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FROM PROMISE TO PRACTICE: SOUTH AFRICA'S LEGAL FRAMEWORK FOR MINERAL RESOURCES AND THE SUSTAINABLE DEVELOPMENT GOALS

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Cover image: Open cast mining in the Eastern Cape, South Africa.

ABSTRACT

The UN Sustainable Development Goals (SDGs) are a concerted global effort to realise the imperatives of sustainability. It is crucial that South Africa, which plays a leading role on the African continent, makes every effort to realise the targets set out by the SDGs. This paper assesses the extent to which the legal framework governing mineral resources is capable of facilitating the realisation of two targets within the broader goal of 'responsible consumption and production'. The focus is on two specific targets associated with this goal, namely the sustainable management and efficient use of natural resources and the adoption of sustainable practices. It is posited that the South African legal framework already incorporates the tools required to achieve the realisation of the SDG targets. Practical implementation, however, is likely to be bedevilled by the usual culprits that undermine successful implementation of the law: lack of political will, inefficiency and a lack of capacity, as well as failure by departments to coordinate.

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ABBREVIATIONS AND ACRONYMS

AU	African Union
DEA	Department of Environmental Affairs
DMR	Department of Mineral Resources
EIA	environmental impact assessment
EU	European Union
MPRDA	Mineral and Petroleum Resources Development Act
MSR	Mineral Sands Resources
NDP	National Development Plan
NEMA	National Environmental Management Act
SDGs	Sustainable Development Goals
UN	United Nations

INTRODUCTION

The vision of the UN's 2030 Agenda for Sustainable Development, adopted by 193 of its members, is bold: 17 goals to 'transform our world'.[1] These Sustainable Development Goals (SDGs) include eradicating poverty and hunger; ensuring access to clean water, sanitation and affordable, clean energy; promoting inclusive and sustainable economies, with decent employment for all; ensuring responsible consumption and production patterns; and combating desertification, land degradation, and loss of biodiversity.[2]

These goals are ambitious and noble. Yet they suffer from the same weakness as the very concept of sustainable development itself: internal conflict. How can competing goals ever be achieved? The tension between mankind's need to exploit natural resources to support development and the accelerated degradation of the environment that results has become an intractable problem. Can poverty be eradicated *and* the environment be protected? Can clean water and sanitation for all be achieved *and* production and consumption patterns be controlled? Can sustainable economies be created *and* biodiversity be protected? These are questions to which there are no easy answers.

These goals are ambitious and noble. Yet they suffer from the same weakness as the very concept of sustainable development itself: internal conflict. How can competing goals ever be achieved?

South Africa is considered to be a developing country and a leader on the African continent. It is expected to make every effort to realise the targets set out by the SDGs. This paper considers whether the regulatory conditions in South Africa are favourable for meeting such expectations; for turning the ideals and promises of the SDGs into local realities. While sustainability as understood under the SDGs is a broadly encompassing term, owing to scope limits the paper will focus on only one facet thereof, namely environmental sustainability.

THE CHALLENGE OF SUSTAINABILITY

The concept of sustainable development is now 30 years old. Over this time, it has gained traction internationally, as well as within the South African legal framework. Sustainability is a concept that recognises the plight of both the environment and those communities most harshly affected by the inequalities and inequities that modern lifestyles inflict on those less capable – for whatever reasons – of protecting themselves against the demands of those in more dominant positions. Conceptually, 'sustainable development' embodies the need to achieve a balance between the competing interests of economic and social development, relative to the protection of environmental interests, while taking into account the needs of present and future generations.

1 UN, 'Transforming our World: The 2030 Agenda for Sustainable Development', Resolution Adopted by the General Assembly on 25 September 2015 A/Res/70/1, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E, accessed 29 November 2017.

2 *Ibid.*, goals 1, 2, 6, 7, 12 and 15 respectively.

Why the need for sustainability cannot be ignored

Sustainable use of natural resources is not simply a matter of good global citizenship. It is an imperative for human survival on Earth. There is no melodrama intended here: mankind's unprecedented consumption of natural resources has placed the world on a course that will soon push it out of the 'safe operating space' within which the Earth can sustain humans.[3] This is when the nine 'planetary boundaries' (such as climate change, chemical pollution, land-system change and freshwater use)[4] are exceeded: when changes to the environment become irreversible and threaten to collapse human-sustaining systems completely. Four of the nine planetary boundaries – climate change, biosphere integrity, land-system change and altered biogeochemical cycles – have already been crossed.[5] This places mankind on the track of creating its own extinction.[6] Our modern lifestyles and needs are compromising the very environmental systems that sustain the world as we know it.

This awareness is what has made sustainability an expression of the *zeitgeist* of the past three decades. It acknowledges concern about the exponential damage[7] to the environment that ensues from accelerated development.[8] Biodiversity loss, land degradation and deterioration of freshwater resources are a few of the visible blights of development.[9] These failures of development are now catching up with industries and governments around the world, and have necessitated the introduction of the SDGs. Once the dramatic consequences of the failings of development per the business-as-usual approach are realised, a global effort to change how various stakeholders and role players interact with the environment becomes imperative. The mining industry is one such stakeholder. It has had an undeniably significant impact on human development: it has facilitated access to resources (eg, cobalt) that catapulted us into the technological age[10] while

3 Rockström J *et al*., 'Planetary boundaries: Exploring the safe operating space for humanity', *Ecology and Society*, 14, 2, 2009.

4 See Häyhä T *et al*., 'From planetary boundaries to national fair shares of the global safe operating space: How can the scales be bridged?', *Global Environmental Change*, 40, 2016, p. 62, who distinguish between global and local effects on the planetary boundaries.

5 Steffen W *et al*., 'Planetary boundaries: Guiding human development on a changing planet', *Science*, 347, 6223, 2015.

6 Some argue that we are already in the sixth great extinction (the Holocene or Anthropocene extinction), with extinction rates potentially '100 times higher than normal'. See Drake N, 'Will humans survive the sixth great extinction', *National Geographic*, June 2015.

7 Häyhä T *et al*., *op. cit*., p. 60.

8 Referred to as the 'Great Acceleration': Hibbard K *et al*., 'Group report: Decadal interactions of humans and the environment', in Costanza R, Graumlich LJ & W Steffen (eds), *Sustainability or Collapse? An Integrated History and Future of People on Earth*. Boston: MIT Press, 2006.

9 Olsson P *et al*., 'The concept of the Anthropocene as a game-changer: A new context for social innovation and transformations to sustainability', *Ecology and Society*, 22, 2, 2017.

10 Brown J, *Seven Elements that Have Changed the World*. London: Orion Publishing Group, 2013, pp. 7–8.

enabling humans to access resources such as coal and oil whose harmful impact on the environment is well known and documented.

Why sustainability remains problematic

It is one thing to articulate the laudable goals of sustainable development. It is quite another to develop a working practice of sustainability while fostering development. Sustainability is a problem that needs to be addressed on a global scale, and the ultimate question is one of equity across the globe. Development has long been taken as an answer to the global problems of inequity.[11] For the SDGs to succeed, tangible objectives, targets and deadlines have been developed. But even so, 192 nation states need to cooperate to achieve global goals. These states contend with vastly different conditions and demands when it comes to operationalising sustainable development. For instance, in 2015 in sub-Saharan Africa, approximately 634 million people still lacked access to modern energy services.[12] These needs are difficult to comprehend when one considers the statistics on access in developed countries. For example, according to the World Bank, the EU has achieved 100% access to energy.[13] The drafters of the SDGs seem to have been sensitive to critiques of the concepts of both development and sustainability, and have built the principle of common-but-differentiated responsibility into the proposed approach.[14] There is enough leeway for each nation state to develop its own national targets for the realisation of the SDGs.[15] This approach has, however, devolved global problems to the domestic level at which the SDGs are to be operationalised.

Sustainability is a problem that needs to be addressed on a global scale, and the ultimate question is one of equity across the globe

An important aspect of the problem is that the SDGs are not legally binding. This is not surprising: it would be impossible to attach legal consequences to the implementation of a project of such grand proportions across the globe. And, yet, there is such urgency to realising the underlying objectives of the SDGs that their successful implementation should be made mandatory. How this is to be achieved is a matter of pressing concern for those involved with law and policymaking. To be sure, implementation at the domestic level is crucial.

When it comes to implementing sustainable development, lawyers and policymakers find themselves in unchartered waters. South Africa's Constitutional Court has already pointed

11 Pieterse J, *Development Theory* (2nd edition). London: Sage Publications Ltd, 2010, p. 1.

12 IEA (International Energy Agency), 'World Energy Outlook: Electricity Access Database 2015', 2015, http://www.iea.org/publications/freepublications/publication/WEO2015.pdf, accessed 19 April 2018.

13 World Bank, 'Access to electricity (% of population)', 2014, https://data.worldbank.org/indicator/EG.ELC.ACCS.ZS, accessed 22 January 2018.

14 UNESCO (UN Educational, Scientific and Cultural Organisation), Rio Declaration on Environment and Development, 1992, Principle 7, http://www.unesco.org/education/pdf/RIO_E.PDF, accessed 11 April 2018.

15 UN, *op. cit*.

out[16] that sustainable development does not have the usual 'sharp categories and sharp distinctions' that are the comfort zones of the law. 'All is much fuzzier,' Osborn remarked by way of explanation: it is not a world of 'black and white, yes or no decisions, right and wrong, duties and penalties'.[17] This is the new context in which innovative ways must be found to counter the negative impacts of development, to make sustainability work.

Why mining is key to sustainable development

Mining almost always plays a dual role, contributing significantly to the economy and presenting the threat or reality of environmental destruction and social degradation. Some actors within the mining industry may be doing better than others to increase the contribution the sector could make to development, and/or to minimise the negative consequences that ensue from extracting mineral and petroleum resources.

Even if the mining sector is not the biggest contributor or the biggest destructive force to the environment, it plays a crucial role in respect of all 17 SDGs, in terms of both cause and effect. It is impossible to engage with all the SDG targets here. Two targets within SDG 12 ('Ensuring sustainable consumption and production patterns') must suffice as examples. They are of particular relevance to the mining sector.

Mining activities are known to have a negative effect on the local environments in which they occur. It could be argued that the destruction caused by mining is a deliberate choice: it is necessary, anticipated and calculated against the benefits of extraction. The resources mined are such significant components of modern lifestyles that a world without them is unimaginable.[18] Still, even if every waking moment of the day is facilitated by mined resources, the sacrifice asked may not be one which has been mindfully made. In a globalised world, where everything we need is just the flash of a credit card away, it might be easy to forget or ignore that sacrifices are made anyway, as much by the environment as by people. Many local and traditional communities make sacrifices for the sake of extraction of the resources needed for modern lifestyles.[19] Yet local economies do not typically benefit from mining projects in ways that they should or could.

16 Osborn, as cited by the court in *MEC: Department of Agriculture, Conservation and Environment and another v HTF Developers (Pty) Limited* 2008 (4) BCLR 417 (CC) para 25.

17 *Ibid.*, para 25.

18 The World Bank forecasts a steep increase in the demand for minerals and metals in response to the 'carbon-constrained future'. See Arrobas D *et al.*, 'The Growing Role of Minerals and Metals for a Low Carbon Future', Working Paper. Washington, DC: World Bank, 2017, p. 58.

19 IIED (International Institute for Environment and Development), Mining, Minerals and Sustainable Development Project, *Breaking New Ground: Mining, Minerals, and Sustainable Development*, Report, 2002, p. 200ff, https://www.iied.org/mmsd-final-report, accessed 29 November 2017. See, for example, Chuhan-Pole P *et al.*, 'Socioeconomic Impact of Mining on Local Communities in Africa', Working Paper. Washington, DC: World Bank, 2015, p. 81ff.

Today, mining companies are under much pressure to contribute to local and traditional communities in terms of sharing the benefits of mining.[20] The legal duties imposed on mining companies to manage the extent of environmental harm, by minimising effects or rehabilitating damage, have also increased massively over the past decade. How the mining sector will respond to the challenge of reconciling the opposing forces of development and sustainability in its industries remains an open question. Global pressure for increased responsibility in the mining sector is exerted through factors such as international law and corporate image.[21] These may influence the shaping of corporate agendas. But ultimately, domestic legal frameworks will shape the behaviour of companies on the ground, where they operate.

THE SOUTH AFRICAN CONTEXT: LOCAL REALISATION OF THE SUSTAINABLE DEVELOPMENT GOALS

South Africa no longer finds itself within its 'safe operating space'.[22] Even the South African 'National Development Plan 2030: Our Future – Make It Work' (NDP) acknowledges that the country's 'economy is overly and unsustainably resource-intensive'.[23] The following section looks at some of the mechanisms in place to address the issue.

Policy frameworks for domestic implementation of the SDGs

Sustainability is already embedded deeply in South Africa's policy frameworks. Its domestic goals, expressed in the NDP, must align with the AU's Agenda 2063 and the South Africa–UN Strategic Cooperation Framework 2013–2017. This triple-layered policy framework renders it difficult to identify a single standard against which to measure success in respect of the specific objectives within the 17 SDGs.

There are other factors that make operationalising the SDGs at a domestic level difficult. The SDGs are interdependent and interrelated,[24] making the measurement of compliance complicated. Sometimes data upon which to base policy choices is lacking. There may be uncertainty around the proportion of responsibility borne by each country for implementing the SDGs. Cooperation and buy-in may be hard to come by, especially where each country's right to determine how it achieves the SDGs is reinforced. In a

20 IIED, *op. cit.*, p. 232ff.

21 Hamann R & P Kapelus, 'Corporate social responsibility in mining in Southern Africa: Fair accountability or just greenwash?', *Development*, 47, 2, 2004, p. 86.

22 Cole M, *The South African Doughnut: A Framework for Environmental Sustainability and Social Justice*, Research Report, 2015, http://course.greenskills.co.za/wp-content/uploads/2017/09/rr-south-african-doughnut-sustainability-social-justice-280515-en.pdf, accessed 7 May 2018.

23 South Africa, National Planning Commission, 'National Development Plan 2030: Our Future – Make It Work', p. 25, http://www.dac.gov.za/sites/default/files/NDP%202030%20-%20Our%20future%20-%20make%20it%20work_0.pdf, accessed 19 April 2018.

24 Collste D, Pedercini M & SE Cornell, 'Policy coherence to achieve the SDGs: Using integrated simulation models to assess effective policies', *Sustain Sci*, 2017, p. 1.

context where state sovereignty over natural resources is the overarching principle, redefining the political will may be particularly difficult.

It is a tall order for any state to operationalise the SDGs. One of the first steps in the process is ensuring that the legislative framework aligns with the policy objectives through which these SDGs are embodied. Once the commitment is established at the policy level, the next question is whether the legal framework can facilitate this project.

Two examples from the 169 targets aimed at realising the SDGs that are both most crucial to the planet's wellbeing and most applicable to the mining context, can be found in SDG 12. This goal is not the only SDG that requires mindset shifts within the mining industry, but it is particularly relevant to it. The sections below consider how the South African legal framework addresses the specific targets of sustainable management and efficient use of natural resources, as well as adoption of sustainable practices and reporting requirements.

Sustainable management and efficient use of natural resources

To 'achieve the sustainable management and efficient use of natural resources' by 2030 is a broad target. Success will depend on the yardsticks used and the ability to quantify this target scientifically. Nevertheless, scrutinising the legal framework for mining suggests that the mechanisms to achieve this target are already in place. There are also mining companies that have gone a long way in moving towards sustainable mining practices.[25] But there is room for improvement.

Success will depend on the yardsticks used and the ability to quantify this target scientifically. Nevertheless, scrutinising the legal framework for mining suggests that the mechanisms to achieve this target are already in place

The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the National Environmental Management Act 107 of 1998 (NEMA) both function under the fundamental right to a clean and healthy environment, as entrenched in section 24 of the Constitution of the Republic of South Africa, 1996. The preamble to the MPRDA clearly states its objectives: among others, South Africa's mineral and petroleum resources should be developed in an ecologically sustainable manner.[26] The MPRDA also expressly acknowledges the constitutional obligation to 'secure ecologically sustainable development and use of natural resources'.[27] The minister of mineral resources is entrusted with the duty to realise these objectives, representing a custodial state.[28] Although the MPRDA establishes a framework for ecologically sustainable development of mineral and petroleum resources, uncertainty remains about the exact nature and scope of the state's custodial role, more than a decade after the MPRDA came into force.[29]

25 See, for example, the International Council on Mining and Metals (ICMM), which aims to promote a sustainable mining industry through a voluntary membership scheme. African Rainbow Minerals, Anglo American, Anglo Gold Ashanti, BHP and Glencore are among 25 corporations that belong to the ICMM.

26 *Maccsand (Pty) Ltd v City of Cape Town and Others (Chamber of Mines of South Africa and Another as Amici Curiae)* 2012 (7) BCLR 690 (CC) para 5.

27 Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), Preamble.

28 *Ibid.*, section 3(3).

29 *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 71.

NEMA may provide some pointers about how state custodianship can be understood in the context of mining and sustainable development. This act gives effect to the fundamental right to the environment (section 24 of the Constitution). The principles that underpin and inform NEMA must be considered when interpreting the MPRDA.[30]

NEMA conceptualises environmental management through principles[31] such as intra- and inter-generational equity,[32] polluter-pays,[33] the precautionary principle,[34] public participation,[35] cooperative governance,[36] the public trust (that is, natural resources are held by the state and managed on behalf of the nation),[37] the promotion of equitable access to natural resources,[38] and the realisation of environmental justice.[39] An integrated approach to environmental management is expressly required by NEMA, which states that 'all elements of the environment are linked and interrelated', thereby echoing the approach taken to implementation of the SDGs.[40]

30 MPRDA, *op. cit*., section 37.

31 National Environmental Management Act 107 of 1998 (NEMA), section 2.

32 *Ibid*., section 1: '"[S]ustainable development" means the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that development serves *present and future generations*' [own emphasis].

33 *Ibid*., section 2(4)(p): 'The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.'

34 *Ibid*., section 2(4)(a)(vii): '[T]hat a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.'

35 *Ibid*., section 2(4)(f): 'The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured'; *ibid*., section 2(4)(k): 'Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.'

36 *Ibid*., section 2(4)(l): 'There must be intergovernmental coordination and harmonisation of policies, legislation and actions relating to the environment'; *ibid*., section 2(4)(m): 'Actual or potential conflicts of interest between organs of state should be resolved through conflict resolution procedures.'

37 *Ibid*., section 2(4)(o): 'The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.'

38 *Ibid*., section 2(4)(d): 'Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human wellbeing must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.'

39 *Ibid*., section 2(4)(c): 'Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.'

40 *Ibid*., section 2(4)(b).

A particular kind of decision-making is needed to manage systems as complex as the mining–development–sustainability triad

The state bears the primary responsibility for ensuring the satisfactory implementation of sustainable development. This means the framework already set in place by the legislature must be implemented by the executive branch of the state, and the courts must exercise appropriate oversight.[41] The South African judiciary is clearly committed to the ideals of sustainability. The Constitutional Court, commenting on sustainable development in South Africa,[42] holds the position that 'development cannot subsist upon a deteriorating environmental base … the environment cannot be protected if development does not pay attention to the costs of environmental destruction'.[43] The court recognises that finding the optimal balance between conflicting principles and competing factors is key;[44] and that achieving balance is an ongoing process.[45] It acknowledges that a particular kind of decision-making is needed to manage systems as complex as the mining–development–sustainability triad.

The concept of sustainable development is thus firmly entrenched in the South African legal framework and applies equally to the regulation of mineral and petroleum resources. Both the executive and judiciary are enjoined with a duty to ensure its successful implementation. In principle, therefore, the SDG seeking to achieve the sustainable and efficient use of natural resources is capable of realisation. However, the target date of 2030 seems wholly unrealistic. For one, how does one define what amounts to 'efficient' use of a resource? The answer depends on whether the resource is valued for environmental, cultural and/or economic potential. Further, more specific definitions, targets or indicators are needed to measure whether this target is being achieved.

Adopting sustainable practices

Another target in SDG 12 seeks to 'encourage companies … to integrate sustainability information into their reporting cycle'.[46] There are two facets to this target, namely the adoption of sustainable practices and the reporting requirements.

Mineral and petroleum resources law requires extensive planning and programmes to be created to prevent and minimise potential and actual environmental damage in the pre-mining, mining and post-mining phases. Those requirements focus strongly on sustainability. The legislation facilitates implementation of sustainable mining practices and monitoring thereof (see sections below).

41 *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC) para 99.

42 Constitution of the Republic of South Africa, 1996, section 24.

43 *Fuel Retailers*, *op. cit.*, para 44, 102–104.

44 *Ibid.*, para 102–104.

45 *Ibid.*, para 78.

46 UN, Division for Social Policy and Development Disability, '#Envision2030 Goal 12: Responsible consumption and production', https://www.un.org/development/desa/disabilities/envision2030-goal12.html, accessed 19 April 2018.

The adoption of (environmentally) sustainable practices

Environmental authorisation is a prerequisite for awarding prospecting,[47] mining,[48] and exploration[49] rights, as well as mining[50] and reconnaissance[51] permits. To obtain an environmental authorisation, an Environmental Impact Assessment (EIA) Report and Scoping Report must be submitted to the Department of Mineral Resources (DMR).[52] NEMA determines the content of the required environmental reports accompanying an application.[53] When such rights or permits are granted, the minister of mineral resources must be satisfied that the mining activities 'will not result in unacceptable pollution, ecological degradation or damage to the environment'.[54]

There are several potential pitfalls here. For one, if the minister fails to consider and meet this requirement, his/her decision will be set aside if taken on review.[55] Proper implementation therefore demands strong involvement of the courts, and by extension, aggrieved parties with a litigious appetite. The Achilles' heel of this approach would be that parties hoping to be on good terms with the DMR, with a view to having their applications approved, would be unlikely to want to engage litigiously with the same department.

Second, it is problematic that the competence to decide on the environmental acceptability of mining and prospecting activities is situated with the DMR[56] (as has been the case since the 2008 amendments to the MPRDA)[57] rather than the Department of Environmental Affairs (DEA). [58] The DEA is now responsible for the development, amending and review

47 MPRDA, *op. cit.*, section 16(1).
48 *Ibid.*, section 22(1).
49 *Ibid.*, section 80(1)(c).
50 *Ibid.*, section 27(2).
51 *Ibid.*, section 75(1)(c).
52 *Government Gazette*, 38282, 'Environmental Impact Assessment Regulations', 4 December 2014, reg. 21–24; read with National Environmental Management Act 107 of 1998: Amendment of the Environmental Impact Assessment Regulations, 7 April 2017, GG 40772 [part 3(2)] 'Environmental Impact Assessment Regulations'.
53 MPRDA, *op. cit.*, sections 16(4)(a) [prospecting right], 22(4)(a) [mining right], 27(5)(b) [mining permit], 74(4) [reconnaissance permit]; 79(4) [exploration right]; s 83(4) [production right]. See also *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (Bengwenyama-ye-Maswati Royal Council Intervening)* 2011 (3) BCLR 229 (CC) para 34.
54 MPRDA, *op. cit.*, sections 17(1)(c) [prospecting right], 23(1)(c) [mining right], 75(1)(c) [reconnaissance permit], 84(1)(c) [production right].
55 *Bengwenyama Minerals*, *op. cit.*, para 75–78.
56 NEMA, *op. cit.*, section 24C(2A).
57 Mineral and Petroleum Resources Development Amendment Act 49 of 2008.
58 Humby T, '"One environmental system": Aligning the laws on the environmental management of mining in South Africa', *Journal of Energy & Natural Resources*, 33, 2, 2015, p. 117.

of the legislative framework governing the environment.[59] If the DEA had retained its competence of decision-making regarding the implementation of environmental laws as regards mining activities, there would have been better measures of oversight. That the DMR now is at once the competent authority for the awarding of environmental authorisations [60] as well as the department responsible for implementation of these authorisations [61] weakens the oversight available, and the reliability of the monitoring process. The arrangement is unlikely to change, however, judging by the latest set of proposed amendments to the MPRDA.[62] The strongest measure of oversight is that the DEA remains the appeal authority in respect of environmental authorisations.[63] This arrangement suffers from the same weakness regarding the litigious appetite of the aggrieved party, as already mentioned.

At least the DMR must still be guided by the environmental law framework, at present embodied in NEMA. This act provides considerations determining whether an environmental authorisation should be granted. These include the likely damage to the environment arising from the mining operation, and the measures proposed to prevent, mitigate or abate environmental impacts and degradation.[64] The environmental impacts of the proposed activity must be addressed in both the EIA Report and Scoping Report. The 'nature, significance, consequence, extent, duration and probability of the impacts'[65] must be set out, as well as the proposed degree of the impacts. The reports should hence stipulate whether potential environmental impacts can be reversed, avoided, managed or mitigated, and whether they will result in an irreplaceable loss of resources.[66] These requirements align with the objectives of NEMA: to adopt a cautious and risk-averse approach to development that may negatively impact the environment.[67] Furthermore, the information provided to the DMR must anticipate the totality of effects for the duration of the mining project, thereby giving effect to the principle of life-cycle responsibility.[68]

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59 Mineral and Petroleum Resources Development Amendment Bill B 15D-2013, p. 47.

60 Humby T, *op. cit.*, p. 111.

61 *Ibid.*, p. 125.

62 Mineral and Petroleum Resources Development Amendment Bill, *op. cit.*, p. 47. The proposed amendments to the MPRDA retain the functions of the departments in respect of their competencies relative to environmental management. The bill furthermore states that '[p]rocesses are under way to give effect to this arrangement between the two departments regarding the mine environmental management function which include further refinement of both pieces of legislation to ensure that there is no duplication of mandates'.

63 NEMA, *op. cit.*, section 43(1A).

64 *Ibid.*, section 24O(1)(b).

65 *Government Gazette*, *op. cit.*, Appendix 3, part 3(h)(v).

66 *Ibid.*, Appendix 3, part 3(h)(v)(aa)-(cc).

67 NEMA, *op. cit.*, section 2(4)(a)(vii).

68 The environmental impact assessment requires 'a full description of the process undertaken to identify, assess and rank the impacts the activity and associated structures and infrastructure will impose on the preferred development footprint on the approved site as contemplated in the accepted scoping report through the life of the activity'. See *Government Gazette*, *op. cit.*, Appendix 2, part 3(i).

An example of where the DMR has followed the letter of the law is its recent decision to refuse an application by Mineral Sands Resources (MSR) for an Integrated Environmental Authorisation, which would have allowed MSR to expand its heavy mineral sands mining on the West Coast.[69] The DMR motivated its refusal in part by indicating that MSR had commenced the expansion, undertaking listed activities without the requisite authorisation,[70] and failed to disclose these activities in its Scoping Report.[71] The decision no doubt had huge commercial implications for MSR.

The information provided to the DMR must anticipate the totality of effects for the duration of the mining project, thereby giving effect to the principle of life-cycle responsibility

Reporting requirements

The legal framework incorporates reporting requirements that must assist in managing environmental and other impacts of ongoing mining operations. The MPRDA requires ongoing annual reporting once a right or permit has been granted,[72] but there is no express requirement of reporting about a right holder's environmental obligations. The reporting must detail how the requirements of the MPRDA are met, specifically those relating to:

- employment and transformation;
- the Mining Charter; and
- the Social and Labour Plan.[73]

The focus of the MPRDA's reporting requirement, therefore, is measuring right holders' compliance with the industry's transformation targets. For renewal of a right or permit, the holder must submit a report 'reflecting the extent of compliance with the conditions of the environmental authorisation'.[74] The MPRDA is silent, however, on the format and details of this report. There is also no guidance in terms of whether formal compliance would suffice, or whether it should be substantial or meaningful.

NEMA's EIA Regulations provide more guidance in terms of environmental reporting. When the minister of mineral resources issues an environmental authorisation, he/she must stipulate how often an auditing report measuring 'compliance with the conditions of the environmental authorisation' must be submitted. It must be submitted at least every five years.[75] The regulations provide the parameters for the report, including by whom it must be generated, what it must contain and how the public is expected to participate.[76]

69 Groundup, 'Setback for giant West Coast mine project', *Daily Maverick*, 9 January 2018, https://www.dailymaverick.co.za/article/2018-01-09-groundup-setback-for-giant-west-coast-mine-project/#.WliTmlT1VE4, accessed 12 January 2018.

70 *Ibid.*

71 *Ibid.*

72 MPRDA, *op. cit.*, sections 25(2) [mining rights], 28(2)(c) [mining permits].

73 *Ibid.*, section 25(2)(h).

74 *Ibid.*, sections 18(2)(c) [prospecting rights], 24(2)(b) [mining rights].

75 *Government Gazette*, *op. cit.*, Regulation 26(e).

76 *Ibid.*, Regulation 34 read with Appendix 7.

The right holder must also include recommendations for remedying any shortcomings noted in the report.[77]

Where operations require environmental authorisation, the right holder must make financial provision so that sufficient funds are available for several contingencies relating to the environment. These include:

- the remediation and/or rehabilitation of the environment;
- pumping and treatment of polluted water; and
- decommissioning and closure of the mining operations.[78]

An annual assessment in the form of an independently audited report on environmental liability is required from the holder of a right/permit, to ensure that the extent of financial provisions is sufficient.[79]

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A key shortcoming of the current reporting process is the high level of discretion afforded to the state as the administrator in deciding on whether stated legal obligations are being satisfied. The problem is exacerbated by the lack of oversight functions available, as already discussed.

CONCLUSION

The legal structures for an SDG-friendly context already exist in South Africa; but a conscious effort by the state to link the national legal frameworks to these specific targets is lacking. Two observations apply: first, where a country's laws make 'bad' behaviour – in this instance, non-sustainable mining practices – possible, or even acceptable, achieving the SDGs is a pipe dream. Second, even if the most sophisticated regulatory frameworks imaginable are in place to promote achievement of the SDGs, there is still the well-known defect of many legal systems around the world: poor monitoring, enforcement and implementation of the law defeat the best motivations and considered legal frameworks.[80] The state, being the key role player in realising the objectives of the SDGs, can make or break a commitment to real change.

The typical impediments to proper implementation of the law prevail in South Africa. One such impediment is lack of political will, which is evidenced in the state's inability to give concrete timelines and terms for each of the targets of the SDGs. Another is administrative inefficiency and incapacity (whether technical, institutional or financial), which impedes the proper functioning of the MPRDA. Several recent cases[81] exemplify the repercussions

77 *Ibid.*, Regulation 34(4).

78 NEMA, *op. cit.*, section 1, read with MPRDA, *op. cit.*, section 46(2).

79 NEMA, *op. cit.*, section 24P(3).

80 Madihlaba T, 'The fox in the henhouse', in McDonald DA (ed.), *Environmental Justice in South Africa*. Cape Town: UCT Press, 2004, p. 161.

81 See, for example, *Taisoar Consulting and Projects (Pty) Ltd v Canyon Resources (Pty) Ltd* 2016 JDR 1236 (GP), which concerns the jeopardy in which ongoing mining operations

of administrative bungling and/or delays within the DMR. It clearly is an exceptionally expensive, roundabout solution to wait for the judiciary to rectify bungling, pursuant to litigation. Processes that promote better transparency and accountability on the part of the DMR are needed.

A third noticeable impediment is lack of cooperation and coordination between departments. Where the management and protection of various facets of the environment are concerned, such disjointedness is problematic. Citizens of any modern, operative democracy should be able to rely on the state's fulfilling its functions and working towards its democratically approved purposes.[82] However, the state of current South African politics exposes the fallacies of such assumptions. Can the South African citizenry really trust the state to keep commitments crucial for the flourishing of its people? Over the past decade, instead of experiencing the growth of the developmental state, the country has witnessed the rapid demise of an economy and a body politic. Entrenched weak leadership has tragically atrophied the state's ability to perform positively for its citizens[83] and, by extension, the planet.

Existing approaches to sustainable development may focus too intently on only some aspects, namely society, or the economy, or the environment. The 'triple bottom line' approach underpinning sustainable development theory is also criticised for causing 'trade-off' decision-making: decisions that may damage the environment are justified when economic and social gains outweigh the environmental cost.[84] Instead of fostering trade-offs, integrated decision-making is needed: all factors that might affect the system, and each other, should be viewed jointly.[85] An integrated approach to the social-environmental system can function well only if enormous amounts of current data are available and managed effectively.[86] This would enable decision-makers to review and reassess information in real time, thus monitoring the impact of their decisions on relevant systems. The potential for such an approach to be crippled by bureaucracy and undermined by inefficiency is real. But South Africa's remaining options are limited, and a change of direction desperately necessary.

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are placed when renewal applications are not finalised timeously; *Aquila Steel (South Africa) Limited v Minister of Mineral Resources & Others* 2017 (3) SA 301 (GP), which concerns an apparently deliberate double-grant of rights by the DMR; and *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy* 2016 (6) SA 121 (SCA), which demonstrates how the custodianship model fails to protect interested parties where rights turn dormant.

82 In the progressive legal theory of human flourishing, there is reliance on state intervention to ensure individual well-being within a specific jurisdiction or constituency. Nussbaum M, 'Human functioning and social justice: In defence of Aristotelian essentialism', *Political Theory*, 20, 2, 1992, p. 225.

83 World Bank, *World Development Report 2017: Governance and the Law*. Washington, DC: World Bank, 2017, p. 61.

84 Olsson P *et al.*, *op. cit.*, p. 31.

85 Häyhä T *et al.*, *op. cit.*, p. 61.

86 *Ibid.*, p. 68.

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