

RAINING

FOR

**SUSTAINABLE
DEVELOPMENT
RESEARCH
PROGRAMME**

corruption
watch



Mineral and petroleum resources are THE COMMON HERITAGE OF ALL THE PEOPLE OF SOUTH AFRICA and the State is the custodian thereof for the benefit of all South Africans.

Section 3 of the MPRDA

WHAT IS IT ABOUT?

The primary objective of this research project is to identify vulnerabilities in the mining application process, which give rise to corruption. This research focused specifically on four types of applications:

**MINING PERMITS;
MINING RIGHTS;
PROSPECTING RIGHTS AND
ENVIRONMENTAL AUTHORISATIONS**

WHY ARE WE INVOLVED?

One of the reasons Corruption Watch (CW) undertook this project was to raise public awareness of vulnerabilities in the mining application process, so that we can mobilise public opinion and encourage good practice in mining activities. In the next phase of the project we aim to advocate for change by engaging with the state, running educational initiatives in mining-affected communities, and contributing to legislative and policy review. We hope that these actions will lead to transparency and accountability in the application process.

This is a summary of the main report and highlights the central findings and recommendations. [The full report can be accessed here](#)



WHO ARE OUR PARTNERS?

CW is one of 20 Transparency International (TI) Chapters participating in the TI *Mining for Sustainable Development* (M4SD) programme, a global thematic network initiative that is coordinated by TI Australia with the support of the TI Secretariat. It aims to improve transparency and accountability in the extractive industries by focusing specifically on the start of the mining decision chain, when governments grant and award mining permits and licences. CW's participation in Phase 1 of the programme is supported by the BHP Billiton Foundation. Globally, the M4SD Programme is also funded by the Australian Department of Foreign Affairs and Trade.

DATA COLLECTION/RESEARCH METHODOLOGY

The methodology used in obtaining our research is based on a research method contained in the *Mining Awards Corruption Risk Assessment (MACRA) tool* (Nest 2016), which was created by TI to provide a consistent method for identifying corruption risks in all of the 20 countries participating in the M4SD programme. For more information on the MACRA tool, refer to the main report.

Corruption Watch engaged with the following groups within the sector for the purpose of this research paper – civil society; academics; mining lawyers; mining companies; the National Chamber of Mines; investigative journalists; government; the South African Human Rights Commission; and community members affected by mining activities. We conducted our research through interviews, focus group discussions and desktop research.



WHO IS AFFECTED?

Because mining impacts the growth and stability of the national economy, corruption in the mining application process hinders investment opportunities and affects everyone from large mining multi-nationals down to the average person buying a loaf of bread. Government plays a significant role in this space, as it not only determines the legislative framework, but is meant to ensure that all relevant stakeholders, like mining communities, benefit from mining and that the rule of law is upheld. Civil society is also key in ensuring that communities are not exploited and that there is sufficient awareness around roles, responsibilities and rights.

WHAT LEGISLATION GOVERNS MINING IN SOUTH AFRICA?

South African mining law is regulated by the Mineral and Petroleum Resources Development Actⁱ (MPRDA). According to Section 3 of the MPRDA, ‘Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.’ⁱⁱ This provision places a huge burden on the state to ensure the fair and equal distribution of wealth for all.

Unfortunately, if the custodian of the land’s mineral resources is involved directly or indirectly in corrupt practices in the first part of the mining value chain, this necessary and commendable objective can be severely undermined, resulting in great disproportionality in terms of the distribution of wealth.

THE MINING CHARTER

The Mining Charter is a unique feature of South African mining policy and aims to advance black economic empowerment and transformation in the sector. Section 100 (2) (a) of the MPRDA provides for “...the development of the broad-based black economic empowerment charter for the South African mining and minerals industry as an instrument to effect transformation...”ⁱⁱⁱ. In June 2017 mineral resources minister Mosebenzi Zwane released the 2017 Mining Charter: *An Instrument of Change: Giving Practical Expression to Radical Economic Transformation*.^{iv} This new version has been widely criticised. Among others, the vagueness of some clauses has sparked fears of significant opportunities for cronyism and maladministration, and the Chamber of Mines is particularly aggrieved by a lack of consultation in relation to this version. Several legal challenges have been instituted and threatened in relation to the charter’s implementation.

Despite its good intentions, research has revealed that the charter’s provisions are indeed benefiting a small elite, and that mining companies are coerced into including specific, usually politically connected BEE partners as a pre-condition to having their applications approved. This completely undermines the objectives of the charter.

Stakeholders hope that in future the minister will follow a fair, consultative and transparent process that will properly advance the key and long overdue policy for real transformation and change in the sector.

A LANDMARK CASE THAT SPEAKS TO THIS ISSUE INVOLVED GOLD FIELDS MINE, WHOSE BLACK ECONOMIC EMPOWERMENT (BEE) TRANSACTION DREW CONTROVERSY FOR THE WAY IT CHANNELLED BENEFITS TO CONNECTED INDIVIDUALS, INCLUDING THE SPEAKER OF THE NATIONAL ASSEMBLY, WHO WERE ASSEMBLED BY A PRESIDENTIAL LAWYER AND TWO EX-CONVICTS. THE ALLEGATION RAISED PUBLIC CONCERNS ABOUT THE ABUSE OF MINING SECTOR OPPORTUNITIES TO FAVOUR A SMALL ELITE.^v

APPLICATION PROCESSES UNDER SCRUTINY

This report will briefly look at the four application processes relating to mining permits, mining rights, prospecting rights and environmental authorisations. Infographics at the end of the document visually capture the steps of each process from beginning to end.

- **Application for a mining permit** – a document issued by the Department of Mineral Resources (DMR) which allows the holder to conduct small-scale mining operations.
- **Application for a prospecting right** – issued when ‘intentionally searching for any mineral by any method which disturbs the surface or subsurface of the earth, including any portion of the earth that is under the sea, or under other water; or in or on any residue stockpile or residue deposit, in order to establish the existence of any mineral and to determine the extent and economic value thereof; or in the sea or other water on land.’^{vi}

- **Application for a mining right** – this pertains to the ‘mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto, in, on or under the relevant mining area.’^{vii}
- **Environmental Authorisation (EA)** – required for prospecting and mining operations. Because mining operations cannot take place without an EA, we must include EAs within the scope of this research report – see the full report for a brief discussion.

The related infographics capture these legislative processes. To identify where the weaknesses lie, we looked at how the actual application process deviates from the official or legislated process. This approach enabled us to clearly identify the problems – termed as **vulnerabilities within the application process** – and the reason for their occurrence.



VULNERABILITIES

IDENTIFIED IN THE

APPLICATION PROCESSES

1. SAMRAD

The mining application process in South Africa is managed by the South African Mineral Resource Administration System (SAMRAD). One of the main reasons for introducing SAMRAD was so that all applications could be submitted electronically. In practice, however, there is intermittent access to the online portal and as a result, applications are still being lodged manually. SAMRAD also does not allow for potential applications or investors to view the location of possible mineral deposits, unlike the cadastre system of other countries such as Botswana or Kenya. While government, mining companies and even the Chamber of Mines are all aware of the problems with the SAMRAD system, it appears that no corrective measures have been taken by government, nor does it look like any are going to be taken. Although SAMRAD's deficiencies have been identified by various stakeholders in the sector, the DMR has failed to take remedial steps, because the system weaknesses are seemingly working to the advantage of those involved in corruption.

“SAMRAD is a credible initiative, but it has not had the desired effect of streamlining the application process and may have the opposite effect of inhibiting further growth of an already stressed mining sector.”^{viii}

**THE CASE INVOLVING SISHEN
IRON ORE COMPANY,^{ix} AMSA
AND ICT WENT AS FAR AS THE
SUPREME COURT OF APPEAL, BUT
INVOLVED HIGH COURT BATTLES
ALLEGING FRAUD, FORGERY AND
CORRUPTION OVER THE MANUAL
LODGING OF THEIR RESPECTIVE
APPLICATIONS AT THE DMR'S
KIMBERLEY REGIONAL OFFICE.^x**

2. TIMEFRAMES

Although the MPRDA provides for specific timeframes for the processing of applications, the DMR does not consistently adhere to these timeframes. Processing can sometimes take up to 18 months, which deters investors and hinders junior mining companies. Mining companies often have to take the DMR to court to compel them to decide on their application. Interestingly, a community activist saw this delay as beneficial to mining communities, as they get time to challenge an unlawful application.

Our anonymous source from the DMR stressed the fact that timeframes are not properly regulated, and that the various regional offices interpret the law differently.^{xi} We found that the reason for such tardiness ranges from a lack of capacity at the DMR and system failures, to unlawful conduct. As with SAMRAD, this issue is known to the DMR; however, these lengthy delays often work to the advantage of corrupt individuals.

3. COMMUNITY CONSULTATIONS

Community members are a crucial stakeholder in the application process, yet the MPRDA contains limited provisions relating to consultations with communities. Under the MPRDA's Chapter 2, mining companies must notify and consult 'with the land owner or lawful occupier of the land in question.' This provision has a very broad interpretation, and allows mining companies to do the absolute minimum while complying with a weak piece of legislation. Furthermore, government does not monitor the consultations, and as a result, civil society and community activists are forced to play the watchdog on behalf of communities. This is unacceptable.

A researcher from the Land and Accountability Research Centre said, with regard to community consultations; "Community consultations are often tick box exercises and do not fulfil their intended purpose."^{xii}

A community member stated; "Mining companies come into our community and only engage with the chief, they don't consult any community members, and they pay him a lot of money and give him shares in the mining company. The community does not benefit from this money at all, and we only see the traditional leader and his family getting more rich."^{xiii}

A legislative review panel, mandated by Parliament and chaired by former president Kgalema Motlanthe, has travelled across South Africa's nine provinces and has received more than 1 000 written submissions from communities. Motlanthe noted a trend of asking traditional leaders to give the go ahead on mining projects while supposedly representing the entire community. "... Mining companies merely give the traditional leaders an office or a 4x4 vehicle and the project gets approved."^{xiv}

IN THE CASE OF BENGWENYAMA MINERALS PTY LTD.^{xv} GENORAH ONLY WROTE A LETTER TO THE KGOSHI (CHIEF) INFORMING HIM OF THEIR INTENTIONS. NO ACTUAL CONSULTATIONS TOOK PLACE IN RESPECT OF THE PROSPECTING RIGHT APPLICATION OR THE ENVIRONMENTAL MANAGEMENT PLAN, YET THE APPLICATION FOR A PROSPECTING RIGHT WAS GRANTED. THIS WAS SET ASIDE ON REVIEW BUT SUCH ACTIONS ARE AN EXAMPLE OF A COMPLETE LACK OF REGARD FOR THE LAW WHEN IT COMES TO COMMUNITY CONSULTATIONS.

4. SECTION 10 NOTICES

Section 10 of the MPRDA requires the DMR Regional Manager to notify interested and affected parties of a proposed application and to receive any objections from them. These objections are then raised at the Regional Mining and Development Committee. Research revealed that these Section 10 Notices are written only in English, which is problematic for most community members. Furthermore, the MPRDA and the National Environmental Management Act (NEMA) both require applicants to post notices informing the public of mining activities. Applicants tend to follow the public participation process as set out in NEMA, without following the Section 10 Notice in the MPRDA.^{xvi} This is a clear deviation from the law, possibly because government is not monitoring and ensuring that all stakeholders carry out their obligations honestly and fairly. This leaves community members having to rely on the judiciary to resolve their dilemmas, which in financial terms is challenging.



5. REGIONAL MINING DEVELOPMENT AND ENVIRONMENTAL COMMITTEE (RMDEC)

RMDECs are comprised of officials from the DMR and other relevant government departments, who meet with objectors and listen to their concerns. After deliberating the matter, the RMDEC sends a report to the minister, who then decides whether or not to grant the right. RMDECs are, for the most part, meant to benefit interested and affected parties, as they provide a platform to raise concerns about prospective mining activities. Research revealed that RMDECs are not a standard procedure in every regional office, and some community members had never even heard of them. Furthermore, minutes are not taken at these meetings and objectors are not given the reason for the final outcome of the minister's decision. This is a clear example of a lack of transparency and opens up doors to corruption.

**THE CASE OF EYESIZWE PAARDEPLAATS^{xvii}
DEALT WITH THE GRANTING OF A
PROSPECTING RIGHT FOR COAL. IN THIS
PARTICULAR CASE, THE MINISTER (OR
THE DELEGATED OFFICIALS) GRANTED A
PROSPECTING RIGHT EVEN THOUGH THE
RMDEC TOOK A DECISION AGAINST THE
GRANTING OF THE PROSPECTING RIGHT.**

6. DELEGATION OF AUTHORITY

During interviews, this issue was raised several times. According to Section 103 of the MPRDA, the minister may delegate the authority to grant a license to the director-general or regional manager. Understandably, the minister cannot deal with every application singlehandedly and delegation is a necessary part of ministerial duties – the concern is that if ministers merely approve applications on the recommendation of lower ranking officials without verifying the merits or truthfulness of the application, it may allow the delegated officials to push their own agendas when approving applications. In our engagement with the Chamber of Mines, we were also advised that officials at the DMR have an inordinate amount of discretionary power, and the fact that there are no guidelines on how this power should be exercised is problematic.^{xviii}

7. SOCIAL AND LABOUR PLANS

There is a deep disparity between the distribution of wealth amongst mineworkers and communities on the one hand, and mining management, financiers and shareholders on the other. Social and labour plans (SLPs) are one of the corrective measures introduced into the regulatory framework to address this issue.^{xix} SLPs are meant to improve the livelihoods and social status of mining affected communities, and to merge with the integrated development plan of the municipality.

Despite this, there is a lack of proper monitoring of SLPs by government and so mining companies are able to make commitments that they are not being held accountable for, while communities are left worse off than before, with empty promises.

CALS STATES THAT “... SLPs SEEM TO BE AN UNREFINED TOOL FOR DEALING WITH A COMPLEX AND NUANCED AREA INVOLVING A RANGE OF SOCIAL, ECONOMIC AND ENVIRONMENTAL VARIABLES.”

8. ENVIRONMENTAL AUTHORISATIONS

This is a contentious issue. We chose to include it in our research because the One Environmental System (OES) requires that mining applications be submitted together with environmental authorisations, to streamline the process. Environmental authorisations are an intricate and complex process, and although we acknowledge that there are several vulnerabilities in this process, we only looked at the most immediate ones. Our research identified the OES as a vulnerability within the application process. Our engagement with the Centre for Environmental Rights revealed that DMR officials do not have the knowledge or expertise to deal with environmental authorisations.^{xx}

MINING COMPANY A SUBMITTED THAT “... THE LEGISLATIVE PROCESSES TO IMPLEMENT THE OES HAVE BEEN HAPHAZARD, INCOMPLETE AND UNINTEGRATED, RESULTING IN GREATER CONFUSION AND UNCERTAINTY ESPECIALLY BECAUSE NOT EVEN THE GOVERNMENT DEPARTMENTS TASKED WITH IMPLEMENTING THE NEW REGIME APPEAR ABLE TO MAKE SENSE OF THE CURRENT STATE OF THE LAW. THERE ARE ALSO STILL A NUMBER OF OTHER OUTSTANDING LEGISLATION/REGULATIONS THAT NEED TO BE IMPLEMENTED TO SUPPORT THE ROLL-OUT OF THE OES...”^{xxi}

9. ENVIRONMENTAL IMPACT ASSESSMENTS (EIAs)

An EIA is a mandatory process of evaluating possible environmental impacts resulting from proposed mining activities. These assessments are governed by NEMA and its regulations. Our research revealed that EIA practitioners are hired by mining companies and often will draft reports in favour of their employer, as they are being paid to serve its interests, and failure could result in a termination of their contract. This creates a serious lack of impartiality when performing this vital task of evaluating the future environmental impacts of mining.

IN A ROUNDTABLE HELD BY CORRUPTION WATCH, MANY OF THE PARTICIPANTS RAISED THE ISSUE OF COMMUNITY MEMBERS NOT UNDERSTANDING THE CONTENTS OF EIA REPORTS, AND HOW THEY ARE GIVEN 30 DAYS TO RESPOND OR MAKE OBJECTIONS TO DOCUMENTS THAT ARE TECHNICAL, BULKY AND INCOMPREHENSIBLE TO THE LAY PERSON. FURTHERMORE, THESE DOCUMENTS ARE ALWAYS IN ENGLISH, WHICH IS NOT THE FIRST LANGUAGE OF ANY INDIGENOUS COMMUNITY.

10. LACK OF PROCEDURAL UNIFORMITY AND CO-OPERATIVE GOVERNANCE

Research established that there is no procedural uniformity between regional offices; this is a clear sign of a national problem. Provinces should not be allowed to operate differently. This was reiterated by mining companies A and B, who both raised the issue, with company A giving the example that the Free State is extremely efficient while the North West is notably inefficient.^{xxii} This shows that there is either a general lack of regard for the law by officials or a lack of sufficient knowledge of the law – in any case, it is a vulnerability that needs to be addressed by government.



11. CAPACITY

A DMR official confirmed the issue of a lack of capacity and stated that; “currently... officials cannot work on all the applications at once. Posts are often frozen despite the fact that we need more people. As long as there is a backlog, corruption will always be there; because where there is chaos, it is easier for corrupt activity to take place. Even though we send motivations requesting an increase in capacity, nothing happens... there is even a province with over 600 unattended applications.”^{xxiii}

The ongoing issue of lack of capacity at the DMR is the excuse used by officials to explain the backlog of applications and non-adherence to timeframes. Although this is not impossible to resolve, the non-resolution indicates that capacity is not a genuine problem, or it would have been addressed by now. Again, this is a justification which allows the corrupt activity to continue.

A LACK OF CAPACITY AT THE DMR RESULTS IN A BACKLOG OF APPLICATIONS, A RISE IN CORRUPTION AND AN OVERALL DECLINE IN INVESTMENT. AN IMPORTANT FEATURE OF THE DMR’S 2013 ANNUAL REPORT WAS ACKNOWLEDGEMENT OF CAPACITY CONSTRAINTS IN BOTH ITS LEGAL AND FINANCIAL ACTIVITIES.^{xxiv}

12. LACK OF SKILLS AT THE DMR

Closely related to the lack of capacity at the DMR is a marked shortage of relevant skills in that department. In an interview, mining company B stated that many senior staff are political appointees – as a result, under-qualified individuals are appointed at the national level.^{xxv} Because appointments at the DMR are being made without ensuring that either senior or junior officials are competent and possess the necessary skills to perform their duties, the integrity of the entire application process could be undermined.

13. LACK OF KNOWLEDGE OF THE MPRDA

The MPRDA has undergone amendments over the years, and for the right reasons. Although these changes were implemented to ensure an effective regulatory system, they have also caused confusion and uncertainty and this has allowed corruption to flourish. The fact that different provinces operate under different systems/laws (see point 10) is evidence of the uncertainty in the industry.

14. CORRUPTION & BEE PARTNERSHIPS

Despite the Mining Charter’s good intentions, the issue of BBBEE partnerships in the mining industry is a difficult one, more especially from the applicant’s perspective. Interviews with mining law experts revealed that mining companies sometimes feel that the DMR holds them to ransom by imposing unrealistic demands, which causes delays. It has been said that the DMR suggests specific BEE partners to be included in a particular mining deal, and if not, they will not grant the license.^{xxvi} In 2015, National Assembly Speaker Baleka Mbete, also the ANC national chairperson, declared equity shares to the value of R27-million in two companies involved in a deal with Gold Fields. This was not declared in the 2016 register, and is just one example of a high level official whose financial interests in a mining company have not been properly scrutinised.^{xxvii}



RECOMMENDATIONS

THE APPLICATION PROCESS INVOLVES THREE GROUPS WITHIN THE MINING SECTOR, NAMELY COMMUNITIES, MINING COMPANIES, AND GOVERNMENT/POLICY MAKERS. CIVIL SOCIETY, MEANWHILE, MAINLY REPRESENTS THE INTERESTS OF COMMUNITIES. THESE RECOMMENDATIONS WILL ADDRESS EACH OF THESE GROUPS.

1. RECOMMENDATIONS FOR COMMUNITIES AND CIVIL SOCIETY

There is a critical need to educate communities on their rights and the role they play in the application process. Community members cannot demand that processes designed to protect their interests be upheld if they do not know or understand these processes. Thus, it is essential that civil society form coalitions and partnerships to work together with community activists. This will ensure that initiatives such as workshops – which will educate communities on the steps of the application process, their role in the process, and their rights – form part of the much needed change in this sector.

We also urge traditional leaders to resist and report corruption and maladministration in their dealings with state and corporate representatives. This will ensure that mineral resource wealth does reach communities and that all owners of surface rights in their communities are adequately protected.

2. RECOMMENDATIONS TO GOVERNMENT

The DMR must urgently address a number of internal issues, including:

- internal capacity constraints, which will cut down on lengthy periods for the processing of applications, and reduce existing backlogs in the different provinces, resulting in efficient, fair and transparent processing with a drastically lessened risk of manipulation,
- implementing and streamlining SAMRAD. The proper implementation and administration of an online cadastre system will ensure transparency of information and greatly reduce the possibility of corruption creeping in,
- boosting the technical capacity of state officials, as well as the invigoration of existing resources with individuals who have expert knowledge in the mining sector and who will consider the needs of the economy and mining communities alike. New technological advancements could affect the policy and practice of awarding licences,
- the implementation of monitoring and evaluation systems, or tasking the Department of Planning, Monitoring and Evaluation with the important job of ensuring that mining companies honour their social and labour commitments to communities,
- a review of the mining application process with an emphasis on public participation and consultation.

3. RECOMMENDATIONS TO MINING COMPANIES

Mining companies have a number of obligations in this regard, including:

- holding fair and meaningful consultations that consider the needs of the community as a whole, are inclusive and transparent, and ensure that communities understand the nature and extent of the environmental and social impacts of the proposed mining activities. We urge mining companies to honour their social commitments to communities and to ensure that the commitments they make are in line with the needs of the community,

- ensuring that corruption and maladministration do not taint application processes. Mining companies must contribute to change in the sector, not only because of the increasing cost of conducting operations in South Africa due to perceptions of corruption and maladministration in the sector, but also because of the potential damage to their reputation and governance structures,
- ensuring that they follow the correct legislative processes throughout the application process, and that the outcomes of this process are made fully transparent. Any requests for bribes and other corrupt activities should be reported to the relevant authorities and made publicly known.

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