time. In this regard, s. 19(2)(b) of the MPRDA provides that the holder of a prospecting right must commence prospecting activities within 120 days from the date on which the prospecting right becomes effective (i.e. upon approval of the EMP), whilst s. 25(2)(b) similarly holds in respect of the mining right, that an applicant must commence mining operations within one year of the right becoming effective. However, it should be noted that in both cases the Minister has a discretion to provide for an extended period; i.e. to extend the validity of the prospecting or mining right until the WUL is granted, with the effectiveness of the prospecting/mining right being conditional upon the grant of the WUL. The Minister's failure to exercise this discretion could thus constitute an additional ground for judicial review.

The issue of illegal mining ensuing in the wake of the grant of a prospecting or mining right also arose, however, in cases where prospecting or mining was authorised in protected or sensitive areas. In the TEM–Xolobeni case, for instance, the Xolobeni area is part of the Pondoland Marine Protected Area where, in terms of s. 9(c) read with s. 48(1) of the Protected Areas Act 57 of 2003 and s. 43 of the Marine Living Resources Act 18 of 1998, commercial prospecting and mining *cannot take place at all*. The Xolobeni area had also been declared a protected area in terms of Transkei Decree 9 (Environmental Conservation) of 1982. On this basis, in terms of s. 48(1) of the Protected Areas Act, commercial mining or prospecting can only take place with the written permission of the Minister of Environmental Affairs and the Minister responsible for Minerals and Energy. In the Limpopo Coal–Mapungubwe case, the proximity of the proposed mine to sensitive landscapes and, more importantly, the effect of the colliery as a precedent for future development of mining in the area was raised as a concern. Additionally, the proposed colliery is situated on land proclaimed as private nature reserves in 1965, being the Skutwater and Sighetti Nature Reserves respectively. Each of these private nature reserves was proclaimed both as a 'game reserve' and as a 'native flora reserve' in terms of the Transvaal Game Ordinance 23 of 1949 and the Transvaal Native Flora Protection Ordinance 9 of 1940 respectively. These ordinances were repealed by the Transvaal Nature Conservation Ordinance 17 of 1967, which was in turn repealed by the Transvaal Nature Conservation Ordinance 12 of 1983, in turn repealed by the Limpopo Environmental Management Act 7 of 2003 (LEMA). All of the repealing laws preserved things done under the repealed legislation (i.e. including the declaration of private nature reserves) and provided for the establishment of private nature reserves. In terms of s. 28(1)(a) of the LEMA no mining whatsoever may be authorised on private nature reserves. Such reserves also receive protection under s. 48(1) read with s. 12 of



the Protected Areas Act. In the Bright Coal–Commissiekraal case, a prospecting right was granted in respect of a highly sensitive area, being the headwaters of the Pongola river system. Whilst not explicitly disallowed, as in the preceding two cases, this case raises the issue of the application of the NEMA principles – which require, for instance, that pollution be minimised – to the granting and implementation of prospecting and mining rights.

In contrast to compliance with the provisions of the MPRDA, ensuring compliance with other relevant laws is not an explicit consideration which the Minister must take into account when she decides to grant a prospecting or mining right or not. It could be argued that compliance with other relevant laws is relevant to determining whether the prospecting or mining will result in 'unacceptable pollution, ecological degradation and damage to the environment', with the quality of unacceptability thus being integrally linked to legality – if a mining company pollutes water resources in the absence of a WUL that authorises certain levels of pollution then the pollution is 'unacceptable' *per se*. This linkage could be supported by reference to the principles of cooperative governance which lean strongly against particular departments operating as isolated entities. Of particular relevance here would be the principle that all spheres of government and all organs of state within each sphere should 'cooperate with one another in mutual trust and good faith by ... informing one another of, and consulting one another on, matters of common interest; [and] coordinating their actions and legislation with one another ...' (s. 41(1)(h)(iii) and (iv), Constitution). There is also the argument that the state is bound by law and that the Minister is therefore bound by the prohibitions against prospecting and mining in certain areas contained in laws such as the Marine Living Resources Act and the LIMA. This argument takes a somewhat different form for water usage: Because the Minister is bound to respect the manner in which 'water use' is regulated in South Africa, she is bound to take greater joint responsibility with the Department of Water Affairs in ensuring that the water use which is inherently bound up with the issuing of a prospecting or mining right is properly authorised.

STRATEGIC OBSERVATIONS

Most of these points of law have been raised for consideration in the Limpopo Coal-Mapungubwe case and the hearing and outcome in that matter should be awaited before any further action is initiated.

3.6 Principles of public administration

As noted in Chapter Two, in *CA Visser Delwerye (Edms) Bpk v Du Plooy & others; In re: Du Plooy & another v Minister of Minerals and Energy & others* [2006] 2 All SA 614 (NC) the Court remarked *obiter* that the conduct of the DME fell short of the standard required by s. 195(1) of the Constitution. This provision of the Constitution articulates nine broad principles of public administration.

The following three are relevant to this review:

- People's needs must be responded to, and the public must be encouraged to participate in policy-making (s. 195(1)(e)).
- Public administration must be accountable (s. 195(1)(f)).
- Transparency must be fostered by providing the public with timely, accessible and accurate information (s. 195(1)(g).

It was apparent from a number of cases in the review that the DMR's conduct (and in some instances also that of the provincial environmental departments), is falling far short of this ideal. This manifests most often in the department's lack of responsiveness and communication (see the Trollope Mining Services–Elandskloof; TEM–Xolobeni; Khulile–Wikranz; and Limpopo Coal–Mapungubwe cases), but also in instances of the giving of incorrect advice (for example in the TEM–Xolobeni case an official in the office of the DDG incorrectly cited the expiry of appeal from the date of decision, not from the date that the issue became known to the Amadiba Crisis Committee) and regulatory inconsistency (for example, the Trollope Mining Services–Elandskloof case, in respect of the granting of access to the EMP in terms of PAIA).

In a number of cases, there also appear to be discrepancies between the description of the property for which a prospecting or mining right was applied for, and the description of the property in the prospecting or mining right (see Mashala Resources–Witbank and Eyesizwe–Zoekop). The most outrageous instance of this occurred in the Mine Waste Solutions–Stilfontein case. This case dealt with the construction of a mega tailings dam or 'Centralised Tailings Deposition Facility' – CTDF) on nine properties situated close to the Vaal River. A positive environmental authorisation for the facility was issued by the North West Department of Agriculture, Conservation and Environment (NW DACE, Ref. No. NWP/EIA/176/2008) on 21 July 2009. The Federation for a Sustainable Environment submitted an appeal against the positive environmental authorisation (EA) on 1 August 2009. The appeal against the positive EA was however dismissed on the technical basis that the appeal (correctly) related to properties situated to the south-east of the town of Stilfontein whereas the environmental authorisation (incorrectly) indicated that the properties were situated to the north of the town. During October 2009 Mine Waste Solutions had applied for an amendment to the environmental authorisation to accommodate the correct description of the site location, which was subsequently issued on 25 February 2010, now containing a correct description of the properties to the south-east of the town of Stilfontein. In this case, therefore, the NW DACE used its own technical error as a ground for the dismissal of the FSE's appeal.

STRATEGIC OBSERVATIONS

There is no reason why the constitutional principles of public administration cannot be used to frame a challenge to the conduct of the DMR and other departments concerned with authorising mining. However, it must be borne in mind that 'one swallow does not a summer make' and that the general conduct of such departments, and their non-compliance with such principles would need to be proven to make a successful case.

3.7 Other issues

The following additional issues arose in some of the cases reviewed:

Public participation in the conversion of old order rights. This issue arose in the Optimum–Schoonoord case. The landowners in this case claim that they were not consulted at all in the conversion of the old order right. From interaction which the author has had with DMR officials in other contexts, it appears that the conversion of old order rights is also being experienced as problematic.

Failure to consider the effects of land claims. In the Limpopo Coal–Mapungubwe case, the EMP for the proposed project failed to make any reference to the restitution claim of the Ga-Machete community to farms falling within the project area, viz. the farms Bergen op Zoom 124, Overvlakte 125 and Semple. The matter was referred to the Land Claims Court by the Land Claims Commission on 1 October 2009. This also raises the issue of preferent mining rights for such community if the land claim is successful.

Negotiation for compensation. In two of the cases reviewed – Mashala Resources–Witbank and Angloplat–Blinkwater – documentation is available to study the process of negotiation that unfold between mining companies and individual landowners and/or communities regarding the use of land for prospecting or mining operations. These cases are illustrative of the strategic positioning of the players from both sides, but they also highlight issues such as the fairness of compensation offered and the inclusivity of processes undertaken to gains consensus on compensation.

THERE IS NO REASON WHY THE CONSTITUTIONAL PRINCIPLES OF PUBLIC ADMINISTRATION CANNOT BE USED TO FRAME A CHALLENGE TO THE CONDUCT OF THE DMR AND OTHER DEPARTMENTS CONCERNED WITH AUTHORISING MINING.

CHAPTER 4

CONCLUSIONS & RECOMMENDATIONS

This review of prospecting and mining-related litigation in relation to the environment and interested and affected parties set out to determine trends, successes, failures and lessons learnt. The body of this report has been devoted to a number of trends, grouped according to legislative authority or thematically. The trends show that 'success' and 'failure' are difficult to speak about in absolute terms: 'Success' at one point may translate into 'failure' at the next – as with the *Maccsand*[13] decision on the relationship between the MPRDA and NEMA, or a 'failure' may upon closer inspection turn out to be a success, as with the *Bareki* decision on the retrospectivity of NEMA. An apparent 'success' may make a 'failure', as with the TEM–Xolobeni administrative appeal. Rather than bifurcating the judicial precedents and live cases in this fashion, the focus in this chapter falls on the lessons learnt and the implications thereof for future litigation, advocacy and research.

The review has enabled a mapping both of the scope of precedent in this field, and the most glaring gaps. From the perspective of civil society organisations concerned with the protection of the environment, there are now favourable precedents or *obiter dicta* relating to:

- The relationship between the MPRDA and land-use planning legislation (and thus the relationship between the DMR and local authorities).
- The need for the conduct of the DMR to conform to the principles of public administration set out in the Constitution.
- The use of contempt proceedings to enforce environmental rights.
- The need for landowners to be informed of prospecting applications in sufficient detail to assess the impact thereof on their livelihoods.
- The ethos of the consultation which should take place between the mining company and landowners.
- The consultation that should take place between mining companies and landowners in order to gain access to the land.
- Linkage between 'solidification' of the right of access to land on the part of mining companies and compliance with the provisions dealing with public participation and consultation.
- The need for environmental considerations to be considered prior to the approval of a prospecting (and by implication a mining) right.
- The availability of an internal appeal to the Minister where a right has been granted by an official of the DMR.
- An obligation on the part of the DMR to afford communities holding preferent rights a hearing prior to the granting of prospecting or mining rights in respect of their land.
- The extra-territoriality of the duty of care in relation to water resources in terms of s. 19(1) of the NWA.
- The jurisdiction of the Land Claims Court to make an order dealing with environmental damage in directing the restitution of land.
- Affirmation of the right to lateral support.

There are fewer or unfavourable precedents or *obiter dicta* relating to:

- The relationship between the MPRDA and the NEMA.
- Directors' responsibility in the face of an inability to comply with environmental obligations.
- The retrospectivity of the duty of care in terms of the NEMA.
- The clarity of directives issued in terms of s. 19(3) of the NWA.
- *Locus standi* to bring an appeal before the Water Tribunal.

In terms of favourable versus unfavourable decisions on the issues the courts had to consider, it would thus seem that there has been a considerable measure of 'success'.

The review highlighted areas in which the jurisprudence is considerably underdeveloped. As a general observation, for instance, there are no cases which deal with the constitutionality of the provisions of the MPRDA or its regulations directly, only one dealing with the obligations of mining companies in terms of NEMA, and only two dealing with their substantive obligations in terms of the NWA.

13 See update on the 2012 Constitutional Court decision in the Maccsand case on page 37.

The review of live cases together with the mapping of judicial precedent indicated the need for some form of judicial determination of the following pressing issues:

- The nature and scope of the duty of care both in s. 28 of NEMA and s. 19 of the NWA. This includes whether unlawfulness and fault are required before the State can compel a person causing pollution or environmental degradation to implement reasonable measures or whether such are only required for purposes of criminal prosecution.

- The cause of action to which civil society organisations are entitled in terms of s. 28 of NEMA and s. 19 of the NWA, and whether the statutory duty of care enables private persons to hold perpetrators of environmental pollution or degradation liable for compensation in terms of the law of delict.

- *Locus standi* to bring an appeal before the Water Tribunal, as well as the criteria the water regulator does and should exercise in deciding whether to allow for public participation in the granting of a WUL.

- The reasonableness of the time taken by the Minister of Mineral Resources to decide an appeal.

- The criteria the Minister should exercise in deciding whether to suspend the operation of a prospecting or mining right prior to the finalisation of an appeal.

- The constitutionality of the MPRDA's provisions regarding the scope and manner of notification of interested and affected parties and the failure to specify categories of information to which interested and affected parties are automatically entitled.

- The constitutionality of the conduct of the DMR in light of the constitutional principles of cooperative government and public administration.

- The consistency of the right to lateral support with the provisions of the MPRDA and whether the MPRDA override of the common law is consistent with the Constitution.

As the MPRDA is currently being reviewed, it would be wise in the short to medium term (the next twelve months) to avoid litigation pertaining to the interpretation of the provisions of the law as they currently stand. Instead, the efforts of civil society should be focused on advocacy around the proposed amendment Bill (when it is made public). Advocacy should also encompass areas where the MPRDA is currently under-legislated, such as the provisions dealing with the operations of the RMDECs and the procedures for amending the EMP. Any new litigation during this time should perhaps be focused on the NWA and the NEMA.

One of the interesting aspects of the cases reviewed is that gains were made in cases initiated by state organs or even by mining companies. This points to the need for civil society organisations to 'piggy back' the litigation of other entities. In addition to litigation *per se*, the review therefore highlighted the need for **advocacy** in respect of a number of issues of which the following are the most pressing:

- Local authorities must be alerted to their rights and responsibilities in relation to prospecting and mining authorisations and the costs and benefits of their engagement (or failure to engage). Civil society organisations should also start engaging with the IDP-planning process in targeted areas.

- Communities who could hold preferent rights in terms of s. 104 should be identified and notified of their right to be afforded a hearing prior to the granting of a prospecting or mining right. This should be coupled with a mapping of land claims and tracts of land in respect of which prospecting or mining applications have been made.

- The designated national authorities and possibly the international secretariats of multilateral environmental agreements to which South Africa is a party should be engaged on the extent to which prospecting and mining authorisations are causing South Africa to be in non-compliance with international obligations.

Finally, further **research** on the following issues is recommended:

- Directors' responsibilities in the face of an inability to comply with environmental obligations.
- Whether other land use ordinances define mining as a 'land use'.
- The tax implications of pollution-control measures on the part of prospecting and mining companies.
- The historical continuity of obligations relating to the environment or aspects thereof applicable to prospecting or mining operators.
- Whether the approval of the EMP constitutes a separate administrative action from that of the granting of the prospecting or mining right or not.
- The practice surrounding the consideration of the EMP in relation to the granting of a prospecting or mining right.
- The manner in which the concerns of interested and affected parties are modified or omitted in the documentation comprising the EMP and then the memorandum compiled by departmental officials.
- The Minister's power to delegate the granting of prospecting or mining rights.

THE REVIEW HIGHLIGHTED AREAS IN WHICH THE JURISPRUDENCE IS CONSIDERABLY UNDERDEVELOPED. FOR INSTANCE, THERE ARE NO CASES WHICH DEAL WITH THE CONSTITUTIONALITY OF THE PROVISIONS OF THE MPRDA OR ITS REGULATIONS DIRECTLY, ONLY ONE DEALING WITH THE OBLIGATIONS OF MINING COMPANIES IN TERMS OF NEMA, AND ONLY TWO DEALING WITH THEIR SUBSTANTIVE OBLIGATIONS IN TERMS OF THE NWA.

UPDATE

THE 2012 CONSTITUTIONAL COURT DECISION IN THE MACCSAND CASE

On 12 April 2012, the Constitutional Court handed down judgment in the matter of *Maccsand (Pty) Ltd v City of Cape Town & others* CCT 103/11 [2012] ZACC 7. This matter had previously been heard in both the *Western Cape High Court (City of Cape Town v Maccsand (Pty) Ltd & others 2010* (6) SA 63 (WCC)) and the *Supreme Court of Appeal (Maccsand (Pty) Ltd & another v City of Cape Town & others* (Chamber of Mines as *amicus curiae*) ([2011] ZASCA 141, decided 23 September 2011)). The precedent is significant for its interpretation of the powers of different spheres of government as set out in the Constitution, and for its interpretation of s. 23(6) in the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

Regarding the constitutional allocation of powers between the different spheres of government, the court rejected all arguments put forward by Maccsand and the Minister for Mineral Resources that were premised on the MPRDA regulating a functional area that belonged 'exclusively' to the national sphere of government. The court held clearly that mining rights holders were not exempt from the requirement to obtain rezoning of the land in respect of which they held a permit or right (as required by the Land Use Planning Ordinance 15 of 1985, LUPO). This did not amount to the local sphere of government unlawfully intruding into the national sphere, or usurping the powers of the national sphere or even vetoing the exercise of national powers, because different spheres of government do not operate in 'hermetically sealed compartments.' As such, it was permissible for different spheres of government to exercise powers in respect of the same object and for their powers to overlap at times. In these circumstances, the spheres concerned would need to attempt to resolve their differences in line with the principles of co-operative government set out in the Constitution or, alternately, bring the matter on review before a court.

An interesting side-effect of the court's position on the MPRDA-LUPO conflict is that it re-empowers the owner of land in respect of which prospecting or mining rights are sought, because (at least in terms of the LUPO), the landowner is the primary agent who applies for rezoning.

Regarding the interpretation of s. 23(6) of the MPRDA, the Constitutional Court rejected the argument that the reference to 'relevant law' in this section should be confined to laws regulating mining (such as the Mine Health and Safety Act 29 of 1996). Because this phrase was not defined in the MPRDA it had to be accorded its ordinary wide meaning, thus incorporating reference to the LUPO. (The court's interpretation of this provision therefore opens up the possibility that the reference to 'relevant law' includes reference to environmental legislation such as the NEMA.)

Although all the parties before the court wanted it to decide whether obtaining a prospecting or mining right exempts the holder from obtaining authorisation under the National Environmental Management Act 107 of 1998 (NEMA), the court found that it was not in the interests of justice to decide the matter.

STRATEGIC OBSERVATIONS

The Centre for Environmental Rights and/or its partners should undertake a review of the four provincial Ordinances that regulate land zoning in South Africa with a view to determining the agencies and procedures involved in rezoning.

It will be imperative to bring this precedent to the attention to landowners and specifically community landowners so that they can exercise a choice whether to apply to have their land rezoned or not.

The Centre for Environmental Rights should select a few cases for determining the extent to which mines are operating without the land in question having been rezoned, and the kinds of problems that are being experienced as a result.

One of the implications of the Maccsand *judgment is that mining operations authorised by the DMR on land that has not been appropriately zoned are probably unlawful. In principle, interested parties could apply to a court to interdict mining operations until the land has been rezoned. Whilst this might have serious financial implications for the mines concerned, rezoning applications will allow local authorities to consider the costs and benefits of this kind of development and to elect whether they want to have the mine in their community. Civil society organizations could also take the rezoning decisions of local authorities on review if they do not meet the requirements of just administrative action.*

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