Three Sustainable Mining - Policy and Legislative Framework

For most of its history, the mining industry in South Africa has not been subjected to comprehensive environmental regulation. In recent years, however, this has changed significantly and the industry is now required to comply with a complex web of mining and environmental policy and legislation. This chapter outlines the most relevant legislation and policy documents that govern sustainable mining in South Africa.

The lynchpin for sustainable mining is arguably section 24 of the Constitution of the Republic of South Africa (Constitution). Section 24(a) proclaims the right of everyone ‘to an environment that is not harmful to their health or well-being.’ Section 24(b) states that everyone has the right ‘to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development’.

In two recent decisions,¹ the Constitutional Court provided guidance on the meaning of ‘ecologically sustainable development’, thereby informing on the nature of the state’s obligations in terms of the right. Firstly, the court stated that sustainable development requires recognition of the inexorable links between socio-economic development and the environment: Development cannot subsist on a deteriorating environmental base – unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development.² All decision- and law-making processes therefore need to integrate economics and ecology – not just to protect the environment, but to protect and promote future development as well.³ Secondly, sustainable development requires the provision for all of an adequate livelihood base and equitable access to adequate resources, including future generations. The court stated:

‘The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment’⁴

¹ In Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others 2007 (6) SA 4 (CC) (Fuel Retailers case) and MEC: Department of Agriculture, Conservation and Environment & Another v HTF Developers (Pty) Ltd [2007] ZACC 25 (HTF Developers case), respectively.
² Fuel Retailers para 44.
³ Ibid, HTF Developers para 60.
⁴ Fuel Retailers para 102; HTF Developers para 28.
Thirdly, court affirmed the **precautionary approach** to environmental management\(^5\) and held this to be especially important when considering the **cumulative impacts** of a development on the environment and socio-economic conditions.\(^6\)

The right to environment **intersects with a number of other substantive and procedural constitutional human rights**. Thus, depending on the context, protection of the right to environment would tend to lead to protection of the right of access to sufficient food and water\(^7\) as well as the right of access to housing,\(^8\) and **vice versa**. The right of the child to basic nutrition, shelter, basic health care services and social services also intersects positively with the environmental right.\(^9\) The procedural rights of access to information,\(^10\) just administrative action\(^11\) and access to the courts\(^12\) support protection of the right to environment by facilitating greater public participation in environmental governance and decision-making. The rights of access to information and just administrative action are particularly pertinent in regard to the process of granting prospecting and mining rights.

There are no shortage of policy and legal frameworks for sustainable mining in South Africa. The **Minerals and Mining Policy for South Africa, 1998** devoted an entire chapter to the topic of environmental management. This policy affirmed that the State, as **custodian of the nation’s natural resources**, will ensure that development of South Africa’s mineral resources takes place within a framework of sustainable development and in accordance with national environmental policy, norms and standards.\(^13\) To this end, 10 principles on sustainable mining were adopted.\(^14\) These included adoption of the precautionary approach as well as the polluter pays principle; insistence that a consistent standard of environmental impact management would be adopted, irrespective of the scale of mining concerned; equitable and effective consultation with interested and affected parties, including provision for a right to appeal all decision-making; compliance with, and taking into account of the local development objectives, spatial development planning and integrated development plans of the municipalities in which mining operations occur; and the building of capacity to effectively implement environmental management measures and monitor occurrences of pollution, amongst others.

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\(^5\) The precautionary principle, as articulated in the National Environmental Management Act 107 of 1998, holds that a risk-averse and cautious approach should be applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.

\(^6\) *Fuel Retailers* paras 98 – 9.

\(^7\) Section 27(1)(b) Constitution.

\(^8\) Section 26(1) Constitution. Interestingly, unlike ss 26(1) or 27(1)(b) the right to environment is not qualified by the statement that the state achieve ‘the progressive realization’ of the right ‘within its available resources’.

\(^9\) Section 28(1)(c) Constitution.

\(^10\) Section 32(1) Constitution. The right of access to information is fleshed out in the Promotion of Access to Information Act 2 of 2000 (PAIA).

\(^11\) Section 33(1) Constitution which guarantees the right to administrative action that is lawful, reasonable, and procedurally affair and section 33(2) which states that everyone whose rights have been adversely affected administrative action has the right to be given written reasons. This right is elaborated in the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

\(^12\) Section 34 Constitution.

\(^13\) Para 4.2 **Minerals ad Mining Policy for South Africa** (October 1998).

\(^14\) Ibid para 4.4.
Following on from this policy, the **Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)** was enacted to replace the Mineral Act 50 of 1991. The MPRDA is now the primary statute regulating prospecting and mining in South Africa. It is a complex piece of legislation with multiple legislative objectives, amongst which are the promotion of equitable access to the nation’s mineral wealth, expansion of opportunities for historically disadvantaged persons in exploiting such, and ensuring that the holders of mining rights contribute to the socio-economic development of the areas in which they are operating. These objectives have since been translated into a comprehensive policy framework for promoting Broad-based Black Economic Empowerment (BBBEE) in the mining sector, which includes **mine community and rural development**. At the same time, the MPRDA strongly emphasized the need to give effect to the environmental right by ensuring that mineral resources are developed in an orderly and ecologically sustainable manner. This translated into a number of ‘balancing mechanisms’ which are outlined in greater detail in Chapter 4.

In 2005, the (then) Department of Minerals and Energy initiated a **Sustainable Development through Mining (SDM)** programme. The vision underlying this programme is to ensure that by 2015 the South African minerals sector is contributing optimally to sustainable development. The key strategic objectives of the SDM programme were recently formulated for discussion. They include the objectives: That value extraction from South Africa’s minerals sector **benefits vulnerable groups**; that the minerals sector **moves toward sustainable end states, internalizes negative costs and associated consequences** and fully aligns the cumulative and life-cycle aspects of the sector with sustainable development principles; and that fundamental human rights are upheld.

The **Mine Health and Safety Act 29 of 1996**, whilst primarily targeted at ensuring the health and safety of employees at mines, also contains a few provisions relating to the health and safety of non-

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15 Published as GNR 527 GG 26275 of 23 April 2004. The MPRDA was recently amended by the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (MPRDA Amendment), although this Act – while it has been assented to by the President – has not yet commenced. The most significant change effected by the MPRDA Amendment is to facilitate the transfer of the approval of mining-related environmental authorizations from the Department of Mineral Resources to the Department of Water and Environmental Affairs. The MPRDA is supplemented by the MPRDA Regulations which include a chapter on pollution control and waste management.

16 See section 2(c) – (f) and (i).

17 In particular, the **Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry**. The objectives articulated in the Empowerment Charter were further developed in the **Codes of Good Practice for the South African Minerals Industry** (April 2009 – see GN 446 GG 32167 of 29 April 2009). As regards mine community and rural development, the scorecard published in the Codes of Good Practice, indicates that this element will be assessed with reference to the following: (1) Whether the mining company contributed in the formulation of integrated development plans, and whether the mining company is co-operating with government in the implementation of these plans, both in the areas in which mining takes place and the major labour sending areas; and (2) whether the mining company has made an effort to engage the local mine community and major labour sending area communities.

18 See the Preamble and sections 2(h) and 3(3) MPRDA in particular.

employees. It therefore forms part and parcel of determining whether the right to an environment not harmful to health and well-being has been violated.

Mining policy and legislation states that national environmental norms are applicable to the mining sector. The National Environmental Management Act 107 of 1998 (NEMA) defines the national approach to environmental management and contains a variety of innovative regulatory mechanisms aimed at sustainable development of renewable and non-renewable resources. The regulatory mechanisms in the NEMA include a comprehensive list of national environmental principles; environmental impact assessment (EIA) of activities having a substantial detrimental impact on the environment; and establishment of a statutory duty of care in regard to environmental degradation and pollution. As with the balancing mechanisms prescribed in the MPRDA, these are explored in greater detail in Chapter 4.

While prospecting and mining activities can pollute all environmental media, water resources are arguably impacted most severely. The mining of coal, in particular, can hold long-term negative consequences for the sustainable use of South Africa’s already scarce water resources. For this reason, this report pays special attention to the National Water Act 36 of 1998 (NWA) which provides for the integrated management of all aspects of water resources in South Africa.

There are many other policy and legislative instruments that are applicable to balancing mining against other present and future uses of resources with a view to ensuring sustainability. These include policy and legislation pertaining to agriculture, conservation and biodiversity, waste management, food security, land reform, land use planning, the protection of heritage resources, and tourism, amongst others. For the purposes of this report, however, which aims only at an understanding of the core policy and legislation applicable to sustainable mining, they are not considered.

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20 R385 – 387 GG 28753 of 21 April 2006. The EIA process is threshed out in the NEMA EIA regulations. The NEMA was recently amended to incorporate mining into the EIA framework – see the National Environmental Management Amendment Act 62 of 2008. The Amendment Act commenced on 1 May 2009 (GN 27 GG 32156 of 24 April 2009), but the provisions relating to mining only enter into force upon the commencement of Act 49 of 2008.

21 For instance, the Conservation of Agricultural Resources Act 43 of 1983; the White Paper on Agriculture, 1995; the Administration Manual for State Agricultural Land, 2001; the Draft Sustainable Utilization of Agricultural Resources Bill, 2003; and the Policy on Agriculture in Sustainable Development (Discussion Document, 8th draft).

22 Including the Biodiversity Act 10 of 2004; the Protected Areas Act 57 of 2003; and the Mpumalanga Nature Conservation Act, 1999.


27 Particularly the National Heritage Resources Act 25 of 1999.

28 Including the policy on the Development and Promotion of Tourism, 1996.