

TRANSFORMATIVE MINERAL RESOURCES BENEFICIATION LEGISLATION: AN  
IMPETUS FOR SOCIO-ECONOMIC TRANSFORMATION AND POVERTY  
ALLEVIATION IN SOUTH AFRICA

by

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## **ABSTRACT**

South Africa, like many African States is faced with an increase in the unemployment rate and decrease in economic growth. In terms of Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) as amended, the people of South Africa are the owners of mineral resources such as; Platinum Group Metals, Gold, Platinum, and the State is the custodian thereof. The main problem is that the majority of black people in South Africa remain destitute and marginalized. They revolt by demanding radical socio-economic transformation and beneficiation from mineral resources, as the backbone of their survival. The government rejected nationalisation instead favouring a Mineral beneficiation strategy. In terms of Section 26 of MPRDA, the minister of mineral resources may initiate or prescribe levels of beneficiation of minerals in the Republic. The beneficiation strategy entails that the people must have control and access to their country's mineral resources; in another context, it entails the transformation of minerals or a combination of minerals to higher value product, which can either be consumed locally or exported. Thus creating economic growth, jobs and alleviate poverty. The study examines legislation and policies that promote beneficiation of minerals and petroleum resources in the Republic. The study also deals with the importance of minerals and petroleum beneficiation as an impetus towards socio-economic transformation in the country. It utilised jurisprudence of Botswana, which has robust legislation, and strategies that promote and deliver resource beneficiation to the citizens equitably. It points out the challenges faced in the transformation of mineral resources beneficiation and legislative prospects that have been put in place to redress them.

**Key Words:** Beneficiation legislation, Minerals resources, Socio-economic transformation and Poverty.

**DECLARATION BY SUPERVISOR**

I, **Prof, Kolawole Odeku**, hereby declare that this dissertation by **Mr Thupane Peshley Kgoale**, for the degree of Masters of Laws (LLM) by dissertation be accepted for examination.

.....

**Prof, Kolawole Odeku**

...../...../.....

**Date**

**DECLARATION BY STUDENT**

I, Thupane Peshley Kgoale declare that this dissertation for the degree of Masters of Laws at the University of Limpopo (Turfloop Campus) hereby submitted, has not been previously submitted by me for a degree at this or any other university, this is my own work in design and execution and all material contained herein has been duly acknowledged.

.....

**Kgoale Thupane Peshley**

...../...../.....

**Date**



## **DEDICATION**

This dissertation is dedicated to my late father who afforded me unwavering support and encouraged me to pursue master's degree. Unfortunately, God took him, when I was in the process of finalising my proposal. I dearly believe wherever, he is, he will rejoice with tears of joy when he hears my name being called again in the Great Onkgopotse Tiro Hall.

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## TABLE OF ABBREVIATIONS AND ACRONYMS

**AEMFC** - African Exploration Mining Finance Corporation

**ANC**- African National Congress

**BBSEEC**- Broad-Based Socio-Economic Empowerment Charter

**BRICS**- Brazil, India, China and Russia

**CALS**- Centre for Applied Legal Studies

**CDC**- COEGA Development Corporation

**CSP**- Comprehensive State Partnership

**DMR**- Department of Mineral Resources

**EFF**- Economic Freedom Fighters

**FTA** - Free Trade Area

**GDP**- Gross Domestic Product

**HDSA** - Historically Disadvantaged South Africans

**IDC** - Industrial Development Corporation

**IDP** - Integrated Development Plan

**IDZ**- Industrial Development Zone

**ITAC**- International Trade Administration Commission

**ITC**- International Trade Commission

**LHR** - Lawyers for Human Rights

**MISTRA**- Mapungubwe Institute for Strategic Reflection

**MQA** - Mining Qualifications Authority

**NDP**- National Development Plan

**NEF** - National Empowerment Fund

**NEPAD**- New Partnership for Africa's Development

**NGP**- New Growth Path

**OSCOLA** - Oxford University Standard for the Citation of Legal Authorities

**PWC**- Price Water Coopers

**RDP**- Reconstruction and Development Programme

**SADC**- Southern Africa Development Communities

**SAQA**-South African Qualifications Authority

**SARS**- South African Revenue Service

**SEFA**- Small Enterprise Funding Agency

**SETA**- Sector Education Training Authority

**SLP**-The Social and Labour Plans

**SOC**- State Owned Company

**TB** - Tuberculosis

**WHO** - World Health Organisation

**WTO**- World Trade Organisation

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Botswana, Mines, Quarries, Works and Machinery: [CAP 44:02] Act 20 1973

Botswana, Mining and Minerals Act of 1999

Botswana, Precious and Semi-Precious Stones (Protection) Act 3 of 1969

Botswana, Unwrought Precious Metals Act 11 of 1999

Extension of Generalized of System of Preferences of 1974

Free Trade Agreement between the EFTA States and the SACU States.

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General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources"

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Mine, Health and Safety Act 29 Of 1996

Mineral and Petroleum Resources Development Act 28 of 2002

Mineral and Petroleum Resources Development Amendment Act 49 of 2008

Mineral and Petroleum Resources Royalty Act 28 of 2008

Minerals Act 50 of 1991

Mining Rights Act 20 of 1967

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Precious Metals Act 37 of 2005

Precious Stones Act 73 of 1964

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*National Coalition for Gay and Lesbian Equality V Minister of Justice* 1999 (1) SA 6 (CC) [60] - [62]

*Nkala and Others v Harmony Gold Mining Company Limited and Others* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) (13 May 2016)

*Road Accident Fund v Mdeyide*, 2011 (2) SA 26[125] (dissenting Judgment of foreman J)

*Scholes and Another V Minister of Mineral Resources* (50642/2015) [2017] ZAGPPHC 303 (30 June 2017)

*Turffontein Estates Ltd V Mining Commissioner of Johannesburg*, 1917, AD 419, page 428



## 1. INTRODUCTION AND BACKGROUND

South Africa has the world's richest mineral deposits, with \$3.3 trillion (R36 trillion) in platinum, gold, iron ore and coal.<sup>1</sup> Deloitte's report on the 2010 financial year indicated that South Africa achieved gross revenue of \$24.5 billion from sales of all minerals but only \$9 billion has been generated from processing those minerals. According to the Johannesburg Stock Exchange, the main reason for low beneficiation production is that South Africa has relatively low levels of mineral beneficiation value-added processing facilities that transform those extracted minerals into a semi-finished and more valuable end products, but these needs to change.<sup>2</sup> This bearing the potential to enable South Africans to benefit from abundance of their mineral resources, consequently leading to sustainable economic growth and the proceeds to create employment and alleviate poverty.

South African Minerals Policy White Paper of 1998<sup>3</sup> defines beneficiation as the successive processes of adding value to raw materials from their extraction through to the sale of finished products to consumers, covering a wide range of very different activities.<sup>4</sup> During the Southern Africa Development Communities (SADC) summit in 2014, Mugabe<sup>5</sup> said that, Southern Africa region has abundant resources, which have to be exploited in a manner that adds value, to the beneficiaries. By amongst others being sold at the higher prices instead of being sold as raw products at very low prices.<sup>6</sup> The South African government has pegged beneficiation as a top priority for achieving its job creation and economic growth goals. In 2012 Mining Indaba, the then

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<sup>1</sup> *Business report, economy.* (2014). Investors shun SA's R36 trillion in minerals, Retrieved from <http://www.iol.co.za/business-report/economy/investors-shun-sas-r36-trillion-in-minerals-1762558>. Accessed on the 25 February 2017.

<sup>2</sup> *Van Dijk, M.* (2017). JSE Magazine, Beneficiation full value, accessed at <http://www.jsemagazine.co.za/jse-supplement/full-value/>. Accessed on 26 February 2017.

<sup>3</sup> *White paper.* (1998). Minerals and Mining Policy of 1998. Retrieved from [http://www.gov.za/sites/www.gov.za/files/white\\_paper\\_mining\\_minerals\\_policy\\_2.pdf](http://www.gov.za/sites/www.gov.za/files/white_paper_mining_minerals_policy_2.pdf) Accessed 27 March 2017.

<sup>4</sup> *Zonwabele, Z.T.* (2015). Analysis of the key factors affecting beneficiation in South Africa. University of the Witwatersrand, Faculty of Engineering and the Built Environment, School of Mechanical, Industrial & Aeronautical Engineering. Page 08.

<sup>5</sup> *Mugabe, R.G.* is the former president of Zimbabwe.

<sup>6</sup> *Mugabe, R.G.* (2014). Address at Southern African Developing Communities two-day 34th SADC summit at Victoria Falls on the 17 and 18 August 2014.

Minister of Minerals Resources Shabangu said, “Nationalisation is off the table, and the beneficiation policy is definitely going ahead”.<sup>7</sup>

Therefore, the research focuses on how beneficiation legislation can be used for the benefit of the Historically Disadvantaged South Africans (HDSA), by participating in the management and utilization for job creation and poverty alleviation in South Africa.

Prior 1994 there was the apartheid legal system in South Africa, which perpetuated unjust oppression, racism, and amongst others discriminatory laws and policies.<sup>8</sup> The South African Constitution of 1996 is the supreme law of the Republic and any law or conduct inconsistent with it is invalid.<sup>9</sup> The Bill of Rights is the cornerstone of South Africa’s democracy;<sup>10</sup> for it encapsulates the rights of all the people in the country and affirms democratic values, human dignity, equality and freedom. The 1994 democratic government inherited a country from apartheid repressive laws, which regulated access to and exploitation of mineral and petroleum resources, which were based exclusively on a racial basis and discrimination.<sup>11</sup>

The mining industry continues to experience serious imbalances as far as beneficiation is concerned. Inequality played a bigger role in the participation process of distribution of mineral and Petroleum Resources.

In terms of Section 9 of the Constitution, everyone is equal before the law and has the right to equal protection and benefit of the law.<sup>12</sup> Section 9 further prohibits unfair discrimination, either directly or indirectly amongst others on race, gender and colour as this used to be the case in the mining industry prior to the enactment of the Mineral Act (MA) 50 of 1991.<sup>13</sup> The MA repealed all the unfair discriminatory practices in the mining industry that excluded HDSA from active participation and ownership of the mineral resources in South Africa. Secondly, the Constitution affords every citizen the

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<sup>7</sup>Naidoo, S. (2012). Nationalisation taken off the table at mining indaba. Mail & Guardian retrieved from: <https://mg.co.za/article/2012-02-06-nationalisation-taken-off-the-table-at-mining-indaba>. Accessed on 25 February 2017.

<sup>8</sup> South Africa history online. (2017). Retrieved from <http://www.sahistory.org.za/article/pass-laws-south-africa-1800-1994> Accessed on the 16 February 2017.

<sup>9</sup>Section 2, Constitution of Republic of South Africa, (1996).

<sup>10</sup> Chapter 2, Ibid.

<sup>11</sup> Mostert, H. (2012). Mineral law: Principles and Policies in Perspectives. Juta Publishers. Cape Town. Page 33.

<sup>12</sup>Section 9(1), Constitution, 1996.

<sup>13</sup> Section 9(3), Constitution, 1996.

right to fair labour practices in terms of Section 23.<sup>14</sup> Therefore, all employees have equal labour rights and must not be subjected to oppressive and adverse working conditions. Thirdly, the Constitution in terms of Section 24 provides that everyone has the right to have the environment protected, for the benefit of present and future generations.<sup>15</sup> As such processing and re-smelting of minerals has to be conducted in a manner that does not harm the environment, the health and the well-being of the workers and surrounding community areas.

Historically, the mining industry has experienced inequality and racial discrimination amongst the Blacks, Whites, Indians and Coloureds for decades, which caused economic and political instability in South Africa. These have affected the mining industry in many ways because minerals have been constantly export-oriented instead of local processing. Secondly, local entrepreneurs have been excluded from the industry, limited to work as labourers. The South African mining industry business operations are currently dominated largely by European and Asian companies. Thirdly, the apartheid laws intensified exploitation of minerals in favour of the whites for example, the Precious Stones Act (PSA) 73 of 1964, prohibited the blacks, Indians and coloured from owning the mineral resources in South Africa. The landowners were marginalized and disadvantaged at the time. Section 48(1) of PSA specifically recognized mineral rights holders instead of mineral landowners who were the owners of means of production.<sup>16</sup>

Due to massive exploitation, mining companies have made huge profits to the benefit few Whites whereas, majority of black people were neglected.<sup>17</sup> The Mining Rights Act 20 of 1967 (MRA), attempted to reverse discriminatory policies of the colonial era. Section 3 of the MRA gives general power of control and administration of all mining operations to the State. However, the Mineral Rights were still in the hands of landowners and the State was controlling entitlement flowing from it. The principal purpose of all the laws promulgated was for the State to increase revenue for the country from exploitation and sale of minerals.

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<sup>14</sup> Section 23(1), Constitution, 1996.

<sup>15</sup> Section 24(b), Constitution, 1996.

<sup>16</sup> Section 48(1), Act 73 of 1964.

<sup>17</sup> *Jordan, P.* (2012). *State Intervenes in the Minerals Sector (SIMS) study* commissioned by ANC, 2011, Flexi Cadastre, Cape Town.

In the case of *Geduld Proprietary Mines Ltd v Government Mining Engineer*, 1932, AD 214,<sup>18</sup> the court held that the main reason for state custodianship was for the public to mine special metals under the State control. The decision founded on the earlier precedent delivered by Innes CJ, in the case of *Turffontein Estates Ltd v Mining Commissioner of Johannesburg*, 1917, AD 419<sup>19</sup> whereby it was held that the mining under state control was for generating financial benefit for the state as the laws apportioned rights amongst landowners, the discoverer and the general public.<sup>20</sup>

The African National Congress (ANC) has been on the mission to correct this inequality and racial imbalances of the past. Firstly, by adoption of 1955 Freedom Charter which envisaged that: “the national wealth of our country, are the heritage of all South Africans, shall be restored to the people; the mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole”.<sup>21</sup> It is clear from the Charter that the ANC’s mineral resources beneficiation has been the core of the struggle with the main focus on ensuring that all citizens benefit from the common wealth.

Pursuant to the above, the Minerals Act 50 of 1991(MA), was enacted to repeal past discriminatory laws which excluded other races in the industry. The MA recognised specifically common law rights of landowners in relation to mining.<sup>22</sup> The MA streamlined the law on mineral exploitation by doing away with the differentiation between different classes of land<sup>23</sup> and minerals.<sup>24</sup> The MA provided for the expropriation of surface or mineral rights against payment of compensation to the person whose rights expropriated.<sup>25</sup> The state only paid royalties by the owner of the mining rights. This means that under this MA government did not benefit economically.

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<sup>18</sup>*Geduld Proprietary Mines Ltd V Government Mining Engineer*, 1932, AD 214, pp. 220, 221.

<sup>19</sup>*Turffontein Estates Ltd V Mining Commissioner of Johannesburg*, 1917, AD 419, page 428.

<sup>20</sup> *Van der Schyff, E.* (2012). South African mineral law: A historical overview of the State’s regulatory power regarding the exploitation of minerals, New Centre, No. 64.

<sup>21</sup> The Freedom Charter. (1955). Retrieved from [www.anc.org.za/ancdocs/history/charter.htm](http://www.anc.org.za/ancdocs/history/charter.htm) p.1 Accessed 23 April 2017.

<sup>22</sup> Section 5(1), Act 50 of 1991.

<sup>23</sup> These being state land, alienated state land and private land.

<sup>24</sup> In previous legislation a distinction was made between precious metals, base minerals, natural oil, precious stones, source material and tiger’s eye. It is important to note that the right to certain diamonds still vested in the state – S 46, Minerals Act 50, 1991, section 46

<sup>25</sup> Section 24, Act 50 of 1991.

The aim of the MA is that the mineral resources and petroleum must benefit the landowners, and as a good initiative to compensate common law owners.

The ANC *Ready to Govern* document was a product of consultation with unions and employers. It aimed as the strategy and policies to develop and integrate the mining industry with other sectors of the economy and significantly promoted mineral beneficiation. Therefore, mineral beneficiation has been part of ANC agenda even prior taking power. This is evidenced by the first policy adopted by the government after 1994 elections upon attainment of democracy called Reconstruction and Development Policy (RDP).<sup>26</sup> The policy reiterated the need to strengthen and broaden beneficiation of exploitation of mineral and petroleum resources for economic growth and development in order to create job opportunities and reduce poverty.

One of the legal tools that have been promulgated to drive and accelerate resource beneficiation is the Mineral and Petroleum Resources Act 28 of 2002(MPRDA), which brought structural change of the mining industry. Firstly, giving the state sole authority and responsibility to manage the exploitation of nation's minerals and petroleum resources.<sup>27</sup> MPRDA is a pivotal legal instrument enacted to heal racial discriminations of the past and distribute the exploitation and beneficiation of the country's mineral resources equitably. The State is currently entrusted with the sole prerogative to decide when, where and which minerals will be mined and by whom. Therefore, the promulgation of MPRDA was the first step towards socio-economic beneficiation and transformation in the mining industry. For an example, Section 100 provides for the enactment of Broad-Based Socio-Economic Empowerment Charter, which aims to transform the sector for previously disadvantaged black people. Furthermore, Section 26 of MPRDA mandates the minister to provide for beneficiation initiatives on mineral resources.

## **2. RESEARCH PROBLEM**

### **2.1 Source of Research Problem**

The unjust apartheid system has left South Africa with an unequal society, with white minority having vast control of the resources and very prosperous while the majority

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<sup>26</sup> Reconstruction and Development Programme. (1994). A policy framework, Johannesburg, Umanyano, Publications.

<sup>27</sup> Section 3(1), Act 28 of 2002.

of black people remain poor, vulnerable and marginalized due to amongst others mainly denial of access to natural resources. At the dawn of the democratic dispensation in 1994, legislation and policies were enacted in order to address the past imbalances in the mining industry; however, the implementation remains a huge challenge. The MPRDA was enacted to promote and deliver beneficiation and fast track transformation in the mining industry for the interest of the HDSA's. However, this legislation is poorly administered and implemented.

The Act requires mining companies to have Social and Labour plans, for social development and socio-economic transformation, but there has been a lack of proper implementation. It is apparent from the surrounding mining communities, that there is no adequate infrastructural development, there is lack of basic needs such as food, water, good roads, and deteriorating schools and houses. The concern is that, nowadays, the mining industry is currently experiencing serious decline in production levels, leading to job losses, unemployment and slow economic growth.

## **2.2 Background of the study**

South Africa has a rich history and it is subjected to international attention, respectively with regard to various transformation initiatives it has founded post-apartheid imbalances. The mining industry has always played a pivotal role towards economic development and socio-economic transformation of South Africa. However, according to statistics South Africa report of 2016, its contribution to the Gross Domestic Product (GDP) declined from 21% contribution in 1980 when the economy was at its peak level to 8%.<sup>28</sup> Consequently this has led to a drastic decline in economic growth in the mining industry and contributing largely towards decrease in employment as the report indicates that in 1987 mining industry employed 760 000 individuals compared with 2015 where only 490 146 individuals, were employed in the industry.<sup>29</sup> This contributed negatively towards moratorium increase in unemployment rate leading to 29% in 2017 according to Statistics SA.<sup>30</sup>

The unfortunate part is that minerals are not like trees they do not grow but deplete with time and according to statistics South Africa, the country would exhaust its proven

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<sup>28</sup> Stats SA. (2017). Retrieved from: <http://www.statssa.gov.za/publications/Report-04-05-20/Report-04-05-20March2017.pdf>. Accessed on the 23 March 2017.

<sup>29</sup>Ibid.

<sup>30</sup>Ibid.

platinum group metal reserves in 239 years, coal reserves in 118 years and gold reserves in 38 years.<sup>31</sup> This implies that there would be outright depletion in the next three centuries. This is a cause for concern. Therefore, it is paramount to utilise sensibly and responsibly available resources for purpose of beneficiation and to increase contribution to the GDP and creates employment opportunities in the country According to Botha, the mining industry has always formed the backbone of South Africa's economy and development.<sup>32</sup> Linda agreed with Botha by stating that without the rich minerals deposits South Africa would be a different country, and the infrastructure development would be far less and the country history would have taken different shape.<sup>33</sup>

Beneficiation connotes that the country's national wealth benefits the people for the common benefit.<sup>34</sup> According to the ANC's Ready To Govern document of 1992, provides that the ruling party would in consultation with unions and employers, introduce a Mining Strategy and Policies which will be developed to integrate the mining industry with other sectors of the economy by encouraging mineral beneficiation and create progressive mining production industry. It is against this background that the Reconstruction and Development Programme (RDP) indicates that for there to be sustainable development in the mining industry private ownership must be transferred to the government as contained in Section 3 of the MPRDA

The government of South Africa has drafted and implemented different policies, strategies, initiatives and legislation that envisioned transformation of the mining industry for benefit of the HDP's that they can actively participate as forerunners to address past imbalances.<sup>35</sup> One of which is the White Paper on Minerals and Mining

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<sup>31</sup> Stats SA. (2016). Retrieved from: [http://www.statssa.gov.za/?page\\_id=5992](http://www.statssa.gov.za/?page_id=5992). Accessed on the 29 March 2017.

<sup>32</sup> *Botha, Z.* (2004). Miners contribute R1-trillion to SA's decade of democracy, *Mining Weekly*, vol. 10 no. 45. 2 page 18. See also: Preserving the future with mining—2004 Annual Report of the Chamber of Mines of SA and Mining's Contribution to South Africa in Decline. *Mining Review Africa*. Issue 6, 2004. Page 8.

<sup>33</sup> *Doke, L (ed).* (2014). Mail and Guardian: Beneficiation the good, the bad and the necessary. Retrieved from: <https://mg.co.za/article/2014-02-12-beneficiation-the-good-the-bad-and-the-necessary>. Accessed on the 24 April 2017.

<sup>34</sup> *Biermann, J.* (2001). Undermining mineral rights: An international comparison Johannesburg, The Free Market Foundation. Occasional Paper No. 10.

<sup>35</sup> *Rungan, S.V et al.* (2005). Incorporating BEE into the new Mineral law framework for the South Africa Mining Industry. *The journal of the South African Institute of Mining and Metallurgy*, Volume 105.

Policy for South Africa in 1998.<sup>36</sup> Chapter one (1) deals with mineral beneficiation concept and aptly identified that there is a need to adopt a policy that will create an enabling environment for the development of the country's mineral wealth to its full potential, of which the MPRDA initiated the Mining Charter as the policy to facilitate this development.<sup>37</sup>

MPRDA is an important legislation because it promotes the beneficiation of Mineral and Petroleum resources in South Africa. It authorises the Minister in terms of section 26 to initiate or prescribe incentives to promote the beneficiation of minerals in South Africa. The Minister may implement any legislation, which after consultation with the Minister of Trade and Industry thinks would benefit the country economically. Section 26(b) of MPRDA, any person may do so after written notice and consultation with the Minister.<sup>38</sup> The Section is paramount in order to ensure that beneficiation is legislated and conducted within the confinement of the law. However, the Minister's power to determine conditions for beneficiation in South Africa is restricted: first, he/she must act on the advice of the Minerals and Mining Development Board established under Section 57 and its functions outlined in Section 58 of the MPRDA; and second, the beneficiation of a particular mineral must be economically viable.<sup>39</sup>

Secondly, MPRDA deals with the need for transformation in the mining industry. In terms of Section 100 of the MPRDA it provides for Broad-Based Socio-Economic Empowerment Charter (BBSEEC) that will set the framework, targets and timetable for effecting the entry of HDSA into the mining industry and allow South Africans to benefit from the exploitation of mining and minerals resources.<sup>40</sup> The Mining Charter enacted to drive transformation agenda in the mining industry are: The South African Mining Charter of 2004 specifically stipulates that mining companies will be able to offset the value of the level of beneficiation achieved by the company against its HDSA ownership commitments.<sup>41</sup>

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<sup>36</sup> White paper. (1998). Minerals and Mining Policy of 1998. Retrieved from: [http://www.gov.za/sites/www.gov.za/files/white\\_paper\\_mining\\_minerals\\_policy\\_2.pdf](http://www.gov.za/sites/www.gov.za/files/white_paper_mining_minerals_policy_2.pdf) Accessed on the 27 March 2017.

<sup>37</sup> White paper on Minerals and Mining Policy. (1998). Chapter 1, clause 1.5.

<sup>38</sup> Section 26 (a) - (b) of MPRDA.

<sup>39</sup> Wesley, T *et al.* (2014). Lessons on mineral beneficiation: the stick or the carrot? Webber Wentzel (LLC).

<sup>40</sup> Section 100 (1) -(2), Act 28 of 2002.

<sup>41</sup> Score card for the Broad-Based Socio-economic Empowerment Charter for the South Africa Mining Industry, Notice 1639 of 2004.



Recently, both the Mining Charter of 2004 and the Mining Charter of 2010 were repealed with the new Mining Charter of 2017.<sup>42</sup> The new Mining Charter is instrumental in implementing the conversion of the ownership of South Africa's mineral wealth to benefit the black person from white elite's persons.<sup>43</sup> In terms of paragraph 2.1.1, the holders of new prospecting and mining rights must have minimum of 50% + 1 Black Person shareholding which shareholding shall include voting rights to be granted the rights.<sup>44</sup> Further, the new mining company to hold mining or prospecting rights must have a minimum of 30% Black Person shareholding which shall include economic interest plus a corresponding percentage of voting rights.<sup>45</sup>

The existing mining companies required to Top Up its Black Person shareholding from the existing level to a minimum of 30% Black Person shareholding within the twelve (12) months transitional period, identify, and develop local beneficiation activities beyond mining processing. Consequently, if these mining companies fails to comply with the said proposed new charter they would face the risk of their mining licences being terminated by the State.<sup>46</sup>

The concept of beneficiation transformation explained in the case of *Bato Fishing v Minister of Environmental Affairs and Tourism 2005 (4) SA 490 (CC)*,<sup>47</sup> where the court unpacked the concept of transformation in the constitutional context that in the course of transformation unequal treatment tolerated, for transformation is a process. Some profound difficulties need confrontation to effect constitutional commitment to achieve equality. They must not underestimate the measures that bring about transformation as will inevitably affect some members of the society adversely, particularly those coming from previously advantaged communities. It is apparent that other considerations may be in a process to conduct as to fulfil goals fashioned by the constitution.<sup>48</sup> Therefore, transformation is a process that must be conducted in accordance with the constitution and other laws of South Africa.

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<sup>42</sup>Sorensen, P. (2014). Legislative transformation of South African mining since 1994: What progress? *International Journal of Environmental Studies*, Vol. 68, No. 2, 171–190.

<sup>43</sup>Broad-Based Black Socio-Economic Empowerment Charter for the South African mining and minerals industry, 2017. See paragraph 2.1.

<sup>44</sup>*Ibid.*

<sup>45</sup>*Ibid.*

<sup>46</sup>*Ibid.* see paragraph 2.1.2.

<sup>47</sup>*Bato Fishing V Minister of Environmental Affairs and Tourism*, 2005 (4) SA 490 (CC).

<sup>48</sup>*Ibid* para [74].

Transformation is inevitable and it has to be fast-tracked within the confinements of the law. It is clear from the *Bato's* case that for equitable distribution of wealth the previously advantaged individuals would have to be fairly discriminated in favour of previously disadvantaged South Africans, which are black majority, Indians and coloureds. As part of the solution to correct past injustices government enacted various policies to address historical imbalances as transformation initiatives such as affirmative action, policy and black economic empowerment policy as enshrined in section 9(2) of the constitution, which allows for subjective transformation.

The other pieces of beneficiation legislation enacted to accelerate transformation and beneficiation of mineral and petroleum resources in South Africa is the Diamonds Amendment Acts, 2005<sup>49</sup> and the Diamonds Second Amendment Act 30 of 2005. This amended the Diamonds Act of 1986<sup>50</sup> to increase access to rough diamonds for jewellery manufacturing in South Africa; maintain security of supply of rough diamonds; promote the beneficiation industry in South Africa thus creating jobs; and increase participation throughout the diamond value chain. There is also Precious Metals Act 2005<sup>51</sup> enacted to provide for acquisition, possession, smelting, refining, beneficiation, use, disposal of precious metals, local beneficiation and sound development for equitable access to the wealth of the Republic.<sup>52</sup> The Act is significant to facilitate the equitable access to precious metals in South Africa for Mineral beneficiation purposes.

The New Growth Path, Policy (NGP) of 2010 stated that the government would accelerate exploitation of Mineral resources and intended to set-up state owned mining company, which would be a competitor with private mining companies to promote beneficiation and greater utilisation of mineral resources for developmental purposes. It envisioned that the government is to refocus the beneficiation strategy to support fabrication stage rather than only smelting and refining. This with the aim of promoting local beneficiation and development of the South Africa mining industry in the interests of the communities and employees.

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<sup>49</sup>Act No. 29 of 2005.

<sup>50</sup>Act No.56 of 1986.

<sup>51</sup> Act 37 of 2005.

<sup>52</sup> Section 2(a)-(d), Act 37 of 2005.

The National Development Plan (NDP) also aims to accelerate beneficiation by targeting identified opportunities as the vision to increase economic growth and alleviate poverty in South Africa by 2030.<sup>53</sup> It aims to decrease high unemployment rate in South Africa from 24.9% in June 2012 when it initiated the policy to 14% by 2020 and ultimately 6% by 2030. Unfortunately, the government already fails to meet the envisaged target moreover, unemployment continues to increase and economic growth decline. The plan also aims to increase mineral resources beneficiation in South Africa through giving clear certainty over property rights. It aims to increase rail, water and energy infrastructure development in order to facilitate smooth running of beneficiation. However, it must be pointed out that these programmes are being delivered at a very slow pace than expected. The plan aims to structure a taxation regime that is fair, equitable and predictable that recognises the non-renewable nature of mineral resources thus combats export of unfinished raw materials and promotes local beneficiation.

The proper implementation of NDP would usher smooth implementation of local beneficiation as it envisages to create massive infrastructure development and skills development this being major hindrances for effective implementation of beneficiation of mineral resources in South Africa mining communities. As it stands, the policy is implemented on the low scale.

The Department of Mineral Resources drafted beneficiation strategy for the minerals industry of South Africa, adopted by the cabinet aimed at providing a strategic focus for South Africa's minerals industry in terms of developing mineral value chains and facilitate the expansion of beneficiation initiatives in the country, up to the last stages of the value chain.<sup>54</sup> The strategy is a very robust document of the DMR illustrating the significance of local beneficiation to the development of South Africa mining industry. The strategy expresses government undertaking to implement beneficiation of mineral resources, pieces of legislation governing beneficiation and challenges attached thereof towards implementation. The need for implementation of beneficiation of mineral resources effectively and adequately is sacrosanct for the

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<sup>53</sup> South Africa government online website. Retrieved from: <http://www.gov.za/issues/national-development-plan-2030>. Accessed on the 10 April 2017.

<sup>54</sup> Department of Mineral Resources. (2011). A Beneficiation strategy for the minerals industry of South Africa, of June 2011.

benefit of black persons in South Africa and transformation in the mining industry in the interest of the mining companies, communities and employees.

### **2.3 Statement of the research problem**

In terms of Section 3(1) of MPRDA, the “Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans”. This seems not to be the case because the reality is that majority of blacks in South Africa remain destitute, vulnerable, marginalized, and subjected to unemployment and poverty. According to International Labour Organisation (ILO) South Africa ranked number 69 out of 100 different developing countries.<sup>55</sup> This clearly evidenced the fact that South Africa is one of the worst unequal country in the world. The main reason being that the means of production are still in the hands of white minority and very few black elites. Mining has always formed the backbone of South Africa’s economy and in the last two decades has contributed significantly towards employment and economic growth but most of the HDSA’s have not really benefited broadly.

Therefore, there is need to ensure that the current Mineral and Petroleum resources legislation is utilised appropriately and adequately to unblock and unlock economic potentials from these resources to benefit the majority of the HDSA’s. By so doing, there will be massive and remarkable changes in the lives and well-beings of the citizens especially the HDSA’s. This could be possible and realisable only if there are strong political and administrative wills on the part of the government and the role players to strengthen beneficiation delivery and transformation.

## **3. DEFINITION OF KEY CONCEPTS**

3.1 Black Person - is a generic term which means Africans, Coloureds and Indians-

(a) Who are citizens of the Republic of South Africa by birth or descent; or

(b) Who became citizens of the Republic of South Africa by naturalisation: (i) before 27 April 1994; or (ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date;

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<sup>55</sup>*International Labour Organization*. (2010). Global Wage Report 2016/17: Wage inequality in the workplace. Page 42. International Labour Office in Geneva. Retrieved from [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_537846.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_537846.pdf). 11 February 2017.

(c) A juristic person which is managed and controlled by person/s contemplated in paragraph (a) and/or (b) and the person/s collectively or as a group own and control all issued share capital or members' interest, and are able to control the majority of the members' vote.

3.2 Beneficiation - entails the transformation of a mineral (or a combination of minerals) to a higher value product, which can either be consumed locally or exported. The term is used interchangeably with "value-addition."<sup>56</sup>

3.3 Broad-Based Socio-Economic Empowerment - a social or economic strategy, plan, principle, approach or act, which is aimed at redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries.<sup>57</sup>

## **4. AIMS AND OBJECTIVES**

### **4.1 Aim**

The aim of the study is to critically examine whether the Mineral and Petroleum Resources Beneficiation Legislation and other related legislation are effective and efficient in enhancing the promotion and delivery of socio-economic transformation, where the mineral resources of South Africa are utilised to benefit everybody especially the HDSA's.

### **4.2 Objective**

The objective of the study is to evaluate the extent at which beneficiation legislation; policies and measures are being used, implemented and enforced in order to drive socio-economic transformation and poverty alleviation in South Africa

## **5. LITERATURE REVIEW**

According to Section 1(b) of the MPRDAA 'beneficiation' in relation to any mineral resource, is outlined in four stages as follows:

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<sup>56</sup> Beneficiation strategy for the minerals industry of South Africa, Retrieved from: [http://www.gov.za/sites/www.gov.za/files/Beneficiation%20Strategy%20June%202011%20final%20%283%29\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/Beneficiation%20Strategy%20June%202011%20final%20%283%29_0.pdf). Accessed on the 12 February 2017.

<sup>57</sup>Article 2, Mining Charter.

(a) Primary stage, which includes any process of the winning, recovering, extracting, concentrating, refining, calcining, classifying, crushing, screening, washing, reduction, smelting or gasification thereof.<sup>58</sup> This involves the actual extraction of the ore, the concentration of the particular mineral into concentrates and the further beneficiation of the mineral into a saleable product typically defined by industry standards - examples include gold ore (22+ carats) and platinum bars (99,99% Pt).<sup>59</sup>

(b) Secondary stage, which includes any action of converting a concentrate or mineral resource into an intermediate product.<sup>60</sup> The mineral is enhanced by the addition of other metals to create a metal alloy. This is usually also done to meet defined industry standards.<sup>61</sup>

(c) Tertiary stage, which includes any action of further converting that product into a refined product suitable for purchase by minerals-based industries and enterprises.<sup>62</sup> The tertiary Stage involves the production process of mineral resources to a saleable product - examples include the production of vehicle exhaust systems and jewellery design and manufacturing. There may be more than one value-enhancing step in this stage.<sup>63</sup>

(d) Final stage, which is the action of producing properly processed, cut, polished or manufactured products or articles from minerals accepted in the industry and trade as fully and finally processed or manufactured and value added products or articles."<sup>64</sup>

The Department of Mineral Resources has released the beneficiation strategy for minerals industry of South Africa, which aimed at providing a strategic focus for South Africa's minerals industry in terms of developing mineral value chains and facilitating the expansion of beneficiation initiatives in the country, up to the last stages of the value chain.<sup>65</sup> According to Beech and Veltman they highlight that the strategy seeks paradigm shift in mineral development and strategic investment in assets to drive

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<sup>58</sup> Section 1(b)(a)

<sup>59</sup> *Robinson, I.C. and Von Below, M.A.* (1990). The role of the domestic market in promoting the beneficiation of raw materials in South Africa. *Journal of the South African Institute of mining and metallurgy*. vol. 90, no. 4. Apr. 1990. pp. 91-98.

<sup>60</sup> Section 1(b)(b)

<sup>61</sup> *Ibid.* 56.

<sup>62</sup> Section 1(b)(c).

<sup>63</sup> *Ibid.* 56.

<sup>64</sup> Section 1(b)(d)

<sup>65</sup> Approved by the cabinet on 8<sup>th</sup> June 2011.

growth in beneficiation projects.<sup>66</sup> However, successful implementation depends largely on teamwork between government, business and organised labour. Unfortunately, in the mining industry, there is no cooperative team-work, this is evident in the traumatic Marikana massacre of mine workers<sup>67</sup> and numerous protests in South Africa by organised labour Unions against businesses and the government.

In order for beneficiation to work, it requires cooperation of various stakeholders. For an example in Northern Cape, the Department of Trade and Industry, Mintek, the Department of Mineral Resources, the Small Enterprise Development Agency, and the Pixley ka Seme District Municipality have collaborated to develop the Griekwastad community. The main reason is to create employment opportunities, provide state funds for equipment, training, and marketing of products with Department of Trade and Industry and importantly assistance of communities to apply for mining permits through Department of Mineral Resources in order encourage communities and companies to mine their own minerals as part of beneficiation.<sup>68</sup>

Mapungubwe Institute for Strategic Reflection (MISTRA) indicates that beneficiation is the most significant options for socio-economic transformation in South Africa and Africa: it leads to sustainable job creation, social development and economic growth, as currently happening in resource rich country like Botswana.<sup>69</sup> However in order for an effective and efficient provision of mineral and petroleum resources beneficiation there should be availability of human capital (well trained and fully equipped labour together with enabling institutions and networks), to drive healthy competitiveness. As enshrined in the environmental policies of South Africa from the Green Paper of 1996,<sup>70</sup> White paper of 1997<sup>71</sup> and consequently National Environmental and Management Act 107 of 1998.<sup>72</sup>

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<sup>66</sup> Beech, W and Veltman, N. (2011). Making the most of SA'S Mineral Wealth. [Without Prejudice, Volume 11, Issue 6](#), page 16 – 17.

<sup>67</sup>South Africa History Online. (2012). Retrieved from: <http://www.sahistory.org.za/article/marikana-massacre-16-August-2012> Accessed 05 May 2017.

<sup>68</sup> Mahumapelo, N.P. and Magaseng, C. (2014). Beneficiation of marble from Griekwastad, Northern Cape Province, The Journal of the Southern African Institute of Mining and Metallurgy Volume 114, page 951.

<sup>69</sup> Montja, N. (2014). Mineral Beneficiation in Africa: What was missed and what can now be done? MISTRA Page 1.

<sup>70</sup> Department of Environment Affairs and Tourism. (1998). Green Paper on an Environmental Policy for South 1996

<sup>71</sup> Department of Environment Affairs and Tourism. (1997). White Paper on Environmental Management Policy

<sup>72</sup> Ibid page 2.

MISTRA categorised, beneficiation into four stages: Firstly is the extraction of raw ore and turning it into a highly concentrated product. Secondly, production of metal alloys is the first process of manufacturing. Third stage is a crucial one where various skills applied in enhancing the mineral to meet the requirements of the end user. Fourthly, is the selling and consumption stage where the final product ready to hit the market. This is a process where, production and labour costs are involved in turning the raw ores into final product. This is a mechanism for job creation because every stage creates employment and ultimately contributes fruitfully towards economic growth and poverty alleviation in South Africa.

For there to be absolute beneficiation, there is a need to create black owned South African mining companies, which would participate from the first to the last stage of the process of beneficiation. Correctly, as most of the mining companies are foreign owned and the challenge with these foreign companies is that they care more about making profit only and care less about the inclusiveness.

According to Tukor South Africa has to use its natural resources to develop skills, create jobs and economic growth.<sup>73</sup> As such, the main objective of local beneficiation according to Speight<sup>74</sup> is for raw materials to be processed in the country in which they are mined rather than exported to oversee where they are processed.<sup>75</sup> The processing of raw materials locally can bring economic benefits, such as increased income from taxation and increased profits once the processed materials are exported. It can also improve the quality of life of those living locally – creating jobs, providing opportunities to develop a skilled workforce and generating more money to reinvest in local communities.<sup>76</sup>

According, to Matlou, the aim of beneficiation strategy is to “increase employment by requiring that mining companies provide a government set quantity of ore to local producers for beneficiation and allows for exports only with specific government

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<sup>73</sup> Tukor, B. (2014). Beneficiation seen as the best way. Industrial Development Cooperation. Retrieved from <http://www.idc.co.za/home/media-room/articles/719-beneficiation-seen-as-the-best-way.html>. Accessed 23 April 2017.

<sup>74</sup> Partner at Mayer Brown attorneys.

<sup>75</sup> Speight, R. (2015). Beneficiation legislation- does it achieve the desired effect? Mining Journal.

<sup>76</sup> Ibid para 2.



consent.”<sup>77</sup> Matlou,<sup>78</sup> points out that the gold industry has the right idea: “we mine it and refine it” as currently, also the Rand Refinery in the Gauteng province within the area called Germiston is the largest gold refinery in the world.<sup>79</sup> South Africa has the largest share of minerals in the world, and South Africans should benefit more by creating more manufacturing facilities to accelerate beneficiation. Collier asserted that creation of employment and economic growth that would be sustainable is through creation of adequate infrastructure around the mine, good roads, railways lines, power electricity and water supply to the mines and community around the mines.<sup>80</sup> This contributing adequately towards sustainable development, massive infrastructure upgrading, job creation and poverty alleviation within mining communities and ultimately contributing positively to the economic growth of South Africa.

The Department of Trade and Industry portfolio committee indicates that beneficiation creates pivotal opportunities unlocking South Africa’s comparative advantage to drive industrial development and create jobs.<sup>81</sup> The Chambers of Mines indicates that beneficiation is the right path for socio-economic transformation and poverty alleviation in South Africa, in order to ensure sustainability over mineral resources. According to chamber of mines response to the Economic Freedom Fighters (EFF) Memorandum, they agreed that beneficiation is an important subject for the country and the mining industry.<sup>82</sup> Already a significant industrial base supplies goods and services into the South African mining industry has made serious in-routes within South Africa creating employment and economic growth. Mike said the downstream of the mining sector contributes R300 Billion in economic activity and 200 000 jobs are created in

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<sup>77</sup> Matlou, O. (2014). Centre stage for local beneficiation, Business Day, Companies and Markets. Retrieved from [https://www.ensafrica.com/Uploads/Images/news/31\\_January\\_2014\\_-\\_Business\\_Day\\_-\\_Centre\\_stage\\_for\\_local\\_beneficiation.pdf](https://www.ensafrica.com/Uploads/Images/news/31_January_2014_-_Business_Day_-_Centre_stage_for_local_beneficiation.pdf). Accessed 24 April 2017.

<sup>78</sup> Matlou, O. ENSafrica director in the mining business area.

<sup>79</sup> Doko, L (ed). (2014). Mail and Guardian: Beneficiation – the good, the bad and the necessary. Retrieved from <https://mg.co.za/article/2014-02-12-beneficiation-the-good-the-bad-and-the-necessary>. Accessed 24 April 2017.

<sup>80</sup> Collier, P.P. (2014). Oxford University: Beneficiation – the good, the bad and the necessary. Retrieved from <https://mg.co.za/article/2014-02-12-beneficiation-the-good-the-bad-and-the-necessary>. Accessed 24 April 2017.

<sup>81</sup> Portfolio Committee on Trade and Industry: Briefing on upstream and downstream mining linkages dated 20 August 2014. Retrieved from [https://www.thedti.gov.za/parliament/2014/Briefing\\_Beneficiation.pdf](https://www.thedti.gov.za/parliament/2014/Briefing_Beneficiation.pdf) Accessed 20 April 2017.

<sup>82</sup> Teke, M and Baxter, R. (2015). Chamber of mines response to eff memorandum dated 25 November 2015. Retrieved from <http://www.chamberofmines.org.za/industry-news/special-features/47-chamber-of-mines-response-to-eff-memorandum-of-27-october-2015> Accessed 20 April 2017.

beneficiation industry.<sup>83</sup> This clearly implies that implementation of beneficiation bears the fruits of job creation and economic growth. Illustrating, clearly that if beneficiation is adequately and effectively championed would definitely contribute positively towards improving the standard of living for majority South Africans.

Currently, 98% of South Africa's cement, 80% of the steel, 50% of the chemical feed stocks and 30% of our liquid fuel requirements are produced locally by industries using South African mined products.<sup>84</sup> South Africa also accounts for the fabrication of 9% of the world's platinum catalytic converters and produces a wide array of beneficiated products for exports to global markets. The upstream and downstream industries the mining cluster created around 1.3 million jobs (495 000 direct and 800 000 indirect), with significant contributions to the economy and to the fiscus.<sup>85</sup> The chamber of mines also indicated that all stakeholders need to collaborate more effectively to create a better investment environment to grow the beneficiation base in South Africa. While this is commendable, more still needs to be done.

COEGA Development Corporation, (CDC)<sup>86</sup> is a State Owned Company (SOC) established to develop and operate industrial land of the Developmental Zones, as it recently, announced its ambitious plans for the expansion of metals beneficiation initiatives and metal sector investments in South Africa over the next decade.<sup>87</sup> The CDC target is to bring R28 billion in local and foreign investments to the Industrial Development Zone (IDZ), according to its newly unveiled 2014 to 2024 metals cluster strategy over the next 10 years. An estimated 8 198 direct and 19 853 indirect jobs for the economy can potentially be created, according to CDC projections, and approximately 2 000 hectares, or 20% of the total IDZ land surface, will be dedicated to ferrous and nonferrous metal industrial activity.<sup>88</sup> According to Sadick, several metal

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<sup>83</sup>Ibid, also see Kingsley Makhubela is the chief executive of Brand South Africa. Retrieved from <http://www.iol.co.za/business-report/opinion/decline-in-commodity-prices-can-create-opportunities-1981095> Accessed on 20 April 2017.

<sup>84</sup>Ibid note 79.

<sup>85</sup> Ibid.

<sup>86</sup>The Coega Development Corporation (CDC) is a State Owned Company (SOC) mandated to develop and operate the 11 500 hectare's industrial land of the Coega Industrial Development Zone (IDZ).

<sup>87</sup>*Mogamad, S.D.* (2014). Leading SA'S National Metals beneficiation strategy, COEGA, Inside Mining, Volume 7, Issue 11, page 18.

<sup>88</sup>*Mining News.* (2014). Coega IDZ's metals beneficiation precedent in SA. Retrieved from <http://www.miningne.ws/2014/09/23/coega-idzs-metals-beneficiation-precedent-in-sa/#>. Accessed on 27 April 2017.

sector and mineral beneficiation projects are progressing well in the Coega IDZ with a “healthy investment pipeline.”<sup>89</sup>

In addition, recently De Beers has launched beneficiation project in partnership with government and Anglo American Zimele, it confirmed its desire to continue to facilitate the growth and competitive sustainability of the local diamond beneficiation industry and to achieve national transformation goals.<sup>90</sup> The company supplies by value 40% of its local diamond production for beneficiating in South Africa.<sup>91</sup> Cleaver,<sup>92</sup> emphasised the significance of the project, by stating that beneficiation is the right thing for De Beers commercially and strategically to be involved with, for their benefit, that of the industry and for South Africa.<sup>93</sup> Cleaver said that South Africa diamond cutting and polishing industry employment has declined from peak of 5000 employees to 400 employees in 2016, as the developing countries with finished diamond dominated the market. <sup>94</sup> Henceforth, South Africa should increase the refining and production of finished value added products from its abundance of diamonds. The intention as to compete in an advanced level at the international markets.

Therefore, the project called Diamond Enterprise Development Project for South Africa will facilitate growth and transformation and create employment in the diamond beneficiation industry against the declining employment.<sup>95</sup> Premier Makhura congratulated them for advancing the country’s mineral resource beneficiation agenda. He said “the mining industry in the Gauteng province employs over 35 000 people, and it contributes R40 billion to the province's economy.”<sup>96</sup> Therefore, we have to ensure that all the citizens enjoy equal benefit from country mineral resources respectively particularly the HDSA’s. It is pertinent to point out that African mineral resources are mined and exported as raw materials, which are turned into “beautiful

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<sup>89</sup> Ibid.

<sup>90</sup> Cleaver, B. (2016). De Beers Group: Enterprise Development Project for Diamond Beneficiators.pdf. Retrieved from <http://jewellersnetwork.co.za/de-beers-enterprise-development-project-for-diamond-beneficiators/>. Accessed on the 27April 2017.

<sup>91</sup> Ibid.

<sup>92</sup> Cleaver, B. CEO of the De Beers Group of Companies.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> At the launch held in Johannesburg on 13 July 2016, De Beers, along with government and other industry stakeholders, unveiled the Enterprise Development Project for Diamond Beneficiates.

<sup>96</sup> Makhura, D. (2016). During his address at De Beers Consolidated Mines in Johannesburg.

things”, often unaffordable to buy back said Makhura. Oliphant shared his sentiments by saying that “We need to get the best out of our mineral endowment.”<sup>97</sup>

Also recently the Minister of Trade and Industry launched the R4 Billion Titanium beneficiation project for manufacturing titanium at Richards Bay as the step towards implementation of maximum beneficiation from the country’s rich mineral and petroleum resources.<sup>98</sup> The project estimated to create more than 2000 jobs, and taking into account that the country is the second largest with titanium reserves therefore is wise enough to use it profitably than to be exported.<sup>99</sup> It is evident that South Africa has vast minerals deposits; as such, it is capable to drive sustainable local beneficiation of its mineral wealth. According to Netshitenzhe “South Africa should be in the forefront to affecting the market price of commodities in order to drive its emergent beneficiation industry.”<sup>100</sup> South Africa should utilize the opportunity of being blessed with largest reserves of mineral resources and ensure that it benefit from foreign investors, international trade and infrastructure investment.

MINTEK<sup>101</sup> has created Small Scale Mining & Beneficiation Division, which contribute towards poverty alleviation, job creation, and uplift historically marginalised South Africans, through the exploitation of the country’s mineral wealth and beneficiate mineral resources into commercial products and ensure long-term sustainability. One of its launched projects is Kgabane Jewellery Project, which is founded to develop, position and market the South African emerging informal precious metal jewellery craft sector. The project is strategic component of the country’s minerals beneficiation

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<sup>97</sup>Omarjee, L. (2016). Beneficiation the future of SA's diamond industry,13 July 2016. Retrieved from [www.fin24.com/.../beneficiation-the-future-of-sas-diamond-industry-20160713](http://www.fin24.com/.../beneficiation-the-future-of-sas-diamond-industry-20160713). Accessed on the 24 April 2017.

<sup>98</sup> *South African News*. (2017). Retrieved from <http://www.sanews.gov.za/south-africa/r4bn-titanium-beneficiation-milestone-sa>. Accessed on the 13 April 2017.

<sup>99</sup> *The New Age*. (2017). R4.5 billion titanium beneficiation plant opened in Richards Bay dated 11 April 2017. Retrieved from <http://www.thenewage.co.za/mec-zikalala-opens-r4-5-billion-titanium-beneficiation-plant-in-richards-bay/>. Accessed on the 20 April 2017.

<sup>100</sup>Netshitenzhe, J. and Tukor, B. (2014). Industrial Development Corporation media room. (MISTRA): Beneficiation seen as the best way. Retrieved from <http://www.idc.co.za/home/media-room/articles/719-beneficiation-seen-as-the-best-way.html>. Accessed on the 23 April 2017.

<sup>101</sup>MINTEK is an autonomous research and development organisation specialising in all aspects of mineral processing, extractive metallurgy and related technology.

programme, since its operations has contributed significantly to economic growth by alleviating poverty and empowering HDSA's.<sup>102</sup>

However, it is pertinent to point out that there are five main constraints for effective implementation of local beneficiation: firstly, is the Limited access to raw material for local beneficiation. As a result, of structural arrangements in the mining industry, which is, export orientated of raw metals and many producers have long-term contracts with international clients.<sup>103</sup>In addition, pricing mechanisms used by some raw and intermediate material producers also hamper beneficiation to the final stages of the value and derail local beneficiation. Therefore, the government as the custodian of the country's minerals have to take full control of the industry and restructure it to facilitate downstream beneficiation and impose prices and taxes that would promote local beneficiation.

Secondly is the shortage of critical infrastructure such as rail, water, ports, and electricity. The government must ensure that existing infrastructure planning mechanisms and programmes properly consider infrastructure requirements for mineral beneficiation and the business sector have to assist in infrastructure development to facilitate local beneficiation and embrace energy efficiency. This would alleviate poverty and create more employment.

Thirdly is that South Africa has limited exposure to break-through research and development programmes. The government especially, the Department of Science and Technology, in partnership with mining companies must support research and development through programmes such as scholarship, bursaries, mentorship and internships, which would assist the HDSA to generate strategies which can be used for effective and sustainable local beneficiation. These is need for skill development to use competitive technologies. This would ultimately be solution to the constraint of lack of skills sought for expediting local beneficiation. The government must align the beneficiation skills pipeline to the National Skills Development Strategy and the Sector

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<sup>102</sup>MINTEK (Lydall M ed). (2011). beneficiation of SA's Natural Resources. Retrieved from <http://www.mintek.co.za/wp-content/uploads/2011/10/Metal-Jewellery-Brochure.pdf>. Accessed on the 21 April 2017.

<sup>103</sup>Department of Mineral Resources. (2011). A Beneficiation strategy for the minerals industry of South Africa, of June 2011. Page 7.

Skills Plans for required skills and the mining industry must amongst others cooperate with the government and Investment in Human Capital Development.

Lastly, there is limited access to international markets for produced markets. This is because a South Africa have International Trade obligations and Bilateral Investment treaties with more than 100 countries, which was entered into long time ago.<sup>104</sup> Therefore, they make beneficiation difficult to be achieved equitably and drive socio-economic transformation in the country.<sup>105</sup> The government must take advantage of the Comprehensive Strategic Partnership with Brazil, India, China and Russia known as (BRICS) to support investment in beneficiation in South Africa as well as access to markets and amend their international trade treaties to support beneficiation.

Recently, in 2017 mining Indaba, the President of South Africa Mining Chamber, indicated that another few challenges faced by mining industry in particularly in South Africa are: firstly wage inequality in the sector between the employees and executive.<sup>106</sup> For example, there was wonderful boom in commodities such as Platinum group metals, iron ore and coal, which resulted in more production but the reality, is that only shareholders and executive benefited proportionately than the workers.

Secondly, the health and safety of employees and communities in which mining companies operate still a serious challenge.<sup>107</sup> The painful and fatal accidents, serious injuries and illness continuously occurring in the sector evident that much need to be done for the benefit of employees and affected communities. Chamber of mine, companies and government enacted polices and legislation<sup>108</sup> to end this challenge, consequently are not being adequately utilised or implemented as the numerous employees continue to lose their lives daily. Therefore, maximum precautionary and preventative measures must be employed to protect the lives of ordinary miners.

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<sup>104</sup> Ibid.

<sup>105</sup> *Doke, L.* (2014). Mail and Guardian online news. Beneficiation – the good, the bad and the necessary. Retrieved from <https://mg.co.za/article/2014-02-12-beneficiation-the-good-the-bad-and-the-necessary>. Accessed on the 24 April 2017.

<sup>106</sup> *Teke, M.* (2017). Chambers of Mines of South Africa. Achieving the mining sector's great economic and transformational potential - what is required. Retrieved from: <http://www.chamberofmines.org.za/industry-news/publications/presentations/send/7-2015/395-achieving-the-mining-sector-s-great-economic-and-transformational-potential-what-is-required>. Accessed on the 26 May 2017.

<sup>107</sup> Ibid.

<sup>108</sup> Mine, Health and Safety Act 29 of 1996.

Thirdly, the community grievances on pollution which contaminate water and environment: the noise and amongst others loss of agricultural land to allow mining operations for inadequate compensation. The mining chambers alleges that it uses estimation of R2 billion for community initiatives but this remain a dream that this money be shared equitably for the benefit of HDSA who remain vulnerable with unhygienic water and poor infrastructure.

Fourthly, there is a need to strengthen State involvement in the mining industry for the efficient and sustainable exploitation of mineral and petroleum resources of South Africa. Recently the State has established state owned mining company called African Exploration Mining Finance Corporation (AEMFC) to secure the resources that would supply energy for the future and champion beneficiation in the energy and steel value chain.<sup>109</sup> Zuma said, “the role of the state cannot merely be confined to that of a regulator however it must actively participate in the mining industry to ensure that our national interest is protected and advanced.”<sup>110</sup> This is the first step, however the government of South Africa have to take full control of management of mining sector as the custodian and ensure sustainability of beneficiation of mineral resources.

## **5.1 Legislative framework promoting beneficiation of mineral resources**

### **5.1.1 Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002**

In terms of Section 26 of the MPRDA provides that the Minister may initiate or prescribe incentives to promote the beneficiation of minerals in the Republic. The MPRDA also stipulates that, if the Minister, acting on advice of the Board and after consultation with the Minister of Trade and Industry, finds that a particular mineral can be beneficiated economically in the Republic, the Minister may promote such beneficiation subject to such terms and conditions as the Minister may determine. MPRDA authorises any person who intends to beneficiate any mineral mined in the Republic outside the Republic may only do so after written notice and in consultation with the Minister.<sup>111</sup> The MPRDA requires transformation in the mining industry, which

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<sup>109</sup> African Exploration Mining and Finance Corporation Website. Available online at [www.aemfc.co.za](http://www.aemfc.co.za). Accessed on 06 May 2017.

<sup>110</sup> Zuma, J.G. (2011). BBC News. South Africa launches state-owned mining company. Retrieved from <http://www.bbc.com/news/business-12591324>. Accessed on the 06 May 2017.

<sup>111</sup> Section 26(1) - (3), Act 28 of 2002.

would ensure that historically disadvantaged South African benefit from the exploitation of mineral and petroleum resources in the country.<sup>112</sup> Regulation 41 of the MPRDA requires every mining company to have social and labour plan, which promotes employment, and advance social and economic welfare of all South Africans, the plan must contribute towards socio-economic development of the areas in which they are operating.<sup>113</sup>

### **5.1.2 Mine, Health and Safety Act (MHSA) 29 of 1996**

The MHSA obliges owners of every mine in the Republic of South Africa to ensure, as far as reasonably practicable, that the mine is designed, constructed and equipped to provide conditions for safe operation and a healthy working environment.<sup>114</sup> MHSA is necessary to protect the employees and community in which the mines operate in ensuring that the environment is conducive for both the employees and the community. Chief Inspector of mines in terms of Section 49(6) of MHSA after consultation with the Council, gazetted guidelines for a mandatory code of practice on the right to refuse dangerous work and leave dangerous working mining environment.<sup>115</sup> This, affording miners more protective regulations to ensure their safety and healthy working conditions.

### **5.1.3 National Environmental Management Act (NEMA) 107 of 1998**

The purpose of NEMA is to provide co-operative and environmental governance by establishing principles for decision-making on matters affecting the environment, for individuals, institutions and State organs.<sup>116</sup> In terms of Section 2(2) of NEMA the “environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.”<sup>117</sup> Beneficiation require smelting and re-smelting of raw ores into a final product, consequently it causes environmental implications and as such, they have to be conducted within the parameters of the NEMA for environmental sustainability and protect the environment for future generation.

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<sup>112</sup>Section 100(1) - (2), Act 28 of 2002.

<sup>113</sup>Government Gazette, 26275. Government Notice R527 dated 23 April 2004.

<sup>114</sup> Section 2(1), Act 107 of 1998.

<sup>115</sup>Government Notice R148 in Government Gazette 39656 dated 5 February 2016

<sup>116</sup>Preamble of Act 107 of 1998.

<sup>117</sup>Section 2(2), Act 107 of 1998.



#### **5.1.4 Skills Development Act 97 of 1998**

The Skills Development Act (SDA) its main purpose is to develop the skills of the South African workforce and to improve the quality of life of workers and their prospects of work.<sup>118</sup> To improve productivity in the workplace and the competitiveness of employers and to promote self-employment society. This is to be achieved through cooperation with various established institutions to forge skills developments, such as Sector Education Training Authority (SETA) and South African Qualifications Authority (SAQA) and partnership with role players in both private and public sector.<sup>119</sup> The SDA aims through its role players to equip the historically disadvantaged persons with necessary training and skills. This sacrosanct for sustainable processing of raw material until final stage.

#### **5.1.5 Broad-Based Socio-Economic Empowerment Charter for the Mining Industry (BBSEEC) 2017**

The BBSEEC provides that as the supporting elements to beneficiation provision that mining companies have to offset maximum of 11% Black Person's ownership by financially investing in the value of their levels of beneficiation. The procurement and enterprise development element: This element requires mining companies to procure a minimum of 70% of their mining goods, 80% of services and 50% consumables from Black Persons.<sup>120</sup> Mining companies are obliged to use 100% of South African based companies for processing samples.<sup>121</sup>

#### **5.1.6 Precious Metals Act 37 of 2005**

The main purpose of Precious Metals Act (PMA) is to provide provisions for the acquisition, possession, smelting, refining, beneficiation, use and disposal of precious metals in the Republic of South Africa under the custodianship of the State through Department of Mineral Resources.<sup>122</sup> PMA, provides that for precious metals application for licences, permit or certificate the priority would be given to those applicants whose beneficiation processes will be at the last stage. Further, the mineral

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<sup>118</sup>Section 2, Act 97 of 1998

<sup>119</sup>Ibid.

<sup>120</sup>Mining Charter 2017, Paragraph 2.2.

<sup>121</sup>Ibid.

<sup>122</sup>Preamble of Act 37 of 2005.

beneficiation value chain or will have a positive impact on the beneficiators in the last stage of the mineral value chain in terms of Section 6 of the PMA.<sup>123</sup> In terms of Section 12 of the PMA no person may export unwrought precious metals unless is authorised by the Minister only if he is satisfied the extent of the applicant's facilitation of access for local beneficiation.<sup>124</sup> PMA enacted to regulate the extraction and exploitation of precious metals to ensure that benefit the people of the Republic of South Africa.

### **5.1.7 Mineral and Petroleum Resources Royalty Act 28 of 2008**

The Mineral and Petroleum Resources Royalty Act (MPRRA) recognise that the Mineral wealth of South Africa is the common heritage of its citizens and therefore they must benefit from their exploitation. The MPRRA came about as a means of extracting a charge from the users of its mineral resources for the benefit of all South Africans.<sup>125</sup> As in terms of section 2 of MPRRA any person that wins or recovers a mineral resource from within the Republic must pay royalty for the benefit of the National Revenue Fund in respect of the transfer of that mineral resource. The primary purpose of the MPRRA is to impose royalty on any mineral extracted or recovered in the Republic ensure that citizens of South Africa benefit from their mineral wealth.

### **5.2 Beneficiation of mineral resources in Botswana**

Botswana's Mines and Minerals Act 17 of 1999 (MMA), regulate the granting, renewal and termination of prospecting licences, retention licences, mining licences and mineral permits, payment of royalties and all matters incidental to mines and minerals. In terms of Section 3 of the MMA, the Republic of Botswana has custodianship over their minerals in the public interest, which have similar provisions with section 3 of the MPRDA.<sup>126</sup> The MMA came as amendment, which abolished government right to 15 per cent free equity in all mining projects.<sup>127</sup> However in terms of Section 40 of the MMA government should have 15 per cent working participation interest on mutually

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<sup>123</sup> Section 6(1)(a)(b) of the Precious Metals Act of 2005.

<sup>124</sup> Section 12(1) - (2).

<sup>125</sup> Mineral and Petroleum Resources Royalty Act 28 of 2008. Government Gazette No. 31635, 24 November 2011.

<sup>126</sup> Section 3, Botswana Mines and Minerals Act 17 of 1999.

<sup>127</sup> Republic of Botswana Mineral Investment Promotion, Ministry of Minerals, Energy and Water Resources at page 3.

agreed commercial terms and obligations like any other shareholders to contribute working interest capital.<sup>128</sup> Botswana government holds a stake in almost all key mining companies in the Republic.<sup>129</sup>

Botswana successfully and effectively used its mineral wealth to promote growth and sustainability in the Republic. Between 1966 and 1996, it has recorded annual average growth rate of 9% of GDP this resulting in being amongst the leading growing countries globally.<sup>130</sup> As in the past decade despite the global commodities slump it survived at the growth rate of 5% of GDP annually in contrast with South Africa which has the average of only 2.6% GDP annually below but now less than 0.5%.<sup>131</sup> In addition, it accumulated the average GDP per capita of some \$7 240 in 2014 whereas South Africa's GDP per capita in the same year was some \$6 800, amounting to roughly 5% below Botswana.<sup>132</sup> Consequently, the World Bank rated Botswana growth as upper middle-income country based on its political stable environment, fastest economic growth and social context development.<sup>133</sup>

According to Taylor, Botswana ranked the best in Africa and globally competitive with regard to mining regulations, availability of skills and labour and infrastructure.<sup>134</sup> The overall survey ranked Botswana 19<sup>th</sup> out of 104 countries in the world and in contrast South Africa ranked 74<sup>th</sup>. The main reason is that South African have policy uncertainty such as BEE policy, the policy uncertainty creates a grave risk of ownership as government modify the laws regularly and ranked 84<sup>th</sup> with regard to best policy practices index out of 104 countries whereas Botswana ranked 12<sup>th</sup> globally.<sup>135</sup> In 2015, Fraser survey South Africa has ranked 105 out of 109 countries being the fourth last whereas Botswana ranked 46<sup>th</sup> with regard to labour issues.<sup>136</sup> Consequently, the

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<sup>128</sup> Section 40 (1), Mines and Minerals Act of 1999. See also Mines and Minerals (Prospecting and Leasing Charges) Regulations [CAP 66:01].

<sup>129</sup> *Bookhinder, J and La Flèche, E.R. (2013). The Mining Law Review (2<sup>nd</sup> Edition) Law Business Research at 25.*

<sup>130</sup> *Anthea, J. (2016). Liberty, a product of the IRR," No 5, 2016, Issue 28.*

<sup>131</sup> *Ibid* page 1.

<sup>132</sup> *Ibid*.

<sup>133</sup> *The World Bank in Botswana. (2017). retrieved from:*

<http://www.worldbank.org/en/country/botswana/overview>. Accessed on the 23 May 2017.

<sup>134</sup> *Taylor, J & Kenneth. G. (2017). Annual Institute Annual Survey of Mining companies 2016. Page 09 – 22.*

<sup>135</sup> *Ibid*.

<sup>136</sup> *Taylor, J and Kenneth, P. G. (2016). Annual Institute Annual Survey of Mining companies 2015 issued on the 8 June 2016. Page 08 - 31.*

unresolved labour issues in South Africa mining industry have caused investors deterrence. Investors are reluctant to invest in a country that is vulnerable to strikes and unstable policy issues. Despite Botswana's economic growth, the country faces moratorium levels of poverty and inequality, like in South Africa in the rural areas.<sup>137</sup> Reason being, Botswana depends largely on mineral resources commodities amounting to almost 40% of their GDP. This making it difficult if not impossible for the mining industry alone to transform the country at large.

Speight points out that local beneficiation has worked successfully in Botswana to the extent that De Beers began cutting diamonds in Botswana over 20 years ago. Through partnership with the government of Botswana, the Diamond Trading Company Botswana has created a 50/50 joint venture between the government and De Beers.<sup>138</sup> By 2013, De Beers had moved all its international trading activity from London to Botswana. Although not perfect, this beneficiation programme has achieved positive outcomes such as improved infrastructure and skilled workforce, currently employs more than 3000 workers in Botswana for cutting and polishing diamonds for export.<sup>139</sup> In addition, there is the knock-on effect of boosting local businesses, such as hotels, leisure centres and restaurants, and, arguably most importantly, the project has helped to signal that Botswana is a safe and welcoming place for foreign investors, creating a stable climate for future growth. Botswana introduced and amended legislation to make more significance changes.<sup>140</sup>

It is important to point out that beneficiation is paramount towards socio- economic empowerment as it helped citizens of Botswana. South Africa can draw good lessons from the mineral beneficiation legislation and strategies of Botswana to ensure that the destitute masses in South Africa benefits from their minerals. However, the implementation of beneficiation legislation has full support and cooperation of the mining industry, stakeholders, government and labour unions in Botswana. South

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<sup>137</sup>The World Bank in Botswana. (2017). Retrieved from <http://www.worldbank.org/en/country/botswana/overview>. Accessed on 23 February 2017.

<sup>138</sup>De Beers Group of Companies. (2017). De Beers in Botswana. Retrieved from: <http://www.debeersgroup.com/botswana/en/who-we-are/de-beers-in-botswana.html>. Accessed 23 February 2017.

<sup>139</sup>*Anglo American*. (2011). Botswana and De Beers announce milestone agreement marking new era for Botswana diamonds. Retrieved from [http://www.angloamerican.com/media/press-releases/2011/botswana\\_debeers\\_milestone](http://www.angloamerican.com/media/press-releases/2011/botswana_debeers_milestone). 23 February 2017.

<sup>140</sup> Mining and Minerals Act of 1999.

Africa should emulate this in order to strengthen beneficiation participation for socio-economic emancipation and growth.

## **6. Research Methodology**

The research methodology is qualitative. The research utilised library materials, which include but are not limited to legislation, constitution, case laws, regulations, charters, policies, amendments to the legislations, academic journals, government gazette, international journals and textbooks. The study makes use of legal comparative method application to find solutions to the problem, by examining beneficiation legislation of Botswana and draw lessons from them. It interprets the legislative frameworks that have been put in place to fast-track socio-economic transformation and eradicate poverty. The research adopts Oxford University Standard for the Citation of Legal Authorities<sup>141</sup> (OSCOLA) style of referencing in this dissertation. Therefore, all the information and materials used in this dissertation correctly acknowledged in the text and captioned in both footnotes and the bibliography.

## **7. Limitation of Study.**

The study is limited to beneficiation of mineral resources in South Africa in two fold. Firstly, beneficiation of mineral resources as a process that transform mineral resources to a higher value product. Secondly, beneficiation of mineral resources as a process that bears an imperative to create employment, alleviate poverty, and improve the economy of South Africa.

## **8. Significance of the study**

The study is important because it is aimed at critical examination of the legislation, policies, regulation, materials and strategies providing and promoting mineral and petroleum resources beneficiation particularly to the HDBP's and the under privileged South Africans. The critical evaluation of these laws and measures using Botswana as comparison will provide the impetus for growth and poverty alleviation so as to accelerate economic growth, create jobs, improve socio-economic well-being of mineworkers and improve the standard of living of the HDSA's.

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<sup>141</sup>Oxford University Standard for the Citation of Legal Authorities, 4<sup>th</sup> edition.

## CHAPTER 2: LEGISLATIVE AND POLICIES FRAMEWORK ON MINERAL AND PETROLEUM RESOURCES BENEFICIATION IN SOUTH AFRICA

### Introduction

This chapter focuses on the various pieces of legislation that foster beneficiation of mineral and petroleum resources in South Africa. Discussion of these pieces of legislation strives to establish the extent in which are implemented for the purposes of realising socio-economic transformation and poverty alleviation.

#### 1. History of Mining legislation in South Africa

The mining industry has experienced racial discrimination with regard to beneficiation in South Africa. Mineral resources benefited white elites during the apartheid era causing undesirable inequality and escalation of poverty for blacks, Indians and coloureds.<sup>142</sup> Prior to 1994, mining operations in South Africa were regulated by Mines and Works Amendment Act 27 of 1956 (MWAA) which aimed 'to consolidate and amend the laws relating to the operations of mines and works and of machinery used in connection therewith however it deprived blacks, Indians and coloureds from owning the mineral resources.'<sup>143</sup> This has perpetuated the discriminatory practices to wide spread amongst South Africa's mining industry. As in terms of Precious Stones Act (PSA) 73 of 1964, Section 48(1) recognised only mineral rights holders instead of mineral landowner's despite being the owners of means of production. Consequently, this equally depriving the blacks, Indians and coloureds citizens of South Africa from participation and ownership in the mining industry.

Whereas, the white people had the privilege of being the sole owners and participants in the South African mining industry until the enactment of Minerals Act (MA) 50 of 1991. MA repealed past discriminatory laws that excluded other races in the industry by recognising specifically common law rights of landowners in relation to mining.<sup>144</sup> MA provided for the expropriation of surface or mineral rights against payment of compensation to the person whose rights expropriated.<sup>145</sup> The MA regulated uniformly

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<sup>142</sup>Seekings, J & Natrass, N. (2005). *Class, Race, and Inequality in South Africa*. Yale University Press. New Haven and London. Page 3 & 83.

<sup>143</sup>Mines and Works Amendment Act 27 of 1956, Section 1.

<sup>144</sup> Section 5(1).

<sup>145</sup> Section 24.

process of prospecting, optimal exploitation, processing and orderly utilisation of minerals resources of the Republic.<sup>146</sup> The State was only paid royalties by the owners of the mining rights and did not have administrative authority to transform the mining industry. MA repealed discrimination within the mining industry and allowed other race group to benefit and participate in the ownership of the means of production. It is worth noting that this legislation opened doors for black people for the first time in the history of South Africa to be able to apply for mining rights and benefit from mineral resources beneath the soil. Henceforth, was a total departure from the past injustices, which deprived them from participating in the development of the industry.

However, the mineral resources were still under private ownership, hence the clarion call by white Paper of 1998 as stated in clause 1.3.3.2 for radical change of ownership of the minerals resources to the state custodianship.<sup>147</sup> Consequently, the mineral resources of the Republic of South Africa were transferred from private ownership to state custodianship. Therefore, currently the State bequeathed with the sole authority and custodianship to regulate and administer the mining industry in the interests of its citizens who are the beneficiaries.

## **2. The mineral legislation in South Africa:**

### **2.1 The Constitution of Republic of South Africa Act, 1996**

The Constitution founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms for all.<sup>148</sup> The founding objective of this Constitution is to pave the way for South Africa that promotes human dignity, create measures that would advance long fought human rights and freedom to all persons. It is the supreme law of South Africa and law or conduct inconsistent with it is invalid and obligations imposed by it must be fulfilled.<sup>149</sup> This implies that any law enacted or promulgated must adhere to its fundamental values and be consistent with all its provisions. Accordingly, beneficiation legislation must be promulgated in

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<sup>146</sup> Section 1 of the Minerals Act 50 of 1991.

<sup>147</sup> White Paper: A Minerals and Mining policy for South Africa, 1998. Available at : <http://www.dmr.gov.za/publications/summary/125-white-papers/335-white-paper-minerals-and-mining-policy-for-sa-1998>. Chapter 1, clause 1.3.3.2.

<sup>148</sup> Section 1(a).

<sup>149</sup> Section 2.

accordance with the Constitution to avoid being declared unconstitutional, therefore *null and void*.

Furthermore, since the promulgation of the Constitution there has been public awareness through various means such as court judgements and amongst others eradication of parliamentary sovereignty with Constitutional supremacy that everyone is equal before the law and has the right to equal protection and benefit of the law in South Africa.<sup>150</sup> As according, to Section 9(1), this means that everyone must be treated, protected and enjoy the benefits of the law equally. Currie, expressively explains the concept equality that “people who are in a similar situation in relevant ways should be treated equally similarly and equally people who are not in similar situation should be treated dissimilarly.”<sup>151</sup> This emanates from the past apartheid imbalances in South Africa, whereby White people benefited unjustly at the expense of blacks, coloureds and Indians. Henceforth, the unequal treatment between historically disadvantaged races and historically advantaged race would persist in the process of transforming South Africa. Therefore, in addressing the injustices of the passed with relation to economic, social and academic different treatment would have to be offered to different races.

In terms of Section 9(2) of the Constitution, 1996 “equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.”<sup>152</sup> The section acknowledges that in order for persons to enjoy equality as the founding values of the Constitution there must be absolute enjoyment of both fundamental rights and socio-economic rights as encapsulated in the constitution. As such, it mandates the legislature to enact policies and measures to ensure the protection and advancement of historically disadvantaged individuals of South Africa in order to correct past imbalances.

In the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>153</sup> the Court held that Section 9(2) of the Constitution recognises a conception of

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<sup>150</sup> Section 9 (1).

<sup>151</sup> Currie, De Waal, J. (2015). The Bill of Rights Handbook (6<sup>th</sup> edition) Juta, Page 210. Cape Town.

<sup>152</sup>Section 9(2).

<sup>153</sup> 1999 (1) SA 6 (CC) [60]- [62].



restitutionary equality that in a country such as South Africa which experienced serious unfair discrimination in the apartheid era. The Bill of Rights in the constitution alone is insufficient to heal unfair statutory provisions caused by imbalances of the past. Unfair discriminations have caused hardships and negative consequences. For instance, it has recently indicated that white South Africa investors holds 39% of Johannesburg Stock Exchange while black South Africans investors holds only 10%.<sup>154</sup> Therefore, unless remedial measures such as legislative policies enacted to address injustices of the past, the apartheid legacy would continue for substantial time and indefinite period. Henceforth, the equality clause referred to, as remedial and restitutionary clause, it must be implemented properly and sufficiently as an imperative for transformation in South Africa to redress the injustices of the past.

Due to the protection enshrined in the Constitution, government has enacted various initiatives and legislation that empower historically disadvantaged individuals in South Africa, such as the Black Economic Empowerment of 2003 (BEE) policies,<sup>155</sup> Mining Charter of 2004, Mining Charter of 2010 and Mining charter of 2017. Therefore, various pieces of legislation, which support and empower HDSA's need to be promoted and accelerated to fast-track beneficiation in the Mining industry. Section 9(2) of the Constitution, makes it clear that beneficiation of mineral resources for HDSA's is constitutionally recognised and protected in order to heal the past injustices and drive socio-economic transformation and poverty alleviation in South Africa. Further transformation bears the imperative to restore human dignity and protect other inherent fundamental rights of HDSA's. Whereas, some people are living under dire unconducive environment and subjected to poverty coupled with unemployment that is tantamount to violation of person's human dignity. Wherefore, beneficiation of mineral resources remains pivotal instrument that can be utilized to address inequality and poverty in South Africa through, job creation and economic growth.

In terms of Section 23(1) of the Constitution, it provides that "everyone has the right to fair labour practices."<sup>156</sup> This implies that all employees in the Republic are entitled to fair labour rights, consequently must not be subjected to oppressive and unconducive

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<sup>154</sup>*Old Mutual Investment Group*. (2016). Retrieved from: <http://ww2.oldmutual.co.za/old-mutual-investment-group/insights/magazines/tomorrow-2016/who-owns-the-jse>. Accessed on 23 November 2017.

<sup>155</sup>Broad-Based Black Economic Empowerment Act 53 of 2003

<sup>156</sup>Section 23(1) of the Constitution.

working conditions. There are many laws regulating labour relations in South Africa such as Labour Relations Act (LRA) 66 of 1995 enacted by parliament in order to ensure fair labour practices in the workplace. The mining companies have to comply them. As Beech and Veltman indicated that successful implementation of mineral resources, beneficiation depends largely on corporation between government, business and organised labour to drive growth in beneficiation projects.<sup>157</sup> As such, the government, business and unions have to cooperate so that the process of value addition of mineral resources to a higher value product would be effective and sustainable in the mining industry. Ultimately, successful corporation between these key role players would lead to effective and efficient implementation of beneficiation capable of creating sustainable and stable employment and economic growth.

In terms of Section 24 of the Constitution, it provides that “everyone has the right —

(a) to an environment that is not harmful to their health or wellbeing; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures.....”

According to Section 24 of the Constitution, in the process of beneficiation one should not cause harm to the environment or person’s or health well-being. Therefore, it requires environmental protection not only for the current generation but also for the future generation as process of beneficiation involves smelting and re-smelting of raw material into final product at higher value.<sup>158</sup> This is to ensure sustainable development in the mining industry. According to Kidd, sustainable development encapsulates economic, social and environmental development with equal effort.<sup>159</sup> As such environment must be protected to ensure development that is sustainable for the present and future generation.

Section 24 of the Constitution led to the enactment of National Environmental Management Act 107 of 1998 (NEMA) which its primary objective is for environmental protection and conservation for present and future generation. It encapsulates ample

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<sup>157</sup>Beech, W and Veltman, N. (2011). Making the most of SA’S Mineral Wealth. Without Prejudice, Volume 11, Issue 6, page 17.

<sup>158</sup>Department of Mineral Resources. Beneficiation Economic. Retrieved from <http://www.dmr.gov.za/beneficiation-economics.html>. Accessed on 18 November 2017.

<sup>159</sup>Kidd, M. (2011). Environmental law. Juta & Co Ltd. Page 17-18.

principles concerning the use of environment, *inter alia* in terms of Section 2(2) one of the principles require “environment management that must place psychological, developmental, cultural and social interests equitably.”<sup>160</sup> Therefore, implementation of processes of beneficiation would lead to massive infrastructural development which would require processing of this raw materials. These processes may produce environmental degradation. Therefore, protective measures must be adopted to ensure sustainable mining processes and development.

Section 24(b)(ii) of the Constitution allows amongst others the use of natural resources to promote justifiable economic and social development for the present and future generation.<sup>161</sup> South Africa have been blessed with vast natural resources which the constitution mandates that they have to be utilised to advance economic growth and improve infrastructure development in the interests of everyone both present and future generation. It is therefore clear that the Constitution encapsulates the importance of natural resources and provides that they should be utilised to advance the transformation of the people’s lives. Therefore, beneficiation of mineral resources as natural resources is for the benefit of the people of South Africa in order to promote maximum potential to transform its mining industry, create sustainable employment, improve economic growth, create infrastructure and skills development for the present and future generation.

The Constitutional property clause in Section 25(4) provides that for the purposes of this Section—

“(a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and (b) property is not limited to land.” The government commitment to speedy land redistribution to historically disposed inhabitants of South Africa is good initiative majority of mines are situated in marginalised communities and as such, the return of their land would enable majority of HDSA to utilise natural resources beneath their soil to create economic growth, employment opportunities and eradicate poverty. Further, the effective implementation of beneficiation of mineral resources lies on the availability of

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<sup>160</sup>Section 2(2) of NEMA.

<sup>161</sup>Section 24 (b) (iii) of Constitution, 1996.

land where process of production up-to the last stage of beneficiation would be conducted, infrastructure and skills developed.

Therefore, the fundamental importance of land reform is for the public interest by allowing majority HDSA to have access to their land and natural resources. The Constitution supports land reform programme for land to be distributed equitably amongst the people of Republic of South Africa as a matter of public interests.<sup>162</sup> Section 24(4) of Constitution state clearly that equitable access to land includes everything beneath the soil, which amongst others is mineral resources of the Republic.

The Constitution of Republic of South Africa encapsulates both fundamental rights and Socio-economic rights that are very important for the full realisation of transformation of the mining industry. In the case of *Road Accident Fund v Mdeyide*, 2011 (2) SA 125; the court held that one of the important purposes of transformation envisioned by Constitution is for the realisation of fundamental socio-economic rights. In essence, that people previously deprived of social and economic benefits become more capable of enjoying a life of dignity, freedom and equality as the gains of democracy.<sup>163</sup> The Court further stated that social legislation such as Road Accident Fund Act 56 of 1996, primary purpose is to give victims of negligent or unlawful act by motorist driver's greatest possible protection.<sup>164</sup> Similarly, the realisation of socio economic rights in the mining industry is dearly imperative, as it affords mining communities and miners greatest possible benefits. Furthermore, social legislation enacted in the mining industry has to be transformative in nature and form for effective social change.

There are other various socio-economic rights that are relevant towards beneficiation in the mining industry such as Section 26 of the Constitution, which provides that:

“(1) Everyone has the right to have access to adequate housing.<sup>165</sup>

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<sup>162</sup>Lahiff, E. Redistributive Land Reform and Poverty reduction in South Africa. Programme for Land and Agrarian Studies, University of the Western Cape. Page 4.

<sup>163</sup>*Road Accident Fund v Mdeyide*, 2011 (2) SA 26[125] (dissenting Judgment of Foreman J).

<sup>164</sup>Ibid.

<sup>165</sup> Section 26(1).

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.<sup>166</sup>

As such, Section 26 affords everyone which includes mine workers and mining communities right to housing and which the state must ensure that various measures are initiated to realise this right within its available resources. The state has built many houses as part of RDP policy in South Africa including in the mining communities.<sup>167</sup>

However, also the mining companies plays significant role, such as recently, Anglo Platinum promised to build 20,000 houses (including social and business amenities) for their employees in North West and Limpopo provinces for an investment of R2.5 Billion in terms of a Memorandum of Understanding with the Department of Housing.<sup>168</sup> However, both this remain insufficient as communities in the mining areas nationwide remain vulnerable and destitute despite social and labour plan demanding mining companies to improve the living conditions of miners and mining communities.<sup>169</sup> Therefore, state in partnership with mining companies must build more houses and develop living conditions of its people as the socio-economic right as the Constitutional obligation and further regulation 42 of the MPRDA mandates all mining companies to have social and labour plan to develop their mining communities.

Other socio-economic rights are stated in Section 27 of the Constitution, which provides that everyone has the right to access to healthcare services, sufficient food, water and social security.<sup>170</sup> In addition, the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.<sup>171</sup> Section 27 implies that everyone is entitled to free healthcare services, food, water and social security at the state expense. Furthermore, to realise this, the State must enact various measures to ensure that

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<sup>166</sup> Section 26(2).

<sup>167</sup>SA News. 2017. Government set to build 6 Million homes by 2019. Available at: <https://www.sanews.gov.za/south-africa/government-set-build-six-million-homes-2019>. Accessed 17 November 2017.

<sup>168</sup>Department of Housing, 2008, Housing and Anglo-Platinum sign a twenty-thousand deal for mine workers, 13 November. Available online at: [<http://www.fslgh.gov.za/MEDIA%20STATEMENT%20FOR%20ANGLO-PLAT%20SIGNING.pdf>]. Accessed 18 August 2010.

<sup>169</sup>Rutledge, C. 2016. *Social Labour Plans, an Unequal outcome: Part 4. ActionAid*. Available at: <http://www.actionaid.org/south-africa/2016/02/social-labour-plans-unequal-outcome-part-4>. Accessed 19 November 2017.

<sup>170</sup>Section 27(1)(a)-(c).

<sup>171</sup>Section 27(2).

majority of the citizens live in conducive environment and have sufficient socio-economic amenities.

Mining companies have the obligation to play significant role in the State to ensure realisation of socio-economic rights. Regulation 42 requires mining companies before granted rights to have social and labour plan. According to Regulation 46 such plan shall address various inclusion plans in the mining communities they are situated ranging from skills development plan; human resources development; employment equity plan; infrastructure and poverty eradication projects.<sup>172</sup>The Social and Labour Plans (SLP) system, together with BBBEE schemes under the Mining Charter, are the instruments put in place to channel the mines to utilize their proceeds of mining to benefit the mining communities and transform societies in South Africa.<sup>173</sup> As it is under this mechanism that mines have the obligation to ensure that they develop the mining industry and transform both communities and workers in South Africa.

According to Thobatsi, SLP must be aligned with the local and district Integrated Development Plan (IDP) for local economic development initiatives which would provide a platform for investment opportunity, economic growth, reduction and infrastructure development.<sup>174</sup> As in terms of section 152(1) (c) of the Constitution, it is equal objective of the municipalities to promote social and economic development in South Africa. Therefore, partnership between municipalities and mining companies is both legally required and necessary to advance social and economic development in South Africa.

## **2.2 Mineral and Petroleum Development Act 28 of 2002 (MPRDA)**

MPRDA is the principal Act, which regulates the mining industry in South Africa, significantly transferred mineral rights from private ownership to government as guardian of peoples of South Africa and makes special provision to benefit historically disadvantaged persons

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<sup>172</sup>Department of Mineral Resources. 2010. Revised Social and Labour Plan Guidelines. Page 6-25.

<sup>173</sup>Rutledge, C. (2016). Social Labour Plans, an Unequal outcome: Part 4. ActionAid. Available at: <http://www.actionaid.org/south-africa/2016/02/social-labour-plans-unequal-outcome-part-4>. Accessed 19 November 2017.

<sup>174</sup>Thobatsi, J.T. (2014). The alignment of Social and Labour Plan (SLP) commitments with municipal Integrated Development Plans (IDPs). North-west University mini dissertation. Page 1.

Accordingly, in terms of Section 3 of the Constitution, provides that:

“(1) Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.

(2) 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; and (b) in consultation with the Minister of Finance, determine and levy, any fee or consideration payable in terms of any relevant Act of Parliament.

(3) The Minister must ensure the sustainable development of South Africa’s mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development.”<sup>175</sup>

MPRDA gives government of South Africa sole custodianship over all mineral and petroleum resources in the Republic for the benefit of all South Africans in terms of Section 3(1). In the case of *Agri SA v Minister of Minerals and Energy*, 2013 (4) SA 1 (CC); an application was sought to declare MPRDA unconstitutional on the basis that it expropriated the property rights of Sebenza Pty Ltd coal mine without compensation as required by section 25(2) of the constitution. It sought compensation to be payable in terms of Section 25(3) of the Constitution. They argued that ownership was legislated to the State by MPRDA, as such it must pay compensation. The existing mining companies afforded an option to apply for conversion of old order rights to new order rights wherein the State is the custodian.<sup>176</sup>

The Chief Justice Mogoeng, in delivering the judgment held that the State did not acquire ownership but custodianship on behalf of the people of South Africa and thus, compensation was not payable as no expropriation occurred.<sup>177</sup> The court held that the State is not a competitor with other business entities for rights but entrusted with

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<sup>175</sup> Section 3 (1) -(3).

<sup>176</sup> *Brassey, V.* (2014). IOL. Minerals act puts people’s property rights at risk. Retrieved online at: <https://www.iol.co.za/business-report/opinion/minerals-act-puts-peoples-property-rights-at-risk-1731038>. Accessed 20 November 2017.

<sup>177</sup> *Agri SA v Minister of Minerals and Energy*. 2013. (7) BCLR 727 (CC).

administrative authority to equitably distribute mineral resources in South Africa and dismantle past discriminatory practices in the mining industry.<sup>178</sup>

In terms of Section 3(2) of MPRDA, provides that the state acting through the Minister of Minerals have the authority and responsibility to manage the exploitation of the nation's mineral and Petroleum resources and ensure that the majority citizens, which are historically disadvantaged individuals, benefit from their common wealth. As the preamble of the MPRDA recognise that the mineral and petroleum resources are non-renewable natural resources, as such the precautionary measures have to be taken to ensure that as they deplete with time, their exploitation contribute broadly towards realisation of socio-economic transformation in South Africa.

Further, the State acting through the minister have the obligation in terms of Section 3(3) of MPRDA to ensure that the mining industry adhere to the national and international mining pieces of legislation, policies, norms and standards and promote economic and social development in South Africa. As part of beneficiation, the State must further assist black owned South African mining companies with financial assistance and an opportunity to facilitate process of beneficiation. As the former President Zuma confirmed that black owned companies raised concerns of various difficulties encountered with in acquiring industrial finance support, suppliers and technical production support in many industries.<sup>179</sup> Therefore, urged institutions such as National Empowerment Fund (NEF),<sup>180</sup> Industrial Development Corporation (IDC) and Small Enterprise Funding Agency (SEFA) effectively empower black industrialist companies through funding and skills trainings.<sup>181</sup> Similarly, these public entities must be on the forerunner funding companies that aims to beneficiate of mineral resources in South Africa.

Accordingly, the Minister in terms of Section 12(1) is authorised to:

“facilitate assistance to any historically disadvantaged person to conduct prospecting or mining operations. (2) The assistance referred to in subsection (1) may be provided subject to such terms and conditions as the Minister may

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<sup>178</sup>Ibid.

<sup>179</sup> Zuma G. J. (2014). State of the National Address February 2014.

<sup>180</sup>National Empowerment Fund is a public entity established to grow black economic participation in South Africa.

<sup>181</sup>Ibid. 169



determine. (3) Before facilitating the assistance contemplated in subsection (1), the Minister must take into account all relevant factors, including— (a) the need to promote equitable access to the nation’s mineral resources; (b) the financial position of the applicant;(c) the need to transform the ownership structure of the minerals and mining industry; and (d) the extent to which the proposed prospecting or mining project meets the objects referred to in Section 2(c), (d), (e), (f) and (i). (4) when considering the assistance referred to in subsection (1), the Minister may request any relevant organ of State to assist the applicant concerned in the development of his or her prospecting or mining project.”<sup>182</sup>

Therefore, it is in terms of Section 12 that the minister has to assist historically disadvantaged persons to venture into mining industry, as this is very significance to ensure that they create jobs that will benefit South African black mining companies. The Minister has to ensure that historically disadvantaged South Africa are assisted based on the rights they possess. Assistance implies that training and services must be available for them to properly conduct their operations either of prospecting or mining. In ensuring that communities benefit from their mineral and petroleum resources the minister in granting rights in terms of Section 104 preference have to be given to communities applying for prospecting or mining right. The applications thereof, by communities must be in accordance with Section 16. The similar procedure followed by other ordinary applicants however would be awarded preference by the minister in determining granting of rights.

However, there are requirements to be complied with before the Minister can grant such preferential right in terms of Section 17 (a) such as the right must be used to contribute towards the development and social empowerment of the community concerned.<sup>183</sup> Also amongst others the benefits which accrue from such prospecting or mining must be utilised by the community in question to advance infrastructure development, social development and economic participations such as creation of employment, business opportunities and amongst others skills development.

In the case of *Bengwenyama-ya-maswazi community and Others V Minister for mineral Resources and Others, 2015(1) SA 197(SCA)*; where the community’s

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<sup>182</sup>Section 12(1)(4) OF MPRDA.

<sup>183</sup>Section 17(a) of MPRDA.

application for prospecting right was competing with another private mining company to prospect over minerals resources in the Bengwenyama community two farms. The court of first instance awarded the private company prospecting right on the basis that it complied with procedures and applied first. The community appealed the decision. The SCA said that this create special category of right for communities as they are owners of the land to have preferential right to be granted for prospecting right except only if is already granted to another person.<sup>184</sup> Accordingly, SCA instructed the minister to assist the community with application and award them the prospecting right. According to Section 9 (1) of MPRDA, the “regional manager if he or she receives more than one application for a prospecting right, a mining right or a mining permit, as the case may be, in respect of the same mineral and land, applications received on the same date.<sup>185</sup> The minister is authorised in terms of Section 9(2) of MPRDA to grant preference to applications from HDSA’s. As such, Section 9 of MPRDA affords the minister preferential powers to award rights to HDSA is when competing against their white’s counterparts regardless of who lodged the application first. This Section affords HDSA opportunity to be the forerunners with rights to speedy transform the mining industry and South Africa.

The principal Section that deals with mineral beneficiation in the MPRDA of 2002 is Section 26 as amended by Section 22 of MPRDA of 2008,<sup>186</sup> it provides as follows:

“(1) the Minister may initiate or promote the beneficiation of minerals in the Republic. (2) If the Minister, acting on advice of the Board and after consultation with the Minister of Trade and Industry, finds that a particular mineral can be beneficiated economically in the Republic, the Minister may promote such beneficiation subject to such terms and conditions as the Minister may determine. (2A) in promoting beneficiation, the Minister may prescribe the levels required for beneficiation. (3) Any person who intends to beneficiate any mineral mined in the Republic outside the Republic may only do so after written notice and in consultation with the Minister.”<sup>187</sup>

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<sup>184</sup>*Bengwenyama-ya-Maswazi Community and others v Minister for Mineral Resources and Others*, 2015(1) SA 197(SCA); [2014] 4 All SA 539 (SCA) (26 September 2014).

<sup>185</sup>Section 9(2) of MPRDA

<sup>186</sup>Mineral and Petroleum Resources Development Act 49 of 2008.

<sup>187</sup> Section 26(1)- (3) of MPRDA.

According to Section 26 the minister is empowered to initiate, promote or prescribe levels required for beneficiation, however his powers is restricted. Firstly, he must act within the advice of the mines and mining development board established by Section 57 and after consultation with the Minister of Trade and Industry. Secondly, mineral beneficiation such minerals must be economically viable in the Republic.<sup>188</sup> This means that the minister cannot solely prescribe measures to be used to advance mineral resources beneficiation without consulting the stakeholders and this derail effective implementation of beneficiation because it is further time consuming and costly.

Consequently, the Mineral and Petroleum Resources Development Amendment Bill of 2013,<sup>189</sup> repeals all these restrictions. Henceforth, the Minister will have the sole discretion to mandate the beneficiation of minerals under Section 26 of the MPRDA; seemingly, regardless of whether such beneficiation would be economically viable or not.<sup>190</sup> Therefore, the Minister is obliged to ensure that the mineral resources in the Republic of South Africa transformed to a superior value product that can be sold to different stakeholders globally and domestically.

The MPRDA expressly in Section 100 deals with the need for transformation in the mining industry and provides that (1) the “Minister within five years from the date of the Act came into effect to firstly, after consultation with the Minister for Housing, develop a housing and living conditions standard for the minerals industry; and secondly develop a code of good practice for the minerals industry in the Republic.”<sup>191</sup>

According to Section 100(1), the Minister must enact code of good practice, which would transform the mining industry. Accordingly, as mandated the Minister gazetted the Codes of good practice for the South African minerals industry in 29 April 2009 that deals with several fundamental principles to transform the mining industry amongst others is beneficiation of the minerals resources.<sup>192</sup> Clause 2.7.1 of the codes

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<sup>188</sup>Tim, W. (2014). Lessons on mineral beneficiation: the stick or the carrot? Retrieved from: <http://thewritecandidate.co.za/lessons-mineral-beneficiation-stick-carrot/> Accessed 28 May 2017.

<sup>189</sup>Mineral and Petroleum Resources Development Amendment Bill, Government Gazette No. 36523 of 31 May 2013.

<sup>190</sup>Section 21. (1) - (2) of Mineral and Petroleum Resources Development Amendment Bill of 2013.

<sup>191</sup>Section 100(1) (a)-(b) of MPRDA.

<sup>192</sup> The codes of good practice for the minerals industry, published under Government Notice No. 446 in Government Gazette 32167 dated 29 April 2009. Commencement date: 29 April 2009.

of good practice for the South African minerals industry, prescribe the scorecard to be used to measure beneficiation in the mining industry, by mandating the mining companies to identify its level of beneficiation and prescribe percentage required for them to qualify for an offset from their annual production volumes until refine stage.<sup>193</sup> According to beneficiation scorecard, the set target is 42% to meet compliance target in accordance with section 26 of MPRDA<sup>194</sup>

Furthermore, the scorecard of Broad Based Socio Economic Empowerment Charter for South Africa (BBBSEC) has found that only 15% progress achieved in 2010 and it was then after the review and implementation of mining charter of 2010, that 26% target had been reached.<sup>195</sup> These indicates that transformation in the mining industry is stagnant. Therefore, calls upon on the State to fasten transformation in the mining industry through various mechanisms that would effectively impute progress.

According to Section 100(2)(a) of MPRDA, provides that “to ensure the attainment of government’s objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which the Act takes effect develop a Broad-Based Socio-Economic Empowerment Charter that will set the framework, targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources. The framework, which have since established is Mining charter of 2004 with the aim of transforming the mining industry. Unfortunately, this has not been successfully implemented, as the mining industry is still grossly untransformed. The legality and obligations of Mining Charter is being challenged before the judiciary by the chambers of mines and other mining companies since they are against the powers vested in the minister in setting targets required by the new charter and implementation thereof.<sup>196</sup> Lately with the judicial review of Mining charter of 2017, the communities such as mining communities United in Action, Women from Mining Communities United in Action and Mining and Environmental Justice Community Network of South Africa obtained applied joinder in

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<sup>193</sup> Ibid, para 2.7.1 page 15.

<sup>194</sup> Ibid, table 2.7.2 page 15.

<sup>195</sup> The Scorecard of Broad Based Socio Economic Empowerment Charter for South Africa (BBBSEC).

<sup>196</sup> *Scholes and Another V Minister of Mineral Resources (50642/2015) [2017] ZAGPPHC 303 (30 June 2017).*

the proceedings against the Department of Mineral Resources (DMR).<sup>197</sup> Legally represented by the Centre for Applied Legal Studies (CALS) and Lawyers for Human Rights (LHR) to judicially review mining charter of 2017.<sup>198</sup>

Pursuant to the appointment of Ramaphosa as President of Republic of South Africa, he reached consensus with Chamber of mines and other applicants to postpone the judicial review of the said mining charter.<sup>199</sup> The President said that is certain that through robust engagement with all stakeholder to resolve the current impasse, and they will agree on a Charter that both accelerates transformation and grows the mining sector as dearly vital to the economy of South Africa.<sup>200</sup>

The Mineral and Petroleum Resources Development Amendment Act (MPRDAA) 49 of 2008 amended Section 100(2)(a) of MRDA of 2002 by Section 70 that the historically disadvantaged South Africans must not only have access of entry to the market but must equally have entry into and actively participate in the mining industry and further benefit from the exploitation of the mining and beneficiation of such mineral resources.

Section 100 speaks of the need for transformation in the mining industry as it prescribes time-frame for minister to implement the charter which would address transformation impediments. Therefore, Section 100(2) of MPRDA, the first broad-based socio-economic charter for the South African Mining industry well known as (Mining Charter of 2015)<sup>201</sup> was gazetted in 2004.<sup>202</sup> Amended by Mining Charter of 2010<sup>203</sup> and recently amended again by Mining Charter of 2017 all these charters have a clear vision to transform mining industry to become competitive globally and offer real benefits to all South Africans.

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<sup>197</sup>News 24. 2017. Victory for community Organizations in Mining Charter battle. Accessed: <https://www.news24.com/SouthAfrica/News/victory-for-community-organisations-in-mining-charter-battle-20171118>. Accessed on 28 March 2018.

<sup>198</sup>Ibid.

<sup>199</sup>Ramaphosa C.M. 2018. Office of the Presidency. Statement on the postponement of Mining Charter application. Retrieved from <http://www.thepresidency.gov.za/press-statements/statement-postponement-mining-charter-application>. Accessed on 28 March 2018.

<sup>200</sup>Ibid.

<sup>201</sup> Mining Charter of 2015.

<sup>202</sup>Broad-Based Socio Economic Empowerment Charter for the South Africa mining industry, notice 1639 of ,2004.

<sup>203</sup>Broad-Based Socio Economic Empowerment Charter for the South Africa mining industry, Amendment of 2010.

The objectives of the Charter are amongst others to promote equitable access to the nation's mineral resources to all the people of South Africa; Substantially and meaningfully expand opportunities for HDSA's including women, to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources. Utilise the existing skills base for the empowerment of HDSA's; Expand the skills base of HDSA's in order to serve the community; Promote employment and advance the social and economic welfare of mining communities and the major labour areas in which majority of miners reside; and expand on measures that would promote beneficiation and implementation in South Africa's mineral commodities. The charter was enacted to fast-track transformation by imposing targets which must be fulfilled by mining companies in South Africa.<sup>204</sup>

Beneficiation in terms of Mining Charter of 2004, clause 4.8 provides that mining companies will in respect of their involvement in beneficiation activities, specifically activities beyond mining and processing include production of final consumer products.<sup>205</sup> Mining companies will be able to offset the value of the level of beneficiation achieved by the company against its HDSA ownership commitments. Mining companies agree to: identify their current levels of beneficiation and indicate to what extent they can grow the baseline level of beneficiation. Therefore, it is the duty of the mining companies to assess their contribution towards beneficiation in their respective companies. Furthermore, if it is below what is envisaged must institute alternative measures to achieve this desirable target.

In 2009, the Department of Mineral Resources conducted a comprehensive assessment of the transformation progress made in the mining industry against the objective set out by the Mining Charter of 2002. It was found that there was progress made but the shortcomings materialised in the implementation ranging from ownership, employment equity, mine community development, housing and living conditions and even with beneficiation. Consequently, this led to enactment of Mining Charter of 2010 to redress these barriers.

Also in 2014 second comprehensive assessment was conducted to inquire on the extent of compliance by mining companies on Mining charter of 2010 and whether

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<sup>204</sup>Ibid.

<sup>205</sup>Ibid above.

since the enactment of the charter, mining companies have complied with the set target and it was found that significant number of companies have met the targets, but with regard to employment equity white males still dominates the top management positions and mining industry ownership remain in the minority of white persons.<sup>206</sup> As the result the new mining charter of 2017 have been finally gazetted with the aims of radically transforming the mining industry in South Africa. It repeals both 2004 and 2010 Mining Charters according to clause 2.14.<sup>207</sup>

The charter had been challenged in the case of *Scholes and Another V Minister of Mineral Resources* (50642/2015) [2017] ZAGPPHC 303, the application sought to challenge powers vested in the minister in terms of section 100 (2)(a)-(b) of the MPRDA, on it does not empower the minister to develop broad-based Socio-Economic Employment Charter that holders of rights or permits must comply with at all times.<sup>208</sup> They therefore, sought an order in terms of Section 172(1)(a) of the Constitution, to declare the decision of the Minister inconsistent with the Constitution and therefore invalid. The court upheld that the charter and ordered all parties with direct and substantial interest to be joined in the proceedings.<sup>209</sup> The court in high court joined the parties to the proceedings and refused to deal with any of the merits.

Furthermore, despite this court case the minister has developed and gazetted new Mining Charter of 2017 setting new definitional terms relating such as black person and targets stated below to harmonise the policies and legislation in order to implement meaningful participation of Black persons. The principal objective is to substantially and meaningfully expand opportunities for Black Persons to enter the mining and mineral industry and to benefit from the exploitation of mineral resources of the Republic.<sup>210</sup>

There are different targets set out on each elements of the Charter, amongst others, in relation to ownership of new holder of a prospecting right are required to have

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<sup>206</sup> Assessment of the Broad-Based Socio Economic Empowerment Charter for the South Africa mining industry, (Mining Charter) May 2015.

<sup>207</sup> The Department of Mineral Resources. 2017. The Broad Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2017. Clause 2.14. Page 27.

<sup>208</sup> *Scholes and Another V Minister of Mineral Resources* (50642/2015) [2017] ZAGPPHC 303

<sup>209</sup> *Ibid.*

<sup>210</sup> Clause 1. Page 6.

minimum of 50%+1 Black Person shareholding which shall include voting rights.<sup>211</sup> Further, such holder required to have 30% Black Persons shareholding which shall include economic interest plus corresponding percentage voting rights. This implies that no prospecting right would be issued unless the applicant have 50%+1 of Black Person shareholding who must further have 30% shareholding bearing economic interest plus voting rights. The existing prospecting and mining rights holders are required to top up its Black Persons shareholding from existing level as previously was 26% to 30% Black person shareholding with a twelve (12) month period. Unfortunately, the above charter have been suspended before implementation. Consequently, lately the Minister of Minerals Resources has published the long awaited new draft mining charter of 2018 for public comments before the final charter gazetted.<sup>212</sup>

The draft mining Charter of 2018, intends to bring certainty in mining industry of South Africa. It sets new targets in all elements for example with regard to ownership it requires 30% BEE shareholding, which is ring fenced and compliance is mandatory at all material times, other than as set out in other previous charter.<sup>213</sup> It further outline standards required for procurement, supplier and enterprise development provisions prescribed.<sup>214</sup> Also to what extent mining goods may be imported and exported, where services must be sourced and how and where processing of samples should be conducted. With regard to employment equity, human resources development and mine community development required standard increased. However, with regard to beneficiation the baselines still required to be determined by the minister of mineral resources in South Africa mining industry. <sup>215</sup>

Therefore, at this stage is safe to state that the charter is published for public comments and the targets are likely to be amended as all parties are willing to sacrifice to afford the industry with stable policies and legislation it deserves. This it serves as step to change the unequal mining industry, with white people still holding superior

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<sup>211</sup> Broad-Based Black Socio-economic Empowerment Charter for the South African mining and minerals Industry, 2017. pa

<sup>212</sup> Department of Mineral Resources. News Room retrieved from: <http://www.dmr.gov.za/news-room/post/1722/media-advisory-minister-mantashe-to-publish-draft-mining-charter-for-public-comments>. Accessed 17 June 2018.

<sup>213</sup> Mining & Minerals alert 18 June 2018. Cliffe Dekker Homyer. Reid, A. (2018). Draft Mining Charter III: More uncertainty amid the certainty? Page 3. Johannesburg.

<sup>214</sup> Department of Mineral Resources. (2018). Draft Broad-Based Black Socio-Economic Empowerment Charter for the South African mining and minerals industry.

<sup>215</sup> Ibid footnote 210.



positions and lucrative salaries compared with black majority who continuously were marginalize and faced with hard labour.

### **2.3 Mine, Health and Safety Act 29 of 1996 (MHSA)**

The discovery of minerals in South Africa clouded by hazardous peacetime and unhealthy occupations for mine workers. The main purpose of the Act as outlined in Chapter 1 is amongst others to:

“(a) to protect the health and safety of persons at mines;

(b) to require employers and employees to identify hazards and eliminate, control and minimise the risks relating to health and safety at mines.”<sup>216</sup>

According to Section 1 of MHSA the Health and safety of mine workers is dearly pivotal and is the duty of both employers and employees to ensure that this is observed and adhered to at all material times to avoid unnecessary injuries and losing lives.

Chapter 2 of MHSA obliges the owner of the mine to do various measures to ensure health and safety in the mining industry such as in terms of Section 2(1) the owner of every mine that is being worked must:

“(a) ensure, as far as reasonably practicable, that the mine is designed, constructed and equipped (i) to provide conditions for safe operation and a healthy working environment; and (ii) with a communication system and with electrical, mechanical and other equipment as necessary to achieve those conditions;

(b) ensure, as far as reasonably practicable, that the mine is commissioned, operated, maintained and decommissioned in such a way that employees can perform their work without endangering the health and safety, of themselves or of any other person;

(c) compile an annual report on health and safety at the mine including the statistics on health and safety that must be kept in terms of this Act and the annual medical report referred to in Section 16.”<sup>217</sup>

According to Section 2(1), the mine owners have to ensure that the employees in performing beneficiation process adequately should be equipped with necessary operational skills, mechanisms, equipment's and significant to operate under conducive environment which would allow them to perform their task effectively and

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<sup>216</sup>Section 1 of MHSA.

<sup>217</sup>Section 2 of MHSA.

accordingly without endangering their health and safety or of surrounding communities, or other stakeholders or any other person who may be exposed. Further, according to Section 2(1) (c) the mining companies obliged to conduct annual report for health and safety measures they conducted which must be made in accordance with the MHSA.

Miners have been exposed to threats of their lives especially those who are drilling. According to Simons, in 1960 said that the mining industry since the beginning of the century has killed 36 000 men in the gold mines.<sup>218</sup> He said that the annual death toll in 1956 all mines fluctuated at 816. Some 30 years later, in 1983, the figure was still a high at 831, according to government figures.<sup>219</sup> Since the enactment of MHSA death toll has been, dropping in the mining industry.

As the historical lowest death toll in the mining industry since its establishment recorded by the Mine Health and Safety statistics performance report of 2016, that there were 3 fatalities in 2016 compared to 77 in 2015 (excluding fatalities among illegal miners).<sup>220</sup> This turns out to be in accordance with improvement plan for 5% year on year. The breakdown of the fatalities per commodity during the year 2016 most death occurring on gold mines (30), followed by platinum (27), the least coal (4) and then other mines (12). In the category of other mines, these include diamonds, chrome, copper and iron ore.<sup>221</sup>

This decline in fatalities is being achieved despite the ever-increasing depths at which gold mining in particular takes place. According to chamber of mines the three main causes of fatalities, are rock falls, transport accidents, and accidents, which include inhaling of dangerous fumes.<sup>222</sup> Professor Simons noted that rock falls, even in the early of the century the explosions, and transport and other accidents were the major

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<sup>218</sup>Simons, H.J. (Undated). Death in South African Mines, an undated study published in the early 1960s by, professor of native law and administration at the University of Cape Town. Page 41.

<sup>219</sup>Ibid.

<sup>220</sup>Zwane, M. (2017). Department of Mineral Resources. Available at, South African government. 2017. Minister Zwane M: Releases of 2016 mine health and safety statistics. <https://www.gov.za/speeches/minister-mosebenzi-zwane-releases-2016-mine-health-and-safety-statistics-19-jan-2017-0000>. Accessed 10 November 2017.

<sup>221</sup>Ibid.

<sup>222</sup>Chamber of Mines of South Africa: the state of the mining industry. 2017. Accessed at <http://www.chamberofmines.org.za/industry-news/publications/presentations/send/7-2015/479-presentation-to-the-parliamentary-portfolio-committee-on-mineral-resources>. Accessed on 29 November 2017.

causes of fatalities.<sup>223</sup> He further stated that the employment of inexperienced and untrained men on dangerous operations contributed largely to the fatalities.<sup>224</sup> As such the inadequacy and ineffectiveness by the mining companies to train and equip their employees to ensure that quality safe service is conducted, contribute to the continuous risk to the lives of miners.

Recently, in Impala Platinum's Rustenburg shaft 12 it has been reported that two men died as a result of rock that fell on their heads while drilling.<sup>225</sup> These have instigated fear to miners in the platinum belt. According to Zwane, the department is concerned about miners losing their lives on duty and as a result of these incidents instituted the investigations on this matter with the aim of preventing them as their legislative obligation. Also, Harmony Gold mine have experienced rising death toll of miners on duty.<sup>226</sup> Motsepe said that they take full responsibility for the lives of miners who lost their lives regardless of the outcome of the investigations.<sup>227</sup>

The number of deaths recorded are concerning the ministry of Mineral resources needs to take appropriate steps to employ mechanism, which would be used as a precautionary measure to avoid miner's killings. The lives of employees are very significant and can never be justified by profit making scheme, as such beneficiation which would result in increase, the death of mine workers at mines is a futile exercise. Therefore, it is necessary to adopt precautionary measures which would alleviate killings in the industry with immediate effect.

Pursuant the above, the survivors of death fatalities to some extent in many mine workers have contracted silicosis and other diseases such Tuberculosis (TB). The World Health Organisation (WHO) in 2015 have estimated that in South Africa had about 450,000 cases of active TB.<sup>228</sup> It is found most of this incidence occur in the

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<sup>223</sup> *ibid* footnote 211.

<sup>224</sup> *ibid*.

<sup>225</sup> *De Villiers, J.* (2017). News 24. Rockfall kills two miners at Impala Platinum's Rustenburg mine. Available at <https://www.news24.com/SouthAfrica/News/rockfall-kills-two-miners-at-impala-platinums-rustenburg-mine-20170919>. Accessed on 19 November 2017.

<sup>226</sup> Pitjoos, I. (2017). Miner dies at Harmony Gold mine. News 24. Available at: <https://www.news24.com/SouthAfrica/News/miner-dies-at-harmony-gold-mine-20171120>. Accessed 10 November 2017.

<sup>227</sup> *News 24.* (2017). Harmony Gold Non-Executive Chairman, Patrice Motsepe, said the mining company takes full responsibility for the deaths of five Kusaalethu miners, regardless of investigation findings. <https://www.news24.com/RelatedGalleryItemModal.aspx?type=video&id=1a450546-36f8-45cf-bd3d-edf2a3f3b9f2&iFrame>. Accessed on the 12 November 2017.

<sup>228</sup> *TBFACTS.org.* TB Statistics for South Africa – National & provincial. 2015. Retrieved from: <https://www.tbfacts.org/tb-statistics-south-africa/>. Accessed on 23 March 2018.

mining communities and to mine workers. Recently, in the case of *Nkala and Others v Harmony Gold Mining Company Limited and (Treatment Action Campaign NPC and Sonke Gender Justice NPC as Amicus Curiae)* [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ), the applicants sought to bring class action against 32 companies operating in the gold mining industry. They claim compensation on behalf of current and former underground mineworkers and or their dependants who contracted silicosis or pulmonary TB whilst employed by the respondents.<sup>229</sup>

The applicants proposed a bifurcated process through which the single class action would proceed in two stages, firstly dealing with common issues and later issues of individuals shall be determined. The potential class members may range from between 17 000 and 500 000 members, the bulk of which belong to the silicosis class<sup>230</sup> or court have ordered class action to be instituted against mining companies South Africa in 2013. The court held that a class action is the only realistic option through which justice can prevail and most mineworkers can assert their claims effectively against the mining companies and the only avenue to realise the right of access to courts,<sup>231</sup> which guaranteed for mineworkers by the Constitution of the Republic of South Africa, 1996.<sup>232</sup> The case provides mine-workers and or their dependants the legal remedy to exploit when affected by health attack caused by unhealthy mining conditions. This is a victory to mine workers as for many decades have suffered from hazardous working conditions causing chronic diseases and due to financial constraints failing to seek recourse from the courts.

#### **2.4 Skills Development Act 97 of 1998 (SDA)**

In terms of Section 2(1) of the Act, the purposes of this Act are -

“(a) to develop the skills of the South African workforce -

(i) to improve the quality of life of workers, their prospects of work and labour mobility;

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<sup>229</sup>*Nkala and Others v Harmony Gold Mining Company Limited and Others* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) (13 May 2016).

<sup>230</sup> *Pansegrouw, M.* (2016). Werksmans Attorneys legal brief. Far-reaching judgment of the recent silicosis class action case. Retrieved from: <https://www.werksmans.com/wp-content/uploads/2016/08/061416-Silicosis-Class-Action-Case.pdf>. Accessed on 23 March 2018.

<sup>231</sup>Section 38.

<sup>232</sup>*Ibid* 215.

- (ii) to improve productivity in the workplace and the competitiveness of employers;
  - (iii) to promote self-employment; and
  - (iv) to improve the delivery of social services;
- (b) to increase the levels of investment in education and training in the labour market and to improve the return on that investment;”<sup>233</sup>

The majority of South Africa workforce are unskilled and this is creating major impediment for effective implementation of beneficiation. As beneficiation requires skilled workforce that would be able to develop a product from mineral resources as conception up to the last stage as final finished product ready to hit the market both domestic and international.

Accordingly, Section 2(1) of SDA aims to develop South Africa workforce skills to be more productive and competitive for their employers. Importantly, the nation that have effective and skilled workforce likely to attract more investors.

Further, this creates certainty towards desired production results and further likely to make good profit returns. The skilled workforces are cost-effective and labour-intensive, automatically leading to sustainable beneficiation of the mineral wealth in South Africa.

In terms of Section 9(1) of the SDA, the Minister may establish a Sector Education and Training Authority (SETA) with a constitution for any national economic sector.<sup>234</sup> Accordingly, in March 2000 the Minister of Labour established the SETA tasked with the responsibility to develop and implement a sector specific skills plan, registering and promoting learnerships in the Republic of South Africa in order to increase sectoral skills.<sup>235</sup> SETA has established Mining Qualifications Authority (MQA) with the responsibility to the administer skills development programmes for the mining and minerals sector in South Africa. <sup>236</sup> The MQA is a necessary vehicle that the industry

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<sup>233</sup> Section 2(1).

<sup>234</sup>Section 9(1)

<sup>235</sup> Department of Labour. (2000). Sector Education and Training Authorities. Available at <http://www.labour.gov.za/DOL/downloads/documents/useful-documents/skills-development-act/Useful%20Document%20-%20NSF%20-%20Sector%20Education%20and%20Training%20Authorities.pdf> Retrieved on the 10 August 2017.

<sup>236</sup> Mining Qualifications Authority. 2008. <http://www.mqa.org.za/welcome>. Accessed 19 November 2017.

is in dire need of, to further fund and promote skilled workers who would ensure sustainable facilitation of mineral resources.

## **2.5 Mineral and Petroleum Resources Royalty Act 28 of 2008 (MPRRA)**

The MPRRA also recognises that the mineral wealth of South Africa is the common heritage of its citizens and therefore they must benefit from their exploitation.<sup>237</sup> Accordingly, the MPRRA is enacted to regulate beneficiation by the state through taxation. The imposed levies serve as revenue generation to benefit the people of South Africa as government depends largely on taxation to provide services and administration of transformative development to everyone.

According to Section 2 of MPRRA it provides that:

“A person that wins or recovers a mineral resource from within the Republic must pay a royalty for the benefit of the National Revenue Fund in respect of the transfer of that mineral resource.”<sup>238</sup>

Section 2 imposes levy on any person either juristic or natural to pay royalty to the National Revenue when they transfer mineral resources they extracted in the Republic of South Africa. This amounts to beneficiation from any mineral resources exploited in the Republic when they are being transferred. Section 2 encourages mineral resources exploited in the country to be refined and smelted in the country from first stage of beneficiation to final stage which is productivity as stage as it amounts to maximization of profits and create employment, significantly in royalty levy is not imposed.

## **2.6 Precious Metals Act 37 of 2005 (PMA)**

The PMA regulates the use and benefits of South African Diamond and Precious Metals together with Diamonds Act, 1986<sup>239</sup> which in terms of Section 3(1) established the regulator who in terms of this PMA controls the smelting, refining, beneficiation, use and disposal of precious metals.

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<sup>237</sup> Mineral and Petroleum Resources Royalty Act 28 of 2008. Government Gazette No. 31635, 24 November. Available online at: [http://www.google.co.za/search?sourceid=navclient&aq=0&oq=Royalty+Act+south+africa&ie=UTF-8&rlz=1T4SKPB\\_enZA315ZA358&q=royalty+act+south+Africa](http://www.google.co.za/search?sourceid=navclient&aq=0&oq=Royalty+Act+south+africa&ie=UTF-8&rlz=1T4SKPB_enZA315ZA358&q=royalty+act+south+Africa). Accessed 06 May 2017.

<sup>238</sup>Section 2

<sup>239</sup>Act No 56 of 1986

In terms of Section 2 of the PMA, objects of the Regulator are to-

“(a) ensure that the precious metal resources of the Republic are exploited and developed in the best interest of the people of South Africa;

(b) promote equitable access to, and local beneficiation of, the Republic's precious metals;”<sup>240</sup>

Accordingly, in terms of Section 2 it is the duty of the regulator to ensure that precious metals of the Republic are developed, promoted and shared equitably and administered in the best interest of all the people of the Republic of South Africans as to realise maximum participation in implementation of local beneficiation.

In terms of Section 4(1) of PMA, it prohibits persons from acquisition, possession or disposal of unwrought precious metals without licence.<sup>241</sup> Therefore, only persons with licence to mine precious metals can exploit and utilise the Republic's precious metals resources. This, creating a regulation that ensures uniformity of the use of precious metals and avoid illegal mining extraction in the Republic of South Africa.

PMA opens the doors for anyone to apply for licence to mine precious metals. Accordingly, in terms of Section 6(1) the regulator in “considering an application for any licence, permit or certificate must consider following factors:

(a) the promotion of equitable access to and the orderly local beneficiation of precious metal;

(b) the requirements of the broad-based socio-economic empowerment Charter developed in terms of Section 100 of the MPRDA.”<sup>242</sup>

As such Section 6(1) of PMA authorises the regulator to grant licence in to the Republic to anyone who aspires to mine precious metals subject to two conditions firstly it must promote access to and orderly local beneficiation of precious metal. Secondly, it must advance the objective of Broad Based Socio-Economic Charter (Mining Charter) as required by MPRDA.

The PMA further impose conditions on export of precious metals Section 12(1) provides that “no person may export any unwrought or semi-fabricated gold except with the approval of the National Treasury in terms of the Exchange Control

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<sup>240</sup> Section 2 (a)-(b).

<sup>241</sup> Section 4 of PMA.

<sup>242</sup>Section 6 (1).

Regulations made under the Currency and Exchanges Act, 1933 (Act No. 9 of 1933), granted with the 45 concurrence of the Minister.

(2) No person may export any unwrought or semi-fabricated metals of the platinum group except with the written approval of the Minister which shall be granted subject to the promotion of equitable access to, and the orderly local beneficiation of such metals.”<sup>243</sup>

Precisely, Section 12 aims at prohibiting exportation of unwrought or semi-fabricated metals gold and platinum without consent from the Minister. This promoting local; beneficiation of precious metals to the final product which would be sold at a higher market price, thus ensuring that the people in the Republic of South Africa benefit maximally from the mineral resources beneath their soil.

## **2.7 Diamonds Export Levy Act 15 of 2007 (DELA)**

Section 2(1) of DELA imposes charges to any person who export diamond to be liable for the levy whenever that person delivers (or should have delivered) a bill of entry for export in respect of any unpolished diamond.<sup>244</sup> According to section 2(1) of DELA, diamonds must be polished before exiting the borders of South Africa. As a result, levy is imposed on any unpolished diamond to be exported from South Africa. This deters exportation of unpolished diamonds and boosts mining companies to refine and polish diamonds prior exportation. Consequently, increasing employment opportunities and economic growth from refining mineral resources.

Notwithstanding, Section 2(1), if during any assessment period a person holds a permit to export pursuant to Section 26(h) of the Diamonds Act covering that entire assessment period, that diamond beneficiator is exempted in respect of its unpolished diamonds under the cover of a bill of entry for export delivered during that assessment period to the extent those unpolished diamonds were previously offered but not sold at a diamond exchange and export centre.<sup>245</sup>

Therefore, the diamond beneficiator exempted from paying levy if during assessment period there was delivery new unpolished diamonds that were never sold at exchange centre or exported before. This leaving a vacuum for diamond beneficiator to escape

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<sup>243</sup>Section 12 (1) -(2).

<sup>244</sup>Section 2(1).

<sup>245</sup>Ibid.



levy liability on the grounds that the resources received under the cover of the bill and as such exempted from paying levy.

All the diamonds in South Africa have to be refined and produce as finished products to the global markets. Likewise, many diamond beneficiation companies have been launched to facilitate diamond beneficiation such as De Beers diamond beneficiation mining company that produce refined products from South Africa skilled innovators. Therefore, such initiatives require sufficient mineral resources to sustain production and improve its developmental growth.

## **2.8 Income Act Tax 58 of 1962 (ITA)**

In terms of Section 37E (1) ITA defines beneficiation process as:

“Any process approved by the committee whereby any base mineral which has been mined in a local country or any intermediate product which in the opinion of the committee was wholly or mainly produced in a local country, is processed to yield any intermediate product or final product, if in the opinion of the committee such process—

(a) adds substantial value to the value of the base mineral or intermediate product processed;

(b) is carried on a scale which makes it internationally competitive; and

(c) is carried on by the taxpayer with the intention of exporting at least 60 per cent (or such lesser percentage as the committee in any case determines) by value of the intermediate product or final product produced to a country other than a local country, but excludes any process which is either a simple purification process in consequence of which the base mineral or intermediate product in question remains unchanged except for the removal of impurities or a physical process resulting merely in a change of shape and any process which is a mining operation or any operation which is normally carried on in the course of mining operations.”<sup>246</sup>

According to Section 37E(1) ITA, vividly explains what is beneficiation and what it aims to achieve within the context of generating income towards economic growth of South Africa. Therefore, it is apparent, that the implementation of beneficiation by mining companies would contribute largely to growth in the mining industry as it is currently struggling and confronted with enormous challenges. It is further in accordance with

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<sup>246</sup>Section 37E (1) of ITA.

ITA that any base mineral mined in the country has to be processed into an intermediate product or final substantial added product in an international competitive market price. Certainly, the implementation of mineral resources beneficiation is the pave-way for mining industry development. Moreover, this process would amounts to massive infrastructure development, social development, economic growth, job creation and these leading to poverty eradication for the ordinary citizens in South Africa.

The Department of Trade and Industry pronounced in terms of Section 12i of ITA, tax incentives for research and development (R&D) funding Allowance Programme to accelerate economic growth through beneficiation activities in South Africa.<sup>247</sup> This pronouncement lead to increase in mining companies' investment towards R&D.<sup>248</sup>

## **Conclusion**

The Republic of South Africa have many pieces of legislation and policies which seek to ensure that there is meaningful participation of everyone particularly the Black majority persons in the mining activities. The legislative framework conferred ownership of mining resources under private ownership by mining companies for decades whereas the majority of South Africans were excluded from ownership and effective participation. Furthermore, the HDSA had been prohibited from holding rights or permits in the industry until the enactment of MA in 1991. However, ownership of mineral resources continued to control in majority by private owned white mining companies. Henceforth, this necessitated the need for transformation that would deal with the legacy of the past as required by Section 9(2) of the Constitution, 1996.

Wherefore, the promulgation of MPRDA in 2002, afforded State with custodianship of all the mineral and petroleum resources in the Republic of South Africa and all those mining companies given an option to apply for conversion of old order rights to new order rights. The court in *Agri SA v Minister of Minerals and Energy*, had declared this constitutional. Since 1994, the dawn of democracy many pieces of legislation had been enacted with the aim of transforming the mining industry to provide opportunity to the black people to participate.

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<sup>247</sup> Section 12I of ITA.

<sup>248</sup> Mining Weekly. Tax incentives to stimulate mineral beneficiation . Accessed at: [http://www.miningweekly.com/article/tax-incentives-to-stimulate-minerals-beneficiation-2013-03-08/rep\\_id:3650](http://www.miningweekly.com/article/tax-incentives-to-stimulate-minerals-beneficiation-2013-03-08/rep_id:3650). Retrieved on 25 August 2018.

MPRDA is the principal Act, which empowered the State through the minister administrative authority amongst others to transform the mining industry and also to prescribe method of beneficiation of mineral resources. The MPRRA requires that persons who extract minerals to pay royalty levy to benefit the people of South Africa. Secondly, PMA aims to ensure that precious metals is exploited in the best interests of South Africans. Thirdly, DELA aims impose the levy to those who export unpolished diamonds. This is to encourage beneficiation of mineral resources in South Africa. Fourthly, ITA explains how beneficiation is envisaged and it must be implemented for the benefit of South Africans. Fifthly, the MHSA acts as the protective tool on behalf of the employees to ensure that in the transition of beneficiation there is zero harm and precautionary measures imposed to avoid killings of workers on duty. Sixthly, the SDA through its agent MQA have the mandate to ensure that it deal with shortage of skills in South Africa by continuously training people to be skilled in order to supply the mining industry with the resource persons and resources they need to continue to contribute sustainably.

Therefore, it is clear that South Africa drafted may pieces of legislation with the imperative to ensure that the country's mineral resources are used for the benefit of all particularly the HDSA, realise socio-economic transformation, creation of employment and poverty alleviation in South Africa. Furthermore, the need for effective and efficient implementation of this legislative framework is sacrosanct to effect certainty in economic growth, sustainable employment and rapidly transformation in South Africa.

## CHAPTER 3: INTERNATIONAL TREATIES PROMOTING BENEFICIATION: MINERAL AND PETROLEUM RESOURCES BENEFICATION

### Introduction

South Africa is a member of the United Nations and international community, which have numerous sets of standards that have been put in place to regulate the conduct of its members. Bilateral or multilateral treaties regulate the international community. According to Dougard, a treaty is simply a written agreement between States and international organizations or nation-states.<sup>249</sup> It may also be referred to as an agreement, or amongst others, convention, protocol, declaration, charter, Covenant, pact, act, statute, exchange of notes, *modus vivendi* or even understanding between states.<sup>250</sup> The Republic of South Africa is also a party to most of the agreements; some of these agreements contain beneficiation of mineral resources.

According to Section 231(2) of the Constitution of 1996, it states that an international agreement or treaty binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces.<sup>251</sup> Exception is made in case of an agreement in terms of section 231(3) relating to amongst others technical or executive nature, or an agreement entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.<sup>252</sup>

The Vienna Convention on the Law of Treaties of 1969 (VCLT) is the main instrument that regulates treaties.<sup>253</sup> It states as to how treaties have to be made, amended, interpreted, operated and terminated.<sup>254</sup> The VCLT affords parties to a treaty, freedom to create specific substantive rights or obligations for the parties and wide discretion on decision making within their agreement.

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<sup>249</sup>Dougard, J. (2014). International law: A South African Perspective. 4<sup>th</sup> edition Juta and Co (Pty) Ltd. Cape Town. Page 25.

<sup>250</sup>Legal Dictionary. <https://dictionary.law.com/treaty/>. Accessed 18 September 2017.

<sup>251</sup>Section 231(2).

<sup>252</sup>Section 231 (3).

<sup>253</sup>United Nations. Treaty Series. (1969). Vienna Convention on the Law of Treaties of 1969. Available at: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>. Accessed on the 17 September 2017.

<sup>254</sup>Ibid.

The Constitution of the Republic of South Africa mandates the courts in terms of Section 39(2) when interpreting the Bill of rights to consider international law. Therefore, treaties that South Africa had ratified automatically become binding as international law and the court is bound to apply it whenever is relevant and subject to the Constitution. This chapter discusses various treaties that are relevant for the promotion of effective implementation of mineral resources beneficiation to the people.

### **1. UN General Assembly Resolution 1803 (XVII) of 1962**

In 12 December 1958, the General Assembly passed resolution 1314 (XIII) for the establishment of the Commission on Permanent Sovereignty over Natural Resources with the aim of conducting a survey on the status of permanent sovereignty over natural resources as fundamental constituency for self-determination and heritage of the people.<sup>255</sup> The commission further tasked with the mandate to provide recommendations, where necessary, for its strengthening, and decide otherwise where deemed in the interest of self-determination by nations over use of their natural resources.<sup>256</sup> Emphasis duties of employees and the importance of international cooperation in the economic development of developing countries.<sup>257</sup>

As a result, on the 14<sup>th</sup> of December 1962 the General Assembly passed resolution 1803 which according to its declaration 1, “the right of people and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned”.<sup>258</sup> Declaration 2 provides that, “the exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes should be in conformity with the rules and conditions which the people and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.”<sup>259</sup>

This means that the mineral resources in the country must be utilized for the benefit of the people and the development of every nation. Therefore, the adoption of mineral

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<sup>255</sup> General Assembly resolution 1314 (XIII) of 12 December 1958. “Establishment of Commission on Permanent Sovereignty over Natural Resources”

<sup>256</sup> Ibid.

<sup>257</sup> Ibid.

<sup>258</sup> General Assembly resolution 1803 (XVII) of 14 December 1962, “Permanent sovereignty over natural resources”.

<sup>259</sup> Ibid.

resources beneficiation strategy is the mechanism by South Africa to adhere to this resolution in the best interests of economic growth and well-being. The resolution gave ordinary people in South Africa to have self-determination on how their mineral resources have to be exploited and which foreign investment is allowed without international external forces. As such all the treaties which South Africa is a party to, must be within the conformity of the rules and conditions which the people of South Africa have freely considered as necessary or desirable for the national development and their well-being.

Furthermore, the United Nations Conference on the Human Environment Conference have called upon Governments including South Africa and its people to exert common efforts for the preservation and improvement of the human environment, for the benefit present and future generation prosperity. <sup>260</sup> The conference has resolved that in realising the protection of environment various principles must be observed. Therefore, according to principle 2 states that “the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.” <sup>261</sup>

Wherefore, the General Assembly resolution read with United Nations Conference on the Human Environment Conference provides the resolute mandate to South African government. Firstly, to exercise independence in drafting its own policies and secondly such policies must be in the interest of present and future generation of citizens. Further, most importantly natural resources are sacrosanct for nation building as such must be protected and it is the common interest of United nation that the protected and exploited of them be in the interest of the citizens of all the people of South Africa. Henceforth, it is against this background South Africa must implement beneficiation in the interest of its majority citizens.

## **2. International Trade Administration Act 71 of 2002 of South Africa**

The International Trade Administration Act (ITAA) of 2002 is an important legislation that regulates international trade agreements in South Africa. ITAA is the one which

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<sup>260</sup>United Nations Conference on the Human Environment, Stockholm, June 1972. Retrieved from <http://www.un-documents.net/unchedec.htm>. Accessed on the 23 March 2018.

<sup>261</sup>Principle 2 of United Nations Conference on the Human Environment, Stockholm declaration of 1972.

established the International Trade Administration Commission (ITAC). The Act in Chapter 3, part B solely describe the functions of this Commission and regulates the procedures of how it must operate.<sup>262</sup> Section 4 of ITAA provide the detailed provisions of how certain aspects of the Southern African Customs Union (SACU) agreement should be implemented in the Republic of South Africa.<sup>263</sup>

The ITAC is established by the Ministry of Trade and Industry in terms of Section 7 of ITAA as an “independent juristic person with jurisdiction throughout the Republic of South Africa subject only to the Constitution and the law; any trade policy treaty or directive issued by the Minister in terms of Section 5; and any notice issued by the Minister in terms of Section 6; and must be impartial and must perform its functions without fear, favour or prejudice. Each organ of state must assist the Commission to maintain its independence and impartiality, and to exercise its authority and carry out its functions effectively.”<sup>264</sup>

The commission aims to create an enabling environment for fair trade through efficient and effective administration of its trade instruments, and technical advice to the relevant government department in entering into international agreements. The commission is guided by tariff investigations regulations, which provides clarity and assist parties who wish to bring in a customs duty amendment application.<sup>265</sup> The effective implementation of beneficiation requires cooperation with international markets as final products have to be exported. As such the commission is tasked with the obligation to regulate tariffs with international markets. The existing dominant countries often imposed unreasonable tariffs as to hinder emerging companies to penetrate international markets with their beneficiated products.

The fundamental importance of ITAA is that regulate the procedures executive have to adhere to when entering into treaties with the international community. This limiting absolute powers of the executive and affording ordinary people an opportunity to be consulted before the treaty become effective. Therefore, ITAA offers consistency and conformity to the functions and formations of treaties in South Africa.

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<sup>262</sup>Section 15 – 22 of International Trade Administration Act 71 of 2002.

<sup>263</sup>Section 4.

<sup>264</sup>Section 6.

<sup>265</sup>International Trade Tariff Investigations Regulations. Available as Notice R397 in Government Gazette 28767.

### 3. Southern African Customs Union Agreement of 2002

The Union consists of the Governments of the Republic of Botswana; Kingdom of Lesotho; Republic of Namibia; Republic of South Africa and the Kingdom of Swaziland. South Africa became the signatory to this agreement in 2004 and it came into operation on the 15<sup>th</sup> July 2004.<sup>266</sup>

According to Article 2 of the agreement, its principal objectives are *inter alia*:

- (a) “To facilitate the cross-border movement of goods between the territories of the Member States;
- (b) to create effective, transparent and democratic institutions which will ensure equitable trade benefits to Member States;
- (c) to promote conditions of fair competition in the Common Customs Area;
- (d) to substantially increase investment opportunities in the Common Customs Area;
- (e) to enhance the economic development, diversification, industrialization and competitiveness of Member States;
- (f) to promote the integration of Member States into the global economy through enhanced trade and investment;
- (g) to facilitate the equitable sharing of revenue arising from customs, excise and additional duties levied by Member States; and
- (h) To facilitate the development of common policies and strategies”

Therefore, the SACU agreement serves as a vehicle to strengthen Southern Africa’s regional unity and on the same breath facilitate economic development, integration and investment. Henceforth, the majority of the people of Southern Africa would benefit equitably from these trade relations established. The SACU agreement is very significant towards advancement and implementation of mineral resources

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<sup>266</sup>Notice R800 in Government Gazette 26537 of 2 July 2004.



beneficiation, as it opens the doors between member States to trade amongst themselves on cost effective manner.

The parties committed to ensure that the abovementioned objective outlined in Article 2 of SACU agreement are realised and fulfilled with the region. In light of the above, the member States in terms of Article 18 agreed for allowance of free movement in relation to domestic products. Article 18(1) established a Common Customs Area, in which it affords members States goods that they have grown, produced, manufactured, or imported from the area of one Member State to the area of another member of State, free from customs duties and quantitative restrictions, except as provided elsewhere in this Agreement.<sup>267</sup> This affording members States such as South Africa to have an opportunity to produce their mineral resources to the last stage of beneficiation with the offer to be imported to one member State to another free from exorbitant customs duties and tariffs.

However, notwithstanding the provisions of free movement within the States, Article 18(2) allows parties to in exceptional circumstances to impose restrictions on imports or exports in accordance with national laws and regulations for the protection of amongst others the environment and exhaustible natural resources.<sup>268</sup> This means that the agreement does not supersede the national laws and regulations of members States because they still retain their self-determination and sovereignty at all times for the benefit of the people.

In terms of SUCA, members States are allowed to have free trade relationships with fellow members States, which is pivotal and cost effective to import or export any goods. Further, significantly, SUCA allows members States to have their own unilateral terms from their national regulatory legislation to protect their environment and parties when trading with one another, which must observe such imposed restrictions. Similarly, when dealing exhaustible natural resources, the member States need to ensure that mineral resources are exploited for the benefit of their citizens. South Africa has the autonomous power to ensure that beneficiation is implemented

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<sup>267</sup>Article 18(1).

<sup>268</sup>Article 18(2).

to the last stage and moved to members States at value added price, with the benefit of free movement agreement encapsulated by SUCA.

In terms of Article 25, SUCA affords Members States rights in certain circumstances to prohibit or restrict the importation into or exportation from its area of any goods for one of the following reasons inter alia: economic, social, cultural or any other reason as may be agreed upon by the Council.<sup>269</sup> Except in so far as may be agreed upon between the Member States from time to time, the provisions of this Agreement shall not be deemed to suspend or supersede the provisions of any law within any part of the Common Customs Area which prohibits or restricts the importation or exportation of goods.<sup>270</sup> Therefore, member States are still afforded the right to deny or allow any importation or exportation for any other reasons they deem fit for their economic or social development. These afford member states discretion to deny goods exportation of goods that may cause detrimental consequences towards the economy of their country such as would destroy local markets or pose negative impacts on cultural practices of the country.

Summarily, firstly the member States council have the authority to restrict importation of certain goods to another members State or viz versa. Secondly, as an alternative the bilateral or multilateral consensus may be reached between Member States on restriction of importation of certain goods or as a result of domestic laws prohibitions. Both the two exception according to Article 25(3) its main purpose is to protect domestic industries of member States in producing or either manufacturing variety of goods.<sup>271</sup>

SUCA agreement bears an imperative role to transform Southern region of Africa, however its implementation requires maximum cooperation of all member States. Henceforth as it is vividly stipulated in article 23 that all member States shall respond appropriately, including arrangements regarding customs co-operation, to ensure that the provisions of this agreement are effectively and harmoniously applied within member States trade practices with one another.<sup>272</sup> Member States shall take such measures as deemed necessary to facilitate the simplification and harmonization of

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<sup>269</sup>Article 25(1).

<sup>270</sup>Article 25 (3).

<sup>271</sup>Article 25(3).

<sup>272</sup>Article 23.

trade documentation and procedures.<sup>273</sup> This article is mandatory for all parties to act and implement the SUCA as required accordingly.

This ensures that all member States trade practices are clearly made available on public domains, to be a guiding tool for countries such as South Africa that opt for beneficiation of mineral resources to be prepared for customs duties and practice of every members States that may be required.

The Republic of South Africa serves as a leader of SUCA with four other countries, which are the Government of Botswana, Lesotho, Namibia and Swaziland. Their Infant Industries are protected in terms of Article 26 from paying high customs duties and tariffs.<sup>274</sup> Meaning, temporary measures or additional duties are imposed on imported goods into infant industrial countries area. Thus, to enable them to survive competition from dominant globally established other producers or manufacturers in the Common Customs Area. This it is effected through duties and levies imposed on goods grown, produced or manufactured in the Common Customs Area. For instance, products imported from outside that area, irrespective of whether the latter goods are imported directly or from the area of another Member State are subject to payment of the customs duties applicable to such goods on importation into the Common Customs Area.

South Africa is not regarded as infant market country and therefore is not protected by the SUCA agreement. This is a hindrance to mining companies that aims to facilitate effective implementation of beneficiation of minerals. As these South Africa emerging companies intent to export finished products to member States of SUCA on the upper hand against international market competitors.

Rail and road transport obviously have to be utilized for the transportation of goods produced or manufactured from one country to another. Accordingly, for the benefit of member states in terms of Article 27 the transit through their areas of goods imported from outside the Common Customs Area to or exported to a State outside the Common Customs Area from the areas of other Members of States shall not be subject to transport rate discrimination by public authorities.<sup>275</sup> Thus being beneficial to all

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<sup>273</sup>Article 23.

<sup>274</sup>Article 26.

<sup>275</sup>Article 27.

members of States, since they would be able to transport their grown, produced or manufactured goods within themselves free from transportation rate costs. These beneficial to South African companies when transporting products manufactured from mineral resources in South Africa to other member States.

Article 41 reserves the right to protect member states from any form of Unfair Trade Practices.<sup>276</sup> The commission shall advise the council on developing policies and instruments to address unfair trade practices, which are amongst others: various deceptive, fraudulent or unethical methods to obtain business between Member States. This is to ensure that in the process of facilitating mineral resources beneficiation amongst the countries, parties are protected from any form of malpractice and fraudulent activities.

#### **4. EFTA- SACU Free Trade Agreement of 2006**

The member states of the European Free Trade Association (EFTA) are Iceland, Liechtenstein, Norway and Switzerland and the Southern African Customs Union (SACU) members who negotiated a free trade agreement (FTA) in order to improve their relationship and market access.<sup>277</sup> The agreement was signed in June 2006.<sup>278</sup> The Agreement consists of seven Chapters with 44 Articles and 8 Annexes. It covers trade in goods and lays the foundation for a further engagement of the Parties with regard to the following intellectual property; - competition; trade in services; investment; public procurement; and cooperation and assistance.<sup>279</sup> According to Article 33 the supervision and administration of the Agreement will be done by an established Joint Committee that comprises of representatives from member States of both agreements, and provisions are included providing for consultations and dispute settlement procedures.

The agreement focuses more on tariff reduction on selected goods ranging from industrial goods and processed agricultural products with the choice of creating other

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<sup>276</sup>Article 19.

<sup>277</sup> Free Trade Agreement between the EFTA States and the SACU States. (2006). Retrieved from <http://www.sacu.int/docs/tradeneg/efta-fta2006.pdf>. Accessed on the 20 September 2017.

<sup>278</sup>*Parliamentary Monitoring Group*. (2006). Free Trade Agreement between European Free Trade Association & Southern African Customs Union: Approval for Ratification. Available at: <https://pmg.org.za/committee-meeting/7553/>. Accessed on the 20 September 2017.

<sup>279</sup>*Fundira, T.* (2007). The SACU-EFTA Agreement: current trading relationship and implications. Tralac trade brief. Page 3.

bilateral agreements with individual EFTA States. This is a beneficial treaty as it joins numerous countries from two international agreements to external agreement that would benefit all the parties. As such this treaty is very important to South Africa as it paves the way for it to export finished value added mineral resources products to EFA states.

#### **5. Southern African Development Community (SADC) Free Trade Agreement of 2008**

SADC agreement envisages the establishment of a Free Trade Area (FTA) in the SADC region and its objectives are to further liberalise intra-regional trade in goods and services; ensure efficient production; contribute towards the improvement of the climate for domestic, cross-border and foreign investment; and enhance economic development, diversification and industrialisation of the region.<sup>280</sup> SADC treaty instigated the creation of FTA in Southern of Africa, as it prompted Southern African Development Community<sup>281</sup> to agree on largely tariff free market to the exclusion of only Angola and Democratic Republic of Congo in the SADC region who did not ratify the treaty. The agreement brings African countries in the SADC region together on free trade agreement on customs and duties, this advancing the economic growth of Africa. As a result, member States enjoys the benefits of free trade within SADC FTA. This ensures hegemony in implementation of beneficiation mineral resources in the region.

Article 2 of the agreement states that the objective of this treaty is amongst others between countries and relevant stakeholders is to achieve the following: increased domestic production; greater business opportunities, higher regional imports and exports, access to cheaper inputs and consumer goods, greater employment opportunities, more foreign direct investment and joint ventures.<sup>282</sup> According to Article 2 the parties to these treaty aims to develop the SADC region into free trade area, that would improve economic growth, create employment, alleviate poverty and improve business opportunities in the SADC region. This further allows mineral

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<sup>280</sup>Protocol on trade in the Southern African Development Community (SADC) Region. 1996. Maseru, Lesotho.

<sup>281</sup> Member states of SADC that signed the agreement are Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

<sup>282</sup>Article 2.

resources value added products to be sold within the member states at free trade terms without incurring exorbitant levies.

According to Sandrey taking into consideration statistics from international Trade Commission (ITC) and World Trade Organisation,<sup>283</sup> SACU concludes that South Africa dominates both SADC and intra-SADC trade, therefore this treaty is extremely significant for the economic development of South Africa.<sup>284</sup> South Africa is amongst the five partners of these treaty having limited bilateral intra-regional SADC export trade and even more limited bilateral intra-regional SADC imports reported with mineral resources, which are largely exported to the global markets. South Africa has for many years dominated the international markets on production of mineral resources especially with regard to minerals such as gold and platinum group metals. However, in the past decade production have declined, these being overtaken by global competitors such as China.<sup>285</sup> Therefore, it would be to the advantage of South Africa to target African countries with their produced value added products with the aim of improving African economy and their well-being.

## **6. Trade, Development and Cooperation Agreement (TDCA) Additional Protocol on Croatia Accession to European Union of 2004**

The Trade, Development and Co-operation Agreement (TDCA) is the ambitious free trade agreement ever concluded with third world country that covers 90% of bilateral trade between the EU and South Africa.<sup>286</sup> The agreement is meant to provide for the liberalisation of 95% of the EU's imports from SA within ten years, and 86% of South Africa's imports from the EU in 12 years, which came into full effect in 2012.<sup>287</sup> Since 2004 when it was provisionally implemented there was more than 231% increase in

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<sup>283</sup>WTO. (2013). Statistics. International Trade and market access data. Available online; [www.wto.org/statistics](http://www.wto.org/statistics). Accessed on the 22 September 2017.

<sup>284</sup>SACU.(2010). Merchandise trade agreements statistics 2015. Available: [http://www.sacu.int/docs/reports/2012/merchandise\\_trade\\_statistics.pdf](http://www.sacu.int/docs/reports/2012/merchandise_trade_statistics.pdf). Accessed on the 22 September 2017.

<sup>285</sup> Wayne M. M. (2018). China's Economic Rise: History, Trends, Challenges, and Implications for the United States. Congressional research service. Page 2-8.

<sup>286</sup>Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, on the other part. Official Journal of the European Communities. 4.12.1999. Page 3.

<sup>287</sup>Kruger, N. (2013). Portfolio Committee on Trade & Industry. Additional Protocol to SA/EU Trade Development and Cooperation Agreement (TDCA). Presentation page 3.

trade between SA and EU by 2014.<sup>288</sup> The agreement relates to number of issues from competition and intellectual property, financial assistance, developmental cooperation and economic cooperation.<sup>289</sup> Since the signing of the agreement between EU and South Africa, there had been a number of countries joining the EU which have impacted the trade agreement, recent addition to the EU was Croatia in 2013.<sup>290</sup> Hence, the meeting for extension of the TDCA to include Croatia. It is worth noting that EU enlargement creates greater opportunities for South Africa to export to different countries. However, this is detrimental to domestic markets as they would face competition from cheaper products from EU countries. Therefore, when entering into these treaties the government must strive to protect domestic markets and prevent flood of cheaper foreign products to destroy local economy.

TDCA is progressive free trade agreement that open doors for greater economic opportunities for South Africa. For example, South Africa exports majority of its mineral products to Croatia such as base metals, cement and asbestos; while Croatia exports to South Africa textiles, machinery and mechanical appliances and vehicles. This would advance both countries economic opportunities and creation of employment. This paramount treaty ensures that the mineral resources in South Africa are transformed to value addition chain to the last stage of beneficiation and are exported to all EU members without having to pay exorbitant export duties to the benefit of South Africans.

## **7. Economic partnership between Southern Africa Customs Union (SUCA) and European Union (EU) of 2016**

SUCA is a free trade multilateral agreement between five countries whereas EU is the world country with 27 members States in a free trade agreement with South Africa. The agreement between SUCA and EU have not yet been finalized but seeks to forge economic partnership agreement for their member States. South Africa is on a mission

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<sup>288</sup> Makue, E. (2015). Trade, Development & Cooperation Agreement (TDCA) Additional Protocol on Croatia Accession to European Union. Parliamentary Monitoring Group. Available: <https://pmg.org.za/committee-meeting/21531/>. Accessed 22 September 2017.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid.

to achieve unity and strengthen cooperation between member States.<sup>291</sup> Moreover, in this case its core interests have been to harmonise trading barriers between SACU and EU, this would secure effective implementation of beneficiation to the rest of the world. The implementation would replace trade chapter within TDCA. The new economic opportunities would accrue better than TDCA by enforcement of SADC-EU EPA.

### **8. The African Growth and Opportunity Act 106 of 2002(AGOA)**

The African Growth and Opportunity Act (AGOA) is a United States Trade Act, enacted on 18 May 2000 as Public Law 106 of the 200<sup>th</sup> Congress and it has since renewed to 2025.<sup>292</sup> Section 102 of AGOA provides that the Congress found it of mutual interest for the United States and the countries of Sub-Saharan Africa to promote stable and sustainable economic growth and development in sub-Saharan Africa.<sup>293</sup> AGOA provides South Africa with a duty-free market access to the United States amongst qualifying Sub-Saharan African countries on preferential products such as natural resources, vehicles and steel.<sup>294</sup> AGOA treaty has covered almost 90% of South African exports into US duty free for the past 15 years creating about 62 000 jobs in South Africa.<sup>295</sup> Therefore, AGOA is also one of the agreements, which South Africa utilises to market its AGOA products to the US with duty free, this making it cost effective. As the country constantly enjoy preferential access to the US market thorough AGOA to the larger extend.

AGOA is a unilateral performance agreement created by USA for Sub-Saharan African countries and reserves the right unilaterally to withdraw from it or circumvent it. <sup>296</sup> The African trade ties with the US have doubled since the agreement in 2000, making the US being as the potential country that can import more value added products from

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<sup>291</sup> *European Commission*. Retrieved from <http://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/>. Accessed on the 19 November 2017.

<sup>292</sup> Trade and Development Act 106 of 2002.

<sup>293</sup> Trade and Development Act 106 of 2002. Section 2.

<sup>294</sup> *Brand South Africa*. 2015. AGOA benefits both South Africa and US: Davies. Retrieved, <https://www.brandsouthafrica.com/investments-immigration/business/trade/agoa-benefits-both-south-africa-and-us-davies>. Accessed 20 November 2017.

<sup>295</sup> *Ibid*.

<sup>296</sup> *Prinsloo, C.* (2016). South Africa Institute of International Affairs. AGOA and the future of US – Africa trade relations. Retrieved from: <http://www.saiia.org.za/opinion-analysis/agoa-and-the-future-of-us-africa-trade-relations>. Accessed on the 20 November 2017.



South Africa. However, US unilateral power towards the agreement makes it an unpredictable and unsustainable trade partner for long-term implementation of beneficiation of mineral resources.

AGOA is unilateral trade policy concessions governing US-Africa trade and investment relations.<sup>297</sup> This treaty has since, increased importation of goods from US, consequently with the potential risk of destroying domestic markets. Recently, in the agricultural sector, the resistance by South Africa to import US poultry, they reverted by threatening to withdraw its trade benefits with South Africa within 60 days if does not resolve outstanding technical, health and safety issues.<sup>298</sup> Fortunately, South Africa resolved all those issues; however, this demonstrating that the US have the potential to pull out of the agreement anytime when it is in dispute with other AGOA countries. This calling on South African governing to ratify AGOA trade agreement to be binding to member States for mutual interest. Furthermore, strengthen the relations between US-South Africa.

## **9. The Beijing Declaration on the establishment of a Comprehensive Strategic Partnership between the Republic of South Africa and the People's Republic of China**

South Africa and the People's Republic of China have strengthened their relationship for the better for more than two decades in different aspects from diplomat's ties which led to strong economic participation and trade relations developed.<sup>299</sup> Several events have led to the signing of this comprehensive partnership emanating from bilateral signing of the establishment of a Bi-National Commission in 2001.<sup>300</sup> Secondly, the signing of the elevation of bilateral relations to a Strategic Partnership in 2004.<sup>301</sup> Thirdly, the signing of a Programme for Deepening Strategic Partnership in 2006.<sup>302</sup> Consequently, in August 2010 the South African government officials and strong

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<sup>297</sup> *Chinembiri, E.* (2013). Trade and Industrial Policy Strategies. South Africa Trade Relations and Agreements Workshop. South African Trade relationship with the European Union and the United States explored.

<sup>298</sup> *Ibid.*

<sup>299</sup> Relations between China and Africa Information of the Ambassador About China – South Africa Relations. (2004). Available at: <http://www.fmprc.gov.cn/ce/ceza/eng/zghfz/zngx/t165290.htm>. Accessed 15 September 2017.

<sup>300</sup> *Ibid.*

<sup>301</sup> *Patel, E.* (2009). Minister of Economic Development, Republic of South Africa. Defining the Strategic Partnership between South Africa and China. Speaking at International Centre for trade & sustainable Development & Gordon Institute of Business science (GIBS), University of Pretoria on the 23 November 2017.

<sup>302</sup> *Ibid.*

business delegations led by Former President Zuma visited the People's Republic of China. Resulting, into successful co-signing of declaration on Comprehensive State Partnership (CSP).<sup>303</sup> The CSP consist of 38 bilateral corporate agreements between China and South Africa in different sectors of the economic development including trade, investment and mineral exploration.<sup>304</sup>It through CSP that the trade relation between South Africa and China strengthened in a mutual interest for both countries.

CSP articulated more broadly from its founding values, which are equality, mutual benefit and common developments, therefore China and South Africa committed to work towards the following:<sup>305</sup>

- Balanced trade relations,
- Encouraging trade in manufactured value – added products,
- Increase trade and investment Missions,
- Establishment of a Joint Working Group on trade statistics,
- China to encourage its enterprises to increase investment in SA's manufacturing industry,
- Promote value-adding activities in close proximity to the source of raw materials,
- Beneficiation at source be facilitated,
- Cooperate and provide mutual technical support in the areas of green economy, skills development and industrial financing,
- Encourage companies from both countries to explore cooperation opportunities in infrastructure and construction projects such as roads, railways, ports, power generation, airports and housing.

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<sup>303</sup>*Xinhua*. People's Daily Online. (2010). China, South Africa upgrade relations to comprehensive strategic partnership. Retrieved from: <http://en.people.cn/90001/90776/90883/7116239.html>. Accessed on the 20 September 2017.

<sup>304</sup>*Ibid*.

<sup>305</sup>*Department of International Relations and Cooperation*. (2010). Remarks by the Minister of International Relations and Cooperation, Ms Maite-Mashabane to a Media Briefing today, 2 September 2010, in Cape Town. Retrieved from: <http://www.dirco.gov.za/docs/speeches/2010/mash0902a.html>. Accessed on the 20 September 2017.

The state visit also resulted in successful co-signing of Memorandum of Understandings (MOU) in different key sectors of the economy in the mining industry. In addition, the parties signed MOU on the establishment of the China-South Africa Minerals Cooperation Sectoral Committee to facilitate mineral exploration and beneficiation of mineral resources to the last stage.<sup>306</sup> This means that China agreed to assist South Africa with the implementation of beneficiation of mineral resources. It is of paramount importance for South Africa to utilise China as mutual trade partner to accelerate skills development and infrastructure development within the path of implementing beneficiation of mineral resources. The parties agreed in their MOU, to establish of China-South Africa Sectoral Committee on Energy Matters and MOU on energy cooperation, these MOUs strengthened China-South Africa cooperation towards realization of ensuring that beneficiation of mineral resources of South Africa is achievable. Wherefore, the commitment by China towards implementation of beneficiation bears an imperative to advance skills development, infrastructure development and business opportunities especially in South Africa.

The parties agreed to hold the Bi-National Commission every two years at the level of Deputy Presidents as well as annual Ministerial consultations.<sup>307</sup> The respective Presidents will meet at bilateral and multilateral level when the opportunity arises. The two countries have further signed 5 to 10 Year Strategic Framework on Cooperation in 2014, which serves as an overall implementation plan with respect to all existing agreements and frameworks including trade.<sup>308</sup>

South Africa and China cooperation within international communities aimed at advancing development from the strategic group of Brazil, Russia, India, China and South Africa usually called (BRICS); the BASIC Group on Climate Change (Brazil, SA, India and China), the Group of 77 + China and the G20. <sup>309</sup>South Africa also Co-Chairs the Forum on China-Africa Cooperation (FOCAC). China's involvement in exploitation

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<sup>306</sup>Ibid. Also Available at United Nations Public Administration Network. 2010.SA: Nkoana- Mashabane by the Minister of International Relations and Cooperation.

<sup>307</sup>Ibid.

<sup>308</sup>Media Remarks by the former Minister of International Relations and Cooperation, Ms Maite Nkoana-Mashabane, following Bilateral Consultations with Mr Wang Yi, Minister of Foreign Affairs of The People's Republic of China, 14 April 2015, Pretoria. Available at: <http://www.dirco.gov.za/docs/speeches/2015/mash0414.htm>. Accessed on the 21 September 2017.

<sup>309</sup>Yu Hong – Yuan, ZH Song – Li. Towards Paris: China and climate change negotians. Ke Ali: Advancing Research Enrolling Science.

of African natural resources have since significantly increased in the past two decades being at the forefront of advancing industrialization, access to oil and other raw materials.

The relationship between China and South Africa have turned out to be effective and mutually beneficial. While addressing China-SA Business forum in Beijing President Ramaphosa acknowledged the role China is playing towards South Africa's developmental agenda and encouraged South Africans to beneficiate their mineral resources to their last stage of value addition. To import value added products and labour intensive products as these would improve the economy and create employment.<sup>310</sup> He welcomed China's initiative to increase finance towards local beneficiation of mineral resources in South Africa, which would accelerate development in the manufacturing industries.<sup>311</sup>

Recently, has been reported that China, finance local beneficiation through the development of a metallurgical complex in Musina, which aims to increase investment and create more employment opportunities for South Africans.<sup>312</sup> The Department of Trade and Industry reported that these energy and metallurgical cluster within the Musina - Makhado special economic zones is now at implementation stage set to create direct 22 000 job opportunities.<sup>313</sup>

## **10. Trade Agreement between Zimbabwe and South Africa**

Zimbabwe and South Africa have co-signed Bi-national commission agreement and Memorandum of Understanding on various aspects at Zimbabwe on the 08<sup>th</sup> April 2015.<sup>314</sup> The bilateral agreements included amongst others on trade cooperation as South Africa is the largest investor in Zimbabwe and the countries agreed on untapped mining and energy among other trade opportunities.<sup>315</sup> The former President of

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<sup>310</sup> SA News. (2015). Retrieved: [www.sanews.gov.za/south-africa/south-africa-china-expand-trade](http://www.sanews.gov.za/south-africa/south-africa-china-expand-trade). Accessed on the 24 September 2017.

<sup>311</sup> Ibid.

<sup>312</sup> IOL News. (2015). China-SA ties grow stronger. Retrieved: <https://www.iol.co.za/capetimes/opinion/china-sa-ties-grow-stronger-1886337>. Accessed on the 24 September 2017.

<sup>313</sup> Ensor, L. (2017). Business Day. Signed operator deal gives Musina-Makhado SEZ energy cluster green light. Available at <https://www.businesslive.co.za/bd/companies/industrials/2017-03-06-signed-operator-deal-gives-musina-makhado-sez-energy-cluster-green-light/>. Accessed 24 September 2017.

<sup>314</sup> SA News. (2015). South Africa sign five bilateral agreements. Available at: <https://www.sanews.gov.za/africa/sa-zimbabwe-sign-five-bilateral-agreements>. Accessed on the 25 November 2017.

<sup>315</sup> Ibid.

Zimbabwe alluded that both countries must strengthen their efforts towards commitment for beneficiation of their mineral resources, to ensure that their vast mineral deposits utilized in a higher integrated manner and desist from producing them in a primary level but on a tertiary level to ensure that they are beneficial to their countries.<sup>316</sup> This would improve economic growth of both countries, alleviate poverty and create employment for the marginalised.

### **11. Generalised System of Preferences (GSP) of 1974**

GSP is the unilateral preferences granted under the enabling clause of the World Trade Organisation (WTO) that are not contractually binding upon the benefactors offered to South Africa as a developing country by the EU, Norway, Switzerland, Russia, Turkey, the US, Canada and Japan.<sup>317</sup> Therefore, products from South Africa as a developing country qualify for preferential market access in the world especially in the specified industrial and agricultural products.<sup>318</sup> South Africa value added products enjoy preferential treatment in the world trade market as a developing country market.<sup>319</sup> The Trade Act of 1974 allowed products from South Africa to be duty free in order to benefit economically.<sup>320</sup>

### **12. Rules of Origin Guides / Trade Agreements (SARS)**

Rules of origin are the criteria that are used by South African Revenue Service (SARS) to define where a product was made.<sup>321</sup> They are an essential part of international trade rules because of the policies that “discriminate” between exporting countries.<sup>322</sup> All the trade agreements are discussed and trade tariffs on imports and exports are conducted by SARS.<sup>323</sup> SARS is an important institution to determine

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<sup>316</sup> Ibid.

<sup>317</sup> US Trade Act of 1974. Also Available at Department of Trade and Industry. 2017. Retrieved from: [https://www.thedti.gov.za/trade\\_investment/ited\\_trade\\_agreemnts.jsp](https://www.thedti.gov.za/trade_investment/ited_trade_agreemnts.jsp). Accessed on the 22 September 2017.

<sup>318</sup> Section 4101, Extension of Generalized of System of Preferences. Section 3100 of Trade Benefits under African Growth Opportunity Act.

<sup>319</sup> Ibid.

<sup>320</sup> Office of the United States Trade Representative. Generalised System of Preference. Retrieved from: <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp>. Accessed on the 23 November 2017.

<sup>321</sup> SARS. (2008). External Reference Guide to Understanding Preferential Rules of Origin.

<sup>322</sup> SARS. Rules of Origin. Retrieved at: <http://www.sars.gov.za/ClientSegments/Customs-Excise/Processing/Assessment/Pages/Rules-of-Origin.aspx>. Accessed on the 23 November 2017.

<sup>323</sup> Ibid.

whether certain trade agreements are beneficial to the economic growth of South Africa or not.

### **13. African Mining Partnership (AMP)**

African mining partnership (AMP) launched in 2014 with the mandate of advancing the objectives of the New Partnership for Africa's Development (NEPAD), through mining sector in the quest for economic development in Africa.<sup>324</sup> Partnership formulated by 21 ministers from African countries at the occasion of the ninth Investing in Africa Mining Indaba held in Cape Town in February 2004.<sup>325</sup> Amongst the countries representatives Ghana was elected as the Chairperson, South Africa the secretariat and projects leader, the other countries are Mali, Tanzania, Madagascar, DRC, Angola, Namibia, Egypt, Zimbabwe, Nigeria and Senegal.<sup>326</sup> These countries assigned with projects to spearhead in a quest to ensure significant growth in Africa's economy within its available mineral wealth.

AMP have successfully merged with African Union (AU), the partnership would greatly increase access to AU financial resources and benefit of Africa's mineral wealth for its own people. The merger escalates the standing of AMP and it would greatly attract more African Countries to participate. Furthermore, the fact that AMP formulated by African ministers responsible for mining, it strengthen African Unity towards mineral wealth beneficiation agenda and it provides wide range of opportunities for networking.<sup>327</sup>

The member States of AU-AMP partnership agreed to various initiatives that must be implemented as the road map to alleviate poverty and improve the standard of living of Africans in the continent. These include:<sup>328</sup>

1. Beneficiation: to achieve this, they established beneficiation framework intended to maximise the economic benefit of mineral value addition and to

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<sup>324</sup>South African government news. (2010). African mining partnership. Retrieved from <https://www.gov.za/african-mining-partnership>. Accessed on the 24 November 2017.

<sup>325</sup> Mining Weekly. (2004). Retrieved from: <http://www.miningweekly.com/article/new-african-mining-partnership-announced-2004-02-12>. Accessed on the 24 November 2017.

<sup>326</sup>Ibid.

<sup>327</sup>South African government news. (2010). African mining partnership. Retrieved from <https://www.gov.za/african-mining-partnership>. Accessed on the 24 November 2017.

<sup>328</sup>Ibid.

increase Africa's productive capacity, revenue generation and employment creation from the exploitation of mineral resources within the continent.

2. Small-scale mining: base case studies in respect of marketing, financing as well as safety, health and environment strategies for artisan and small-scale mining was finalised.
3. African mining policy framework: A mining policy framework for Africa, which seeks to harmonise Africa's mining regulatory environment to attract investment and achieve socio-economic development.
4. Sustainable Development Charter: Sustainable development charter to provide a collective framework for a vision on "sustainable development for Africa" in the mineral and the mining sector was established.

Therefore, it is apparent that through this partnership African people would enjoy the proceeds of exploitation of their mineral wealth. Africa as a continent is faced with enormous social ills ranging from poverty, illiteracy, unskilled labour, inadequate infrastructure and lack of development, all this constitute the urgent need for African States to unite and road map the framework to heal them. In South Africa the Department of Mineral Resources through beneficiation economics Directorate participate in the African Mining Partnership activities, with other member States.<sup>329</sup>

## **Conclusion**

Section 231(2) of the Constitution, states that an international agreement or treaty in the Republic of South Africa is binding immediately after being ratified. The courts are thereof bound in terms of Section 39 (2) of the Constitution to apply international law whenever is relevant subject to the constitution. South Africa has entered into international treaties with number of international communities. Thus, proving that international markets are highly regulated and countries need to align their trade policies with global markets. Accordingly, in South Africa international agreements are established within the pyramids of ITAC and approved by SARS in accordance with rules of origins in trade relations between South Africa and other nations.

Wherefore, South Africa has entered into numerous treaties with its neighbouring countries through SACU agreement, which is extended to European countries through

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<sup>329</sup> *Department of Mineral Resources*. Beneficiation Economics Directorate. Retrieved from: <http://www.dmr.gov.za/beneficiation-economics.html>. Accessed on the 11 December 2017.

EFTA and SACU agreements for its members. South Africa has further entered into free trade agreement with SADC countries excluding only Angola and DRC.

In all these trade agreements South Africa enjoys free trade agreements and it has started to benefit from the sale of its vast mineral deposits to the global markets because of these agreements. However, some trade agreements are hindering effective implementation of local beneficiation such as AGOA agreement, which is a unilateral trade agreement by US to African States. It is unpredictable and unsustainable as such South Africa government should take the initiative to re-negotiate it.

South Africa have international trade obligations and bilateral investment treaties with more than 100 other countries, which was entered long ago, therefore they make beneficiation difficult to be achieved equitably and drive socio-economic transformation in the country.<sup>330</sup> The government must take advantage of the Comprehensive Strategic Partnership with Brazil, India, China and Russia as known as (BRICS) to support investment in beneficiation in South Africa as well as access to markets and amend their international trade treaties to support beneficiation.<sup>331</sup>

The consequences of reckless using of natural resources have negative effect to the International trade and market prices of raw materials and other goods, and the productivity and competitiveness of the economy<sup>332</sup> South Africa is capacitated with immense mineral resources that dominates the global markets as amongst the largest exporters of unrefined mineral resources. Thus having the potential to implement local beneficiation with its available resources, which bears the potential to create stable direct and indirect employment, contribute significantly towards investment, transformation and developmental goals.

South Africa pride itself with vast control of mineral resources beneath the soil such as ample platinum group metals and gold and it attracts capital investment. Therefore, it is necessary to improve productivity for local beneficiation in a less cost effective

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<sup>330</sup>*Doke L(ed)*. (2014). Mail and Guardian Online news: Beneficiation the good, the bad and the necessary. Retrieved from <https://mg.co.za/article/2014-02-12-beneficiation-the-good-the-bad-and-the-necessary>. Accessed on the 24 November 2017.

<sup>331</sup>*Geldenhuys, D*. The comprehensive strategic partnership between South Africa and Russia. Department of Politics and International Relations, University of Johannesburg, South Africa. Page 123.

<sup>332</sup> *OECD*. Above.



and reliable manner; the need for stable labour relations; progress on technology; the smart tape; available energy and importantly the need for collaborative international market developmental approach strategic initiative to resolve challenges confronting mining industry.<sup>333</sup>

South Africa has the advantage of having vast control of PGM's which needed globally in the rising potential investment, jewellery demands, development and innovation of new technologies manufactured through PGM. However, this viewed against the rising international markets from EU, Asia and China.

It is worth noting that, International commodity markets are growing, with increasing mobility of production factors and closer linkages among countries and regions. This has been supplemented by highly volatile commodity prices and increasing competition for many raw materials.<sup>334</sup> South Africa, is amongst the international key role players in the gold market and platinum group metals, as the competition escalates, it has to value add its mineral resources, to be exported at to member States to trade agreements.

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<sup>333</sup> *Chambers of mines of South Africa*. (2016). Future of the South African Mining Industry. Page 14.

<sup>334</sup> OECD above.

## CHAPTER 4: CHALLENGES BEING ENCOUNTERED IN IMPLEMENTATION OF MINERAL RESOURCES BENEFICIATION LEGISLATION IN SOUTH AFRICA

### Introduction

The mineral wealth deposits of South Africa are the backbone of its economic growth and ranked amongst the leading countries with largest mineral reserves.<sup>335</sup> Therefore, South Africa contribute meaningful role towards exportation of mineral resources and mining industry development in the global markets.

The beneficiation of minerals and petroleum resources creates ample opportunities towards the development of human well-being and their desired enormous needs, which include the following:

1. The creation of mechanical technology and improvements;
2. The minerals extraction provide energy development, for example from natural gas found in Egoli gas project and demonstration of platinum beneficiation projects;<sup>336</sup>
3. The metals and minerals utilized to create smart technologies from copper, Gold and *inter alia* chrome;
4. The minerals resources significant for creation of attractive buildings and places such as the dome, Eiffel Tower and stadiums, which are beneficial for tourism industry;<sup>337</sup>
5. The metals and minerals necessary for infrastructure development such as wind turbin, which made form steel and cooper.<sup>338</sup>
6. Further, amongst others the manufacturing industry depends largely on mineral resources in producing different products.

Therefore, Beneficiation in summary means transformation, value addition or downstream beneficiation of a mineral and petroleum resource (or a combination of minerals) to a higher value product, over baselines to be determined by the Minister,

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<sup>335</sup> Rungan, S.V et al. (2005). Incorporating BEE into the new Mineral law framework for the South Africa Mining Industry, The journal of the South African Institute of Mining and Metallurgy, Volume 105. Page 735.

<sup>335</sup> White paper. (1998). Minerals and Mining Policy of 1998.

<sup>336</sup> Chamber of Mines. (2016). Future of South Africa Mining Industry. Page 7.

<sup>337</sup> Ibid.

<sup>338</sup> Baxter, R. (2016). The future of the South African mining industry. Chamber of mines. Page 7-12.

which can either be consumed locally or exported.”<sup>339</sup> The beneficiation of mineral resources is an impetus to accelerate production, creation of employment and economic growth consequently it would alleviate poverty in South Africa. Unfortunately, its implementation is hindered by various challenges in South Africa.

According to Section 1(b) of the MPRDAA beneficiation in relation to any mineral resource, outlined in four stages from primary stage of extraction of mineral resources to final stage of finished products.<sup>340</sup>The final last stage lies in the realm of engineering, and involves changes of physical shape rather than of chemical composition. Therefore, it is labour intensive, involving the diversity of production of shapes and forms. Consequently, leading to mass production requiring much more comprehensive skills and innovation from workers to manufacture world-class product.<sup>341</sup>Reason being, the produced products must be internationally competitive and marketable.

For example, in the case of chromium, ore firstly smelted to ferrochromium; then ferrochromium is melted with iron and other alloying elements to produce a fabrication alloy in the form of stainless-steel billets.<sup>342</sup>Wherefore, producing semi-manufactured articles in the form of flat stainless-steel products; and finally, a great variety of fabricated articles, ranging from teaspoons to pressure vessels, are produced from the rolled flat products. Consequently, competes at the international markets with multi-national companies dominating the industry.

Henceforth, the following discussion outline these challenges in detail, from the causes of ineffective implementation of beneficiation, their impacts towards the transformation, cooperative investment and the significance of developing South Africa’s economy.

#### **4.1 Limited access to raw material for local beneficiation**

South Africa's domestic production has wide diversity of raw materials, and frequently noted as major producer of many ores and metals although a relatively small producer

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<sup>339</sup> Section 1(b)(a)-(d) of MPRDAA.

<sup>340</sup>Section 1(b)(a)-(d) the MPRDAA.

<sup>341</sup> *Robinson, I.C. & Von Below, M.A.* (1990). The role of the domestic market in promoting the beneficiation of raw materials in South Africa. *Journal of the South African Institute of mining and metallurgy*. vol. 90, no. 4. April 1990. Page 91-98

<sup>342</sup> *Ibid.*

of processed mineral products.<sup>343</sup> Robison and Von below summarizes beneficiation as processing of a mineral beyond the stage where it represents a saleable raw material.<sup>344</sup> In terms of Section 1(b) of MPRDAA, the stages of beneficiation clearly articulates the development of mineral industry and elucidate further why, access to mineral resources is very crucial in implementing local beneficiation.

It is therefore found that natural resources provide significant advancement for production, extraction, processing and ultimate disposal of materials all these being very essential backbone for revenue generation and creation of employment in many countries globally.<sup>345</sup>

The structural arrangements in the mining industry are export orientated of raw metals under long-term contracts with international clients. Thereof, these contracts impose obligations on these South African companies exporting to their favour. Due to limited mineral resources in South Africa, it becomes unbearable for mining companies to export raw materials to the world and on the other hand, beneficiate, their mineral resources to a higher value product. Consequently, this warrants breach of international contracts and it cannot be condoned as bear's potential to curtail relationship of South Africa with international community. This calling for precautionary measures to be applied before restricting international exportation to maintain long-term contractual relationship with International clients.

South Africa blessed with natural resources utilized for production and consumption processes. However, in many ways this affects the environmental, economic and social development to the extent that it impacts beyond borders and would affect future generations. Ultimately this have serious consequences on: "The rates and taxes on extraction and depletion of renewable and non-renewable natural resource stocks, and the extent of harvest and natural productivity of renewable resource stocks in South Africa reserves"<sup>346</sup> As such the natural resources need to be utilized productively in the interest of the people of South Africa against depletion and exploitation. Further,

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<sup>343</sup> *Robinson, I.C. and Von Below, M.A.* (1990). The role of the domestic market in promoting the beneficiation of raw materials in South Africa. *Journal of the South African Institute of mining and metallurgy*. vol. 90, no. 4. Apr. 1990. Page 91-98.

<sup>344</sup> *Ibid.*

<sup>345</sup> *Organization for Economic Cooperation and Development (OECD)*. Material Resources, Productivity and the Environment. Page 1.

<sup>346</sup> *OECD*. Material Resources, Productivity and the Environment. Page 1.

<sup>346</sup> *Ibid.* Page 4.

ensure that the environment is protected and citizens are not vulnerable to illness that may be generated from such exploitation.

In 2013 South Africa Mineral reserves was reported to be the world's largest resources of platinum group metals (88% of world total), Manganese (80%), Chromium (72%) and Gold (30%).<sup>347</sup> The total value conservatively estimated at US\$ 2.5 Trillion, excluding energy commodities (coal, uranium, and thorium).<sup>348</sup> This serves to prove that South Africa has the necessary potential to penetrate the market with the value added produced mineral resources within its reserves. However, in the gold sector, South Africa has dominated the world as the number one producer until 2009 when overtaken by China, and currently South Africa ranks fifth after China, Australia, Russia, and the USA.<sup>349</sup> Statistics South Africa,<sup>350</sup> envisages that the mineral resources of South Africa are depleting; the gold sector has only 39 years remaining to exhaust its available gold reserves, however, 335 years for PGMs and 256 years for coal reserves available.<sup>351</sup>

Firstly, these Statistics indicates that mineral resources indeed they depletes, secondly South Africa left with few decades to extract gold sector and few centuries in other mineral deposits. Therefore, South Africa have to ensure that the remaining mineral deposits are exploited adequately in a manner that benefit the economy and citizens. Furthermore, it pleads for cautionary measures to be applied when extracting these resources for various reasons including for safety and security upon closure.

It is undisputed that for more than a century gold sector in South Africa has contributed tremendously towards economic bloom however it is currently confronted with ample challenges ranging from technical, economic, social, and operational which contributed to its decline in the global market competitiveness.<sup>352</sup> Firstly, amongst others is gold price volatility.<sup>353</sup> According to Deloitte, gold price volatility are influenced by various global conditions, which are beyond the control of South African companies

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<sup>347</sup> *Gauteng Province, Department of Economic Development*. (2013). Gauteng mineral beneficiation strategy. SAPSDA Networking/Members meeting. Page 4.

<sup>348</sup> Ibid.

<sup>349</sup> *Neingo, P.N. and Tholana, T.* (2016). Trends in productivity in the South African gold mining industry. The Journal of Southern African Institute of mining and metallurgy. Vol 116. Page 283.

<sup>350</sup> Statistics South Africa: [http://www.statssa.gov.za/?page\\_id=1859](http://www.statssa.gov.za/?page_id=1859). Retrieved 23 June 2017.

<sup>351</sup> *Lehohla, P.J. STATS SA.* (2017). Environmental Economic Accounts Compendium. Report no: 04-05-20. Statistics South Africa, Pretoria.

<sup>352</sup> Ibid. Page 84

<sup>353</sup> Ibid.

and consequently makes strategic planning stimulating.<sup>354</sup> This is because the gold price is a major value driver and price volatility has an adverse effect on revenue, cash flows, profitability, and mineral asset values. Price volatility and gold price have been increasingly declining this contributing to adverse revenue, cash flows, profitability and mineral assets values. Another reason for the decline is as the result of weakening of rand. This has to be addressed alternatively, this would lead to most operations closing down indefinitely or curtailed.<sup>355</sup> Recently, AngloGold Ashanti's announced that it would close two mines and retrench 8 500 workers.<sup>356</sup> Their decision was based on number of such as unpredicted depreciation of the rand, water shortage and the 300% electricity price hike in the past five years in South Africa.<sup>357</sup>

The mining industry is confronted with the challenges of the escalating costs of electricity tariffs and access to water, these increase the prices of production and leading to serious decline.<sup>358</sup> According to Muller and Frimmel in the mining industry ore grade and energy consumption are exponential, meaning they are indispensable to one another towards production.<sup>359</sup> The declining gold resources grade is as result that South Africa gold have been milked for more than a century, since 1886 in Witwatersrand goldfields.<sup>360</sup> Conversely, the diamond has been exploited since their discovery in 1867 that sparked the development of mining industry in Africa and South Africa in particular.<sup>361</sup> Unfortunately mineral and petroleum resources are not like trees they do not grow but deplete with time as such equally high grade gold in South Africa have been exhausted and only lower grade remains.<sup>362</sup> Therefore, South Africa must conduct adequate planning on the optimization of remaining low-grade and deep-lying

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<sup>354</sup> Deloitte. (2014). Tracking the trends 2014. The top 10 issues mining companies will face in the coming year. [https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Energy-and-Resources/dttl-erTracking-thetrends-2014\\_EN\\_final.pdf](https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Energy-and-Resources/dttl-erTracking-thetrends-2014_EN_final.pdf). Accessed 05 October 2017.

<sup>355</sup> Ibid. footnote 20.

<sup>356</sup> City Press. (2017). De Lange, L (Editor). SA gold mines are on the brink of death.

<https://www.fin24.com/Companies/Mining/sa-gold-mines-are-on-the-brink-of-death-20170630>. 19 April 2018.

<sup>357</sup> Ibid.

<sup>358</sup> Ibid. footnote 335.

<sup>359</sup> Müller, J. and Frimmel, H.E. (2010). Numerical analysis of historic gold production cycles and implications for future sub-cycles. The Open Geology Journal, vol. 4. pp. 29–34. <http://benthamopen.com/contents/pdf/TOGEOJ/TOGEOJ-4-29.pdf>. Accessed on the 05 October 2017.

<sup>360</sup> Gold Fields. Our History. Retrieved from: <https://www.goldfields.com/our-history.php>. 23 November 2017.

<sup>361</sup> Berman, J. K. (2017). Political Web. Mining in South Africa. Then, now and into the future –IRR-Archive. Page 2. Retrieved from: <http://www.politicsweb.co.za/archive/mining-in-sa-then-now-and-into-the-future--irr>. Accessed on the 23 April 2018.

<sup>362</sup> Neingo, P.N and Tholana, T. (2016). Trends in productivity in the South African gold mining industry. The Journal of the Southern African Institute. Vol 116. Page 84.

mineral deposits to be exploited, these to ensure that benefit the people of South Africa.<sup>363</sup>

As a result, of decades on extraction of mineral resources in South Africa, they are currently deep lying requiring depth mining method. Recently, it is reported that South Africa has the worlds' deepest mines, which reach depths of close to 4 km.<sup>364</sup> For instance, AngloGold Ashanti's Mponeng gold mine, located South-West of Johannesburg in South Africa, is currently the deepest mine in the world, with depth operations of between 2.4km to beyond the 4km mark as expanded in 2012.<sup>365</sup> AngloGold Ashanti's *TauTona*, gold mine in the West Wits region of South Africa, ranks as the second deepest mine in the world with the depth operations of 3.9km as expanded in 2008.<sup>366</sup> At these depths, the cost of ventilation, coupled with the cost of rock support necessary to stabilize the working environment, they amount to high production costs and constraints for development. <sup>367</sup>The sector on its own requires the review of mine planning, design, and optimization in a gesture to achieve sustainable beneficiation of mineral resources.<sup>368</sup>

South Africa role in the world mining industry is crucial, these is evidenced by when the mineral base reserve of iron ore, coal, manganese and even Gold, depletes it has impacted world production of the set minerals declining with 10%.<sup>369</sup> Therefore, the depletion of mineral resources is an impediment towards effective implementation of beneficiation of mineral resources in South Africa. Price Water Coopers (PWC) conducted a study for top 40 mining companies from 2014 to 2016, which indicates that the mining industry has been hit hard by various pessimistic challenges.<sup>370</sup> Ranging, from; the decline in commodity prices of all minerals except gold, revenues,

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<sup>363</sup> *Musingwini, C.* (2014). Introduction of specialization in Mine Planning and Optimisation within the Master's degree (MSc) programme at the University of Witwatersrand. Proceedings of the 6<sup>th</sup> International Platinum Conference, 'Platinum – Metal for the Future', Sun City, South Africa, 20–22 October 2014. Symposium Series S81. Southern African Institute of Mining and Metallurgy, Johannesburg. Page 23–27.

<sup>364</sup> *Mining Technology.* (2013). The top ten deepest mines in the world. <https://www.mining-technology.com/features/feature-top-ten-deepest-mines-world-south-africa/>. Accessed 20 April 2018.

<sup>365</sup> *Ibid.*

<sup>366</sup> *Ibid.*

<sup>367</sup> *Neingo, P.N and Tholana, T.* (2016). Trends in productivity in the South African gold mining industry. The Journal of the Southern African Institute. Vol 116. Page 85.

<sup>368</sup> *Ibid.* page 84.

<sup>369</sup> *Chambers of mines of South Africa.* (2016). Future of the South African Mining Industry. Page 20. Available at SA Chamber of mines, SAIMM.

<sup>370</sup> *Price Water Coopers.* (2016). Mine 2016, Slower, lower, weaker... but not defeated. Review of global trends in the mining industry.

net profit, miner's impairments, market capitalization and free cash flow, all of these contributing to increase in operational costs, work capital improvements and gearing.<sup>371</sup>Wherefore, the depreciation of commodity prices whereas raw material becoming inaccessible s discourage investment and constrains effective implementation of local beneficiation by mining companies. Furthermore, divert their attention on exploring mechanism on how to limit the cost of cutting, improve productivity, capital discipline and adjustment to this new era of exorbitant expenditure.<sup>372</sup>

Due to limited raw material agricultural land in certain area compromised for mining operations, such as acquisition of alternative grazing land to allow mining operations effectively. As in Aganang community farmers from Springbokpan and Verdwaal villages livestock were suffering as the result of mining operations, alternatively grazing land have acquired for them which is estimated at 739 ha for both communities compared with 2000 ha converted for mining operations and this raising community protests.<sup>373</sup>

#### **4.2 The shortage of critical infrastructure such as rail, water, ports, and electricity**

The government must ensure that existing infrastructure planning mechanisms and programmes properly consider infrastructure requirements for mineral beneficiation and the business sector assist in infrastructure development to facilitate local beneficiation and embrace energy efficiency.<sup>374</sup>This would alleviate poverty and create more employment. The demand for infrastructure development is a prerequisite for effective transformation to the ordinary people of South Africa.

In the case of *Association of Mineworkers and Construction Union (AMCU) and Others v Buffalo Coal Dundee (Pty) Ltd and Zinoju Coal (Pty)Ltd* the applicant sought declaring order against Buffalo Coal, that it had failed to follow the procedure as required by

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<sup>371</sup> *Price Water Coopers. SA mine.* (2017). Highlighting trends in the South African mining industry. 6<sup>th</sup> edition. Page 29.

<sup>372</sup> *United Nations Conference on Trade and Development.* (2005). Improving the competitiveness of SMEs through enhancing productive capacity. New York and Geneva. Page 5 and 97.

<sup>373</sup> *Intergraded Annual Review.* (2016). Business review: Dognote Cement South Africa. Sephaku Holdings Ltd. Page 54.

<sup>374</sup> *Deloitte.* (2011). Positioning for mineral beneficiation Opportunity knocks. Challenges and benefits of beneficiation. Deloitte, Johannesburg. Page 7.



Section 189A (13) of the Labour Relations Act (LRA),<sup>375</sup> to deal with large scale retrenchments, as well as Section 52 of the MPRDA, of 2008.<sup>376</sup>

The main issue was that the mining rights holder subcontracted the mining operations to another company, which has since issued large-scale notice to retrench employees for operational requirements.<sup>377</sup> The court had to consider whether mining rights holder entitled to be part of the consultation process in terms of section 189 of the LRA read with the objectives of the MRPDA to ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating. The court found that mining rights holder have to participate effectively towards realization of Social and Labour Plan (SLP). It includes responsibility by mining rights holders on the implementation of the retrenchment process irrespective of the fact that subcontracted mine.<sup>378</sup> Therefore, this entails that the mining right holder and subcontractors are responsible to participate effectively and responsibly towards implementation of SLP.

The mining companies made an undertaking through SLP to develop the mining communities and their employees, which include delivering critical infrastructure. Furthermore, it also the duty of local municipality to provide service delivery of critical infrastructure including administration of water and electricity. Local municipalities in South Africa use Integrated Development Planning (IDP) as a method to plan present and future development in their respective areas.

According to Section 35 of Local Government Municipal Systems Act (LGMSA) an integrated development plan adopted by the council of a municipality:

(a) Is the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality;

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<sup>375</sup> Act 66 of 1995.

<sup>376</sup> *Association of Mineworkers and Construction Union ("AMCU") and Others v Buffalo Coal Dundee (Pty) Ltd and Another (JA42/2015) [2016] ZALAC 18; (2016) 37 ILJ 2035 (LAC); [2016] 9 BLLR 855 (LAC) (11 May 2016).*

<sup>377</sup> *Ibid.*

<sup>378</sup> *Ibid.*

(b) Binds the municipality in the exercise of its executive authority, except to the extent of any inconsistency between a municipality's integrated development plan and national or provincial legislation.

(c) Binds all other persons to the extent that those parts of the integrated development plan that impose duties or affect the rights of those persons have been passed as a by-law.

According to section 35 of LGMSA the IDP duly adopted accordingly by a municipality is binding and it have to be implemented by the executive and all other persons involved. Conversely, in terms of regulation 42 of the MPRDA, SLP binding to mining companies and they have to be implement it. Therefore, this entails that both the local municipalities and local mining companies have the legislative duty to provide critical infrastructure in communities.

The delivery of critical infrastructure imperative, as the is an emergence of new centres of economic growth, most notably in Asia, coupled with higher logistics costs and resource nationalism will change the mineral commodity economy.<sup>379</sup> This result in driving opportunities for future beneficiation in resource rich countries include however, their accompanied by higher logistical costs, such as the transportation of raw materials is costlier.<sup>380</sup>

According to 2012 KPMG Global Construction Survey, the new infrastructure projects anticipated to be on a huge scale and of world class, requiring skilled, trained, diligence and capacitated leadership and workforce to implement it.<sup>381</sup> As it is undisputed that inadequate infrastructure in South Africa has hindered it from benefiting in the global commodity boom over past decade and to earn maximum proceeds from its resources.<sup>382</sup>This indicating the need for skilled engineers and managers to facilitate the improvement of infrastructure as the critical aspect for effective implementation of beneficiation.

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<sup>379</sup>Deloitte. (2011). Positioning for mineral beneficiation Opportunity knocks. Deloitte, Johannesburg.

<sup>380</sup> Ibid.

<sup>381</sup>KPMG. (2015). Global Construction Survey 2015. Climbing the Curve. Retrieved from: <https://assets.kpmg.com/content/dam/kpmg/pdf/2015/04/global-construction-survey-2015.pdf>. Accessed on the 23 November 2017.

<sup>382</sup>Amrop, L. (2012). Developing skills to meet Infrastructure demand. Infrastructure Sector Research Report 2012. Page 7.

The mining operations requires large scale of electricity power supply, however integrated resource plan for electricity states that from 2010 to 2030 they would be electricity shortfall in South Africa.<sup>383</sup> However, the completion of Medupi and Kusle power stations would reduce the risk confronted with.

#### **4.3 Limited exposure to break-through research and development programmes**

Research and development programmes are key to advance the sustainability of beneficiation. As the process of beneficiation involves refinery of raw minerals up to last stage of production of finished products to international markets. According to Cawood, investment in research development and quality education would advance skills and knowledge of technical areas for the next generation of mining projects.<sup>384</sup> Unfortunately, Chamber of mines research organization (COMBRO) has closed the structure that assisted with research and shaping the mining industry.<sup>385</sup> Therefore, it requires skill, knowledge and technology to open new structures that would advance the optimal use of mineral resources of South Africa. Department of Science and Technology and mining companies must support research and development through programmes such as scholarship, bursaries, mentorship and internships, which would assist the HDSA's.

They are various pieces of legislation that regulates research development in South Africa particularly with impact to mining industry. Namely:

##### **4.3.1 Geoscience Act, 100 of 1993, as amended by the Geoscience Amendment Act, 12 of 2010 (GA)**

Section 2 of the Geoscience Act (GA) established the Council for Geoscience (CGS) as the juristic person to be the custodians of geotechnical information. The objective of the council in terms of Section 3 of GA are to promote the search for, and exploitation of, any mineral in the Republic, to undertake research in the field of geoscience and to furnish specialized geoscientific services<sup>386</sup>

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<sup>383</sup> *Integrated Resource Plan For Electricity 2010–2030, Revision 2 Final Report* 25 March 2011.

<sup>384</sup> Cawood, FT. (2011). Threats to the South African minerals sector- an independent view on the investment environment for mining. The journal of the Southern African of mining and metallurgy. Page 469.

<sup>385</sup> Ibid.

<sup>386</sup> Section 3, Geoscience Act 100 of 1993.

Therefore, the council act as the national advisory authority in respect of geo-hazards related to infrastructure and development; and to undertake exploration and prospecting research in the mineral and petroleum sectors.

The functions of the council in terms of section 5 of GA, 100 as amended in 2010 in relation to beneficiation of mineral resources. Firstly, is to promote the search for, and the exploitation of, any minerals in the Republic.<sup>387</sup> Secondly, have legislative mandate to bring notice of the Minister any information in relation to the prospecting for and mining of mineral resources, which is likely to be of use or benefit to the Republic.<sup>388</sup> Thirdly, to promote the study of mineral resources of the distribution and nature of mineral resources; and (ii) geo-environmental aspects of past, current and future mineral exploitation. <sup>389</sup>

Wherefore, the council have legislative duty to promote study of mineral resources, exploration and beneficiation. However, in Limpopo despite the province blessed with many mines of Platinum group metals and diamonds the province does not have a single university that offers study of mineral resources. This contributing regressively towards advancement of research and innovations in the mining.

#### **4.3.2 National Research Foundation Act, 23 of 1998 (NRF)**

According, to Section 3, of National Research Foundation Act (NRF), the objective of the Foundation is to support and promote research through funding, human resource development and the provision of the necessary research facilities in order to facilitate the creation of knowledge, innovation and development in all fields of science and technology, including indigenous knowledge.<sup>390</sup> Thereby to contribute to the improvement of the quality of life of all the people of the Republic.<sup>391</sup>

According to NRF annual report of 2016/2017 the total income received from parliamentary grant R2,178 million while including funding from other stakeholders it amounted to R4 501 120 000 000. <sup>392</sup> Therefore, it is worth noting that NRF is highly

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<sup>387</sup>Section 5 (1) (bA) of Geoscience Amendment Act 12 of 2010.

<sup>388</sup>Section 5(1) (bB) *ibid*.

<sup>389</sup>Section 5(d) *ibid*.

<sup>390</sup>Section 3 NRF.

<sup>391</sup>*Ibid*.

<sup>392</sup> *Department of Science and Technology*. NRF Annual Report 2016/17. Page 25.

funded by both the State and other external stakeholders. However, NRF funds are still insufficient to fund research development for mineral resources.

#### **4.3.3 Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008 (IPR-PFRD)**

According, to Section 2 of IPR-PFRD provides that the objective of the Act, is to make provision that intellectual property emanating from publicly financed research and development is identified, protected, utilised and commercialised for the benefit of the people of the Republic, whether it be for a social, economic, military or any other benefit.<sup>393</sup> IPR-PRFD, promote research development in the mining industry in the interest of the people of South Africa.

According to Section 8 of IPR-PFRD, make provision for establishment of the National Intellectual Property Management Office (NIPMO) that aims to provide for the more effective use of intellectual property emanating from publicly financed research and development.<sup>394</sup>The Act further in terms of section 13 established the Intellectual Property Fund, to provide financial support to institutions for the statutory protection offices of technology transfer at institutions.<sup>395</sup> Wherefore, the IPR-PFRD Act was enacted with the special purpose to protect and promote intellectual property financed by the State. To achieve this, the Act establish NIPMO office, which is entrusted with authority to administer the intellectual property fund. The fund vested with capital to empower and protect emerging intellects that innovate alternative technical methods through research.

Despite the above legislative framework, the majority of people in South Africa are faced with high rate of poverty and inequality, coupled with inadequate infrastructure, poor literacy level and inadequate education development facilities.<sup>396</sup>The mining communities are not immune from these social ills in fact are suffer most. For instance, in Rustenburg with largest Platinum geographical area, Eunomix research indicates that only 31% of Rustenburg's population aged 20 and over have completed high

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<sup>393</sup>Section 2 (1)-(2) of Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008.

<sup>394</sup>Section 8.

<sup>395</sup>Section 13.

<sup>396</sup>*Government of Republic of South Africa*. Discussion document. 2008. Towards an anti-poverty strategy for South Africa. Page 6.

school and only 8.9% of that same age group have some form of higher education, had only 5.4% of those aged 20 and older have received no form of schooling.<sup>397</sup> The research also revealed overcrowded schools and a lack of basic schooling infrastructure.<sup>398</sup> In addition, the recent platinum strikes have contributed to a professional skills drain with many teachers leaving Rustenburg to find jobs elsewhere.<sup>399</sup>

Recently, in Limpopo Province 82 mining projects are currently listed on Africa Mining IQ<sup>400</sup> yet there is no single University producing engineers to develop and facilitate beneficiation in the mining industry. There is need for research development and skills provision, which require the state and Private sector to invest more on research innovation and development.

Adequate investment on research would cure these ample challenges faced by the industry. According to Kowalski no research has been conducted with relation to physically demanding needs of workforce especially for those older mine workers against the changing dynamic needs of mining.<sup>401</sup> Consequently, the workplace that continuously change, dynamic, physically demanding such as mines, have on the way aging workers interact with their jobs, nor on the kinds of educational interventions that could help them deal with their changing circumstances.<sup>402</sup>

#### **4.4 Lack of skills sought for expediting local beneficiation**

South Africa is faced with shortage of skilled workforce, and the mining industry competes with manufacturing and other local industries in insourcing these proletarians throughout the country.<sup>403</sup> Firstly, it is worth commenting that the apartheid government policies on education from 1948 to 1994 created a distortions racial segregation system in South Africa, which require robust intervention for it to be

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<sup>397</sup> *Eunomix Research*. (2016). The impact of platinum mining in Rustenburg A high-level analysis. Page 3.

<sup>398</sup> *Ibid*.

<sup>399</sup> *North West Department of Education*. (2013). "Annual Report 2012/13."

<sup>400</sup> *Africa Mining IQ*. Retrieved from: <https://www.projects iq.co.za/mining-in-limpopo.htm>. Accessed on the 26 November 2017.

<sup>401</sup> *Kowalski, K.M et al*. The Evolving Mining Workforce: Training Issues. National Institute for Occupational Safety and Health. Page 2.

<sup>402</sup> *Ibid*.

<sup>403</sup> *Motsoeneng, L., Schultz, C., Bezuidenhout, A.* (UNDATED). Skills Needed by Engineers in the Platinum Mining Industry in South Africa. Mining Qualifications Authority. Tshwane University of Technology. University of South Africa. Pretoria, South Africa. Page 1

reviewed.<sup>404</sup> According to Global competitiveness report of 2016 the quality of education in South Africa ranked 128<sup>th</sup> out of 139 countries whereas the standard of mathematics and science is even worse in the 135<sup>th</sup>.<sup>405</sup> The question therefore being, how can this level of education implement beneficiation of mineral resources in a world class sustainable manner?. It is very unfortunate but also intolerable for South Africa with a vision to improve skills levels, and research and development turnout to continue under this trajectory. According to Cawood, the country needs to overhaul its education system to improve its skills development.<sup>406</sup> He suggests that the intervention should start with pre-school education, so that education can start on the first day of Grade 1 in order to prepare the children for success at a secondary school level, not only primary school.<sup>407</sup> While the percentages completing secondary school and gaining university exemption must be increased significantly.<sup>408</sup>

The government must align the beneficiation skills pipeline to the National Skills Development Strategy and the Sector Skills Plans for required skills and the mining industry must amongst others cooperate with the government and investment in Human Capital Development.<sup>409</sup> Skills shortages is regarded as the major risk in entering into business with emerging economic markets which contribute enormously to both local and international market.<sup>410</sup> There is an urgent need for skills development and training in the strategic sectors of the economy including the mining industry to ensure sustainable implementation of beneficiation.

However, the emergence of new partnership on the global economic market such as BRICS and SACU have widened industrialization in many production areas of the world, including resource rich countries, which will serve to enable access to skills, expertise and technology.<sup>411</sup> As countries such as China and Russia are capacitated

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<sup>404</sup> Karmis, M.B. et al. (2005) "Global mining engineering education: Past, present and future," Presentation at the Annual Meeting of SME, 28 February – 2 March, Salt Lake City, UT.

<sup>405</sup> *World Economic Forum*. The Global Competitiveness Report 2016–2017. Page 30.

<sup>406</sup> Cawood, F.T. (2011). Threats to the South African minerals sector- an independent view on the investment environment for mining. The journal of the Southern African of mining and metallurgy. Page 470.

<sup>407</sup> Ibid.

<sup>408</sup> Ibid.

<sup>409</sup> Department of Higher Education and Training. National Skills Development Strategy III.

<sup>410</sup> Amrop, L. (2012). Developing skills to meet Infrastructure demand. Infrastructure Sector Research Report 2012. Page 3.

<sup>411</sup> Deloitte. (2011). Positioning for mineral beneficiation Opportunity knocks. Deloitte, Johannesburg.

in vast skills opportunities that can be acquired for the effective implementation of mineral resources.

South Africa is heavily regulated including the Skills development in the mining industry is governed firstly by the Skills Development Act 97 of 1998 (SDA). The SDA discussed more broadly in Chapter 2, however it worth noting that its primary purpose is to improve and promote skills development in South Africa.<sup>412</sup> Section 4 of SDA established National Skills Authority (NSA).<sup>413</sup> In terms of section 5 of SDA the NSA has the duty to advise the Minister with regard to national skills development policy together national skills development strategy and the implementation thereof.<sup>414</sup>

Secondly in terms of Section 9 the SDA established Sector Education and Training Authority (SETA) with the responsibility to develop and implement a sector specific skills plan, registering and promoting learnerships in the Republic of South Africa in order to increase sectoral skills.<sup>415</sup> SETA is inaccessible to mining communities, despite its attempt to open branches across the cities of South Africa. Further when it accessed funding to improve skills development is inadequate.

In an attempt to improve skill development, SETA has established Mining Qualifications Authority (MQA) with the responsibility to administer skills development programmes for the mining and minerals sector in South Africa. <sup>416</sup>The necessity of MQA has been long overdue, as the mechanism to facilitate skills development in the mining industry. However, it has been reported recently that MQA senior executive before awarding funds to applicants they require bribe. The MQA employees have lodged official complaints against their Acting Chief Executive Officer, whom they accuse of misappropriating the entity's funds, despite the employees writing to the Director General of DHET.<sup>417</sup> Furthermore, the DA tabled a motion before the

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<sup>412</sup>Section 2 of SDA.

<sup>413</sup>Section 4.

<sup>414</sup>Section 5.

<sup>415</sup> Department of Labour. (2000). Sector Education and Training Authorities. Retrieved from: <http://www.labour.gov.za/DOL/downloads/documents/useful-documents/skills-development-act/Useful%20Document%20-%20NSF%20-%20Sector%20Education%20and%20Training%20Authorities.pdf> Accessed on the 10 August 2017.

<sup>416</sup> *Mining Qualifications Authority*. (2008). <http://www.mqa.org.za/welcome>. Accessed on the 19 November 2017.

<sup>417</sup>*Polity News*. 2017. Retrieved from <http://www.polity.org.za/article/da-hlomela-bucwa-says-pp-must-investigate-corruption-at-mining-qualifications-authority-2017-03-03>. Accessed on the 23 March 2018.



parliament for public protector to investigate corruption at Mining Qualifications Authority after forensic report alleged more previous corruption.<sup>418</sup>

SDA Amendment Act 37 of 2008 in section 26k established Productivity South Africa as justice person to improve to workplace productivity. According to section 26L of SDA, the function of these institution is amongst other to promote a culture of productivity in workplaces; to develop relevant productivity competencies; to facilitate and evaluate productivity improvement and competitiveness in workplaces; to measure and evaluating productivity in the workplace; to undertake productivity-related research; and to support initiatives aimed at preventing job losses.<sup>419</sup>Therefore, the institution is very much important towards improvement of productivity and protection of jobs in South Africa.

The mining companies must be offered an opportunity to access skilled workforce and to recruit more employees enthusiastic to become skilled and productive in their work. Furthermore, to achieve the required target, based on industry demand, the focus should be on skills development programs aligned with prerequisite skills for implementation of beneficiation of mineral resources.<sup>420</sup>

#### **4.5 The health and safety of employees and communities in which mining companies operate still a serious challenge**

The mining industry is faced with continuous painful and fatal accidents of serious injuries and illness occurrence.<sup>421</sup>These indicates that much need to be done in the mining industry to protect lives of employees and affected communities. The Chamber of mine, government and other stakeholders forged worked together towards enactment of various pieces of polices and legislation such as Mine, Health and Safety Act 29 of 1996.<sup>422</sup>The mining industry is highly regulated but the continuous fatal

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<sup>418</sup>Ibid. 400.

<sup>419</sup>Section 11 of SDA 37 of 2008.

<sup>420</sup>Ibid. 386.

<sup>421</sup> Van den Honert, A. (2014). Estimating the Continuous Risk of Accidents Occurring In The South African Mining Industry. Department of Industrial Engineering, University of Stellenbosch. South Africa. page 4.

<sup>422</sup>Teke, M. (2017). Chambers of Mines of South Africa. Achieving the mining sector's great economic and transformational potential - what is required. Retrieved from <http://www.chamberofmines.org.za/industry-news/publications/presentations/send/7-2015/395-achieving-the-mining-sector-s-great-economic-and-transformational-potential-what-is-required>. Accessed on the 26 May 2017.

accidents, exposure to unhealthy working environment and the communities vulnerable to pollute the water and environment.

Health and safety is significant issue in the mining industry to all employees. As the result of inadequate investment in educational development of employees, less is known about the kinds of education and training experiences that are most useful for the aging mine worker, or the best way to prepare young people for work in a mining environment.<sup>423</sup> These leading to numerous fatal accidents in the mining industry and unfortunately miners continue to lose their lives. It is apparent that this is detrimental to advance beneficiation in the mining industry. Therefore, there is a need for cautionary measures to be employed in the mining industry to protect the lives of the miners and allow them to develop the process of facilitating beneficiation of mineral resources in South Africa.

According to Mine Health and Safety statistics performance report of 2016, about 73 fatalities in 2016 compared to 77 which have been reported in 2015 (excluding fatalities among illegal miners).<sup>424</sup> Death of mine worker, occupational injuries and or ill-health have tremendous impact to social and economic implications of individuals, their families and their communities.<sup>425</sup> Therefore, to achieve sustainable beneficiation of mineral resources, in the broader context healthy and safe working conditions are sacrosanct.

In 1995, the Commission of Inquiry into Mine Safety and Health found that for 50 years the mining industry in many aspects remain unchanged.<sup>426</sup> It then recommended that new systematic approach be initiated to control health particularly, respiratory disease in the mining industry.<sup>427</sup> It is very much unfortunate, for mine workers to be exposed to respiratory diseases, TB and HIV/AIDS as these illnesses are health risks in South African mining. This caused the living and working conditions of miners, such as

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<sup>423</sup>Kowalski, K.M. et al. The Evolving Mining Workforce: Training Issues. National Institute for Occupational Safety and Health. Page 2.

<sup>424</sup>Zwane, M. (2017). Department of Mineral Resources. Available at, South African government. 2017. Minister Zwane M: Releases of 2016 mine health and safety statistics. <https://www.gov.za/speeches/minister-mosebenzi-zwane-releases-2016-mine-health-and-safety-statistics-19-jan-2017-0000>. Accessed 10 November 2017.

<sup>425</sup>Hermanus. M.A. (2007). Occupational health and safety in mining—status, new developments, and concerns. The Journal of the Southern African Institute of Mining and Metallurgy. Volume 107. Page 531.

<sup>426</sup>Commission of Inquiry into Safety and Health in the Mining Industry, 1995, pp. 54–55

<sup>427</sup>Ibid.

migrant labour, single sex hostels, undiagnosed active TB, closed ventilation systems in underground mines, and dense living arrangements.<sup>428</sup>

The recent recognition of small-scale and artisanal mining, offered an opportunity for merging mining companies to mine without prior adequate experience these pose new challenges for health and safety regulation and practice in the mining industry.<sup>429</sup>

The mines and safety Act 29 of 1996 as amended, offers the following to employees

- In terms of chapter 2 of MSHA is the primary responsibility of employers to ensure a safe and healthy work environment to employees.
- In terms of section 2 the employer must initiate risk management approaches to address health and safety hazards.
- Workers have rights to work in a health and safety environment, access to such information, to training and to withdraw from dangerous workplaces.

However, despite this constructive legislation there has been continuous occurrence of fatal accidents in the mining industry resulting in death of mineworkers and or in some cases serious injuries. According, to Chapter 23 of the MSHA as amended, employers must report accidents and dangerous occurrences at a mine to the Regional Principal Inspector of Mines.

Recently, in Lily Vantage gold mine in Barberton, Mpumalanga 79 workers trapped underground, the company was able to rescue 76 of which they suffered serious injuries and other 3 workers remain buried in the mine.<sup>430</sup> According to Section 65 of the MSHA is the duty of the Chief Inspector of Mines to direct an inspector to conduct an inquiry into any accident or occurrence at a mine that results in the death of any person.<sup>431</sup> However, is unfortunate that despite this clear legislation, the Public Inquiry has not happened. Whereas the families of mineworkers, surviving community and surviving workers are left in turmoil.<sup>432</sup>

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<sup>428</sup> Guild, R., Erlich, R., Johnston, J., & Ross, M. *MHSC, SIMRAC*. Editors: (2001). *Handbook of Occupational Health Practice in the South African Mining Industry*. p. 161.

<sup>429</sup> Mutemeri, N. & Petersen, F. *Small-scale Mining in South Africa: Past, Present and Future*. *Natural Resources Forum*, vol. 26, 2002. p. 287.

<sup>430</sup> *News 24*. (2016). Shaheed Mahomed Cape Town Academic. The case for a public inquiry into the Lily mine disaster. Retrieved from: <https://www.news24.com/MyNews24/the-case-for-a-public-inquiry-into-the-lily-mine-disaster-20160916>. Accessed 23 December 2017.

<sup>431</sup> Section 65 of MSHA.

<sup>432</sup> *Ibid*.

## Conclusion

South Africa vested with vast mineral reserves, bearing potential to implement the process of beneficiation of mineral resources to the last stage of beneficiation. Nevertheless, currently confronted with different challenges that hinder the effective implementation of beneficiation strategy, which bears imperative to provide jobs and improve economic growth in South Africa.

Wherefore, it is undisputed, that the mining industry has played significant role towards building the economy of South Africa. Nevertheless, it has to be acknowledged that, mineral resources are finite, they deplete with time. As such, alternative measures must be outsourced to ensure that South Africans enjoy the benefits of exploitation of their mineral resources. According to section 1(b) of the MPRDA as amended the process of beneficiation involve the transformation of mineral resources from refinery of mineral resources to the finished consumable product. However, these processes have not yet implemented accordingly as envisaged due number challenges confronted with, including the following:

Firstly, is the limited access to raw materials for local beneficiation. South Africa whereas, being amongst the world largest producer of Platinum Group metals its mineral resources including the latter gradually deplete because of continuous exploitation.<sup>433</sup> Recently, reported that gold reserves left with only three decades to deplete. Furthermore, South Africa has the worlds' deepest mines, which reach depths of close to 4 km.<sup>434</sup>These indicates that quality transportation and rare skills required to deep down and extract the remaining mineral resources. Consequently, this process becomes `more often time consuming and costly. Therefore, the limited access to raw materials hinder effective implement local beneficiation. These requiring skills and quality infrastructure to extract these limited resources in the rural mining areas.

Secondly, most developing countries including South Africa have poor infrastructure. As such critical infrastructure to implement beneficiation of mineral resources are in dire need in South Africa. It is worth noting that adequate and sustainable implementation of the latter depends largely on availability of critical infrastructure

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<sup>433</sup> Gauteng Province, Department of Economic Development. (2013). Gauteng Mineral Beneficiation Strategy. SAPSDA Networking, Members meeting. Page 4.

<sup>434</sup> *Mining Technology*. (2013). The top ten deepest mines in the world. Retrieved from <https://www.mining-technology.com/features/feature-top-ten-deepest-mines-world-south-africa/>. Accessed on the 20 April 2018.

such as railways, running water, ports and affordable electricity. Almost mining communities are situated in a deteriorating environment with shortage of critical infrastructure these indicates that development of local communities would result in successful implementation of beneficiation.

Wherefore, it is the duty of the local municipality through their IDP to deliver quality infrastructure to their local communities. It is further duty of mining companies in terms of regulation 42 of mining charter to have a social and labour plan entailing various initiatives intending to embark on, to transform mining communities and lives of their employees. Therefore, municipality must develop their IDP in alignment with local mines Social and labour plans to ensure effective and adequate development of local communities. These would ensure that critical infrastructure in the mining industry provided in the most effective and sustainable manner.

Uneducated and unskilled workforce overcrowds the mining industry. These hinder the effective implementation of beneficiation. Thirdly, skills sought to implement beneficiation are rarely found. The Skills Development Act 97 of 1998 (SDA) enacted with special purpose to promote skills development in South Africa. The SDA established MQA that act as the agent of Department of Labour to promote skills development in the mining industry. However, MQA for the past two decades of its existence failed to adequately and effectively promote skills development in the mining industry.

Fourthly, limited exposure to research and development programmes would lead to disastrous implementation of beneficiation of mineral resources. Research and development programmes would discover potential risk and losses assessment of the implementation thereof. They are various pieces of legislation enacted to promote research development namely, Geoscience Act (GA) that undertakes to promote study of mining through provision of funding. However, purpose is defeated by its unavailability and inaccessibility in the mining communities. The National Research Foundation Act, 23 of 1998 established NRF that also promote research in higher education and training annually awarded extraordinary budget from parliament. However, NRF despite these exorbitant funds fails to transform historically disadvantaged universities to study mining.

The other legislation is Intellectual Property Rights from Publicly Financed Research and Development (IPR-PFRD) Act 51 of 2008 that aims to protect and promote innovations emanating from research funded by CGS, NIPMO, NRF and other state entities publicly funding research. However, the purpose of IPR-PFRD is defeated by insufficient funds to promote research. Furthermore, by its inaccessibility in the historically disadvantaged communities respectively mining areas. Generally, mining communities remain uneducated with limited exposure to break-through research and development programmes this leading to continuous exploitation, as they are unaware of their rights.

## CHAPTER 5: COMPARATIVE STUDY

### Introduction

African must strive to learn lessons from one another as developing countries in quest to find better strategies, laws, policies, methods and practices to better the lives of their citizens. Wherefore, the research intends to find ways to effectively implement beneficiation of mineral resources legislation in South Africa compared with best country in Africa that achieved good results. According to best international good practice statistics Botswana rank as having good policies, legislation and methods in Africa and their people stand to benefit from same. As such, this chapter aims to comprehensively compare between South Africa Botswana mineral resources beneficiation various pieces of legislation, policies and practices. As well as the challenges confronted by Botswana in implementing beneficiation of mineral resources compared with the ones in South Africa. In conclusion suggest the lessons South Africa can derive from Botswana and how to deal with challenges either from domestic reactionary forces and or international markets.

### 5.1 Beneficiation of Mineral Resources in Botswana

Africa is a dark continent but rich with minerals wealth beneath the soil, it currently holds over 30 percent of the world's global mineral reserves.<sup>435</sup> Whereas, less than 5% of the total global mineral exploration and extraction budget is invested in the continent.<sup>436</sup> The continent plays a very pivotal role in the world mining industry, as it produces over 60 different metals and minerals and which has extensive potential to lead the exploration and production in beneficiation process.<sup>437</sup> The Republic of Botswana Mining Industry is regarded as being amongst the best regulated industry in accordance with international best practice.<sup>438</sup> After 33 years, since independence from 1966, Botswana has promulgated the Mines and Minerals Act 17 of 1999 (MMA).

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<sup>435</sup> *DLA Piper*. (2012). Mining in Africa - A legal overview. Page 4. Retrieved from: [file:///C:/Users/Peshley/AppData/Local/Packages/Microsoft.MicrosoftEdge\\_8wekyb3d8bbwe/TempState/Downloads/mininginafrica.PDF](file:///C:/Users/Peshley/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/mininginafrica.PDF). Accessed on the 28 March 2018.

<sup>436</sup> *Ibid*.

<sup>437</sup> *Ncube, M.* (2012). Mining Industry Prospects in Africa. African Development Bank Group. Retrieved from: <https://www.afdb.org/en/blogs/afdb-championing-inclusive-growth-across-africa/post/mining-industry-prospects-in-africa-10177/>. Accessed on the 28 March 2018.

<sup>438</sup> *Anthea, J.* (2016). Liberty, a product of the IRR," No 5, 2016, Issue 28.

Henceforth, MMA regulates the granting, renewal and termination of prospecting licences, retention licences, mining licences and mining permits, payment of royalties and all matters incidental to mines and minerals in Botswana.<sup>439</sup>

In terms of Section 3 of the MMA, the Republic of Botswana has custodianship over their minerals in the public interest, which have similar provisions with Section 3 of the MPRDA.<sup>440</sup> The MMA came as an amendment, to abolish government right to 15 per cent free equity in all mining projects.<sup>441</sup> However, in terms of Section 40 of the MMA, government should have 15 per cent working participation interest on mutually agreed commercial terms and obligations like any other shareholders to contribute working interest capital.<sup>442</sup> Botswana government holds a stake in almost all key mining companies in the Republic.<sup>443</sup>

As result, Botswana government has successfully and effectively used its mineral wealth to promote growth and sustainability in the Republic. The annual average growth rate of 9% of GDP has been recorded between the year 1966 and 1996, this led this country to be amongst the leading growing countries globally.<sup>444</sup> As in the past, decade despite the global commodities slump, it survived at the growth rate of 5% of annual GDP in contrast with South Africa which has the average of only 2.6% annual GDP, which was below and now less than 0.5%.<sup>445</sup> In addition, it accumulated the average GDP per capita of some \$7 240 in 2014 whereas South Africa's GDP per capita in the same year was some \$6 800, amounting to roughly 5% below Botswana. Consequently, the World Bank rated Botswana as upper middle-income country.

According to Fraser survey 2016,<sup>446</sup> Botswana ranked the best in Africa and globally competitive with regard to mining regulations, availability of skills and labour and infrastructure. The overall survey ranked Botswana 19<sup>th</sup> out of 104 countries in the

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<sup>439</sup>Mines and Minerals Act 17 of 1999, Preamble.

<sup>440</sup> Section 3, Botswana Mines and Minerals Act 17 of 1999.

<sup>441</sup> Republic of Botswana Mineral Investment Promotion, Ministry of Minerals, Energy and Water Resources at page 3.

<sup>442</sup> Section 40 (1), Mines and Minerals Act of 1999. See also Mines and Minerals (Prospecting and Leasing Charges) Regulations [CAP 66:01].

<sup>443</sup> *Bookhinder, J and La Flèche, E.R.* (2013). *The Mining Law Review* (2<sup>nd</sup> Edition) Law Business Research page 25.

<sup>444</sup> *Anthea, J.* (2016). *Liberty, a product of the IRR,* No 5, 2016, Issue 28.

<sup>445</sup> *Ibid* page 1.

<sup>446</sup> *Taylor, J and Kenneth, G.* (2017). *Annual Institute Annual Survey of Mining companies 2016.* Page 09 – 22.



world and in contrast South Africa ranked 74<sup>th</sup>. The main reason is that South Africa has policy uncertainty such as BEE policy considerations compliance. This results in grave risk of ownership, as government uncertainly amend the laws regularly. Currently South Africa ranked 84<sup>th</sup> with regard to best policy practices index out of 104 countries whereas Botswana ranked 12<sup>th</sup> globally.<sup>447</sup> In 2015 Fraser survey South Africa has ranked 105 out of 109 countries being the 4<sup>th</sup> last whereas Botswana ranked 46<sup>th</sup> with regard to labour issues.<sup>448</sup> Consequently, the unresolved labour issues in South Africa mining industry have caused investors deterrence. According to Fraser survey the infrastructure, legal system and community development in Botswana show that this country is far much better than South Africa.

Local beneficiation has worked successfully in Botswana to the extent whereby De Beers began cutting diamonds in Botswana over 20 years ago, and through partnership with the government of Botswana, the Diamond Trading Company Botswana was created, which is a 50/50 joint venture between the government and De Beers.<sup>449</sup> By 2013, De Beers had moved all its international trading activity from London to Botswana. Although not perfect, this beneficiation programme has achieved positive outcomes such as improved infrastructure and skilled workforce, currently employs more than 3000 workers in Botswana for cutting and polishing diamonds for export. In addition, there is the knock-on effect of boosting local businesses, such as hotels, leisure centres and restaurants. Arguably, most importantly, this project has helped to signal that Botswana is a safe and welcoming place for foreign investors, creating a stable climate for future growth. Botswana introduced and amended legislation to make more significance changes.<sup>450</sup>

It is important to mentions that beneficiation is paramount towards socio-economic empowerment as it helped citizens of Botswana. South Africa can draw lessons from the mineral beneficiation legislation of Botswana to ensure that the destitute masses in South Africa benefit from their minerals. However, the implementation of beneficiation legislation has full support and cooperation of the mining industry,

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<sup>447</sup> Ibid.

<sup>448</sup> Taylor, J and Kenneth, P. G. (2016). Annual Institute Annual Survey of Mining companies 2015 issued on the 8 June 2016. Page 08 - 31.

<sup>449</sup> IGF. Guidance for governments. Leveraging Local Content Decisions for Sustainable Development. Case Study Botswana: Downstream linkages leveraging negotiation position. Page 2.

<sup>450</sup> Mining and Minerals Act of 1999.

stakeholders, government and labour unions in Botswana. South Africa should emulate this in order to strengthen beneficiation participation and delivery.

## **5.2 Challenges**

There are various elements identified in comparing Botswana and South Africa mining progression.

### **5.2.1 Beneficiation requirements**

The mineral resources are finite, they deplete within limited time. The governments in many countries opted for beneficiation process for their mineral deposits to ensure that that majority of their citizens benefit from their common heritage. Consequently, this led to increase in employment opportunities, promotion of economic growth and enhancement of the value addition to the mineral products prior exportation to the global markets.

However, beneficiation requirements are derailed by various challenges resulting in ineffective implementation. These hindrances are lack of skills and sufficient capital to produce internationally competitive goods *inter alia*. The discussion that follows compare the implementation of beneficiation in Botswana and South Africa.

#### **➤ Botswana**

MMA imposes no beneficiation obligations on mining companies. However, requires mining companies to conduct mining operations in the manner that is more beneficial and efficient for exploration, mining, reconnaissance and use for the people of Botswana.

#### **➤ South Africa**

Section 26 of the MPRDA prescribes requirements of mineral resources in the Republic:

“(1) The Minister may initiate or prescribe incentives to promote the beneficiation of minerals in the Republic.

(2) The Minister, may consult other government stakeholders to promote such beneficiation subject to other terms and conditions as the Minister may determine.

(3) Any person who intends to beneficiate any mineral mined in the Republic outside the Republic may only do so after written notice and in consultation with the Minister. The minister has the sole authority to prescribe beneficiation and companies wanting to beneficiate mineral resources of South Africa outside the Republic they must do so in consultation with the minister.”<sup>451</sup>

The contravention of the provisions of section 26 is an offence in terms of Section 98 of the MPRDA, and punishable, under section 99 of the MPRDA, by a fine of up to 10% of the miner’s “annual turnover in the Republic and its exports from the Republic during the (miner’s) preceding financial year”, four years’ imprisonment, or both.

Therefore, in South Africa, when mining companies fail to adhere to requirements of beneficiation commit punishable offence. These intend to force mining companies to comply with the Statute. Whereas in Botswana the mining companies comply voluntarily in the implementation of the beneficiation.

### **5.2.2 State control**

#### **➤ Botswana**

In Botswana prior to 1999, Section 2 of the Mineral Rights in Tribal Territories Act,<sup>452</sup> (MRTTA) vested all the mineral rights of the tribal territories in the Republic of Botswana government. Meaning, the government controlled and owned all mines in the tribal authorities’ land which happened to be rural areas where mines are situated. The position circumvented in 1999, by enactment of Mines and Minerals Act 17 of 1999 (MMA). As, in terms Section 3(1) of MMA, subject to the provision of the MRTTA “all rights of ownership in minerals are vested in the Republic. And the Minister shall ensure, in the public interest, that the mineral resources of the Republic are investigated and exploited in the most efficient, beneficial and timely manner.”<sup>453</sup>

These means that the government of the Republic of Botswana is entrusted with sole authority to be the custodian of all minerals resources in the country. Under, the Ministry of Mineral, Energy and Water Resources whereas in South Africa the Ministry

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<sup>451</sup>Section 26 of MPRDA.

<sup>452</sup>Mineral Rights in Tribal Territories Act 31 of 1967. (Chapter 66:02). An Act to provide for the vesting of mineral rights in tribal territories in the Republic of Botswana

<sup>453</sup>Section 3(1) Mines and Minerals Act of 1999. See also Mines and Minerals (Prospecting and Leasing Charges) Regulations [CAP 66:01].

of Mineral Resources, Ministry of Energy and Ministry of Water and Sanitations are three departments. However, the Ministry of Mineral Resources is entrusted with administrative authority of all mines.

The Government of Botswana plays not only active role in the administration of mines but also effectively in the operations of mines in Botswana. This active role participation is legislated. As in terms of Section 40 of the MMA, the government has the option to obtain up to 15 per cent working participation interest on mutually agreed commercial terms and obligations like any other shareholders to contribute working interest capital to the proposed mine.<sup>454</sup> Accordingly, Botswana government utilised this progressive legislation, by acquiring a stake in almost all key mining companies in the Republic.<sup>455</sup>

Further, the Government of Botswana has the right to acquire working interest which allows it to appoint two of the company's directors and receive dividends proportional to its stake.<sup>456</sup> Even though, statute obliges the government to pay for its working interest like any other ordinary shareholders. This is achieved by contributing, again on a proportional basis, towards the expenditure incurred in obtaining the mining licence and developing the mine.<sup>457</sup> Whereby the government of Botswana has no right to a 'free' interest in a new mine. In addition, its maximum 15% stake is not big enough to give it control of a mining operation in which it chooses to participate. Nevertheless, this ensures that the government participate fully in the day to day operational requirements of the mines including fulfilment of social licensing.

### ➤ **South Africa**

In South Africa, by contrast, about 60 per cent of the country's mineral resources were privately owned before the MPRDA came into force in May 2004.<sup>458</sup> These mining companies acquired registered real rights over mineral resources, meaning were enforceable, successive and transferable to anyone anytime in the world, with unlimited duration thereof.

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<sup>454</sup> Section 40 (1), Ibid

<sup>455</sup> *Bookhinder, J & La Flèche, E.R.* (2013). *The Mining Law Review* (2<sup>nd</sup> Edition) Law Business Research. Page 25.

<sup>456</sup> Section 40(1)(a) of MMA

<sup>457</sup> Ibid.

<sup>458</sup> *Anthea, J.* (2016). *Liberty, a product of the IRR,* No 5, 2016, Issue 28.

Currently, in terms of Section 3 of MPRDA, State is the custodian over the mineral resources of South Africa like it is in Botswana. The MPRDA grants state administrative authority to administer all the acquisition or granting of rights in the mining industry. The Minister in terms of Section 17 has the authority to grant prospecting right. Wherefore, the minister has administrative authority in terms of Section 23 of MPRDA to grant mining right for a duration of 30 years maximum.<sup>459</sup> The grant of mining right depends largely on compliance with social and labour plans. DMR reserves the right to cancel any right granted right anytime. In the case of *Agri SA v Minister of Minerals and Energy*, 2013 (4) SA 1 (CC); the court declared that state custodianship over mineral resources is constitutional. The court held that existing mining companies must exercise their option to apply for conversion of old order rights to new order rights wherein the State is the custodian.<sup>460</sup>

The State established African Exploration Mining and Finance Corporation, as a legal entity with powers to apply, acquire and control their own mine. Moreover, to participate meaningfully in the mining industry.<sup>461</sup>

### **5.2.3 The uncertainty with regard to mining regulation**

The international law best practice requires mining laws that are certain, stable and unambiguous that promotes accountability, transparency and leaves no room for corruption, abuse of power or biasness in administration of mines by governments.<sup>462</sup> According to Fraser survey Botswana ranked 2<sup>nd</sup> in the world whereas South Africa is at 84<sup>th</sup> with regard the uncertainty of mining regulations.<sup>463</sup> The discussion that follows explain the difference.

#### **➤ Botswana**

Since, the enactment of MMA in 1999, Botswana government has not expressed its intentions to amend new mining laws. Equally, does not intend anytime soon to

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<sup>459</sup>Section 23 of MPRDA

<sup>460</sup>*Agri SA v Minister of Minerals and Energy*, 2013 (4) SA 1 (CC);

<sup>461</sup> African Exploration Mining and Finance Corporation Website. Available online at [www.aemfc.co.za](http://www.aemfc.co.za). Accessed 06 May 2017.

<sup>462</sup> *Anthea, J.* (2016). Liberty, a product of the IRR," No 5, 2016, Issue 28.

<sup>463</sup>*Ibid.* Page 6.

expropriate or nationalise mining operations or any other laws. In general, Botswana has maintained policy stability, since 1999, this boosting investors' confidence.<sup>464</sup>

MMA, Chapter 66:01 largely regulates the mining industry in Botswana. According to Section 13 of MMA, the application for prospecting licence is made by any person wishing to obtain a prospecting licence to the Minister by just completing form I set out in the first schedule.<sup>465</sup> In terms of Section 14 of MMA, the Minister before granting any licence or permit for prospecting licence the applicant must meet the following requirements:<sup>466</sup>

- (a) The applicant has, or has secured access to, adequate financial resources, technical competence and experience to carry on effective prospecting operations;
- (b) The proposed programme of prospecting operations is adequate and makes proper provision for environmental protection;
- (c) The proposed prospecting area is not the same as, nor does it overlaps an existing prospecting area, retention area, mining area or minerals permit area in respect of the same mineral or associated mineral and;
- (d) The applicant is not in default.

According, to Section 37 of MMA, the "holder of prospecting right, retention licence, or a waiver may apply for a mining licence for an area in respect of which the waiver has been issued, or for an area within his prospecting area or retention area, in respect of the mineral covered by such prospecting licence, retention licence or waiver, and in the case of a prospecting licence or a retention licence."<sup>467</sup>

The requirements that must be meet, with regard to application rights are:

- a) The proposed programme of mining operations will ensure the most efficient and beneficial use of the mineral resources in the proposed mining area;

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<sup>464</sup>*United Nations Research institute for Social Development*. Gervase S. Maipose. 2008. Project of Poverty Reduction and Policy Regimes. Institutional Dynamics of Sustained Rapid Economic Growth with Limited Impact on Poverty Reduction. Page 3. Geneva. Switzerland.

<sup>465</sup>Section 13 of MMA.

<sup>466</sup>Section 14 of MMA.

<sup>467</sup>Section 37 of MMA.

- b) The proposed mining area extends to cover only that area reasonably required for surface mining and treatment facilities and also to cover the proved, indicated and inferred reserves;
- c) The applicant has or has secured access to adequate financial resources, technical competence and experience to carry on effective mining operations;
- d) The proposed financing plan submitted as part of the feasibility study is in accordance with good financial practice, and provides for a debt to equity ratio of no more than 3:1 unless the Minister otherwise agrees and;
- e) The guarantee by the mining company that registered in Botswana and plans to carry business solely in terms of mining licence applied for.

Wherefore, if the minister is satisfied that the applicant for the proposed mining operations has adequate financial resources feasible to facilitate the good mining practice coupled with technical competence and experience that would ensure that the exploitation of such mineral resources are beneficial to the proposed mining area. Other than, the mining company must have registered in Botswana with the declaration that it would conduct mining operations in accordance with Botswana mining laws no other requirements required for compliance such with regards to composition of ownership.

The Republic of Botswana promote outsourcing of local products by mining companies. It is in terms of Section 12 of MMA where, local preference requirement outlined as very fundamental to Botswana mining regulations. The holder of a mining licence must give preference as far as possible to mining communities such as:<sup>468</sup>

- a) Buy materials and products made in Botswana;
- b) Utilize service agencies located in Botswana;
- c) Provide employment to the citizens of Botswana;
- d) Strengthen the security, efficiency and the economy of Botswana. and
- e) Conduct training programmes for employees to advance production.

According to Anthea, the government of Botswana has influenced the mining companies to invest in beneficiation of mineral resources without imposing onerous

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<sup>468</sup>Section 12 (1)-(3) of MMA.

social obligation to comply with thereof.<sup>469</sup> These realised as the result of corporation between government, mining companies and other stakeholders.

In Botswana when application for mining right is made, according to Section 39(4) of MMA, if the minister faced with competing application for a mining licence to mine at the mining areas or it's overlapping.<sup>470</sup>The minister must award licence to the applicant whose mining programme would benefit more the mineral resources area. Conversely, in South Africa in terms of Section 102 MPRDA, the minister must give preference to community mining company or black owned mining company.<sup>471</sup>

### ➤ **South Africa**

Section 10 of MPRDA provides the requirements that an applicant to obtain a mining right must follow as: An application for a mining right in terms of Section 22(1) of the Act must be completed in the form D contained in annexure I and must contain the following:

- a) "The applicant must have the necessary financial resources or access thereto;
- b) The applicant must possess technical ability or access thereto to conduct the mining activities and to mitigate and rehabilitate relevant environmental impacts;
- c) The applicant must have social and labour plan, which in terms of Regulation 41 and 42 of MPRDA has to promote employment and advance the social and economic welfare of all South Africans. Furthermore, contribute to the transformation of the mining industry; and ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating.<sup>472</sup>

These Social and labour plans developed by mining companies outlines their proposals to change the standard of living and human resources of the mining

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<sup>469</sup>*Anthea, J.* (2016). Liberty, a product of the IRR," No 5, 2016, Issue 28. Page 9.

<sup>470</sup>Section 39(4) of MMA.

<sup>471</sup>Section 102 of MPRDA.

<sup>472</sup>Mineral and Petroleum Resources Development Regulations. Published under Government Notice R527 in Government Gazette 26275 dated 23 April 2004. Commencement date: 23 April 2004.



communities and their employees. However, DMR officials if meet the requirements of mining charter and be feasible for implementation must approve it. The DMR officials are afforded with vast discretion to approve or disapprove the plan which often time consuming and raising uncertainty about these requirements as there is no clear guidelines to follow. These leaving the DMR enormous authority to disapprove or approve social and labour plan these derailing the granting of mining rights.

- d) The applicant must further comply with the mining charter promulgated in terms of Section 100 of MPRDA to ensure that the mining industry for HDSA. These, to substantially and meaningfully participate in the opportunities in the mining industry.
- e) A mining work programme contemplated in regulation 11;
- f) The minister further in terms of Section 100 (2) (a) of MPRDA has to redress historical, social and economic inequalities brought by past imbalances as stated in the Constitution. Through promulgation of broad-based socio-economic empowerment Charter, that sets the framework specific targets and measures for effective improvement into entry and active participation of HDSA into the mining industry. Further, that aims to ensure that majority of people of South Africans benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources. Therefore, mining rights granted have to comply with required specific targets by mining charter.
- g) Mining charter set specific targets to comply ranging from ownership requiring 26% BEE ownership for by existing and new mining operators, as such failure to meet such target, therefore no mining right can be granted.<sup>473</sup> These leading to investors fronting BEE partners in South Africa in order to obtain mining rights.
- h) In terms of Section 12 the minister in granting mining rights need to assist the HDSA to acquire mining rights. As the court stated in case of *Bengwenyama ya Maswazi community and others V Genorah Resources (Pty)Ltd*, 2015 (1) SA 197 (SCA), the court held that is the duty of the minister to assist the community

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<sup>473</sup>Clause 2.1 of Mining Charter of 2004.

with application for a mining right when the application is made in terms of section 104 of MPRDA.<sup>474</sup>

- i) In terms of Section 104 of the MPRDA, the minister in granting prospecting or mining right must give preference to any of community which wishes to obtain the preferential right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned. Meaning, if the application is lodged on the same day the minister must give preference to application from Black South Africans or community.”

The first in, first assessed principle, simply implies give preference to whomever applied first but this seems to disregard it. The vast authority granted to Minister in granting rights often abused in favour of those politically connected. As in the case of *Minister of Mineral Resources and Others v Sishen Iron Ore Co (Pty) Ltd and Others*, 2014 (2) SA 603 (CC) the Khumba owned 78.6% of the old order mining rights at its Sishen Mine and Arcerlor Mittal South Africa (AmSA) held the remaining 21.4% of the old order rights. The mining companies required to transfer their older right to new order rights by 30 April 2009, as such Khumba applied for conversation and it was granted whereas AMSA failed and that meant that its right would cease to exist.<sup>475</sup>

On the closing date 30 April 2009, Khumba applied for prospecting over the remaining portion and on the 04<sup>th</sup> May 2009 Imperial Crown Trading (ICT) Black owned mining company lodged a competing application to prospect. ICT was Shelf Company without mining experience but with a good political connection. Consequently, was granted such prospecting right. The constitutional court ordered the minister to grant Khumba an opportunity to make re-application to prospect on the remaining 21% in the mine it holds, since was first in and as such must be first assessed.<sup>476</sup>

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<sup>474</sup>*Bengwenyama ya Maswazi community and others V Genorah Resources (Pty)Ltd. 2015. (1) SA 197 (SCA).*

<sup>475</sup> *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* (CCT 51/13) [2013] ZACC 45; 2014 (2) BCLR 212 (CC); 2014 (2) SA 603 (CC) (12 December 2013).

<sup>476</sup>*Ibid.*

The case illustrates that when sole powers vested in the minister with numerous requirements to be met often abused and defrauded by the Minister and mining companies seeking rights in South Africa.

#### **5.2.4 Cancellation of mining rights.**

The government of Botswana and South Africa as custodians of mineral resources grant mining rights and have the discretion to cancel the mining rights in case of non-compliance with the rules. The mining companies need to satisfy that before undertaking enormous risk investment. However, the rules of cancellation would not prematurely have amended without just consultation and justification.

##### **➤ Botswana**

MMA largely regulates the mining industry of Botswana, which include cancellation of rights which all the mining companies have to comply with, unfailingly would lead to cancellation of the rights. According to Section 76 of MMA empowers the minister to cancel (or suspend) a mining licence if the mining company:

- a) “fails to pay its annual fee or make any other required payments;
- b) contravenes any provisions of MMA or any other legislation regulating mines and minerals in Botswana;
- c) fails to comply with the terms on which its mining licence has been granted (for example, by failing to adhere to its mining programme);
- d) knowingly makes a false statement in the information it is obliged to provide; or
- e) fails to remain registered as a Botswana company.”<sup>477</sup>

However, before cancelling a mining licence, the minister must give notice to the mining company and give it the opportunity to rectify the matter within a specified period of not less than 30 days. If remedial action is not taken in this period, the minister may then cancel the mining licence.

As such, the mining companies operating in Botswana upon attainment of mining licence on the specified date must commence production as stated in the mining programme within the confirmations of mineral regulations in Botswana. These must be adhered to avoid cancellation of the mining rights such as to develop and mine the

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<sup>477</sup> Section 76 (1) (a)-(e) of MMA.

mineral in accordance with good mining and environmental practice, maintain accurate technical records of all mining operations. Further, required to submit appropriate information and financial records as the minister may require; and timeously furnish a copy of its annual audited financial statements.

➤ **South Africa.**

Conversely, in terms of Section 47 of MPRDA provides more similar powers to the minister of mineral resources to cancel (or suspend) a mining right, reconnaissance permission, prospecting right, mining permit, retention permit or holders of old order rights or previous owner of works, if the holder of a right:

- a) “Conducted the rights, permits or permissions in contravention of the MPRDA;
- b) reaches any material term or condition of the mining right; permit or permission.
- c) contravenes any condition in its environmental authorisation;
- d) submits information which is ‘inaccurate, false, fraudulent, incorrect, or misleading’;<sup>478</sup>
- e) contraventions of Social and labour plan- The holder of a right must comply with their respective social and labour plans submitted to be granted the licence it would result in cancellation of the mining right by the minister.
- f) Contraventions of Mining charter – the mining companies South Africa obliged to comply with mining charter consequently, would result in cancellation or suspension of its mining rights by the Minister.

Similarly, in South Africa before cancelation of any mining right, the minister must give written notice to the company and allow it a reasonable opportunity’ to make representations.<sup>479</sup> The minister must also direct the mining company to take specified measures to remedy any contravention. If the company fails to do so, the minister must give it a reasonable opportunity to make representations before proceeding with a cancellation. As this list shows, mining rights can be cancelled if a company contravenes ‘any condition’ in its environmental authorisation. Section 90 of MPRDA makes it clear minister powers of cancellation subject to above procedure outlined in terms of Section 47 of MPRDA.<sup>480</sup>

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<sup>478</sup>Section 47 (1) of MPRDA.

<sup>479</sup>Section 47(2)-(5).

<sup>480</sup>Section 90 of MPRDA.

### 5.2.5 The environmental regulations

The environmental preservation and conservation is of paramount significant for both present and future generation in any nation. As such governments and private sector must institute various measures and initiatives for environmental protection and rehabilitation. According to Fraser survey Botswana ranked 5<sup>th</sup> whereas South Africa ranked 44<sup>th</sup> in terms of regulation and adherence to environmental laws.<sup>481</sup>

#### ➤ **Botswana**

According to Section 65 (1) of MMA “the holder of a right in Botswana have to conduct mining operations in accordance with existing law at particular time, good mining industry practice, conduct his operations in such a manner as to preserve in as far as is possible the natural environment, minimize and control waste or undue loss of or damage to natural and biological resources, to prevent and where unavoidable, promptly treat pollution and contamination of the environment and shall take no steps which may unnecessarily or unreasonably restrict or limit further development of the natural resources of the concession area or adjacent areas.”<sup>482</sup> Section 66(1) entails that it is an obligation of the rights holders to ensure that environment is protected and conserved in accordance with the environmental regulations in the mining areas and affected areas in the interest of natural resources development.<sup>483</sup>

Section 66(2) of MMA requires holders of rights to submit such as mining licence or retention licence to submit comprehensive Environmental Impact Assessment (EIA) as part of the Project Feasibility Study Report that is line with good international mining industry standards.

#### ➤ **South Africa**

According to Section, 37(1) of the MPRDA provides that the principles regulating environmental management in South Africa are largely outlined in Section 2 of NEMA for mining operations.<sup>484</sup>

Section 37(2) of MPRDA read with Section 24 (b) of the Constitution provides that any prospecting or mining operation must be conducted in accordance with acceptable

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<sup>481</sup>*Anthea, J.* (2016). Liberty, a product of the IRR,” No 5, 2016, Issue 28. Page 6.

<sup>482</sup>Section 65 (1) of MMA.

<sup>483</sup>Section 66(1) of MMA.

<sup>484</sup>Section 37(1) of MPRDA.

principles of sustainable development by integrating social, economic and environmental factors within the planning and implementation mining operations in the mining communities to ensure that the mineral resources exploited in the interest both present and future generations.<sup>485</sup>

Under recent amendments to the National Environmental Management Act of 1998, which took effect in November 2015, the environmental obligations of mining companies have become very much more complex and costlier.

### **5.2.6 The tax implications on mining progression**

All countries have distinct tax regulations as the major source of government revenue.

- **Botswana**

Botswana Income Tax Act (BITA) 12 of 1995 as last amended by Income Tax Amendment Act 18 of 2006, to consolidate and amend the law relating to the imposition, assessment and collection of tax on incomes in Botswana.<sup>486</sup>The Commissioner General of the Botswana Unified Revenue Service regulates the administration of Taxation in Botswana. Accordingly, Section 43 of BITA regulates the deductions allowable in relation to mines and minerals found in Botswana. It provides that notwithstanding the generality of section 39(2) and other sections in ascertaining the chargeable income of any person for any tax year from mining operations, the deductions allowed outlined by the Act.<sup>487</sup>

Tax applicable to operating mining companies varies from:

- 1. Royalties tax in terms of Section 66 of MMA.**

In terms of Schedule 12 paragraph, 1 of BITA royalties' payable from gross market value is at 10% for diamonds. Whereas, 5% is payable from precious metals such as gold and platinum group metals. In terms of Schedule 12 paragraph 4 of BITA outlines how companies must calculate their variable incomes to determine taxable gross income

- 2. Corporate tax standard rate is 22% of the annual profit.**

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<sup>485</sup>Section 37(2) of MPRDA

<sup>486</sup>Preamble.

<sup>487</sup>Section 43 of IA.

The government of Botswana derives most of their revenues from royalties, taxes and dividends payable by mining companies.<sup>488</sup> According to Molaetsa the tax regime adopted in Botswana intended to ensure that Botswana remains internationally competitive in attracting and retaining mining investment.<sup>489</sup> At the expense of comprising Botswana government an opportunity to optimize returns from mineral resources wealth.

- **South Africa**

South Africa Income Tax Act (ITA) 58 of 1962 as amended by Section 39 of Act 5 of 2001 to consolidate and amend the law relating to the imposition, assessment and collection of tax on incomes in South Africa.<sup>490</sup> The Commissioner of the South Africa Revenue Services (SARS) regulates the administration of Taxation in South Africa.<sup>491</sup>

Tax applicable to operating mining companies varies from:

- 1. Income Act Tax 58 of 1962 (ITA)**

According to Section 37E (1) ITA, vividly explains what is beneficiation and what it aims to achieve within the context of generating income towards economic growth of South Africa. As such it is apparent, that implementation of beneficiation by mining companies would contribute largely to growth in the mining industry as it is currently struggling and confronted with enormous challenges.

- 2. Mineral and Petroleum Resources Royalty Act 28 of 2008 (MPRRA)**

Accordingly, the MPRRA enacted to regulate beneficiation by the state through taxation. The imposed levies serve as revenue generation to benefit the people of South Africa as government depends largely on taxation to provide services and administration of transformative development to everyone.

Section 2 of MPRRA it provides that:

“A person that wins or recovers a mineral resource from within the Republic must pay a royalty for the benefit of the National Revenue Fund in respect of the transfer

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<sup>488</sup>Principal Minerals Officer. Ministry of Minerals, Energy and water Resources. Melaetsa, O. Is Taxation of Minerals in Botswana a success story and what can other countries learn from this? Page 7-13.

<sup>489</sup>Ibid.

<sup>490</sup> Preamble of Income Tax Act 58 of 1962.

<sup>491</sup>

of that mineral resource.”<sup>492</sup> Section 2 imposes levy on any person either juristic or natural to pay royalty to the National Revenue when they transfer mineral resources they extracted in the Republic of South Africa.

### **5.2.7 Other legislation governing mining industry**

The legal system of Botswana according to Fraser survey ranked 20<sup>th</sup> whereas of South Africa ranked 70<sup>th</sup> in the global market.<sup>493</sup>

### **6.1 Unwrought Precious Metals Act 11 of 1999**

Unwrought Precious Metals Act (UPMA) regulates the control of dealings in unwrought precious metals in Botswana.<sup>494</sup>

According to section 3 of UPMA, no person in the Republic of Botswana entitled to be in possession any unwrought precious metal unless the person established that:

- (a) such unwrought precious metal has been won or found in the ground held by him under any mining right, or on which he is lawfully entitled to prospect;
- (b) entitled to be in possession of such unwrought precious metal by virtue of contractual obligation;
- (c) is a jewellery manufacturer or a jewellery repairer, or otherwise deals in precious metals and holds a permit authorised by the Minister

Therefore, according to section 3(2) of UPMA, any person who found in possession any unwrought precious metal, must satisfy that acquired such metals in a lawful manner. Consequently, shall be guilty of an offence and liable to a fine.<sup>495</sup>

### **6.2 Precious and Semi-Precious Stones (Protection) Act 3 of 1969**

The Precious and Semi-Precious Stones Act (PSPSA) as last amended by Precious and Semi-Precious Stones Amendment Act 16 of 2005, to provide for the protection

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<sup>492</sup>Section 2

<sup>493</sup>*Anthea, J.* (2016). Liberty, a product of the IRR,” No 5, 2016, Issue 28. Page 6.

<sup>494</sup>Preamble of Act 11 of 1999.

<sup>495</sup> Section 3(2) of UPMA.



of the precious stones industry and regulation of dealings in precious stones and semi-precious stones in Botswana.<sup>496</sup>

In terms of section 3 of PPSA, it is the duty of holder of prospecting right to report discovery of precious stones to forthwith give written notice to the Minister. In which declares the weight, estimated value and any other information which may be required with regard to precious stones found thereof.<sup>497</sup> The impose sanctions to any person who declares false information to the minister, these ensuring that minerals being are well known by the minister and their worth thereof.<sup>498</sup>

### **6.3 Petroleum (Exploration and Production) [CAP 67:01] Act 12 of 1981**

Petroleum (Exploration and Production) Act, make provision with regard to the exploration for and exploitation of petroleum resources and for purposes incidental thereto or connected therewith.<sup>499</sup>

### **6.4 Mines, Quarries, Works and Machinery: [CAP 44:02] Act 20 1973**

The Mines, Quarries, Works and Machinery Act as Amended by Mines, Quarries, Works and Machinery Amendment Act 15 of 1995, it regulates the safety, health and welfare of persons engaged in prospecting, mining and quarrying operations including any works which are part of and ancillary to mining and quarrying operations.<sup>500</sup> And it make provision with respect to the inspection and regulation of mines, quarries, works, and of machinery used therewith.<sup>501</sup>

### **6.5 Mines and Minerals (Prospecting and Leasing Charges) Regulations [CAP 66:01]**

Section 2 of the Mines and Minerals (Prospecting and Leasing Charges) Regulations, subject to provisions of MMA, regulates prospecting licence lease charges.<sup>502</sup> Thereafter, Section 3 of the Mines and Minerals (Prospecting and Leasing

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<sup>496</sup>Preamble of Act 3 of 1969.

<sup>497</sup>Section 3(1) of Precious and Semi-Precious Stones (Protection) Act 3 of 1969.

<sup>498</sup>Section 4 (1) *ibid*.

<sup>499</sup>Preamble Act 12 of 1981.

<sup>500</sup>Preamble of Mines, Quarries, Works and Machinery: [CAP 44:02] Act 20 1973.

<sup>501</sup> *Ibid*.

<sup>502</sup>Section 2(i)-(ii) of Mines and Minerals (Prospecting and Leasing Charges) Regulations. [CAP 66:01].

Charges) regulates the mining licenses lease charges of the land in the tribal authority.<sup>503</sup>

### **6.6 Mines and Minerals (Health, Mortality and Labour Returns) Regulations; [CAP 66:01]**

According to Section 2 of the regulation, provide that employers usually mining companies or their sub-contractors in the mining or quarrying are obliged to submit monthly health, labour and mortality returns in a prescribed form according to scope of employment of the specific employee to mining commissioner.<sup>504</sup> Consequently, non-compliance to furnish such monthly returns amount to punishable offence either by fine or imprisonment by mining commissioner.<sup>505</sup> These ensures that mining companies comply with all health and safety standards in Botswana. It further informs the mining commissioner monthly of the health status of employees adequately and efficiently. Therefore, it assists the mining commissioner in conducting survey and importantly able to act accordingly if at the specific mine there is health risk or health standards are not complied with.

### **6.7 Mines and Minerals (Demarcation of Mining Lease Areas) Regulations. [CAP 66:01]**

The regulation demarcates areas by means of beacons, line marks, ancillary marks, direction trenches and cleared belts.

## **7 South Africa other similar legislation governing mining industry**

The South African pieces of legislation regulating mining industry are broadly discussed in chapter 2 of the research which are :

7.1 Diamonds Act 56 of 1986 as amended

7.2 Geoscience Act, 100 of 1993, as amended by the Geoscience Amendment Act 2 of 2010

7.3 International Trade Administration Act 71 of 2002

7.4 Labour Relations Act 66 of 1995

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<sup>503</sup>Section 3 (a)-(b) of *ibid*.

<sup>504</sup>Section 2 of Mines and Minerals (Health, Mortality and Labour Returns) Regulations; [CAP 66:01].

<sup>505</sup>Section 3 *Ibid*.

- 7.5 Mine, Health and Safety Act 29 of 1996
- 7.6 Mineral and Petroleum Resources Development Act 28 of 2002
- 7.7 Mineral and Petroleum Resources Development Amendment Act 49 of 2008
- 7.8 Mineral and Petroleum Resources Royalty Act 28 of 2008
- 7.9 National Environmental Management Act 107 of 1998
- 7.10 Precious Metals Act 37 of 2005
- 7.11 Precious Stones Act 73 of 1964
- 7.12 Skills Development Act 97 of 1998
- 7.13 Trade and Development Act 106 of 2002

However, the implementation of the above legislation remains a common concern towards realisation of beneficiation in South Africa.

### **Conclusion**

Pursuant to the above it is pleasing to realise that one of the African country called Botswana has managed to achieve enormous progressive towards administration and development of their own mining industry. It is apparent from the statistics and pieces of legislation that Botswana in comparison with South Africa is far much better.<sup>506</sup> There is clearly nothing special about Botswana, these two government are custodians of mineral wealth of their countries at the behest of their citizen's interest. The main difference is that the mining regulation of Botswana are stable and certain whereas in South Africa continuously changes regularly. These is hindering mining growth and investment for progression in South Africa. Botswana government has opted to participate effectively and efficiently towards operational administration of mines in the country. Whereas South Africa relies more on taxation and social licencing to benefit from mineral wealth. These led to closure of many mines and job losses in South Africa as the State in South Africa act as revenue collector without understanding the day to day challenges mining companies confronted with thereof.

Botswana remains internationally competitive in attracting and retaining mining investment from the rest of the world.<sup>507</sup>As mining companies such as De Beers decided to invest more on Botswana mining and development of the country. Further, the certainty of mining regulations fastened development of Botswana citizens and the

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<sup>506</sup>*Anthea, J.* (2016). Liberty, a product of the IRR," No 5, 2016, Issue 28. Page 6.

<sup>507</sup>*Ibid.*

country opportunity to enjoy proceeds of mining companies as a result of their effective participation. Further, the certainty of mining regulations fastened the development of Botswana citizens and the country opportunity to milk mining companies through exorbitant taxation like in South Africa. Therefore, the government of Botswana compromises maximization of tax returns from mineral resources wealth and prioritise policy certainty, stability, growth and development of the mining industry.

## CHAPTER 6: CONCLUSION

South Africa Mining industry for decades has been the backbone of the economy. However, it has paid lip service towards advancement of socio-economic transformation, economic development and poverty alleviation in South Africa. This is evident by the mining communities remaining clouded with social ills such as inadequate infrastructure; poverty; escalating unemployment; inadequate health services in the midst of health hazards imposed by mining. Whereas, millions of tons of mineral resources extracted daily and exported to international markets unrefined. These resulting in the ordinary people protesting to benefit from exploitation of mineral resources thereof. Some voices recommended nationalisation whereas some calling for beneficiation. The government approved beneficiation of mineral resources strategy as the pathway to transform the mining industry in the best interest of its citizens.

Therefore, the research discusses mineral resources beneficiation legislation and policies in South Africa. The research found South Africa mineral resources industry is highly regulated by various pieces of legislation and policies, as discussed in broad in Chapter 2. Firstly, the Constitution of Republic of South Africa is the supreme law founded on the fundamental values of freedom, human dignity and equality. In terms of Section 9(2) of the Constitution for equality to prevail in South Africa, it authorises the parliament to enact legislation that redress the historical imbalances. The constitution of South Africa is transformative in nature to an extent whereby tolerates deprivation of another person rights in order to redress the injustices of the past. The judge in case of *Bato Fishing V Minister of Environmental Affairs and Tourism* stated that the transformation is a process that cannot be achieved overnight nor through enactment of bill of rights. The court held further that in that process the previously advantaged persons may have to be discriminated in order to empower the historically disadvantaged persons. Therefore, South Africa have legislative obligation to transform to redress the injustices of the past and cure the social ills in the communities such as poverty and unemployment.

The MPRDA serves as principal Act that regulates the operations of mines in South Africa. In terms of Section 3 of MPRDA, it accords the State custodianship of mineral resources in South Africa from private ownership by private mining companies. In the case of *Agri SA v Minister of Minerals and Energy*, the Chief Justice Mogoeng vividly

elucidated further that this is constitutional in realising state autonomy in the administration of South African economy. As such, South African government is entrusted with the administrative powers to regulate granting of rights and how must be excised on behalf of its people.

Pursuant to above, various legislation had been enacted since the dawn of democracy in 1994 to transform the mining industry discussed in Chapter 2 above. South Africa regulates its mining industry in conjunction with international treaties is a signatory thereof. It is worth noting that South Africa plays the pivotal role in the world economy and therefore, its operations are sacrosanct to the development of international mining industry. The constitution in section 39 (2) provides that international treaties are binding upon South Africa being a signatory and adopted by our parliament. Therefore, transformative legislation of South Africa despite the country independent autonomy must adhere to international trade agreements with the world.

The research found that there are various challenges faced by South Africa government towards its initiative to beneficiate the mineral resources. Therefore, South African government has to firstly address this impediment and equally ensure that mineral resources are transformed to the last stage of beneficiation.

Comparative study has been with Botswana as benchmark country in which lessons can be drawn on how best South Africa mineral resources can be transformed in manner that would benefit its people. The study found that Botswana mining industry is regarded as the best in Africa, whereas South Africa ranked is drastically low. These is merely because Botswana mining laws are certain, unambiguous and transformative in nature. Whereas in South Africa various pieces of legislation are enacted, amended and repealed continuously. Further, unlike in Botswana, South Africa does not have unambiguous and definite policy regulating mining industry. South Africa politics atmosphere calls for different agenda, from nationalisation, privatisation, capitalisation, industrialisation and whereas agreed on beneficiation.

## **6.1 RECOMMENDATIONS**

South Africa to be internationally competitive in a sustainable manner must implement the following.

- 6.1.1 A long term policy that would advance the transformation in the mining industry. The mining charter considered mechanism capable of transformation the mining industry. Therefore its finalisation and certainty is sacrosanct towards development and transformation of the mining industry in the interest of the people of South Africa
- 6.1.2 South Africa since the dawn of democracy has continuously enacted various pieces of legislation, these creating uncertainty. Therefore, it must refrain from enacting various parallel legislation regulating one industry.
- 6.1.3 However, the country must outsource various measures and mechanism that would ensure adequate and robust implementation of South Africa legislative framework.
- 6.1.4 A heavy punishment must be imposed on any person either juristic or natural who violates legislation, policy or regulation that serve to transform mining industry.
- 6.1.5 South Africa must invest more on skills development, to ensure that skills sought for adequate implementation are accessible and realisable for sustainable beneficiation in South Africa.
- 6.1.6 The government, mining companies and other stakeholders must invest more on research and learning development. These is critical component of sustainability, as source alternative measures for to maximise profit and minimise risk. Therefore, R&D is crucial for development of mining industry in South Africa.

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