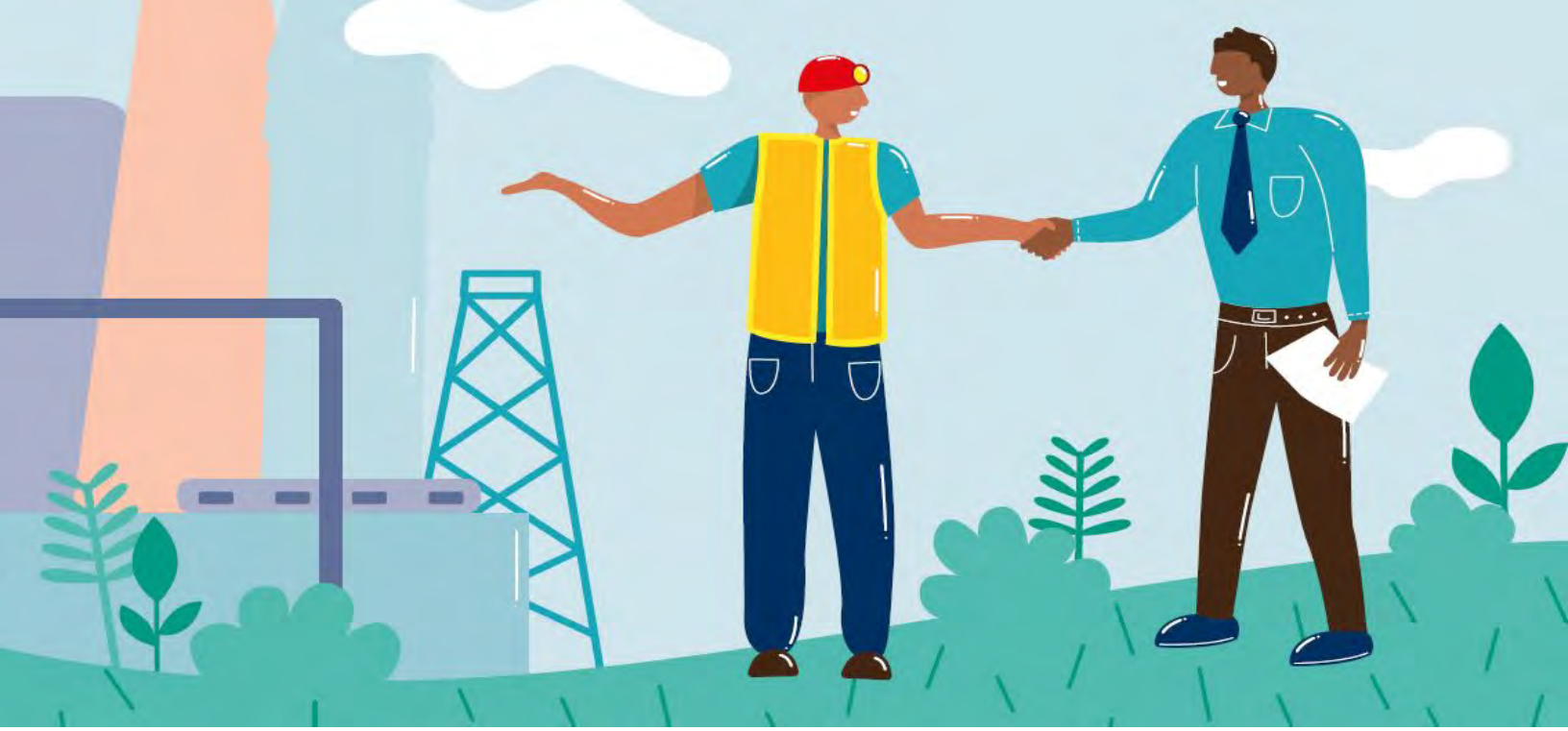

MINING FOR SUSTAINABLE DEVELOPMENT RESEARCH REPORT

October 2017
Corruption Watch

Foreword

South Africa has an abundance of mineral resources, which is a direct source of foreign investment. We are said to have the world's fifth-largest mining sector, employing 5% of the South African workforce.

The mining industry is currently regulated under the Mineral and Petroleum Resources Development Act (MPRDA), and black economic empowerment in the mining industry is regulated under the newly released Mining Charter. At the time of publication, the mining industry is in a very volatile state, with parties contesting the current MPRDA and there are legal battles raging around the charter. The situation is compounded by the efforts of the minister of mineral resources to impose a blanket moratorium on specific mining applications. As a result, there is a great sense of industry uncertainty.

The economic and commercial benefits of mining have an equivalent downside. The industry is riddled with corruption and maladministration, and communities who live close to mines are exposed to the unhealthy effects of mining, such as air, water and land pollution, while their agricultural livelihoods are severely impacted. More often than not, there is no compensation for this.

Community consultations are often tick box exercises, and mining companies do not always comply with the social and labour plan commitments which they make to communities. As a result, communities are left with broken promises and insecure livelihoods. The vast open lands, which were once unindustrialised and used only for agricultural development and indigenous community sustainability, have been tarnished by mining operations. When these operations come to an end, the mine shafts are often left open and neglected, with mines claiming that they have insufficient funds for rehabilitation.

Our research reveals that corruption in mining does not arise as a result of one particular issue. We found that many of the issues stem from the fact that the legislation governing the application process is often side-stepped to favour those who are able to pay a bribe. In other instances, officials at the Department of Mineral Resources (DMR), who are supposed to follow legislative processes to the letter, are often involved in the very same corruption and maladministration.

We found several vulnerabilities in the application process, many of which are not unknown to the regulator. Despite this knowledge, government is still failing to address these issues. This begs the question: is this non-action from government deliberate?

We also uncovered severe capacity constraints at the DMR, which delay applications and open doors to bribery and corruption. Other issues like system weaknesses, knowledge gaps and a lack of monitoring and evaluation, among others, were highlighted by our research.

This research paper focuses on one particular aspect of the mining chain phase, and that is the application process. We look at the legislative requirements for obtaining a mining permit, a mining right, a mining license and an environmental authorisation, and analyse this situation for deviations from the official process, which indicate weaknesses that give rise to corruption.

Because the application process is one of the first points of call in the mining chain, this research attempts to address the problem from the start of the process. This will decrease the possibility of corruption arising further down the line.

The methodology was based on the research method contained in the Mining Awards Corruption Risk Assessment (MACRA) Tool (Nest 2016), which was created by Transparency International (TI). The MACRA tool builds on TI's experience with corruption risk assessment in other fields such as national integrity systems as well as other mining and extractive sector instruments, indices and resources. We conducted our research at the same time as 19 other countries, and TI will release the results in a global report in November 2017. The report will offer an in-depth comparative analysis of the corruption faced in the application process of all 20 participating countries.

In the recent country-wide high level panel hearings that were chaired by former president Kgalema Motlanthe, community members were given a chance to raise concerns to the panel, in terms of issues caused by mining activities, among others. We eagerly await the panel's recommendations on aspects of the MPRDA and its weaknesses. This report aims to also highlight issues with the current legislation which give rise to corruption and which, we believe, will complement the recommendations made by the panel.

We make several recommendations of our own to different stakeholders in the mining sector, and stress the need for accountability and transparency in the industry. All stakeholders must ensure that the economy, mining companies both large and small, and community members benefit equally from mining activities.

In the second phase of this research project, Corruption Watch intends to form partnerships with civil society, community activists, and mining houses, working to narrow the gaps in the application process that give rise to corruption, and promoting the need for accountability and transparency.

Amanda Shivamba
Project researcher and report author

Findings

1. The **online application system, South African Mineral Resources Administration System (SAMRAD),** was initially introduced to curb corruption. However, the system is designed in such a way that it can be used to facilitate corrupt practices.
2. There is a general **lack of knowledge and understanding of the Mineral and Petroleum Resources Development Act (MPRDA)** throughout the sector, and there is an overall **lack of understanding of the steps** of the processes for awarding mineral authorisations.
3. The mining sector in South Africa is heavily politicised and political appointments are based on cadre deployment. The result is a **mining regulator staffed with individuals without the relevant knowledge and expertise required** to make informed decisions.
4. There are nine provincial offices throughout the country, but different processes are adopted and followed in different regional offices, resulting in a **lack of uniformity within the national mining sector.**
5. Although **legislative timeframes** are put in place to ensure predictable turn-around times, they are open to interpretation and ambiguous; this results in long delays, an industry susceptible to corruption, and a decline in investment.
6. **Capacity constraints at the Department of Mineral Resources (DMR)** have also been the cause of delays in processing applications; regional offices are left with massive backlogs and the resultant fast-tracking of applications may also abet corruption.
7. The MPRDA allows for the **minister to delegate his authority** for the approval of awards. This sometimes results in applications being approved without quality assurance.
8. The Mining Charter's **BBBEE provisions** are being misused to benefit a few elite and not always being used for the purpose for which it was created.
9. **The manner in which community consultations** are conducted shows that they are merely tick-box exercises, used to facilitate corruption, which results in a lack of regard for community livelihoods.
10. **Section 10 notices** are always written in English and more often than not, community members do not understand the contents and thus are unable to raise meaningful objections.
11. The **Regional Mining Development and Environmental Committee (RMDEC)** platform is either unknown to some parties, known but under-used, or does not serve its desired purpose. This results in objections not being dealt with and a system that is vulnerable to corruption.
12. **Social and labour plan (SLP)** commitments are not adhered to. There are also **no monitoring and evaluation systems** in place to ensure that SLPs are followed through.
13. **The One Environmental System (OES)** has not been regulated and remains unintegrated.
14. **Environmental impact assessment (EIA) reports** are often too bulky and too technical for the layman to understand. Furthermore, these reports are always done in English and community members are left in a position where they are unable to raise objections, or to participate in meaningful engagements.

Contents

List of abbreviations

BAR	Basic Assessment Report
BBBEE	Broad Based Black Economic Empowerment
CW	Corruption Watch
CER	Centre for Environmental Rights
DMR	Department of Mineral Resources
DMPE	Department of Monitoring Planning and Evaluation
DSR	Draft Scoping Report
EA	Environmental Authorization
EIA	Environmental Impact Assessment
EIAR	Environmental Impact Assessment Report
FPIC	Free Prior and Informed Consent
FSE	Federation for Sustainable Environment
MACUA	Mining Affected Communities United
MEJCON	Mining and Environmental Justice Community Network
MPRDA	Mineral and Petroleum Resources Development Act
NEMA	National Environmental Management Act
MS4D	Mining for Sustainable Development
OES	One Environmental System
RMDEC	Regional Mining and Development Committee
SAHRC	South African Human Rights Commission
SAMRAD	South African Mineral Resources Administration System
SLP	Social and Labour Plan
TI	Transparency International
WAMUA	Women from Mining Affected Communities United in Action

Overview of Corruption Watch

Corruption Watch (CW) is a registered, non-profit civil society organisation, in operation since January 2012. Our principal objective is to encourage and enable public participation in combatting corruption. As part of our mandate, we are committed to ensuring that the public is informed of the legislative and regulatory framework that governs the interface between the public and private sectors and to mobilising public opinion in support of measures and practices that reduce the vulnerability of this critical interface to corruption.

CW is also an accredited chapter of Transparency International (TI). TI is an international non-governmental organisation, founded in 1993 and based in Berlin, Germany. Its purpose is to take action to combat corruption and prevent criminal activities arising from corruption. Its members include more than 100 national chapters who engage in fighting corruption in their home countries.

Overview of TI's Mining for Sustainable Development (M4SD) programme

CW is one of 20 national chapters participating in Transparency International's global *Mining for Sustainable Development* (M4SD) Programme. The programme is a global thematic network initiative coordinated by TI Australia with the support of the TI Secretariat. It complements existing efforts to improve transparency and accountability in extractive industries by focusing specifically on the start of the mining decision chain: the point at which governments grant and award mining permits and licences, negotiate contracts and make agreements.

Phase 1 of the programme (2016-2017) involves understanding the problem by identifying and assessing the corruption risks in the process and practice of awarding mining licences, permits and contracts. This report presents the main findings from the corruption risk assessment in South Africa.

With an understanding of the nature and causes of corruption risk, national chapters will then develop and implement solutions to tackle priority corruption risks in Phase 2 (2018-2020). They will work with key stakeholders from government, the mining industry, civil society and affected communities to improve transparency, accountability and integrity in the mining application and approval process.

Purpose of the M4SD programme

Although its share of economic activity has declined, mining remains an extremely important component of the South African economy. However, despite all the benefits of mining, it is widely known and acknowledged that the industry is riven with corruption.

The aim of this phase of the programme is to identify the systemic, regulatory and institutional vulnerabilities to corruption in awarding mining and mining-related licences, permits and contracts and to assess the specific corruption risks created by these vulnerabilities. This report presents the main findings from the study and the results of the corruption risk assessment.

A number of vulnerabilities in the mining chain may arise from the application process related to the granting of mining rights, prospecting rights and mining permits and these vulnerabilities may in turn give rise to corruption and maladministration.

We have therefore identified this application process and a close examination of these vulnerabilities as the focal point of our research. By examining, assessing and exposing potential vulnerabilities in the application process and assessing the risks derived from these vulnerabilities, it is intended that this report will enable the public to participate in the preventing and combating of resultant corruption.

This research is aimed at the promotion of accountability and transparency in a mining application process, a process which has not been given sufficient attention by civil society and state actors but which may create a significant opportunity for reform.

Structure of Research Report

This report begins with a short discussion of the research methodology, followed by a brief analysis of the history of the South African mining sector with reference to applicable legislation. The scope of the research and reasons for further refinement of the research focus is then followed by an in depth analysis of the vulnerabilities which give rise to corruption risks and a discussion of those risks.

Methodology: *MACRA Tool**

The analysis in this report is based on the research method contained in the *Mining Awards Corruption Risk Assessment (MACRA) Tool* (Nest 2016), which was created by TI to provide a consistent, clear and robust methodology for identifying and assessing corruption risks in the twenty countries participating in the M4SD Programme. The MACRA tool builds on TI's experience with corruption risk assessment in other fields such as National Integrity Systems and other mining and extractive sector instruments, indices and resources.

Experts from multilateral institutions, major international non-governmental organisations and industry bodies provided valuable feedback in the development of the MACRA tool.

The first part of the risk assessment involves data collection and analysis. The MACRA tool is used to create a map of the awards process as set out in law, official guidelines and policy in order to systematically collect information about the practices in implementing the process and relevant contextual factors. An analysis of the mining award process, practice and context is used to identify vulnerabilities which may give rise to corruption. Vulnerabilities are defined to mean systemic, regulatory, institutional or other weaknesses that create risks of corruption that then undermine the lawful, compliant and ethical awarding of licences, permits and contracts.

The tool is then used to identify and assess the specific corruption risks created by these vulnerabilities by analysing eighty-nine (89) common risks relating to five different risk factor categories. These are corruption risks originating in:

1. the process design
2. process practice
3. contextual factors
4. accountability mechanisms, and
5. the legal and judicial responses to corruption.

In line with the tool, each corruption risk is assessed by analysing evidence of the likelihood of it occurring and of its potential impact.

The final stage of the analysis is risk prioritisation. The priority risks are those corruption risks that we will seek to mitigate or manage. The results of the risk assessment are the primary input into this determination, but other matters such as the national chapter's capacity to take action, the resources required and potential for stakeholder collaboration are also important considerations.

Corruption Watch engaged with the following groups within the sector: civil society; academics; mining lawyers; mining companies; The National Chamber of Mines (chamber); investigative journalists; government; the South African Human Rights Commission (SAHRC) and community members affected by mining activities.

Annexure 1 to this report contains a list of the stakeholder engagements, documenting the dates of interviews, designations of the interviewees, location and purpose of the engagement.

Mining in South Africa

South Africa's transformation from an agricultural economy into the most industrialized nation in Africa began in the Witwatersrand Basin in the late 19th century: "The discovery of the Witwatersrand goldfields in 1886 was a turning point in the history of South Africa. It presaged the emergence of the modern South African industrial state."[1] The world's largest diamond deposits had been already discovered in the 1860s, around the area that later became known as the city of Kimberley in the Northern Cape Province.

Historically, South Africa's mining industry has been at the heart of the economy's development, and the country is marked as not only one of the most competitive countries in the international mining industry, but also as one of the most natural resource-rich nations in the world. In fact, the industry has played a key role in attracting foreign investment and developing leading global enterprises, and remains South Africa's most analytically observed economic sector.[2]

In many ways South Africa's political, social and economic landscape has been shaped by mining, given that for so many years the sector has been the backbone of the country's economy

Although gold, diamonds, platinum and coal are the most well-known amongst the minerals and metals mined, South Africa is extremely well-resourced with mineral resources, with some of the largest reserves of the platinum group metals (PGMs), gold, chromite, manganese, vanadium and refractory minerals (alumina-silicates). In addition to these, there are large resources of coal, iron ore, titanium, zirconium, nickel, vermiculite, phosphate and many other minerals.[3]

[1] Government Communication and Information System 2012, p. 21.
[2] *Ibid.*
[3] Pocket Guide to South Africa 2012/2013 Mineral Resources.pg 150-154.

Legal and Policy Framework

National legislation

South African mining law is regulated by the Mineral and Petroleum Resources Development Act[4] (MPRDA), which is the primary piece of legislation dealing with the right to conduct inter alia: *reconnaissance*, *prospecting* and *mining* operations. The MPRDA places all mineral and petroleum resources in South Africa in the hands of the state, which means that the state is the custodian of all mineral and petroleum resources, and is responsible for allocating mineral authorizations under the 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.*[5]

The state entity responsible for mineral authorisations and for the governance of the mining industry in South Africa is the Department of Mineral Resources (DMR) under the executive leadership of the minister of mineral resources (the minister). Its head office is situated in Pretoria and each of South Africa's nine provinces or regions has its own DMR office, headed by a regional manager. *Section* 3 goes further to provide that the minister (acting on behalf of the state), may: *grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right.*[6]

The MPRDA also states that the holder of a mining right[7], prospecting right[8] or mining permit[9] is prohibited from mining without an environmental authorisation and without giving the landowner of lawful occupier of the land at least 21 days' written notice of intention to exercise allocated rights.[10]

It is noteworthy to mention that the MPRDA does not legally require that a water use license be obtained before mining/prospecting operations begin. However, under the National Water Act it is a criminal offence to commence with a water use that requires licensing without the necessary water use license. In this regard, since the establishment of the One Environmental System (OES) in 2014, an important component of the MPRDA provides that: *Any person who wishes to apply to the Minister for a mining right, prospecting right or mining permit must simultaneously apply for an environmental authorisation and must lodge the application at the office of the Regional Manager.*

[4] Act No. 28 of 2002 (MPRDA).
[5] Section 3 of the MPRDA.
[6] Section 3(2)(a) of the MPRDA.
[7] Section 22 of the MPRDA.
[8] Section 16 of the MPRDA.
[9] Section 27 of the MPRDA.
[10] Section 5A of the MPRDA.

In terms of the MPRDA, the minister is able to delegate his powers to the director-general and or the deputy director-general, who are able to take various decisions as delegated by the minister.[11] Upon the granting of a right or permit, the right is then executed and registered with the Mineral and Petroleum Titles Registration Office.

The MPRDA also stipulates that if a regional manager receives more than one application for a prospecting right, a mining right or a mining permit, in respect of the same mineral and land, the application should be considered in the order of the dates upon which it was received. If they are received on the same day, the regional manager should give preference to applications from historically disadvantaged persons.[12]

This aspect of the law, known as the *first come first served* principle, has often resulted in litigation by contending applicants.

Former president Kgalema Motlanthe chairs a panel of 17 people who have been mandated by Parliament to probe legislation and the effects of such legislation on the South African people, more especially with regards to poverty, inequality, social cohesion and other social ills. When asked about the MPRDA, the former president said that the system only favours a few, considering that it took almost eight years to get a greenfields mining project to operational stages, and thus it is evident that only people with available resources can follow through with these processes.

Motlanthe went on to state that the legislation is structured in such a way that it is disadvantageous to communities.[13]

Mining Charter

One of the objectives of the MPRDA is to redress historical, socio-economic inequalities and to ensure broad based and meaningful participation of black persons in the mining and minerals industry. In particular, 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…* [14].

The Mining Charter is a unique feature of the legislation governing the mining sector and is seen as an instrument to effect transformation with specific targets in the mining industry in South Africa. Failure to comply with the charter amounts to an offence which could result in a fine or imprisonment. [15]

[11] Section 103 of the MPRDA.
[12] Section 9 (b) MPRDA.
[13] Kgalema panel not keen on laws in mining, 26 July 2017, Bianca Capazorio, Business Day. Available at www.Businessday.co.za
[14] Broad-Based Black Socio-Economic Empowerment Charter For The South African Mining And Minerals Industry, 2017 June 2017, available at: http://pmg-assets.s3-website-eu-west-1.amazonaws.com/1/FinalCharter.pdf
[15] Section 98 and Section 99 of the MPRDA.

In 2015, government initiated its third[16] review process in order to strengthen the efficacy of the Mining Charter. The provisions of the recently finalised Mining Charter of 2017 are harmonised with the provisions of the Broad-Based Black Economic Empowerment (BBBEEE) Act[17], the Codes of Good Practice (DTI codes), the Employment Equity Act[18], and other relevant regulatory frameworks.[19]

In June 2017 the minister of mineral resources, Mosebenzi Zwane, released the 2017 Mining Charter: *An Instrument of Change: Giving Practical Expression to Radical Economic Transformation.*[20] It is noteworthy to mention that the Chamber of Mines has challenged the new charter, due to, among other reasons, a lack of effective and meaningful consultation in respect of the development and finalisation of the charter.

Subsequent to the minister's publication of the new mining charter, the Chamber of Mines, which represents 90% of the mining industry, brought an urgent application to interdict Zwane, his delegates, the DMR and its officials from implementing and applying the charter "in any way, directly or indirectly". pending the finalisation of a judicial review application.[21]

Following the urgent application brought on 14 July 2017, an agreement was reached wherein the minister and the DMR undertook not to apply the provisions of the new charter pending the outcome of the interdict application. In addition, in the event of a breach of the above undertaking, the chamber may set down the interdict for hearing by giving the minister 48 hours' notice. It is anticipated that the hearing date for the interdict application will be in September 2017.

The minister recently published a notice in the *Government Gazette* (using section 49 of the MPRDA[22]), advising of his intention to impose a moratorium on the following applications:

- *'the granting of any new application for a prospecting right and mining right in terms of sections 16 and 22 of the MPRDA;*
- *the processing of applications for renewal of a prospecting right and renewal of a mining right in terms of sections 18 and 24 of the MPRDA; and*

[16] The First review was initially done in 2009 and then subsequently in 2014.
[17] Act No. 53 of 2003
[18] Act No. 55 of 1998
[19] DMR Annual Report 2015/2016 available at: http://www.dmr.gov.za/publications/annual-report.html
[20] Address By The Minister Of Mineral Resources, The Honourable Minister Mosebenzi Zwane, Mp on The Occasion Of The Release Of The Mining Charter, 2017 15th June 2017, available at: http://pmg-assets.s3-website-eu-west-1.amazonaws.com/1/FinalSpeech.pdf
[21] How Zwane has overstepped the mark with mining rights moratorium, Businesslive.co.za, 20th July 2017, Jonathan Veeran.
[22] Section 49 of the MPRDA stipulates that the minister, after inviting representations from relevant stakeholders, may; prohibit or restrict the granting of any reconnaissance permission, prospecting right, mining right or mining permit in respect of land identified by the minister for such period and on such terms and conditions as the minister may determine; and restrict the granting of any reconnaissance permission, reconnaissance permit, prospecting right, mining right or mining permit in respect of a specific mineral or minerals or class of minerals identified by the minister for such period and on such terms and conditions as the minister may determine.

- *the granting of applications in terms of section 11 of the MPRDA.'*[23]

The above moratorium will, however, not apply to applications for new rights, renewal of existing rights and applications under section 11 of the MPRDA, which have been received and or accepted before 19 July 2017, subject to the condition that such applications, if granted, will not immediately be subject to the requirements of Mining Charter III.'[24] The minister granted interested and affected stakeholders until 4 August to submit representations to his deputy director-general.

According to the Democratic Alliance (DA), the decision by Zwane to freeze the issuing of new mining and prospecting licences shows that the ANC would prefer to halt all mining activities in the event that there is no share for its politically connected.[25] The DA goes on to point out the fact that 9-million South Africans are without work, and closing the door on new business is irresponsible of the minister, as this moratorium will adversely impact the growth of the mining sector and will chase investors away.[26] Nicola Jackson, a partner at the law firm Fasken Martineau, told *Business Day*: "The section relied on requires the minister to identify the land, specific mineral or class of minerals. It does not permit a blanket moratorium in respect of applications for the entire country and in respect of all minerals, effectively halting the entire mining industry."[27]

Chamber of Mines president Mxolisi Mgojo has stated that the above moratorium demonstrates the DMR leadership's disregard for the current crisis in the mining sector, and that a moratorium may have negative implications on the viability of already struggling mining companies, together with the high number of jobs that could be lost as a direct consequence.[28]

A further comment from the chamber was made by Tebello Chabana, the senior executive of transformation, who noted that: "The failure of the minister to disclose any information as to the reasons why he intends imposing the proposed restrictions or what legitimate objective they will fulfil leads to the reasonable and inevitable conclusion that his purpose in imposing the restrictions is not a bona fide one and that he has some undisclosed ulterior motive."[29]

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[23] How Zwane has overstepped the mark with mining rights moratorium, Businesslive.co.za, 20th July 2017, Jonathan Veeran.
[24] *Ibid 23.*
[25] Zwane's moratorium on mining licences an attempt to bully mining sector, www.da.org.za ,20 July 2017.
[26] Ibid 25.
[27] All Mining Transactions have been halted by Zwane, www.huffingtonpost.co.za, 20 July 2017.
[28] **Chamber of Mines shocked by Zwane's alleged moratorium on mining right applications, The Citizen, 3 August 2017. Available at: http://citizen.co.za/news/south-africa/1597102/chamber-of-mines-shocked-by-zwanes-alleged-moratorium-on-mining-right-applications/**
[29] Chamber steps up legal war on Zwane, Business Day, Allan Seccombe, Wednesday 26 July 2017. Available at www.businessday.co.za

The scope of the research

The scope of this research is limited to mining permit applications, mining right applications, prospecting right applications and environmental authorisations. We chose to examine only these processes after consulting experts in the field and conducting thorough desktop research. South Africa has a national legislative system; thus our research area is not confined to one particular province as may be the case in many other jurisdictions. We also did not consider any mining processes involving the extraction of oil and gas, as those processes fall outside the boundaries of this research project.

Transfer of mining rights

It is important to note in relation to the transfer of mining rights – an important and relevant process for purposes of this research – that an in depth analysis on the transfer of mineral rights has not been carried out. However, the way in which mining rights are transferred within the South African context, is one worth mentioning briefly.

The transfer of mining rights from one entity to another is governed by section 11 of the MPRDA, which states that one cannot transfer, cede, let, sub-let, assign or alienate the right without the written consent of the minister. However, for the change in controlling interests of listed companies, the written consent of the minister is not required, and so these types of transactions are not transparent or open to public scrutiny.

When mineral rights are transferred, the amount for the financial provision can change – mining company X may estimate the closure costs to be a certain amount, and the buyer may make provision for a smaller amount, even though the physical impact of the mine has not changed. This type of transfer can be approved by the DMR, despite having severe impacts on the environment and the likes.

There is, in fact, no legal obligation on the minister to consider the socio-economic impacts of the transfer. Also, there is unfortunately no provision in the MPRDA for public participation and as a result there is no transparency when such transactions take place.

According to Catherine Horsefield of CER, "It more often than not happens that large multinational mining companies mine most of a resource on a particular parcel of land and thereafter sell their mining rights to lesser known, less established mining companies. It is not a legal requirement for there to be public participation for the transfer of a mining right, and as a result many of these transfers take place unnoticed. These smaller companies then mine what is left of the resource and cannot afford to clean up – the result is that they either go into [business rescue, winding-up (liquidation)] or deregister. Environmental rehabilitation of the abandoned mines then falls to the state."[30]

[30] Centre for Environmental Rights, Newsflash: Mining Minister agrees to disclose De Beers' Namaqualand Mines records to Conservation South Africa, September 2015, available at: http://cer.org.za/news/newsflash-mining-minister-agrees-to-disclose-de-beers-namaqualand-mines-records-to-conservation-south-africa ,September 17, 2015.

In a case regarding the sale by De Beers of its Namaqualand mines to Trans Hex, civil society organisation Conservation SA brought the matter to the Western Cape High Court so that De Beers may be ordered to disclose documents relating to the sale of their mining right.[31] The said documents indicate that the financial provision for environmental rehabilitation, after the sale, may allegedly have been reduced by as much as 70%.[32] This is an example of a case where civil society intervention allowed for public scrutiny of this type of transaction. Such transactions can have severe impacts, and this case also shows how, without public scrutiny, such types of transactions more often than not go unnoticed owing to a lack of transparency.

Examined application processes

Each of the four processes is dealt with separately under the headings below and in order to clearly depict each process, a diagram/flowchart has been included to set out the step-by-step legislative process.

The diagrams depict the legislative processes set out in the MPRDA and NEMA (official process) compared with the way the process unfolds in reality (actual process). This dual illustration highlights the extent to which the actual process deviates from the official prescribed process.

In order to establish the extent and nature of this deviation, Corruption Watch hosted a roundtable focus group discussion on 7 February 2017, as a side event to the 8th Alternative Mining Indaba in Cape Town, South Africa. The 22 roundtable participants included various stakeholders, ranging from mining communities, civil society, community members, academics and lawyers, all of whom encounter the deviations from official process on a daily basis in relation to the work that they are engaged in.

Application for a mining permit

A mining permit is a document issued by the DMR which allows the holder to conduct small-scale mining operations. It must be noted that mining permits are only issued where the particular area does not exceed five hectares and if the mineral can be mined optimally within a period of two years.[33] A mining permit should be submitted together with an application for environmental authorisation.[34] A mining permit may be renewed for three periods, each of which may not exceed one year, and may

[31] *Ibid 21.*
[32] *Ibid 22*.
[33] Section 27 of the MPRDA.
[34] Section 27(2) of the MPRDA.

not be transferred, ceded, let, sublet, alienated or disposed of. It may however, be encumbered or mortgaged for the purpose of funding or financing, but only with the minister's consent. [35]

Step by step process for a mining permit application[36]

1. An application is made online via the online portal, known as SAMRAD (South African Mineral Resources Administration System);
2. In accordance with the MPRDA, an application for environmental authorisation should be made simultaneously online, (environmental authorisation will be dealt with below);
3. If the applicant does not have all required documents, the application will be rejected;
    3.1 If the application meets the requirements (all documents, and there is no other permit holder), the application is accepted and the applicant is notified that the application has been accepted for consideration.
4. The applicant is required to consult with the land owner, occupier or interested and affected party and is required to submit environmental reports;
5. The regional manager is required to issue a section 10 notice:
    a. In the event of an objection, the objection is sent to RMDEC
    b. Application is either accepted or rejected at RMDEC
6. The regional manager must ensure compliance with section 27 and send the application to the minister for consideration;
7. The minister can grant or reject the application.

Infographic for a mining permit application

The aforementioned narrative of the legislative process for a mining permit is depicted in the infographic below. The actual practices, which give rise to vulnerabilities in the application process, will be dealt with in more detail in the section which deals with vulnerabilities.

[35] Section 27(8) of the MPRDA.
[36] Section 27 of the MPRDA.

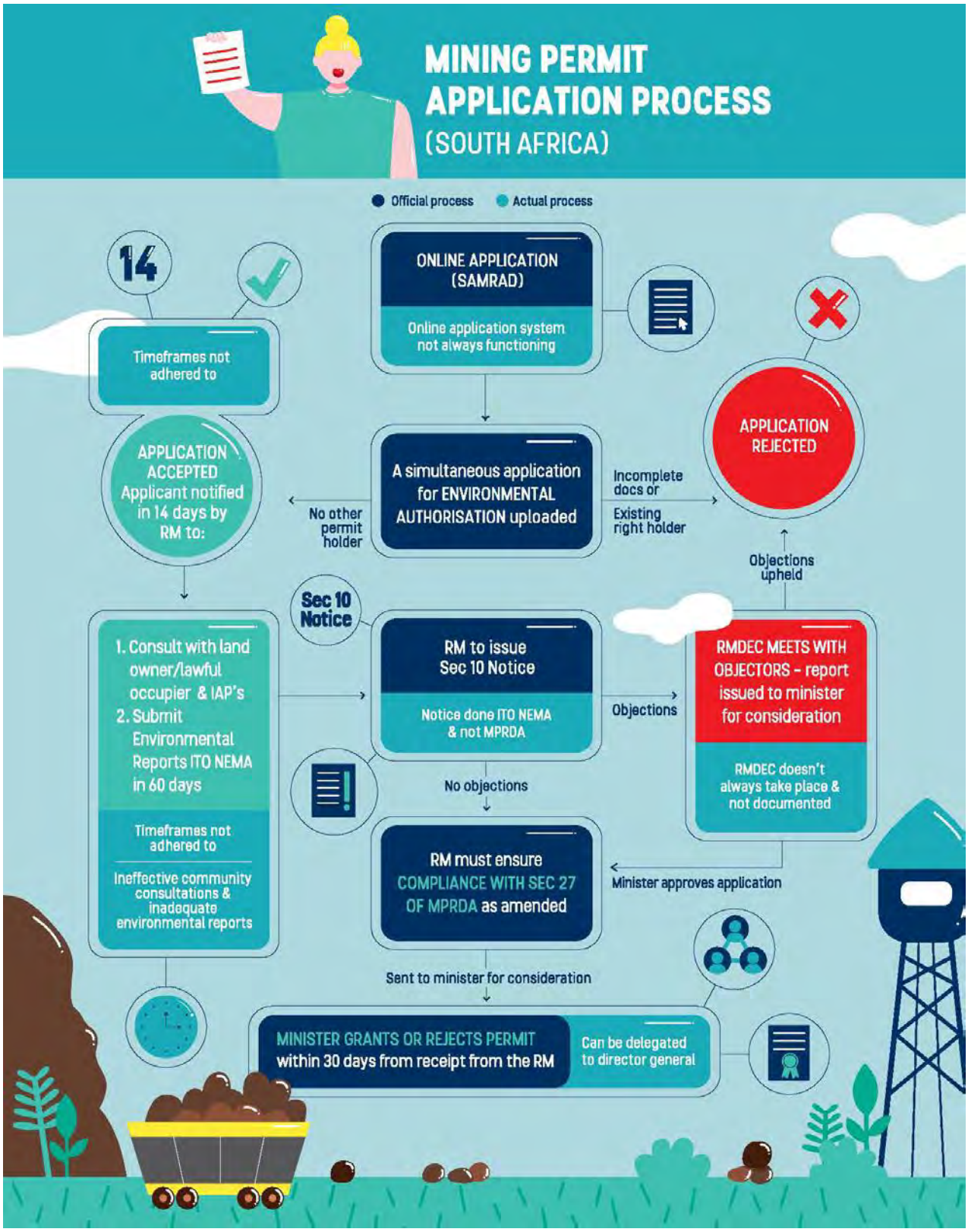
MINING PERMIT APPLICATION PROCESS
(SOUTH AFRICA)
Official process
Actual process
ONLINE APPLICATION (SAMRAD)
Online application system not always functioning
APPLICATION REJECTED
A simultaneous application for ENVIRONMENTAL AUTHORISATION uploaded
Incomplete docs or
Existing right holder
No other permit holder
14
Timeframes not adhered to
APPLICATION ACCEPTED Applicant notified in 14 days by RM to:
Objections upheld
Sec 10 Notice
1. Consult with land owner/lawful occupier & IAP's
2. Submit Environmental Reports ITO NEMA in 60 days
Timeframes not adhered to
Ineffective community consultations & inadequate environmental reports
RM to issue Sec 10 Notice
Notice done ITO NEMA & not MPRDA
Objections
RMDEC MEETS WITH OBJECTORS - report issued to minister for consideration
RMDEC doesn't always take place & not documented
No objections
RM must ensure COMPLIANCE WITH SEC 27 OF MPRDA as amended
Minister approves application
Sent to minister for consideration
MINISTER GRANTS OR REJECTS PERMIT within 30 days from receipt from the RM
Can be delegated to director general

Diagram 1

Application for prospecting right and mining right

Prospecting right

Chapter 1 of the MPRDA describes prospecting as "intentionally searching for any mineral by means of any method which disturbs the surface or subsurface of the earth, including any portion of the earth that is under the sea or 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."[37]

A prospecting right is valid for five years, and may be renewed for a period of no longer than three years.[38] An ordinary prospecting right is granted by the minister upon application, if the requirements of section 17 of the MPRDA are met. Section 104 (1) of the MPRDA also provides for the granting of "preferential right to prospect or mine" to a traditional community to prospect on community land.

A unique aspect of prospecting rights is the *use it or lose it* principle which states that the holder of a prospecting right should commence with prospecting activities within 120 days from the date on which the prospecting right becomes effective.[39] Furthermore, according to section 20 of the MPRDA, the holder of a prospecting right may only remove and dispose of any mineral found during prospecting operations in quantities as may be required to test, identify or analyse it.

The holder of a prospecting right must also obtain the minister's written permission to remove and dispose of diamonds and bulk samples of any other minerals found during prospecting operations.[40] This is a provision which is unique to prospecting rights and one which could easily be manipulated because removed bulk samples could be sold commercially without the minister's consent.

The legislative requirements for the granting of a prospecting right are set out in section 17 of the MPRDA. If the minister refuses to grant such a right, he or she must "within 30 days of the decision, in writing, notify the applicant of the decision with reasons…the Minister may delegate her power to grant or refuse an application for a prospecting right to the Deputy Director-General of Mineral Development".[41]

Once granted a prospecting right, the holder of the right must register it at the Mining Titles office.[42]

[37] Section 1 of the MPRDA.
[38] Section 18(4) of the MPRDA.
[39] Section 19(2)(b) of the MPRDA.
[40] Section 20 of the MPRDA.
[41] Section 103 (1) of the MPRDA; Delegation of Powers by the Minister of Minerals and Energy to Officers in the Department of Minerals and Energy of 12 May 2004.
[42] Section 19(2)(a) of the MPRDA.

Mining right

According to the MPRDA, mining refers 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"[43]

A mining right comes into effect on the effective date on which the right is executed.[44] It may be reviewed for further periods, not exceeding 30 years at a time.[45] The application for a mining right will be granted if the legislative requirements as set out in section 23 of the MPRDA are met. If the minister refuses to grant the mining right he should notify the applicant of his decision within 30 days with reasons.

Below is a narrative of the legislative procedure for both a prospecting right and a mining right application, followed by an infographic depicting both processes;

Step by step legislative process for a prospecting/mining right application

1. An application is made online via the online portal, known as The South African Mineral Resources Administration System (SAMRAD);
2. In accordance with the MPRDA, an application for environmental authorisation should be made simultaneously online (environmental authorisation will be dealt with below);
3. If the applicant does not have all the required documents, the application will be rejected;
    3.1 If the application meets the requirements (all documents, and no other permit holder), the application is accepted and the applicant is notified that the application has been accepted for consideration.
4. The applicant is required to consult with the land owner, occupier or interested and affected party and is required to submit environmental reports;
5. The regional manager is required to issue a section 10 notice:
    a. In the event of an objection, the objection is sent to RMDEC
    b. Application is either accepted or rejected at RMDEC
6. The regional manager must ensure compliance with section 17 (prospecting) and section 23 (mining right) of the MPRDA and must send the application to the minister for consideration;
7. The minister can either grant or reject the application.

Infographic for a mining right and prospecting right

The step by step legislative process for both a prospecting right and a mining right is depicted in the infographic below. Because the processes are similar, the same diagram is used to showcase both processes. The diagram depicts the legislative or official process alongside the actual practice. The

[43] Section 1 of the MPRDA.
[44] Section 23(5) of the MPRDA.
[45] Section 24(4) of the MPRDA.

actual practices which give rise to vulnerabilities in the application process will be dealt with in more detail in the relevant section below.

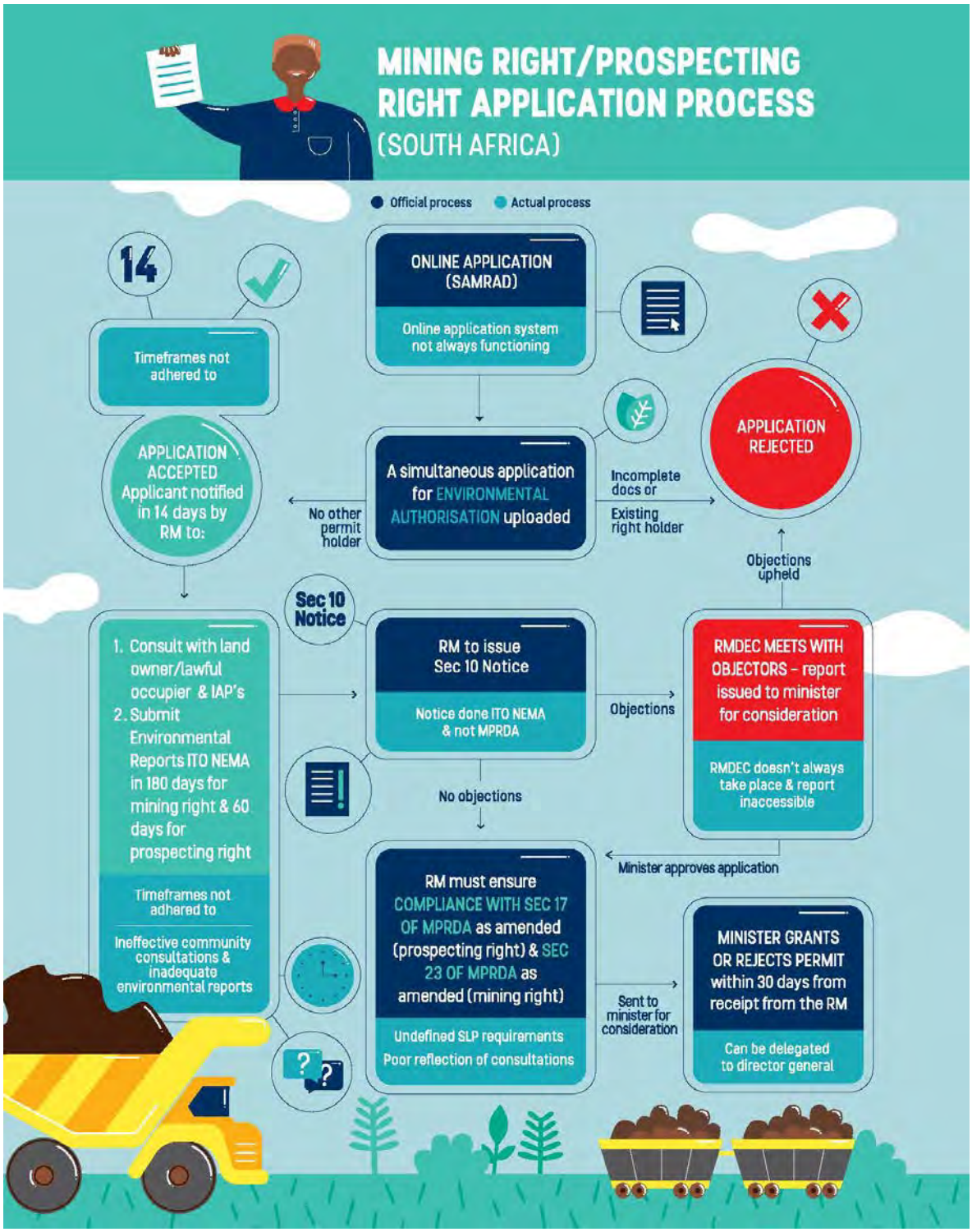

Diagram 2

Environmental authorisation application

Following the implementation of the One Environmental System, environmental authorisation applications are dealt with under the National Environmental Management Act, 1998 (NEMA) read with the Environmental Impact Assessment (EIA) regulations and the various listing notices.[46] NEMA sets out environmental management principles[47] that should guide environmental decision-making throughout the mining life cycle.

Environmental authorisations (EAs) are required for prospecting and mining operations. Because mining operations cannot take place without an EA, it is imperative to include EAs within the scope of this research report.

The activities which require EAs are set out in listing notices published in terms of section 24(2)(a) of NEMA.[48] EA applications made in respect of activities listed in listing notice 1 must be accompanied by a basic assessment report and activities listed in listing notice 2 must be accompanied by a scoping and environmental impact assessment report. It must be noted that a scoping and environmental impact assessment report is more cumbersome than a basic assessment report.

For all of the aforementioned activities, applicants are also required to submit specialist reports (such as reports by geo-hydrologists, wetland specialists, biodiversity specialists and heritage specialists), draft environmental management programmes, closure plans and financial provision.

Step by step process for applying for an environmental authorisation

1. An application is made online via the online portal, known as SAMRAD (South African Mineral Resources Administration System);
2. Upon acceptance of the online application, the DMR instructs the applicant to submit relevant environmental reports and to give notice to interested and affected parties to submit comments on the application (section 10 notice);

    *Different processes are then followed depending on whether it is a prospecting right or a mining right/permit; these will be dealt with separately and in turn below:

Prospecting right or mining permit

1. A basic assessment process is followed:
    a) Applicant must submit an environmental management plan (EMPR), and a basic assessment report (BAR);
    b) A meeting is held with interested and affected parties to comment on the draft EMPR and BAR;

[46] Government Gazette No. 40772.
[47] See s 2(4) of the NEMA.
[48] See activities 20 (prospecting right) and 21 (mining permit) in Listing Notice 1 and activities 17-22 (mining right, exploration right, the removal and disposal of minerals, production right and the primary processing of a petroleum resource) in Listing Notice 2.

c) The draft reports are submitted to the DMR for consideration;
d) Environmental authorisation is either accepted or rejected;
e) Appeals are made to the Department of Environmental Affairs.

Mining right

1. A scoping and environmental impact assessment process is followed:
   a) A draft scoping report (DSR) is made available to all registered and interested and affected parties and a meeting is held for comments to be made;
   b) The DSR, together with comments made by interested and affected parties, is submitted to the DMR for consideration;
   c) The DSR is either accepted or rejected and the interested and affected parties are notified thereof;
   d) Upon acceptance, the applicant is instructed to submit an EMPR and an environmental impact assessment report (EIAR);
   e) A meeting is held with interested and affected parties to comment on the draft EMPR and BAR;
   f) The draft reports are submitted to the DMR for consideration;
   g) Environmental authorisation is either accepted or rejected;
   h) All appeals are made to the Department of Environmental Affairs

Appeals

Any decision to either grant or refuse the requested EA may be appealed to the Department of Environmental Affairs (DEA). It is relevant to note that appeals regarding EAs are made to the DEA and not to the DMR. The Centre for Environmental Rights (CER) has in the past argued (and continues to argue) that the function of processing and taking decisions relating to environmental authorisation applications should be performed by the Department of Environmental Affairs (DEA) and the various provincial departments responsible for environmental affairs.

CER argues further that the DEA is in a better position to take all decisions on environmental authorisation applications as opposed to the DMR, whose core mandate is promoting the extractive industry.[49]

Infographic for environmental authorisation

The step by step legislative process for environmental authorisations is depicted in the infographic below. The diagram depicts the legislative or official process alongside the actual practice. The actual

[49] Zero Hour, by CER, May 2016 available at: http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf).

practices which give rise to vulnerabilities in the application process will be dealt with in more detail in the relevant section below.

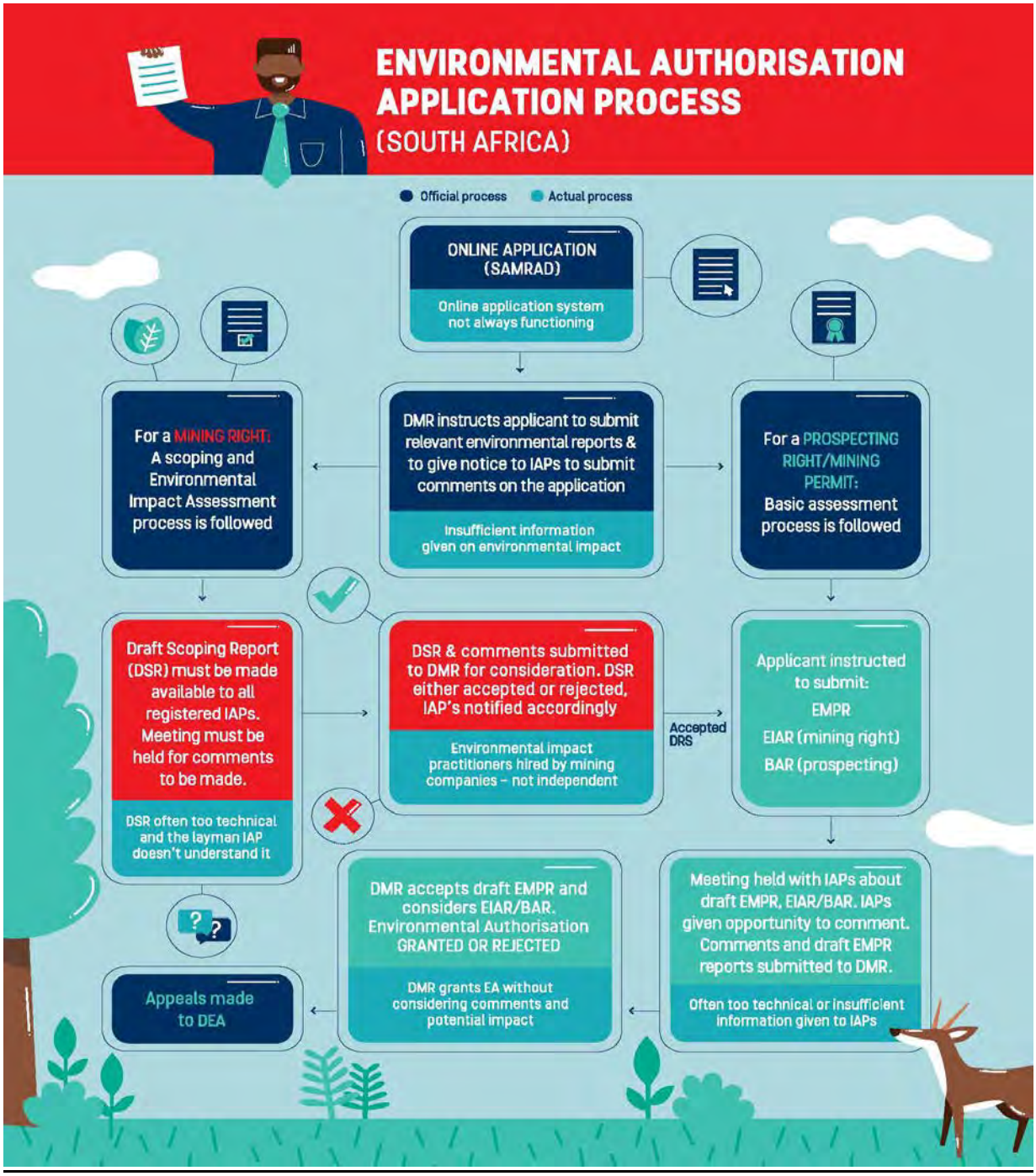

Diagram 3

Vulnerabilities in the application processes

Key vulnerabilities, identified through the research process involving informant interviews, focus group discussions, analysis of legislation and secondary literature, are dealt with below.

To identify vulnerabilities, each stage of the application process was examined and the design of the different processes was also analysed. Note that the vulnerabilities identified below apply to all four processes discussed within the scope of this research (mining permit, mining right, prospecting right and environmental authorisation). Each will be discussed separately and in turn below.

The identified vulnerabilities are as follows:

- Online application system (SAMRAD);
- Timeframes;
- Community consultations;
- Section 10 notices;
- Regional Mining Development and Environmental Committee (RMDEC);
- Delegation of authority;
- Social and labour plans (SLPs);
- One Environmental System;
- Environmental impact assessments;

Online application system (SAMRAD)

South Africa's mining awards process is managed by SAMRAD**,** a system which provides for all applications to be submitted electronically. In practice, SAMRAD does not always function as it is meant to. In a Parliamentary Monitoring Group meeting held on 8 March 2017, Ms Nkambule, chief director for mineral regulation at the DMR, stated: "Measures have been put in place to address the challenges that might arise from non-access to the SAMRAD system, hence there is still a chance to allow manual lodgement of applications".[50]

The fact that manual lodgement of applications is still possible despite the introduction of SAMRAD, is a clear vulnerability within the application process. This was evident in a widely publicised case involving Sishen Iron Ore Company, AMSA and ICT.[51] The case 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 Kimberly regional office.[52]

[50] https://pmg.org.za/committee-meeting/24103/;

[51] Minister of Mineral Resources of the Republic of South Africa and Others v Sishen Iron Ore Company (pty) Ltd and Another (394/12) [2013] ZASCA 50; 2013 (4) SA 461 (SCA); [2013] 3 All SA 270 (SCA) (28 March 2013).

[52] 'Concourt puts Sishen Mining Rights Dispute to Bed', Mail & Guardian, by Lionel Faul,12 December 2013. Available at: https://mg.co.za/article/2013-12-12-concourt-puts-sishen-mining-right-dispute-to-bed

In an interview with mining house A, we were advised that SAMRAD's dysfunctionality sometimes causes the granting of double rights and applicants have to resort to litigation to settle such a dispute.[53] Mining lawyer and expert Peter Leon corroborated this story. He stated that: "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." [54]

Our engagement with a source from the DMR, who preferred to remain anonymous, pointed to the fact that the MPRDA has not been amended to include a provision for applications to be lodged on SAMRAD. In fact, the MPRDA still states that applications should be lodged at the office of the regional manager. The source noted that despite the fact that SAMRAD was intended to curb corruption, it has not had this desired effect, as double, triple and sometimes even quadruple licenses are still being granted over the same mineral deposit. The source stipulates that the reason for this could be due to the fact that the DMR is either ill-informed, or that the system administrator is not updating the SAMRAD system to include approved applications.

The DMR source spoke of a system specialist (also known as the GIS specialist) who deals with reports in terms of mineral information and may sometimes unlawfully disclose information about where minerals are geographically located. Furthermore, the DMR relies on the credibility of the system specialist, who can easily provide false information: "…the system is even being manipulated to suit 'friends', and cash and cars are being exchanged, with not only the system specialist but with other internal individuals."

The DMR source pointed out the very interesting fact that sometimes internal applicants (DMR staff), have interests in mining activities and are able to manipulate the coordinates on the system to suit themselves (with the assistance of the system specialist).[55]

There is, however, an upside to the use of SAMRAD. For instance, the system can track which staff member made changes on the system or who altered particular details.[56] This feature could thus assist in tracking corruption.

There is also a hotline for internal investigations/maladministration, known as the special investigations unit, (telephone: +27 12 444 3740/+27 12 444 3216). However, we did not establish how well-informed the public is about this hotline.

The evidence cited above confirms that the vulnerabilities which arise from SAMRAD can either be attributed to human manipulation or to system failure. As the first procedural step into the application process, these weaknesses in SAMRAD pose a clear vulnerability which applies to all the processes within the scope of this research.

[53] Interview held with *Mining Company A* on the 10th March 2017.
[54] 'Concerns that South Africa's Flawed Online Mining Cadastre Portal could be Constricting an already Stressed Mining Sector' 2012-11-30; Mining Weekly.
[55] Meeting with anonymous official from the DMR May 2017.
[56] Ibid.

Timeframes

The MPRDA provides specific timeframes for the processing of applications to enable applicants to estimate the length of processing time as well as to guide investors on the turnaround periods for their investments.

Research revealed that the legislative timeframes stipulated in the MPRDA are, more often than not, not adhered to. The reason varies from a lack of capacity at the DMR and system failures to unlawful conduct. Below are different sources of evidence obtained from our research, stipulating challenges with regards to the issue of timeframes.

In our expert interview with well-established mining lawyers,[57] it was stated that time periods for processing applications in South Africa need to be more stringent. They also pointed out that other countries, like Botswana, have a rapid turn-around time which is beneficial to investment.

This issue was addressed during a Parliamentary Monitoring Group meeting, where Ms Nkambule of the DMR, stated that: "Some measures have been put in place to improve the turnaround times in the application process. Among these is the investment *one stop shop*, capacity building workshops on the application process, the OES, and continuous improvement of the legislation framework".[58]

Our interview with a senior executive at the National Chamber of Mines also confirmed that legislative timeframes are not adhered to, and as a result, many companies take the regulator to court, using the Promotion of Administrative Justice Act (PAJA)[59] in order to get them to comply with timelines.[60]

In our interview with mining company B, the official confirmed the long delays when applications are processed at the DMR. He stated that more often than not, one has to speak to a staff member internally in order to get an application processed. He also advised that mining company B has stressed to the DMR that there is a need for strict timelines for approval.[61]

Our engagement with the anonymous source from the DMR also raised an interesting issue with regards to timeframes. The source stressed the fact that timeframes are not properly regulated, and that there are different interpretations of the law across the different regional offices. For instance, the law stipulates that within 14 days of receipt, the regional manager must notify the applicant of the acceptance of an application. However, this is sometimes interpreted to mean that *only* if the regional manager *decides* to accept the application, should he inform the applicant within 14 days. The result of such an interpretation means that it can take the regional manager an unspecified amount of time to decide to accept the application, and only after he has decided is he obliged to inform the applicant

[57] Interview held on 12 December 2016; Johannesburg.
[58] Parliamentary Monitoring Group Minutes 8 March 2017**.** Available at *https://pmg.org.za/committee-meeting/24103/;*
[59] Act 3 of 2000.
[60] Meeting with a Senior Executive at the Chamber of mines; 13 December 2016.
[61] Meeting with Official at *mining company B* on 12 April 2017.

within 14 days. This is a deviation from the original meaning of this provision, which is to accept an application 14 days after receipt of same.

We were advised further by the anonymous source that there are several provinces with a backlog of applications. In Mpumalanga in particular, there is a huge backlog of applications, with almost 600 applications awaiting consideration. The source revealed that unfortunately, it depends on who is supporting your application (whether internally at the DMR or externally), as there are applications dating back to 2012 that have not been accepted or rejected, yet unbeknown to the applicant, have been sent to registry. Furthermore, if a staff member is absent from work, files can be taken from that member's office to prevent an application from being processed; or if a staff member intends to sabotage a particular application they will merely file it without accepting or rejecting the application.[62]

The aforementioned evidence, obtained from a variety of sources, indicates that non-adherence to legislative timeframes is a weakness within the application process, and the delays (whether cause by capacity constraints or deliberate mal-intention), may result in corrupt activity.

Community consultations

South African mining law requires mining companies to engage in public consultations while to acquiring a prospecting right, a mining right and or an environmental authorisation. However, the term 'consultation' does not refer to consent, and as a result these consultation processes can be said to merely be procedural. Furthermore, there is a vast imbalance in terms of knowledge resources, wealth and power that underpin such engagements, and most communities are intimidated by the level of expertise presented by corporations at such gatherings.[63]

When mines hold compulsory EIA meetings with communities, the representative of the particular corporation has high level environmental, geographical, geological and hydrological knowledge, whereas in contrast, the communities have low levels of literacy and hardly any tertiary education.[64]

The MPRDA contains limited provisions relating to mining communities. Under its chapter 2, MPRDA, mining companies must notify and consult "with the land owner or lawful occupier of the land in question." Although the MPRDA has broad commitments to the well-being of communities, in contrast

[62] Meeting with anonymous official from the DMR May 2017.
[63] Badenhorst PJ and Olivier NNJ, Host community and competing applications for prospecting rights in terms of Mineral and Petroleum Resources Development Act 28 of 2002. See section 10 of MPRDA.
[64] Ibid.

it also has some limited provisions pertaining to the actual community consultation process and notification. [65]

There has been criticism surrounding the legal provisions regarding community consultations. This is because the regulatory scheme in South Africa presupposes a *one-size-fits-all* model for communities, despite their different needs and circumstances, and the actual voices of the affected mine communities are not heard.[66] "This challenge is directly related to the difficulties in defining 'indigenous peoples' and 'previously disadvantaged communities' in the South African context, and which ultimately makes it difficult to design laws that effectively benefit these groups".[67]

There has been important case law on the issue of community consultations in South Africa. For instance, the case of Bengwenyama Minerals Pty Ltd.[68] dealt with many issues, but the one of relevance to this particular section of the report is how Genorah Resource's application for prospecting was approved by the DMR, and they were requested to submit an environmental management plan, to consult with the land owner and to consult with any interested and affected parties.

However, Genorah only wrote a letter to the Kgoshi (Chief) informing him of their intentions, and no actual consultations took place in respect of the prospecting right application or the environmental management plan. The application for a prospecting right was granted nonetheless. Fortunately, the actions of Genorah and the DMR were set aside on review, after 10 years of litigation. Their actions are an example of the complete lack of regard for the law when it comes to community consultations.

We engaged on the subject of community consultations in all our interviews. The organic development of the research revealed the gravity of the problem in South Africa, and the dire impact it has on communities. In an engagement with Marthán Theart of the Centre for Environmental Rights, we were advised that because of the lack of effective community consultations, community members are not able to voice their concerns about the potential impacts of mining on the environment. This often leads to licenses being granted without proper consideration of community needs and the community's legitimate concerns.[69].

A researcher from the Land and Accountability Research Centre said, with regards to community consultations, that: "Community consultations are often tick-box exercises and do not fulfil their intended purpose."[70]

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[65] A Mandela Institute report '*Public regulation and corporate practices in the extractive industry*' available Public Regulation and Corporate Practices in the Extractive Industry; A South–South Advocacy Report On Community Engagement, *By* The Mandela Institute, University of The Witwatersrand.

[66] *Ibid 56.*

[67] *Ibid 56*.

[68] CCT39/10(2010) ZACC 26.

[69] Expert Interview with Centre for Environmental Rights, Marthan Theart & Matome Kapa (9th February 2017).

[70] Corruption Watch round table discussion on Mining for Sustainable Development-transparency and accountability in the awarding of mining licenses, contracts and permits (7th February 2017).

In 2016 the South African Human Rights Commission hosted a national hearing on the socio-economic effects of mining on communities.[71] During the hearings, it emerged that community members often get threats or are intimidated by other members of the community, who are illegally benefiting from mining activities, in order to prevent the community from voicing its opinions or raising concerns regarding proposed mining activities.

From the above, it is clear that consultation with communities can lack meaning and purpose and mining companies often merely feel the need to meet their legislative requirement to consult, as opposed to fulfilling the intended purpose of consultations, which is to ensure the voices of community members are heard, and their specific needs are addressed. The issue of community consultations is also defective when it comes to the issue of traditional leadership or chieftainship – this will be dealt with in more detail below.

As already indicated, the regulatory scheme in South Africa presupposes a *one-size-fits-all* model for community engagements, irrespective of specific community need or circumstances. Mining companies will sometimes only engage with one individual to fulfil their legislative obligations for public participation, despite the ineffectiveness and futility of such an engagement.[72]

During a roundtable hosted by Corruption Watch, the subject of community consultations was discussed at length. Community members gave testimonies of their first-hand experience with mining companies during community consultations. One participant, a member of a mining community, stated that: "mining companies come into our community and only engage with the Chief/'Kgoshi', 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."[73]

In a report received by Corruption Watch, the issue of traditional leadership surfaced, and we were advised that mining companies are able to enter into agreements with individuals as opposed to engaging with the community as a whole or with the lawful land owners. This was confirmed by an article published in the *Sowetan*, which stated that apparently in most mining affected communities where there are traditional authorities, there are mining companies entering into private deals with traditional authorities on behalf of the whole community.[74]

In an interview with mining company A*,* it was indicated that traditional leadership is a contentious issue. The government needs to better regulate the issue of traditional leaders, and the manner in which mining companies ought to consult with the Council (Kgoro). Mining company A went on to

[71] Hearing held at the SAHRC on 13 & 14 September 2016.
[72] South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals Elmarie van der Schyff Faculty of Law North-West University, Potchefstroom Campus.
[73] Corruption Watch round table discussion on Mining for Sustainable Development-transparency and accountability in the awarding of mining licenses, contracts and permits (7 February 2017).
[74] Traditional Leaders Fuel Mining Tension, Sowetan, 14 September 2016; PressReader.com

stipulate that at the moment, mining houses are not sure who the community leaders are, and legislation does not govern the issue of traditional leadership properly, most likely because government has failed to streamline the legislation.[75]

A news article published in the *City Press* in 2015 affirmed that "…Section 24 of the proposed Traditional and Khoi-San Leadership Bill, gives traditional councils the power to enter into partnerships with the private sector in ways that may undermine the customary rights of rural citizens…clears the way for traditional councils to strike deals that could have massive communal ramifications for local communities, without consulting them. These could include mining deals, private land developments, infrastructure projects, road building and so on".[76]

The civil society coalition against the MPRDA argues that communities should have the right to decide whether or not they want mining on their land and if so, under what conditions. They highlight the fact that: "The MPRDA allows mining companies to occupy communities' land, to destroy their environment and to extract huge amounts of profit while giving communities nothing in return". These practices are exploitative and have led to great adversity for affected communities, including forced removals, ill-health, bad working conditions, and the marginalisation of local communities from economic opportunities arising from mining activities.[77]

The parliamentary mandated panel, chaired by former president Kgalema Motlanthe, has travelled across all nine provinces in the country and has received more than 1 000 written submissions from communities. Motlanthe expressed that traditional leaders are asked to give the go-ahead on mining projects, under the auspices of representing the entire community, and that "…mining companies merely give the traditional leaders an office or a 4x4 vehicle and the project gets approved."[78]

In an article published by the Mandela Institute on community consultations, it is cited that in South Africa, mining laws disempower rather than empower local communities. There is a lack of sufficient information, there are weak legal protections and insufficient mechanisms in place to ensure that communities not only participate but also benefit from mining. The result is that communities are unable to hold either the government or mining companies accountable, and are restricted from pursuing protection of their rights and interests[79].

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[75] Meeting with *Mining Company A* (10 March 2017).

[76] Democracy for rural people under threat; City Press, 2017-01-15, News24.com

[77] https://www.wits.ac.za/news/sources/cals-news/2017/civil-society-coalition-vows-to-fight-mprda.html

[78] Kgalema panel not keen on laws in mining, 26 July 2017, Bianca Capazorio, Business Day. Available at www.Businessday.co.za

[79] Public Regulation and Corporate Practices in the Extractive Industry, A South South Advocacy Report on Community Engagement, By The Mandela Institute, University of the Witwatersrand, 2017. Available at: https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/mandela-institute/documents/research-publications/Public%20Regulation%20and%20Corporate%20Practices%20in%20the%20Extractive%20Industry,%20a%20Mandela%20Institute%20report.pdf

In light of the above sources, it is clear community consultations is a contentious issue in the South African mining sector. It is an extremely vital part of the application process, with little legislation governing it, and having detrimental impacts on communities. The issue of mining companies consulting only with a traditional leader/chief to fulfil their legislative obligation is also an area of great concern, especially because traditional leaders are notorious for serving their own personal interests and that of their families above that of the community at large.[80] Furthermore, there is a lot of contention as to who the rightful traditional authorities are within these communities.[81]

Section 10 notices

Section 10 of the MPRDA states that within 14 days after accepting an application for a mining permit, mining right or prospecting right, the regional manager must not only make it known that an application has been made, but should also call upon interested and affected persons to submit their comments regarding the application, within 30 days from the date of the notice.

If a person objects to the granting of a prospecting right, a mining right or a mining permit, the regional manager must refer the objection to the RMDEC for consideration of the objections, and to advise the minister thereof. Section 10 notices are placed in the government gazette, the local newspaper or the Magistrates Court. A Section 10 notice must stipulate that the regional manager is inviting all interested and affected parties to send comments, concerns and or objections to the regional office within 30 days of the notice.

Our engagement with Marthán Theart, knowledge and information coordinator for the Centre for Environmental Rights (CER), revealed that both the MPRDA and NEMA require applicants to put up notices to inform the public of mining activities. Furthermore, section 41 of the EIA regulations[82] sets out the process for notifying the public with regards to environmental authorisations, and section 10 of the MPRDA sets out the process for notifying the public in respect of mining activities.

Both of these processes are required in order to notify the public so that objections may be raised. However, applicants have a tendency to follow the public participation process as set out in the EIA regulations only, without following the section 10 notice as set out in the MPRDA.[83] CER said they were unsure of the exact reason for this deviation from the official process but it could possibly be because the EIA process is more onerous and as a result applicants prefer to only follow the one process.

[80] See: http://www.lhr.org.za/news/2016/press-release-david-and-goliath-wilgespruit-community-goes-north-west-high-court-over-thei
[81] Ibid 70.
[82] Environmental Impact Assessment Regulations, 2014, in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998).
[83] Expert Interview with Centre for Environmental Rights, Marthán Theart & Matome Kapa (9 February 2017).

Another aspect of Section 10 notices that was brought to our attention was that these notices are always in English, despite the fact that most community members are unable to read, let alone object to these notices. At the roundtable held by Corruption Watch,[84] many participants said that the information presented to communities was too technical and complex and presented as bulky English documents, which no one is able to read. This has the propensity to exclude the illiterate from raising objections, because they do not understand the nature of the proposed mining operations.

We raised this issue in our engagement with mining company B, who said that: "The issue of what language the notices or reports are done in is irrelevant. If people cannot read, they can't read, and those who can read, can read English also. Even if I publish it in 11 languages, I am still going to get the same results. It is a criticism that I have always had. If it is in the newspaper they say they don't have money to buy a newspaper, if it is on the website they say they don't have data. Even through SMS, they say they don't get it as they don't have data. Generally speaking, those who are in a position to understand are able to read English. It is a problem, but is not a very big problem."[85]

From the above it is clear that in theory, Section 10 notices are meant to ensure that certain information is disseminated between mining companies and the community, so that objections may be raised. However, this does not take place in practice, either due to unofficial processes taking place or the inability of communities or interested and affected parties to understand the nature of Section 10 notices. This argument was contested by mining company B as depicted above, as well as by the official from the DMR who stated that there are mayors and chiefs who are literate and are able to disseminate this information to the community at large.[86]

It is apparent from the research conducted that there are varying positions on this particular risk. In our view, the risk lies in communities not being able to understand any notice that is likely to impact on their lives, despite there being arguments countering this.

Regional Mining Development and Environmental Committee (RMDEC)

As already mentioned above, a RMDEC is called when there is an objection to a Section 10 notice. RMDECs are made up of officials from the DMR and other government departments. They meet with the objector(s), deliberate the matter, and send a report to the minister, who then decides whether or not to grant the right.

[84] Participants at the Corruption Watch roundtable at the Alternative Mining Indaba, 7 February 2017.
[85] Meeting with mining company B 12 April 2017.
[86] Interview with an anonymous official from the DMR (May 2017).

The case of Eyesizwe Paardeplaats 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 decided against granting it[87] for the following reasons;

- Insufficient public participation and consultation;
- An insufficient environmental management plan; and
- The inputs of other state departments were ignored.

Despite the issues raised, the prospecting right was still granted. This case is illustrative of the fact that although RMDECs are set up to uphold important objections or issues raised by community members, they do not always serve the intended purpose.

RMDECs are an important part of the application process, as they provide a platform for interested and affected parties to raise concerns about prospective mining activities. The research conducted revealed that RMDECs do not always take place, and in fact some interviewees were altogether unaware of them. For instance, in an interview with mining company A we were advised that: "RMDEC is a committee that sits in order to advise on whether or not a right should be granted. It involves all other departments and it is important that it takes place. They are effective and they advise the minister on whether to grant a right. They involve departments like Rural Affairs, Traditional Affairs, Land Development etc."[88]

However, the National Chamber of Mines gave a different perspective, saying that*:* "One of the issues in terms of the awarding of licenses is that if there is a dispute at a regional level, there is meant to be an RMDEC, but these REMDCs have not been operational."[89]

The official interviewed from mining company B was unaware of the RMDEC or its functions.

It must be noted that if the regional manager does not properly implement a RMDEC, the DMR can be taken to court to compel him to convene a RMDEC. This is not a right of recourse most members of communities are aware of, and there are also significant financial barriers relating to community members accessing justice. This was confirmed in a report brought to Corruption Watch, which said that despite an objection to a Section 10 notice for prospecting, a RMDEC was not convened and prospecting operations continued despite objections.[90] This matter is subsequently being taken to court to appeal the decision of the DMR.

From the conflicting information obtained from our different sources, it is clear that RMDECs in South Africa is a touchy subject. In some instances, they don't take place at all, in others they do take place but the effects are not felt by the objectors, and in other instances, they are meaningful and effective.

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[87] *Centre for Environmental Rights;* EYESIZWE PAARDEPLAATS case; summary available at: http://cer.org.za/wp-content/uploads/2011/12/Eyesizwe-Paardeplaats.pdf

[88] Meeting with mining company A (10 March 2017).
[89] Meeting with Senior Executive at the Chamber of Mines (13 December 2016).
[90] Report brought to Corruption Watch in October 2016, by community affected by mining operations.

This creates industry uncertainty and is a weakness in the system, not only because there is no uniformity within the DMR in terms of convening RMDECs, but it also means that the objections of interested and affected parties are being overlooked, if heard at all.

Delegation of authority

During the course of interviews, the issue of *delegation of authority* was raised several times. According to Section 103 of the MPRDA, the minister may delegate the authority for the granting of a license to the director-general or regional manager. The concern here is that if ministers merely approve applications on the recommendation of lower-ranking officials without verifying the merits or truthfulness of the contents of the application, it may allow the delegated officials to push their own agendas when approving applications.

However it must be noted that according to the MPRDA, the minister may also withdraw any decision taken by a delegated authority.[91]

In our meeting with mining company A, we were advised that DMR officials have too much discretionary power. The company official went on to explain that corruption, more often than not, involves lower-ranking officials and not their high-ranking colleagues. Furthermore, the deputy director-general makes recommendations to the director-general (DG) regarding approval of a license and the DG accepts without having a clear idea of whether the applicant meets all the requirements.[92]

In an interview with a DMR official, we were advised that the aspect of delegation of authority does not necessarily give rise to corruption, as corruption can arise anywhere in the application chain. However, the official did point out the fact that delegation of authority must be allowed, as the minister would not practically have the time to approve each and every license. The official went on to state that if an applicant is not happy with the mandate of the DG, they can appeal and then take the matter to court, in which case the minister will get involved and will hold the DG accountable.[93]

However, it must be noted that while for a well-established mining company access to justice may be relatively easy, a smaller company with fewer resources may find it significantly more challenging. Our engagement with expert mining lawyers confirmed that appeals against decisions made by officials or even the minister can be taken to court. It can take up to 18 months, however, for a decision to be handed down..[94]

In our engagement with the Chamber of Mines, we were also advised that the DMR has an inordinate amount of discretionary power, and the fact that there are no guidelines on how this power should be exercised is problematic.[95]

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[91] Section 103 4(a)(b) of the MPRDA Act No. 28 of 2002.
[92] Meeting with *Mining Company A* (10 March 2017).
[93] Interview with anonymous official from the DMR 2017.
[94] Meeting with mining lawyers, Johannesburg (12 December 2016).
[95] Meeting with Senior Official at the Chamber of Mines (13 December 2016).

From the above, one can conclude that despite the fact that authority must be delegated, more especially for practical purposes, failure to conduct internal due diligence checks on applications can lead to issues wherein corruption may arise.

Social and labour plans (SLPs)

The inescapably reality of the mining sector in South Africa, is the deep disparity between mine workers 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. [96]

Applicants of mining rights are required by law[97] to give the DMR an SLP which benefits the livelihoods of mine workers and communities. These plans, once approved, are meant to be seen as binding documents and are intended to be aligned with a municipality's integrated development plan (IDP). In order to do so, sometimes companies have to consult with the chief, who is an authority with unregulated powers. This creates an environment susceptible to corruption as the chief can agree to a SLP as long as his personal needs are met. As a result, there is a lack of adequate consultation to ensure that SLPs align with community needs. Having said that, an application for a mining right cannot be granted without the approval of an SLP, as it is a vital component for the awarding of such a right. However, despite their importance, the lack of proper monitoring of SLPs is disproportionate to the need for which they are intended.

The Centre for Applied Legal Studies (CALS) conducted a two-phase research project on SLPs from 2015 to 2017. Their report suggests that SLPs do not appear to cater for actual community needs. They state further that the SLP system does not serve its intended purpose in that it does not promote long term planning, nor does it incorporate sustainability considerations. CALS states that: "…SLP's seem to be an unrefined tool for dealing with a complex and nuanced area involving a range of social, economic and environmental variables."[98]

In the second phase of the CALS project, community members raised issues regarding the mismatch between large amounts of money stipulated for infrastructure projects and the very small-scale actual deliverable; for example, millions depicted being spent on the construction of a very small computer lab.[99] This is a common problem faced by communities and was raised countless times at the 8th Alternative Mining Indaba held in Cape Town in February 2017.

Research has revealed that the challenge lies in the fact that SLPs are being approved without the DMR taking into consideration whether or not the SLP proposal is in line with the actual needs of the

[96] The Social and Labour Plan Series, Phase 1: System Design Trends Analysis Report by the Centre of Applied Legal Studies March 2016.
[97] Section 23 (1)(e)(e) of the MPRDA Act No. 28 of 2002.
[98] *Ibid 96.*
[99] The Social and Labour Plan Series Phase 2: Implementation Operation Analysis Report the Centre for Applied Legal Studies, page 32.

community, or whether or not the applicant has the financial resources to follow through with the proposed SLP. Of greatest concern is the fact that the DMR has no monitoring mechanism in place to ensure that SLPs' commitments are followed through.[100] This is particularly detrimental because if companies are well aware of the fact that there is no system in place to hold them accountable, then SLPs are more likely to become tick-box exercises to fulfil application requirements as opposed to legally binding documents with serious repercussions in the event of a failure of compliance.

The Lonmin mine saga was a widely publicised account of the failure of a mining company to follow through with its SLP commitments. As part of its SLPs, Lonmin mine undertook to convert all its single sex hostel accommodation and committed to build 5 500 houses for migrant workers, by September 2011. It was stipulated in the SLP that in the first three years, 3 200 houses were to be built with 70 hostels being converted. However, by the end of the 2009 financial year, only three of the 3 200 houses had been built and only 29 hostels had been converted.[101] This is an example of not only an applicant's lack of compliance, but ineffective monitoring on the part of the regulator (The monitoring of applicant's obligations will be dealt with in more detail below).

A senior official at the National Chamber of Mines confirmed the above, stating that even when these plans are agreed upon and SLPs are submitted, mining companies are frequently not compliant. There are also capacity-related problems at the municipal level, so even though a company may build a school, the municipality does not supply electricity and water to the school and it remains an empty shell.[102]

This was further validated at the roundtable held by Corruption Watch, during which a community member stated: "Mining companies come and make promises to uplift our communities, but they never fulfill those promises and we still don't have access to basic services, and our communities are left in worse off positions than before the mining took place."[103]

From the above, it is clear that the issue of SLPs raises several concerns. Despite the fact that SLPs are designed to benefit communities and mine workers, there is a general lack of transparency in terms of accessing the plans. In addition, the MPRDA does not specifically state that SLPs are in fact public documents.[104] And the only way to ensure compliance with SLPs is if these documents are easily accessible. Our research purported that these issues require intervention.

During the South African Human Rights Commission's national hearings on the socio-economic effects of mining, held in September 2016, the DMR was asked whether or not they exercise oversight over

[100] Meeting with the Department of Monitoring and Evaluation (DPME) 10 April 2017.
[101] Marikana: World Bank loan undermines Lonmin's arguments, says academic; GroundUp; 7 November 2014 available at
[102] Meeting with Senior Executive at the Chamber of Mines (13 December 2016).
[103] Corruption Watch round table discussion on Mining for Sustainable Development-transparency and accountability in the awarding of mining licenses, contracts and permits (7 February 2017).
[104] The Social and Labour Plan Series Phase 1: System Design Trends Analysis Report, The Centre for Applied Legal Studies, page 103.

SLPs. The response was that, currently,, they do not have systems in place to oversee the implementation of SLPs.[105] This shows a clear weakness in the existing system – if the regulator has not put a monitoring system in place, then there lies a risk for corruption, as mining houses can make SLP commitments knowing full well that there is no follow-up to ensure they see them through. The result is that the DMR is merely relying on the good faith of companies to meet the needs of communities. The regulator's failure to address this issue in the Lonmin case (discussed above) is an example of this.

In our engagement with the Department of Planning Monitoring and Evaluation (DPME), we asked what level of oversight or monitoring the department has over the obligations of applicants who have been awarded licenses or permits. The response was that the DPME in fact does not monitor these and that requests to the DMR for SLPs submitted from license and permit holders in a particular province were not adhered to by the DMR. This not only speaks to lack of cooperative governance (discussed below), but is a clear indication that mechanisms need to be put in place to ensure that obligations by mining companies are followed through.

Environmental authorisations

In order to discuss environmental authorisations within the South African context, the issue of the OES must be discussed. Government commenced with the rollout of OES in September 2014, to streamline the licensing processes for mining, environmental authorisations and water use licenses. The system was introduced as part of government's commitment to improve the ease of doing business, and to enhance South Africa's global competitiveness as a mining investment jurisdiction.[106]

Under the OES, the minister of mineral resources will issue environmental authorisations and waste management licenses for mining and related activities, and the minister of environmental affairs will be the appeal authority for these authorisations.

We identified the OES as a vulnerability within the application process. In our engagement with the CER we learned that that DMR officials do not have the knowledge or expertise to deal with environmental authorisations.[107] The CER was possibly able to draw these conclusions because of information outlined at the South African Human Rights Commission Hearing where the DEA submitted that although they have the OES in place, they don't have regulations governing how the system works – however they are currently working on the issue.[108]

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 in light of the fact that 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

[105] Meeting with the South African Human Rights Commission (12 April 2017).
[106] See: http://www.gov.za/government%E2%80%99s-one-environmental-system-ready-commence-8th-december-2014
[107] Meeting with Centre for Environmental Rights, Cape town, 9 February 2017;
[108] Meeting with South African Human Rights Official (12 April 2012)

outstanding legislation/regulations that needs to be implemented to support the roll-out of the OES…"[109]

These sentiments were further reiterated by the DMR, who said to us that while they have capacitated the internal department dealing with OES quite well, there is still confusion in terms of the law.[110]

From the above, it is clear that although the OES was intended to curb corruption, there have been struggles in terms of system implementation. This in turn gives rise to corruption risks in the application process, because a lack of certainty about the application process allows for applications to be processed in a manner that suits either the applicant or the official handling the application. The lack of skills at the DMR to address issues such as the OES is discussed in more detail below.

Environmental impact assessments (EIAs)

An EIA is a process of evaluating possible environmental impacts resulting from proposed mining activities. These assessments are governed by NEMA and its regulations.

In our engagement with CER, they submitted that EIA practitioners (EAPs) are hired by mining companies and often will draft reports in favour of their employer. They recommended that EAPs should be completely independent and not hired by a mining company as this creates a situation of bias and impartiality. They further stated that: "often if they (EAPs) draft something that is not in accordance with what the mining company wants, they run the risk of getting fired".[111]

Importantly, a Harvard Law School International Human Rights Clinic's report stated that as a country, South Africa has failed to meet its human rights obligations to address the environmental and health impacts of mining.[112]

Furthermore, in a Corruption Watch roundtable, many participants complained that they don't understand the contents of EIA reports, that they are given 30 days to respond to documents that are technical, bulky and incomprehensible to the lay person, and that they are always in English, which is not the first language of any indigenous community.[113]

Mining company A as well as the DMR reiterated the same sentiments for EIAs, with respect to them being presented in English. They again stated that that there are mayors and community leaders who can disseminate this information to communities. However, this does not address the issue of EIA reports being too technical and bulky, and the fact that community members are not in a position to

[109] Meeting with 'Mining Company *A'* (10 March 2017).
[110] Meeting with anonymous official from the DMR (May 2017)
[111] Meeting with Centre for Environmental Rights (9 February 2017)
[112] The Cost of Gold: Environmental, Health, and Human Rights Consequences of Gold Mining in South Africa's West and Central Rand; Harvard Law School International Human Rights Clinic; October 2016
[113] Participants at the Corruption Watch roundtable at the Alternative Mining Indaba, 7 February 2017.

understand the documents, let alone raise objections. Furthermore, community members are only given 30 days to comment on EIAs, which is insufficient and imbalanced.

According to Professor Tracey-Lynn Humby of Wits University, one problematic area pertaining to EAs is the broad discretion afforded to the minister of mineral resources to amend an EA. In practice, a mining right may be granted over a very broad area, although the applicant will only apply for an EA over a much smaller area – this then brings the mining right into effect only over that particular area. The public participation process is then conducted with respect to the smaller property. When the EA is granted, over time the holder applies to the minister to have the EA amended to include the additional properties, a process which does not require public participation

The application for environmental authorisation within the South African context is a complex, detailed and multi-faceted issue. Corruption Watch intentionally decided to only highlight the pertinent issues that relate to the application process for environmental authorisations. We understand the subject is technical and broad and requires a more in-depth analysis to properly flesh out the challenges. Such an analysis has not been conducted for the purposes of this particular research paper.

Vulnerabilities identified within the context of the South African mining sector

The aforementioned vulnerabilities arise from deviations from the official process as well as from weaknesses in the design of the process. We have attempted to depict how these vulnerabilities give rise to corruption, and the resulting impact. The vulnerabilities referred to below do not necessarily only arise from the official and actual process, but may arise from factors that are within the context of the South African mining sector.

These vulnerabilities were identified using the research technique known as a STEEPLE analysis (social, technological, environmental, economic, political, legal and ethical factors), using a multi-stakeholder engagement as well as through desktop research. These vulnerabilities arising from contextual factors, together with supporting evidence were documented in Annexure Worksheet B.

These vulnerabilities relate to the following:

- A lack of procedural uniformity and cooperative governance;
- Capacity-related issues within the DMR;
- Uncertainty of the legislation governing the mining sector;
- Black economic empowerment requirements;

Lack of procedural uniformity and cooperative governance

The issue of a lack of uniformity across provinces, with regards to the application process, was raised multiple times during stakeholder engagements. Research showed that not all provinces follow the same procedures and that there is a general lack of uniformity nationally.

An official from the DMR also confirmed this issue and suggested that the DMR needs to come up with a system for all regions to follow, while stringent measures need to be put in place by the accounting officer.[114] Mining company A and mining company B both reiterated the lack of uniformity across the provinces, with mining company A giving the example that the Free State is extremely efficient while the North West is notably inefficient.

When we engaged with the DPME, we were advised that despite several attempts by them to access information from the DMR pertaining to statistics, they have been unsuccessful. This is clear evidence of a lack of cooperative governance within government, and was noted as a vulnerability.

A lack of uniformity across the provinces is a vulnerability which ultimately results in a corruption risk. This is because if different provinces are operating using different rules, generating overall industry uncertainty, with deviations from the law, including corruption, frequently unnoticed.

Capacity

Capacity or a lack thereof is a serious issue within the DMR. A lack of capacity results in a backlog of applications, a rise in corruption and overall decline in investment. An official at the DMR confirmed the issue of a lack of capacity and stated the following: "Currently there is an issue of capacity, we can't 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, 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…".[115]

An official from the National Chamber of Mines reiterated that the lack of internal capacity at the DMR often results in legislative timeframes not being adhered to, and that because it can take from six to 18 months to sell a mining right, posing a huge deterrent to international investors.[116]

An important feature of the DMR's annual report published in 2013, was acknowledgement of its capacity constraints, both in its legal and financial activities.[117] This is indicative of the fact that the DMR is well aware of its capacity constraints and the consequences thereof. Despite this, measures have yet to be put in place to address capacity related issues, and in so far as the DMR remains under

[114] Meeting with anonymous official from the DMR (May 2017)
[115] *Ibid 104.*
[116] Meeting with Senior Executive at the Chamber of Mines (13 December 2016)
[117] DMR manpower constraints just part of problem By David McKay ;October 1 2013

capacitated, the avenues for corruption remain open. During our research, we were unable to ascertain as to whether capacity constraints are due to lack of financial resources from government, or due to other reasons.

Lack of skills at the DMR

An issue that is closely related to that of a lack of capacity at the DMR, is that of a marked lack of relevant skills at the DMR. The issue of a lack of skills has already been touched on above, with regards to the OES and a lack of internal knowledge and skills to deal with same.

In an interview with mining company B, it was stated that many of the senior staff are political appointees resulting in, individuals without the required skills being appointed at the national level, despite them being unable to perform at their jobs.[118]

This was validated by our engagement with a senior official from the Chamber of Mines who also raised concern about the skills or the lack thereof, at the DMR. He also emphasized the danger in the practice of making political appointment with no regard to competency or experience.[119]

The fact that appointments at the DMR are being made without ensuring that the officials, whether senior or junior, are competent and possess the necessary skills to perform their duties, is a practice capable of undermining the integrity of the entire application process. This creates an environment that is easily susceptible to corruption because not only is there a possibility that the legislative processes will not be followed through, there is a possibility that decisions will be made without taking into account issues related to mine closure, rehabilitation, thorough due diligence claims on an applicant's financial capabilities and many other factors, many of which are discussed within the contents of this research report. This vulnerability has the potential to give rise to a multitude of risks.

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 has also had the effect of causing confusion, uncertainty and this has allowed for corruption to flourish. The fact that different provinces operate under different systems/laws (discussed above) is evidence of the fact that there is uncertainty in the industry. Another tell-tale sign is that of RMDECs (discussed above) and how different stakeholders submitted different information regarding their operation.

The Fraser Institute cited an investor as describing the country's regulatory regime as follows; "Changing environmental and regulatory laws (have) resulted in extended delays ... lengthy red tape and a multitude of departments overseeing permits."[120]

[118] Meeting with mining company B (12 April 2017)
[119] Meeting with Senior Official at the Chamber of Mines (13 December 2016)

Our engagement with mining law experts confirmed this vulnerability, by drawing our attention to the fact that the civil service in South Africa is hyper-politicised, and that, if the minister changes, then the DG changes automatically. The mining law experts asserted that the current deputy DG of Mineral Regulation has little knowledge on mining and licensing despite being in charge of the entire mineral regulatory framework in South Africa. Another major concern is that, because ministers do not have to have any specific interest/qualification in mining, they lack knowledge about the sector, and policy and legislative reform are not always in the best interest of the industry as a whole.[121]

Uncertainty in any industry curtails investment, and as already mentioned creates an environment which is not only susceptible to corruption, but one wherein identifying the root or cause of the corruption is that much more difficult.

Corruption and BEE partnerships

Although the intention of the Mining Charter is to uplift the injustices of South Africa's history, the issue of BBBEE partnerships in the mining industry is a contentious one, more especially from the applicant's perspective.

A landmark case that speaks to this issue involved Gold Fields mine, where the Gold Fields black economic empowerment (BEE) transaction drew controversy for the way it channelled benefits to connected individuals, including the speaker of the National Assembly and chairperson of the governing party, 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.[122]

Mining company A and mining company B both expressed their concern with the fact that DMR officials have the effective power to refuse to accept your application, depending on whether or not you include a specific BEE partner of their choosing as a partner to your company.

Interviews with mining law experts revealed instances where mining companies have felt that the DMR has held them to ransom, by imposing unrealistic demands on companies which then delays the process. The DMR suggests specific BEE partners should be included as partners to a particular mining deal, and if not, they will not grant the license.[123]

A senior official at the National Chamber of Mines revealed that the BEE component of the application process is particularly vulnerable to external influence and to corruption on the part of both applicants

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[120] See: http://www.politicsweb.co.za/opinion/how-to-turn-around-sas-mining-industry#_ftn3
[121] Meeting with mining lawyers (12 Dec 2016)
[122] Investigators: Goldfields bribed Mbete; Mail & Guardian, 6 September 2013., available at: https://mg.co.za/article/2013-09-06-00-investigators-gold-fields-bribed-mbete/
[123] Ibid 112.

and the DMR. We were informed that mining companies will either sometimes look for someone with political influence or in other instances the regulator will 'dislike' the particular BEE partner, and they will insist that a particular individual be included as a 'right of way' to obtaining the license or permit applied for.[124] Furthermore, according to the Mining Charter, procurement contracts are intended for individuals who fall within the BBBEE requirements. These contracts are often centralised around one person, creating local kingpins – this results in a lot of unrest within the communities.[125]

The transparency or the lack thereof, of BEE partnerships is also a cause for concern. This is because without sufficient public scrutiny, BEE partnerships can go unnoticed, and individuals who hold high level positions may not always disclose their interests in certain deals. The executive code of ethics linked to the 1998 Executive Ethics Act specifically states that members of the executive may not "*expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests*". Parliament requires parliamentarians to annually disclose their shares, financial interests, directorships, gifts over a certain threshold, sponsorships, and/or property, in the registration of members' interests. Interestingly, in 2015 National Assembly Speaker Baleka Mbete, also the ANC National Chairperson, declared "equity shares", valued at a total of R27-million, in two companies involved in a deal including Gold Fields. However this was not declared in the 2016 register. This is merely one example of a high level official with financial interests in a mining company that has not been properly scrutinised.[126]

Land owners and property rights

It must be noted that the MPRDA does not provide for a surface rights holder to apply to stop prospecting or mining activities in the event negotiations are taking place.[127] Section 54 of the MPRDA does provide for compensation to be negotiated in situations in which surface right holders try to prevent a prospecting or mining rights holder from entering the land and the minister decides that the surface owner, "… has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or mining operations. If the parties cannot agree on compensation, the matter goes to arbitration under the Arbitration Act, or to a competent court."[128]

The judge in Van Vuuren and others v The Register of Deeds[129] stated that: "A mineral right entitles the holder thereof to go upon the property to which they relate to search for minerals, and, if he [the holder] finds any, to sever them and carry them away".

Furthermore, Section 5(3)(a) of the MPRDA allows a "…Prospecting, mineral or exploration right holder

[124] Meeting with Senior Executive at the Chamber of Mines (13 December 2016).
[125] Meeting with South African Human Rights Commission (12 April 2017).
[126] MP's Interests, Nothing Much to Disclose, Sort of, Daily Maverick, Marianne Merten, 24 February 2017, available at: https://www.dailymaverick.co.za/article/2017-02-24-mps-interests-nothing-much-to-disclose-sort-of/#.WVSaVOuGPIU
[127] Mining, Land, And Community In Communal Areas III: Community Governance, Tamara Jewett, August 2016
[128] 1965 (Act No. 42 of 1965)
[129] Van Vuren and Others v Registrar of Deeds 1907 TS 289 at 294;

to enter the land to which such right relates together with his or her employees and may bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of prospecting, mining, exploration or production, as the case may be …".

Felix Majoni describes this as an invasion of private property, because the surface landowner is only merely consulted without having any real say once the consultation process is concluded by the DMR.[130]

In her article, Tamara Jewett points out that surface owners are not the only occupiers who may face difficulty caused by mining. There is also the group of people who occupy land close to mines (who could be deemed interested and affected parties), but are not on the land actually being mined. Such people complain about issues such as cracks in their houses and dust affecting their crops.[131]

The MPRDA provides no protection for this type of harm. And negligence claims brought by such people often fail because of the inability to fulfil the fault requirement. The requirement for negligence is to prove fault. And unfortunately, a mining company with a legitimate permit and diligently attempting to minimize harm does not necessarily fulfil this fault requirement, even though its operations results in harm. The result is that compensation is not awarded and often historically disadvantaged individuals suffer an unfairly disproportionate burden, in that the burden is on them to prove fault which is somewhat impossible. [132]

Our engagement with the South African Human Rights Commission reiterated the fact that there is no ability for the community to refuse mining. They are merely relocated and when they are compensated, they are only paid out for the physical structure but not paid out for their land or their livelihoods. Applicants are supposed to consult with communities in accordance with cultural practices. In the case of graves on the proposed land, they merely give the family members money to re-bury the bodies themselves, thus merely shifting obligations to those detrimentally affected.[133]

The aforementioned examples are a clear indication of the challenges land owners face when minerals are discovered or thought to be located on their properties. A report brought to Corruption Watch in October 2016 divulged that although there was a family dispute about land ownership, mining operations continued to take place. The parties have resorted to take the matter to court in order to resolve the dispute.[134] This is one example of several mining related land disputes and the resultant impact being that parties have to resort to the judiciary to resolve such disputes.

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[130] Mine or yours?**;** By Felix Majoni; August 2013; available at: http://www.saflii.org/za/journals/DEREBUS/2013/151.pdf
[131] Mining, Land, And Community In Communal Areas III: Community Governance, Tamara Jewett, August 2016
[132] *Ibid.*
[133] Meeting with the South African Human Rights Commission (12 April 2017)
[134] *Family at war over mine riches' Independent Online* http://www.iol.co.za/news/south-africa/gauteng/family-at-war-over-mine-riches-8339593; Mark *Olalde* Published on 25 March 2017.

Bearing in mind that this is not necessarily a component or a step in the application process *per se*, we consider it to be a factor worth documenting in this research, for the mere fact that many communities and land owners are deprived of their land with no official say, or legislative standpoint to refute mining on their land, and as a result, have no real security of rights to ownership. This results in community unrest, and burdens the judiciary with cases regarding land issues. It further leads to a situation whereby mining houses are in a more advantageous position in terms of mining than communities.

Resulting corruption risks

The aforementioned identified vulnerabilities, whether identified through the official or actual process, or within the context of the application process, have given rise to eighteen risks in total. This is not to claim that these are the only vulnerabilities which give rise to risks within the application process, but they are risks identified within the scope of this research.

Having identified the vulnerabilities, this report will now go on to discuss the resulting corruption risks that emerge as a result of the identified vulnerabilities. In order to clearly depict all the identified risks, a summary of the vulnerabilities have been tabled alongside the resulting corruption risks (see Annexure Worksheet A).

For ease of reference, each resulting corruption risk has been given a specific code as per the MACRA toolkit. It must be noted that each risk was given a code dependent on a specific category; Contextual Factors (CF), Process Design (PD), Process Practice (PP), Accountability (RA) and Legal Mechanisms (RL). Below is a table (risk key) which depicts the emerging corruption risk alongside its specific code.

Risk Key

What is the risk that the legal framework for consultation is inadequate to ensure meaningful and effective consultation with communities? **PD8 (adapted)**	What is the risk that companies will be confused or misled about the stage their application is at in the awards process? **PD32**
What is the risk that the duration and timing of each step of the awards process can be manipulated? **PD28**	What is the risk that the steps of an awards process will not be publicly knowable? **PD3** What is the risk that the steps of awards process will not be publicly knowable or are not being properly implemented? **PD3.2 (adapted)**

	What is the risk that the criteria for awarding licenses etc. will not be publicly knowable? **PD4**
Assuming consultation with affected communities is required, what is the risk that their free, prior and informed consent will be ignored as a result of corrupt practices? **PP6** What is the risk that community leaders negotiating with a mining company will not represent community members' interests? **PP7**	What is the risk that DMR staff and managers will be unable to cope with the workload of the agency? **PP1**
What is the risk of mining companies being compelled by the DMR to include certain parties in the ownership of their company? **PP-N1** When companies are legally required to partner with BEE partners for a mining permit or license, what is the risk that the details of these partnerships will not be publicly knowable? **PD21**	What is the risk that too much authority for recommending approval of licenses has been delegated to lower ranking DMR officials? **PD-N1 (additional risk)**
What is the risk that there will be inadequate monitoring of license and permit holders and their obligations? **RA14**	What is the risk that there is no verification of the truthfulness of environmental impact assessment (EIA) reports? **PP9**
What is the risk that community members and land owners will not understand the notices and contents of the EIA reports or Draft Scoping Reports and as a result, will not be able to make meaningful objections or comments? **RA7 (adapted)**	What is the risk that there is no internal synergy within the DMR and no uniformity across the provinces? **CF-N1 (additional risk)**
What is the risk that the DMR staff do not have the skills to perform their jobs? **PP2**	What is the risk that DMR staff are politically appointed and do not have skills to perform their jobs? **PP-N2**

In line with the methodology used in the MACRA toolkit, a risk assessment was done on each of the 18 identified risks tabled above, wherein both the likelihood and the impact of each risk was assessed and

scored (see Annexure: Worksheet B[2]*)*. Evidence was obtained from key informant interviews, focus groups, analysis of legislation as well as from secondary literature, in order to arrive at the specified scores. Each of the 18 identified risks has been given a score out of five for likelihood and a score out of five for impact. The overall score for each risk was arrived at by multiplying the **likelihood** X **impact.**

These scores were subsequently verified through a focus group discussion with five experts with relevant knowledge of the mining sector.[135] This focus group consisted of an investigative journalist, two community activists, an academic as well as a member of civil society.[136]

The final scores were then tabled in a risk matrix. The risk matrix has been divided into five recommended colour zones using the traffic light system. The colours represent five levels of importance; blue - very low; green - minor; yellow - moderate; amber - significant; and red - very high.

See Risk matrix table below - Worksheet C.

Risk Matrix

Likelihood	1 Insignificant	2 Minor	3 Moderate	4 Major	5 Catastrophic
5 Almost Certain	5	10	15	PP.1 PD.21 PP-N1 CF-N1 (additional) 20	RA.7 PP.6 PP.7 25 PD.8 (adapted) PD.3.2 (adapted)
4 Likely	4	8	12	PD.3 PD.4 PD-N1 PD.28 16	PP.9 PP.2 PP.N2 RA.14 20
3 Possible	3	6	9	PD.32 12	15
2 Unlikely	2	4	6	8	10
1 Almost impossible	1	2	3	4	5

Impact

[135] Focus Group Discussion held on 12 June 2017, Braamfontein Johannesburg.
[136] See Annexure 1

Discussion of the results

We will discuss the risk matrix in more detail below. The discussion will be based on the resultant scores, whilst looking at the relationship between particular risks and how they interact with each other, the types of impacts certain risks pose, and how certain risks exacerbate others. Of the 20 identified risks 38.8% were as a result of vulnerabilities in the process practices (PP), 44.4% were as a result of the design of the process (PD), 11.1% were as a result of the accountability mechanisms (RA) and 5.5% resulted due to contextual factors (CF).

Process practice

38.8% of the risks fell into this particular category. This indicates clearly that not only are there deviations from the official process but there are vulnerabilities arising in the implementation of the examined processes. The risks identified as a result of vulnerabilities in practices include:

- The inability of DMR staff to cope with their workload (PP1);
- During community consultations, the risk that free, prior and informed consent of communities will be ignored (PP6);
- The risk that community leaders will not represent the interests of community members when negotiating with mining companies (PP7);
- The risk that there is no verification of the truthfulness of EIA reports (PP9); the risk that DMR staff may not have the skills to perform their jobs (PP2);
- The risk that DMR staff are politically appointed and as a result may not have the skills to perform their jobs (PP-N2);
- The risk that mining companies may be compelled to include certain parties in the ownership of their company (PP-N1).

Process design

We found that 44.4% of the identified risks fall within this category. The way a particular process is designed is extremely important in that if it is fraught with weaknesses it may give rise to numerous forms of corruption.

The risks identified which arise as a result of the design of the process include:

- The lack of transparency with regards to BEE partnerships (PD21);
- The steps of the application (awards) process not being publicly knowable, or not being properly implemented (PD 3 & PD3.2);
- The criteria for the awarding of licenses not being publicly knowable (PD4);
- The issue relating to too much authority for approval being delegated to lower ranking officials (PD-N1);
- Companies not having clarity with regards to what stage of their application process their application is at (PD 32);

- The lack of an effective legal framework governing community consultations (PD8);
- The timing of each step of the application (awards) process can be manipulated (PD 28).

Accountability mechanisms

Only 11.1% of the risks fell into this category. Despite this being a small percentage in comparison to the aforementioned risks, it does not reduce the severity of a possible resultant impact. The two risks that fall into this particular category are:

- The risk that community members and or land owners may not understand the notices and contents of the EIA reports or DSR and will not be able to make meaningful objections (RA7 adapted); and
- The risk that there will be inadequate monitoring of license permit holders and their obligations (RA14).

Contextual factors

Risks that arise as a result of contextual factors are quite important to note as they relate the particular context within which the application process takes place. In this case 5.5% of the risks in question fell in this category. Again the small percentage is does not mean this particular risk is of less importance. The only risk that fell within this category is the risk that there is no internal synergy within the DMR and no uniformity across provinces. This risk has a high score of 20 and has an almost certain likelihood of occurring with major impacts.

Cross cutting implications of certain risks

There are risks which, if they arise, may result in other risks occurring. These risks will be discussed in more detail below and will reflect on how these risks are interrelated.

The risk regarding DMR staff being politically appointed (PP N2) gives rise to the risk that DMR staff do not have the skills to perform their jobs (PP2). These two risks are inter-linked and the one may sometimes be as a result of the other. Both these risks had a high score of twenty on the risk matrix.

The risk that there is no internal synergy within the DMR and no uniformity across the provinces (CF-N1) may give rise to the risk that the steps of an awards process are not publicly knowable (PD3) as well as the risk that the criteria for awarding licenses are not publicly knowable (PD4). This may occur because different processes are followed in different parts of the country and may worsen the overall confusion about existing legal processes. These risks had scores of 20, 20 and 16 respectively.

The risk that the legal framework for consultations is not adequate enough to ensure meaningful and effective consultations with communities (PD8 adapted), is likely to give rise to the risk that the free, prior and informed consent of communities will be ignored as a result of corrupt practices (PP6) as well as to the risk that traditional leaders may not represent the interests of community members when

negotiating with mining companies (PP7). One could even say that if the legal framework for community consultations is tightened it would reduce the risk of inadequate community consultations taking place. These risks all had high scores of 25 on the risk matrix.

Types of impacts

The identified risks have different resultant impacts. Some of these impacts directly impact communities, while others directly impact the environment and still others directly impact applicants (mining companies). Each of these types of impacts will be discussed separately and in turn.

Impacts on the environment

Of the 19 identified risks, two of these risks directly impact the environment. One is risk that there is no verification of the truthfulness of EIA reports (PP9). If no verification is done on EIA reports, and an environmental authorisation is granted this can have serious environmental implications. The risk that community members and land owners will not understand the notices and contents of EIA reports or draft scoping report, resulting in them being unable to make meaningful objections or comments (RA7), also has direct environmental impacts because if community members do not raise their legitimate concerns or objections regarding environmental issues, this can be detrimental to their surrounding environment and in turn their livelihoods which are more often than not dependent on the agricultural use of the land.

Impacts on the rights of communities to be consulted

Of the 19 identified risks, five of these risks directly affect community consultations or are directly related to public participation. One of them is the risk that the legal framework for consultation is inadequate to ensure meaningful and effective consultations with communities (PD8 adapted). Another is the risk that free, prior and informed consent will be ignored as a result of corrupt practices (PP6), as is the risk that traditional leaders will not represent community interests (PP7). The risk that community members and land owners will not understand EIA reports or DSR reports and as a result will not be able to make meaningful objections or comments (RA7), directly impacts on communities and their rights to have meaningful consultations. Finally, there is the risk that the steps of an awards process are not publicly knowable or are not being properly implemented (PD3.2) will affect communities in that they may not know when processes have been incorrectly enforced or when their rights have been infringed. It is interesting to note that a number of risks directly relate to the issue of public participation and community consultations; this indicates a need for intervention in this particular area.

Impacts on applicants

Of the 19 risks identified, five risks directly impact companies. The risk that the duration and timing of each step of the awards process can be manipulated (PD28) not only impacts applicants (mining companies) but also potential investors. The risk that companies will be confused or misled about what

stage their application is at in the awards process (PD32) also has a direct impact on applicants, as it relates to an uncertainty with regard to timeframes for the processing of applications. The risk that the criteria for awarding licenses is not publicly knowable (PD4), can also affect applicants as they can unwittingly not comply with legislative requirements. The risk that mining companies can be compelled by the DMR to include certain parties in the ownership of their company (PP-N1) also directly impacts applicants. The risk that too much authority for recommending approval of licenses has been delegated to lower-ranking DMR officials (PD-N1), directly affects companies in that applications may be rejected for this reason. The above observations indicate how the design of the process as well as the process practice can have negative impacts on applicants as well, although more often than not they are regarded as the offenders.

Analysis of colour zones

Another interesting observation from the risk matrix is that all of the risks, except for one, fell within the red colour zone. Red signifies that the risk is considered to be very high. The risk that companies will be confused or misled about the stage their application is at in the awards process (PD32), is the only other risk that fell within the amber colour zone, signifying that the risk is only considered to be significant. From this observation it is evident that the majority of the identified risks require intervention in order to address issues that give rise to corruption.

The above discussion of the results points to the fact that many risks identified are interrelated or in some instances result in other risks occurring and having somewhat of a domino effect on the entire application process. It does not suffice to say that solving the problem of one risk will in turn solve resultant risks – but prioritising certain risks and advocating for change will result in addressing some of the issues faced within the South African awards process.

Limitations of the results

It must be noted that there were certain limitations to conducting the research. The three main limitations are as follows:

Accessing the Department of Mineral Resources

We experienced difficulty in accessing the DMR. Despite several correspondences sent through open channels, we were not able to yield any response directly from the DMR. We did however have an interview with an official who chose to remain anonymous for reasons related to victimisation for being a ‘whistle blower’.

Accessing more mining companies

As illustrated in the research, we were able to engage with two separate mining companies. Although we yielded substantial research from these engagements, we did however attempt to engage with three other mining companies, namely, Ivanplats, Goldfields and Exxaro in order to solidify our research using different perspectives. We however did not receive any responses from these three.

Environmental authorisations

Environmental authorisations are an important component of the application process. However, they are complex, require several sub applications, and are quite an in-depth analysis. Owing to the timelines given for completion of this project as well as the limitations on the length of the content, we chose to not go into detail with the content on environmental authorisations, instead dealing with it from a broad perspective.

Conclusions and recommendations

South Africa is confronted with burgeoning corruption, and despite the fact that measures are put in place to expose it, perpetrators are rarely penalised. "South Africa is still ranked amongst those countries perceived to have a serious corruption problem, with our ranking perilously close to those countries suffering from endemic corruption."[137]

This research paper indicates numerous gaps in and shortcomings of the existing systems in place governing the application process for specific licenses and permits. Corruption Watch believes that the current legislation governing the mining sector in South Africa requires some fine-tuning and that the actual process needs to be aligned with the legislative framework. And with mining being a solid contributing factor to the growth of the South African economy, it suffices to say that, the same people who are most affected by that which grooms the economy, deserve to be treated with respect, and more especially, deserve for their voices to be heard. And furthermore, those who fail to comply with the legislative processes need to have proper sanctions issues against them.

Not only does this report intend to reach out to speak on behalf of community members, it also seeks to inform government of the need to tighten the gaps where necessary in order to promote a sector that strives to be transparent and accountable. The report also seeks to challenge mining houses, both national and international, to report incidents of corruption and to strive to operate in a society free from corruption and maladministration and it ultimately seeks to serve as an information tool, of the legislative steps that should be taken when licenses and or permits are applied for.

[137] State of Capture Report No 6 of 2016/2017-

Recommendations

The application process involves three groups within the mining sector, namely communities, mining companies, and government/policy makers. There is also civil society, which mainly represents the interests of communities. These recommendations will address each of these groups.

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. An individual cannot demand that their rights be upheld if they have no knowledge of those rights. Thus, we call on civil society to form coalitions and partnerships and to work together with community activists, educating communities on the steps of the application process, their role in the process, and their rights. Such joint efforts will help to empower communities to stand up for themselves.

We also urge traditional leaders and community members to take a stand against corruption, to report any corrupt activities to the relevant authorities, and to refuse to accept bribes from mining company representatives or government officials.

Recommendations to government

We urge the DMR to address internal issues such as capacity constraints. This will help to cut down on lengthy periods for the processing of applications, and will also reduce the number of backlogged applications in the different provinces.

The DMR must also urgently fix SAMRAD. The system is extremely susceptible to human manipulation and requires more monitoring to ensure that corruption does not creep in.

We urge government to deploy individuals with expert knowledge in the mining sector, who are mindful not only of foreign investment, and the wider economy, but also of the needs of mining communities.

We also urge government to put in place monitoring and evaluation systems, or to task the Department of Planning, Monitoring and Evaluation with the job of ensuring that mining companies honour their social and labour commitments to communities.

We urge Parliament to oversee a legislative and policy intervention into the mining application process, to have a public participation involvement when legislation is being drafted and to tighten the gaps which leave applicants vulnerable.

Recommendations to mining companies

We urge mining companies to hold fair and meaningful consultations that consider the needs of the entire community as a whole, are inclusive and transparent, and which 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.

We urge mining companies to ensure that they follow the correct legislative processes throughout the application process, and that the outcomes of this process are made transparent. We also urge them to report any requests for bribes and other corrupt activity to the relevant authorities.

Who funded the chapter's participation?

Corruption Watch is one of 20 national chapters participating in Transparency International's global *Mining for Sustainable Development* (M4SD) programme. The programme is coordinated by TI Australia, and complements existing efforts to improve transparency and accountability in extractive industries by focussing specifically on the start of the mining decision chain: the point at which governments grant and award mining permits and licences, negotiate contracts and make agreements.

Phase 1 of the M4SD programme (2016-2017) is about understanding the problem by identifying and assessing the corruption risks in the process and practice of awarding mining licences, permits and contracts. This report presents the main findings from the corruption risk assessment in South Africa

With an understanding of the nature and causes of corruption risk, national chapters will develop and implement solutions to tackle priority corruption risks in Phase 2 (2018-2020). They will work with key stakeholders from government, the mining industry, civil society and affected communities to improve transparency, accountability and integrity in the decisions about approving mining projects.

The participation of Corruption Watch 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.

Disclaimer

The research, language, views, conclusions and strategies outlined in this document have been created by the Transparency International national chapter in South Africa and are not necessarily endorsed by Transparency International, Transparency International Australia, BHP Billiton Foundation or the Australian Department of Foreign Affairs and Trade.

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We engaged with several civil society organizations, including the Centre for Sustainability in Mining Industry, the Centre for Environmental Rights, the Federation for Sustainable Environment and the Land and Accountability Research Centre.

We also acknowledge those who agreed to consult with us but cannot be mentioned by name for confidentiality reasons, such as individuals from the Chamber of Mines, mining attorneys, mining companies and the Department of Monitoring and Evaluation as well as the Department of Mineral Resources.

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Annexure 1

ANNEXURE 1

Civil Society Organizations					
No.	**Name of Organization**	**Date**	**Interviewee Designation**	**Location**	**Purpose**
1.	Federation for Sustainable Development (FSE)	24 Jan 2017	Mariette Liefernink- *CEO*	Corruption Watch offices, Johannesburg (Skype)	South Africa has a strong civil society network with a lot of work currently being done on the mining sector and the issues facing communities due to mining. Engaging with civil society was beneficial to our research, so as to not to duplicate research, but to build on already existing research already conducted by various civil society organization in order to explore further into the issues and objectives of this project.
2.	Centre for Environmental Rights (CER)	9 Feb 2017	Marthán Theart- *Knowledge & information Coordinator*	CER offices, Cape town	
3.	Land And Accountability Research Centre (LARC)	1 Feb 2017		Corruption Watch Offices, Johannesburg	
4.	Centre for Sustainable Mining and Industry (CSMI)	14 Feb 2017	Caroline Digby	CSMI offices, Johannesburg	
Academics					
5.	Wits University	23 Jan 2017	Tracey Humby- *Professor*	Corruption Watch offices, Johannesburg	Academics were able to give us theoretical and legal perspectives from their own research into certain aspects of the mining sector, as well as insights into their own engagements with different parts of the sector, we were able to draw from their experiences and knowledge as well as use their expert advice when strategizing and formulating ideas going forward.
6.	Wits University	24 Feb 2017	Fola Adeleke - *Visiting Senior Researcher*	South African Human Rights Commission office, Johannesburg	
Mining Lawyers					
7.	Mining Attorneys	12 Dec 2016	Senior Partners	Johannesburg	Our engagement with Mining Lawyers, was also of great importance as we were able to identify the issues faced when the judiciary is required to facilitate the application process. Mining lawyers were able to give us a clear holistic perspective of the application process and the changes that need to be made, as well as confirm which aspects are working.

South African Chamber of Mines					
8.	Chamber of Mines SA	13 Dec 2016	*Senior Executive*	Chamber of Mines, Johannesburg	The National Chamber of Mines, which represents about 90% of South Africa's mines, brought a clear perspective of the challenges Mining Companies face in commonality and the challenges faced more especially with regards to the application process. From this engagement we were also able to hear the concerns pertaining to the legislation governing the mining sector and the problems faced by Mining Companies in this regard.
Mining Companies					
9.	*Mining Company A*	10 March 2017	*Senior official & Legal official*	*Mining Company A* offices,	Our engagement with Mining Companies, was imperative in order to establish the perspective of the application process from the standpoint of the '*applicant*' and the challenges they face. We were able to establish what aspect of the application process is working and what needs to be relooked at.
10.	*Mining Company B*	12 April 2017	*Senior official*	*Mining Company B* offices	
Independent Investigative Journalists					
11.	Mark Olalde	24 Jan 2017	*Investigative Journalist*	CSMI offices, Johannesburg	Our engagement with Investigative Journalists, built on our research in that we were able to use investigations they had already done as sources of evidence as well as to use the skills and capacity of the journalists to investigate the report received, (discussed above). This type of engagement solidified our research and broadened our evidence base.
12.	Sasha wales Smith	1 March 2017	*Investigative Journalist*	Rustenburg City Hall	
Government Departments					
13.	Department of Planning Monitoring and Evaluation	10 April 2017	*Kailash Bhana-Chief Director of Distressed Mining Communities*	DPME offices, Johannesburg	We were able to engage with the DMR. The official engaged with preferred to be anonymous and provided us with internal knowledge regarding the application process, and the internal challenges faced therein. In our Engagement with DMPE we were able to engage on issues pertaining to mining affected communities, and the DMPE's mandate and involvement in this regard. This proved to be very
14.	Department of Mineral Resources	Feb & May 2017	*Anonymous*	unrevealed	

					beneficial and gave us clear insight into Government's involvement in community issues.
Chapter 9 Institutions					
15.	South African Human Rights Commission (SAHRC)	12 April 2017	*Junior official*	SAHRC offices, Johannesburg	The South African Human Rights Commission (SAHRC) is a chapter 9 institution mandated by the Constitution of South Africa. The SAHRC held hearings in 2016 regarding the socio-economic effects of mining on communities, these hearings not only looked at the socio economic challenges, but also looked at environmental and land reform, traditional leaders, public participation and access to information. In this regard we were able to get a holistic perspective of the effects of mining on surrounding communities. The hearing was held over a period of 5 days, of which the Commission provided us with the transcripts in order to obtain information we required for our research purposes. This was also very beneficial to our research, as we were able to listen to the perspective of varied communities across the country.
Roundtable Discussions					
16.	Responsible Mining Index	28 September 2016	*Various participants from the mining Sector*	Sunnyside Hotel, Johannesburg	
17.	Amnesty International Roundtable on *Gender Insecurities in the Mining Sector*	19 April 2017	*Various participants from the mining sector*	Constitutional Hill, Johannesburg	
18.	Corruption Watch Roundtable on *Transparency and Accountability in the awarding of*	7 Feb 2017	*Various Participants from the mining sector*	Double Tree Hotel, Cape town	

	Mining Licenses Contracts and Permits				
19.	Corruption Watch Focus Group Discussion	12 June 2017	*Meshak Mbangula- MACUA Elton Thobejane Sasha Wales-Smith- Investigative Journalist Trusha Reddy- International Coal Network*	Parktonian Hotel, Braamfontein, Johannesburg	
Mining Indaba					
19.	Attending the 8th Alternative Mining Indaba	6-9 Feb 2017	*Various participants from the mining sector*	Double Tree Hotel, Cape town	
Panels					
20.	High Level Panel Hearing on Communities Affected by Mining	1 March 2017	*Various members of the Communities and Members of the Parliamentary portfolio Committee on Mining*	Rustenburg City Hall	
Community Members					
21.	Report received by Corruption Watch regarding corruption in the awarding of a prospecting right in the Northwest Province	October 2016	*Community members affected by mining*	Corruption Watch offices, Johannesburg	In terms of our engagement with community members, as already stipulated in the introduction to this report, Corruption Watch relies on the public to report corruption to us. We use the reports as an important source of information to fight corruption and hold leaders accountable for their actions. Corruption Watch provides a platform for reporting corruption. One of the reports we received and investigated,

					involved community members who were feuding over family land and the mining operations taking place on their land, the report also involved their application as previously disadvantaged persons being declined illicitly. We then worked together with an investigative journalist in order to publish this story in a popular newspaper in order to raise awareness about the corruption taking place in the Northwest Province Regional office. The link to the story can be found here: http://www.iol.co.za/news/south-africa/gauteng/family-at-war-over-mine-riches-8339593; Mark *Olalde* Published on 25 March 2017. Corruption Watch has engaged with an Attorney as well as an Advocate who intend on challenging this matter through the Courts.

Annexure 2 - Worksheet A

WORKSHEET A SOUTH AFRICA

Vulnerabilities	***Resulting Corruption Risks***
Mining Permit/Mining Right /Prospecting Right Application Process	
A general lack of knowledge of the mining regulatory regime is one of the reasons that has resulted in uncertainty of the overall application process, furthermore, applicants using different procedures in different provinces that may or may not be in line with regulatory practices, creates an environment easily susceptible to corruption. Furthermore, because the criteria for awarding of licences or permits is also not well known, it further enables an environment that is easily susceptible to corruption.	**PD3:** What is the risk that the steps of an awards process and the criteria for awarding licences will not be publicly knowable? **PD4** What is the risk that criteria for awarding licences etc. will not be publicly knowable?
Companies are often at the mercy of the regulator in terms of receiving timeous responses to their applications. Multiple licenses are often granted which results in competing licences SAMRAD is vulnerable to human manipulation (with few checks and balances) which could possibly lead to bribery to ensure your license application is pushed through by speaking to an influential person at the DMR.	**PD32** What is the risk that companies will be confused or misled about the stage their application is at in the awards process?
Legislative turnaround times for the processing of applications are not adhered to, and processes take much longer than prescribed and so this can lead to bribery to ensure that your application is dealt with speedily, or to officials placing conditions on the applicant to ensure the application is processed speedily.	**PD28** What is the risk that the duration of each step of the awards process can be manipulated?

Consultations with land owner/lawful occupier/ interested and affected parties are not clearly defined in law are often tick box exercises and bear no meaning on the outcome of the application process. Mining Companies often just consult with the Chief or Traditional Leader to get consent, and community is not involved at all, and so agreements are made to serve the interests of traditional leaders and not the community at large.	**PD8 (adapted)** What is the risk that the legal framework for consultation is inadequate to ensure meaningful and effective consultation with communities? **PP6** Assuming consultation with affected communities is required, what is the risk that their free, prior informed consent will be ignored as a result of corrupt practices? **PP7** What is the risk that community leaders negotiating with a mining company will not represent community members' interests?
RMDEC (Regional Mining Development and Environmental Committee) is supposed to take place in the event there are objections to section 10 notices. RMDEC's do not always take place and when they do they are not recorded and results are not made public.	**PD3(adapted)** What is the risk that the steps of an awards process will not be publicly knowable or are not being properly implemented?
Social and Labour Plans (SLP's) are a mandatory requirement for applicants, however the Act does not clearly stipulate what is required of an SLP. Furthermore, the DMR does not adequately ensure that applicants have the financial resources to fulfil their SLP commitments. and furthermore there isn't an efficient monitoring system in place to ensure compliance. This can lead to mining companies making empty promises about uplifting the social status of communities, knowing that they will not be held accountable for it.	**RA14** What is the risk that there will be inadequate monitoring of licence and permit holders and their obligations?

DMR is understaffed, under-capacitated, and so mining applications sit for long periods of time and this can lead to mining companies issuing bribes to relevant officials to speed up applications.	**PP1** what is the risk that cadastre staff and managers will be unable to cope with the workload of the agency?
BEE requirements has enabled DMR officials to insist on mining houses including the emerging black elite and in particular those with political standing as shareholders in their company. Furthermore, these BEE partnerships are not always transparent and so there is no way of uncovering corrupt political activity.	**PP-N1 (additional risk)** What is the risk of mining houses being coerced to include certain parties in the ownership of their company? **PD21(adapted)** When companies are legally required to partner with BEE partners for a mining permit or licence, what is the risk that the details of these partnerships will not be publicly knowable?
DMR officials (Director Generals) have considerable discretion and authority in recommending that the Minister approve the granting of a license. The Minister then approves an application without properly considering the merits and this enables officials to engage in corruption by recommending applications be approved illicitly.	**PD-N1 (additional risk)** what is the risk that too much authority for recommending approval of licenses has been delegated to lower ranking DMR officials.
Different provinces often have different ways of processing licensing applications and Internal departments within the DMR often do not work organically together. This lack of collaboration and uniformity creates an environment that is susceptible to corruption as there is no standard of compliance being used to measure transparency and accountability.	**CF- N1 (additional risk)** what is the risk that there is no internal synergy within the DMR, no uniformity across the provinces.

Environmental Authorization Application Process	
Section 10 reports are only done in English and Environmental Impact Reports and Draft Scoping Report are too bulky and technical and always done in English, they do not contain information comprehensible to the layman and so if no one is able to read them or understand them, there is no way anyone can question them or understand the impact the proposed mining activity will have on the environment, which meaning mining companies cannot be held accountable for the environmental impacts of mining activities.	**RA7 (adapted)** What is the risk that community members and land owners will not understand the notices and content of the EIA reports or Draft Scoping Reports and so will not be able to make meaningful objections or comments?
Environmental Impact Practitioners (EIP) are hired by Mining Co.'s and are not independent and thus have the ability to draft an EIA that favours the applicant, as they have a commercial interest in staying in favour with the company. Furthermore because the DMR is not capacitated enough, nor do officials always have the required skills, it can result in EA's being approved without proper knowledge of the implications of the approval of same.	**PP9** What is the risk that there is no verification of the accuracy or truthfulness of environmental impact assessment (EIA) reports? **PP2** what is the risk that cadastre agency staff do not have the skills to perform their jobs?
The DMR is not capacitated/skilled to deal with subjects (i.e. the OES), this is most likely because appointments are not made on the basis of qualifications and experience in the mining sector but are largely based on cadre deployment this can result in a lack of understanding of the system and can enable corrupt activities to take place.	**PP-N2** what is the risk that DMR staff are politically appointed and do not have the skills to perform their jobs?

Annexure 3 – Worksheet B STEEPLE

STEEPLE ANALYSIS	WORKSHEET B	SOUTH AFRICA

Social Factors

1. **Q: How informed are affected communities about mining issues?**

Answer:

Many civil society organizations have capacitated communities affected by mining, there are still however a few that know very little or are still poorly organized.

Evidence for answer:

Civil Society Groups

- **MEJCON-SA (Mining and Environmental Justice Community Network South Africa)** *is an example of* a network of communities, community based organisations and community members whose environmental and human rights are affected, directly or indirectly, by mining and mining-related activities. Mining Environmental Justice Community Network South Africa

Evidence for answer: Mining Environmental Justice Community Network South Africa available at http://cer.org.za/programmes/mining/mining-environmental-justice-community-network-south-africa.

- **MACUA (Mining Affected Communities United in Action)** has capacitated communities in all 8 of South Africa's mining-effected communities. With the Economic Justice Network, they ran workshops to inform mining-effected communities of the proposed Mineral and Petroleum Resources Development Act and advocated for greater consultation with community leaders and local government.

Evidence for answer: Reports from mining affected communities available at : http://altminingindaba.co.za/2016/02/09/reports-from-mining-affected-communities/

- **The Benchmarks Foundation,** is a non-profit lobby group owned by various churches, reports that it works in some 40 mining communities but that none feel they benefit from the nearby mine.

Stakeholder Engagements

- **The Alternative Mining Indaba (AMI)** provides a platform for communities affected by the extractives industries, and creates meaningful decision-making processes for communities, advocating for just national and regional policies and corporate practice.

Evidence for answer: Alternative Mining Indaba website available at http://altminingindaba.co.za/

2. **Q: Is there a corporate and social responsibility towards mining?**

Answer:

Applicants for mining rights issued by the DMR, are required to submit a social and labor plan (SLP) to the department for approval before the rights will be granted. These plans outline the company's contribution to local community development. However, many mining communities have failed to benefit from mining in their surrounding areas. Although SLP's are designed to benefit local communities, several communities have complained that they are denied the right to say yes or no to mining where they live. They also complain that the plans are agreed to without their involvement, and that they are kept in the dark about deals made between traditional leaders and/or politicians as to who benefits from the mining.

Evidence for answer:

News Articles

- John Kane-Berman *'Mining in South Africa: Then, now and into the future – IRR' Politicsweb* available at http://www.politicsweb.co.za/documents/mining-in-sa-then-now-and-into-the-future--irr Published on 15 February 2017.
- Social labour plan commitment welcomed as a first for mining article available at http://www.timeslive.co.za/local/article1205148.ece
- Social Labour Plans website available at http://slps.co.za/index.php/slp-what-is-it.html

Academic Articles

- Social Labour Plans report by Centre for Applied Legal Studies available at https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/

Stakeholder Engagements

- *Round table discussion held by Corruption Watch at AMI (**7th February 2017**); community member voiced the fact that SLP details are withheld from community members*

3. **Q. Are meaningful community consultations taking place, if any, and are community member's rights being protected when mining applications are granted?**

Answer:

Community consultations are often tick box exercises and do not fulfil their intended purpose, sometimes communities are not consulted and only the community leader/chief or traditional leader is consulted and other times, community members are made to sign consent forms without full

knowledge of the meaning behind what it is they are signing. Although community engagements are an incredibly important component of the application process, very little emphasis is put on ensuring community concerns are raised and taken into consideration.

Evidence for answer:

Reports

- A Mandela Institute report '*Public regulation and corporate practices in the extractive industry*' available Public Regulation and Corporate Practices in the Extractive Industry, A South–South Advocacy Report On Community Engagement, By The Mandela Institute, University of The Witwatersrand

News Articles

- Lawyers for Human Rights – Press Release: '*David and Goliath' Wilgespruit Community goes to the North High Court over their land'* available at http://www.lhr.org.za/news/2016/press-release-david-and-goliath-wilgespruit-community-goes-north-west-high-court-over-thei

Online Articles

- Action Aid South Africa '*For Immediate Release: Mining Affected Communities call on Anglo American to respect human rights*' available at http://www.actionaid.org/south-africa/news/immediate-release-mining-affected-communities-call-anglo-american-respect-human-ri

Stakeholder Engagements

- *Round table discussion held at the Alternative Mining Indaba* ***(February 7th 2017);*** *Morthan Theart from CER expressed his concern that* the 30 days provided for in section 10 are not sufficient for communities to obtain all the necessary information, to consult with other structures and members of the community, and to prepare comment.

Q: Are there marginalized groups vulnerable to mining?

Answer:

Women are often the marginalized and vulnerable group in the mining sector, as mining operations are often perceived to widen gender disparities within communities due to the fact that revenues from mining are not equitably shared, this in turn aggravates inequalities within communities. Women tend to bear a disproportionate share of the social costs and receive an inadequate share of the benefits. In 2000, women made up only 2.3% of the work force in the South African mining industry.

Evidence for answer:

Research Papers

- Glansi Changachirere *'Young Women in Marginalised Communities of Southern Africa: The forgotten lot'* available at http://www.osisa.org/sites/default/files/sup_files/young_women_in_marginalised_communities_of_southern_africa.pdf
- The Mining, Minerals and Sustainable Development Project *'Local communities and Mines'* available at http://pubs.iied.org/pdfs/G00901.pdf
- Kate Philip 'Inequality and economic marginalisation: How the structure of the economy impacts on opportunities on the margins' Law Democracy and Development Volume 14 (2010) available at http://www.saflii.org/za/journals/LDD/2010/8.pdf

Quotes

- Mining and Environmental Justice Community Network of South Africa *'Comments of the Mining and Environmental Justice Community Network on the Mineral and Petroleum Resources Development Act Draft Amendment Bill, 2012'* - "Women remain inadequately represented amongst the ranks of owners and senior managers in the mining sector. Jobs and skills development associated with mining are predominantly available to men." Available at http://cer.org.za/wp-content/uploads/2013/09/MEJCON-SA-COMMENTS.pdf

News Articles

- Action Aid South Africa *'For Immediate Release: Mining affected communities call Anglo-American to respect human rights'* available at http://www.actionaid.org/south-africa/news/immediate-release-mining-affected-communities-call-anglo-american-respect-human-ri

Technological issues

1. **Q: How effective is the online application system, SAMRAD?**

   Answer:

   South Africa's awards process is managed by SAMRAD **(South African Mineral Resources Administration System)** where the general public are meant to view the locality of applications, rights and permits made or held in terms the MPRDA, and where applications in terms thereof can be

submitted electronically. Unfortunately, SAMRAD does not always function, and there are more often than not glitches in the system, furthermore, applications are still being submitted manually, and the system has not fully integrated to an online system.

Evidence for answer:

Online Articles

- Brand South Africa *'Online system for mining rights, permits'* available at https://www.brandsouthafrica.com/investments-immigration/business/economy/policies/miningonline-090211
- Environment *'DMR SAMRAD Portal Only Serves Mining Interest – NOT PUBLIC'* available https://www.environment.co.za/poisoning-carcinogens-heavy-metals-mining/dmr-samrad-portal-only-serves-mining-interest-not-public.html
- Lisa Steyn *'End of Sishen saga casr in iron' Mail and Guardian* available at *https://mg.co.za/article/2013-12-20-end-of-sishen-saga-cast-in-iron* Published 20 December 2013.

News Articles

- Natalie Greve *'SA online minerals portal constricting already stressed mining sector' Engineering News* available at http://www.engineeringnews.co.za/print-version/sa-minerals-cadastre-constricting-already-stressed-mining-sector-2012-11-30 Published 30 November 2012

Stakeholder Engagements

- Parliamentary Monitoring Group Minutes **8th March 2017**; Ms Nkambule, Chief Director Mineral Regulation at the DMR stated *that Measures have been put in place to address the challenge that might arise from non-access to the SAMRAD system hence there is still a chance to allow manual lodgement of applications.* Available at *https://pmg.org.za/committee-meeting/24103/;*
- Parliamentary Monitoring Group Minutes **8th March 2017;** Mr N Mandela from the ruling democratic party expressed his reservation on the shift to an IT only system and was of the opinion this may be a disadvantage to the illiterate populace and those in rural areas. Available at *https://pmg.org.za/committee-meeting/24103/;*
- Meeting held at *Mining Company A* on **10 March 2017**; wherein we were advised that due to SAMRAD's dysfunctionality sometimes double rights are granted and applicants have to resort to litigation to settle the dispute.
- Parliamentary Monitoring Group Minutes **8th March 2017**; Ms Nkambule, Chief Director Mineral Regulation at the DMR stated that efforts were being put in place to ensure the system improves and that regional managers must ensure that there is no other application on

the system with respect to the right being applied for, before an application is accepted. This is to reduce the possibility of litigation. Available at https://pmg.org.za/committee-meeting/24103/

- Meeting held with an anonymous official from the DMR in **May 2017** wherein we were informed that double licenses are still being granted, the DMR is being ill informed, or the system administrator is not updating SAMRAD to say an application has been accepted.

2. Q: Is overly technical information used in Environmental Authorization Reports to disseminate information to interested parties?

Answer:

Yes, overly technical information is used, more especially in applications for environmental authorization, this leads to a general lack of understanding amongst community members, who are supposed to make comments and or objections.

Evidence for answer:

Stakeholder Engagements

- *Meeting with Centre for Environmental Rights, Cape town, **9th February 2017**, wherein we were advised that community members generally don't understand the information contained in the documents they are meant to object on*
- *Meeting with Federation for Sustainable Environment, **24th January 2017**, wherein we were advised that community members often don't understand the technical terms contained in a EIA*
- *Alternative Mining Indaba, **6-8 February 2017,** Many participants in different sessions, raised the issue of information being too technical for community members to understand*
- Side Event hosted by Corruption Watch at the Alternative Mining Indaba, **7th February 2017;** many participants raised the issue of the information presented to communities being too technical and complex with bulky documents which no one is able to read

Research Papers

- Centre for Environmental Rights & Lawyers for Human Rights *'Mining and Your Community: Know Environmental Rights Guide'* available at http://cer.org.za/wp-content/uploads/2014/03/CER-Mining-and-your-Community-Final-web.pdf

3. Q: Does the online application process cater for applicants in the rural areas?

Answer:

SAMRAD is disadvantageous to individuals in the rural areas who do not have access to computers or to the internet.

Evidence for answer:

Stakeholder Engagements

- Parliamentary Monitoring Group Minutes 8th **March 2017**Mr N Mandela (ANC) expressed his reservation on the shift to an IT only system and was of the opinion this may be a disadvantage to the illiterate populace and those in rural areas. He asked DMR how such people would have access to the system. Available at https://pmg.org.za/committee-meeting/24103/

Economic Factors

1 **Q: How important is mining to the economy?**

Answer:

The SA economy remains highly dependent on the export of minerals and metals, mining has often been viewed as the locomotive of South Africa's economic development and directly exported minerals and metals account for as much as 60% of all export revenue.

Evidence for answer:

Online Articles

- KPMG South African Blog *'The role of mining in the South African economy'* available at https://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/
- South African Minerals to Metals Research institute *' The SA Mining Industry'* available at http://www.sammri.com/?page_id=33
- South African Government *'Invest SA: One stop shop'* available at http://www.gov.za/Invest%20SA%3AOnestopshop

Research Papers

- Johannes Fedderke & Farah Pirouz *'The Role of Mining in the South African Economy'* ERSA, University of the Witwatersrand available at https://econrsa.org/system/files/publications/policy_papers_interest/pp09_interest.pdf

News Articles

- Anthea Jeffery *'Mining: What Botswana can teach us – IRR'* Politicsweb available at http://www.politicsweb.co.za/news-and-analysis/mining-what-botswana-can-teach-us--irr Published on 04 October 2016.

2. **Q: What has caused the recent decline in investment in the South African Mining Industry?**

Answer:

The constant altering of mining legislation, and the overall uncertainty of the MPRDA, has caused investors to opt to invest elsewhere out of fear that they will make a loss.

Evidence for Answer:

Online Articles

- PriceWaterhouseCoopers *'SA's mining industry sees steep decline in financial performance impacted by a slump in commodity prices and increased cost pressures'* available at http://www.pwc.co.za/en/press-room/sa_s-mining-industry-sees-steep-decline-in-financial-performance.html
- *SA mining industry must shape up Fin24.com* available at http://www.fin24.com/Economy/SA-mining-industry-must-shape-up-20130702 Published on 03 July 2013.
- Kevin Crowley & Andre Janse van Vuuren *'Red tape and power struggles: SA is losing mining investment' Mail & Guardian* available **https://mg.co.za/article/2016-02-09-red-tape-and-power-struggles-sa-is-losing-mining-investment** Published on 09 February 2016.
- John Kane-Berman *'Mining in South Africa: Then, now and into the future – IRR' Politicsweb* available at http://www.politicsweb.co.za/documents/mining-in-sa-then-now-and-into-the-future--irr Published on 15 February 2017.

Stakeholder Engagements

- *Meeting at Herbert Smit Freehills on the 12th December 2016 wherein we were advised that the uncertainty of the MPRDA often causes investors to want to invest elsewhere in a market that is not so unpredictable due to regulatory uncertainty.*

Environmental factors

1. **Q: Does the Government have sufficient capacity to deal with Environmental Authorizations?**

Answer:

NO, since the introduction of the *one environmental system*, the DMR is the sole authority for dealing with Mining rights and Environmental authorizations, although this system is meant to streamline the application process and make the process easier- *'one stop shop'*, it has created a significant number of problems.

Evidence for answer:

Stakeholder Engagements

- *Meeting with Mining Company A on **10th March 201;** wherein we were advised that capacity or the lack thereof at the DMR is an issue which causes applications to be delayed or licenses to be granted without comprehensive consideration of the facts.*
- *Meeting with Centre for Environmental Rights, Cape town, **9th February 2017;** wherein we were advised that DMR officials do not have the knowledge or expertise to deal with environmental authorizations.*

Online Articles

- Miriam Mannak *'South Africa: Mines Threaten the Environment' Ethicalliving* available at *http://www.ethicalliving.co.za/south-africa-mines-threaten-the-environment/* Published on 15 February 2012.

News Articles

- John Yeld, GroundUp *'Critical court showdown on mining and environment'* News24.com available at *http://www.news24.com/SouthAfrica/News/critical-court-showdown-on-mining-and-environment-20170219* Published on 17 February 2017.

2. **Q: Does the community have a voice on the impact of mining on their environment?**

Answer:

Legislation requires that community members comment on Environmental impact assessment reports, however due to the technical nature of these reports, community members often do not understand the reports and are thus unable to comment or alternatively their objections are not sometimes overlooked.

Evidence for answer:

Research Paper

- Centre for Environmental Rights & Lawyers for Human Rights *'Mining and Your Community: Know Environmental Rights Guide'* available at http://cer.org.za/wp-content/uploads/2014/03/CER-Mining-and-your-Community-Final-web.pdf - This report highlights the fact that community members can object to EIA reports.

Stakeholder Engagements

- Corruption Watch roundtable at the Alternative Mining Indaba, **7th February 2017**. Many participants raised the issue of the information presented to communities being too technical and complex and presented in the form of bulky documents which no one is able to read.

Political factors:

1. **Q: Do politicians or officials have private interests in mining?**

Answer: Yes, the mining sector is extremely politicized in South Africa which results in apparent conflicts of interests.

Evidence for answer:

News Articles

- Sungula Nkabinde *'The Impacts of Politics on SA Mining' Mineweb* available at http://www.mineweb.com/news/political-economy-analysis/the-impact-of-politics-on-sa-mining/ Published on 06 September 2016.
- *Mining Companies 'Polluting SA politics'* Fin24.com available at http://www.fin24.com/Economy/BMF-Giving-mining-communities-a-share-20120814 Published on 14 August 2012.

Stakeholder Engagements

- Expert interview with Mining Lawyers; **Herbert Smith Freehills, 12 December 2016** wherein we were advised that there is a significant political involvement in the mining sector in SA

Online Articles

- Dianna Games *'SA works, but that is not enough to attract investors anymore' Business Day* available at http://www.bdlive.co.za/opinion/columnists/2015/03/30/sa-works-but-that-is-not-enough-toattract-investors-anymore Published on 30 March 2015.

Research Papers

- "BEE requirements in the *mining charter* are particularly problematic. The 26% BEE ownership requirement (which had to be met by 2014) has made it possible in practice for DMR officials to choose the 'correct' BEE investors for mining companies to partner with by signalling that an application for a mining right is unlikely to succeed unless a specific BEE partner is brought in". **Trick or Treat: Rethinking Black Economic Empowerment Paperback – October 1, 2010,** by Jenny Cargil https://mg.co.za/article/2013-08-30-00-gold-fields-buries-bee-findings

2. **Q: Has the issue of state capture had an effect on the mining sector?**

Answer: Yes, the issue of a prominent family, known as *the Gupta's*, having captured the state, has been a serious issue in South Africa and has affected the mining sector and the economy as a whole, this is due to allegations of the Gupta family being politically connected to the President and to the Minister of the DMR and has resulted in further allegations of corruption and undue political influence in licensing decisions.

Evidence for answer:

Online Articles

- Anine Kilian *'Chamber of mines welcomes release of state capture report'* Miningweekly.com available at http://www.miningweekly.com/article/chamber-of-mines-welcomes-release-of-state-capture-report-2016-11-03 Published on 03 November 2016.
- *New State Capture Claim Pops up in Mining Sector BusinessTech* available at https://businesstech.co.za/news/general/143675/new-state-capture-claim-pops-up-in-sa-mining-sector/ Published on 18 November 2016.
- Jan Hofmeyr *'State capture in South Africa' Transparency International* available at http://blog.transparency.org/2017/02/14/state-capture-in-south-africa/ Published on 14 February 2017.

Reports

- Public Protector *'Report No:6 of 2016/17 on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of the State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses'* available at http://www.pprotect.org/library/investigation_report/2016-17/State_Capture_14October2016.pdf
- https://businesstech.co.za/news/wp-content/uploads/2016/11/329756252-State-of-Capture-14-October-2016.pdf

3 **Q: How effective is the government response to corruption?**

Answer:

South Africa is regularly confronted with public sector corruption, although measures are put in place to expose corruption, perpetrators are often not penalized. South Africa is still ranked amongst those countries perceived to have a serious corruption problem, with our ranking perilously close to those countries suffering from endemic corruption

Evidence for answer:

Reports

- State of Capture Report No 6 of 2016/2017- This report is a clear indication of the strength of integrity institutions in a sense that the public protector investigated and exposed aspects of corruption involving high level officials within the country.
- *[The latest Transparency International Corruption Perception Index (CPI) ranks South Africa 64th out of 176 countries with a score of 45/100];*

Online Articles

- Corruption Watch *'Why is corruption getting worse in South Africa'* available at http://www.corruptionwatch.org.za/why-is-corruption-getting-worse-in-south-africa/ Published on 17 January 2014.

- Dr Eugene Brink *'Corruption in SA uncontrollable – Solidarity' Politicsweb* available at http://www.politicsweb.co.za/politics/corruption-in-sa-uncontrollable--solidarity Published on 09 December 2015.

News Articles

- Genevieve Quintal *'SA moves five places on corruption perception index' News24* available at http://www.news24.com/SouthAfrica/News/sa-moves-five-places-on-corruption-perception-index-20160127 Published on 27 January 2016.

Legal and Ethical Factors

1. Q: Are the timeframes stipulated in the legislation adhered to?

Answer:

No, the processing time for applications takes extended periods of time, which often leads to a reluctance from investors, and opens up opportunities for corruption in order to fast track applications.

Evidence for answer:

Online Articles

- 'Changing environmental and regulatory acts/laws have resulted in extended delays and various other issues. Lengthy red tape and multitude of departments overseeing permits, etc'; comments by mining executives canvassed during Fraser surveys in 2013. Anthea Jeffery *'Mining: What Botswana can teach us – IRR' Politicsweb* available at http://www.politicsweb.co.za/news-and-analysis/mining-what-botswana-can-teach-us--irr Published on 04 October 2016.

- The MPRDA provides little guidance on Social and Labour Plans. Uncertainty about these requirements has made it easy for DMR officials to approve or disapprove social and labour plans on arbitrary, and often spurious, grounds. It has also allowed officials to require repeated revisions of social and labour plans, contributing to long delays in the approval of applications. Says Manus Booysen, a partner at Webber Wentzel: 'Delays commonly run to 18 months'. Anthea Jeffery 'Mining: What Botswana can teach us – IRR' Politicsweb available at http://www.politicsweb.co.za/news-and-analysis/mining-what-botswana-can-teach-us--irr Published on 04 October 2016.

Stakeholder Engagements

- Expert interview with Mining Lawyers; **Herbert Smith Freehills, 12 December 2016;** wherein we were advised that time periods need to be more stringent and the discretionary aspect is too wide and unambiguous provisions and transparency and a cadastral system that is open to the public. Other countries have a rapid turn-around which is beneficial to investment.

- Parliamentary Monitoring Group Minutes **8th March 2017**; Ms Nkambule, Chief Director Mineral Regulation at the DMR stated *that* Some measures have been put in place to improve the turnaround times in the application process. Among these is the investment one stop shop, capacity building workshops on the application process, the One Environmental system and continuous improvement of the legislation framework. Available at *https://pmg.org.za/committee-meeting/24103/;*

2. Q: How stable are mining laws and policies?

Answer:

There is a general lack of policy stability in South Africa, which has led to a reduction in investment. The MPRDA Amendment Bill and the third draft charter are yet to be finalized leading to more uncertainty.

Evidence for answer:

Online Articles

- Adam Wakefield *'Phosa: South Africa's instability scares away investors' Mail & Guardian* available at https://mg.co.za/article/2015-05-20-south-africas-instability-scares-away-investors-anc-stalwart Published on 20 May 2015.

- Allan Seccombe *'News alert: mining indaba is not all about you, SA' BusinessLive* available at https://www.businesslive.co.za/bd/opinion/2017-02-06-news-alert-indaba-is-not-all-about-you-sa/ Published on 06 February 2017.

- Allan Seccombe *'Tension remains between miners and department' BusinessLive* available at https://www.businesslive.co.za/bd/companies/mining/2017-02-07-tension-remains-between-miners-and-department/ Published on 07 February 2017.

Case Law

- *Scholes and Another V Minister of Mineral Resources (50642/2015) [2016] ZAGPPHC 326 (3 May 2016)* Available at *http://www.saflii.org/za/cases/ZAGPPHC/2016/326.html* This case challenges the constitutionality of both the Charters, the conduct of the Minister, the exercise of ministerial powers, the conduct of departmental officials and the lawfulness of acts of Parliament.

News Article

- Dirk De Vos *'Op-Ed: Let's get mining under way – again' Daily Maverick available at* https://www.dailymaverick.co.za/article/2017-02-27-op-ed-lets-get-mining-under-way-again/ Published on 27 February 2017.

3. **Q: Is information about mining licenses/environmental reports authorizations easily accessible to the public?**

Answer:

The Promotion of Access to Information Act 2 of 2000(PAIA) in South Africa, has been used to ensure better service delivery, in turn promoting the socioeconomic rights of citizens, however PAIA requests in the extractives sector are often met with recalcitrance and obstruction. There are routine denials of PAIA requests or simply failures to respond to requests

Evidence for answer:

Online Articles

- Michalsons *'Promotion of Access to Information Act'* available at https://www.michalsons.com/focus-areas/information-technology-law/access-to-information-paia/promotion-of-access-to-information-act
- Centre for Applied Legal Studies reported that nearly half of the extractive companies approached for access to their SLPs denied the requests, see Peter Leon *'The steps SA must take to rejuvenate mining industry'* Business Day available at http://www.bdlive.co.za/opinion/2016/02/15/the-steps-sa-must-take-to-rejuvenate-mining-industry Published on 15 February 2016.
- South African History Archive *'Segment 4 Mining Information: Case Study from Civil Society DVD'* available at **http://foip.saha.org.za/static/segment-4-mining-information**

Stakeholder Engagements

- *Meeting with Centre for Environmental Rights, Cape town, 9th February 2017* wherein we were advised that despite several PAIA applications to Government departments, there has been no response.

Research Papers

- ***The Promotion of Access to Information Act And Mining Related Disclosure Practices In The Public And Private Sectors Experiences, Successes, Shortcomings And reform working paper 3***; Dr Olufolahan Adeleke and Prof. Tracy-lynn Humby; http://www.osf.org.za/wp-content/uploads/2017/01/OSF-Extractives-Working-Paper_PAIA-and-Mining-Related-Disclosure-Practices.pdf

- South African History Archive *'Segment 4 Mining Information: Case Study from Civil Society DVD'* available at **http://foip.saha.org.za/static/segment-4-mining-information**

4. **Q: How secure are citizen's rights to property?**

The MPRDA eliminated previous private ownership of mineral rights and vested ownership of minerals and petroleum in the people of South Africa under the custodianship of the state and Unfortunately, although holders of mining and production rights are required to negotiate with landowners and occupiers about access to the land, barriers to beginning mining or prospecting before negotiations have concluded are few and weak.

Evidence for answer:

Online Articles

- Martin Brassey *'Mineral's Act puts people's property right at risk' Independent Online* http://www.iol.co.za/business-report/opinion/minerals-act-puts-peoples-property-rights-at-risk-1731038 Published 06 August 2016.

- Helen Suzman Foundation *'Mining land and Community in communal areas ii Minireal rights and land rights'* available at http://hsf.org.za/resource-centre/hsf-briefs/mining-land-and-community-in-communal-areas-ii-mineral-rights-and-land-rights'

News Paper Articles

- Mark *Olalde 'Family at war over mine riches' Independent Online* http://www.iol.co.za/news/south-africa/gauteng/family-at-war-over-mine-riches-8339593 Published on 25 March 2017.

Case Law

- *AGRI SA v MINISTER FOR MINERALS AND ENERGY* 2013 (4) SA 1 (CC) available at http://www.saflii.org/za/cases/ZACC/2013/9.html

- *Msiza v Director-General for the Department of Rural Development and Land Reform [2016] ZALCC 12* available at http://www.saflii.org/za/cases/ZALCC/2016/12.html

Reports

"...in the province of Limpopo alone, more than 600 disputes have been declared concerning community boundaries and the legitimacy of certain chiefs"

- Mining and Environmental Justice Community Network of South Africa 'Comments of the Mining and Environmental Justice Community Network on the Mineral and Petroleum Resources Development Act Draft Amendment Bill, 2012' - "Women remain inadequately represented amongst the ranks of owners and senior managers in the mining sector. Jobs and skills development associated with mining are predominantly available to men." Available at http://cer.org.za/wp-content/uploads/2013/09/MEJCON-SA-COMMENTS.pdf

Annexure 4 – Worksheet B2

Risk Assessment | Worksheet B[2] | South Africa

What is the risk that the legal framework for consultation is inadequate to ensure meaningful and effective consultation with communities? *If the regulatory regime governing consultations is not regulated properly and is not guided by known criteria, this means that mining houses can have non-meaningful community consultations and also creates room for bribery and corrupt practice in order to produce evidence that consultations took place.*	**Code** **PDB (adapted)**

Likelihood *Score* *5/5*	**Evidence to support assessed likelihood** 1. *Mining Companies will often just consult with a Traditional leader /Chief to fulfil their legislative obligation to consult with communities, however Traditional leaders/Chiefs are notorious for serving their own interests and that of their families above that of the community.* • **Source:** http://www.lhr.org.za/news/2016/press-release-david-and-goliath-wilgespruit-community-goes-north-west-high-court-over-thei

2. *With regards to community wellbeing, the MPRDA contains provisions which requires commitments that are broad and open to interpretation by mining companies, and it also contains some limited provisions pertaining to community consultation and notification.*

Source: Public Regulation and Corporate Practices in the Extractive Industry: A South–South Advocacy Report On Community Engagement, By The Mandela Institute, University of The Witwatersrand.

3. The regulatory scheme in South Africa presupposes a 'one-size-fits-all' model for all community engagements, despite their individual diverse needs and circumstances, this makes it easier for mining companies to engage with only one individual and still meet their legislative obligations despite the ineffectiveness and futility of such consultations

Source: South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals Elmarie van der Schyff Faculty of Law North-West University, Potchefstroom Campus

Impact *Score* *5/5*	**Evidence to support assessed impact** 1. *Fatima Shabodien, ActionAid South Africa's Country Director says, "In the mining communities where we work, we see that women in mining communities bear a disproportionate burden as a consequence of unaccountable mining practices. We believe that such mining operations undermine the livelihoods of the most vulnerable—women and children."* **Source:** http://www.actionaid.org/south-africa/news/immediate-release-mining-affected-communities-call-anglo-american-respect-human-ri

2. *Anglo Platinum's operations have thrust the community into increased poverty; severe food security; and frightening environmental and health crises*

Source: Precious Metals II, A Systemic Inequality, Action Aid.

3. Civil society organisations, communities, researchers, farmers and other government agencies have expressed concern about the detrimental impacts of mining on water security, soil and food security and the health, wellbeing and development prospects of communities in Mpumalanga.
Source: Zero Hour, Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga, Centre for Environmental Rights May 2016

4. Because of a lack of effective community consultations, community members are not able to voice their concerns about the potential impacts of mining on the environment, this often leads to licenses being granted without proper consideration of community needs and the community's legitimate concerns.
Source: **Expert Interview with Centre for Environmental Rights, Marthan Theart & Matome Kapa (9th February 2017)**

5. *Despite the fact that procurement contracts are supposed to go to BEE's within the mining community, these contracts are often centralized around one person and creates 'local kingpins', this in turn creates a lot unrest within the communities.*
Source: Meeting with South African Human Rights Commission (12 April 2017)

6. *There is no ability for the community to refuse mining, then they are relocated, and when they are compensated, they are only paid out for the physical structure but not paid out for their land, or their livelihood. Or when they dig up grave sites and re burry. They are supposed to consult with community in accordance with cultural practices, now they say to communities, they give them money to re burry them themselves, so they are shifting obligations.*
Source: Meeting with the South African Human Rights Commission (12 April 2017)

Description of impact *The lack of transparency and the absence of clear regulations for conducting community consultations and concluding agreements undermines the overall integrity of the awards process, mining communities are left disgruntled and destitute and mining houses and government make huge profits at the expense of communities which increases systemic inequality and poverty and results in community unrest.*

Assessment

Likelihood x Impact = *25* ***Total score:*** ***Colour: red***

Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	Very Low	*Minor*	*Moderate*	*Significant*	Very High

Risk Assessment | Worksheet B[2] | South Africa

What is the risk that companies will be confused or misled about the stage their application is at in the awards process? *SAMRAD online is not designed in a way to update the applicant about the stage of their application. Also, multiple licences are often granted over the same area and applications take long periods of time to be processed, resulting in recourse being sought in court. This situation opens the doors to possible bribery of officials to ensure your application is dealt with speedily.*	**Code** **PD32**

Likelihood *Score* *3/5*	**Evidence to support assessed likelihood** 1. *SAMRAD has too many faults which are not being rectified which results in Mining Houses resorting to court to rectify the issue of competing applications, in the event SAMRAD was functioning efficiently, applications would not be made on already existing licenses* **Source:** Meeting with Mining Company A **(10th March 2017) & Meeting at Herbert Smit Freehills (12 Dec 2016)**

2. *"SAMRAD is a credible initiative, 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." Peter Leon- Mining Lawyer*

Source: 'Concerns that South Africa's Flawed Online Mining Cadastre Portal could be Constricting an already Stressed Mining Sector' 2012-11-30: Mining Weekly

3. *"Where a right already exists in relation to the same mineral on the land in question, the state may not grant a right to anyone other than the existing right-holder … the A[ct] simply does not contemplate two right-holders in respect of the same mineral and land" The words of Judge Moseneke with regards to a case which dealt with competing right applications*

Source: Sishen Iron Ore Company (Pty) Ltd v Minister of Mineral Resources and Others (28980/10) [2012] ZAGPPHC 2 (3 February 2012)

4. *Ms Nkambule, Chief Director Mineral Regulation at the DMR stated that Measures have been put in place to address the challenge that might arise from non-access to the SAMRAD system hence there is still a chance to allow manual lodgement of applications.*

Source: Parliamentary Monitoring Group on Mining: Minutes (**8th March 2017**);

Impact *Score* *4/5*	**Evidence to support assessed impact** 1. *The fact that the cadaster system in South Africa is not 100% functional, deters foreign investment out of fear of engaging in long winded court battles to settle competing application disputes.* **Source**: https://mg.co.za/article/2016-02-09-red-tape-and-power-struggles-sa-is-losing-mining-investment

2. *Ms Nkambule, Chief Director Mineral Regulation at the DMR stated that efforts were being put in place to ensure the system improves and that regional managers must ensure that there is no other application on the system with respect to the right being applied for, before an application is accepted. This is to reduce the possibility of litigation.*

Source: Parliamentary Monitoring Group on Mining: Minutes (**8th March 2017**);

3. Mr J Lorimer, a member of the DA opposition party talked about the feedback he had received from people using the SAMRAD system. People complained about completing a rights application without doing it on paper. He also felt the way the system is conceived
looks problematic. In his opinion, the system raises doubt in people's mind and it is open to perceptions of corruption.

Source: Parliamentary Monitoring Group on Mining: Minutes (**8th March 2017**);

4. *Double licenses are still being granted, the DMR is being ill informed, or the system administrator is not updating SAMRAD to say an application has been accepted.*

Source: Meeting with anonymous official from the DMR (May 2017)

Description of impact *SAMRAD online is a vital component of the application process, if there is corruption and bribery by way of manual manipulation of the 'first come, first serve' system it will increase litigation as the only means to seek recourse which will discourage investors and will result in economic instability for the country.*

Assessment

Likelihood x Impact = *3X4* ***Total score: 12*** ***Colour: Amber***

Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	Very Low	*Minor*	*Moderate*	*Significant*	Very High

Risk Assessment	Worksheet B[2]	South Africa

What is the risk that the duration and timing of each step of the awards process can be manipulated? *If legislative timelines for the processing of applications are not adhered to and the DMR sometimes takes extended periods of time to process applications, this can lead to bribery of officials to try and speed up the application process in your favour to prevent further delays or the DMR officials can frustrate the process to ensure a particular BEE partner is included in the application. (which related to PP N1 discussed below)*	**Code** **PD 2B**

Likelihood *Score: 4 / 5*	**Evidence to support assessed likelihood** 1. *Prospecting rights are a lot quicker, mining rights can take up to 2 years to be granted. This is due to lack of capacity sometimes. It can take from 6 to 18 months to sell a mining right, which is a huge deterrent to international investors.* **Source: Meeting with mining lawyers at Herbert Smit Freehills (12 Dec 2016)**

2. *Legislative timelines are not adhered to, so many companies take the regulator on utilizing the Promotion of Administrative Justice Act (PAJA) to say you have not taken the action, in order to get them to comply with timelines. Aside from lack of capacity being the reason for not adherence to legislative timelines, but in situations where they want a particular outcome, they may be steering them towards a particular partner, (i.e. a BEE partner).*

Source: Meeting with Senior Executive at the Chamber of Mines (13 December 2016)

3. *Ms Seipati Dhlamini, DMR Deputy Director General: Mineral Regulation, responded to the questions about timelines... She said that that was a challenge which DMR was looking into. She also spoke about the need for more money to improve the system.*

Source: : Parliamentary Monitoring Group on Mining: Minutes (8th March 2017);

4. *When you apply for a Section 102 it can stay there for years without being approved and things are waiting there without getting approved, it's about who do you know or who forceful you are. We have argued that there must be strict timelines for approval.*

Source: Meeting with Mining Company B(12 April 2017)

5. We were advised that in a particular province, there is a huge backlog of applications, almost 600 applications have not been attended to.

Source: Meeting with anonymous official from the DMR (May 2017)

Impact *Score* *4/5*	**Evidence to support assessed impact** 1. *Some of the problems that were identified as impacting negatively on our aim to be competitive included but were not limited to an increase in litigation cases and appeals as well as letters from applicants relating to delays in processing their applications.* Source: What we're doing about mining right problems: Susan Shabangu, 07 February 2011: politics web

Description of impact *Legislative timelines not being adhered to has a potentially severe impact in that bribes/gifts can be given in order to speed up the application process and DMR can use the delay as leverage on the applicant to include particular individuals as BEE partners in the application. Lengthy processes can also lead to using litigation as a means of recourse which in turn cause a decline in investment.*

Assessment

Likelihood x Impact = 4 X 4 *Total score:16* *Colour: Red*

Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	Very low	*Minor*	*Moderate*	*Significant*	Very high

Risk Assessment | Worksheet B[2] | South Africa

What is the risk that the steps of an awards process will not be publicly knowable? *The constant amending of mining legislation results in different regional offices following different procedures for the same application, this creates an environment that is susceptible to corruption due to a lack of uniformity and a lack of legislative compliance, this allows corrupt practices to take place unnoticed.*	**Code** **PD3**
What is the risk that the criteria for awarding licenses etc. will not be publicly knowable? If the criteria for awarding of license is not knowable then applicants can fail to meet some critical steps in the process due to a lack of knowledge, this will result in licenses being granted without following through with legislative processes, this creates an environment that is susceptible to corruption.	**PD4**

Likelihood *Score* *4 / 5*	**Evidence to support assessed likelihood** 1. *Different regions of the DMR operate differently, and have different requirements from applicants. The Limpopo regional office is quite bad, whereas the Free State regional office is quite pedantic and meticulous.* **Source: Meeting with Mining Company A (10 March 2017)**

2. *In some instances, RMDEC's do not even occur and there is no Committee to deal with objections, furthermore Section 10 notices are sometimes not done in terms of the MPRDA regulations but are done in terms of NEMA. There is a general uncertainty on which regulation to follow.*

Source: Meeting with Centre for Environmental Rights (9 February 2017)

3. *If there is a dispute, at a regional level, there is meant to be a REMDC, these REMDC's have not been operational, so what tends to happen is that a dispute goes to head office, or goes straight to court, for a mining company may not be so bad,* but at REMDEC these disputes should be resolved… sometimes the person in authority at a National level doesn't want the person in authority at a regional level to make key decisions.

Source: Meeting with Senior Executive at the Chamber of Mines (13 December 2016)

4. "The DMR has capacitated the department dealing with the One Environmental System quite well, however there is confusion in terms of the law.

Source: Meeting with anonymous official from the DMR (May 2017)

Impact *Score* *4 / 5*	**Evidence to support assessed impact** 1. *A general lack of policy stability leads to political, social and economic uncertainty. Policy stability in contrast created an "investment friendly culture where every investor feels protected and free to do business* **Source:** Mail and Guardian, Phosa: South Africa's instability scats away investors; 20 May 2015

2. *An investor described the country's regulatory regime as "changing environmental and regulatory laws (have) resulted in extended delays…lengthy red tape and (a) multitude of departments overseeing permits."*

Source: *Fraser Institute, loc cit*

3. *The Department of Environmental Affairs said that although they have the One Environmental System (OES) in place, they don't have regulations of how the system works, but they are working around it for now.*

-This results in industry uncertainty

Source: Meeting with South African Human Rights Official (12 April 2012)

Description of impact *The underlying impact of the steps of the application system not being publicly knowable is that the applicant or the public has no way of compelling the DMR to perform in line with legislation if the legislation itself is not known, the impact is that the system remains corrupt, and communities suffer the consequences of all the steps of the process not being carried out correctly.*

Assessment

Likelihood x Impact = *4 X 4* *Total score: 16* *Colour: Red*

Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	*Very low*	*Minor*	*Moderate*	*Significant*	*Very high*

Assuming consultation with affected communities is required, what is the risk that their free, prior informed consent will be ignored as a result of corrupt practices? *If Mining houses ignore the voice of the community and enter into agreements and receive consent from Traditional Leaders/Chiefs only, they are able to offer bribes/gifts to Traditional Leaders in order to receive consent and to conclude agreements that do not serve the best interest of the community at large.* **What is the risk that community leaders negotiating with a mining company will not represent community members' interests?** If community leaders only look out for their own interests, and the interests of their immediate families when negotiating with mining companies, the needs of the communities will completely be overlooked and only a small minority will benefit from mining operations in the community.	**Code** **PP 6** **PP 7**

Likelihood *Score* *5/5*	**Evidence to support assessed likelihood** 1. In April (2016), in addressing violent protests the previous September, Anglo American Platinum ("Amplats") subsidiary, Rustenburg Platinum, announced a R1.75 million deal to "settle all outstanding issues" between the mine and the Mapela community and to "settle a number of legacy issues" other than land leases, unfortunately, the company dealt exclusively with Kgoshi David Langa and his traditional council. This caused more violent protests and exacerbated ongoing tensions. Many residents in Mapela, including headmen, were upset that not only had they not been consulted about the settlement deal, Kgoshi Langa withheld information from the community about the details of the settlement. He signed the deal even after community members came forward asking him not to sign until the community had been properly consulted. **Source:** Mining, Land, And Community In Communal Areas III: Community Governance, Tamara Jewett, August 2016

2. *Mining Companies come into our community and only engage with the Chief/'Kgoshi', 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.*

Source: Corruption Watch round table discussion on Mining for Sustainable Development-transparency and accountability in the awarding of mining licenses, contracts and permits (7th February 2017)

3. *Mining companies are able to enter into agreements with individuals as opposed to the community at large or the lawful land owners, this results in funds being misdirected, corrupt collusions between companies and individuals and disgruntled members of the community.*

Source: Report received by Corruption Watch about corruption on a family owned farm in Rustenburg (October 2016)

4. *"It appears that in most mining affected communities where there are traditional authorities, there are mining companies entering into private deals with traditional authorities on behalf of the whole communities.*

Source: Traditional Leaders Fuel Mining Tension, Sowetan, 14 September 2016: PressReader.com

5. *The issue of traditional leaders is a contentious issue for everyone, not just mining houses, government needs to regulate the issue of traditional leaders better and how one should consult with the Council (Kgoro). At this stage mining houses are not sure who are community leaders, and legislation does not govern this properly and so Government is not playing its role in order to streamline the legislation.*

Source: **Meeting with Mining Company A (10 March 2017)**

Impact *Score* *5/5*	**Evidence to support assessed impact** 1. *Lengthy strikes have also had devastating impacts on communities, with local businesses struggling to survive and strikers having to obtain loans, often at high interest rates through unregulated and/or unlawful mechanisms. The effect of this is that miners are driven even deeper into poverty as the repayment of loans may be unaffordable, despite any wage increase which may have ensued* **Source:** Media Release by the South African Human Rights Commission (SAHRC) on hearings to be held on the 13th & 14th September 2016 ,on The Underlying Socio-economic Challenges of Mining Affected Communities in South Africa.

2. *"there was a growing discontent among miners, trade unions and mining communities over low wages and poor living conditions that have sparked a wave of strikes and protest action across the sector over the past few years. This has in turn "resulted in a decline of the country's GDP and shaken investor confidence". This was a comment made at the SAHRC hearing held on the 9th September 2016.*

Source: Traditional Leaders Fuel Mining Tension, Sowetan, 14 September 2016; PressReader.com

3. *If they miss this opportunity to start to be fair with communities, they're going to face a revolt," John Capel, executive director of the Bench Marks Foundation, a corporate social responsibility monitoring organisation, said. "I just see angry, angry, angry communities whether it's across coal, platinum, diamonds, iron ore, whatever."*

Source: Mines fight over proposed community revenue share, Business day 29 August 2016

4. *Section 24 perpetuates this problem further by giving traditional councils the power to enter into partnerships with the private sector in ways that may undermine the customary rights of rural citizens...clears the way for traditional councils to strike deals that could have massive communal ramifications for local communities, without consulting them. These could include mining deals, private land developments, infrastructure projects, road building and so on.*

Source: Democracy for rural people under threat; City Press, 2017-01-15, News24.com

Description of impact *The underlying impact of ignoring the free prior and informed consent of community members is community needs are not addressed, resulting in disgruntled community's which often leads to strikes which can often turn dangerous and lead to loss of life. Striking also leads to a loss of overall GDP for the country and creates uncertainty from investors.*

Assessment

Likelihood x Impact = *5 X 5* ***Total score:*** *25* ***Colour:*** *Red*

Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	*Very low*	*Minor*	*Moderate*	*Significant*	*Very high*

Risk Assessment	Worksheet B[2]	South Africa

What is the risk that cadastre staff and managers will be unable to cope with the workload of the agency? *The issue of capacity at the DMR results in there being a backlog of applications and opens up a window for corruption as bribes will be given or requested in order to speed up applications.*	**Code** **PP1**

Likelihood *Score 5 / 5*	**Evidence to support assessed likelihood** 1. *Time periods need to be more stringent and the discretionary aspect is too wide and unambiguous provisions and transparency and a cadastral system that is open to the public. Other countries have a rapid turn-around which is beneficial to investment.* **Source: Meeting with mining lawyers at Herbert Smit Freehills (12 Dec 2016)**

2. *Sometimes the reason for DMR not adhering to timelines is due to a lack of capacity.*

Source: Meeting with Senior Executive at the Chamber of Mines (13 December 2016)

3. *An important feature of the Department of Mineral Resources (DMR's) annual report published earlier this month was acknowledgement of its capacity constraints, both in its legal and financial activities. Bruce Falcon, an attorney for Brink, Falcon & Hulme Inc., said he hoped capacity improvements were even-handed such that more hands were dedicated to approving mining and prospecting licence applications, rather than just on the compliance side.*

Source: DMR manpower constraints just part of problem By David McKay ;October 1 2013

Impact *Score* *4/5*	**Evidence to support assessed impact** 1. *If the minister (of mineral resources) fails to consider an application that has been submitted by a person in terms of the MPRDA, the minister's inaction will be "an administrative action", and falls within the ambit of PAJA. Under these circumstances a person should be able to approach the court for appropriate relief.* **Source:** Online Article: When the Minister of Mineral Resources Ignores You; By Clinton Pavlovic, 2015-11-30;

2. 'A *Lack of transparency in decision making leads to perceptions of 'too much official discretion' and perception of impropriety, especially on the part of those who are negatively affected by decisions taken,* and an Absence of inherent accountability system for officials involved in processing applications and administering rights.

Source: What we're doing about mining right problems; Susan Shabangu; 07 February 2011; politicsweb

3. *"Currently there is an issue of capacity, we can't work on all the applications due to lack of manpower. Posts are frozen. We need more people, as long as there is a backlog, corruption will always be there, where there is chaos it is easier to hide. Despite the fact that we send motivations requesting more capacity, nothing happens."*

***Source:* Meeting with anonymous source from the DMR (May 2017)**

Description of impact *The impact of a lack of capacity is the backlog of applications, which is a discouragement to investors, and also results in burdening the judiciary with Promotion of Administrative Justice (PAJA) applications in court in order to compel the Department to process applications.*

Likelihood x Impact = 5 X 4	***Assessment*** ***Total score: 20***	***Colour: Red***

Colour:	**Blue**	**Green**	**Yellow**	**Amber**	**Red**
Risk level:	*Very low*	*Minor*	*Moderate*	*Significant*	*Very high*

What is the risk of mining companies being compelled by the DMR to include certain parties in the ownership of their company? *If a mining company applies for a license and is indirectly coerced to include particular individuals as BEE partners of their company, the DMR can ensure whom they want included, and can withhold a mining license from being approved if such an individual(s) is not included, this can completely undermine the fairness of the application process and creates a vacuum for corruption.*	**Code** **PP-N1 (additional risk)**
When companies are legally required to partner with BEE partners for a mining permit or licence, what is the risk that the details of these partnerships will not be publicly knowable? Corruption can occur in an instance wherein the BEE partner of an applicant is politically connected which results in a conflict of interest between the mining company a government employee	**PD21**

Likelihood *Score 5/5*	**Evidence to support assessed likelihood** 1. *There are instances where the DMR has held a mining company ransom, they hold unrealistic demands on companies which then delays the process, the DMR suggests specific BEE partners should be included, and if not they will not grant them the license.* **Source: Meeting with mining lawyers at Herbert Smit Freehills (12 Dec 2016)**

2. *The Gold Fields black economic empowerment (BEE) transaction has already drawn controversy for the way it channeled benefits to connected individuals assembled by a presidential lawyer and two ex-convicts. the latest allegations are likely to increase concerns about the abuse of mining sector opportunities to extend patronage to a small elite.*

Source: News Article; Investigators: Goldfields bribed Mbete, Mail & Guardian, 6 September 2013.

3. *The BEE component is particularly vulnerable to external influence, you must have a BEE partner and then you get your license. This process is fraught with so many complexities, both mining companies and the regulators are corrupt in this. Mining companies will look for someone with political influence. The regulator will then state that they don't like your BEE partner, and they force that upon you.*

Source: Meeting with Senior Executive at the Chamber of Mines (13 December 2016)

4. *There are instances where the DMR has held a mining company ransom, they hold unrealistic demands on companies which then delays the process, the DMR suggests specific BEE partners should be included, and if not they will not grant them the license.*

Source: Meeting with mining lawyers at Herbert Smit Freehills (12 Dec 2016)

Impact *Score* *4/5*	**Evidence to support assessed impact** 1. *The Constitution states that everyone has the right to administrative action which is lawful, reasonable and procedurally fair. Rejecting a mining company's application for a license due to non-inclusion of a specific BEE individual violates the Constitution and the rule of law.* **Source:** Section 33 of the Constitution of South Africa, 1996

2. The nature of corporate governance transgression that emerged in this category related to the use of influential political connections to unfairly secure BEE contracts. This appears to be the single greatest factor by far that leads to poor governance in such deals within the mining sector (56.9%).

Source: Media-reported corporate governance transgressions in broad-based black economic empowerment deals in the South African mining sector Adèle Thomas, African Journal of Business Ethics, Vol. 8 No. 2, November 2014, 89-107 available at: file:///C:/Users/AmandaS/Downloads/87-350-1-PB.pdf

Description of impact *The impact of having external political involvement under the guise of a BEE requirement, is that it not only destroys mining firm's credibility, but the resulting financial enrichment of Political officials/ influential peoples results in ordinary citizens within communities not fully benefiting from the mining activities. Government officials benefiting from the mining as BEE partners will then be in a position of power to make policy decisions regarding mining activities that benefit their own interests and not that of the people as their affiliation with both Government and mining results in a conflict of interest .*

Likelihood x Impact =5 X4	***Assessment*** ***Total score: 20***	***Colour:Red***

Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	*Very low*	*Minor*	*Moderate*	*Significant*	*Very high*

What is the risk that there will be inadequate monitoring of licence and permit holders and their obligations? *If there is inadequate monitoring of licence and permit holders and their obligations, corruption can take place in that licence or permit holders can make financial commitments that they have no intention of fulfilling.*	**Code** **RA14**

Likelihood *Score 5 / 5*	**Evidence to support assessed likelihood:** 1. *"Lonmin undertook to convert all its single sex hostel accommodation and to build an additional 5,500 houses for migrant workers, by September 2011. In the first three years, 3,200 houses were to be built and 70 hostels converted. But by the end of the 2009 financial year, only three of the 3,200 houses had been built and only 29 hostels converted."* **Source**: Marikana: World Bank loan undermines Lonmin's arguments, says academic; GroundUp; 7 November 2014

2. *"Community members drew attention to the mismatch between large spends on some infrastructure projects and the very small scale actual deliverable, for example, millions spent on the construction of a very small computer lab."*

Source: The Social and Labour Plan Series Phase 2: Implementation Operation Analysis Report the Centre for Applied Legal Studies, page 32

3. *"Even when these plans are agreed with, SLP's are submitted, mining companies haven't been good with complying with these SLP's, they do it begrudgingly, also there are capacity related problems at the municipal level, so even though a company may build a school, the municipality does not supply electricity and water to the school, and so it remains an empty shell."*

Source: Meeting with Senior Executive at the Chamber of Mines (13 December 2016)

4. *"Mining companies come and make promises to uplift our communities, but they never fulfill those promises and we still don't have access to basic service, and our communities are left in worse of positions than before the mining took place."*

Source: **Corruption Watch round table discussion on Mining for Sustainable Development-transparency and accountability in the awarding of mining licenses, contracts and permits (7th February 2017)**

Impact *Score 5 / 5*	**Evidence to support assessed impact** 1. During the South African Human Rights Commissions' National Hearing on Mining, the question was put to the DMR as to whether or not they have oversight over SLP's, and they responded that they do not have systems in place to oversee the implementation off SLP's. **Source: Meeting with the South African Human Rights Commission (12 April 2017)**

2. *'Little is known about SLP undertakings ... because they are kept confidential by companies, the department and local authorities.'*

The LRC has called on Parliament to withdraw the Mineral and Petroleum Resources Development Amendment Bill (MPRDA). It said there is "no evidence" that rural mining communities have been consulted during deliberations around the bill.
This article provides evidence of civil society approaching parliament, in at attempt of getting more communities' involved in issues around the act including but not limited to SLP's

Source: Mining rights: Communities 'not consulted' on bill; Mail and Guardian; Sarah Evans ; 7 September 2013

Description of impact *The impact of SLP's not being monitored and evaluated is that communities socio economic needs are not met despite government and the private sector benefiting from mining operations. This fails to eradicate systemic inequality, and communities right to development is infringed upon.*

Likelihood x Impact = 5 X 5 ***Assessment*** ***Total score: 25*** ***Colour: 25***

Colour:	**Blue**	**Green**	**Yellow**	**Amber**	**Red**
Risk level:	*Very Low*	*Minor*	*Moderate*	*Significant*	*Very High*

Risk Assessment	Worksheet B[2]	South Africa

What is the risk that too much authority for recommending approval of licenses has been delegated to lower ranking DMR officials? *If Ministers merely approve applications on the recommendation of lower ranking officials without verifying the merits or truthfulness of the contents of the application, these allows for lower ranking officials to engage in corrupt activities and push their own agendas when licenses are applied for.*	**Code** **PD-N1 (additional risk)**

Likelihood *Score 4 / 5*	**Evidence to support assessed likelihood:** 1. *Officials have an inordinate amount of power and too much discretionary power, Corruption often involves lower officials and not high ranking officials. The DDG makes recommendations to the DG regarding approval of a license and the DG accepts without having a clear perspective of whether the applicant meets all the requirements.* **Source: Meeting with Mining Company A (10 March 2017)**

2. *One of the ways to tighten up the gaps of corruption is to ensure that there is scrutiny over official's decisions*

Source: Meeting with Senior Executive at the Chamber of Mines (13 December 2016)

3. *According to Sec 23, theoretically there is no discretion, if the right complies then the Minister must grant it, and there are delegated powers for smaller rights.*

Source: Meeting with mining lawyers at Herbert Smit Freehills (12 Dec 2016)

4. *Low level officials have too much discretion, low level officials don't read anything, they take whatever feedback they get from junior guys and just sign. No guidelines in terms of timelines, or in terms of principals.*

Source: **Meeting with Mining Company B (12 April 2017)**

Impact *Score* *4/5*	**Evidence to support assessed impact** 1. *Some other large African countries have failed to improve their scores on the index. These include* ***South Africa.*** *-A failure to improve scores on the Corruption Perception Index is indicative of the fact that South Africa is still perceived to have high levels of corruption with no impunity* **Source:** Corruption Perception Index 2016, Transparency International;

2. *"The bad news is that we are still ranked amongst those countries perceived to have a serious corruption problem, with our ranking perilously close to those countries suffering from endemic corruption. the country had to turn the situation around as it cannot not afford to fall any further."- Corruption Watch Executive Director, David Lewis.*

Source: SA moves six places on corruption perception index; News24; 21 January 2016.

3. *The Regional Manager can sign an acceptance or a rejection letter. There are fraudulent rejection letters, and there are fraudulent acceptances, asserting to be signed by the Regional Manager and carrying a false signature*
- A criminal case can be opened in this regard.

Source: *Meeting with anonymous official from the DMR (**May 2017**)*

Description of impact *The impact of lower ranking officials recommending that applications being granted and the Minister doing so without proper consideration, is that corruption goes unnoticed and mining regulations governing the mining sector are undermined this in turn lowers South Africa's ranking on the corruption perception index scale and leads to a decline in investment and affects the overall economy.*

Assessment

Likelihood x Impact = ***4 X 4*** ***Total score: 16*** ***Colour: Red***

	Blue	Green	Yellow	Amber	Red
Risk level:	*Very Low*	*Minor*	*Moderate*	*Significant*	*Very High*

Risk Assessment | Worksheet B[2] | South Africa

What is the risk that community members and land owners will not understand the notices and content of the EIA reports or Draft Scoping Reports and so will not be able to make meaningful objections or comments? *If EIA reports are not understood by community members and interested and affected parties, then communities can't object to potential impacts on their environment and so Environmental Authorizations will be granted without having gone through the regulatory process of objections.*	**Code** **RA7 (adapted)**

Likelihood *Score 5/5*	**Evidence to support assessed likelihood:** 1. *Many participants raised the issue of the information presented to communities being too technical and complex and presented in the form of bulky documents which no one is able to read.* **Source: Participants at the Corruption Watch roundtable at the Alternative Mining Indaba, 7th February 2017.**

2. *Community Members often don't understand the contents of Environmental Impact Assessments, and the timeframes which they are given to read them and object are unreasonable.*

Source: Meeting with Centre for Environmental Rights (9th February 2017)

3. *"The issue of what language the notices or reports are done in is irrelevant, if people cannot read, they can't read, those who can read, can read English also. Even if I publish it in 11 languages, I am still going to get the same results., it is a criticism that I have always had. If it is in the newspaper they say they don't have money to buy a newspaper, if it on the website they say they don't have data. Even through SMS, they say they don't get it as they don't have data. Generally speaking, those who are in a position to understand are able to read English. It is a problem, but is not a very big problem."*

Source: Meeting with Mining Company B (12 April 2017)

4. *Community members often don't understand the terms contained in a EIA as they are too technical and are in English.*

Source: Meeting with Federation for Sustainable Environment (24th January 2017)

Impact *Score* *5/5*	**Evidence to support assessed impact** 1. *The Department of Water and Sanitation (DWS) has been accused of "authorizing pollution", after its water quality tests for its acid mine drainage (AMD) plants in the Witwatersrand surpassed the government's own water resource quality objectives* **Source:** Residents Left In The Dark Over Acid Mine Drainage Treatment; Written By Sheree Bega Monday, 13 February 2017; Federation for Sustainable Environment Website.

2. *The detrimental environmental impacts of mining on communities are both direct and indirect. Mining can lead to the loss of natural resources on which communities rely for their livelihoods and well-being, including water resources, agricultural land and important biodiversity. The pollution of the air, soil and water caused by mining furthermore results in pernicious impacts on the health of communities and the socio-demographic changes brought by mining can lead to social conflict. The industrialisation of a landscape through mining can also result in an impact on the psychological well-being of especially rural communities. Indirect impacts may include food insecurity and climate change impacts.*

Source: Centre for Environmental Rights Website

3. *Contrary to promises of contributing to socioeconomic development, mining companies provide poor labour conditions; evade tax; are complicit in corruption; pollute the environment and natural resources; and regularly flout health and safety regulations.*

Source: Living Next to the Mine: Women's struggles in Mining Affected Communities; Documentary by Action Aid; 6 February 2017

Description of impact *The impact community members not understanding EIA's results in a possibility that false information will be presented by the EIAP's with no due diligence checks, which results in communities not being unable to raise objects, resulting in communities suffering from health issues as well as the land on which they live and cultivate on being severely affected by mining operations and such land being rendered uninhabitable after mining operations have taken place.*

Risk Assessment Worksheet B[2] South Africa

Likelihood x Impact = 5 X 5			Assessment Total score: 25		Colour: Red
	Blue	Green	Yellow	Amber	Red
Risk level:	*Very Low*	*Minor*	*Moderate*	*Significant*	*Very High*

Risk Assessment	Worksheet B[2]	South Africa

What is the risk that there is no verification of the accuracy or truthfulness of environmental impact assessment (EIA) reports? *If EIA reports are too technical for community members and if there is no regulatory system in place to verify the conclusions of Environmental Impact Assessment practitioners, then mining applications will be granted with no due diligence check on their validity, and as a result potential hazardous impacts on the environment may occur as a result of mining activities.*	**Code** **PP9**

Likelihood *Score 4 / 5*	**Evidence to support assessed likelihood:** 1. *Advocate Peter Hodes SC, for MSR, had argued that the warrant was invalid for reasons including "serious non-disclosure" and "false and misleading" statements by the environmental authorities.* **Source:** Tormin mine claims false, court hears: News 24: 2017-02-23

2. *Environmental Impact Practitioners are hired by Mining Companies and often will draft reports in favour of the Mining Company. EIP's should be independent and not hired by a mining company, often if they draft something that is not in accordance with what the mining company wants, they run the risk of getting fired.*

Source: Meeting with Centre for Environmental Rights (9th February 2017)

3. *The legislative processes to implement the One Environmental System have been haphazard, incomplete and unintegrated, resulting in greater confusion and uncertainties especially in light of the fact that 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 needs to be implemented to support the roll-out of the One Environmental System.*

Source: Anglo American South Africa Limited submissions to Business Leadership South Africa On Legislative Uncertainty and Regulatory Impediments to Investment in South Africa ;**18 March 2016 (document not permitted for distribution)**

Impact *Score* *5/ 5*	**Evidence to support assessed impact** 1. *'Across the continent, millions are struggling with the environmental, health and social implications of mining.'* **Source:** Miriam Mannak *'South Africa: Mines Threaten the Environment' Ethicalliving* **available at** http://www.ethicalliving.co.za/south-africa-mines-threaten-the-environment/ Published on 15 February 2012.

2. *Bad mining practices can ignite coal fires, which can burn for decades, release fly ash and smoke laden with greenhouse gasses and toxic chemicals. Furthermore, mining releases coal mine methane, a greenhouse gas 20 times more powerful than carbon dioxide. Coal dust inhalation causes black lung disease among miners and those who live nearby, and mine accidents kill thousands every year. Coal mining displaces whole communities, forced off their land by expanding mines, coal fires, subsidence and contaminated water supplies.*

Source: Effects of Mining on the Environment and Human Health: Environment: 20 April 2015

3. *South Africa has failed to meet its human rights obligations to address the environmental and health effects of gold mining in and around Johannesburg.*

Source: The Cost of Gold: Environmental, Health, and Human Rights Consequences of Gold Mining in South Africa's West and Central Rand; Harvard Law School International Human Rights Clinic: October 2016

Description of impact *The impact of a lack of verification of EIA reports is that a report that doesn't contain truthful information could result in Mining communities being left in distress during and after mining activities have taken place, and are unable to live let alone cultivate on their land, the land and water become hazardous to the communities, and affects their health.*

Assessment

Likelihood x Impact =4 X 5 ***Total score: 20*** ***Colour: Red***

Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	Very low	*Minor*	*Moderate*	*Significant*	Very high

Risk Assessment	Worksheet B[2]	South Africa

What is the risk that cadastre agency staff do not have the skills to perform their jobs? *If officials at the DMR are not qualified to conduct assessments on applications related to EIA's, EA's will be awarded without a thorough understanding of the implications and environmental impact of the proposed mining activities..*	**Code** **PP2**

Likelihood *Score 4 / 5*	**Evidence to support assessed likelihood:** 1. *The ruling party is appointing people based on cadre deployment, the problems are not only at municipal level. Now people who cannot deliver are being appointed at a National level and they can't do the job. There is nothing wrong with cadre deployment, as long as the people are competent* **Source: Meeting with Mining Company B (12 April 2017)**

2. *It appears that DMR officials do not have the knowledge or expertise to deal with environmental authorizations.*

Source: *Meeting with Centre for Environmental Rights, Cape town, 9th February 2017;*

3. *Melissa Fourie, executive director of the Centre for Environmental Rights (CER) stated; "We know of 84 mining firms in South Africa that operate without water usage licenses." This means that it is impossible to know how much water they use and what they discard," she explained.*

   The statement in this article is a clear example of how DMR officials are not performing their duties correctly by allowing mining companies to operate without water use licenses.

Source: Miriam Mannak *'South Africa: Mines Threaten the Environment' Ethicalliving* available at http://www.ethicalliving.co.za/south-africa-mines-threaten-the-environment/ Published on 15 February 2012.

4. *The DMR currently does not have the capacity or expertise to deal with the OES.*

Source: Meeting with 'Mining Company A' (10 March 2017)

Impact *Score* *5/5*	**Evidence to support assessed impact** 1. *Legal recourse through the courts has to be sought as during the past two years, the DMR has come in for stinging criticism for not tackling its new environmental compliance responsibilities with enthusiasm or effectiveness.* Source: John Yeld, GroundUp *'Critical court showdown on mining and environment'* News24.com available at http://www.news24.com/SouthAfrica/News/critical-court-showdown-on-mining-and-environment-20170219 Published on 17 February 2017.

Description of impact *The impact of unqualified officials being appointed to authorize EA's is that licenses to conduct mining operations are granted without water use license, IAP's have to approach the courts to seek legal recourse and the impacts on the environment have long term effects that affect the livelihoods of communities.*

Assessment

Likelihood x Impact = *4 X5* *Total score: 20* *Colour: Red*

Colour:	**Blue**	**Green**	**Yellow**	**Amber**	**Red**
Risk level:	*Very Low*	*Minor*	*Moderate*	*Significant*	*Very High*

What is the risk that there is no internal synergy within the DMR and no uniformity across the provinces? *If there is a disconnect within the internal departments of the DMR responsible for the approval of different points of the application process, this creates weak points within the overall system and makes the entire process more volatile to corruption. The same goes for a lack of uniformity across provinces, this also allows for more corruption to take place in certain parts of the country, due to less stringent rules being applied.*	**Code** **CF- N1 (additional risk)**

Likelihood *Score 5 / 5*	**Evidence to support assessed likelihood:** 1. *During a National Hearing on the socio-economic challenges faced by mining communities, the DMR was asked to submit a document on how they draw up their annual monitoring framework. Different provinces (Kwazulu-Natal, Northwest and & Gauteng) submitted completely different documents regarding this issue, which draws the conclusion that there is no alignment or uniformity across the provinces.* **Source: Meeting with South African Human Rights Commission (12 April 2017)**

2. Different regions of the DMR operate differently, for example, Limpopo is quite bad, whereas the Free State is quite pedantic and meticulous.

Source: Meeting with Mining Company A (10th March 2017)

3. *Different Provinces, operate differently. The department needs to come up with a department for all regions to follow. It needs stringent measures from the accounting officer.*

***Source*: Meeting with anonymous official from the DMR (May 2017)**

Impact *Score* *4/5*	**Evidence to support assessed impact** 1. The trade union Solidarity warned today, on International Anticorruption Day, that corruption in South Africa has become uncontrollable. According to Eugene Brink, senior researcher at the Solidarity Research Institute (SRI), the corruption problem in South Africa can be ascribed mainly to a culture of non-accountability among politicians and public servants. *Source:* Dr Eugene Brink *'Corruption in SA uncontrollable – Solidarity' Politicsweb* available at http://www.politicsweb.co.za/politics/corruption-in-sa-uncontrollable--solidarity Published on 09 December 2015.

2. In an article published by Corruption Watch, it was stated that South Africans certainly think that public sector corruption is getting worse. Transparency International's (TI) 2013 global Corruption Perception Index (CPI) shows that South Africa has dropped 34 places since 2001, with half the decline of 17 places occurring since 2009. South Africa is currently ranked at number 72 out of 175 countries and heading downwards.

Source: Corruption Watch *'Why is corruption getting worse in South Africa'* available at http://www.corruptionwatch.org.za/why-is-corruption-getting-worse-in-south-africa/ Published on 17 January 2014.

3. South Africa is regularly confronted with public sector corruption, although measures are put in place to expose corruption, perpetrators are often not penalized. South Africa is still ranked amongst those countries perceived to have a serious corruption problem, with our ranking perilously close to those countries suffering from endemic corruption

Source: State of Capture Report No 6 of 2016/2017- This report is a clear indication of the strength of integrity institutions in a sense that the public protector investigated and exposed aspects of corruption involving high level officials within the country.

Description of impact: The result of different provinces operating differently is that corruption is able to go unnoticed or undealt with due to different practices being used in different provinces. The result is that the application system is dysfunctional, and is not respected. The overall integrity of the application system can then be questioned which puts the DMR and the mining sector in disrepute especially from an international perspective.

Likelihood x Impact = 5 X 4 ***Assessment Total score: 20*** ***Colour: Red***

Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	Very low	*Minor*	Moderate	*Significant*	Very high

Risk Assessment Worksheet B[2] South Africa

What is the risk that the steps of an awards process will not be publicly knowable or are not being properly implemented? If specific steps (such as RMDEC's) are not being properly implemented because they are not publicly knowable or because of a lack of oversight from the necessary governing body, then it creates an environment that is susceptible to corruption as steps in the regulatory system can be completely overlooked by mining houses without impunity.P	**Code** **PD 3(adapted)**

Likelihood *Score 5 / 5*	**Evidence to support assessed likelihood:** 1. *One of the issues in terms of the awarding of licenses, is that if there is a dispute, at a regional level, there is meant to be a Regional Mining Development and Environmental Committee (RMDEC), these REMDC's have not been operational, so what tends to happen is that a dispute goes straight to court. DMR's responsibility should be putting together RMDEC's.* **Source: Meeting with Senior Executive at the Chamber of Mines (13 December 2016)**

2. *During the interview with the official, it was evident that he had not heard of RMDEC's and or what they were meant to achieve.*

Source: Meeting with Mining Company B (12 April 20170)

3. *RMDEC is a committee that sits in order to advise on whether or not a right should be granted, it involves all other departments and it is important that it takes place. They are effective and they advise the minister on whether to grant a right. It involves departments like the department of rural affair, department of traditional affairs, land development etc.*

This mining house was very confident in RMDEC's and their functionality and advised that they occur often, this specific mining house participates in them and are very beneficial.

Source: Meeting with Mining Company A (10th March 2017)

4. *RMDEC's do happen, However, sometimes it is a one-man show, if the Regional Manager doesn't 'like' you, he/she can dismiss your objection without listening to you. It has the tendency of being a bit of tick box exercise.*

Source: Meeting with anonymous official of the DMR (May 2017).

Impact *Score* *5/ 5*	**Evidence to support assessed impact** 1. *If RMDEC's don't take place, you can take the DMR to court for maladministration.* *This is a form of mitigating against the possibility of corruption.* **Source:** Meeting with Mining Company A (10th March 2017)

2. *An incident in Fuleni, KZN, demonstrates how a community prevents an RMDEC from conducting a site visit prior to a RMDEC sitting. This is an example of a disgruntled community not wanting mining to occur on their land and not wanting a RMDEC to sit in order to 'discuss' proposed mining activities.*

Source: Fuleni Blockade Stops RMDEC Site Visit; Fuleni Blockade Stops RMDEC Site Visit; April 21, 2016 ; Sheila Berry; www.earthlorefoundatio.org

3. *The case is illustrative of the systemic issues of failure to on the part of the mining company and officials in the Department of Mineral Resources to properly consult with all interested and affected parties and to provide access to relevant information. The case, however, is interesting in serving as an example where the RMDEC took a decision against the granting of the prospecting right. The Minister (or her delegated officials) however, granted the right in spite of this*

***Source:** Centre for Environmental Rights;* EYESIZWE PAARDEPLAATS case; summary available at: http://cer.org.za/wp-content/uploads/2011/10/Eyesizwe-Paardeplaats.pdf

***Description of impact** If RMDEC's only occur occasionally, then objections from interested and affected parties and more especially community members do not get heard, and decisions are made to only favour mining houses. This results in mining operations taking place without the concerns of community members being heard.*

Likelihood x Impact = *5 X 5*	***Assessment*** ***Total score:*** *25*	***Colour: Red***

Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	*Very low*	*Minor*	*Moderate*	*Significant*	*Very High*

Risk Assessment | Worksheet B[2] | South Africa

What is the risk that DMR staff are politically appointed and do not have the skills to perform their jobs? *If officials at the DMR are not qualified to perform their duties and are merely political appointments, this enables applications for mining licences to be approved without a thorough examination of compliance with legislative requirements. This allows corruption to take place as Mining Companies can submit documents that are legally non-compliant, furthermore decisions can be made to favour the current ruling party.*	**Code** **PP-N2**

Likelihood *Score: 4/5*	**Evidence to support assessed likelihood:** 1. *The ruling party is appointing people based on cadre deployment, the problems are not only at municipal level. Now people who cannot deliver are being appointed at a National level and they can't do the job. There is nothing wrong with cadre deployment, as long as the people are competent* **Source: Meeting with Mining Company B (12 April 2017)**

2. *The DDG makes recommendations to the DG regarding approval of a license and the DG accepts without having a clear perspective of whether the applicant meets all the requirements*

Source: Meeting with Mining Company A (10 March 2017)

3. *Political appointments need to be people that understand a particular sector. The ANC brings in a person who doesn't understand the sector. Furthermore, the technical competence or lack thereof at a municipal level is a problem.*

Source: ***Meeting with Senior Executive at the Chamber of Mines (13 December 2016)***

4. *The civil service in South Africa is politicized. There is huge uncertainty at the DMR, if the Minister changes, then the Director General changes automatically. The current DDG of mineral regulation, has no knowledge on mining and licensing and she is going to be in charge of the whole licensing aspect of things in South Africa. because ministers don't have to have any specific interest/qualification in the mining, Director Gemerals level should atleast stay due to institutional knowledge.*

Source: Meeting At Herbert Smit Freehills (12 Dec 2016)

Impact *Score* *5/5*	**Evidence to support assessed impact** 1. *Baxter from the Chamber of mines states that, "Investment decisions being made now, or the lack thereof, are about whether investors believe they will be able to viably mine a particular deposit in ten to 20 years' time."* **Source: Sungula Nkabinde** *'The Impacts of Politics on SA Mining'* **Mineweb available at** http://www.mineweb.com/news/political-economy-analysis/the-impact-of-politics-on-sa-mining/ **Published on 06 September 2016.**

Description of impact *The impact political appointments is that licenses will be granted without applicants having followed through with due process, without understanding the implications of approval. This undermines the entire legislative process and creates an application process that is susceptible to corruption and easily penetrable, as licenses are granted without a comprehensive consideration of facts and are granted merely to enhance the interests of a few elite, without taking into consideration the affected lives of community members affected by mining.*

Likelihood x Impact =	***Assessment*** ***Total score:***	***Colour:***

Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	Very low	*Minor*	*Moderate*	*Significant*	*Very high*