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A CRITICAL ANALYSIS OF THE ENFORCEABILITY OF SOCIAL AND LABOUR PLANS IN THE SOUTH AFRICAN MINING INDUSTRY

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ABSTRACT

The systematic marginalisation of the majority of South Africans, facilitated by the exclusionary policies of the apartheid regime, prevented Historically Disadvantaged South Africans (HDAs) from owning the means of production and from meaningful participation in the mainstream of the economy.

To redress historical inequalities, and thus give effect to section 9(equality clause) of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution), the democratic government has enacted, among other things, the Mineral and Petroleum Resource Development Act 28 of 2002(MPRDA). The objective of the MPRDA is to facilitate meaningful participation of HDAs in the mining and minerals industry. The objects of the MPRDA are, among other things, to promote equitable access to minerals resources; Expand opportunities for HDPs to benefit from the mining industry; Promote employment and advance the social and economic welfare of all South Africans; Ensure that those holding mining rights contribute to socio-economic development in their operating areas.

To this end, the SLP regime was promulgated to achieve the objective of the MPRDA as stated above. The SLP compliance regulations and guidelines are not clear of the threshold regarded as achievement nor do they have a grievance mechanism for aggrieved parties in this regard.

This research will argue that the SLP regulations must stipulate a level of fulfilment of the targets in the SLPs, as things stand it is unclear when and how do you meet the set targets or goals set in the SLPs. SLPs should also, be included by the DMR in their list of automatically available documents published in terms of section 15 of PAIA and this availability must be free from restrictions regarding who can see the documents and which parts it includes. Future amendments of the MPRDA and the regulations should rectify this. Another problem is the absence in the the Act and regulations that specify recourse mechanisms for workers and community members who are aggrieved with the implementation of the SLP. Any amendments to the Act and regulations, therefore, need to provide formal grievance mechanism about SLP commitments and which need to explicitly specify both the structure and the process of the Mining Charter.

The regulations must also provide a grievance mechanism through which aggrieved parties communities can use to address their grievances.

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LIST OF ACRONYMS

‘’BBBEE Act’	Broad-Based Black Economic Act 2003(Act 53 of 2003)
“MPRDA”	Mineral and Petroleum Resources Development Act, 2002 (Act No 28 of 2002)
‘’ACT’’	Mineral and Petroleum Resources Development Act, 2002(Act 28 of 2002)
‘’SLPs’’	Social and Labour Plan contemplated in section 23 of the MPRDA
“Labour Sending areas”	areas from which a majority of South African Mineworkers both historical and current are sourced from.
‘’Mine Community’’	refers to communities where mining takes place, major labour-sending areas as well as adjacent communities and local municipalities.
‘’Mining Chatter’’	the Broad-Based Black Economic Empowerment Charter"
“SLP”	Social and labour Plans.

KEYWORDS

SLPs, Communities, Labour sending areas, Migrant Labour.

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CHAPTER 1: INTRODUCTION

1.1. Background to the study

The systematic marginalisation of the majority of South Africans, facilitated by the exclusionary policies of the Apartheid regime, prevented Historically Disadvantaged South Africans (HDAs) from owning the means of production and from meaningful participation in the mainstream of the economy.[1]To redress historical inequalities, and thus give effect to section 9(equality clause) of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution), the democratic government has enacted, among other things, the Mineral and Petroleum Resource Development Act 28 of 2002(MPRDA).[2] The objective of the MPRDA is to facilitate meaningful participation of HDAs in the mining and minerals industry. The objects of the MPRDA are, among other things, to Promote equitable access to minerals resources;[3]Expand opportunities for HDPs to benefit from the mining industry;[4]Promote employment and advance the social and economic welfare of all South Africans;[5] Ensure that holders of mining rights contribute to socio-economic development of the areas in which they operate.[6]

Amongst the conditions for the grant of mining right are that the applicant has provided for a social and labour plan;[7] That the objects of expanding opportunities for HDPs, promoting employment and advancing social and economic welfare will be furthered by granting of the right.[8] The Minister must refuse to grant a mining right if the application does not meet all the requirements referred in section 23(1) of the MPRDA; The holder of a mining right must submit annual reports to the Department of Mineral Resources(DMR) on its compliance with this conditions.[9]

Failure to submit these reports or the submission of inaccurate, incorrect or misleading reports; may lead to the suspension or cancellation of prospecting or mining rights by the Minister;[10] May even constitute an offence, punishable by imprisonment for up to six months or imposition of a fine.[11]

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[1] Amendment of the Broad-based socio-economic empowerment charter for the South African Mining and Minerals Industry, September 2010.
[2] *Ibid.*
[3] Section 2(c) of the MPRDA.
[4] Section 2 (d) of the MPRDA.
[5] Section 2(f) of the MPRDA.
[6] Section 2(i) of the MPRDA.
[7] Section 23(1)(e) of the MPRDA.
[8] Section 23(1)(h) of the MPRDA.
[9] Section 25(2)(h) of the MPRDA.
[10] Section 47 of the MPRDA.

Section 100(2) (a) provides for the development of the Mining Charter as an instrument to effect transformation with specific targets. Embedded in the mining charter is the provision for Mine Community Development. The mining charter provides that mine communities form an integral part of mining development; there has to be a meaningful contribution towards community development, both in terms of size and impact, in keeping with the principles of social license to operate.

SLPs are based on the MPRDA and, are the primary tool by which mining companies give effect to the provisions of the mining chatter.[12]

The above programs aim to promote employment and advancement of the social and economic welfare of all South Africans while ensuring economic growth and socio-economic development[13]The management of downscaling and/or closure aims to minimise the impact of cyclical commodity volatility, economic turbulence and physical depletion of the mineral or production resources on individuals, regions and physical depletion of the mineral or production resources on individuals, regions and local economies.[14]

Despite the onerous provision of the Act concerning empowerment of mining communities, mining communities today remain destitute and poor.[15] CALS(Centre for Applied Legal Studies)a civil society organisation that based at the school of law at the University of the Witwatersrand, observed that there is growing evidence that SLP obligations are often unmet.[16] In responding to a question by a member of the National Council of Provinces (NCOP), the Minister of Mineral Resources stated that as of 31 March 2015, a total of 240 mining right holders failed to comply with their SLPs.[17] It was due to the lack of compliance by mining houses that the human rights

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[11] Section 98 and 99 of the MPRDA.
[12] Amnesty International report: Smoke and Mirrors, Lonmin's failure to address housing conditions at Marikana, South Africa, no page number.
[13] Revised Social and Labour Plan Guidelines October 2010.
[14] *Ibid.*
[15] The 2013 Mining Charter report.
[16] The Social and Labour Plan Series, Phase 1, System Design Trends Analysis Report by the Centre for Applied Legal Studies at 14.
[17] NCOP Question for oral reply No.178 Advance Notice No: CO582E.Date of publication in internal question paper: 19 October 2015. Internal quest paper no 37.

commission initiated an enquiry titled a hearing on the underlying socio-economic challenges of mining-affected communities in South Africa.[18]

1.2. Aims and objectives of the study.

This research will critically analyse the reasons for the failure of the Mining companies to meet obligations of their SLPs with specific focus or reference to mining community development or empowerment. It is, therefore, the aim of the study to examine literature, various reports and case law to argue for provisions that will empower the Department of Minerals and Energy to enforce compliance with SLA obligations with specific focus to communities. The study seeks to focus on enforcement of SLAs, with specific focus to mining communities.

1.3. Research questions.

The research is based on a hypothesis that the current regulatory framework of the South African mining sector efficiently frustrates the achievement of the aims and goals of the SLPs, particularly with regards to the challenges regarding its enforceability.

1.3.1. Primary question

Is the current legislation that facilitates SLP in the SA mining sector effective in achieving the goal of betterment of communities?

1.3.2. Secondary questions

Several sub-questions need to be considered to answer the primary question. These include: How communities were historically accommodated in the SA mining sector?; What is the current legal framework that facilitates community empowerment in the SA mining sector?; What are the limitations of enforcing SLP regulations?.

[18] A hearing on the underlying socio-economic challenges of mining-affected communities in South Africa available at 2017 https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/445-media-release-sahrc-hosts-a-hearing-on-the-underlying-socio-economic-challenges-of-mining-affected-communities-in-south-africa

1.4. Significance

The importance of this dissertation and indeed any study in this regard is that it will enable us to traverse legislation related to mining community empowerment, examine and evaluate the challenges and make recommendations that will make mining community empowerment a living reality.

1.5. Methodology

1.5.1. Research methodology

The methodology of the study will come from an analysis through case law, commissions' reports, journals and other relevant literature. The material will be analysed and compared in detail in order to provide a balanced view to achieve the primary objective of the study which is to provide solutions that will enable/aide social labour plans compliance.

1.5.2. Research parameters

The Research will focus on the shortcomings of the SLPs and the Mining charter but will not delve into the details of the other aspects of the Broad-Based Economic Empowerment Act related to other sectors of the economy.

1.5.3. Limitations

The limitations of the research are that the Court has not yet ruled on the once empowered and always empowered case between the Chamber of Mines and the Minister of Mineral resources thereby denying the research much-needed authority in this subject. Further to the above, the Human Rights Commission has not yet released its report on the hearing into socio-economic impact of mining in communities thereby denying the research further persuasive authority in this regard.

1.6. Chapter overview

Chapter 2

This Chapter deals with the literature on the history of the Mining Industry and the inequalities that have been created by apartheid-era legislations. This chapter considers South Africa’s mining history and its role in the development of current laws regulating social labour plans in the mining industry. This chapter will provide a historical perspective on the racial discriminatory mining laws that led to the call for the current social labour plans system in the mining industry. The chapter will provide a historical exposition of how the system of migrant labour led to the disintegration of black families and communities.[19] The chapter will also show that early mining legislation laid the foundation for the exclusion of black communities from benefiting in mining and thereby laying the foundation for centuries of exclusion and segregation of back people in the mining industry. This led to deep-rooted inequality. The Chapter will traverse various generations of legislations in this regard. The Chapter will conclude by introducing the current legislative changes that were brought about by the new democratically elected government.

Chapter 3

This Chapter outlines the current regulatory environment in the mining industry. The Chapter extrapolate how after the end of Apartheid, it was imperative that South Africa's first democratic government develop a new mineral regulatory framework to address the past exclusionary practices against black South Africans. While this was affected across all sectors of the economy, they were worst in the mining industry, with its terrible legacy of migrant labour, unsafe working conditions, labour repression and economic exclusion.

In contrasts to the pre-1994 legislation, this Chapter outlines the objects of the MPRDA to address the history of racial discrimination in the mining industry. The Chapter concludes by introducing the challenges of implementing the MPRDA that are dealt with in detail in Chapter 4.

[19] Commission of Inquiry into Safety and Health in the Mining Industry Volume 1 at 57.

Chapter 4.

Chapter four analyses the ability of the current legislation to ensure compliance with the Social and Labour Plans. The Chapter exposes the weakness of the regulatory mechanisms in the enforcement of the SLP regime. The Chapter traverses the role played by the Department of Minerals and Energy in the compliance. The Chapter further looks in the various reports published concerning the compliance with the SLPs regime. The Chapter concludes by introducing recommendations that will be dealt with in Chapter 5 that the enforcement mechanisms need to provide for a grievance procedure for aggrieved parties and various other recommendations.

Chapter 5.

This Chapter summarises and makes recommendations.

CHAPTER 2: HOW WERE MINING COMMUNITIES HISTORICALLY ACCOMMODATED IN THE SOUTH AFRICAN MINING SECTOR?

2.1. Introduction.

The mining industry has played a defining role to radically transform South Africa from being a mere colonial backwater whose un-promising landscape was seemingly devoid of any economic potential, into a modern, industrialised economy.[20] Nowhere else in the world has a mineral revolution proved so influential in weaving the political, economic and social fabric of society.[21] The region's economy was rudimentary, being almost entirely depended on a middling agricultural sector, which itself was considerable constrained by harsh climatic conditions and the limited size of the domestic market.[22] It was a land without millions and without millionaires; no man dreamed of making a great fortune in such an unforgiving country.[23] Yet beneath the surface of an incredibly varied landscape lay the richest mineral treasure trove ever discovered in one country, almost every precious stone, mineral and metal known to man has been found in deposits varying from mere traces to quantities of enormous value.[24] In fact, South Africa boasts the world's largest reserves of platinum group metals, chromium, manganese, and vanadium, and is also host to some of the most significant reserves of gold, coal, diamonds, iron ore, titanium, andalusite, fluorspar and vermiculite.[25]It was at the back of the export of tonnages of its natural wealth that South Africa was not only able to diversify its economy but also to industrialise at the rate never seen on the African continent.[26]Most importantly, the mineral revolution enabled the introduction of an aggressively organized and racially dominated form of industrial capitalism, an economic system that dominated South Africa's socio-political and fiscal arena for more than a century.[27]

The foundation for racial descrimantion was laid by the first regulations[28] governing the circumstances under which Crown lands would be leased for mineral prospecting. The regulations never recognised the rights of the local Khoi and Nama people who had a semi-nomadic existence in Namaqualand for

[20] Jade Davenport, "*Digging Deep, A history of Mining in South Africa*" at 1.
[21] *ibid*
[22] ibid
[23] ibid
[24] ibid
[25] ibid
[26] ibid
[27] ibid
[28] First published on the 13 September 1853

centuries, moreover, the introduction of these regulations effectively denied them access to certain areas with good grazing land and water supplies where prospecting and mining activities were being conducted, without due compensation.[29] These regulations laid the basis of racial discrimination as it revealed the inherent attitude of the colonial administration to indigenous people.[30] This also planted the seed of excluding mining communities.

This led to deep-rooted inequality in South Africa. This inequality was facilitated by the disposition of land, the levelling of land taxes and the reservations of higher paid jobs for white workers by colonial and apartheid administrations.[31] The chapter will further provide a historical perspective on the culture of none compliance by the mining industry with mining laws.

In historical terms, the period between 1860 and 1910 was characterised by several layers of strife and disputes along racial lines.[32] It affected the manner in which mining policies were developed. The following discussion deals with three aspects of racial discrimination, namely colonial treatment to land and claims, the labour issues, and the genesis of policies of spatial segregation of the races and apartheid.

It is due to the above that to this day the mining industry is grappling with the backlog of socio-economic empowerment of previously disadvantaged communities. Therefore South Africa does not have a history of social labour plans hence the current legislation in mining is aimed to address this backlog.[33]

The mining industry was regulated on a racially discriminatory basis. The apartheid-era legislation, like the Occupational Diseases in Mines and Works Act, 1973(which allowed mines to expose black people to dusty and dangerous conditions) discriminated against black people.[34] The labour benefits of mining flowed to the white populace to the almost total exclusion of the black populace.[35] The backdrop of the

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[29] *Ibid*

[30] *Ibid*

[31] M Legassick 'Capital accumulation and violence (1974) 3 Economy and Violence" 253.

[32] Hanri Mostert, ''*Mineral Law and Policies perspective''* at 30.

[33] Centre for Applied Legal Studies, The Social and Labour Plan Series Phase 1, System Design Trends Analysis Report at 13.

[34] O. Matlou, "Empowering The Mining Industry: Lessons From The Last 10 Years", Business Media MAGS. Available at http://businessmediamags.co.za/empowering-the-mining-industry-lessons-from-the-last-10-years/ (last accessed 12 October 2017).

[35] Supra at 20.

mining industry is the migrant labour system that persists to this day.[36] The migrant labour system had an adverse effect in the communities where the labour was drawn from in the SADC region.[37]

Colonial Treatment of Land and Minerals

It was the discovery of diamonds and gold, rather than copper, which ushered in South Africa's mineral and industrial revolution despite the fact that copper was the first major discovery of minerals in South Africa.[38]

When diamonds were discovered in the Griqualand Western area, neither the British-run Cape Colony nor the adjacent Boer Republic of the Orange Free State had official territorial claims over the area.[39] This was regarded as no man's land.[40] In addition to the Orange Free State, which claimed that the area fell within its sphere of influence, an indigenous tribe, the Griquas, under the chieftainship of Andries Waterboer, and a few resident Tswana people claimed control over the area.[41] Soon after the discovery, the area was swamped with gold diggers from many parts of South Africa and the rest of the World.[42] The diggers refused to acknowledge the sovereignty of any of the local parties, and instead established an independent republic, the digger's Mutual Protection Association,[43]Which made rules that amongst other things precluded black people from obtaining digging licences.[44] The land claims by indigenous people were never settled even after an intervention was requested from the British Crown by Andries Waterboer, but the Crown quickly annexed Griqualand West.[45] In the process, the Griquas were disposed of whatever claims they might have to the diamonds and the land itself, the Tswanas were forced to retire beyond the reach of the new administration; the Boer republic of the Orange Free State lost its claims over the diamond fields, and only the Cape colony benefited greatly from the diamond-driven economy that emerged at Kimberly, the commercial centre.[46] Although some black claim holders

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[36] *Ibid.*
[37] *Ibid.*
[38] Jade Davenport, "Digging deep, a history of mining in South Africa" at 38.
[39] S Gool "Mining Capitalism and Black Labour in the early industrial period in South Africa(1983) Lund" at 69.
[40] Hanri Mostert, ''*Mineral Law, Principles and Policies in Perspective*'' at 31
[41] Supra 31
[42] Supra 32
[43] W Worger, "South African City of diamonds: Mineworkers in and Monopoly Capitalism in Kimberly", 1867-1895(1987) New Haven, Yale University Press at 12.
[44] E.g. Article 28 of the rules for the farm Dorsfontein and article 14 of the rules for the farm Bultfontein reportedly prohibited blacks from obtaining mining licenses.
[45] In accordance with Proclamation 67 of 27 October 1871, which established Crown sovereignty over the territory of Griqualand West.
[46] S Gool (n105) at 69

were permitted to proceed with their operations, the prosperity of Cape Colony enabled white colonists to take charge of the economy and to campaign against the African societies within and beyond the Cape.[47] These events reinforced the perception that African claims to the mineral wealth of South Africa could largely be ignored.[48]

2.2. The history of diamond and gold law in South Africa.

While diamonds were the first discovery of precious metals in South Africa, the South African mining industry was built from the gold industry. The discovery of commercial quantities of gold in the former Transvaal of South Africa in 1861 came twenty years after the exploitation of diamonds in the Northern Cape.[49] Labour practices followed the existing migratory pattern for domestic and foreign labour in industry, a trend which exists to this day.[50] Gold Miners, like Diamond Miners, were accommodated in compounds, often segregated by ethnic group, and contracted for 18 months stints with no certainty of re-engagement[51].

In 1886, the Main Re**e**f of the Witwat**ersra**nd was discovered, triggering an enormous gold rush that gave birth to diamonds which transformed the economic history of South Africa.[52] The transformation resulted in sophisticated economic activity, but this development came with challenges such as power struggles and racism.[53] The diamond industry was transformed by removing the independent diamond diggers.[54] The decision to replace the independent diggers was marred by the rise of the minority ruling class.[55] This class was a capitalist group later assisted by the apartheid government in excluding other race groups from participating more meaningfully in gold and diamond mining.[56] According to an ANC discussion document from the 1980s entitled "The Nature of the of South African Ruling Class:[57]

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[47] *Ibid.*
[48] *Ibid.*
[49] J. S. Harington, N. D. McGlashan, and E. Z. Chelkowska. "A century of migrant labour in the gold mines of South Africa" *Journal-South African Institute of Mining and Metallurgy* 104:2 (2004) at 65.
[50] *Ibid*.
[51] Commission of Inquiry Into Safety and Health in the Mining Industry Volume 1 at 09.
[52] Portia F Ndlovu, *''Diamond, and Policy in Context''* at 04.
[53] *Ibid.*
[54] Wheatcroft G, The Randlords: The Men Who Made South Africa(1985) at 41.
[55]Portia F Ndlovu, ''*Diamond, and Policy in Contex*t''.at 5.
[56] *Ibid.*
[57] ANC Second National Consultative Conference 'The Nature of The South African Ruling Class (1985) available at http://www.anc.org.za/content/second-national-consultative-conference-nature-south-african-ruling-classwww.

“The process begins in the 1870s, in 1872 the white diggers’ democracy on the diamond fields was able to force the colonial government to restrict prospecting and mining rights to whites only. These laws had the effect of declaring all indigenous blacks ineligible for any form of control ownership and from over the nascent industrial economy, any white fortune seeker, no matter what part of the land/globe he came from, could aspire to own an share in the mineral wealth of South Africa, capitalist was but not an indigenous black. The emergent capitalist class was thus defined as white, and this was underpinned by law”.

Diamond trade patens based on racism as illustrated above, resulted in the white miners obtaining vast training and development of prospecting and mining skills.[58] This meant that only white miners had the required mining tools and knowledge which they would have had years to develop. Black miners could not grow into any position of influence as mining entities because of the exclusionary laws.[59] Unfair and oppressive diamond laws created a general perception that the indigenous black was an underclass miner and that criminal activity was involved whenever he or she was in a position of unwrought minerals or rough diamonds.[60]

The Precious Stones Act 44 of 1927 protected the ownership of diamond-rich land in favour of whites and failed to take into account the indigenous ownership rights of black people.[61] Thus old-order alluvial claims evident in legislative history were determined according to patens of racial discrimination in South African Mining history.[62] This means that indigenous people living in the mineral-rich land were disposed of the same.[63] A judicial acknowledged matter as stated above is the one of the Richtersveld community.

Alexkor Ltd and Another v Richtersveld Community and Others 2004(5) SA 460 (cc) paras 9:

> ‘’The Constitutional Court quoted with approval the finding of the SCA that found that the Richtersveld Community had been *in excessive possession of the whole of the Richtersveld, including the subject land, before and after its annexation by the British Crown. It held that those rights to the land, including minerals and precious stones were akin to those held under common law ownership and that they constituted a customary law interest as defined in the Act. It further*

[58] Portia F Ndlovu, “*Diamond, and Policy in Context*” at 5.
[59] *Ibid.*
[60]Supra at 46.
[61] Portia F Ndlovu, Diamond Law, Change, Trade and Policy in Context pg 06.
[62] Alexkor LTD and Another v Richtersveld Community and Others 2004(5) SA 460 paras 87-89.
[63] Portia F Ndlovu, “*Diamond Law, Change, Trade and Policy in context*” pg 06.

found that in the 1920s, when diamonds were discovered on the subject land extended, the rights of the Richtersveld Community were ignored by the state which disposed them and eventually made a grant of those rights in full ownership of Alexkor. Finally, the SCA held that the manner in which the Richtersveld Community was disposed of the subject land amounted to racially discriminatory practices as defined in the Act''.[64]

In the subsequent Precious Stones Act 73 of 1964, the position remained unchanged, with the state having claims to proclaimed alluvial diggings.[65]The Mineral Act 50 of 1991 still had same provisions[66] that maintained state control of alluvial claims and did not take into account the equity-related points raised by the constitutional era mining laws.[67] The endeavours of the mining giants, skewed by racism, resulted in the rise of De Beers and its diamond monopoly.[68] At a later stage, a marriage between gold and diamond mining was seen in South Africa when De Beers was absorbed by Anglo American.[69] The Anglo American group of companies is best defined as a significant force in the economic, political and social life of South Africa.[70]

2.4. Legislative history

After the formation of the union, all rights to minerals and all rights to mine and dispose of precious metals and precious stones which previously vested in the governments of the various jurisdictions were vested in the governor-general in Council.[71]The regulatory context of the colonial period was hence continued into the Union, although it was gradually adapted to serve the Union better. During this time, reliance was placed heavily on the courts to develop common law relating to mineral rights.[72] Essential, the system that emerged from statutory interference and judicial development was based on the primary rights of the mineral rights holder and acknowledged rights and interests that could be derived

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[64] Alexkor Ltd and Another v Richtersveld Community and Others 2004(5) SA 460 (cc) paras 9.
[65] *Ibid.*
[66] Act 50 of 1991 ss 45 and 46.
[67] Portia F Ndlovu, "*Diamond Law, Change, Trade and Policy in context" pg 06.*
[68] Innes D. Anglo American and the Rise of Morden South Africa (1984) 21.
[69] *Ibid.*
[70] *Ibid.*
[71] Hanri Mostert, "*Mineral law: Principles and policies in perspective*" pg 19.
[72] Hanri Mostert, "*Mineral Law: Principles and Policies in perspective*" pg 20.

by others from the primary rights.[73] The right to seek for and extract minerals, however, in many respects the prerogative of the state.[74]

The latter part of the colonial period was characterised by multi-faceted power struggles between the Boer Republics, black tribes and the British Empire.[75] It eventually resulted in the establishment of a united white dominance in politics.[76] The period of the Union saw the beginnings of Afrikaner nationalism and the establishment of the policy of apartheid.[77]

2.3. Racial prejudice and the migrant labour system in South Africa.

Even after the issue of sovereignty over diamond fields was resolved through the unilateral appropriation thereof in the name of the British Crown, dispute and strive continued.[78] Much of this was driven by the ambivalence between the racially biased desire to exclude blacks from profiting from the mining industry on the one hand and the need for cheap labour on the other.[79] Racial attitudes supporting the exclusion of black claim holders and the regulation of African Labour prevailed and eventually pressured the administration into adopting laws that suspended the digging and claim licences of existing black holders.[80] The situation of black miners was similar in respect of the gold mines on the Witwatersrand.[81] In the diamond and the gold mines, the competition over limited resources, skilled workers or the minerals themselves led to the creation of conflict, expressed in terms of race.[82] The gold mines eventual became the major force in shaping the South African Republic.[83]The state had to prescribe the conditions for the organisation and recruitment of the black labour organisation supply.[84] Pass laws drafted by the Chamber of Mines (an organisation established in 1989 to represent the collective interest of the Witwatersrand mine owners)[85], and promulgated in the Transvaal in 1895

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[73] *Ibid.*
[74] *Ibid.*
[75] TRH Davenport and C Saunders South Africa: "A modern history" 5 ed (2000), London, Macmillan Press Ltd ch 8.
[76] Davenport and Saunders Ch 9 and 10.
[77] H Giliomee, ''The Afrikaners: Biography of a people''(2003) Cape Town, Tafelberg at 293-314.
[78]Hanri Mostert, "*Mineral Law, Principles and Policy Perspective"* at 33
[79] The resolution passed at the Digger's meeting held at Dutoitspan, printed in the Diamond News of 17 January 1872 as quoted by Smalberger at 421-422.
[80] IB Sutton, The Diggers revolt in Griqualand West, 1875 1979(12) International Journal of African Historical Studies 40 at 45.
[81] Hanri Mostert, "*Mineral Law, Principles and Policies Perspective*" at 33
[8282] Sutton
[83] D Yudelman, The emergency of Morden South Africa, Capital, and the Incorporation of organised Labour on the South African Gold fields, 1902-1939, Cape Town, David Publishers (PTY)Ltd at 20
[84] ibid
[85] Hanry Mostert, "*Mineral Law, Principles and Policy Perspective*" at 33

resembled those of Griqualand West.[86] Unskilled black mine workers were preferred over unskilled white mineworkers because black labour was cheap.[87] Subsequent attempts after the Anglo Boer war to reduce white wages to address the shortage of cheap black labour on the mines were rebuffed by mass union action, and white labour strikes served.[88] Gradually a system crystallised in terms of which skilled occupations were reserved exclusively for better paid white workers, while manual work was performed by poorly paid black workers.[89]

2.4.1 **Social benefit of the migrant labour system in South Africa**

The democratically elected government appointed a commission of inquiry into the safety and health of mine workers.[90] This commission was established after successive commissions were established by pre-1994 governments whose recommendations were never implemented. The Mining Regulations Commission of 1925 inquired into the causes of contravention of regulations, and its main conclusions can be summarised as follows: A significant factor was the growing practice of assigning to European Miners too large a measure of responsibility; the inspectorate was understaffed, making it imposable to carry out adequate system of inspections to assess compliance with regulations; the report criticised inspectors for not keeping management at arm's length, and for failure to prosecute managers etc.[91]

The establishment of the Mining Safety and Health Commission signalled the importance of the mining industry to the new government. The Commission was reminded by Professor Wilson who was testifying as a migrant labour expert of the quotation from Cecil John Rhodes when introducing the Glen Grey Act in support of an argument for a hut tax in order to obtain labour for the mines:

> *"You will remove them, the natives, from the life of sloth and laziness, you will teach them the dignity of labour, and make them contribute to the prosperity of the state and give them some good return for our wise and good government".[92]*

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[86] JM Smalberger at 419
[8787] EN Katz 'The underground route to mining: Afrikaners and the Witwatersrand gold mining industry from 1902 to 1907 miners strike 1995 (36) Journal of African History 467 at 267.
[88] D Yudeman
[89] CH Feinstein an Economic,"History of South Africa, conquest, discrimination and development" (2005) Cambridge University Press at 63.
[90] Commission of Inquiry into Safety and Health in the Mining Industry Volume 1 at 40.
[91] Commission of Inquiry into the Safety and Health in the Mining Industry Volume 1 at 6, The Marais commission in 1960 came to the same conclusion.
[92] *Ibid.*

The commission observed that in South Africa the discussion of occupational disease is incomplete without taking into account the link between the migrant labour system and the long lag period between exposure and disease manifestation. The Commission further observed that many workers would develop work-related diseases long after they have returned to their rural homes, where appropriate facilities for investigation and diagnosis may be non-existent. In the absence of well-equipped and appropriately staffed diagnostic or recognition centres, which are accessible to retired miners, there will be severe under-ascertainment, and the social costs will be carried by the spouse and children or by the extended family, or by the community at large.[93]

The commission concluded that evidence from the community-based studies as to the impact of the mining industry on societies from which migrant labour has been recruited is derived from the work of scientists working at the National Centre for Occupational Health (NCOH), and from detailed commentary by Professor Wilson. In the absence of scientific evidence to substantiate the claim, the assertion that the industry has been, uniformly a social benefit cannot be accepted.[94]As in so many other areas, the true situation is a trade-off between the benefits and the adverse effects of a particular industrial activity. Informed opinions can only be formed, and realistic decisions be taken on the basis of accurate information. One of the major aspects on which information is lacking is the social costs of the employment of migrant labour.[95]

Despite the apparent short-term benefits of the highly organized system of remittances and deferred pay that stern from migrant labour in the Eastern Cape, the long-term effects was to deplete the rural economy.[96]The productive capital created by the miners was accumulated in and around Johannesburg, where they worked and were paid.[97] The homes and towns of origins received little productive benefits.[98] The system effectively generated poverty within the former Bantustans, which continue to suffer the greatest economic deprivation in South Africa.[99]

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[93] *Ibid.*
[94] Commission of inquiry into the Safety and Health in the Mining Industry Volume 1 at 43.
[95] *Ibid.*
[96] Conference report into Migrant Labour in South Africa: Conference and Public Action Dialogue, University of Forthare, East London Campus 7th -8th February 2017 at 7.
[97] *Ibid.*
[98] *Ibid.*
[99] *Ibid.*

2.5. Conclusion

It is clear that due to the above-mentioned history the mining industry is dealing with the legacy of apartheid in its attempts to address economic empowerment of the previously disadvantaged communities. The history of segregation has systematically excluded blacks from economic participation in the mining industry in a meaningful way.[100] It was against this background that the Mineral Petroleum Development Act 2002(herein referred to as MPRDA)was promulgated with a clear objective to reverse the past imbalances and empower the previously disadvantaged to participate in mining. As a result, the mining charter was first gazetted in 2004.

The Mining Safety and Health Commission concluded that the Safety Inspectorate is understaffed to inspect execute its mandate. The same conclusions were arrived at by Amnesty international recently when they concluded that the failure of mining companies to comply with their SLP is because DMR inspectorate dealing with the SLPS is very understaffed.[101]

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[100] Centre for Applied Legal Studies, The Social and Labour Plan Series, Phase 1, System Design Trends Analysis Report at 23.
[101] Smoke and Mirrors, Lonmin's failure to address housing conditions at Marikana, at 45.

CHAPTER 3: THE LEGAL FRAMEWORK REGARDING SLPs IN SOUTH AFRICA

3.1. Introduction

After the end of Apartheid, it was imperative that South Africa's first democratic government develop a new mineral regulatory framework to address the past exclusionary practices against black South Africans.[102] While this was affected across all sectors of the economy, they were worst in the mining industry, with its terrible legacy of migrant labour, unsafe working conditions, labour repression and economic exclusion.[103]

Moreover, mining is central to the South African economy and a vital element of the country's industrialization.[104]Mining account for more than 5 percent of South Africa's GDP; and nearly 60 percent of the country's export revenue is attributable to the mining and associated industries.[105] Mining in South Africa employed some 490 000 workers directly, and a further 830 000 indirectly.[106] South Africa's mineral reserves are currently estimated at US$2.5 trillion believed to be the largest in the world.[107]

It was against the above mentioned that the Mineral and Petroleum Resources Development Act(MPRDA) was promulgated in 2002, to amongst other objects transform the South African economy for the benefit of historically disadvantaged individuals. Historically disadvantaged persons are defined in section 1 of the MPRDA as (a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect, (b) any association, majority of whose members are persons contemplated in paragraph (a);(c) any juristic persons other than an association, in which persons contemplated in paragraph(a) own and control a majority of the members' votes.

3.2. Constitutional imperatives and the MPRDA

The discussion above had demonstrated that in contrast to mining laws before the constitution came into effect, that the objective of empowerment and broader access to the mining industry is reflected in

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[102] Centre for Applied Legal Studies, the Social and Labour Plan Series Phase 1, System Design Trends Analysis Report at 23.
[103] Portia F Ndlovu, "*Diamond Law, Change, Trade and Policy in Context*" at 14.
[104] Statistics South Africa 2015 at 8.1 available at
http://www.statssa.gov.za/publications/SAStatistics/SAStatistics2015.pdf
[105] *Ibid.*
[106] *Ibid.*
[107] Section 2 of the Mineral and Petroleum Resources Development Act, 2002.

several aspects of the MPRDA. These include the requirements for old order mining rights[108] and the requirements for applications for new mining rights.[109] It extends to the obligation, upon the holder of a mining right, to submit an annual report detailing compliance.[110]

The MPRDA also contains specific provisions on black economic empowerment. For the purpose of the MPRDA, broad-based black economic empowerment is defined in s1 of the Act as a social or economic strategy, plan, principle, approach or act with the aim to redress the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the mineral and petroleum industry, related industries and in the value chain of such industries; and to transform such industries.

Equality, together with dignity and freedom, lie at the heart of the Constitution.[111] Equality includes the full and equal enjoyment of all rights and freedoms.[112] To promote the achievement of substantive equality the Constitution provides for legislative and other measures to be made to protect and advance persons disadvantaged by unfair discrimination. The Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the natural resources of the country.[113] The Mineral and Petroleum Resources Development Act[114] (MPRDA /Act) was enacted amongst other things to give effect to those constitutional norms. It contains provisions that have a material impact on each of the levels referred to, namely that of individual ownership of land, community ownership of land and the empowerment of previously disadvantaged people to gain access to this country's bounteous mineral resources.

Section 3 of the Act provides that the mineral and petroleum resources of this country are the "common heritage of all the people of South Africa" and that the allocation of rights to these resources is done by the Minister acting as the state custodian of the resources.[115] There may well be differences between

[108] Item 7, MPRDA
[109] Section 123(1)(h), MPRDA
[110] *Ibid*
[111] Section 1(a) of the Constitution.

[112] Section 9(2) of the Constitution. See also *Minister of Finance and Another v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 28 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 88.

[113] Sections 24, 25(4)-(7) and 27(1)(b) of the Constitution.

[114] 28 of 2002.

[115] Section 3(2) states that:

the old order and the new as far as the nature of ownership of land holding mineral and petroleum resources is concerned, and the processes whereby prospecting rights are acquired, but many of the underlying practical consequences remain the same, or are similar, under the new order:

a. Nothing prevents owners of land from acquiring prospecting rights on their own land if they wish to do so;
b. Where third parties seek prospecting rights they must engage with the owner of land before acquiring the right;
c. Prospecting rights may only be exercised under state authority or permission;
d. The exercise of prospecting rights is highly invasive of the use by owners of their land, even if just restricted to the surface use of the land.

When assessing applications for prospecting or mining rights submitted on the same day, the Minister of Mineral Resources (Minister) must give preference to applications from Historical Disadvantaged People.[116] The Minister may facilitate assistance to Historical Disadvantaged People to conduct prospecting or mining operations.[117] In order to ensure effective transformation in this regard, the Act requires the submission of the Social and Labour Plan as a pre-requisite for the granting and production rights.[118] Further to the above, the applicant for a mining license must demonstrate that the granting of the licence will expand opportunities for HDPs, promoting employment and advancing social and economic welfare.[119] The Minister must refuse to grant a mining right if the application does not meet all the requirements referred to in section 23(1) of the MPRDA.

The Holder of a mining right must submit annual reports to the Department of Mineral Resources (DMR) on its compliance with these conditions.[120] This study argues that there are no consequences for failure to comply with the SLP.

"As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may—

(a) 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".

[116] Section 9(2) of the Mineral and Petroleum Resources Development Act, 2002
[117] Section 12 of the Mineral and Petroleum Resources Development Act, 2002
[118] Section 23(1)(e) of the Mineral and Petroleum Resources Development Act, 2002
[119] Section 23(1)(h) of the Mineral and Petroleum Resources Development Act, 2002
[120] Section 25(2)(h) of the Mineral and Petroleum Resources Development Act, 2002

The Act further requires the Minister within six months, of the gazetting of the MPRDA to publish, a broad-based socio-economic empowerment charter, setting the framework, targets and timetable for effecting entry of Historical Disadvantaged South Africans into the Mining Industry.[121]

Section 104 of the MPRDA gives preference to mining rights applications with respect to communities. If a mining right application is submitted on the same day with the one of the community, preference must be given to the application of the community. In this regard, the community must be consulted. The Bengwenyama case discussed herein dealt in detail with this subject.

In Bengwenyama Minerals v Genorah Resources (PTY)[122] Ltd and others the court with regard to section 104:

> *DMR must before granting mining right to a third party inform the community.The purpose of the notification and subsequent consultation must thus be related to the impact that the granting of a prospecting right will have on the landowner or lawful occupier. The Community is the landowner of the farms at stake in this application and therefore I will restrict further discussion to the position of landowners[123].*
>
> *Another more general purpose of the consultation is to provide landowners or occupiers with the necessary information on everything that is to be done so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review. The consultation process and its result is an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair[124].*

Section 25 of the Constitution also recognises the public interest in reforms to bring about equitable access to all South Africa's natural resources, not only land,[125]and requires the state to foster conditions which enable citizens to gain access to land on an equitable basis.[126] A community whose tenure of land

[121] Section 100(2) of the Mineral and Petroleum Resources Development Act,2002
[122] Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty)Ltd and Others (CCT 39/10)(2010)ZACC 26; 2011(4)SA 113(CC)
[123] *Ibid* paras 64.
[124] *Ibid* paras 66.
[125] Section 25(4) of the Constitution.

[126] Section 25(5) of the Constitution.

is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.[127] The Act gives recognition to these constitutional imperatives. It recognises communities with rights or interests in community land in terms of agreement, custom or law.[128] Section 104 of the Act makes provision for a community to obtain a preferment right to prospect on community land for an initial period not exceeding five years that can be renewed for further periods not exceeding five years.

3.3. Black Economic Empowerment

Justice for emerging black South African capitalists previously bared from participating in the business of mining and for mine workers who had been exploited were, therefore, priorities for South Africa's first black administration.[129] At the same time, justice for black communities negatively impacted by mining activities was not given the same level of prioritisation.[130] This was due to the main parties in the negotiations being the government, the mining sector and organised labour.[131] Mining communities were not recognised as a sector in government and business circles, and this failure is a severe deficiency of the mining regime that emerged out of these negotiations.[132]

The culmination of these negations was the passing of the Mineral and Petroleum Resources Development Act(MPRDA or the Act) in 2002, which came into effect in 2004.[133] The overarching framework for the Act is informed by the vision of the Freedom Charter, which called mineral wealth to be owned by the people as a whole in South Africa. The approach of the MPRDA is to vest mineral rights in the state, thereby allowing the state to act as custodian of mineral wealth on behalf of all who live in South Africa.[134]

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[127] Section 25(6) and (7) of the Constitution.

[128] A community as defined in section 1 of the Act:

> "means a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law."

[129] Social and Labour plan series, Phase 1, system design trends analysis report at 13
[130] *Ibid*
[131] *Ibid*
[132] *Ibid*
[133] Social and Labour plan series, Phase 1, system design trends analysis report at 14
[134] *Ibid.*

A number of mechanisms are created in order to realise transformative objectives of increasing Historical Disadvantaged Person participation and ensuring that mining contributes to the development of affected communities.[135] Section 100(2) requires the Minister responsible for mineral resources to develop a charter that will set the framework, targets and timetable for effecting the entry of HDPs into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources.[136]The results have taken the form of the Broad-Based Socio-Economic Charter for the South African Mining Industry of 2004(Mining Charter) and the amendment of the Broad-Based Socio-Economic Emancipation of the empowerment Charter for the South African Mining and Mineral Industry of 2010(amended Mining Charter)

The second of these interventions is the creation of the social and labour plan's (SLP) system. The rationale behind this system is to use the state's power to grant or refuse the right to mine to ensure that companies offer opportunities for mine workers and communities to benefit from the resources in their area. I will deal in detail with the SLPs in 3.5. below.

3.3.1. The Mining Charter

The mining charter came into effect in August 2004. It sets a framework, targets and timetables to facilitate the transformation of the mining industry.[137]As regards conversion, the mining charter provides for scorecard approach to facilitate processing of licence conversions.[138] It is designed to facilitate the application of the charter in terms of the MPRDA's requirements for old order rights into new order rights.[139] Though the mining charter is not regarded as being legally relevant to the conversion process, the charter and scorecards obtained some prominence in the conversion process, certain elements of the mining charter found their way into the provisions of the Act's regulations dealing with the content of social and labour plan that must be filled for lodgement of old order mining rights.[140] The charter and scorecard thus set out possible ways in which the requirements in item 7(2)(k) of schedule II of the MPRDA concerning the undertaking to expand opportunities for historically disadvantaged persons and advance the economic welfare can be met. This may be contrasted with the

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[135]*Ibid.*
[136]*Ibid*.
[137] Hanri Mostert, "*Mineral Law, Principles and policies perspective*" at 111.
[138] Para 4.11, Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry GN 1639, Government Gazette 26661(13.08.2004).
[139] Hanri Mostert, *"Mineral Law, Principles and Policies*" at 112.
[140] Item 7, schedule II, MPRDA.

direct relevance that the charter has in terms of the granting of new mining rights. Section 23(1) (h) refers expressly to the charter in listing the requirements to be met for obtaining a new mining right.

The primary aim of the original mining charter was to provide for the promotion of Broad-Based BEE and to achieve a globally competitive mining industry for the benefit of all South Africans.[141]The original mining charter required mining companies to achieve 26 percent HDSA ownership of the mining industry assets in 10years.[142] According to the original Mining charter's scorecard, mining companies were required to achieve 15 percent in 5 years by December 2009.[143] Mining companies were required to achieve 26 percent in 10 years by December 2014.[144] The original Mining Charter was vague in respect of targets and timeframes, providing no clear compliance guidelines for mining companies.[145] Further, it did not adequately define technical terms (e.g. beneficiation), which led to different interpretations of what constitutes compliance.[146]

In October 2009, five years after the original mining charter took effect, the DMR released a dire report on the state of transformation in the mining sector, claiming that black ownership of the mining companies averaged 9 percent against a 2009 target of 15 percent, much of it tied into loan agreements with a negative net value, no effective board representation and no real empowerment at holding company level.[147]Just over a third of companies had filed employment equity plans.[148] Only a quarter had achieved forty percent HDSA in management.[149] Only 17.1 percent of mine workers were functionally literate.[150] Twenty-nine percent of mining companies had improved existing housing standards, and 34 percent had facilitated homeownership.[151]

The 2009 Mining Charter Report was tabled by the Minister on the 13 September 2010 and published in the Government Gazette under number 838/2010 on the 20th September 2010. The revised Mining Charter was aimed to address the inadequacies of the original Mining Charter , remove any potential

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[141] No 26661 Government Gazette, 13 August 2004 at 07.
[142] *Ibid* clause 4.7.
[143] *Ibid* clause 4.7.
[144] Mining Charter Report , October 2009.
[145] Mining Charter Report , October 2009.
[146] Mining Charter Report, 2009.
[147]2009 Mining Charter report.
[148]*Ibid.*
[149] *Ibid.*
[150] *Ibid.*
[151] *Ibid.*

ambiguities, as well as facilitate sustainable transformation, growth and development in the mining industry.

3.3.2 Once empowered always empowered

The debate around the 'once empowered always empowered' rule arose once again following the publication of the draft Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry (Mining Charter) on 15 April 2016.[152] The purpose of the reviewed Mining Charter is to align it with the Broad-Based Black Economic Empowerment Act 53 of 2003 (BEE Act) and its recently amended Codes of Good Practice (the codes). This review happened while the industry was awaiting a High Court ruling for a determination on the 'once empowered always empowered' rule, more specifically whether the ownership element of the Mining Charter should be a continuous compliance requirement for the duration of the mining right as argued by the Department of Mineral Resources, or a once-off requirement as argued by Chamber of Mines.[153] The effect of this rule on the Constitution, the BEE Act and the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) requires much attention in light of South Africa's (SA) constitutional democracy and further achieving equality and economic transformation in the mining industry.

The effect of 'once empowered always empowered' rule is that a mining company will still be deemed to be in compliance with transforming its ownership structure even if that company does not currently have the required level of historically disadvantaged South African (HDSA) ownership.[154] A Mining Charter audit conducted for that year of assessment would find unsuitable and non-compliant levels of HDSA ownership. Most importantly, in a broader context, the ownership levels of SA's mineral wealth would remain with those who were historically advantaged.[155] In light of the aforementioned laws, the effect of the 'once empowered always empowered' rule is then contrary to the constitutional right to

[152] Government Gazette no 39933, 15 April 2016.

[153] Once empowered always empowered close to resolution, available at https://www.moneyweb.co.za/news/south-africa/parties-close-to-out-of-court-settlement-on-ownership-issue/.

[154] Deneo Peta, the effect of the 'once empowered always empowered' rule on the mining industry October 24th, 2016 accessed on the 29th October 2017, http://www.derebus.org.za/effect-empowered-always-empowered-rule-mining-industry/.

[155] Deneo Peta, the effect of the 'once empowered always empowered' rule on the mining industry

October 24th, 2016 accessed on the 29th October 2017, http://www.derebus.org.za/effect-empowered-always-empowered-rule-mining-industry/.

equality, the BEE Act's objective to achieve substantial change in the racial composition of ownership of enterprises and further the MPRDA's function to achieve equal distribution of SA's mineral wealth.[156] It is further contrary to the international law principle of sustainable development.[157]

3.3.3 The 2017 draft mining charter.

Like in all sectors of the economy, redress in the mining industry is an emotive issue that has led to many court challenges and public criticism as I will show below. The principle of once empowered always empowered is awaiting a court determination.[158] The 2017 draft mining charter[159] is also being challenged by various groups and stakeholders, the Chamber of Mines, who presents 90% of the industry, is applying for the review of the mining charter and has lashed out at the mining department, saying the ill-conceived charter was a big hit on the mining industry.[160] About 150 groups of South African mining communities represented by the Centre For Applied Legal studies at Wits will challenge the government's Mining Charter and seek a court order to ensure they are involved in drafting any replacements.[161] On the other hand, the National Union of Mineworkers (NUM) says the actions by the Chamber of Mines to challenge the new Mining Charter have attacked every essence of transformation in the mining industry.[162] The above has led to policy uncertainty and mistrust amongst stakeholders in the mining industry and affected investor confidence in the sector.

The new Mining Charter, which was published in June and has been vehemently opposed by the industry, puts extra levies on companies and increases black-empowerment requirements. The 2017 Charter requires that a new prospecting right must have a minimum of 50% plus 1 Black Person shareholding, which must include voting rights.[163] A new mining right must have 30% Black Persons'

[156] *Ibid.*
[157] *Ibid.*
[158] Available at https://www.moneyweb.co.za/news/south-africa/parties-close-to-out-of-court-settlement-on-ownership-issue
[159] No.40923 Government Gazette, 15 June 2017.
[160] Chamber to challenge new charter in court available at http://www.fin24.com/Companies/Mining/chamber-to-challenge-new-charter-in-court-20170615-2
[161] Mining communities to challenge the charter available at https://www.iol.co.za/business-report/sa-mining-communities-challenge-mining-charter-11696854.
[162] NUM: Chamber of Mines action on the new mining Charter attacks transformation available at http://ewn.co.za/2017/07/16/num-chamber-of-mines-action-on-new-mining-charter-attacks-transformation-battle.
[163] Clause 2.1.1.1 of the draft mining charter, No 40923 Government Gazette, 15 June 2017.

shareholding, with the 30% shareholding to be apportioned between employees, communities and entrepreneurs in a specific manner.[164] The new mining holder right must also allocate 8% shareholding to workers and the separation of workers' shareholding from that of entrepreneurs.[165] Holders of rights are also required to submit a Housing and Living Condition Plan that caters for human dignity and privacy for workers. An 8% shareholding is allocated to mine communities, to be held through a trust; further introduced the requirement to publish the SLPs; A 14% shareholding to Black entrepreneurs.[166]

Holders who have maintained a 30% black shareholding will not be required to restructure their shareholding. In this regard, the Charter seeks to reward those holders of mining rights who have contributed to the transformation of the industry.[167]

Importantly, the 30% ownership requirement also applies to holders who claim historical BEE transactions. A historical BEE transaction is recognised for the reporting period, but such holders are required to top up their shareholding to the minimum requirement of 30% black shareholding within 12 months of the Charter coming into force.[168]

In order to ensure meaningful and effective participation of black persons in the mining and mineral industry, With regards to the transfer of rights, a Holder who sells their mining assets must give black-owned companies a preferential option to purchase[169].

The 2017 Charter also provides for improvements to Beneficiation. Although the maximum offsetting remains at 11%, the 2017 Charter provides clarity by setting out certain criteria for the qualification of the 11% offsetting.[170] The Charter requires 70% procurement of mining goods and 80% procurement of services from BEE entities. It also requires that analysis of 100% of mineral samples be done by South African based companies.[171]

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[164] *Ibid*.
[165] *Ibid* clause 2.1.1.3.
[166] *Ibid.*
[167] *Ibid* clause 2.1.1.6.
[168]Clause 2.1.2.3 Government Gazette no. 40923.
[169] Clause 2.1.3.
[170] Clause 2.1.4.
[171] Clause 2.2.

On Employment Equity[172], the Charter aims to ensure that black representation at the various levels of employment is representative of the demographics of the country, while ensuring harmonisation with other industry Charters.

3.4 Social and Labour plans

SLPs can be viewed as part of a broader project aimed at addressing the legacy of colonialism and apartheid, reconstructing society along egalitarian lines, and building a sense of common nationhood which commenced with the founding of South Africa's first democratic dispensation in 1994 and which is signified by the term transformation.[173]The mining sector has historically been both a central plank of the South African economy and a site of the system of racial wealth inequality.[174] As a consequence, the transformation of the mining industry has been a central imperative in constitutional South Africa.[175] The democratically elected parliament passed the MPRDA in 2002, which vests mineral rights in the state and seeks to use the state power to grant mineral rights to advance transformation.[176] It does so through the promotion of greater participation of Historical Disadvantaged Persons (HDP) in the mining industry and by introducing measures to ensure mineral wealth results in tangible improvements in the lives of workers and communities.[177] Given the depth of the social challenges in the sector and the significant wealth of mining companies, it was decided that the mining sector should assume positive, developmental responsibilities that are ordinarily those of the government.[178] The social labour plans system was the result.[179] The following MPRDA objectives are of direct relevance to the SLP system:

(a) Recognise the internationally accepted right of the state to exercise sovereignty over all the mineral and petroleum resources within the Republic;
(b) Give effect to the principle of state custodianship of the nation's mineral and petroleum resources;
(c) Promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

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[172] Clause 2.3.
[173] The Social Labour Plan Series, Phase 1, System Design, Trends analysis Report at 23.
[174] The Social Labour Plan series, Phase 1, System Design, Trends analysis Report at 23.
[175] *Ibid.*
[176] *Ibid.*
[177] *Ibid.*
[178] *Ibid.*
[179] *Ibid.*

(d) Substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
(e) Promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;
(f) Promote employment and advance the social welfare of all South Africans;
(g) Provide for security of tenure in respect of prospecting, exploration, mining and production operations;
(h) Give effect to section 24 of the Constitution by ensuring that the nations mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development, and
(i) Ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

The Social and Labour Plans requires applicants for mining and production rights to develop and implement comprehensive Human Resources development programs, Mine Community Development Plan, Housing and Living conditions Plan, Employment Equity Plan, and process to save jobs and manage downscaling/closure.[180] The objectives of the social and labour plan are to promote economic growth and mineral and petroleum resources development in the Republic.[181] Promote employment and advance the social and economic welfare of all South Africans.[182] Ensures that holders of mining or production rights contribute towards the socio-economic development of the areas in which they are operating as well as the areas from which the majority of the workforce is sourced.[183] To utilise and expand the existing skills base for the empowerment of HDSA and serve the community.[184]

As stated in 3.2 above, the Minister must refuse to grant a mining right if the application does not meet all the requirements set out in section 23(1).

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[180] Revised Social and Labour Plan Guidelines October 2010.
[181] Section 2(e) of the MPRDA.
[182] Section 2(f) of the MPRDA.
[183] Section 2(i) of the MPRDA.
[184] Revised Social and Labour Plan Guidelines 2010.

The holder of a mining right must submit annual reports to the Department of Mineral Resources (DMR) on its compliance with these conditions.[185] Failure to submit these reports or submission of inaccurate, incorrect or misleading reports may lead to the suspension or cancellation of prospecting or mining rights by the Minister.[186] May even constitute an offence, punishable by imprisonment for up to six months or imposition of a fine.[187] In practice, there is a measure of uncertainty regarding the criteria used by the Minister when assessing whether sub-section 23(1) and 23(1)(h) have been complied with. More importantly these places mining companies at a significant disadvantage as it makes it difficult to determine whether or not they have complied with the MPRDA itself, a pivotal point of the rule of law.

3.3. Conclusion

The Court must settle the once empowered always empowered dispute informed by section 9 of the Constitution that provides for equality. The Minister must consult with a broad spectrum of the industry to achieve consensus for the Mining Charter. The Community must be defined for them to participate meaningfully in the drafting of a new mining charter. Communities should, therefore, be recognised as one of the stakeholders to be consulted before the Mining Chatter is released. The Court must be ensuring that equity is achieved in the mining industry. Subsection 23(1) and 23(1)(h) must provide clear and unambiguous language to ensure compliance. The criteria for compliance must be clear for certainty in achieving the objects of the charter.

[185] Section 25(2)(h) of the MPRDA.
[186] Section 47 of the MPRDA.
[187] Section 98 and 99 of the MPRDA.

CHAPTER 4: WHAT ARE THE LIMITATIONS OF ENFORCING SLPs REGULATIONS?

4.1. Introduction.

"When we conduct oversights, we come back depressed. Because before you enter into a mine, you walk through a sea of poverty. Mining communities specifically are trapped in abject poverty. What we have seen is a picture that is not good at all. It does not auger well for the future of our country".[188]

The above quote reflects community sentiments with regard to social and labour plans. The enforcement of social labour plans is a massive challenge for the Department of Minerals due to the construction of the regulations, and the human resource challenges [189] and in some instances lack of political will.[190] This is clearly demonstrated in Marikana. The Marikana Commission of Inquiry found that Lonmin had failed to adhere to the terms of its SLP with regard to housing and that the Company had created an environment conducive to the creation of tension and labour unrest by not addressing the housing situation at Marikana.[191] The failure of SLPs to meet community needs is a country-wide phenomenon, and not only at Marikana. At the most macro-level are critiques of the very manner in which the SLP system is conceived and core assumptions underpinning it.[192] SLPs seem to be an unrefined tool for dealing with a complex and nuanced area involving a range of social economic and environmental variables. This chapter will, therefore, analyse and critically evaluate the enforceability of social labour plans.

There is growing evidence that SLP obligations are unmet.[193] In response to a member of parliament (MP) in the National Council of Provinces (NCOP), the Minister of Mineral Resources stated that as of 31 March 2015, a total of 240 mining right holders failed to comply with their SLPs. [194] Given that SLPs are a Constitutional imperative, failure of the system represents a failure to realise the Constitution.[195]

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[188] Portfolio Committee on Mineral Resources in the Mining Industry Report of 2013.

[189] Amnesty International, Smoke and Mirrors, Lonmin's failure to address housing conditions at Marikana available at https://www.amnesty.org/en/documents/afr53/4552/2016/en/.

[190] *Ibid.*

[191] Farlam Commission of Inquiry, chapter 24, at 542 par. 37

[192] *Ibid.*

[193] The Social and Labour Plan Series, Phase 1, System design trends analysis report by Centre for Applied Legal Studies at 14.

[194] NCOP Question for oral reply No. 178 advance notice No. CO582E. Date of publication in the internal question paper: 19 October 2015. Internal question paper no 37.

[195] The Social and Labour Plan Series, Phase 1, System design trends analysis report by Cente for applied legal studies at 15.

4.2. Community participation

As stated above, in order to be eligible for a mining right, mining companies are required to submit an SLP, developed in consultation with affected communities, containing commitments to the Department of Mineral Resources in respect of human resources and local economic development. On the granting of the Mining right, these programmes become binding conditions of the mining right, non-compliance with the SLP can lead to suspension of the mining right.

Majority of SLPs do not provide precise mechanisms by which communities can hold companies accountable to their obligations.[196] The regulatory system is not capable of producing SLPs that can effectively contribute towards the transformative objectives as set out in the Constitution and Mineral legislation.[197] The legal framework for SLPs does not set clear requirements for public participation of communities in the development of SLPs.[198] Further, this failure to provide a participatory framework extends throughout the life cycle of SLPs.[199] The regulatory system does not provide sufficiently clear contextual considerations by which the regulator can evaluate the adequacy of SLPs.[200] The specification of the majority of SLP drafting requirements, including the background information regarding the mine and the community, in guidelines without legally binding status, further weakens the effectiveness of the regulatory framework.[201]

> The Centre for Applied Legal Studies suggests four measures that will make the SLP regime effective and I agree with their suggestions.[202] The suggestions are that *"there is a need for greater specificity and standardization regarding the content of the SLPs and the process by which they are complied. Second, the binding status of the SLP system needs to be fortified through measures such as moving core content of the guidelines to the regulations, which have binding status. Third, the regulatory system should expressly provide an inclusive and transparent process for worker and community participation throughout the life cycle of the SLP. Fourth, the framework needs to provide for structures of internal and external accountability. Finally, workers and the community need to be informed about the SLP process and must access*

[196196] The Social and Labour Plan, series, Phase 1, System design trends analysis report by Center for applied legal studies at 7.

[197] *Ibid.*

[198] *Ibid.*

[199] *Ibid.*

[200] *Ibid.*

[201] *Ibid.*

[202] *Ibid.*

to the technical and social-scientific expertise that is equivalent to the one that is being enjoyed by the mine. This will empower the workers and the communities to negotiate at equal length with the mining houses".[203]

The notice provisions in the MPRDA guidelines are significantly less detailed than in the NEMA regulations. Notice provisions are critical, as the breadth of interested and affected parties reached through notice determines the possible inclusivity of the participation process. The requirements in the MPRDA regulations are the following: Notice must take place either at the office of the Regional Manager, or the relevant designated agency that is accessible to the public; the form of the notice may be either publication in the applicable provincial gazette; notice in the magistrate court in the applicable magisterial district; or advertisement in a local or national newspaper that circulates in the area of publication. The result is that many interested and affected persons may not see or hear the initial notice. This contrast with the far more extensive requirements for notice in relation to environmental matters regulated under NEMA and the EIA regulations. These, for example, require proactive measures to be undertaken in the event that interested and affected persons may not be able to read the notice on account of lack of sources, disability or literacy. Another point of contrast between participation under the MPRDA and under NEMA is that the former does not indicate what information interested and affected parties must be provided with to ensure there is a level playing field with regards to access to information. I agree with CALLS recommendations that given the complexity of SLPs in relation to design, implementation and monitoring, separate but complimentary regulations for SLPs are warranted.[204] These regulations should specify the consultation process for SLPs.[205] The general consultation standards in the MPRDA regulations should, however also be strengthened to align with those in NEMA.[206]

CALs has observed that a tendency of mining companies to consult with a narrow range of local stakeholders who are typically the most powerful in the community. It is therefore essential that provisions regulating consultation attempt to counteract this through expressly requiring that consultation is conducted with a broad range of stakeholders, and through adopting an inclusive

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[203] *Ibid*

[204] The Social and Labour Plan Series, Phase 1, System design Trends Analysis Report by the Centre for applied legal studies at 96.

[205] *Ibid.*

[206] *Ibid.*

definition of communities.[207] The DMR regulations should also provide a precise definition of communities instead of it being relegated to the guidelines as it is currently. The definition should include a broad range of community stakeholders.

4.3. Labour sending areas

As stated in Chapter two above, South Africa has a long history of a migrant labour system. The areas were labour is sourced from continues to suffer from the loss of economically active people.[208] It is vital that SLPs contains programs to benefit communities outside of the mining area who contribute a significant proportion of their labour.[209] CALLs found that there is often a failure to adequately define all the major labour-sending areas for permanent and contract workers.[210] It is notable that the concept of labour-sending areas is not defined in the MPRDA or regulations. In the regulations, it is stated that the SLP must contain infrastructure and poverty eradication programs in the areas in which the mines operate and the major sending areas.[211] The 2010 SLP guidelines define labour-sending areas as areas from which a majority of mine workers, both historical and current are or have been to be sourced.[212] The second is based on the areas from which significant proportions of workers have been recruited. These may overlap when the majority or a significant proportion of workers are recruited from the area surrounding the operation but does not always do so.

While the regulations appear to treat labour-sending areas as distinct from the mining area, the guidelines do not view labour-sending areas in opposition to the concept of mining areas but instead, include areas where workers are recruited, regardless whether is in the mining area. It is not clear whether mining area refers to municipalities, cities, villages or towns. Furthermore, there will be no single area where the majority of workers are recruited form. It will make more sense to indicate a lower percentage threshold for constituting major labour-sending areas as well as a more specific description of the areas that constitute labour-sending areas.[213]

[207] *Ibid.*
[208] The Social and Labour Plan series, Phase 1, system and trends analysis report at 99.
[209] *Ibid.*
[210] *Ibid.*
[211] 2010 SLP guidelines.
[212] 2010 SLP guidelines.
[213] Social and Labour Plan Series, Phase 1, System design trends and analysis report at 100.

4.4. Inadequate provision for transparency

SLPs are designed to benefit workers and communities. Each SLP constitutes the fulfilment of statutory obligations on companies to develop and implement projects in the public interest. Consequently, the plans need to be publicly available and easily accessed. Neither the MPRDA nor the regulations state that SLPs are public documents unambiguously. This should be rectified in any future amendments to the MPRDA and regulations. SLPs should also, be included by the DMR in their list of automatically available documents published in terms of section 15 of PAIA and this availability must be free from restrictions regarding who can see the documents and which parts are included.

4.5. Role of the Department of Mineral Resources

As the competent authority for the administration of the MPRDA, including SLPs, the DMR has the utmost significant role of national government departments. DMR's role is central throughout the SLP life cycle. Firstly it manages the mining right application process in which the SLP is submitted as part of the required application documentation.[214] The DMR is required, in terms of the MPRDA to facilitate public participation during the mining right application and, while not expressly stated and not always observed, this must include participation in the development of the SLP and not only the environmental impact assessment processes.[215] Secondly, DMR is responsible for monitoring compliance with and enforcing regulatory requirements including approved SLPs.[216] This requires, receiving, reviewing and approving annual SLP implementation plans and the annual reports on SLP compliance submitted by mining companies.[217] Onsite inspections are vital to verify compliance.[218] Where none compliance is detected, the DMR must use its powers of enforcement including remedial actions, notices, and where necessary, the suspension or revocation of the mining right.[219] Thirdly, the DMR will need to collaborate with stakeholders to ensure that SLPs are implemented.[220] These include mediation and arbitration as

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[214] Section 23(1)(h) of the Act.
[215] Section 10 and 22(4) of the Act.
[216] Section 25(2)(h) and 47 of the Act.
[217] Section 25(2)(h).
[218] *Ibid.*
[219] Section 47 of the Act.
[220] Centre for Applied Legal studies, Social and Labour Plan Series Phase 1, System Design Trends Analysis Report at 35.

well as participating in future forums and any other multi-stakeholder bodies set up to implement SLPs.[221]

Lonmin was found to have failed to deliver on its SLP promises.[222] The failure to deliver on the SLP constitutes a breach of South Africa's Mineral and Petroleum Resources Development Act.[223] The MPRDA requires companies to provide financially and otherwise for their SLPs. Lonmin did not do this. The MPRDA requires that changes to the SLPs can only be done with official approval from the DMR. Lonmin changed its SLP plans significantly but never obtained official permission to do so. The serious failures in the enforcement of social labour plans could not happen if the Government of South Africa enforced the legal provisions it has put in place to address historical discrimination and disadvantage in the mining sector.[224] The Falarm commission of inquiry has found that Lonmin's failure to comply with its housing obligations created an environment conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct.[225] Amnesty international found problems of capacity and policy within DMR. The DMR's capacity to monitor and enforce SLPs is limited by lack of human and financial resources. For example, in the Northwest Province, just three staff is responsible for reviewing and enforcing some 250 SLPs. The DMR carries out sites visits but can only do 20-30 per year, because of budgetary limitations.[226]

4.6. Sanctions and recourse.

A central issue of implementation is the question of accountability. Where accountability is absent, notable promises may go unmet. Accountability requires that the state imposes sanctions where companies fail to deliver on their license obligations such as SLPs. While, in theory, there are repercussions for failure to deliver on SLP targets, in practice these seldom materialise. The MPRDA does empower the Minister to revoke or withdraw licences for non-compliance with SLPs, but I am aware of only two instances to in which a mining right was withdrawn partially as a result of the mine's

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[221] *Ibid.*
[222] Smoke and Mirrors, Lonmin's Failure to address housing conditions at Marikana, Amnesty International at 36.
[223] *Ibid.*
[224] Smoke and Mirrors, Lonmin's failure to address housing conditions at Marikana, Amnesty international.
[225] Farlan Commission report, Chapter 24 at 542, par 37.
[226] Amnesty International, Smoke and Mirrors, Lonmin's Failure to address Housing Conditions at Marikana.

none compliance with SLP.[227] On the face of it does appear that mine companies are not held accountable for their SLP commitments.

Part of the problem is that nowhere in the guidelines is it stated what level of fulfilment target is considered none-compliance. For instance, CALLs observed that a 60% achievement of a target is seen as acceptable while only a complete and systematic failure to realise the SLP as a whole is regarded as none compliance.[228] This should be rectified in a future amendment of the MPRDA and the regulations. Another problem is the absence in the Act and regulations to specify recourse mechanisms for workers and community members who are aggrieved with the manner in which the SLP is implemented.[229] Any amendments to the Act and regulations, therefore, need to provide for formal grievance mechanism in relation to SLP commitments and which need to clearly specify both the structure and the process.

4.6. Conclusion.

Majority of SLPs do not provide precise mechanisms by which communities can hold companies accountable to their obligations. The Centre for Applied Legal Studies suggests four measures that will make the SLP regime effective and I agree with their suggestions.[230] The measures as stated in 4.2. above must be taken into account in the future amendments of the regulations. The regulations must stipulate a level of fulfilment of the targets in the SLPs, as things stand it is unclear when and how do you meet the set targets or goals set in the SLPs. SLPs should also, be included by the DMR in their list of automatically available documents published in terms of section 15 of PAIA and this availability must be free from restrictions regarding who can see the documents and which parts are included.

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[227] The first case related to the cancelation of Central Gold's mining right in September 2011 due to none compliance with the SLP, mining works program, a settlement was reached that DMR will not oppose the application to set aside the order by the company, Central Rand Gold South Africa (Pty) Limited and Another v Central Rand Gold Limited and Another (45200/2011) [2017] ZAGPPHC 275 (13 June 2017) the second case related to Glencore Optimum Mine, The reason for the DMR's suspension of the mining right pertaining to retrenchments of workers, the Minister said the manner in which retrenchment was conducted was inhuman and did and contravened legal requirements including the SLP. The Mining right was reinstated four days later following a settlement with the Minister. Available at

https://www.iol.co.za/business-report/companies/optimum-can-operate---minister-1897726.

[228] The Social and Labour Plan Series, Phase 1, system Design, trends analysis report at 105.
[229] *Ibid.*
[230] *Ibid.*

The DMR capacity to inspect SLP must be significantly improved as the inspectorate is understaffed. [231] This should be rectified in a future amendment of the MPRDA and the regulations. Another problem is the absence of the Act and regulations to specify recourse mechanisms for workers and community members who are aggrieved with the manner in which the SLP is implemented.[232] Any amendments to the Act and regulations, therefore, need to provide formal grievance mechanism in relation to SLP commitments and which need to clearly specify both the structure and the process.

[231] The Social and Labour Plan Series, Phase 1, system Design, trends analysis report at 105.
[232] *Ibid.*

CHAPTER 5: SUMMARY AND RECOMMENDATIONS.

It is clear that due to the above-mentioned history the mining industry is dealing with the legacy of apartheid in its attempts to address economic empowerment of the previously disadvantaged communities. The history of segregation has systematically excluded blacks from economic participation in the mining industry in a meaningful way.[233] It was against this background that the Mineral Petroleum Development Act 2002(herein referred to as MPRDA)was promulgated with a clear objective to reverse the past imbalances and empower the previously disadvantaged to participate in mining. As a result, the mining charter was first gazetted in 2004.

The Mining Safety and Health Commission concluded that the Safety Inspectorate is understaffed to inspect and execute its mandate. The same conclusions were arrived at by Amnesty international recently when they found that the failure of mining companies to comply with their SLP is due to the fact that DMR inspectorate dealing with the SLPS is chronicle understaffed. The Court must rule on the principle of once empowerment always empowered to create policy certainty on this principle. The Court must settle this principle informed by section 9 of the Constitution that provides for equality.

Recommendations.

The Minister must consult with a broad spectrum of the industry to achieve representation. Majority of SLPs do not provide precise mechanisms by which communities can hold companies accountable to their obligations. The Centre for Applied Legal Studies suggests four measures that will make the SLP regime effective and I agree with their suggestions.[234] The suggestions are that there is a need for greater specificity and standardization regarding the content of the SLPs and the process by which they comply. Second, the binding status of the SLP system needs to be fortified through measures such as moving core content of the guidelines to the regulations, which have binding status. Third, the regulatory system should expressly provide an inclusive and transparent process for worker and community participation throughout the life cycle of the SLP. Fourth, the framework needs to provide for structures of internal and external accountability. Finally, workers and the community need to be informed about the SLP process and must access to the technical and social-scientific expertise that is equivalent to the one that is being enjoyed by the mine. This will empower the workers and the

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[233] Centre for Applied Legal Studies, The Social and Labour Plan Series, Phase 1, System Design Trends Analysis Report at 23.
[234] *Ibid.*

communities to negotiate at equal length with the mining houses. It is therefore important that provisions regulating consultation attempt to counteract this through expressly requiring that consultation is conducted with a broad range of stakeholders, and through adopting an inclusive definition of communities.[235] It will make more sense to indicate a lower percentage threshold for constituting major labour-sending areas as well as a more specific description of the areas that constitute labour-sending areas.[236] The regulations must stipulate a level of fulfilment of the targets in the SLPs, as things stand it is unclear when and how do you meet the set targets or goals set in the SLPs. SLPs should also, be included by the DMR in their list of automatically available documents published in terms of section 15 of PAIA and this availability must be free from restrictions regarding who can see the documents and which parts are included. This should be rectified in a future amendment of the MPRDA and the regulations. Another problem is the absence in the Act and regulations to specify recourse mechanisms for workers and community members who are aggrieved with the manner in which the SLP is implemented.[237] Any amendments to the Act and regulations, therefore, need to provide for formal grievance mechanism in relation to SLP commitments and which need to explicitly specify both the structure and the process of the Mining Charter. The Community must be clearly defined for them to participate meaningfully in the drafting of a new mining charter. Communities should, therefore, be recognised as one of the stakeholders to be consulted before the Mining Chatter is released. Subsection 23(1) and 23(1)(h) must provide clear and unambiguous language to ensure compliance. The criteria for compliance must be unambiguous.

[235] *Ibid.*

[236] Social and Labour Plan Series, Phase 1, System design trends and analysis report at 100.

[237] The Social and Labour Plan Series, Phase 1, system Design, trends analysis report at 105.

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