

**SOCIO-ECONOMIC DEVELOPMENT OF MINING COMMUNITIES: A
JURIDICAL AND COMPARATIVE STUDY OF RESPONSIBILITIES AND
LIABILITIES OF MINING COMPANIES IN SOUTH AFRICA.**

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2024

DECLARATION

I declare that the Research thesis entitled **SOCIO-ECONOMIC DEVELOPMENT OF MINING COMMUNITIES: A JURIDICAL AND COMPARATIVE STUDY OF RESPONSIBILITIES AND LIABILITIES OF MINING COMPANIES IN SOUTH AFRICA** hereby submitted to the University of Limpopo for the degree of DOCTOR OF LAWS has not previously been submitted by me for a degree at this or any other university; that it is my work in design and execution, and that all material contained therein has been duly acknowledged.

.....

Signature

.....

Date

DEDICATIONS

I dedicate this thesis to my late grandparents Mokgadi and Mpsa Mokgokong and Ngoato Phokoane.

DECLARATION BY SUPERVISOR

I declare that the Research thesis entitled **SOCIO-ECONOMIC DEVELOPMENT OF MINING COMMUNITIES: A JURIDICAL AND COMPARATIVE STUDY OF RESPONSIBILITIES AND LIABILITIES OF MINING COMPANIES IN SOUTH AFRICA** is the work of MM Mokgokong submitted for the study of LLD at the University of Limpopo. The thesis, completed under my supervision is the candidate's own work in design and execution and all material contained therein has been duly acknowledged.

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Signature

.....

Date

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SUMMARY

In South Africa, the right to a clean environment and environmental sustainability is constitutionally guaranteed. Also, the Mineral and Petroleum Resources Development Act (MPRDA) sets certain obligations to mining and the extractive industry in general, including having to conduct their operations in a manner that takes into account the socio-economic conditions of the mining communities. However, preliminary investigations suggest that these obligations are being ignored and the rights of mining communities are violated daily by the mining industry. Mining communities often bear the brunt of the negative effects of mining operations. With the economic expansion trend in Africa and multinational corporations (MNCs) conducting extractive operations, the protection of mining communities remains a critical issue for the extractive industry. Mining communities must be part of the mining stakeholders who should benefit from the equitable and sustainable distribution of mineral resources. The starting point is to have in place sustainable mining practices that extend to the promotion of the socio-economic development of mining communities or communities affected by mining activities.

The study moves from the proposition that there is a need to develop a corporate social responsibility (CSR) theory or approach that addresses the specific circumstances of rural mining communities. This study further contents that the enshrinement of environmental rights in the South African Constitution not only requires mining communities to be aware of their environmental rights and the rights to sustainable development. Failure to understand the importance of these rights and the relationship between these rights will ensure that sustainable development will remain paper tigers.

The methodology used in the research is primarily desktop which entails the study of primary and secondary literature. The adopted descriptive, doctrinal analysis and comparative perspectives research methods. Using CSR as the main theoretical underpinning of the study, the researcher conducts a juridical and comparative investigation of the contribution of mining companies in South Africa towards the socio-economic development of rural mining communities. Theories of sustainable development and the human rights-based approach will be complementary conceptual frameworks towards the execution of the study.

The study concludes that there is a plethora of legislation that regulates other aspects of CSR, but very few that focus on socioeconomic development and the protection of the rights of dwellers of mining communities. To this end, one of the recommendations by the researcher is the introduction of legislation that regulates the socio-economic development of mining communities through CSR. The researcher provides a draft recommended legislation.

Keywords: Accountability; Companies; Corporate Social Responsibility; Environment, Human-Rights; Liabilities; Mining; Mining Communities; Socioeconomic Development; Sustainable Development; Responsibilities and Liabilities; Rural Communities; South Africa

LIST OF ABBREVIATIONS/ ACRONYMS

BSAC	British South African Company
CC	Constitutional Court
CRT	Critical Race Theory
CS	Corporate Sustainability
CSI	Corporate Social Investment
CSR	Corporate Social Responsibility CSR
GDP	Gross Domestic Product
GG	Governor-General
HDP	Historically Disadvantaged Persons
HRBA	Human Rights-Based Approach
IDP	Integrated Development Plan
MPRDA	Mineral and Petroleum Resources
NP	National Party
SAHRC	South African Human Rights Commission
SD	Sustainable Development
SDG	Sustainable Development Goals
SDM	Sustainable Development through Mining
SLP	Social and Labour Plan
SS	Social Sustainability
ST	Stakeholder Theory
Stats SA	Statistics South Africa
TBLT	Triple Bottom Line Theory
UL	University of Limpopo

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CHAPTER 1

BACKGROUND AND ORIENTATION

1.1. INTRODUCTION

The rich tapestry of South Africa's mining history is woven with threads of discovery, resilience, and transformation. For the purposes of this study, “mining” refers to the process of extraction or abstraction of mineral deposits from either the surface of the earth or beneath the surface of the earth.¹ Mining is one of the oldest activities in South Africa, with a long history dating back to 1852 when the first mining operations were recorded with copper exploration in the Northern Cape Province.² This was followed in 1879 and 1895 with coal mining started in the Vereeniging and Witbank areas.³ The first diamonds were reportedly discovered in 1860 and 1871 and the first platinum deposits in 1924.⁴ The shimmering gold reefs that embrace Johannesburg were in 1886 discovered.⁵

However, as the mining industry evolved and matured, the formidable challenge of crafting a regulatory framework, mining practices and operations that uphold social justice emerged as a persistent shadow. The pages of history are etched with the struggles and triumphs of creating a fair and equitable mining sector that benefits all South Africans.⁶ The pursuit of social

¹ Bell G and Donnelly J. *Mining and its Impact of the Environment*. (Taylor and Francis 2006) 3.

² See generally, Casey, J. P. (2019). *History of mining in South Africa*. Available online at: <https://www.mining-technology.com/features/history-of-mining-in-south-africa/> (accessed July 2023); Britannica (2022).

³ See generally, Casey, J. P. (2019). *History of mining in South Africa*. Available online at: <https://www.mining-technology.com/features/history-of-mining-in-south-africa/> (accessed July 2023); Britannica (2022).

⁴ Casey, J. P. (2019). *History of mining in South Africa*. Available online at: <https://www.mining-technology.com/features/history-of-mining-in-south-africa/> (accessed July 2023).

⁵ Britannica (2022). *Gold mining*. Available online at: <https://www.britannica.com/place/South-Africa/Gold-mining> (accessed September 2023).

⁶ A Lane et al The Journal of the Southern African Institute of Mining and

justice remains an enduring goal, a compass guiding the industry towards a more inclusive and sustainable future. It is within this context that the South African mining sector continues to redefine its narrative, seeking a harmonious balance between its historical legacy and the imperatives of the modern world.

Mining operations and approaches, business profits volatility, duty to develop mining communities, and navigating political conditions will always collide with the best interest of the communities. Yet, amid this conundrum mining companies across South Africa remain with the responsibility towards mining communities. As observed by Müller, there are also serious power imbalances between the political-economic elites and other parts of society that are more likely to bear the negative consequences of mining⁷. This observation is especially accurate to the South African context, where mining communities are prone to suffer disproportionate and severe impacts of mining. More so because these communities are heavily reliant on and attached to their land.⁸ This is a challenge that cannot be resolved easily, but it is already apparent that pressure for good governance will continue to increase.”⁹ Notable also is the observation that at “the global level, geopolitical competition over the access to minerals is increasing” in Africa by multinational mining companies and some countries.¹⁰

Mining companies bear a weighty array of responsibilities and obligations as they conduct their operations. Their commitment extends to operating in a sustainable and conscientious manner, a duty that necessitates a careful consideration of the interests of every stakeholder within their orbit. Mining companies have various responsibilities and liabilities that they must adhere to while operating their businesses. They have a responsibility to operate sustainably and responsibly, taking into account the interests of all stakeholders, including employees, mining

Mettarlurgy 2015 473.

⁷ Müller M *South African Journal of International Affairs*, 2023 194.

⁸ Mathiba G *International Journal on Minority and Group Rights* 2023 5.

⁹ Müller M *South African Journal of International Affairs*, 2023 194.

¹⁰ Müller M *South African Journal of International Affairs*, 2023 187.

communities, shareholders, and the environment. Notable of the responsibilities include environmental responsibility, which entails that mining companies must minimise the negative impacts of their operations on the environment. This includes implementing measures to prevent pollution, conserving water resources, and protecting biodiversity. They must establish good relationships with local communities where they operate, including having to involve them in decision-making processes that may affect them. Furthermore, there must be compliance with laws and regulations. They must comply with all applicable laws and regulations, including environmental regulations, labour laws, and tax laws;¹¹ Mining companies must also be held liable for any damages caused by their operations, including environmental damage, health and safety incidents, and damage to property.¹²

In *Mfolozi Community Environmental Justice Organisation and Others v Tendele Coal and Others*,¹³ the court indicated that mining activities impact on the environment and have the potential to adversely affect persons living and working in the vicinity of the mining operations. Mining activities implicate and create a tension between a number of constitutional rights and principles including the right to an environment that is not harmful to health and wellbeing and the freedom of trade and earning an income of the mining entity.¹⁴ The regulation of mining and mineral extractions in South Africa is intended to give effect to section 24 of the Constitution.¹⁵ Therefore communities must be involved in the process.

¹¹ Here reference is made to how mining companies conduct their operations in an ethical, legal, and transparent manner. For instance, respecting human rights and avoiding corrupt practices. See generally, Frimpong-Manso K and Opoku EB, "The legal and ethical considerations of mining companies' responsibilities towards their host communities" 2018 *International Journal of Social Economics* 45(3), 365-377.

¹² For instance, mining companies must reclaim the land they have disturbed and close down their operations in a responsible manner. This includes rehabilitating the land to its pre-mining condition and ensuring that any hazardous materials are properly disposed of
Mfolozi Community Environmental Justice Organisation and Others v Tendele Coal Mining and Others [2023] 3 ALL SA 768 (KZP) 7.

¹⁴ *Mfolozi Community Environmental Justice Organisation and Others v Tendele Coal Mining and Others* [2023] 3 ALL SA 768 (KZP) 7.

¹⁵ *Ezulwini Mining Company (Pty) Ltd v Minister of Mineral Resources and Energy and Others* [2023] ZSCA 80. The court further reiterated that mining

In brief, among the noteworthy obligations, environmental responsibility takes a prominent place. Mining companies must not merely extract resources but also minimise the often far-reaching negative impacts their actions have on the environment. This entails the rigorous implementation of measures designed to stave off pollution, the preservation of precious water resources, and the safeguarding of biodiversity that sustains our ecosystem. Beyond ecological stewardship, forging strong bonds with local communities stands as another crucial facet of their responsibilities. These companies must not be aloof entities, but rather active participants in the lives of the locales they operate in. Open channels of communication and inclusive decision-making processes must be established, granting the affected communities a voice in matters that hold the potential to shape their existence. It is a call to mutual understanding and shared progress, ensuring that the strides taken in mining reverberate positively through the lives of those it touches. Amidst this complex interplay, the regulatory framework cannot be overlooked. Adherence to a gamut of laws and regulations is non-negotiable. This spans the spectrum from environmental regulations designed to safeguard our planet's future, to labour laws that ensure the dignity and rights of those employed, and even to tax laws that contribute to the betterment of societies at large. This symphony of compliance underscores the role of mining companies as responsible citizens within the broader socio-economic landscape.

With power comes accountability, and mining companies are not exempt from the consequences of their actions. Liability for damages is a somber, inescapable reality. Whether it is environmental degradation, compromising health and safety standards, or causing damage to property, these companies must shoulder the responsibility for rectifying their missteps. This accountability is a linchpin for fostering a culture of transparency, humility, and course-correction, even in industries that inherently grapple with challenges and risks. In essence, the tale of mining companies goes beyond profit and

and extraction of minerals and other mineral resources has extensive impact and affect the environment.

resource extraction. It's an intricate narrative of intertwining responsibilities and liabilities, where each thread, from environmental harmony to community well-being, weaves the fabric of a sustainable and equitable future.

The past three decades have borne witness to a profound transformation in the relationship between the private sector, the State, and civil society. Corporations are being increasingly called upon to transcend the confines of financial considerations and to embrace strategies that take into account the broader societal and environmental repercussions of their business endeavours.¹⁶ Within this evolving landscape, the mining sector is no exception, as many companies are now in the process of recalibrating their policies and practices to align with the principles of Corporate Social Responsibility (CSR).¹⁷

In the context of mining within South Africa, it becomes evident that the nation boasts one of the most abundant reservoirs of extractive mineral resources on a global scale. The extractive sector stands as a pivotal cornerstone of the South African economy, positioning the nation with the fifth largest mining sector worldwide in terms of GDP valuation. The World Bank's assessment underscores this significance, estimating the worth of non-energy minerals within South Africa to exceed a staggering US\$2.4 trillion, thus crowning it as the world's most affluent mining jurisdiction.¹⁸ Highlighting this wealth reports from 2012 accentuated that South Africa's reserves remain among the globe's most valuable, their appraisal reaching an impressive USD 20.3 billion (\$2.5 billion).¹⁹ Within its territory, South Africa lays claim to some of the world's largest deposits of gold, diamonds, and platinum.²⁰ This mineral-rich narrative

¹⁶ Hamman R Development Southern Africa 2003 238.

¹⁷ Hamman R Development Southern Africa 2003 238.

¹⁸ Mineral Resources and Energy <https://www.gov.za/about-sa/minerals>
Accessed on the 21 January 2020.

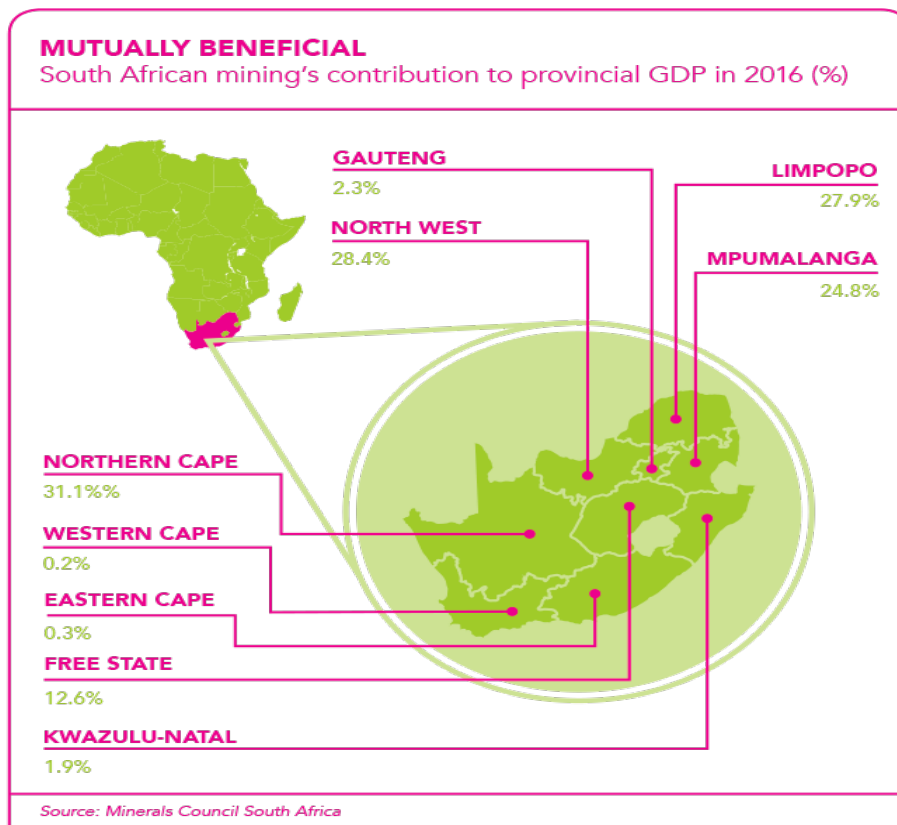
¹⁹ Brand South Africa 2012 Mining and Minerals in South Africa
<https://www.brandsouthafrica.com/investments-immigration/business/economy/mining-and-minerals-in-south-africa>
Accessed on the 21 January 2020.

²⁰ Brand South Africa 2012 Mining and Minerals in South Africa

predominantly unfolds across key provinces such as North West, Limpopo, Mpumalanga, the Free State, and the Northern Cape, each contributing substantially to the nation's mineral wealth.

A visual depiction of this contribution can be gleaned from Figure 1.1, which illustrates the mining sector's impact /on provincial GDP in 2016. The Northern Cape Province leads with the highest contribution percentage, closely followed by North West, Limpopo, and Mpumalanga provinces.²¹

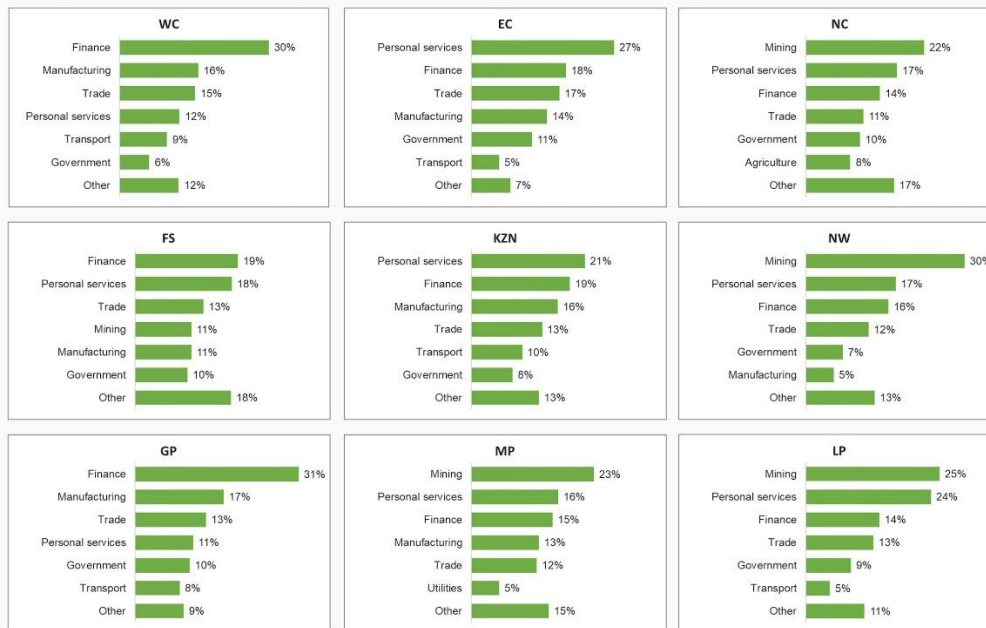
Figure 1.1: Mining sector contribution to provincial GDP in 2016



<https://www.brandsouthafrica.com/investments-immigration/business/economy/mining-and-minerals-in-south-africa>
 Accessed on the 21 January 2020.

²¹ Van Dyk *Natural Resources Governance in Southern Africa* 2017 9.

Figure 2: Mining is the dominant industry in NC, NW, MP and LP
The largest industries in each province. Percentage contribution to provincial value added (2022)



Current prices Source: Provincial gross domestic product: experimental estimates, 2013–2022. Discussion document (D0441.1)



Clearly, the extractive sector is a key economic sector in South Africa, and the country has 'the fifth largest mining sector in the world in terms of GDP value'.²² According to the World Bank, South Africa alone is estimated to have non-energy minerals worth upwards of US\$2.4 trillion, making it the wealthiest mining jurisdiction in the world (if petroleum reserves are excluded).²³

However, as the mining industry evolved and matured, the formidable challenge of crafting a regulatory framework and mining practices and operations that uphold social justice emerged as a persistent shadow. The pages of history are etched with the struggles and triumphs of creating a fair and equitable mining sector that benefits all South Africans.²⁴ The pursuit of

²² STATSSA Stats SA releases new provincial GDP figures <https://www.statssa.gov.za/?p=16650> Accessed on 21 January 2024.

²³ World Bank. *Digging Beneath the Surface: An Exploration of the Net Benefits of Mining in Southern Africa* 2019 9.

²⁴ A Lane et al *The Journal of the Southern African Institute of Mining and Metallurgy* 2015 473.

social justice remains an enduring goal, a compass guiding the industry towards a more inclusive and sustainable future. It is within this context that the South African mining sector continues to redefine its narrative, seeking a harmonious balance between its historical legacy and the imperatives of the modern world.

This thesis asserts that mining should ideally hold a pivotal role in South Africa, especially considering the dependency of many communities on and the proximity to mining operations. Paradoxically, despite its vast mineral resources, South Africa ranks among the world's poorest nations, grappling with a progressively escalating unemployment rate and a staggering 49.2% of the rural population living below the upper-bound poverty line.²⁵ This economic disparity exists even as substantial mineral reserves are found within the nation's boundaries, often situated within some of its most marginalised communities. Rural and indigenous populations, in particular, bear the brunt of this inequality, marked by high unemployment rates, scant infrastructural development, and pervasive poverty.²⁶

Statistics from a report by Statistics South Africa underscore these challenges, revealing that the first quarter of 2019 witnessed a 27.6% unemployment rate, with a staggering 55.2% attributed to youth aged between 15 and 24. The urgency of this issue is further highlighted by a 0.5% increase in unemployment during the same period.²⁷ Notably, despite South Africa's abundance of mineral resources, the country persists as one of the world's most economically divided, with a glaring chasm between the affluent and the underprivileged. This divide permeates through various facets of life, leaving a

Statistics South Africa <http://www.statssa.gov.za/?p=12075> Accessed 21 January 2020. The upper-bound poverty lines consist of people who are earning an amount of R1, 227 per month, per person. This refers to the food poverty line, plus the average amount derived from non-food items of household whose food expenditure is equal to the food poverty line.

²⁶ Whitmore A *Pitfalls and Pipelines* 2013 4.

²⁷ Statistics South Africa Quarterly Labour Force Survey Report. Quarter 1. 2019. Statistics South Africa. <http://www.statssa.gov.za/?p=12115> Accessed on the 22_January 2020

majority grappling with difficult socio-economic conditions and persistent poverty.

Historically, the mining industry has deep roots in the unfair treatment of miners and mining communities, with the sector's foundation built upon the labour of black South Africans, who remain disproportionately represented among lower-paid miners to this day.²⁸ This industry continues to be characterized by exploitative practices that disproportionately affect black individuals, with mining communities shouldering much of the burden. Among such communities, the Marikana massacre stands out as a poignant reminder of the challenges faced by mining communities. This tragic event not only spotlighted the struggles of miners and the low wages that accompany black miners in South Africa²⁹, but it also shed light on the marginalized state of the Marikana community, despite being situated adjacent to a multibillion-dollar mining operation.³⁰

Over time, the South African mining industry has exhibited a history of extracting vast mineral wealth while offering little in return³¹, as mining companies historically evaded substantial participation in CSR efforts. Many considered such contributions as mere acts of philanthropy or self-serving attempts to benefit the corporation rather than the communities.³² This

²⁸ Whitmore A *Pitfalls and Pipelines* 2013 4.

²⁹ The Marikana massacre was a tragic incident in post-democratic South Africa whereby miners were shot by members of the South African Police Services while engaged in a protest over a wage increase.

³⁰ London Mining Network 2019 <https://www.londonminingnetwork.org/2019/03/press-release-lonmins-profits-rise-as-marikana-community-continues-to-suffer> Accessed on the 22 January 2020. Alexander P. *Review of African Political Economy* 2013 (40) 605. Asham, Fine *Think Africa Press* 2012 <http://thinkafricapress.com/south-africa/state-mining-industry-run-mangaung-marikana> Accessed 6 January 2020. Breckenridge *Histories of the Present* 2012 <http://www.historyworkshop.org.uk/revenge-of-the-commons-the-crisis-in-the-south-african-mining-industry/> Accessed 26 February 2020.

³¹ Mining in South Africa Then and now <https://www.politicsweb.co.za/archive/mining-in-sa-then-now-and-into-the-future> Accessed 26 February 2020.

³² Hamman R *Development Southern Africa* 2003 238.

perspective is supported by arguments akin to those presented by Friedman, who contended that CSR could compromise a business's primary responsibility of maximizing profits within established rules.

While legislation during the Union³³ and apartheid³⁴ eras remained silent on the CSR responsibilities of mining companies towards mining communities, South Africa's democratic transition prioritized equality and socioeconomic development. The Constitution underscores this shift, explicitly aimed at enhancing citizens' lives and unlocking their potential.

This thesis posits that the mining industry is one of the industries expected to contribute to the socioeconomic conditions of mining communities.³⁵ Makua and Odeku observed, however, that since the 19th century, mineral wealth in South Africa has been exploited with very little regard for the environment within which such exploitation occurs³⁶ and the applicable laws. The Mineral and Petroleum Resources Development Act³⁷ (hereinafter referred to as the MPRDA), for instance, requires mineral industries to contribute to the socioeconomic development of the communities in which they operate. Section 2 (d) of the MPRDA provides that one of the objectives of the Act is to substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities. Section 2 (e) further states that the Act promotes economic growth and the development of mineral and petroleum resources in the Republic, particularly the development of downstream industries through the provision of feedstock and the development of mining and petroleum input industries. Another important

³³ The Union of South Africa started in 1910. Leacock S *the American Political Science Review* 1910 498, History Online *The Union of South Africa* 1910 <https://www.sahistory.org.za/article/union-south-africa-1910> Accessed 22 February 2020.

³⁴ Apartheid started in 1948. Mhlauli M.B, *et al International Journal of Asian Social Science* 2015 204; *A History of Apartheid in South Africa* <https://www.sahistory.org.za/article/history-apartheid-south-africa> accessed 02 February 2020.

³⁵ Makua M and Odeku K *Environmental Economics* 2017 14.

³⁶ Makua M and Odeku K *Environmental Economics* 2017 15.

³⁷ Mineral and Petroleum Resources Development Act 28 of 2002.

object of the MPRDA, contained in Section 2 (f), is that the Act promotes employment and advances the social and economic welfare of all South Africans. An important caveat in terms of Section 2 (h) is that mineral and petroleum resources must be developed in a manner that 'gives effect to Section 24 of the Constitution by ensuring that mineral and petroleum resources of nations are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development'. Holders of mining and production rights have a duty, in terms of section 2 (i), to contribute towards the socio-economic development of the areas in which they are operating.

The relevance and importance of the MPRDA, which has been highlighted by the courts, can never be underestimated. For instance, the judgment of *Rustenburg Platinum Mines Limited and Another v The Regional Manager, Limpopo Region, Department of Mineral Resources and Others*³⁸ the Supreme Court of Appeal (SCA) in considering the interpretation of section 17(2) of the MPRDA held that the purpose of the Act is to ensure that the extraction of minerals is not concentrated in the hands of large mining corporations and that there is equitable access into the mining industry, thus upholding the transformation objectives of the Act.³⁹

³⁸ *Rustenburg Platinum Mines Limited and Another v The Regional Manager, Limpopo Region, Department of Mineral Resources and Others* (1109/2020) [2022] ZASCA 157.

³⁹ Section 17(2) of the MPRDA specifically states that:

“(2) The Minister [of Mineral Resources and Energy] must within 30 days of receipt of the application from the regional manager, refuse a prospecting right if:
(a) the application does not meet all the requirements referred to in subsection (1);
(b) the granting of such right will result in the concentration of the mineral resources in question under the control of the applicant and their associated companies with the possible limitation of equitable access to mineral resources.”

This section in effect grant discretion to the Minister to refuse any application for prospecting or mining rights if acceptance would not promote equitable access, substantial and meaningful expansion of opportunities for historically

Interesting is that the court's ruling in *Rustenburg Platinum Mines Limited and Another* aligns to the Africa Mining Vision (AMV), which sets the foundation for how African countries should use mining for development. Specifically, the AMV states:

a new social contract for mining that could result in integrated development, with diverse economic linkages and increased social well-being, livelihood security and reduced vulnerability of poor communities, but bearing in mind the localised nature of mineral endowments which requires the balancing of local benefits with sustainable national poverty alleviation strategies.⁴⁰

The state of CSR in South Africa must be understood against the backdrop of the implementation of CSR-mediated initiatives in Africa. In a study looking at CSR-mediated in mining communities in Ghana, for example, Bosso *et al*⁴¹ “record of big business’ contributions to socioeconomic development in Africa is mixed” as opposed to the “voluminous evidence of the benefits of business in developing countries”.⁴² This thesis aligns with the observation of the authors “that there is general agreement that the private sector remains one of the best-placed

disadvantaged people and communities to enter into and benefit from the extraction of any mineral resources, or promote economic growth and the development of the country. This, in my view, speaks to enforcing social responsibility and accountability of mining companies.

⁴⁰ See African Union, 2009. *Africa Mining Vision: African Minerals Governance Framework*. African Union, Addis Ababa. The Africa Mining Vision (AMV) in part emphasises the potential value of mining to Africa in the form of distributive and social justice, support local economic growth, and fostering development generally. Gavin Hilson criticises the discussion around AMV for being rather blind to the challenges. According to Hilson, “No one seemed to question the logic behind asking heads of state, many of whom have deliberately kept sections of mineral-rich Africa poor by marginalizing their citizenries, to design and oversee the implementation of a mining-led development manifesto with ‘good governance’ at its core.”

⁴¹ Boso RK, Afrane S and Inkoom DBK. *International Journal of Corporate Social Responsibility* 2017 5.

⁴² Boso RK, Afrane S and Inkoom DBK. *International Journal of Corporate Social Responsibility* 2017 5.

institutions to make a significant contribution towards development, often couched in the CSR mould.”⁴³

In summary, there is a legislative duty for mining companies to contribute to the social and economic well-being of the communities in which they operate sustainably.⁴⁴ However, mining communities continue to be some of the most impoverished communities in the country, although these companies have a corporate social responsibility towards the development of the communities in which they operate. It is submitted that this may be due to gaps in the implementation of legislation that regulate the contribution of mining companies to the socioeconomic development of mining communities. Therefore, it is necessary to investigate the gaps that exist in the implementation of these duties and responsibilities. Such an investigation is significant, especially with the growing unemployment rate and the ever-expanding gap between the rich and the poor. It would seem that 25 years since the attainment of the democratic dispensation the dream of an equal South Africa, where the lives of its citizens are improved, is nothing but a pipe dream.⁴⁵

Challenges related to mining operations go far beyond the poverty and unemployment plaguing mining communities. Some of the environmental problems that are associated with mining activities, which affect directly or indirectly mining communities, include environmental degradation that results in soil erosion and siltation of rivers, air pollution, and water pollution. According to a study by Dhliwayo, for example, the devastating impacts of

⁴³ Boso RK, Afrane S and Inkoom DBK. *International Journal of Corporate Social Responsibility* 2017 5.

⁴⁴ Strydom H.A and King N.D *Fuggle and Rabies Environmental Management in South Africa*, JUTA, 2018 514.

⁴⁵ This growing inequality and unemployment rate is made worse, especially when looking at the role that mining can play in the development of the lives of South Africans.

mining activities on water pollution are perhaps vividly captured by diamond mining activities in the Marange Diamond Fields in Zimbabwe.⁴⁶ It has far-reaching impacts that affect the communities and households even after the closure of mining operations.⁴⁷ It has a long-term impact on other economic sectors such as agriculture and manufacturing and can hinder economic diversification.⁴⁸

It will be asserted that there is a legislative duty for mining companies to contribute to the social and economic well-being of the communities in which they operate sustainably,⁴⁹ which should take place through CSR-mediated initiatives. In a recent World Bank report⁵⁰ addressed the issue of the role of the mining industry by asking the question: what is the net benefit of mining for Southern African economies? It is argued that this is an important question given the fact that research on the socio-economic development of mining communities suggests that mining communities continue to be some of the most impoverished communities in the country, and many being rural mining communities.⁵¹ Also, there is a reported inability of mining companies to meet the communities' expectations satisfactorily.⁵²

⁴⁶ Dhliwayo M. A Midlands State University, Zimbabwe 2016.

⁴⁷ Ntema J et al *The Extractive Industries and Society* 2023 2.

⁴⁸ Ntema J et al *The Extractive Industries and Society* 2023 (2).

⁴⁹ Strydom H.A and King N.D *Fuggle and Rabies Environmental Management in South Africa*, JUTA, 2018 514.

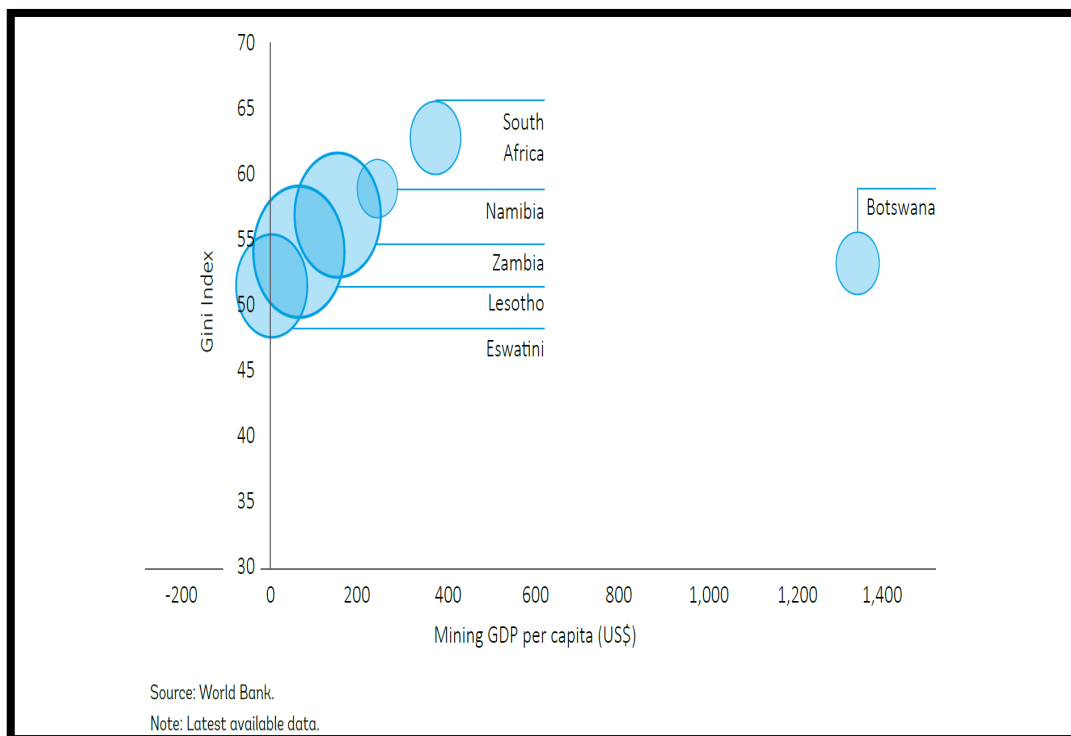
⁵⁰ The World Bank. *Digging Beneath the Surface An Exploration of the Net Benefits of Mining in Southern Africa*. 2019, p.9, noting that mining in Southern Africa has a mixed history with the sector in many countries associated with their colonial legacies – such as apartheid in South Africa and Namibia.

⁵¹ See Ngobese SS. *Examining the socio-economic impacts of mining on the livelihoods of Amajuba District mining communities*. 2015. Master of Commerce Dissertation: University of KwaZulu-Natal. (Conducted a study that observed that in general, “the mines in Dannhauser and Emadlangeni could be viewed as being successful in terms of profit making, yet the contrast of high profits and poor socio-economic conditions is a glaring reality. An examination of the profile of the communities which live within close proximity to the mining sites concludes that a disconnect between the multi-million dollar mining activities and social conditions of the surrounding communities exists” p.5).

⁵² See Ngobese SS. *Examining the socio-economic impacts of mining on the livelihoods of Amajuba District mining communities*. 2015. Master of Commerce Dissertation: University of KwaZulu-Natal.

There is a need to plug gaps in the implementation of legislation that regulates the contribution of mining companies to the socioeconomic development of mining communities. Therefore, it is necessary to investigate the gaps that exist in the implementation of these duties and responsibilities. Such an investigation is significant, especially with the growing unemployment rate and the ever-expanding gap between the rich and the poor. Mining companies can be drivers for poverty alleviation in mining communities. Figure 1.2 below, for example, shows the mining industry GDP in Southern African countries. The figures show inequality and GDP per capita in Southern Africa, with the size of each bubble indicating poverty rates at US1.9 per person per day in Purchasing Power Parity terms.

Figure 1.2: The Mining Sector as a Possible Driver of Poverty Reduction and Inequality Expansion.



It is hoped that the findings of this study will assist in the development of practical, implementable, and enforceable solutions to ensure that mining companies comply with these duties and responsibilities in a sustainable

manner. Also, mining communities benefit from mining operations. The protection of mining communities remains a critical consideration for the extractive industry. Mining communities must be part of the mining stakeholders who should benefit from the equitable and sustainable distribution of mineral resources. The starting point is to have in place sustainable mining practices that extend to the promotion of the socio-economic development of mining communities or communities affected by mining activities. It is hoped that the study will contribute to and generate more discussion on CSR.

1.2. THE CONTEXT OF THE STUDY.

This study focuses on the socioeconomic development of mining communities through the implementation of CSR. The perception in the mining industry that CSR is not compulsory, but an act of charity by mining companies, must be debunked. This study will also look at union and apartheid legislation that regulated mining and CSR and post-apartheid legislation that regulate mining and CSR. As indicated in Section 1.1 above, mining communities are being neglected, especially those located in rural parts of South Africa. The status quo needs to change. To this end, the current legislation regulating the mining industry and the concept of CSR will be analysed as part of addressing the implementation of CSR in mining communities. CSR within the mining industry implies that mining companies must not simply contribute a certain amount of money to projects that might be irrelevant to the community. These companies have to play a central role in the development of the community and be active participants in improving the socio-economic conditions of the communities where they are operating. As evident from the literature review in this study, data and scholarly works is abound regarding the importance of the CRS of mining companies, including its benefits to both the mining sector and the mining community.

1.3. PROBLEM STATEMENT

Within the context of South Africa, the comprehensive and holistic implementation of CSR by mining companies has fallen short of its deserved prominence. This deficiency is glaringly evident in the serious environmental predicaments and persistent challenges endured by mining communities. Despite being a multibillion-dollar industry, the South African mining sector paradoxically leaves mining communities mired in abject poverty and stagnant development, despite the presence of vast mineral resources within their vicinity. Even amid a growth of 14.4%⁵³ in the second quarter of 2019, the benefits of this lucrative industry fail sufficiently to trickle down to South Africa's people, particularly those in mining communities who historically bore the brunt of pre-1994 discriminatory laws.

The lack of development communities associated with the mining sector must be viewed against the backdrop of the industry's historical exploitation of South Africa's black population. This exploitation, historically upheld during the Union of South Africa (1910-1948) and the apartheid era, left a legacy of deep inequities. The 1996 Constitution's enactment sought to redress decades of discrimination and exploitation, reversing the effects of legislation such as the Mines and Workers Act and the Native Land Act, which facilitated the exploitation of black mine workers. The prevailing absence of CSR and meaningful community development initiatives persisted during these eras, perpetuating an exploitative cycle. The Marikana massacre stands out as an emblem of this plight, emphasizing the harsh reality of marginalised mining communities situated next to flourishing multibillion-dollar mining operations.

⁵³ Mineral Resources and Energy <https://www.gov.za/about-sa/minerals>
Accessed 3 February 2020.

In 2016 the South African Human Rights Commission (SAHRC) published a report⁵⁴ following an investigation of the conditions of mining communities in South Africa. The report indicated that the current legislative and policy framework has the potential to foster social and economic development through mining; however, there is a discord between the legislative position and the lived reality of South Africans in mining communities.⁵⁵ The report further indicates that the current position is that mining companies and corporations enjoy the biggest slice of the cake, while mining communities have to rely on mere crumbs for survival. Mining communities continue to experience significant levels of poverty and systematic inequality.⁵⁶ The report does not place these challenges solely at the feet of mining companies but also extends the blame to the government.⁵⁷ The report identifies a number of challenges,⁵⁸ including the failure of municipalities in zoning mining activities. It is common to see mining communities residing dangerously close to the mine, which can be hazardous to their health, safety, and well-being. This is in violation of the provisions of section 24 of the Constitution of the Republic of South Africa, 1996.⁵⁹ The Commission also found that mining companies restrict compensation for reallocation to the physical structure. There is continuous exploitation of mining communities and the fault lies not only with the mining companies but also with the government itself. This is mainly due to the inability and perhaps unwillingness to enforce legislative provisions when mining companies do not comply with the relevant legislative

⁵⁴ National Hearing on the underlying Socio-Economic Challenges of Mining Affected Communities in South Africa. A report by the South African Human Rights Commission 13 -14 September 2016.

⁵⁵ National Hearing on the underlying Socio-Economic Challenges of Mining Affected Communities in South Africa. A report by the South African Human Rights Commission 13-14 September 2016 1.

⁵⁶ National Hearing on the underlying Socio-Economic Challenges of Mining Affected Communities in South Africa. A report by the South African Human Rights Commission 13-14 September 2016 1.

⁵⁷ National Hearing on the underlying Socio-Economic Challenges of Mining Affected Communities in South Africa. A report by the South African Human Rights Commission 13-14 September 2016 2.

⁵⁸ National Hearing on the underlying Socio-Economic Challenges of Mining Affected Communities in South Africa. A report by the South African Human Rights Commission 13-14 September 2016 2 – 7.

⁵⁹ Section 24 (a) provides that "everyone has the right to an environment that is not harmful to their health or well-being".

framework. So far, the legislation enacted to empower mining communities has not been generally successful. CSR is not fully implemented as a duty, despite the legislation clearly indicating that those who hold mining and production rights must contribute to the socioeconomic upliftment of mining communities.⁶⁰

Challenges related to mining operations go far beyond the poverty and unemployment plaguing mining communities. Some of the environmental problems that are associated with mining activities, which affect directly or indirectly mining communities, include environmental degradation that results in soil erosion and siltation of rivers, air pollution, and water pollution.⁶¹ It is hoped that the findings of this study will assist in the development of practical, implementable, and enforceable solutions to ensure that mining companies comply with these duties and responsibilities in a sustainable manner. Also, mining communities benefit from mining operations. The protection of mining communities remains a critical consideration for the extractive industry. Mining communities must be part of the mining stakeholders who should benefit from the equitable and sustainable distribution of mineral resources. The starting point is to have in place sustainable mining practices that extend to the promotion of the socio-economic development of mining communities or communities affected by mining activities. It is hoped that the study will contribute to and generate more discussion on CSR. It is important also to acknowledge, as discussion ensues in this study, that mining impacts several stakeholders. While acknowledging these complexities, this study primarily focuses on the costs and benefits incurred by both workers and community members. Ultimately, the goal is to catalyze meaningful change within South

⁶⁰ CSR is not defined by mining legislation in South Africa and it seems to be clustered under Social and Labour Plans as provided for in the MPRDA.

⁶¹ According a study by Dhliwayo, for example, devastating impacts of mining activities on water pollution are perhaps vividly captured by diamond mining activities in the Marange Diamond Fields in Zimbabwe. See Dhliwayo M. A Midlands State University, Zimbabwe 2016.

Africa's mining sector, turning it into a force that uplifts communities and fosters sustainable development.

1.4 HYPOTHESIS

A clear understanding of the nature, scope, content, interpretation and meaning of CSR specific to the extractive sector is critical in its application, enforcement, implementation and promotion towards the protection and benefit of mining communities. The foundation of this study rests upon the following hypotheses:

- Firstly, it posits that a nuanced comprehension of the intrinsic characteristics, extent, substance, interpretation, and significance of CSR tailored to the unique context of the extractive sector is pivotal for its efficacious application, enforcement, execution, and propagation. Such an understanding is deemed crucial in fostering the safeguarding and advancement of mining communities, encapsulating the dynamic interplay between CSR principles and the extractive industry's operational landscape.
- Secondly, it advances the notion that mining companies bear a measure of obligation to actively contribute to the social and economic betterment of rural mining communities. This thesis contends that CSR offers a comprehensive framework to address the intricate aspects of companies' contributions, attitudes, and rapport towards their stakeholders and the communities intricately linked to their operational domains. In essence, CSR emerges as a strategic platform to underscore the depth of commitment and connection that mining companies should forge with their surrounding ecosystems, enhancing the collective welfare and sustainable development of mining communities.

1.5 STUDY AIMS AND OBJECTIVES

The first objective of this study is to investigate the role that mining companies have in implementing CSR in the communities in which they operate. The argument in this study is that the mining industry must observe the dictates and requirements of CSR. This may sometimes not be compulsory, but it is not a charitable act either when one considers concepts such as sustainable development which underpin environmental protection.⁶² Also, noting the fact that both constitutional and legislative framework in South Africa makes provision for environmental rights, which also speak to the concept of sustainable development to connote what in the view of this thesis the gist of CSR in the form of improving and sustaining a healthy economic, ecological and social system for human development.⁶³

The second objective is to explore the origins and evolution of CSR. The aim is to further determine the meaning, content, and purpose of CSR. In spite of its pervasiveness and being the subject of several scholarship over the years, many researchers continue to ask questions about its meaning and history, as well as what it entails and implies for development theory and practice.⁶⁴ The discussion of CSR under terms and concepts is only cursory, and it is important for a study like this to provide a holistic and substantive context of CSR. The exploration will also provide a firm foundation when this study traces and provides an account of how CSR in the mining industry was regulated and implemented during the Union of South Africa and in apartheid South Africa. The aim is to contribute to the discourse on CSR in mining communities by further explaining the paradigm and its implications for development in mining communities.

⁶² See Mensah J and Casadevall SR. *S Cogent Social Sciences*, 5:1 2019.

⁶³ See generally, Gray R. *Accounting, Organizations and Society*, 35(1) 2010, 47–62; Thomas, C. F. *Naturalizing Sustainability Discourse: Paradigm, Practices and Pedagogy of Thoreau, Leopold, Carson and Wilson*. 2015: Ph.D. Thesis: Arizona State University.

⁶⁴ See, for example, Torrico HB, Frank B and Tavera CA. *International Journal of Corporate Social Responsibility*. 3:7 2018, pp1 – 13 noting that CSR has been studied extensively in developed countries but limited attention to the concept in developing countries. See also,

The third objective is to adapt lessons, if any, from international law and other jurisdictions on the implementation of CSR as a tool towards improving the socioeconomic conditions of mining communities. As this research focuses on mining companies and communities, the investigation will be restricted to selected countries and the focus on information from these comparator countries will be extractive industries although intermittent reference will be made to other industries to provide proper context on how CSR is implemented in these countries.

Finally, this research aims to examine the responsibilities and liabilities of South African mining companies towards the socio-economic development of mining communities. In achieving this aim, this research will also investigate the legislative provisions and the legislative penalties for failing to implement CSR in the mining sector.

1.6 RATIONALE AND SIGNIFICANCE OF THE STUDY

This research commences by analysing the prevailing definitions of CSR as encapsulated in existing studies, subsequently proposing revisions and adaptations tailored to the unique context of South Africa, particularly within the realm of the mining industry. The inherent ambiguity and lack of precision in the current conceptualisation of CSR hinder its effective implementation within certain mining communities.⁶⁵ Existing scholarly discourse often hinges on established and accepted definitions, often overlooking the necessity for a radical deconstruction and reconstruction of the CSR concept to harmonise with the intricate South African landscape. This research seeks to pave the way for a paradigm shift, cultivating a novel perspective and comprehension of CSR that resonates profoundly within the South African milieu.

⁶⁵ Diale A.J *International journal of Business and Economic Development* 2014 18.

Beyond conceptual innovation, this study aspires to instigate legislative reform aimed at enhancing the quality of life for communities adversely affected by mining activities. Intrinsic to this ambition is the drive to foster heightened accountability within mining operations. Furthermore, the study investigates mechanisms for augmenting the empowerment of mining communities to hold mining entities accountable in cases of deficiency.

In its ultimate pursuit, this research sets forth to stimulate inclusive dialogues concerning the predicament of mining communities. These dialogues, it is anticipated, will engender transformative reform and recalibration in the perception and application of CSR by mining companies across South Africa. As a corollary, these discussions will exert pressure for recalibrated enforcement of CSR standards by relevant stakeholders. Through these multifaceted approaches, the research anticipates triggering a ripple effect that not only redefines CSR but also reshapes its practical implementation and, consequently, the landscape of South African mining community development.

1.6.1 Purpose Statement

The purpose of this doctoral study is to comprehensively investigate and analyse the socio-economic development of mining communities in South Africa within the legal framework, focusing on the responsibilities and liabilities of mining companies. This study aims to contribute to the understanding of how legal obligations impact the socio-economic well-being of mining communities and to provide insights into the effectiveness of current regulations in promoting sustainable development and equitable distribution of benefits from mining activities. By conducting a juridical and comparative analysis, this research will facilitate the identification of best practices and potential areas for improvement in the legal mechanisms governing mining company responsibilities and liabilities in South Africa.

1.6.2 Research Question

The main question in this study is: "What are the responsibilities and liabilities

of mining companies in South Africa with regard to the socio-economic development of mining communities, and how do these legal obligations contribute to or hinder sustainable development and equitable distribution of benefits?"

This research question will guide the investigation into the legal frameworks governing mining company responsibilities and liabilities in South Africa, the extent to which these obligations are fulfilled, and their impact on the socio-economic well-being of mining communities. Additionally, the study will compare the South African context with international practices to identify potential areas of improvement and provide recommendations for enhancing the legal mechanisms for fostering socio-economic development in mining communities.

The following are five sub-questions that can help delve deeper into the main question of this doctoral study:

- a) What are the economic benefits of CSR in the mining industry?
- b) How has CSR evolved and what does it mean within the context of South Africa's mining industry after the 1994 dispensation?
- c) What are the specific legal obligations and regulations imposed on mining companies in South Africa to ensure socio-economic development within mining communities?
- d) How do mining companies in South Africa currently engage with and contribute to the socio-economic development of mining communities, including aspects such as infrastructure, education, healthcare, and employment opportunities?
- e) To what extent do the existing legal frameworks and regulatory mechanisms enable or hinder mining companies' efforts to achieve sustainable development and equitable distribution of benefits in mining communities?
- f) What are the key challenges and barriers faced by mining companies

in fulfilling their responsibilities towards socio-economic development, and how do these challenges impact the overall well-being of mining communities?

- g) What best practices, case studies, or international comparisons can provide insights into effective strategies for mining companies to balance their responsibilities and liabilities while promoting sustainable development and equitable benefit-sharing within mining communities?

1.7 RESEARCH METHODOLOGY

Research methodology serves as a systematic approach to methodically address a research problem, essentially functioning as the scientific study of the research process itself. This study will broadly embrace a sequence of coherent steps to comprehensively investigate the research problem, encompassing the following logical progression:

1.7.1 Research Design

Qualitative methodology encompasses a research approach focused on comprehending underlying processes, social and cultural contexts, and the motivations behind diverse behavioural patterns. It prominently addresses the "why"⁶⁶ question within research inquiries. This methodology centers on deriving findings through the observation of real-world settings, relinquishing reliance on statistical procedures and embracing the natural unfolding of phenomena within authentic environments.⁶⁷ Operating as an illuminating tool, qualitative research aims at understanding and extrapolating from similar scenarios. It employs words rather than numerical data for analysis, thereby offering insights into the human experience and its intricacies. Notably, the essence of qualitative methodology lies in the collection of reliable information from textual sources.

⁶⁶ Nieuwenhuis FJ, *Introducing Qualitative Research* 2007 51.

⁶⁷ Golafshani N , *The Qualitative Report* 2003 600.

Given the nature of the research problem and its associated questions, a descriptive, exploratory, and contextual qualitative research design is deemed appropriate. The study aims to elucidate the current state of CSR in the mining sector, delving into its description, exploration, and analysis. This approach will facilitate a comparative analysis of South Africa's CSR landscape and glean lessons for future development.

1.7.2 Methods and Data Collection

The primary research method employed will be a comparative legal research approach, predominantly reliant on desktop research. This approach will utilise the works of established authors to expound upon CSR theory. The qualitative data collection will leverage publicly accessible secondary data from reputable sources such as Stats SA and similar organisations. The study will integrate numerical and non-numerical data to comprehensively analyse the status of mining communities and the extent to which mining companies contribute to their development, i.e., their CSR initiatives. This methodology will guide an exploration of the legislative obligations imposed on mining companies concerning the communities within which they operate.

The research will draw upon textbooks, articles, and contributions from authoritative figures in the field. Additionally, South African legislation and case law will serve as foundational references to examine mining companies' legal obligations regarding CSR. International legal perspectives will also be incorporated to address the research questions. Existing statistical numerical data will provide insights into the status of various mining communities across South Africa. This data will corroborate findings obtained through qualitative methods, corroborating the socio-economic development achieved as a result of CSR practices. The employment of the qualitative approach enables the researcher to assume an objective analytical stance, facilitating the generalization of findings from a positivist perspective. This approach aids in identifying causal links and explanations for the socio-economic conditions

prevalent in mining communities.

A legal positivist research method has guided this study, enabling a comprehensive assessment of relevant mining and environmental protection legislation, policies, and reports.

1.7.2.1 Legal Comparative Research Approach

The study adopts a comparative legal research approach to juxtapose the experiences of mining communities within South Africa, Australia, and Botswana. Botswana will be one of the countries compared to South Africa to determine whether valuable lessons can be learned from the country. Much like South Africa, the indigenous people of Botswana have been mining since time immemorial.⁶⁸ The mining sector is the backbone of the Botswana economy.⁶⁹ The industry is responsible for providing a large number of skilled and unskilled jobs; it is a fertile ground for training, skills development and opportunities in Botswana.⁷⁰ Botswana also has a history of colonisation which is similar to the South African situation.

In Australia, mining has played an important role since its establishment, which is similar to South Africa. According to Punnoose, the “Australian mining industry was established at the end of the 19th century with the discovery of coal reserves. Since then this industry has played a pivotal role by being a main source of the nation's export income and providing for the nation's industrial requirements.”⁷¹ The contribution of mining over decades contributed \$billion to the Australian economy. Just like in South Africa, “the mining industry has been responsible for the building of 26 towns, 12 ports, 25 airfields and more than 2000 kilometres of railway line”⁷² and dominated by the private sector.

⁶⁸ De Wit *Minerology and Petrology* 2018 7.

⁶⁹ Bismarck B.K and Darkoh MBK, *EASSRR* 2001 1.

⁷⁰ Bismarck B.K and Darkoh MBK, *EASSRR* 2001 2.

⁷¹ Punnoose D MAS Thesis 2009 at 24.

⁷² Punnoose D MAS Thesis 2009 at 24.

This methodology seeks to glean valuable insights and lessons from comparator jurisdictions. By employing this approach, the study attempts to improve domestic law and legal understanding. The experiences of these countries will be compared to South Africa's to ascertain the efficacy of CSR implementation.⁷³ This method allows for transcending the boundaries of a single nation and time period to gain a holistic understanding of the law.⁷⁴

The comparison will hone in on the socio-economic conditions of mining communities, the application of CSR, and the pertinent legislation and policies governing mining companies' CSR practices. This approach proves instrumental in addressing the study's research questions.

1.7.2.2 Historical Approach

The study also embraces a historical approach, particularly evident in Chapter 2. Here, an examination is conducted of the establishment of mining communities and towns during the Apartheid era, along with the historical dispossession of Black South Africans by British and Dutch settlers who exploited mineral resources. This historical context aims to shed light on the persisting challenges faced by these communities. A comprehensive exploration of land dispossession and the dearth of the socio-economic development of mining communities is incomplete without acknowledging the role played by the Apartheid system in perpetuating the struggles faced by mining communities. Thus, the study delves into the experiences of mining communities during the Apartheid era, enriching the historical narrative.

1.8 VALIDITY AND RELIABILITY

The validity and reliability of a study is imperative in any research study. Validity and reliability establish the quality of the research carried out. In this study, steps have been taken to ensure that the research and any findings of the study are

⁷³ Van Hoecke M, *Law and Methods* 2015 2.

⁷⁴ Gordley J, *The Journal of Comparative Law* 1995 555.

credible, valid, and reliable. The use of data already collected will ensure that the quality of the data can be easily determined and therefore credible, as the data has already been validated and therefore credible.⁷⁵ This study relies on multiple or mixed methodologies; therefore, the triangulation process will be used in the study. The triangulation process entails that various or multiple methods, data or researchers are used to enhance a study or the findings of a study.⁷⁶ It is perceived as a strategy to improve the validity of research or evaluation findings.⁷⁷

As indicated above, this study will make use of qualitative methodology, which will rely on the writings of various established researchers. These include articles and textbooks. Qualitative research will be supported or consistent with the quantitative data that already exist. The purpose of using the triangulation method is to ensure that the study can withstand the criticism of colleagues and scholars in the field. The qualitative method will attempt to answer the 'why questions' related to CSR and the role of mining companies in the socio-economic development of the mining communities in which they operate and benefit. The use of more than one methodology will ensure that the findings of this research are reliable. The use of multiple methods will alleviate any bias.⁷⁸ The core of the study is centred on the assumption that mining communities are some of the most socioeconomically disadvantaged communities in South Africa and some of the most exploited. To determine the issue holistically, data must be analysed to verify whether that is indeed the position of mining communities.

⁷⁵ McCusker K and Gunaydin S, *Perfusion* 2015 538.

⁷⁶ Mathison S *Educational Researcher* 1988 13.

⁷⁷ Johnson R, Onwuegbuzie J and Turner A *Journal of Mixed Methods Research* 2007 114.

⁷⁸ Rhineberger, Hartmann and Van Valey *Sociological Practices Special Joint Issue with Applied Sociology* 2005 57.

1.8.1 Content validity

Validity refers to how the qualitative data used in this study will validate the position of the law and provide findings that are reliable, relevant, and current. The content of the study must be validated. Content validity refers to measuring the completeness and representativeness of the content of the sources relied upon which the sources are based.⁷⁹ The study will validate and accurately capture and reflect the socioeconomic conditions of mining communities.⁸⁰

The use of relevant legislation and the writing of established researchers in the field will address the issue of validity; therefore, the quality of the sources is imperative. The research is based on desktop research, and therefore quality and reliable data will be relied upon in answering the research questions raised in this research paper. The researcher will conduct thorough and exploratory research by reviewing the existing literature to understand the relevant concepts that are relevant in this study. The data used are peer-reviewed and relevant to the issues raised by the study.

1.8.2 Reliability

Reliability is defined as 'the degree to which results are consistent'⁸¹ spanning a period of time. This entails that, in determining the reliability of the data used, the data must be consistent over a period of time or be reproduced over time. The data must also be an accurate representation of the total population affected in the study. The data that will be collected come from an established data collection institution, StatsSA. Therefore, the data will represent the relevant and accurate population involved in this study.

⁷⁹ Yaghmaie F, *Journal of Medical Education* 2003 25.

⁸⁰ Argyrou A, *Utrecht Law Review, Methodology of Legal Research* 2017 96.

⁸¹ Golafshani N, *The Qualitative Report* 2003 598.

1.9 LIMITATIONS AND DELIMITATIONS OF THE STUDY

As noted above, the study will use publicly available secondary data. However, there may be some limitations outside of the researcher's control, such as access to some data from the population of interest, although publicly available because parts of it are subject to gatekeeping or may identify individuals contrary to ethical clearance requirements.⁸² This is a potential threat to the internal or external validity of the study that the researcher will always be aware of. Thus, where this and other limitations make it difficult to answer certain questions or draw conclusions and inferences from your findings as may be needed, the researcher will explicitly acknowledge such a challenge.

Regarding study delimitations, the researcher has made certain intentional choices to define the scope of the study.⁸³ Within the ethical realm, certain limitations pertaining to data access may arise due to gatekeeping or data sensitivity, potentially impacting the study's internal and external validity. Such challenges will be acknowledged transparently, allowing the researcher to navigate them with diligence. The research also makes conscious delimitations to define its scope. It abstains from primary quantitative research and excludes direct interactions with mining companies and community members. The choice of utilizing only desktop research, focusing on legislative sources, case law, and reputable literature, reflects a methodological delimitation. The focus on rural mining communities in South Africa, and the inclusion of Australia and Botswana as comparator countries, marks further delimitations. This study centers exclusively on mining companies and communities located in South Africa. The MPRDA will be the main legislation to consider, although intermittent references will be made to other legislation in the study.

⁸² Theofanidis D and Fountouki A, *Perioperative Nursing* 2017 156; Leedy and Ormrod *Practical Research: Planning and Design* 63.

⁸³ Theofanidis D and Fountouki A, *Perioperative Nursing* 2017 156.

1.10 ETHICAL CONSIDERATION, AND RESEARCH INTEGRITY

The study is limited to data already captured and publicly available without the need for gatekeeping permission⁸⁴ to access it.⁸⁵ In addition, no interaction with humans and animals will be involved for the purpose of data collection and/or sampling. Issues of confidentiality, harm to respondents, and informed consent are thus not applicable in this case. Still, an application for ethical clearance from the relevant School, Faculty, and institutional committee was obtained to confirm that the study will be conducted taking into account the policies and procedures of the University of Limpopo (UL) post-graduate studies with respect to research integrity. This will include a commitment to the principle of honesty in conducting research and reporting research findings accurately, objectively, and fairly. Moreover, the submission, suggestions, conclusions, and recommendations will be based on verifiable facts.

1.11 TERMS AND CONCEPTS CLARIFICATIONS

1.11.1 The Concept of Social Responsibility

The significant part of this study pivots around CSR and how it has been observed by mining companies in South Africa. Therefore, it is important to have an understanding of what the concept of CSR means or entails and to identify a

⁸⁴ Tripathy J *Iran Journal of Public Health* 2013 478, "if the data is freely available on the Internet, books or other public forum, permission for further use and analysis is implied. However, the ownership of the original data must be acknowledged". To this end, in this study, the researcher will fully acknowledge the original sources or originator of the data."

⁸⁵ According to Tripathy J *Iran Journal of Public Health* 2013 478 "research does not always involve the collection of data from the participants. There is a huge amount of data that is being collected through the routine management information system and other surveys or research Activities. The existing data can be analysed to generate a new hypothesis or answer critical research questions. This saves lots of time, money and other resources. Also, data from large sample surveys may be of higher quality and representative of the population. It avoids repetition of research and wastage of resources by a detailed exploration of existing research data and also ensures that sensitive topics or hard to reach populations are not over-researched."

working definition of CSR employed in this research. Moreover, to assist the reader in obtaining an informative insight on CSR, and how it relates to other concepts such as sustainable development that align with the requirement of CSR.⁸⁶

It must be noted from the onset that there is no single or universally accepted definition of the concept of CSR, as correctly argued by scholars such as Littlewood.⁸⁷ Merrill, for instance, posits that CSR meaning, content, and understanding may also be viewed as jurisdiction-based.⁸⁸ The Green Paper of the European Commission defines CSR as a concept by which companies integrate social and environmental concerns into their business operations and in their voluntary interaction with their stakeholders.⁸⁹ Campbell⁹⁰ takes the definition further by arguing that “CSR is a framework for formulating and implementing the expanded roles and responsibilities of a corporate sector to include the incorporation of all expectations and needs of a larger community in the business model”.⁹¹

The contested terrain of what CSR is and means for different purposes has led to researchers such as Diale arguing that the abstractness and undefined nature of the concept contributes to its ineffective application in some mining communities.⁹² Diale argues that although there are misgivings about the definitional construct of the concept of CSR, scholars are in agreement on the

⁸⁶ Haskins C. *Using the concept of sustainable development to encourage corporate responsibility in small enterprises*. Working paper of Norwegian University of Science and Technology, Department of Industrial Economics and Technology Management Trondheim, Norway 2009. 1-13.

⁸⁷ Littlewood D, *Journal of Business Ethics* 2014 41.

⁸⁸ Merrill MK, Aalborg University 2008 5.

⁸⁹ *Green Paper: Promoting a European Framework for Corporate Social Responsibility* (2001) DOC/01/9 Brussels.

⁹⁰ Campbell B, *Resource Policy* 2012 138.

⁹¹ Campbell B, *Resource Policy* 2012 141.

⁹² Diale AJ, *International Journal of Business and Economic Development* 2014 16.

value and benefit of CSR.⁹³ The author also aptly addresses some of the issues that contribute to the failure of mining companies to contribute towards the socio-economic development of mining communities. He states that in South Africa businesses generally avoid or abstain from the concept of CSR. These companies prefer corporate social investment (CSI) and corporate citizenship.⁹⁴ According to Diale, these concepts do not focus on legacy, memory, history, justice, or moral and ethical responsibility.⁹⁵ Klopper and Fourie⁹⁶ support the view that corporations have an economic, legal, and ethical responsibility toward society. It is submitted that corporations must also be based on the principles of sustainability, accountability, and transparency. Corporations must take the environment where they operate into consideration, in that they must not overexploit the resources and take more than necessary to the detriment of the environment, which will negatively affect the community in which these corporations are conducting business. This addresses the principle of sustainability. Second, corporations must recognize the impact their operations have on the community in which they operate. Additionally, these corporations must behave in a manner that is consistent with the expectations of the stakeholders and accept their responsibilities. This talks to the principle of accountability. Finally, the impact that these institutions have on stakeholders should be made public and the stakeholders, including the mining communities, should be made aware of this impact. This addresses the principle of transparency.

Carroll provided a four-part definition of CSR, which will be the preferred definition in this study. CSR encompasses the economic, legal, ethical, and discretionary (philanthropic) expectations that society has of organizations at a given time, wrote Carroll.⁹⁷ This four-part definition of CSR later gave rise to what is now

⁹³ Diale AJ, *International Journal of Business and Economic Development* 2014 17.
⁹⁴ Diale A.J, *International Journal of Business and Economic Development* 2014 18.
⁹⁵ Diale A.J, *International Journal of Business and Economic Development* 2014 18.
⁹⁶ Klopper E.M and Fourie L.M, *African Journal of Agricultural Sector* 2014 34.
⁹⁷ Carroll A.B, *Academy of Management Review* 1979 499; Carroll *Business Horizons* 1991 40.

regarded as Carroll's CSR Pyramid, which Visser regards as “probably the most well-known model of CSR.”⁹⁸

For the purpose of this research, the definition of CSR will be confined to a definition that is relevant to the South African setting, specifically directed at the mining and mineral industry. Having synthesised the varying expositions of CSR, this thesis settles for the proposition that the concept of CSR entails a framework for formulating, implementing, and enforcing the roles and responsibilities of mining companies toward mining communities and the country in general. In doing so, it moves from the premise that the roles and responsibilities of mining companies towards mining communities include taking into account the social, environmental and socio-economic impact of mining in the communities in which they operate.⁹⁹

Related to CSR are the Stakeholders Theory (ST)¹⁰⁰ and the Triple Bottom Line Theory (TBLT)¹⁰¹. These theories spot a slight difference in focus. In terms of CSR, corporations have certain responsibilities to the communities where they operate. On the other hand, ST requires corporations to take into account the interests of members of society. The TBLT treats the corporation as a member of the moral community with certain defined social responsibilities. According to TBLT, corporations must weigh and balance three different independent scales, namely, economic sustainability, social sustainability, and environmental sustainability.

⁹⁸ Visser W *Revisiting Carroll's CSR Pyramid* 489.

⁹⁹ Sampford C *Business and Human Rights* 315.

¹⁰⁰ Harrison, Freeman and Sa de Abreu *Review of Business Management* 2015 859.

¹⁰¹ Fauzi H *et al Triple Bottom Line as Sustainable Corporate Performance; A Proposition for Future Sustainability* www.mdpi.com/journal/sustainability Accessed 20 January 2020.

Worthing emphasising is that the issues that are central to CSR include environmental, social, community development, employment, and labour and human rights.¹⁰² These are issues that governments must take a keen interest in addressing and promoting. However, Campbell argues that mining in most African countries operates within a context in which the government has a weak capacity to enforce and ensure that its regulations are followed.¹⁰³ There are weak or absent measures to ensure transparent and equitable negotiations.¹⁰⁴ There is also a lack of contribution by mining companies to the mining communities in which they operate.¹⁰⁵

Hamaan observes that the scope of mining companies' contribution to the communities in which they operate is increasing.¹⁰⁶ The responsibility that mining companies have towards mining communities is centered on reducing the negative social and environmental impact of mining. CSR demands that mining companies must respond to shareholders and stakeholders, including employees, customers, affected communities, and the public on issues of human rights, employee welfare, and climate change.¹⁰⁷ The concept of CSR does not limit itself only to what corporations do to benefit the corporation. However, the needs of the communities in which the corporation operates must be taken into account. In Hamman's view, mining companies can be viewed as agents of social transformation.¹⁰⁸

Further, CSR goes beyond philanthropic community investments.¹⁰⁹ Cambell differentiates between the various responsibilities mining companies have.¹¹⁰

¹⁰² Campbell B, *Resource Policy* 2012 139.

¹⁰³ Campbell B, *Resource Policy* 2012 139.

¹⁰⁴ Campbell B, *Resource Policy* 2012 140.

¹⁰⁵ Campbell B, *Resource Policy* 2012 140.

¹⁰⁶ Hamman R, *Development Southern Africa* 2003 238.

¹⁰⁷ Hamman R, *Development Southern Africa* 2003 238.

¹⁰⁸ Hamman R, *Development Southern Africa* 2003 238.

¹⁰⁹ Hamman R, *Development Southern Africa* 2003 238.

¹¹⁰ Campbell B, *Resource Policy* 2012 139.

These responsibilities are corporate business responsibility (CBR), corporate philanthropy (CP), and corporate social responsibility. CBR is concerned with the responsibility of a corporation to its stakeholders in the context of the norms that govern the competitive market relationship. CBR is viewed ideally in terms of existing laws and social expectations. In this CBR, the shareholders' interest is paramount compared to the mining communities. Campbell also defines what he terms CP. This concept refers to the use of corporate resources to protect and promote the well-being of people with whom the corporation has no direct business or economic relationship other than being a donor and recipient of philanthropic assistance.¹¹¹ This is a charitable endeavour that is not to be confused with CSR.

1.11.2 Human Rights-Based Approach to CSR.

The writings of philosophers such as Hugo de Groot, John Locke, and Jean Jacques Rousseau played a critical role in the development of human rights.¹¹² However, the concept of human rights can be traced earlier than the well-documented development of human rights in the seventeenth century. It can be traced to Greek antiquity¹¹³ and African law, customs and practices.¹¹⁴ The human rights theory entails that man, by his or her nature, is endowed with certain rights that cannot be removed or divorced from his or her person. These rights are attained at birth and are inalienable. This concept was further developed in the nineteenth century when civil and political rights were adopted into key national legislation and policy.¹¹⁵ These were known as first-generation rights. First-generation rights are those rights that take power away from the government. These rights prohibit the government from acting in a particular manner.¹¹⁶ These rights are based on the idea that individuals should be free

¹¹¹ Campbell B, *Resource Policy* 2012 142.

¹¹² Thomas P.J *et al. Historical Foundations of South African Private Law* 109.

¹¹³ Thomas P.J *et al, Historical Foundations of South African Private Law* 109.

¹¹⁴ Cobbah J, *Human Rights Quarterly* 1987 vol 9 311.

¹¹⁵ Thomas PHJ *et al.*, *Historical Foundations of South African Private Law* 110.

¹¹⁶ Currie I and De Waal J, *The Bill of Rights Handbook* 2.

from government interference when it comes to their personal and political rights. Second-generation rights were defined as those rights that relate to the idea that the government has certain obligations to fulfil. Second-generation rights make a link between human rights and basic conditions within which an individual must exist. These rights are socio-economic rights and are the basis and core of this study. It is through the successful implementation and application of second-generation rights that people disadvantaged by unfair past and current political, social, and economic conditions can be enabled to enjoy a life of equality, dignity, and freedom.

Human rights are viewed as a vehicle through which South Africa and other countries can achieve transformation from iniquity. The concept of human rights is based on the assumption that all human beings are granted certain inalienable rights by virtue of being human.¹¹⁷ The mere fact that one is human grants such a person certain rights which cannot be removed from that person or be encroached upon by the state or any other person or entity. The Constitution of 1996 enshrines all the ideals that seek to protect the inalienable rights that are granted to every human being from the moment of birth to the moment of death. The Bill of Rights, as contained in Chapter 2 of the Constitution, protects traditional liberal rights that include the right to equality, personal liberty, property, freedom of speech, assembly and association.¹¹⁸

This thesis acknowledges that there is also a link between the concept of CSR and human rights. For instance, South Africa has a long history of inequality perpetuated by colonialism and apartheid. Like most sectors in the Republic, the mining sector was not immune from such inequality. Taking into account the painful history of racial segregation, separate development, and the gross exploitation and violation of human rights under Apartheid, the enforcement of CSR is imperative. Section 1 of the Constitution of 1996 provides that the

¹¹⁷ Rafudeen A, *AHRL J* 2016 227.

¹¹⁸ Currie I and De Waal J, *The Bill of Rights Handbook* 8.

Republic of South Africa is a sovereign state that is founded on a number of values, including human dignity, equality, and the advancement of human rights and freedoms. Several things can affect the values upon which the Constitution is based, and such factors include the continuous exploitation of historically disadvantaged persons, including but not limited to mining communities.

Failure to protect the interest of mining communities can affect their right to enjoy the life that is viewed as ideal by the Constitution, a life that is ideal and promised by the current democratic dispensation. Equally arguable is that failure to comply with, implement, and enforce CSR can affect the right to equality, freedom, and dignity of mining communities. Gragg posits that for a long time, corporations have placed the responsibility to promote and protect human rights entirely on the shoulders of the State.¹¹⁹ What has been observed in this study is the human rights obligations of mining companies were viewed as indirect and limited to the relevant legislation in place.¹²⁰ This, in essence, entails that if a particular country does not have legislation that imposes the duty to CSR then the corporations can continue exploiting the resources of a particular country without contributing to such a country or community.

The theory of human rights is directly related to human dignity. The socioeconomic improvement of mining communities is directly related to the attainment of the dignity of mining communities. The continuous exploitation of these communities, which are characterised by a lack of employment, lack of socioeconomic development, and lack of infrastructural development, is a threat to several rights including the right to dignity and the right to equality. The difficult socioeconomic conditions under which mining communities find themselves have a direct negative effect on the three pillars of the Constitution, which are freedom,

¹¹⁹ Gragg W *Business and Human Rights* 3

¹²⁰ Gragg W *Business and Human Rights* 3. According to Gragg, the corporation should not be at liberty to choose which human right obligation to comply with. It is submitted that the mining company must align itself with the developmental objectives of the country in which they operate. The developmental goals of South Africa are clear. The role of mining companies in the socio-economic development goals of the country is also clear.

equality, and dignity. The role of human rights is to ensure that every human being has the freedom to pursue the objective of his or her choice.¹²¹ The environment must be enabled to ensure that people live to their fullest potential without any unjustifiable impediment to their social and economic development.

From the above discussions, it is clear, as Melé puts it, that each CSR theory presents four dimensions related to profits, political performance, social demands, and ethical values.¹²² It is submitted that mining companies or the extractive industry, in general, have a duty to protect and promote human rights and that governments of countries where mining exploration, prospecting, and exploitation have a duty to enforce CSR. To this end, the provocative definition of CSR by the European Commission as “the responsibility of enterprises for their impacts on society”¹²³ is important by virtue of extending the United Nations’ Guiding Principles on Business and Human Rights beyond human rights concerns to include other externalities. This approach will require placing a CSR-related obligation on extractive industries to identify, acknowledge and appreciate their social costs or their negative externalities. As correctly noted by Tsabora and Dhliwayo, large projects such as mining projects or investments are “known to bring not only social, economic and environmental cost to host communities but also introduce land tenure insecurity in such areas”¹²⁴ which should not be ignored. In Zimbabwe, for example, it was recently reported that “the country is witnessing growing conflicts between communities and Chinese mining

¹²¹ Mining companies should not be allowed to consider CSR and the promotion and protection of human rights as more than the charity of philanthropic endeavour.

¹²² Garriga E and Melé D *Journal of Business Ethics* 2004 53.

¹²³ European Commission. (2011). A renewed EU strategy for Corporate Social Responsibility. COM(2011) 681 final, 25.10.2011.

¹²⁴ Interestingly see Tsabora J and Dhliwayo M Foreign Investment, Indigenous Communities and the Constitutional Protection of Property Rights in Zimbabwe 2019 <https://old.zimlil.org/content/foreign-investment-indigenous-communities-and-constitutional-protection-property-rights> who argue that “most African governments deliberately ignore the security of land tenure of indigenous communities that host such investments.” In particular, that “Large investment projects in sectors such as mining,...projects have huge impacts on the land rights and interests of indigenous communities.”

companies which are controversially evicting villagers from their ancestral lands without compensation to pave the way for mining operations.”¹²⁵

The mining industry has the potential to negatively affect key human rights of mining communities. In addition, it can also negatively affect mining communities. Corporations, including the mining industry, can be a threat to human rights, but can also play a critical role in the development and delivery of human rights, more in particular socio-economic rights.¹²⁶ Therefore, this study will employ the human rights-based approach¹²⁷ (HRBA) to CRS in the mining sector. In this study, HRBA is viewed as an approach recognising that there exists in the mining sector, marginalization and exploitation of mining communities, which denies them their human rights to socioeconomic sustainability. It is submitted that the integration of human rights approaches into CSR and mining sector policies and regulations will offer South Africa a good opportunity to address the socioeconomic challenges of mining communities.

1.11.3 Sustainable Development.

In South Africa Sustainable Development (hereafter referred to as SD), through the Mining Program (SDM) initiated by the Department of Minerals and Energy (DME) in 2004, the aim is to ensure that “the South African mining industry contributes optimally to sustainable development”.¹²⁸ CSR, ST, and TBLT theories within the context of the mining sector are collectively aimed at long-term sustainability. Economic sustainability must focus on the long term because this is the nature of a persistent company. A decision which creates

¹²⁵ Murumo L. 2022 *Address labour, human rights issues: Zela*, <https://www.zimbabwesituation.com/news/address-labour-human-rights-issues-zela/>

¹²⁶ Sampford C, *Business and Human Rights* 316.

¹²⁷ Broberg M and Sano HO, *IJHR* 2018 2.

¹²⁸ Discussion Document. A Strategic Framework for Implementing Sustainable Development in the South African Mineral Sector: Towards Developing Sustainable Development Policy and Meeting Reporting Commitments. Department of Minerals and Energy. October 2007.

an economic boom in the short term, but causes long-term harm, would likely reduce this bottom line to such a degree that the action would be untenable. The classical definition of SD is that it is “development that meets the needs of the present generation without compromising the ability of future generations to meet their needs.”¹²⁹ The right to environmental health is imperative to the achievement of Sustainable Development Goals (SDG). The challenges faced in the development of society is how to improve the quality of life of the society while taking into account the environment and future generations.¹³⁰ It is important that in the pursuit of socio-economic development, the environment must be taken into consideration. There must be a balance between competing interests, on one hand, socioeconomic development must be achieved, while environmental rights are protected.¹³¹ Development is not sustainable if its consequence is environmental degradation, which adversely affects the well-being of society.¹³²

'Sustainable development can lead to wealth creation, eradication of poverty, human and social development, without compromising the natural environment, this can occur if sustainable development is embedded in daily lives'.¹³³ The role of the mining industry in sustainable development is expressed in the concept of SDM. SDM has the objective of ensuring that mineral resource use in South Africa contributes to sustainable development. SDM also has the objective of preventing and minimising the negative impact of prospecting for “mining through the development and implementation of policies, legislation, strategies and programmes”.¹³⁴

¹²⁹ Discussion Document. A Strategic Framework for Implementing Sustainable Development in the South African Mineral Sector: Towards Developing Sustainable Development Policy and Meeting Reporting Commitments. Department of Minerals and Energy. October 2007.

¹³⁰ Aloba E.E and Obaja S.P *Nigerian Law Journal* 2016 244.

¹³¹ Aloba E.E and Obaja S.P *Nigerian Law Journal* 2016 247.

¹³² Aloba E.E and Obaja S.P *Nigerian Law Journal* 2016 248.

¹³³ Discussion Document. A Strategic Framework for Implementing Sustainable Development in the South African Mineral Sector: Towards Developing Sustainable Development Policy and Meeting Reporting Commitments. Department of Minerals and Energy. October 2007.

¹³⁴ Discussion Document. A Strategic Framework for Implementing Sustainable Development in the South African Mineral Sector: Towards Developing

SDM aims to achieve several objectives, including striving to achieve a balanced decision on the extraction and exploitation of minerals in a way that benefits society. This will require one of the principles of CSR, which is transparency. Another important goal is that SDM must contribute to poverty alleviation. This goal refers to one of the CSR criteria, which dictates that CSR must contribute to the achievement and improvement of the lives of the people of South Africa, especially the mining communities. SD is an integral part of CSR. These two concepts are linked. CSR is a societal guiding principle that seeks to integrate 'economic, *social and environmental issues in all spheres and levels, both in the short-term and long-term.*'¹³⁵ SD is an objective tool to 'balance economic, social, and environmental considerations'.¹³⁶ Both are designed to ensure that the exploitation of resources is carried out in a manner that is essential for the benefit of society. SD emanate from government policy and it is applied by corporations through CSR. Another concept, social sustainability (SS), is important in SD. SS takes into account the upliftment of society.¹³⁷ Figure 2 below graphically provides what SS entails and what are the key elements.

Figure 2: Social Sustainability Framework¹³⁸

Sustainable Development Policy and Meeting Reporting Commitments. Department of Minerals and Energy. October 2007.

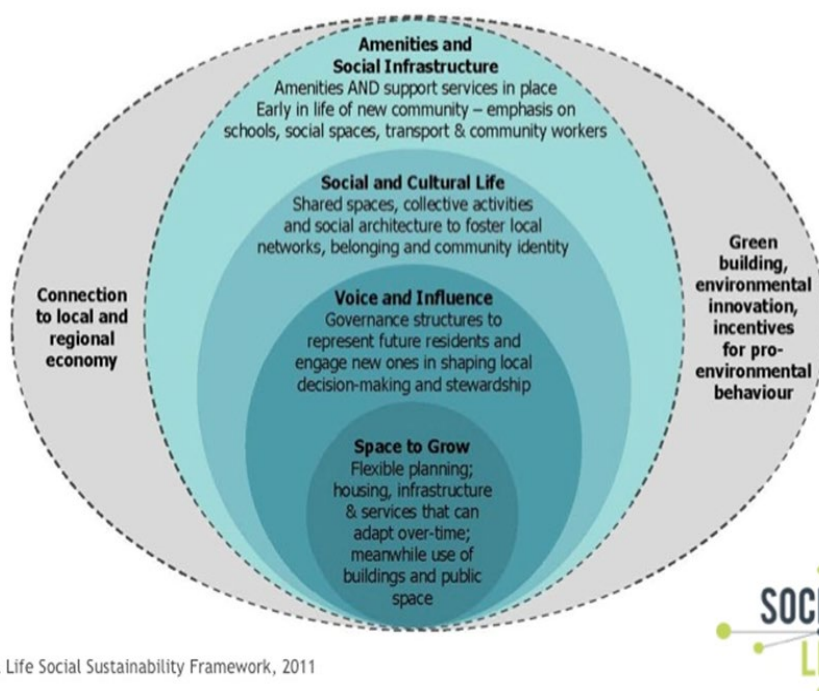
¹³⁵ Steurer R et al, *Journal of Business Ethics* 2015 264.

¹³⁶ Kokko K et al *Barents Studies: peoples, economies and politics* 2015 51.

¹³⁷ Kokko K et al *Barents Studies: peoples, economies and politics* 2015 64.

¹³⁸ Woodcraft S et al *Procedia Social and Behavioural Sciences* 2012 22.

A framework for social sustainability



The concept of SD, on a corporate level, is viewed as Corporate Sustainability (CS).¹³⁹ The concept of CS is based on three pillars, which are economic, ecological, and social. Human rights are the core principles when it comes to SD. CSR, CS, SDM, SD, and SS all have an objective of ensuring that the communities affected by the conduct of corporations are empowered and benefiting from such operations. In general, SD requires that mining ensure that mining communities are protected from the adverse impact of mining operations.

In summary, SD is an integration of environmental protection and economic development, sustainable utilisation of natural resources, and the pursuit of the use and allocation of natural resources for the benefit of the present and future generations.¹⁴⁰ This concept is aimed at attaining a balance between

¹³⁹ Ebner D and Baumgartner R *The Relationship Between Sustainable Development and Corporate Social Development* 6.

¹⁴⁰ Feris L.A, *PER/PELJ* 2010 85.

the people, the planet, and prosperity. It is submitted that the law has an important role to play in ensuring that companies and specifically the mining industry in South Africa comply with the principles of SD. SD must have a component of the law if it is to be applied and enforced. Statutes, regulations, codes, and case law must take centre stage in the prevention of unsustainable conduct by mining companies.¹⁴¹ The protection of mining communities must be central to the application and enforcement of the SD principles.

1.12. SCOPE OF THE STUDY AND CHAPTER LAYOUT

This study will comprise six chapters. The chapters will be organised as follows:

CHAPTER 1 establishes the research's foundation, presenting its rationale and objectives. It comprehensively outlines the research questions, methodologies employed, conceptual framework, significance, and the study's boundaries.

CHAPTER 2 delves into the evolutionary journey of Corporate Social Responsibility (CSR). This chapter explores CSR's origins, charting its historical evolution alongside its contemporary tenets and norms. It delves into the normative frameworks that underpin CSR, encompassing legal, moral, and political dimensions. By weaving through these facets, the chapter intends to unearth potential challenges and opportunities that mining companies might face when executing effective CSR strategies.

CHAPTER 3 follows Chapter 2 by unearthing the historical backdrop of mining communities in South Africa, spanning the eras of the Union of South Africa and Apartheid. This chapter scrutinises the legislative architecture that governed the mining sector during these periods. In essence, Chapter 3

¹⁴¹ Futrell J.W, *American Bar Association Journal of Natural Resources and Environment* 2004 9.

addresses the inquiry: *How was CSR regulated and operationalised in the mining industry during the Union of South Africa and the Apartheid era outlines the position of mining communities in the current democratic system and the legislation that regulates mining companies in South Africa.*

CHAPTER 4 investigates the concept of CSR and its applicability in the South African mining industry. It will look at whether the current legislation gives a clear idea of what CSR is and whether mining companies in South Africa are compliant. Finally, the chapter will outline the challenges facing South Africans and mining communities with regard to the enforcement of CSR. Chapter 4 is a continuation of the discussion in Chapter 3. It therefore answers the majority of the research questions, namely: *What are the responsibilities of South African mining companies towards the socio-economic development of mining communities? Do mining communities have a right to CSR?*

CHAPTER 5 undertakes a comparative exploration, juxtaposing South Africa's CSR landscape against the practices in other nations. This chapter investigates the operational and enforcement dimensions of CSR within the mining sectors of select countries, emphasising lessons to be drawn. Australia and Botswana serve as the case studies due to their contrasting CSR approaches, offering unique perspectives on best practices. Additionally, their historical connections with indigenous populations and issues such as land dispossession make them valuable subjects of comparison. Therefore, Chapter 5 answers the following question. *What lessons can be learned from international law and other jurisdictions with regard to mining communities and CSR?*

In particular, Botswana was considered for its uniqueness given the fact that its economy is predominantly dependent on a single commodity, diamonds and a single corporation, Debswana in which the government is a 50% shareholder with the only other 50% shareholder being De Beers. On the other hand, the State in Australia in terms of the Mining Act of 1992 and as ruled by

the court in *Cadia Holdings Pty Ltd v State of New South Wales*¹⁴² is stripped of the right to enter the land and participate in mineral extracting operations (mine). Thus the diametrically opposed approach between Botswana and Australia makes a good comparative lesson for South Africa on how CSR is promoted.

CHAPTER 6 consummates the study by synthesising the amassed insights. This concluding chapter not only encapsulates the findings but also furnishes recommendations on how South Africa can enhance the implementation and enforcement of CSR for the equitable betterment of mining communities. The chapter's significance is underscored by its role in tying together the threads woven through the preceding chapters. Herein, the research attains its culmination as a contributor to the existing knowledge landscape, especially through the formulation Bill for enactment aimed at dealing with the issue of CSR and liabilities of mining companies in South Africa.

¹⁴² *Cadia Holdings Pty Ltd v State of New South Wales* (2010) 269 ALR 204.

CHAPTER 2

OVERVIEW OF THE ORIGINS AND EVOLUTION OF CSR

2.1. INTRODUCTION

In line with the title of this study, *Socio-economic development of mining communities: A legal and comparative study of the responsibilities and liabilities of mining companies in South Africa*, CSR forms the predominant theoretical foundation of this study. Simply put, the thesis is centred on CSR, despite this term not being on the thesis title. To enhance our understanding of CSR influence and CSR-mediated initiatives on mining companies practices, it is important to explore the origins, evolution, contemporary key elements and norms of CSR.¹⁴³ Interestingly, the history of CSR dates back to time immemorial including Ancient Mesopotamia, around 1700 BC, and still continues to occupy discussions in the modern business world. This is followed by an exploration of the legal, moral and political normative frameworks underpinning CSR. This approach is influenced by the need to properly contextualise recourse to CSR in this study.

Particularly important to note is that this Chapter answers the following three of the questions in this study, namely: a) *Where did or does CSR originate and how has it evolved over time?* b) *What are the origins, evolution, contemporary key elements and norms of CSR?* and c) *Which legal, moral and political normative frameworks underpin CSR in the context of mining companies?*

In achieving the objective of this Chapter, the researcher draws on existing literature. To recap, in Chapter 1 this thesis indicated that CSR has had a varied understanding and it today remains a contested concept.¹⁴⁴ It has been viewed through different prisms or different nomenclature including Corporate Citizenship, Sustainability, Business Ethics, and other socially conscious

¹⁴³ Leite C and Padgett R *Social Responsibility Journal* 2011 528.

¹⁴⁴ See generally, Okoye A. *Journal of Business Ethics*, vol. 89 2009 613-627.

semantics. It would be interesting to know how the origins and the evolution of CSR espouses the functional purposes of all these nomenclatures. The thesis will argue that there is a gradual move towards adopting CSR practices or CSR-inclined practices. This trajectory, it has emerged from the investigation undertaken in this thesis, is due to the inability and/or reluctance of ,countries to impose peremptory and stringent public welfare regulation upon businesses, and thus the burden of ensuring more responsible business is borne increasingly by the CSR.¹⁴⁵

2.2. THE ORIGINS, EVOLUTION, CONTEMPORARY KEY ELEMENTS AND NORMS OF CSR

2.2.1. Pre-1950 Emergence of CSR

There is a plethora of studies on the origins and evolution of CSR.¹⁴⁶ In what is considered a classic in the CSR literature, Davis for instance argues that businesses have a social responsibility to society beyond making a profit.¹⁴⁷ To this end, the writer introduces the concept of social responsiveness, which requires businesses to be aware of and responsive to social issues that affect their stakeholders.¹⁴⁸ Though there are debates regarding the extent to which businesses should introduce CSR-mediated solutions to social and

¹⁴⁵ See generally Sherer, A. G., and Smid, M. *Management International Review*, 40(4) 2000, 351–371

¹⁴⁶ See, for example, Maignan, I and Ferrell, O. C. (2004). Corporate social responsibility and marketing: An integrative framework. *Journal of the academy of marketing science*, 32(1), 3-19; Carroll, A. B. (1991). *The pyramid of corporate social responsibility: Toward the moral management of organizational stakeholders*. *Business horizons*, 34(4), 39-48 (introducing the concept of the pyramid of CSR); Carroll, A. B. (1999). Corporate social responsibility: Evolution of a definitional construct. *Business & society*, 38(3), 268-295 (providing an overview of the evolution of the concept of CSR); Freeman, R. E. (1984). *Strategic management: A stakeholder approach*. Pitman (presenting the stakeholder theory of CSR); Garriga, E., & Melé, D. (2013). Corporate social responsibility theories: Mapping the territory. *Journal of business ethics*, 118(3),519-544 (reviewing The different theories and approaches to CSR);

¹⁴⁷ Davis, K. *California Management Review* 1960 71.

¹⁴⁸ Davis, K. *California Management Review* 1960 71.

environmental issues, and whether CRS is not an encroachment on the interests of shareholders and other stakeholders, research undertaken in this study suggests that CSR is today a widely accepted concept. **In fact, businesses have developed formal CSR policies and practices.**

As far as the origins of CSR is concerned, the late 19th and early 20th centuries have been identified as one of the earliest periods of the introduction of CSR.¹⁴⁹This was the time when the economic and social landscape of many countries was being changed rapidly by industrialisation, and there was a need to guard against the fast growing business environment impacting negatively on society and the environment.¹⁵⁰ The results of this concern were scholars proposing CSR. The Scottish-born American industrialist and philanthropist Andrew Carnegie was one of the earliest proponents of CSR. In his famous article titled *The Gospel of Wealth*¹⁵¹ published in the *North American Review* in 1889 and republished in 2017, Carnegie argued that the wealthy and businesses had a moral obligation to use their wealth and resources to benefit society. Carnegie is regarded as one of the earliest proponents of CSR, evidenced by what he famously wrote in *Gospel of Wealth*:

“The rich man is ...almost restricted to following the examples of Peter Cooper, Enoch Pratt of Baltimore, Mr. Pratt of Brooklyn, Senator Stanford, and others, who know that the best means of

¹⁴⁹ Leite C and Padgett R *Social Responsibility Journal* 2011 529.

¹⁵⁰ Agudelo M *et al International Journal of Corporate Social Responsibility* 2019 3.

¹⁵¹ A Carnegie. *The Gospel of Wealth*. New York: Carnegie Corporation of New York, 2017 (first published in 1889). Andrew Carnegie became one of the self-made rich during the late 1800s and establish a valuable steel business near Pittsburgh, PA. In “Gospel of Wealth” essay, Carnegie (p.18-19) outlines his beliefs about the role that the wealthy should play in society and that wealth must be shared. Controversial among pronouncement in his article was a statement that “...The man who dies leaving behind many millions of available wealth, which was his to administer during life, will pass away “unwept, unhonoured, and unsung”...Of such as these the public verdict will then be : “The man who dies thus rich dies disgraced.” Such, in my opinion, is the true Gospel concerning Wealth.”

benefiting the community is to place within its reach the ladders upon which the aspiring can rise..."¹⁵²

Carnegie was pro-distribution of wealth and beneficent to others by the rich and wealthy, and such received much resistance from others in propositioning what aligns to CSR. In his view, lack of social responsibility and concentration of wealth in the hands of the few is the problem of rich and poor to be solved. He further wrote:

The laws of accumulation will be left free, the laws of distribution free. Individualism will continue, but the millionaire will be but a trustee for the poor, intrusted for a season with a great part of the increased wealth of the community, but administering it for the community far better than it could or would have done for itself. The best minds will thus have reached a stage in the development of the race in which it is clearly seen that there is no mode of disposing of surplus wealth creditable to thoughtful and earnest men into whose hands it flows, save by using it year by year for the general good... Men may die without incurring the pity of their fellows, still sharers in great business enterprises from which their capital cannot be or has not been withdrawn, and which is left chiefly at death for public uses; yet the day is not far distant when the man who dies leaving behind him millions of available wealth, which was free for him to administer during life, will pass away " unwept, unhonored, and unsung," no matter to what uses he leaves the dross which he cannot take with him. Of such as these the public verdict will then be: The 'man who dies thus rich dies disgraced.'¹⁵³

¹⁵² Carnegie. *The Gospel of Wealth* 18.

¹⁵³ Andrew Carnegie became one of the self-made rich men during the late 1800s and establish a valuable steel business near Pittsburgh, PA. In "Gospel of Wealth" essay, Carnegie outlines his beliefs about the role that the wealthy should play in society and that wealth must be shared. Controversial among pronouncement in his article was a statement that "...The man who dies leaving

The researcher in this thesis argues that the social responsibility proposition in Gospel of Wealth is a great precursor to modern CSR because it advocated in part, for development which is community-centric.

Interestingly, the emergence of CSR is also traced to early 20th-century biblical times by some scholars.¹⁵⁴ Baer, for instance, argues that the biblical concept of covenant provides a foundation for CSR.¹⁵⁵ The author reaches this conclusion after examining examples from the Hebrew Bible and the New Testament and how the concept of covenant implies obligations to society and the environment.¹⁵⁶ Another biblical perspective of CSR is offered by Knox, who also explores the biblical roots of CSR by drawing on examples from the Hebrew Bible and the New Testament. Like Baer, Knox argues that the Bible provided early origins of the concept of social responsibility through the concept of stewardship, which implies a responsibility to care for the earth and for others.¹⁵⁷ The roots of the CSR

behind many millions of available wealth, which was his to administer during life, will pass away unwept, unhonoured, and unsung"...Of such as these the public verdict will then be : "The man who dies thus rich dies disgraced." Such, in my opinion, is the true Gospel concerning Wealth, obedience to which is destined some day to solve the problem of the Rich and the Poor, and to bring ' Peace on earth, among men Good-Will."

¹⁵⁴ See Baer, M. D. (2008). Corporate social responsibility as divine command: A biblical foundation. *Journal of Business Ethics*, 82(4), 777-796; Knox, E. M. (2006). Corporate social responsibility: A biblical perspective. *Journal of Business Ethics*, 69(2), 111-124. See also, Ter Haar G and Ellis S. 'The role of religion in development: towards a new relationship between the European Union and Africa. 2006. *Eur. J. Develop. Res.* 18(3): 351–67. Taman S. The Concept Of Corporate Social Responsibility In Islamic Law. 2011 *Indiana International and Comparat. Law Rev.* 21(3): 481-508; Mohammed JA (2007). *Corporate Social Responsibility in Islam*, Doctoral Thesis, Auckland University of Technology, New Zealand; and Angelidis J, and Ibrahim N. An Exploratory Study of the Impact of Degree of Religiousness upon an Individual's Corporate Social Responsiveness Orientation. 2004 *J. Bus. Ethics* 51(2): 119–128; Vlachos, P. A., & Tsamakos, A. Corporate social responsibility: Attributions, loyalty, and the mediating role of trust. 2009 *Journal of Business Research*, 62(9), 849-854.

¹⁵⁵ Baer M.D *Journal of Business Ethics* 2008 777.

¹⁵⁶ Baer M.D *Journal of Business Ethics* 2008 777.

¹⁵⁷ Knox E.M *Journal of Business Ethics* 2006 111.

concept is also reportedly evident in Mesopotamia and traceably to ancient Greece or 17th-century England.¹⁵⁸

These authors made a case for the relationship between religious covenants and the conventional models and theories of social responsibility aimed at leveraging public wellbeing. This thesis acknowledges, without venturing into religious discourse of CSR, that the moral and ethical dimensions of CSR find resonance with biblical covenant of public wellbeing and does bring to the fore as Faith-based Economic model. In fact, the literature that situates the contributions of the Church to the emergence of CSR in pre and post industrialism makes a compelling case.¹⁵⁹ But, it is also admitted that understanding this nebulous concept from the religious lenses needs a different understanding.

2.2.2. Evolution and Formalisation of the Concept of CSR Post-1950s

There exists a long historical account on the evolution and formalisation of the concept of CSR post-1950 to date.¹⁶⁰ The period of the 1950s and 1960s in particular saw a wider recognition of CSR. Figure 2.1 and Figure 2.3 below provide schematic representation of this history.¹⁶¹ In terms of the visual history under both figures, the size of the circles is a subjective representation of the

¹⁵⁸ See Hlochova H. *International Journal of Business Research and Management*, Vol 10 (4) 2019 86.

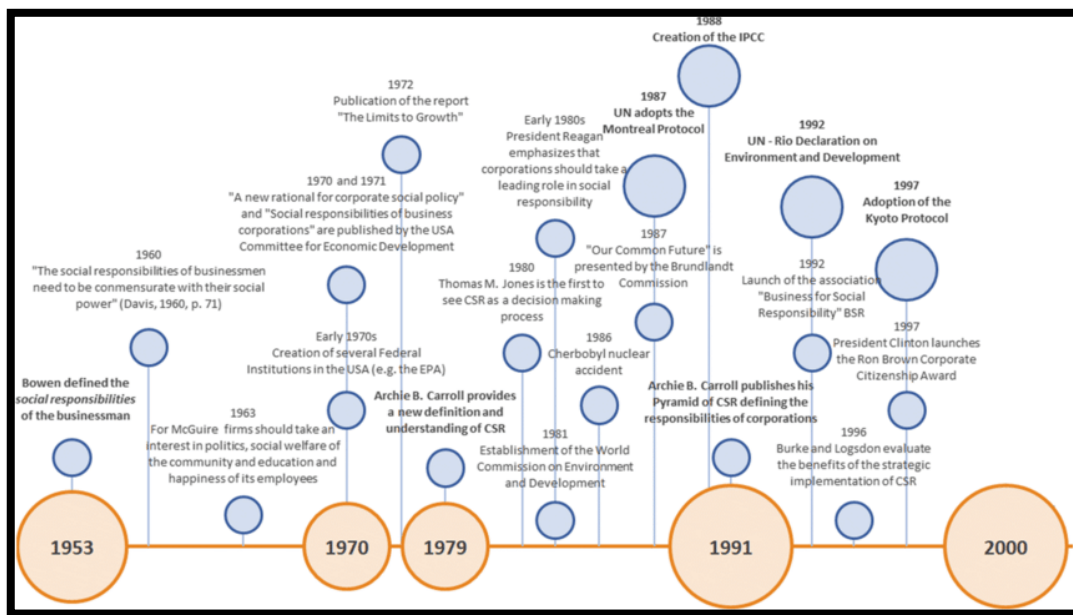
¹⁵⁹ Tounés A, Chakroun W, and Gribaa F. A Spatio-Temporal Odyssey Around the Concepts of Sustainable Development and Corporate Social Responsibility: Boundaries to Be Determined? *2011 J. Modern Account. Auditing*. 7(10): 1158-1168, for instance, propose two viewpoints; one, that the earliest proponents of CSR were the Protestants in the United States of America; and, two, that both Protestantism and Catholicism shared the credit.

¹⁶⁰ Leite C and Padgett R *Social Responsibility Journal* 2011 529.

¹⁶¹ Agudelo M.A.L., Jóhannsdóttir L., and Davídsdóttir B. *International Journal of Corporate Social Responsibility*, 4(1) 2019 at 18.

level of influence each aspect had on the evolution of CSR. The bigger circle represents a higher level of influence.

Figure 2.1 : Visual history of CSR (Part 1 of 2).



Source: Agudelo et al.¹⁶²

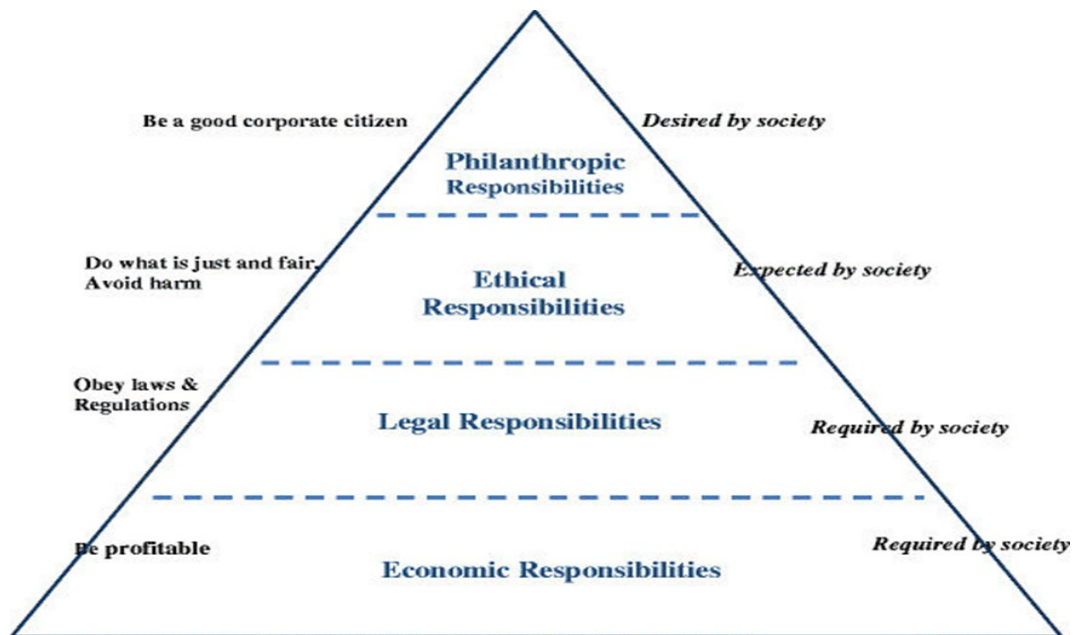
Figure 2.1 above shows the early scholarly engagement with Bowen explaining what is considered the social responsibilities of a businessman. Bowen’s writing represents the start of modern and formalised academic discourse of CSR. It is argued that Bowen’s work should be considered as the inception of CSR as a proper academic discipline.¹⁶³ This thesis, however, aligns itself with the view

¹⁶² Agudelo M.A.L., Jóhannsdóttir L., and Davídsdóttir B. *International Journal of Corporate Social Responsibility*, 4(1) 2019 18.

¹⁶³ For more studies on Bowen's approach to corporate social responsibility and its implications for business practices and performance see, for example: Hemphill, T. A., & Lilien, G. L. Profits and social responsibility. 1980. *Business Horizons*, 23(3), 18-25 (discussing Bowen's concept of corporate social responsibility and its implications for business profitability, and positing that social responsibility can enhance long-term profitability; Frooman, J. Socially irresponsible and illegal behavior and shareholder wealth: A meta-analysis of event studies. 1997. *Business and Society*, 36(3), 221-249 (providing empirical evidence supporting Bowen's view that socially responsible behavior can lead to increased

that in modern literature Carroll's Pyramid of CSR is one of the most cited sources and models of the scholarship of CSR. In fact, Carroll's pyramid of CSR, reflected in Figure 2.2 below, has so far shaped the direction of the CSR discourse.

Figure 2.2: Carrol's Pillar of Corporate Social Responsibility¹⁶⁴

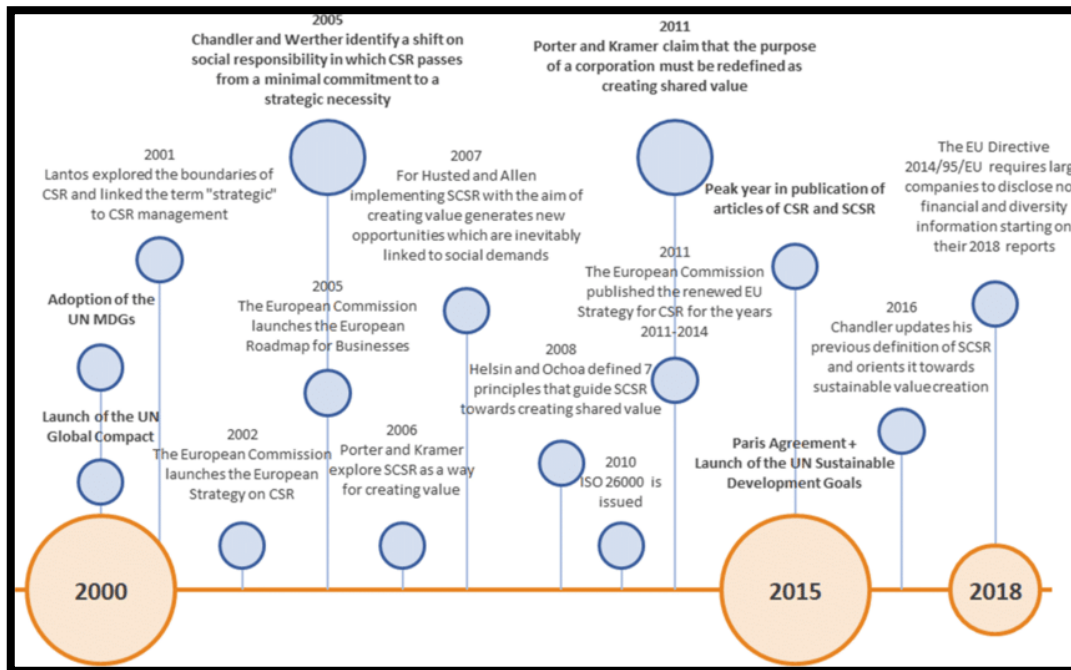


The pyramid consists of four levels: economic, legal, ethical, and philanthropic responsibilities, and stands for the proposition that modern CSR should not only be focused on economic performance but also on social and environmental performance. These levels, it should be noted, form part of what in this thesis is considered the contemporary key elements and norms of CSR, which will later be discussed in part 2.2.2. Though Freeman, has argued that the main business of companies is to make profit, the states in what can be argued as tacit acknowledgment of Carroll's Pyramid of CSR that businesses should take into

shareholder value); Carroll, 1991) *Business Horizons*, 34(4), 39-48 (discussing Bowen's concept of CSR); and Wood, D. J. Corporate social performance revisited. 1991. *Academy of Management Review*, 16(4), 691-718 (discussing Bowen's concept of CSR and its relationship to corporate social performance).
¹⁶⁴ Carroll A.B *International Journal Corporate Social Responsibility* 2016 13.

account the interests of all stakeholders, including employees, customers, suppliers, and communities, in addition to shareholders.¹⁶⁵

Figure 2.3 : Visual history of CSR (Part 2 of 2).



Source: Agudelo et al.¹⁶⁶

¹⁶⁵ See Freeman, R. E. (1984). *Strategic management: A stakeholder approach*. Pitman. For more scholarship on Freeman's stakeholder theory and its applications in corporate social responsibility see: Mitchell, R. K., Agle, B. R., & Wood, D. J. (1997). Toward a theory of stakeholder identification and salience: Defining the principle of who and what really counts. *Academy of Management Review*, 22(4), 853-886 (extending Freeman's stakeholder theory by developing a framework for identifying and prioritizing stakeholders based on their salience); Jones, T. M. Instrumental stakeholder theory: A synthesis of ethics and economics. 1995. *Academy of Management Review*, 20(2), 404-437 (presenting view of stakeholder theory from the strategic benefits of engaging with stakeholders prism); Donaldson, T., & Preston, L. E. The stakeholder theory of the corporation: Concepts, evidence, and implications. 1995. *Academy of Management Review*, 20(1), 65-91. (provides a critical review of stakeholder theory, discussing its conceptual foundations, empirical evidence, and practical implications); Wood, D. J. Corporate social performance revisited. 1991. *Academy of Management Review*, 16(4), 691-718 (Discussing the relationship between CSR and Stakeholder theory, and also presenting a framework for measuring and evaluating CSR).

¹⁶⁶ Agudelo et al *International Journal of Corporate Social Responsibility* 2019 19.

Much of the information on the evolution of CSR in Figure 2.3 above is discussed in Part 2.3 *infra*, which deals with the legal, moral and political normative frameworks underpinning CSR. To avoid unnecessary repetition, it suffices to indicate the developments on the timeline in Figure 2.3 above also represent subsequent development of CSR normative frameworks at both international and regional levels. Perhaps reference should be made, for example, to the UN MDGs and subsequent SDGs. Both these UN development goals espouse or subscribe in some way to CSR or responsible development practises.

2.2.3. Contemporary Key Elements and Norms of CSR

Studies and theories on the concept of CSR jointly and severally provides a wealth of information that can be consolidated into what is termed contemporary CSR or contemporary key elements and norms of CSR. By definition contemporary CSR relates to key elements and norms that prioritise stakeholder engagement, sustainability, transparency, and ethical behavior, as well as a commitment to addressing social and environmental challenges. This study would like to highlight that these key elements and norms find expression in Carroll's Pyramid of CSR. The term "contemporary" is key here because it denotes the need to consider CSR differently from its initial inception or conception in the pre-1950'S and the early 1960's. This important, it must be emphasised, because CSR has evolved significantly to demand a more holistic approach to business that prioritizes ethical, social, and environmental considerations alongside financial consideration. This thesis in the discussion below deals with some of these key elements and norms.

2.2.3.1. Stakeholder Engagement

One key element of contemporary CSR is stakeholder engagement, which involves actively seeking input and feedback from a diverse range of

stakeholders, including employees, customers, suppliers, and communities.¹⁶⁷ By engaging with these groups, businesses can better understand their concerns and interests, and work to address them in a way that benefits both the company and society as a whole.

2.2.3.2. Sustainability

Another key element of contemporary CSR is sustainability, the essence of which involves reducing a business or company's impact on the environment through practices such as energy efficiency, waste reduction, and responsible sourcing. In a nutshell, and particularly in the context of this study, sustainability as a key norm and principle of contemporary CSR must be viewed as the need for business to address challenges facing local communities. CSR, ST, and TBLT theories within the context of the mining sector are collectively aimed at long-term sustainability. It is asserted that economic sustainability must focus on the long term because this is the nature of a persistent company. It is with this understanding, that this thesis also addresses SD as normative framework in 2.3 infra.

For South Africa, SD, through the Mining Program initiated by the Department of Minerals and Energy (DME) in 2004, is made to ensure that “the South African mining industry contributes optimally to sustainable development”.¹⁶⁸ The classical definition of SD accepted in South Africa is that it is “development that meets the needs of the present generation without compromising the ability of

¹⁶⁷ See generally Grayson, D., McLaren, M., & Spitzeck, H. *Journal of Corporate Citizenship*, (58) 2015, 5-22 (exploring the role of stakeholder engagement in promoting systemic change towards sustainability and discusses the challenges and opportunities for companies to engage with stakeholders effectively); Okat, D., & Deniz, N. *Journal of Cleaner Production*, 219, 2019 281-296 (provides a comprehensive review of the literature on stakeholder engagement in corporate sustainability).

¹⁶⁸ Discussion Document. A Strategic Framework for Implementing Sustainable Development in the South African Mineral Sector: Towards Developing Sustainable Development Policy and Meeting Reporting Commitments. Department of Minerals and Energy. October 2007.

future generations to meet their needs.”¹⁶⁹ Sustainable development can lead to wealth creation, eradication of poverty, human and social development, without compromising the natural environment, this can occur if sustainable development is embedded in daily lives.¹⁷⁰ SD is an integration of environmental protection and economic development, sustainable utilisation of natural resources, and the pursuit of the use and allocation of natural resources for the benefit of the present and future generations.¹⁷¹ This concept is aimed at attaining a balance between the people, the planet, and prosperity. It is argued that the law has an important role to play in ensuring that companies and specifically the mining industry in South Africa comply with the principles of SD.¹⁷² Protection of mining communities must be central to the application and enforcement of the SD principles. The mining industry is one of the most important industries and plays a significant role in the economic development of South Africa. Strydom and King argued that humans have been dependent on minerals for a long time and that mining companies have been entrusted with the task of ensuring that the growing demands for minerals are met.¹⁷³ The authors indicate that mining companies also have a duty to develop mining communities and that such developments must be sustainable.¹⁷⁴

¹⁶⁹ Discussion Document. A Strategic Framework for Implementing Sustainable Development in the South African Mineral Sector: Towards Developing Sustainable Development Policy and Meeting Reporting Commitments. Department of Minerals and Energy. October 2007.

¹⁷⁰ Discussion Document. A Strategic Framework for Implementing Sustainable Development in the South African Mineral Sector: Towards Developing Sustainable Development Policy and Meeting Reporting Commitments. Department of Minerals and Energy. October 2007.

¹⁷¹ Feris L.A, *PER/PELJ* 2010 85.

¹⁷² Sustainable development (hereinafter SD) must have a component of the law if it is to be applied and enforced. Statutes, regulations, codes, and case law must take centre stage in the prevention of unsustainable conduct by mining companies. See Futrell J.W, *American Bar Association Journal of Natural Resources and Environment* 2004 9.

¹⁷³ Strydom H.A and King N.D, *Fuggle & Rabies Environmental Management in South Africa* 513.

¹⁷⁴ Strydom H.A and King N.D *Fuggle & Rabies Environmental Management in South Africa* 513.

Du Plessis is of the view that SD obligations apply to many spheres, such as government, economics, social, and environmental.¹⁷⁵ The concept of environmental integrity and social equity is related to CSR and SD.¹⁷⁶ SD calls for responsible use of the environment and the use of environmentally friendly operational practices, while CSR requires the balance of corporate citizenship and environmental responsibility.¹⁷⁷ As noted by Behringer and Szegedi, what needs to be ensured is human needs and aspirations including food, shelter, and the overall improvement of human lives are satisfied.¹⁷⁸ SD must also include an ethical value. The best method used in exercising SD must be one that maximizes the use of resources to benefit the needs of the majority of the people. Special needs of individuals in special social and environmental situations must be given special priority.¹⁷⁹

It is observed that the mining communities are in a very difficult environmental position, as mining operations can be detrimental to the environment and even limit their sources of income. A community that relies on agriculture might find that its traditional means of income are compromised as a result of mining operations. This study presents the argument that these communities are vulnerable people as described by Behringer and Szegedi¹⁸⁰ The role of the mining industry in SD is expressed in the concept of SDM. SDM has the objective of ensuring that mineral resource use in South Africa contributes to sustainable development. SDM also has the objective of preventing and minimising the negative impact of prospecting for "mining through the development and implementation of policies, legislation, strategies and programmes".¹⁸¹ SDM aims

¹⁷⁵ Du Plessis A. *Environmental Law and Local Government in South Africa* 9.

¹⁷⁶ Du Plessis A. *Environmental Law and Local Government in South Africa* 7.

¹⁷⁷ Sustainable Development and Corporate Social Responsibility. <https://work.chron.com/sustainable-development-corporate-social-responsibility-5749.html> Accessed on 20 February 2020.

¹⁷⁸ Behringer K and Szegedi K, *European Scientific Journal* 2016 13.

¹⁷⁹ Behringer K and Szegedi K, *European Scientific Journal* 2016 13.

¹⁸⁰ Behringer K and Szegedi K *European Scientific Journal* 2016 13.

¹⁸¹ Discussion Document. A Strategic Framework for Implementing Sustainable Development in the South African Mineral Sector: Towards Developing

to achieve several objectives, including striving to achieve a balanced decision on the extraction and exploitation of minerals in a way that benefits society. Another important goal is that SDM must contribute to poverty alleviation. This goal refers to one of the CSR criteria, which dictates that CSR must contribute to the achievement and improvement of the lives of the people of South Africa, especially the mining communities.

It must be emphasised that SD is an integral part of CSR. These two concepts are linked. CSR is a societal guiding principle that seeks to integrate 'economic, *social and environmental issues in all spheres and levels, both in the short-term and long-term.*'¹⁸² As Koko *et al* said, SD is an objective tool to 'balance economic, social, and environmental considerations'.¹⁸³ What is clear is that both, when used in the mining industry context, will be designed to ensure that the exploitation of resources is carried out in a manner that is essential for the benefit of society. Another concept, social sustainability (SS), is important in SD. SS takes into account the upliftment of society.¹⁸⁴ Figure 2.4 below graphically provides what SS entails and what are the key elements.

Figure 2: Social Sustainability Framework¹⁸⁵

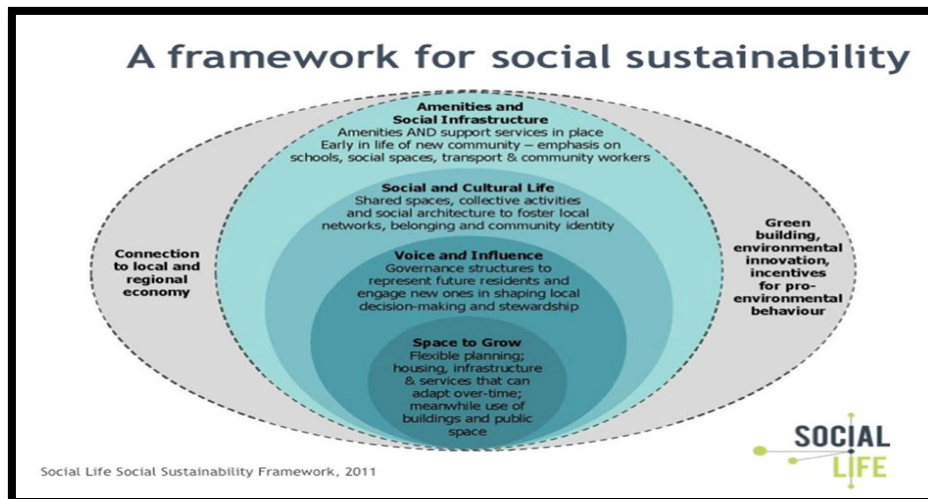
Sustainable Development Policy and Meeting Reporting Commitments. Department of Minerals and Energy. October 2007.

¹⁸² Steurer R *et al*, *Journal of Business Ethics* 2015 264.

¹⁸³ See Kokko K *et al* *Barents Studies: peoples, economies and politics* 2015 51.

¹⁸⁴ See Kokko K *et al* *Barents Studies: peoples, economies and politics* 2015 64.

¹⁸⁵ See Woodcraft S *et al* *Design for social sustainability* 22.



With a cursory look at the depiction of SS in Figure 2.4 above, and applying it to mining business and mining communities, the immediate conclusion to be drawn is that promoting SS in communities is an essential component of sustainable development. Thus, mining companies would be required to engage or consult mining communities, protecting their human rights to health environment, and ensuring that their activities contribute to the long-term well-being of local communities. In sum, it is submitted that there is in the context of mining communities a definite intersection between sustainable development and social sustainability. By way of demonstration, since mining activities can have significant impacts on the social fabric of local communities, including for example the displacement of people, and disturbance of cultural heritage mining activities must be carried out in a way that is socially sustainable and does not harm the long-term well-being of mining communities.¹⁸⁶

¹⁸⁶ See, for instance, Lahiri-Dutt, K. Mining and community relations in South Africa: critical reflections. 2018 *Journal of the Southern African Institute of Mining and Metallurgy*, 118(3), 193-202, Tshivhase, M. V., & Potgieter, J. A. An assessment of the social sustainability initiatives in the mining sector of South Africa. 2021 *Sustainability*, 13(6), 3476, Mabunda, S. M., & Musingwini, C. Analysis of the implementation of social sustainability initiatives in the South African mining industry. 2020 *Sustainability*, 12(9), 3848 (exploring the challenges and opportunities of promoting social sustainability in mining communities in South Africa. Also, advocating for the need to address the social and cultural impacts of mining activities, including the loss of traditional livelihoods and cultural heritage amongst the challenges experienced). For more studies on the concept

2.2.3.3. Transparency

Transparency is also a key norm of contemporary CSR, as companies are expected to be open and honest about their practices, including their social and environmental impacts. In fact, several CSR frameworks and guidelines consider transparency important. For example, the Global Reporting Initiative (GRI), used to guide CSR reporting, provides a set of guidelines for transparent reporting that cover topics such as stakeholder engagement, governance, and sustainability performance. Similarly, the United Nations Global Compact, which is a voluntary initiative for companies committed to responsible business practices, includes transparency as one of its ten principles. It is argued that transparency is inalienable for effective CSR if mining companies are to be held responsible and liable for their actions. As stated by Bryant, for example, the lack of transparency may be a challenge in promoting social sustainability and CSR in the mining industry.¹⁸⁷ Where there is transparency engagements with local communities in decision-making processes and managing consequences of mining activities would be meaningful. Accordingly, it is important for mining companies to have in place reasonable transparency arrangement as part of ensuring community engagement and participation in promoting social sustainability and mitigating the negative impacts of mining activities.¹⁸⁸ Transparency as a norm of CSR allows

of social sustainability in the context of mining, see generally: Matlou, S., & Malatji, N. The challenges of social sustainability in the mining industry: The case of Anglo American South Africa. 2019 *Journal of Cleaner Production*, 237, 117777; Bryant, R. L. Mining, community, and development: problems and possibilities of local-level practice. 2006 *Rural Sociology*, 71(4), 581-600; Kemp, D., & Owen, J. R. Social sustainability in mining in Australia: aligning corporate citizenship with stakeholder expectations. 2016. *Journal of Cleaner Production*, 140, 1254-1265; Wilson, G. Social sustainability and mining: evidence from the Chilean copper industry. 2015. *Sustainability Science*, 10(4), 545-562; Hilson, G. Corporate social responsibility in the extractive industries: experiences from developing countries. 2012. *Resources Policy*, 37(2), 131-137; Kemp, D., & Owen, J. R. Social dimensions of mining: research, policy and practice challenges for the minerals industry in Australia. 2013. *Resources Policy*, 38(4), 613-620.

¹⁸⁷ See Bryant, 2006 *Rural Sociology* 581.

¹⁸⁸ See Wilson 2015 *Sustainability Science* 545.

for an environment conducive for engagement with mining communities and ensures their involvement.¹⁸⁹ It is for this reason, that transparency and consultation is key to the scholarship of CSR in South Africa.¹⁹⁰

2.2.3.4. Ethical Behaviour

Studies show that ethical behaviour is a fundamental element of contemporary CSR, particularly that it implores mining companies avoid harmful practices such as unfair benefit sharing with local communities, child labour or environmental degradation, and upholding values such as respect, integrity, and fairness.¹⁹¹

Ethics, like other dimensions of CSR, are important when conducting business and has even come before South African courts. For example, in the case of *National Union of Metalworkers of South Africa v Aveng Trident Steel*,¹⁹² a case was brought by the National Union of Metalworkers of South Africa (NUMSA) against Aveng Trident Steel, alleging that the company by dismissing employees without following proper procedures not only violated relevant labour laws. The

¹⁸⁹ See Kemp & Owen 2013 *Resources Policy* 613.

¹⁹⁰ See generally, Coetzee 217 *Journal of African Business* 69; Matlou & Malatji 2019 *Journal of Cleaner Production* 117777, Tshivhase & Potgieter 2021 *Sustainability* 3476, and Ndlovu & Gachago 2020 *Journal of Sustainable Mining* 148.

¹⁹¹ See generally, Oyelere, P., Mafini, C., & Iwu, C. G. Corporate social responsibility in South Africa: a review of external reporting practices. 2019 *Social Responsibility Journal*, 15(4), 482-498; Crane, A., Matten, D., & Spence, L. J. (2019). *Corporate social responsibility: Readings and cases in a global context*. Routledge; Oyewole, P. The dynamics of corporate social responsibility in Nigeria: A review of literature. 2018 *Journal of African Business*, 19(1), 86-102; Belal, A. R., & Momin, M. A. CSR reporting practices of listed companies in sub-Saharan Africa: A study of annual reports. 2018 *Journal of Cleaner Production*, 172, 4373-4383.; Wood, D. J. Corporate social performance revisited. 1991 *Academy of Management Review*, 16(4), 691-718; Kolk, A., & Van Tulder, R. International business, corporate social responsibility and sustainable development. 2010 *International Business Review*, 19(2), 119-125;

¹⁹² *National Union of Metalworkers of South Africa v Aveng Trident Steel* [2019] 9 BLLR 899 (LAC).

company also failed to adhere to ethical standards in their interactions with employees. The court in *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa*,¹⁹³ a case was brought by the Association of Mineworkers and Construction Union (AMCU) against the Chamber of Mines of South Africa, alleging that the mining industry was engaging in unethical behavior by failing to implement adequate safety measures for workers. These decisions are evidence of the sometimes thin line between legal regulatory requirements and ethical conduct of companies.

2.3. THE LEGAL, MORAL AND POLITICAL NORMATIVE FRAMEWORKS UNDERPINNING CSR

Garriga and Melé in their work provided a comprehensive review of the different theories and approaches to CSR.¹⁹⁴ Notable is that the authors categorises the CSR theories into four groups: instrumental, political, integrative, and ethical. The authors argue that the different theories of CSR reflect different underlying assumptions about the role of business in society. This section of the thesis will in part address some of the noted underlying assumptions of about the role of business in the society. What has become clear out of the investigation in this study is that the legal, moral, and political normative frameworks that underpin CSR in the context of mining companies are complex and multifaceted.¹⁹⁵ In light of this, this thesis endeavoured to consider mainly selected normative frameworks that can apply to CSR in the mining industry.

¹⁹³ *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa* 2017 (6) BCLR 700 (CC).

¹⁹⁴ Garriga, E., & Melé, D. Corporate social responsibility theories: Mapping the territory. 2013 *Journal of business ethics*, 118(3), 519-544.

¹⁹⁵ See generally Crane, A., Matten, D., and Spence, L. J. 2019. *Corporate social responsibility: Readings and cases in a global context*. Routledge (for a comprehensive overview of the concept of CSR from a global perspective).

2.3.1. Legal Frameworks

Legal frameworks for CSR in the mining industry may include national and international laws and regulations, such as environmental laws, labour laws, and human rights laws. For example, the United Nations Guiding Principles on Business and Human Rights provide a framework for mining companies to respect human rights in their operations. Van der Vyver asserts that international human rights standards have played a major roles in shaping South African CSR laws and regulations.¹⁹⁶

2.3.1.1 International Law

According to Dugard, international law rules also regulate multinational corporations and the relationship between multinational corporations and the various States with which they engage.¹⁹⁷ These multinational corporations are not considered human subjects, but some rules can regulate them and their conduct. This means that multinational corporations engaged in trading with South Africa are also bound by international law. South Africa has adopted several treaties and international instruments to deal with its relations with multinational corporations conducting business in South Africa. One of these instruments is the Kings Report.¹⁹⁸ There is a link between good governance and compliance with the law. Corporations and directors and officers of such

¹⁹⁶ See generally, Van der Vyver, J. D. Corporate social responsibility and human rights in South Africa. 2012. *African Human Rights Law Journal*, 12(2), 485-506. In van der Vyver's view, legal action can be taken against companies that violate human rights in their operations.

¹⁹⁷ Dugard et al Dugard's International Law: A South African Perspective 2018 2.

¹⁹⁸ Institute of Directors Southern Africa. The King Report on Governance for South Africa 2009. 6-7. According to the Kings Report 56 countries of the Commonwealth and the 27 States Europe have opted for a code of principles and practices on a "comply or explain" basis in addition to legislated issues on governance. After the King Report II companies listed on the Johannesburg Stock Exchange are required to include in their annual report a narrative statement on how they complied with the principles of out in the King Report. The King Report III is adapted by South Africa and corporations registered with the JSE must comply with the "comply or explain" approach.

corporations have to comply with the law and discharge their legal duties. They have a duty of care skills, diligence, and fiduciary duties.¹⁹⁹

There is a growing trend in international law and other countries outside the borders of South Africa that take the concept of CSR seriously and traction has been made in legislating CSR.²⁰⁰ This issue has also gained traction regionally and locally. From a local point of view, there is a proliferation of initiatives, tools, and guidelines on sustainability issues.²⁰¹ Companies must demonstrate that they are responsible citizens, and this includes showing that they take into account social, environmental, and economic issues.²⁰² And there must be serious enforcement at the domestic level.²⁰³

The role international law in shaping the concept of CSR can never be underestimated. What emerges from the above discussion is that in as much this study noted that CSR has its origins in the early 20th century when businesses began to recognize their responsibilities to society beyond their financial obligations to shareholders and the discourse of CSR by prominent scholars such as Carroll and Freeman, some roots of CSR can be traced back to international law or international frameworks.²⁰⁴ It for this reason, several international legal

¹⁹⁹ Institute of Directors Southern Africa. The King Report on Governance for South Africa 2009 7.

²⁰⁰ See Institute of Directors Southern Africa. The King Report on Governance for South Africa 2009 11-12 . The United Nations (UN) has published the Global Compact and Principles for Responsible investment. The European Union (EU) has a Green Paper for Corporate Social Responsibility as well as the OECD guidelines of multinational companies. The United Kingdom (UK) CSR forms part and parcel of the Companies Act which came into operation in 2007. It is focused on encouraging Companies to take appropriate long-term perspectives. It is also focused on developing productive relationships with employees and those in supply chain Furthermore it requires companies to take their ethical, social and environmental responsibilities seriously.

²⁰¹ Institute of Directors Southern Africa. The King Report on Governance for South Africa 2009 14.

²⁰² Institute of Directors Southern Africa. The King Report on Governance for South Africa 2009 14.

²⁰³ Bantekas I *Boston International Law Journal* 2004 311.

²⁰⁴ See Wettstein, F. CSR and the debate on business and human rights: Bridging the great divide. 2012 *Business Ethics Quarterly*, 22(4), 739-770 (highlights the key international legal frameworks and initiatives that promote responsible

frameworks require companies to consider their social and environmental impact when conducting business.²⁰⁵ There exists legal instruments addressing CSR of companies, Multinational Enterprises (hereinafter referred to as MNEs) in particular, be it through binding treaties and in terms of what Bantekas terms soft laws or other universally applicable treaties such as the Universal Declaration on Human Rights (hereafter referred to as (UDHR) as well as the Rio Declaration on Environment and Development.²⁰⁶ Below is the capita selecta of international frameworks for CSR.

2.3.1.1.1. Universal Declaration on Human Rights

The first significant development in this area was the adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly in 1948.²⁰⁷ The UDHR sets out a framework of universal values and rights that all individuals are entitled to, regardless of their nationality, race, or gender. The Declaration includes provisions on economic, social, and cultural rights, such as the right to work, the right to education, and the right to a standard of living adequate for health and well-being. While the Declaration did not specifically address the responsibilities of corporations, it established a framework for human rights that would later inform the development of CSR. An investigation into CSR reveals that the principles enshrined in the Declaration have influenced the development of international law and standards related to CSR amongst others.

It is noted that while the UDHR is not directly enforceable in courts, it has been cited in numerous legal proceedings related to human rights abuses committed

business practices and human rights, including the United Nations Guiding Principles on Business and Human Rights, the Global Compact, and the OECD Guidelines for Multinational Enterprises).

²⁰⁵ Tladi D African *Human Rights Law Journal* 2016 317.

²⁰⁶ Bantekas I *Boston Internation Law Journal* 2004 12.

²⁰⁷ United Nations General Assembly. (1948). Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71. The Declaration was adopted by the United Nations General Assembly on 10 December 1948. Note that the Universal Declaration of Human Rights (UDHR) as the Declaration is not a legally binding document.

by corporations and CSR of companies. For example, in the case of *Unión de Afectados por las Operaciones Petroleras de Texaco (UDAPT) v. Chevron Corp*²⁰⁸ the plaintiffs from Ecuador alleged that Texaco, which was later acquired by Chevron, argued that Chevron had polluted their land and water, causing health problems and environmental damage. The plaintiffs invoked the UDHR, among other international human rights instruments, to argue that Chevron had violated their right to a healthy environment.

Scholars have also looked into the relevance of UDHR to CSR. For instance, Mele explored the philosophical and ethical connections between human rights and CSR, coming to the conclusion that the UDHR has an influence on both concepts.²⁰⁹ A similar observation has been made by Moon who indicated that that normative instruments such as , the UN Guiding Principles on Business and Human Rights are based on the UDHR on the development of CSR.²¹⁰

2.3.1.1.2. UN Norms on the Responsibilities of Transnational Corporations²¹¹

²⁰⁸ *Unión de Afectados por las Operaciones Petroleras de Texaco (UDAPT) v. Chevron Corp*, 987 F.Supp.2d 334 (S.D.N.Y. 2014). The U.S. District Court for the Southern District of New York denied Chevron's motion to dismiss the lawsuit brought by the UDAPT.

²⁰⁹ Mele, D. The philosophical foundations of human rights and corporate social responsibility. 2009 *Journal of Business Ethics*, 87(S1), 347-355.

²¹⁰ Moon, J. The contribution of the United Nations Guiding Principles on Business and Human Rights to the development of CSR. 2014 *Journal of Business Ethics*, 123(3), 385-400. See also Van Beers, C., and Hirsch Ballin, E. Universal Declaration of Human Rights: An Unfulfilled Promise for Corporate Social Responsibility. 2016 *Netherlands International Law Review*, 63(2), 171-194 (examining the role of the UDHR in shaping the development of CSR). Scherer, A. G., and Palazzo, G. Toward a political conception of corporate responsibility: Business and society seen from a Habermasian perspective. 2007 *Academy of Management Review*, 32(4), 1096-1120 (discussing the philosophical and political underpinnings of CSR, including the role of the UDHR in shaping the concept).

²¹¹ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, U.N. ESCOR, 55th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003). See also, U.N. ESCOR, 55th Sess., Agenda Item 4, at 2, U.N. Doc.E/CN.4/Sub.2/2003/NGO/44 (2003).

Bantekas notes that the UN Norms on the Responsibilities of Transnational Corporations²¹² places as an obligation on MNEs “to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law.”²¹³ The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights are critical to CSR of companies, and there has been instances where the norms have influenced the development of CSR practices in the mining industry. Through the Norms, mining companies are beginning to embrace challenges of social and environmental issues associated with mining activities. Important to highlight is that these Norms calls for the responsibility of mining companies to respect human rights, including the rights of indigenous peoples and other vulnerable groups. Also, the norms calls for mining companies to engage in meaningful consultation with local communities.

The UN Norms themselves are not legally binding, it is argued they can be instrumental in helping to raise awareness of challenges facing mining companies, and promoting responsible business conduct among mining companies. At the time of writing this thesis no specific case law was reported relating to the Norms themselves and CSR practices of mining companies.

2.3.1.1.3. The International Covenant of Economic, Social, and Cultural Rights

The International Covenant of Economic, Social, and Cultural Rights (ICESCR)²¹⁴ recognises certain aspects of CSR. The ICESCR is a treaty adopted by the United Nations General Assembly in 1966 and one of the core international human rights treaties, along with the International Covenant on Civil and Political

²¹² *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, U.N. ESCOR, 55th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003). See also, U.N. ESCOR, 55th Sess., Agenda Item 4, at 2, U.N. Doc. E/CN.4/Sub.2/2003/NGO/44 (2003).

²¹³ Bantekas | *Boston University International Law Journal* 2004 319.

²¹⁴ International Covenant on Economic, Social and Cultural Rights. General Assembly Resolution 2200A (XXI) 1966.

Rights (ICCPR). The ICESCR amongst others reinforces that everyone has the right to self-determination and to freely pursue their economic, social, and cultural development. It further states that the states parties to the covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social, and cultural development and full productive employment, under conditions that safeguard fundamental political and economic freedom for individuals.²¹⁵ In particular, Article 11, also provides that state parties to the covenant recognise the right of everyone to adequate standards of living for themselves and their families, including adequate food, clothing, and housing, and to the continuous improvement of their living conditions. The states will take appropriate steps to ensure the realisation of these rights, recognising the essential importance of international cooperation.

It is submitted that the ICESCR has an important role to play in influencing CSR of mining companies given the significant impact mining companies have on the realization of these rights - positive impacts such as contributing to economic development, and creating jobs, and on the negative side the impacts can be operations leading to displacement of communities, environmental damage, and health impacts for workers and nearby residents and local communities. In sum, it is argued that the ICESCR provides a framework for understanding mining companies' responsibilities in the context of human rights of mining communities through CSR-mediated initiatives.²¹⁶ ICESCR, as correctly observed by Lozano, mining companies can have a human rights-based approach to CSR drawing on the ICESCR.²¹⁷

²¹⁵ International Covenant on Economic, Social and Cultural Rights. General Assembly Resolution 2200A (XXI) 1966 Article 6.

²¹⁶ Casaburi L.M. The Human Right to Water in Mining Areas: Exploring the Scope of Corporate Responsibility under International Human Rights Law. 2018 *Business and Human Rights Journal*, holds the same view.

²¹⁷ Lozano FJO. Human Rights and Corporate Social Responsibility in the Mining Sector: Possibilities and Challenges of a Rights-Based Approach. 2017 *Resources Policy*.

2.3.1.1.4. The United Nations Conference on Trade and Development

The United Nations Conference on Trade and Development (UNCTAD) is a United Nations body that focuses on trade, investment, and development issues. It has been actively involved in promoting CSR and sustainable development. UNCTAD has published a number of reports and guidelines on, that include guidelines on CSR. The CSR guidelines, for instance, encouraged companies to consider the impact of their activities on the communities in which they operated and to act in accordance with international standards of human rights and environmental protection.

The UNCTAD has been referenced in certain key case law relating to CSR. For instance, in the 2013 case of *Akpan v. Royal Dutch Shell plc*²¹⁸ the Nigerian farmers and fishermen brought a case against Royal Dutch Shell alleging that the company was responsible for environmental damage caused by its oil drilling operations in the Niger Delta. The plaintiffs argued that Shell had violated international environmental and human rights standards, including those promoted by UNCTAD. Following this case, Shell agreed to pay compensation to the plaintiffs and take steps to clean up the affected areas.²¹⁹

In another case, *Okpabi and others v. Royal Dutch Shell plc and another*,²²⁰ Nigerian communities who claimed that the Shell was responsible for environmental damage caused by oil spills in the Niger Delta. In particular, the plaintiffs argued that Shell had failed to take adequate measures to prevent the

²¹⁸ *Akpan v. Royal Dutch Shell plc*, [2013] EWHC 3883 (QB).

²¹⁹ For more discourse on the *Akpan v. Royal Dutch Shell plc*, see generally Barbu, I. M. The Nigerian oil spills: A case study of environmental injustice. 2014 *Global Responsibility to Protect*, 6(2), 178-196; Steininger, S. Challenging the transnational oil industry: The case of the Niger Delta. 2014. *Journal of International Relations and Development*, 17(2), 186-210.

²²⁰ *Okpabi and others v. Royal Dutch Shell plc and another*, [2018] EWCA Civ 191.

spills and had violated their human rights. Unfortunately, the case was ultimately dismissed by the UK Supreme Court. It is argued, however, that this case highlighted the need for companies to ensure that their CSR policies are being implemented effectively throughout their operations.²²¹

Communities have been using UNCTAD to fight back in cases of problematic mining operations. For example, in *Mwabulambo and others v. Barrick Gold Corporation*²²² Tanzanian villagers who claimed that Barrick Gold, a Canadian mining company, was responsible for environmental damage caused by its gold mining operations in Tanzania. In particular, they argued that the company had violated international environmental and human rights standards, including those promoted by UNCTAD. The case was ultimately settled out of court in 2020, with Barrick Gold agreeing to pay \$40 million to the plaintiffs and undertake remedial measures.

2.3.1.1.5. The Rio Declaration on Environment and Development

During the World Summit on Sustainable Development (hereinafter referred to as WSSD)²²³ the parties undertook to assume the collective responsibility to advocate and strengthen the interdependence and mutually strengthening pillars of sustainable development, economic development, and environmental protection at the local, national, and global levels.²²⁴ It is also recognised that eradicating poverty, changing consumption and production patterns, and protecting and managing the base of natural resources for economic and social development are overachieving the objectives and essential requirements for

²²¹ The Court of Appeal ruled that the case could proceed in the UK, as it was arguable that Royal Dutch Shell owed a duty of care to the villagers.

²²² *Mwabulambo and others v. Barrick Gold Corporation and others*, [2019] EWHC 565 (TCC)

²²³ The World Summit on Sustainable Development. The Johannesburg Declaration of Sustainable Development 2002.

²²⁴ The World Summit on Sustainable Development. The Johannesburg Declaration of Sustainable Development 2002 Clause 5.

sustainable development.²²⁵ Furthermore, the parties agreed that in the pursuit of their legitimate Activities, the private sector must contribute to the evolution of equitable sustainable communities and society. The declaration recognises the need for sustainable development, the need eradication of poverty, the role that natural resources play in the eradication of poverty, and finally it recognises that the private sector, including MNEs, has a duty to contribute to the well-being of the communities and the society at large.

The Rio Declaration on Environment and Development does not explicitly reference the term "Corporate Social Responsibility". However, the Declaration does contain several principles that are relevant to the concept of CSR, particularly in the context of environmental sustainability and the role of businesses in achieving sustainable development. First and foremost, the declaration places human beings at the centre of sustainable development, they are entitled to a healthy and productive life in harmony with nature.²²⁶ It further states that states have the sovereign right to exploit their resources according to their own environmental and development policies and the responsibility to ensure activities within their jurisdiction or control do not harm their environment or the environment of other states.²²⁷ Regarding sustainable development, the declaration indicates that the right to development must be fulfilled to equitably meet the developmental and environmental needs of present and future generations.²²⁸

Principle 16 of the Rio Declaration, for example, states that "National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter

²²⁵ The World Summit on Sustainable Development. The Johannesburg Declaration of Sustainable Development 2002 Clause 11.

²²⁶ The Rio Declaration on Environment and Development. UN General Assembly A/CON.17/26 VOL I 12 August 1992 Principle 1.

²²⁷ The Rio Declaration on Environment and Development. UN General Assembly A/CON.17/26 VOL I 12 August 1992 Principles 2.

²²⁸ The Rio Declaration on Environment and Development. UN General Assembly A/CON.17/26 VOL I 12 August 1992 Principle 3.

should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment." Thus, businesses should take responsibility for the environmental impacts of their activities and be held accountable for any harm they cause. Similarly, Principle 13 emphasizes the need for businesses to integrate environmental considerations into their decision-making processes, stating that "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction." It is argued that in terms of this principle mining companies are expected to be aware of the potential environmental impacts of their activities and take steps to prevent and mitigate any harm that may occur. This in essence calls for CSR.

The investigation in this study reveals that the WSSD to aspect of CSR, such as the duty of companies to ensure that they contribute to the socioeconomic development of people. It also address issues around environmental protection and sustainable development, but none addresses the issue of CSR or makes reference to the concept. Most importantly, the WSSD has featured is some of the key case law in Africa. For example, in the 2015 case of *Bodo Community v. Shell Petroleum Development Company of Nigeria*²²⁹ the Bodo community in the Niger Delta region of Nigeria, who claimed that Shell had caused significant environmental damage to their land and waterways as a result of its oil drilling activities. The plaintiffs argued that Shell had violated several principles of the Rio Declaration, including the principle of sustainable development and the principle of the polluter paying for environmental damage. The case was settled out of court in 2015, with Shell agreeing to pay £55 million in compensation to the community. Another case settled out of court that made reference to the Declaration is the case of *Malawi Human Rights Resource Centre and others v.*

²²⁹ *Bodo Community v. Shell Petroleum Development Company of Nigeria Ltd*, [2015] EWHC 2151 (TCC).

*Minister of Natural Resources, Energy and Environment and Others*²³⁰ brought by several Malawian NGOs, who claimed that the government had failed to adequately regulate mining activities in the country and protect the rights of local communities. One of the arguments by the plaintiffs was that the government had violated several principles of the Rio Declaration, including the principle of public participation in environmental decision-making and the principle of precaution in the face of environmental risks. The High Court declared the provisions unconstitutional and ordered the government to amend the law to ensure greater protection of the environment and the rights of affected communities. Ultimately, the case was settled out of court in 2016, and the Malawian government agreed to improve its regulatory framework for mining and consult with local communities on mining projects. Also, in the *Centre for Environmental Rights and Others v. Minister of Mineral Resources and Others* discussed above, the plaintiffs argued that the South African mining laws were inconsistent with international environmental standards, including the Rio Declaration and the court found in their favour.

It is argued that cases demonstrate the importance of the Rio Declaration in shaping international environmental law and policy, particularly in the context of mining activities in Africa and promoting CSR. The cases also highlight the role of local communities and civil society organizations can play in holding governments and mining companies accountable for their environmental and social responsibilities. In South Africa, the Rio Declaration continues to influence and shape debates around sustainable development and CSR in the South African mining industry.²³¹

²³⁰ *Malawi Human Rights Resource Centre and others v. Minister of Natural Resources, Energy and Environment and Others*, [2015] MWSC 23.

²³¹ See Okem ME. *Mining and Corporate Social Responsibility in South Africa: A Case Study of Platinum Mining in Rustenburg*. 2012; van der Merwe. *The role of the mining industry in the transition to sustainable development in South Africa: The case of platinum mining in Rustenburg*. 2018.

2.3.1.1.6. United Nations Framework Convention on Climate Change

CSR plays an important role in the context of the United Nations Framework Convention on Climate Change²³² (UNFCCC) as companies can have a significant impact on greenhouse gas emissions and climate change. The UNFCCC recognizes the important role of the private sector in addressing climate change, and encourages companies to take voluntary actions to reduce their greenhouse gas emissions and promote sustainable practices.

The UNFCCC has established various initiatives and mechanisms to promote corporate social responsibility and support companies in reducing their carbon footprint. For example, the UNFCCC has launched the Global Climate Action Agenda, which aims to mobilize and catalyze action by non-state actors, including businesses, to reduce greenhouse gas emissions and promote sustainable development. It also supports the establishment of carbon markets and other mechanisms to promote the transition to low-carbon economies. Also, the Paris Agreement,²³³ which was adopted in 2015 under the UNFCCC, includes provisions for carbon markets and other mechanisms to incentivize emissions reductions.

It is submitted that the UNFCCC plays an important role in CSR. Mining companies must, therefore, to take voluntary actions to reduce their greenhouse gas emissions and support the transition to a low-carbon economy in their operations.

2.3.1.1.7. The Paris Agreement

²³² United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

²³³ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

The Paris Agreement is an international treaty adopted in 2015 UNFCCC.²³⁴ The agreement also includes provisions for countries to regularly report on their greenhouse gas emissions and to strengthen their efforts over time. In The context of CSR, mining companies have an important role to play in the context of the Paris Agreement, as they are significant emitters of greenhouse gases, particularly through the use of fossil fuels and energy-intensive processes. CSR is a key focus area for mining companies in the context of the Paris Agreement, as they are increasingly expected to take action to reduce their greenhouse gas emissions and contribute to the transition to a low-carbon economy. Some of the key ways in which mining companies can demonstrate their CSR in the context of the Paris Agreement include:

Taking steps to reduce their greenhouse gas emissions through the use of renewable energy, energy efficiency measures, and the adoption of low-carbon technologies; Supporting the development of low-carbon technologies through research and development, partnerships, and investment in new technologies; Engaging with stakeholders, including local communities, governments, and NGOs, to build support for their CSR initiatives and to ensure that their actions are aligned with broader social and environmental goals; and Reporting on their greenhouse gas emissions: Mining companies can demonstrate their commitment to CSR by regularly reporting on their greenhouse gas emissions and setting targets for emissions reductions over time.

There are several cases where issues about the Paris Agreement and mining companies have intersected, though some not related to mining itself.²³⁵ In

²³⁴ The Agreement aims to limit global warming to well below 2 degrees Celsius above pre-industrial levels, and to pursue efforts to limit the temperature increase to 1.5 degrees Celsius.

²³⁵ In *Urgenda Foundation v. The Netherlands (2019)*, for example, the Dutch Supreme Court ruled that the government had a legal obligation to reduce emissions by at least 25% below 1990 levels by the end of 2020. This case has implications for all industries, including mining, as they contribute to greenhouse gas emissions. Further, the case is significant in establishing the legal duty of states to reduce their greenhouse gas emissions to prevent dangerous climate

Friends of the Irish Environment v. Ireland,²³⁶ for example, issue involved a challenge by environmental groups against the Irish government's decision to grant a license to a mining company to extract zinc and lead from the seabed off the coast of Ireland. The groups argued that the license was inconsistent with Ireland's obligations under the Paris Agreement. The High Court of Ireland ruled that the government did not adequately consider the potential impact of the mining on climate change and therefore violated its obligations under the Paris Agreement. Also, Ireland's National Mitigation Plan violated statutory law, the Irish Constitution, and human rights obligations because it is not set to reduce greenhouse gas emissions sufficiently over the near-term

At the time of writing there have not yet been any reported South African case law decisions specifically related to the Paris Agreement and CSR. Be that as it may, some case law related to the Paris Agreement and climate change in South

change. See *The State of the Netherlands v Urgenda Foundation, The Supreme Court of the Netherlands* (20 December 2019), case 19/00135 (English translation) <<https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>> (Supreme Court decision). In this case, the Supreme Court of the Netherlands dismissed the appeal in *The State of the Netherlands v Urgenda Foundation*, thus upholding The Hague Court of Appeal's ruling that the Netherlands is legally obliged to reduce its greenhouse gas emissions by a minimum of 25 percent by the end of 2020 compared to 1990 levels. The Court of Appeal's ruling affirmed the District Court of the Hague's order that the Netherlands should 'reduce emissions by at least 25% by end-2020'. See generally, Wewerinke-Singh M and McCoach A. The State of the Netherlands v Urgenda Foundation: Distilling best practice and lessons learnt for future rights-based climate litigation. 2021 *Review of European, Comparative & International Environmental Law*, Vol 30, Issue 2 p. 275-283. But see, *Germanwatch e.V. et al. v. RWE AG*, Case No. 2 O 265/15 (Essen District Court, Nov. 30, 2016) which came to a different conclusion and refused to rule in favour of the mining communities. This case was brought by a group of Peruvian farmers who claimed that their livelihoods were being threatened by melting glaciers caused by climate change. The farmers sued RWE AG, one of the world's largest carbon emitters, for its contribution to global warming. The case was dismissed by the German court, which ruled that the responsibility for climate change was a matter for governments, not private companies. Be that as it may, the case highlighted the potential legal risks for mining companies that contribute to climate change.

²³⁶ *Friends of the Irish Environment -v- The Government of Ireland & Ors* [2020] IESC 49. See also, *Friends of the Irish Environment CLG v. The Government of Ireland* [2019].

African are relevant to CSR in the mining industry. In this regard reference is to the 2017 South African High Court in the case of *Earthlife Africa Johannesburg and Another v Minister of Environmental Affairs and Others*, which dealt with the proposed construction of a new coal-fired power station. While this case did not directly address CSR, it is argued that it addressing South Africa's international obligations under the Paris Agreement is critical also on sustainability, CRS and mining communities. For instance, where mining activities leads to climate change it would be good for the companies to consider CSR-mediated climate change adaptation measures for community sustainability.²³⁷ In *casu*, the court found that the decision to approve the power station was unlawful because the Minister of Environmental Affairs had not taken into account the climate change impacts of the project in accordance with South African law.²³⁸

It is argued that the Paris Agreement provides an important framework for mining companies to demonstrate their CSR and contribute to the global effort to address climate change. By taking action to reduce their greenhouse gas emissions, support the development of low-carbon technologies, and engage with stakeholders, mining companies can demonstrate their commitment to responsible business practices and contribute to the sustainable development of the countries where they operate.²³⁹

2.3.1.1.8. African Charter on Human and People's Rights.

From a regional point of view, South Africa is a signatory to some instruments that not only protect human rights within the African continent but also recognise

²³⁷ For more on South Africa's consideration of the Paris Agreements, see generally: Ziervogel, G., New, M., Archer van Garderen, E., Midgley, G., Taylor, A., Hamann, R., Stuart-Hill, S., Myers, J., Warburton, M., & Winkler, H. *Climate and Development*, (2020). 12(4), 283-301.

²³⁸ South Africa has also adopted a number of legislative and policy measures related to climate change and CSR. Notable is the *National Climate Change Response White Paper* (2011) and the Companies Act of 2008.

²³⁹ There is still much legal uncertainty around how these obligations will be enforced and what the legal responsibilities of companies will be.

the need for economic development. Notable is the African Charter on Human and People's Rights, also known as the Banjul Charter, which is a regional human rights treaty adopted by the African Union in 1981.²⁴⁰ As a regional instruments the Charter contains a comprehensive set of rights and freedoms for individuals and peoples in Africa. While the African Charter does not explicitly require businesses to engage in CSR, there are provisions that support the concept of responsible business practices and emphasize the importance of businesses contributing to sustainable development and respecting human rights in their operations. This, it is argued, resonates with CSR which mining communities must promote. For instance, Article 21 recognizes the right of all peoples to freely dispose of their wealth and natural resources, and states that the exploitation of these resources should be carried out in the interest of the peoples of Africa. It is submitted that Article 21 can be interpreted not only to providing entitlements to the exploitation of minireal resources, but also that those in the extractive industries have a duty to respect the rights of local communities. Also, that mining operations must be done in a responsible manner taking into account sound environmental and resource management practices. In the so-called Ogoni case, the African Commission found that Nigeria had violated the rights of the Ogoni people under a "sister" provision, the guarantee in article 21 that "all peoples shall freely dispose of their wealth and natural resources".

Another important provision in the context of this thesis is Article 22 of the Charter which in part calls for the promotion of social justice to ensure that the benefits of development are shared by all. Therefore, Article 22 promotes principles espoused in CSR. Article 22, it is argued, also promotes "participatory development" and "equitable distribution" imperatives that are relevant to CSR even in the mining sector. The Declaration on the Right to Development forms part of the "right" conception of the developmental right. One of the most authoritative decisions of the African Commission on Human and Peoples'

²⁴⁰ African Charter on Human and Peoples' Rights (Banjul Charter) adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

Rights, on Article 22 in the case *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. The Republic of Kenya*, otherwise known as the *Endorois case*.²⁴¹ The main grievance of the complainant, the Endorois community, was that the Government of Kenya had failed to adequately involve them in the development process. In particular, they claimed that they were neither consulted before a major developmental project that impacted their lifestyle was embarked upon nor were they compensated for its adverse consequences on that lifestyle. In this project the government of Kenya sought to convert into governmental game reserves of the lands around Lake Bogoria on which the pastoral Endorois community grazed livestock as well as performed religious ceremonies.²⁴² In what can be regarded as one of the worst attempts at displacement²⁴³ of indigenous peoples, something often seen in the mining and exploration sector, the government expected Endorois community to find alternative places to graze their cattle or partake in religious ceremonies. Ruling in favour of the community, the Commission held:

The Respondent State [Kenya] ... is obligated to ensure that the Endorois are not left out of the development process or [its] benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process has suffered a violation of Article 22 of the Charter.²⁴⁴

²⁴¹ *African Commission on Human and Peoples' Rights*, communication No. 276/2003, available at <http://caselaw.ihrda.org/doc/276.03/view/>.

²⁴² See Sing' Oei A.K and Shepherd J, 2010 *Buffalo Human Rights Law Review*, vol. 16 2010 81.

²⁴³ See generally, Ocheje P. *Journal of African Law*, vol. 51, Issue 2 2007 191-192.

²⁴⁴ *African Commission on Human and Peoples' Rights*, communication No. 276/2003, para. 298.

Despite the fact that Article 22 does not expressly refer to CSR and is mainly about protection of human right in development, it is submitted that the Charter can be leveraged to hold mining companies responsible and liable to challenges presented by their mining operations. Also, it is an important treaty in the development of CSR and sustainable development.

2.3.1.1.9. OECD Guidelines

Bantekas argues that “OECD Guidelines, the UN Global Compact, and the 1998 ILO Declaration on Fundamental Principles and Rights at Work” are the most influential public international CSR instruments compared to the UN Norms.²⁴⁵ Seemingly, the OECD better promotes cooperation through balanced non-binding principles and standards addressed to government and enterprises.²⁴⁶ The OECD Guidelines include the following requirements: Multinational companies must first and foremost comply with domestic laws and regulations.²⁴⁷ Governments have the right to prescribe the conditions under which MNEs operate within their jurisdiction, subject to international law. MNEs are subject to the laws of the country within which they operate; MNEs have a duty to contribute to economic, environmental, and social progress with the aim of attaining sustainable development; MNEs must respect the internationally recognised human rights of those affected by the Activities, encourage local capacity building through close cooperation with the local community, and must encourage human capital formation in particular by creating employment opportunities and facilitating training opportunities for employees; MNEs must also abstain from improper involvement in local political activities.

The OECD instrument indicates that MNEs have duties they must comply with, taking into account human rights recognised internationally. They must also

²⁴⁵ Bantekas | *Boston University International Law Journal* 2004 319.

²⁴⁶ The OECD Guidelines for Multinational Enterprises. Organisation for Economic Cooperation and Development. Policy Brief 2001 1.

²⁴⁷ The OECD Guidelines for Multinational Enterprises 17.

contribute towards the development of communities affected by the operations as well as society at large. They must also avoid being involved in local politics. This means that these companies must take into account CSR. International law recognises the concept of CSR, principles of CSR can be found in treaties and the soft unbinding laws which have been adopted by States and which regulate how States interstate

Several international instruments recognise key human rights that form an integral part of CSR. The International Covenant on Civil and Political Rights provides that all people have the right to self-determination because of that right they have, they freely determine their political status and freely pursue their economic, social, and cultural development.²⁴⁸ It further provides that all people may, to their advantage, dispose of their natural wealth and resources without prejudice to any obligation arising from international economic cooperation, based on the principle of mutual benefit and international law, and in no case may be deprived of their means of income.²⁴⁹

2.3.1.1.10. Sustainable Development Goals

The Sustainable Development Goals (SDGs) were adopted by the United Nations General Assembly in September 2015 as part of the 2030 Agenda for Sustainable Development. The SDGs sets new goals to develop a global vision for sustainable development by balancing economic growth, social development, and environmental protection.²⁵⁰ The key to SDGs is that they are expected to

²⁴⁸ International Covenant on Civil and Political Rights. General Assembly Resolution 2200X (XXI) Article 1 1966.

²⁴⁹ International Covenant on Civil and Political Rights. General Assembly Resolution 2200X (XXI) Article 2. 1966

²⁵⁰ The Sustainable Development Goals (SDGs) were developed through inter-governmental collaboration using public engagement processes to actively mobilize and consult national governments of both 'developing' and 'industrialized' countries in addition to various civil society groups. They are the predecessors of the Millennium Development Goals (MDGs). MDGs were a set of eight goals adopted by the United Nations (UN) in 2000 with the aim of reducing poverty and improving social and economic conditions in developing countries by 2015. The eight goals were: Eradicate extreme poverty and hunger; Achieve universal primary education; Promote gender equality and empower women;

address issues of sustainability issues better than the Millennium Development Goals (MDGs). On the whole, it is not far-fetched that to conclude that the SDGs not only concern itself with sustainable development, it can be argued SDGs can serve as a vehicle promoting CSR in mining while there is growing recognition regarding the potential for the SDGs to communities.

The SDGs are a set of 17 goals adopted by the United Nations General Assembly aimed at ending poverty, protecting the planet, and ensuring prosperity for all. Relevant to this study are the following goals: No Poverty: End poverty in all its forms everywhere; Zero Hunger: End hunger, achieve food security and improved nutrition and promote sustainable agriculture; Clean Water and Sanitation: Ensure availability and sustainable management of water and sanitation for all; Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all; Take urgent action to combat climate change and its impacts; Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss; and Peace, Justice and Strong Institutions: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

While the concept of CSR has its roots in the early 20th century, today, many international legal frameworks require companies to consider their social and environmental impact when conducting business. It is thus argued that CSR has become a key component of sustainable and responsible business practices. The perspective in this thesis is that SDGs can be leveraged to mainstream strategic CSR. In the alternative, CSR must be situated within broader sustainability scholarship. There is a growing recognition of the importance of sustainable

Reduce child mortality; Improve maternal health; Combat HIV/AIDS, malaria and other diseases; Ensure environmental sustainability; and Develop a global partnership for development.

development and related principles in legal decision-making and the potential for legal action to promote progress towards the SDGs.²⁵¹

2.3.2. National Law: South Africa

The South African Constitution recognises the need for economic development and social justice, and it places a duty on the State to take appropriate measures to promote these objectives.²⁵² CSR is an important aspect of this obligation, particularly in the mining industry, which has a significant impact on local communities and the environment. Section 24 of the Constitution, discussed in detail in Chapter 4, guarantees the right to an environment that is not harmful to health or well-being. It is argued that CSR is an important tool for achieving this balance, as it encourages companies to take responsibility for the social and environmental impacts of their operations. Malan indicates it is believed that the supreme constitution is actively regulating not only the law outside the Constitution but also the social reality.²⁵³

The MPRDA is, for the purposes of this thesis the main legislation containing provisions dealing with CSR in mining, read in conjunction with NEMA. MPRDA in South Africa includes several provisions related to CSR for mining and petroleum companies operating in the country. The MPRDA, in particular, obligates mining companies to engage in meaningful consultation with affected communities and obtain their consent before mining activities commence.²⁵⁴ It is argued that this is an important provision in the MPRDA because it avoids *post-*

²⁵¹ See, for example, *Mendoza, Beatriz Silvia and Others v. National State and Others on Environmental Protection*, 7/3/2008, 331:267 which is the landmark case where the Argentine Supreme Court held that a mining law allowing open-pit mining in glaciers and permafrost violated the right to a healthy environment and sustainable development under the Argentine Constitution. The court further held that sustainable development requires protecting natural resources and ecosystems for future generations, and that mining in glaciers and permafrost posed significant environmental risks.

²⁵² Mashamaite K and Lethoko M *International Journal of Business and Government Studies* 2018 116.

²⁵³ Malan K *PER/PEJL* (18)4 2015 1224.

²⁵⁴ MPRDA section 10 provides that interested and affected parties must be consulted.

facto consideration of challenges visited upon mining companies, and such communities are given the opportunity to influence amongst others sustainable and environmentally friendly practices in the mining sector. Another noteworthy consideration is that the MPRDA provides a framework to hold mining companies accountable for loss or damage caused by their operations.

Andrews-Speed and Bamber in their study examining the legal framework governing CSR in the mining sector in South Africa bemoaned the effectiveness of the regulatory framework in enforcing CSR pursuant to MPRDA and other legal frameworks such as the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, and the NEMA.²⁵⁵ Indeed, evidence on the ground indicates that it is necessary to improve the effectiveness of the current regulatory framework. Past challenges like the Marikana tragedy may have been avoided if the regulatory framework was effective and the mining companies held accountable for their activities and impact on local communities.

The CSR provisions of National Environmental Management Act (NEMA) aim to promote sustainable development and ensure that companies operating in South Africa take responsibility for the social and environmental impacts of their activities. It is argued that by requiring companies to conduct EIAs, develop EMPs, and engage with affected communities, NEMA becomes a crucial normative framework aimed at balancing the economic development with environmental protection and social responsibility. For the benefits of mining communities, it is important that NEMA contains the duty of mining companies not to do harm. In also a manner that mirrors MPRDA, the following relevant provisions are contained in NEMA: NEMA requires companies to conduct environmental impact assessment (EIAs) before undertaking any activity that may have a significant impact on the environment. EIAs must include an

²⁵⁵ See Andrews-Speed, P and Bamber, P. 2017 *Journal of Energy & Natural Resources Law* 2017) 131-151.

assessment of the social and economic impacts of the proposed activity, as well as measures to mitigate any negative impacts. It also makes provisions for the environmental management plans (EMPs): companies are required to develop and implement EMPs to manage the environmental impacts of their activities. EMPs must include measures to prevent pollution, conserve natural resources, and promote sustainable development. The case of *Maccsand (Pty) Ltd v City of Cape Town and Others*²⁵⁶ involved a sand mining operation in the Western Cape. The court found that the mining company had failed to comply with the requirements of its EMP and had caused significant environmental damage, including the destruction of sensitive coastal dune ecosystems. The court ordered the company to comply with its EMP and to implement measures to rehabilitate the affected areas.

Equally important is the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (Mining Charter), which contains provisions related to corporate social responsibility in mining. The Mining Charter requires mining companies to implement social and labour plans that promote the socio-economic development of affected communities and provide for the advancement of historically disadvantaged South Africans. Courts have dealt with the Charter to determine the compliance of mining companies. *Exxaro Resources Limited v Swartbooi and Others*, for example, involved a challenge to the validity of a mining right granted to a coal mining company. The court found that the mining company had not adequately consulted with local communities and had not fulfilled its obligations under the Mining Charter to promote socio-economic development. The court ordered the company to engage in meaningful consultation with local communities and to develop and implement effective CSR programs. In another important, *Mawetse and Others v Minister of Mineral Resources and Others*²⁵⁷, the validity of a mining right granted to a platinum mining company was challenged. The court found that the mining company had

²⁵⁶ *Maccsand (Pty) Ltd v City of Cape Town and Others* (CCT 104/11).

²⁵⁷ *Mawetse SA Mining Corporation (Pty) Ltd v Minister of Mineral Resources and Others* [2014] ZAGPPHC 11

not adequately consulted with local communities and had not fulfilled its obligations under the Mining Charter to promote socio-economic development. The court ordered the company to engage in meaningful consultation with local communities and to develop and implement effective CSR programs.

As observed by Chodkiewicz, the King IV Report on Corporate Governance for South Africa provides a comprehensive framework for CSR, emphasizing the importance of stakeholder engagement, transparency, and ethical leadership.²⁵⁸ It provides guidance on corporate social responsibility in the mining industry. One of the recommendations in the report is that mining companies should be responsible for the social, economic and environmental impacts of their activities and should engage in meaningful consultation with affected communities.²⁵⁹ Another notable recommendation is that mining companies should be transparent about their social and environmental performance and should report on their progress towards meeting their corporate social responsibility obligations.²⁶⁰

Generally, this thesis will be remiss not to highlight the fact that mining companies in Africa are increasingly facing scrutiny over their environmental and social impact, with litigation and case law growing regarding mining and CSR. The case law considered by the researcher demonstrates the importance of striking a balance between mining companies' quest for economic benefits and economic development with environmental and CSR. In particular, the now settled

²⁵⁸ Chodkiewicz, A. *Journal of Corporate Citizenship* (63), 2016 57-72. See generally, Visser, W. *Corporate Social Responsibility and Environmental Management*, 17(1) 2016, 1-13 (providing a historical overview of the emergence and development of CSR in South Africa. Also, highlights the role of South African law in promoting CSR, including the King Reports on Corporate Governance).

²⁵⁹ King IV Report on Corporate Governance for South Africa 45-46.

²⁶⁰ King IV Report on Corporate Governance for South Africa 47.

approach in many jurisdictions that companies should be held accountable for their impact on mining and local communities and the environment in general.

One of the reported key case laws on NEMA and CSR in mining communities in South Africa is the case of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another*.²⁶¹ In this case, a group of community members from the Bakgatla-Ba-Kgafela tribe in the North West Province challenged the approval of a mining license for Itereleng Bakgatla Mineral Resources. The main argument of the community members was that the mining company had not adequately consulted with them, and that the mining activities would have negative social and environmental impacts.²⁶² The court that the consultative process is imperative and found that the mining company had not adequately consulted with the community, and that its environmental management plan did not adequately address the social and economic impacts of the mining activities.²⁶³ One of the issues that speaks to responsibility and liability is the assertion by the court also noted that the mining company had not adequately provided for the rehabilitation and restoration of the environment in the event of damage or pollution.²⁶⁴ This was bitter-sweet victory for the community in that the approval of the mining license was deemed invalid by the court and set it aside.

The *Maledu case* is significant because it underscores the importance of CSR in the mining industry, particularly in relation to meaningful consultation with affected communities and environmental management planning. It also highlights the role of NEMA in regulating mining activities and ensuring that companies take responsibility for the social and environmental impacts of their activities. The case

²⁶¹ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (1) BCLR 53 (CC).

²⁶² *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (1) BCLR 53 (CC) 16.

²⁶³ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (1) BCLR 53 (CC) 90-98.

²⁶⁴ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (1) BCLR 53 (CC) 53.

reinforces the importance of balancing economic development with environmental protection and social responsibility, particularly in communities where mining activities have significant social and economic impacts.

As expected, questions on the constitutionality of CSR provisions in the MPRDA have been asked and one of the seminal cases that dealt with this issue is the case *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*.²⁶⁵ In this case, the Chamber of Mines challenged the constitutionality of certain provisions of the MPRDA, including those related to SLPs and financial provisioning. The argument presented by the Chamber of Mines was that these provisions violated the rights of mining companies to conduct business and own property without arbitrary interference. In its decision, the Court found that the MPRDA's CSR provisions were constitutional, noting that the state has a legitimate interest in promoting sustainable development and ensuring that mining activities contribute to the social and economic development of the country.²⁶⁶ Further, the court buttressed the importance of meaningful consultation between mining companies and affected communities, as well as the need for mining companies to take responsibility for the environmental impacts of their operations.²⁶⁷

It is submitted that the significance of the Chamber of Mines in the context of this study is that it reaffirms the importance of CSR in the South African mining industry. Further, the case brought to the fore the need for mining companies to engage in meaningful consultation with affected communities and take responsibility for the social and environmental impacts of their activities. In sum,

²⁶⁵ *Chamber of Mines of South Africa v Minister of Mineral Resources and Others* 2018 (4) SA 581 (GP) 18.

²⁶⁶ *Chamber of Mines of South Africa v Minister of Mineral Resources and Others* 2018 (4) SA 581 (GP) 127.

²⁶⁷ *Chamber of Mines of South Africa v Minister of Mineral Resources and Others* 2018 (4) SA 581 (GP)

the case embraced the importance of promoting sustainable development and social development.

Notable of the case law include the case of *Mwelase and Others v Director-General of the Department of Mineral Resources and Others*,²⁶⁸ where the South African court buttressed the duty of mining companies to consult with affected communities and obtain their consent before starting mining operations in line with the MPRDA and NEMA. What is important about this case is that it set a clear legal precedent for greater community participation in decision-making related to mining operations. Mining communities are gradually becoming aware of their rights and avenues of recourse against mining companies. In *Mwelase* the case was brought by a group of communities in KwaZulu-Natal Province who were resisting plans by a mining company, Ibutho Coal, to mine coal on their land. The communities argued that the proposed mining operation would cause significant environmental harm and would also violate their constitutional rights to property, a healthy environment, and cultural heritage.²⁶⁹ It was also alleged that the government had failed to adequately consult with the affected communities and to obtain their consent before granting the mining license to Ibutho Coal.²⁷⁰ The court ruled in favor of the communities, holding that the government had failed to adequately consult with the affected communities and to obtain their consent before granting the mining license to Ibutho Coal.²⁷¹ The court also held that the government had a duty to protect the rights of local communities and to ensure that mining activities are conducted in a socially and environmentally responsible manner.²⁷²

²⁶⁸ *Mwelase and Others v Director-General of the Department of Mineral Resources and Others* 2019 (11) BCLR 1358 (CC).

²⁶⁹ *Mwelase and Others v Director-General of the Department of Mineral Resources and Others* 2019 (11) BCLR 1358 (CC).

²⁷⁰ *Mwelase and Others v Director-General of the Department of Mineral Resources and Others* 2019 (11) BCLR 1358 (CC)

²⁷¹ *Mwelase and Others v Director-General of the Department of Mineral Resources and Others* 2019 (11) BCLR 1358 (CC)

²⁷² *Mwelase and Others v Director-General of the Department of Mineral Resources and Others* 2019 (11) BCLR 1358 (CC)

In *Xolobeni Community v The Minister of Mineral Resources and Others*,²⁷³ for instance, the proposed mining of titanium on land owned by the Xolobeni community was resisted by the community because of the alleged failure by the mining company to properly consult them.²⁷⁴ Xolobeni Community case is a significant case in South African environmental law brought by a group of communities in the Eastern Cape Province of South Africa who were resisting plans by an Australian mining company, Transworld Energy and Mineral Resources (TEM), to mine titanium on their land. The communities argued that the proposed mining operation would cause significant environmental harm and would also violate their constitutional rights to property, a healthy environment, and cultural heritage. They also alleged that the government had failed to adequately consult with the affected communities and to obtain their consent before granting the mining license to TEM. The court ruled in favor of the communities, holding that the government had failed to adequately consult with the affected communities and to obtain their consent before granting the mining license to TEM.²⁷⁵ The court also held that the government had a duty to protect the rights of local communities and to ensure that mining activities are conducted in a socially and environmentally responsible manner.²⁷⁶

The cases established an important legal precedent for greater community participation in decision-making related to mining operations and for holding the government accountable for its duty to protect the rights of local communities and to regulate mining activities in an environmentally sustainable manner. The case also highlighted the need for stronger environmental regulation and oversight of the mining industry in South Africa to prevent environmental harm and to ensure

²⁷³ *Baleni v The Minister of Mineral Resources and Others* (83568/2017) [2018] ZAGPPHC 829.

²⁷⁴ *Baleni v The Minister of Mineral Resources and Others* (83568/2017) [2018] ZAGPPHC 829.

²⁷⁵ *Baleni v The Minister of Mineral Resources and Others* (83568/2017) [2018] ZAGPPHC 829.

²⁷⁶ *Baleni v The Minister of Mineral Resources and Others* (83568/2017) [2018] ZAGPPHC 829.

that mining activities are conducted in a socially and environmentally responsible manner.

*MEC for Agriculture, Conservation and Environment, North West Province v Stilfontein Gold Mining Co Ltd and Others*²⁷⁷ is a landmark case in South African environmental law. The case involved a gold mining company, Stilfontein Gold Mining Co Ltd, that had gone bankrupt and abandoned a mine in the North West Province, resulting in significant environmental damage to the surrounding area. The North West Province's MEC for Agriculture, Conservation, and Environment brought a lawsuit against Stilfontein Gold Mining Co Ltd and other mining companies involved in the operation of the mine, seeking to hold them responsible for the environmental damage caused by the abandoned mine.²⁷⁸ The mining company was held liable for environmental damage caused by its mining activities in violation of the provisions of NEMA.²⁷⁹ The court ruled that the mining companies had a legal duty to prevent environmental harm and to rehabilitate the mine site after mining operations had ceased. The court also held that the mining companies had a continuing obligation to monitor and maintain the site after mining had ceased to prevent ongoing environmental harm.²⁸⁰ Thus, the company had breached its obligations under the NEMA, which requires mining companies to take measures to prevent environmental harm.

As indicated previously, CSR extends to the protection of mine worker. This was demonstrated in the case of *Lubbe and Others v Cape PLC*,²⁸¹ in which a South African asbestos mining company was sued by former mine workers for exposing them to asbestos and failing to protect their health. The principle that came out of this case is that employers have a duty to provide a safe working environment

²⁷⁷ *MEC for Agriculture, Conservation and Environment, North West Province v Stilfontein Gold Mining Co Ltd and Others* (765/07) [2008] ZASCA 83.

²⁷⁸ *MEC for Agriculture, Conservation and Environment, North West Province v Stilfontein Gold Mining Co Ltd and Others* 2006 (5) SA 333 (W).

²⁷⁹ *MEC for Agriculture, Conservation and Environment, North West Province v Stilfontein Gold Mining Co Ltd and Others* 2006 (5) SA 333 (W).

²⁸⁰ *MEC for Agriculture, Conservation and Environment, North West Province v Stilfontein Gold Mining Co Ltd and Others* 2006 (5) SA 333 (W).

²⁸¹ *Lubbe and Others v Cape PLC* 2000) Oct DR 47.

for their employees. The case also set a precedent for holding mining companies accountable for their impact on workers' health and safety. So far case law has established an important legal precedent for greater community participation in decision-making related to mining operations and for holding the government accountable for its duty to protect the rights of local communities and to regulate mining activities in an environmentally sustainable manner. The case also highlighted the need for stronger environmental regulation and oversight of the mining industry in South Africa to prevent environmental harm and to ensure that mining activities are conducted in a socially and environmentally responsible manner.

2.3.3. Moral Frameworks

Moral frameworks for CSR in the mining industry may include ethical principles and values, such as respect for human dignity, justice, and fairness. For example, the principle of "do no harm" requires mining companies to minimize the negative impacts of their operations on local communities and the environment. Nhlabathi proposes a framework for ethical decision-making in the South African mining industry, with CSR in promoting ethical behavior.²⁸² The proposal is based on the view that mining companies have a moral obligation to address social and environmental issues, and that ethical decision-making should be guided by principles of transparency, accountability, and stakeholder engagement. Muthuri and Gilbert, in their article comparing the moral and social responsibility practices of mining companies in the United Kingdom and South Africa, with a focus on the role of CSR in promoting ethical behavior, came to the same argument that mining companies have a moral obligation to address social and environmental issues.²⁸³ Similarly, Bezuidenhout and Wiid argue that that South African mining

²⁸² Nhlabathi, A. T. A framework for ethical decision-making in the South African mining industry. 2016 *Journal of Business Ethics*, 137(2), 305-320.

²⁸³ Muthuri, J. N., & Gilbert, D. U. Moral and social responsibility in the mining sector: A perspective from the United Kingdom and South Africa. 2019 *Journal of Business Research*, 98, 403-412. See also Nkomo, S. M. The ethics of mining in Africa: Understanding the rationale for corporate social responsibility. 2015

companies have a moral obligation to address social and environmental issues, and that CSR practices should be guided by principles of transparency, accountability, and stakeholder engagement.²⁸⁴

The Constitution is the foundation for human rights in post-apartheid South Africa, in terms of which “South Africa is one sovereign state founded on human dignity, the achievement of equality and the advancement of human rights and freedoms.”²⁸⁵ Mining negatively affects the environment and the environmental and human damage done by mining violates the human rights of the residents of mining communities, which are enshrined in the Constitution.²⁸⁶ According to Ramose, the right to life encapsulates the freedom or liberty to strive constantly towards the defence and protection of the right to life towards the right to life and that the right to life involves a fundamental divisible and integral quartet of rights, the right to human life, freedom of work, and property.²⁸⁷ In as much as there may be positives to mining activities, there is a plethora of challenges and disadvantages to communities posed by mining activities even from a moral perspective. It is argued that the concept of Ubuntu²⁸⁸ is also relevant in any discussion relating to CSR of mining companies. Ramose indicates that Ubuntu is the core philosophical concept and the organisational principle of Bantu-speaking people.²⁸⁹ It is submitted that there is a link between human rights and Ubuntu, the link which must be considered when dealing with the impact of extractive

Journal of Business Ethics, 129(1), 101-113 (examining the ethical framework for mining in Africa, with a focus on the role of CSR in promoting ethical behavior).

²⁸⁴ Bezuidenhout, N., & Wiid, J. A. Corporate social responsibility and stakeholder engagement in the South African mining sector: Exploring the gap between policy and practice. 2018 *Journal of Business Ethics*, 147(2), 327-347. See generally, Cohen, T. The normative foundations of corporate social responsibility: A comparative perspective. 2017 *Journal of Business Ethics*, 144(4), 677-688 (examining the different ethical frameworks that underpin CSR, and assesses their compatibility with legal norms and principles).

²⁸⁵ See Section 1 (a) of the Constitution of the Republic of South Africa.

²⁸⁶ CALS et al Universal Periodic Review of South Africa 2017 2.

²⁸⁷ Ramose MB Globalisation and Ubuntu African Philosophy Reader 2003 744.

²⁸⁸ Madlingozi T et al Introduction to Law and Legal Skills in South Africa 2ND ed 2021 Oxford Cape Town 164.

²⁸⁹ Ramose MB Globalisation and Ubuntu African Philosophy Reader 2003 734.

communities on mining communities. For the purposes of this study, it suffices note that Ubuntu is aligned with theism and is divorced from theism, the concept is based on the construction of knowledge which is undogmatic, which is distinguishable from economic fundamentalism, which is dogmatic and aimed at the pursuit of profit, sometimes to the detriment of human rights and development.²⁹⁰

The failure of mining companies to contribute meaningfully to the socioeconomic development and improvement of the lives of mining communities speaks to an alignment with economic fundamentalism to the detriment of the dwellers of these communities.²⁹¹ Once human rights are found to have been violated by mining operations it cannot be ignored that Ubuntu has also been disregarded as Ubuntu relates also to our relationship with the land or the environment. An interesting theological perspective of peoples' relationship with the environment has been captured by Ras, who with reference to the Lily Mine tragedy wrote:

The tragedy of the 2016 Vantage Goldfields' Lily Mine operation in Barberton, Mpumalanga will be used as a kind of lens to augment and explore the different configurations of land and our relationship to it and ourselves. Lily Mine forces us to confront the absence of those three people who are still trapped in that container deep beneath the earth. Their absence forces us to confront our past which has been so cruel to black bodies and nature alike. Ecofeminism and African women's theologies will be used to view the brokenness of both people and nature.²⁹²

²⁹⁰ Ramose MB Globalisation and Ubuntu African Philosophy Reader 2003 734.

²⁹¹ Ramose MB Globalisation and Ubuntu African Philosophy Reader 2003 734.

²⁹² Ras I.F. University of Pretoria 2018 2.

Ras also continues to buttress possible human rights violations as a result of mining operations, particularly with reference to the destruction of people and the environment. The author stated:

The South African economy is very dependent between people, land on the mining sector. For the past 120 years, the mining industry has been at the centre of our politics and economy. Our country's historic economic growth is squarely built on the destruction of people and the environment. Those three workers at Lily Mine are trapped underneath thousands of tons in a container, buried under thousands of tons of earth for the advancement and prosperity of South Africa. The mining industry is indicative of a wider societal problem: the schism between nature, people and God.²⁹³

With reference to the Lily Mine tragedy, it is submitted, uBuntu will also support a call for restoration on the backdrop of CSR in similar calamities.

In interpreting the rights of mining communities, these issues must be taken into account. How attention is paid to these rights is important. Reports by the CALs and SAHRC indicated that the rights of these communities do not receive the urgent attention they require. CALs indicated that the plight of mining communities was not even taken into account during the COVID-19 pandemic.²⁹⁴ Looking at the human-centredness of human rights, it is imperative that the conduct of mining companies must be aligned with the protection, enhancement, and development of human conditions. The moment

²⁹³ Ras I.F. University of Pretoria 2018 9.

²⁹⁴ CALS Ongoing Exclusion of Mining Communities during the Corona Virus Pandemic. 2020 <https://www.wits.ac.za/news/sources/cals-news/2020/ongoing-exclusion-of-mining-communities-during-coronavirus-pandemic.html>. Accessed on the 22nd October 2022.

a mining company fails to positively contribute to the well-being of the communities within which they operate, while they continue to amass vast profit while operating in the throes of poverty, is contributing towards the violation of human rights. The poverty and impoverishment can be exacerbated by the mining operations and the impact that this has on the socioeconomic conditions of such areas. Mining companies have to consider the implications of their operation, and they have a duty to do good in the communities within which they conduct activities related to mining.²⁹⁵

Mining companies must be conscientious about their legal and moral duty to protect human rights. They must be aware that their operations have far-reaching implications that can negatively affect the rights of mining communities. In the application of the theory of human rights regarding the interpretation of mining legislations, policy and regulations, the Ubuntu component of the right theory of human rights must be applied and enforced. The DMR and local government must also take these into account in their enforcement of obligations contained in the MPRDA, policy, and regulation. They must also take this into account when they perform their duties and in the interaction with all stakeholders including mining communities and mining companies. This requires that attention must be given to the human rights of the mining communities that have the potential of being violated by mining companies and other stakeholders, and they must take into account that no right can outweigh the other, the right to socio-economic development forms part of the quartet of rights that contribute towards the maintenance of the right to life and the wellbeing of mining communities.

²⁹⁵ Handelsman S Human Rights in the Mineral Industry. Report by International Institute for Environment and Development 2002 21.

2.3.4. Political Frameworks

Reference to political frameworks for CSR in the mining industry herein is understood broadly to include government policies and regulations, civil society activism, and public opinion. For example, most often then not civil society and local communities would exert pressure that lead lead mining companies to adopt more socially responsible practices in their operations. The value of these political frameworks is that they provide guidance and standards for mining companies to follow when developing their CSR strategies for mining operations that are socially responsible and sustainable, while also contributing to the well-being of the communities where they operate.

Of the several political frameworks that guide CSR in the mining industry some of the most notable ones include the following:

2.3.4.1. United Nations Global Compact

In the 1990s, the concept of CSR gained further prominence with the publication of the United Nations Global Compact. The Global Compact is a voluntary initiative that encourages companies to adopt sustainable and socially responsible policies and practices. The Compact is based on ten principles that cover human rights, labour standards, environmental protection, and anti-corruption measures.²⁹⁶

²⁹⁶ See generally Rasche, A., & Kell, G. 2010. *The United Nations Global Compact: Achievements, trends and challenges*. Cambridge University Press (providing an overview of the United Nations Global Compact).

While it is not a legally binding instrument, the Global Compact has had an impact on the development of international norms and standards related to CSR. It is thus not strange when the Global Compact is referenced in legal proceedings related to CSR. One example is the case of *Wiwa v. Royal Dutch Petroleum Co. et al.*,²⁹⁷ which involved allegations of human rights abuses in Nigeria by a subsidiary of Royal Dutch Shell. The plaintiffs in the case alleged that Shell violated the Global Compact's principles on human rights, labour standards, and the environment.²⁹⁸ The case was brought under the Alien Tort Claims Act²⁹⁹ (ATCA) and the Torture Victim Protection Act³⁰⁰ (TVPA), which allow non-U.S. citizens to sue in U.S. courts for violations of international law. The case went to trial in 2002 and resulted in a settlement of \$15.5 million to be paid by Shell to the plaintiffs.

Perhaps it is apposite to indicate that *Wiwa v. Royal Dutch Petroleum Co. et al.* was filed in 1996 in the United States District Court for the Southern District of New York by representatives of the Ogoni people of Nigeria, including the late Ken Saro-Wiwa, against Royal Dutch Petroleum (also known as Shell) and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria (SPDC), along with other companies. The plaintiffs alleged that the defendants were complicit in human rights abuses committed by the Nigerian government against the Ogoni people, including torture, extrajudicial killing, and crimes against humanity, in an effort to suppress protests against oil exploration and extraction in the Ogoni region. This case is notable for being one of the first successful attempts to hold a multinational corporation accountable for human rights abuses committed in another country. In particular, raising awareness of the negative environmental and social impacts of oil exploration and extraction in developing countries.

²⁹⁷ *Wiwa v. Royal Dutch Petroleum Co. et al.* 226 F.3d 88

²⁹⁸ *Wiwa v. Royal Dutch Petroleum Co. et al.* 226 F.3d 88

²⁹⁹ Alien Tort Claims Act (ATCA) 28 U.S.C. § 1350.

³⁰⁰ Torture Victim Protection Act (TVPA) 28 USC 1350.

Another example is the case of *Kiobel v. Royal Dutch Petroleum Co*³⁰¹ which also involved allegations of human rights abuses by Shell in Nigeria and argued based on the Global Compact. In this case, the plaintiffs alleged that Shell violated the Global Compact's principles on human rights and the environment, among other things. Like in the *Wiwa* case, allegations in the *Kiobel* case filed in 2002 by a group of Nigerian citizens against Shell in the United States District Court for the Southern District of New York, were that Shell aided and abetted the Nigerian government in committing human rights abuses against the Ogoni people, including torture, extrajudicial killing, and crimes against humanity, in order to suppress protests against oil exploration and extraction in the Ogoni region.³⁰² Unfortunately, the case was ultimately dismissed by the US Supreme Court on the basis that the alleged conduct took place outside the US and that US courts did not have jurisdiction over the matter. In what can be regarded as a setback in the area of human rights of mining communities and the CSR of mining companies, in dismissing the case in 2013 Supreme Court stated that the ATCA could not be used to sue foreign corporations for actions that occurred outside the United States. The Court held that the presumption against extraterritoriality applied to the ATCA, and that a "clear statement" from Congress was required to rebut that presumption.³⁰³

The cases above demonstrate that though not mandatory, Global Compact can be used as a reference point in legal proceedings related to CSR. It is argued that the Global Compact has been influential in promoting the adoption of sustainable and socially responsible policies and practices by businesses around the world, and therefore it would be a step in the right direction if its principles

³⁰¹ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

³⁰² *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

³⁰³ This Supreme Court decisions has implications for the ability of foreign plaintiffs to sue corporations for human rights abuses committed outside the United States. It made it more difficult for foreign plaintiffs to bring such claims in U.S. courts.

are incorporated into CSR policies of mining companies or national laws and regulations on CSR of mining companies.

2.3.4.2. United Nations Guiding Principles on Business and Human Rights

The United Nations Guiding Principles on Business and Human Rights³⁰⁴ (UNGPs) is a set of guidelines developed by the United Nations Human Rights Council in 2011. The UNGPs outline the responsibilities of companies to respect human rights, and apply to all industries, including mining, and provide guidance on how companies can identify, prevent, and address human rights abuses. Notable is that the UNGPs framework consists of three pillars, namely: i) The state duty to protect human rights: In terms of this pillar Governments have a responsibility to ensure that businesses operating within their jurisdiction respect human rights; ii) The corporate responsibility to respect human rights: This pillar enjoins businesses with a responsibility to respect human rights, regardless of the country or context in which they operate. The pillar is relevant to mining companies as it requires them to take steps to identify, prevent, and mitigate any adverse human rights impacts of their operations; and iii) Access to remedy: This last pillar of the UNGPs provides recourse to individuals and communities affected by business-related human rights abuses by providing that have a right to access effective remedies, including judicial and non-judicial mechanisms.³⁰⁵ Consequently, under the UNGPs, companies are responsible for the acts or operations that causes harm and violate human rights. Unfortunately, the UNGPs are not legally binding, even though they have been widely endorsed by

³⁰⁴ United Nations Human Rights Council. (2011). Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. *A/HRC/17/31*

³⁰⁵ See generally, Ruggie J.G. Guiding principles on business and human rights: implementing the united nations "protect, respect and remedy" framework: report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises. 2011. (*A/HRC/17/31*). (n. 2). p. 25-26.

governments, businesses, and civil society organizations as a framework for responsible business conduct.

2.3.4.3. The Extractive Industries Transparency Initiative (EITI)

The Extractive Industries Transparency Initiative (EITI) is a global standard for transparency in the oil, gas, and mining sectors. The initiative was launched in 2003 by a coalition of governments, civil society organizations, and companies, with the aim of increasing transparency and accountability in the management of natural resources. The EITI standard requires participating countries to disclose information about their extractive industries, including payments made by companies to governments and revenues received by governments from the extractive industries. The goal is to ensure that natural resource wealth benefits the people of the country, rather than being siphoned off by corrupt officials or companies.

While the EITI is a global standard for transparency in the oil, gas, and mining industries and thus primarily focusing on promoting transparency in the payments made by extractive industries to governments, it also includes provisions related to CSR. It should be noted that corporate social responsibility (CSR) is an important aspect of the EITI standard. The initiative encourages companies in the extractive industries to disclose information about their social and environmental impacts and to engage with stakeholders, including local communities, to build sustainable relationships. This can include disclosing information about community development programs, health and safety practices, and environmental impact assessments. It is argued that by requiring companies to disclose information about their payments to governments and revenues received by governments, the EITI also helps to promote transparency and accountability in the extractive industries. Overall, the EITI promotes responsible and sustainable practices in the extractive industries by promoting transparency,

accountability, and engagement with stakeholders. In sum, the EITI espouse CSR for mining companies.

Such important has been the EITI despite it been more of a political construct that its importance of the EITI in promoting transparency and accountability in the extractive industries has been part of some key case law in some jurisdiction. For example, in the 2013 case of *Publish What You Pay Norway v. The Norwegian Government*³⁰⁶ an Norwegian advocacy group Publish What You Pay Norway, filed a lawsuit against the Norwegian government for failing to implement the EITI standards on tax transparency. The case was ultimately settled out of court, with the Norwegian government agreeing to strengthen its implementation of the EITI standards.³⁰⁷ In the 2019 case of *Nevsun Resources Ltd. v. Araya*³⁰⁸ the Supreme Court of Canada allowed a lawsuit to proceed against Nevsun Resources Ltd., a Canadian mining company, brought by Eritrean refugees who alleged that they were subjected to forced labour at the company's mine in Eritrea. What is significant with this case is that EITI standard have provided a leverage to local communities to ensure liability of mining companies with regard to respect to respect human rights, an issue that is relevant to CSR of mining companies.

³⁰⁶ *Publish What You Pay Norway v. The Norwegian Government*

³⁰⁷ For further discussions of the case of *Publish What You Pay Norway v. The Norwegian Government*, see generally: Stephenson M. A Soft Law Success Story? Assessing the Impact of the Extractive Industries Transparency Initiative. 2014 *Harvard International Law Journal*; Feichtner I. The Role of Courts in Advancing Transparency in the Extractive Industries: An Analysis of Publish What You Pay Norway v. The Norwegian Government. 2015 *Journal of International Economic Law* ; Wettre A. Norwegian State-Owned Enterprises and Transparency: From Tragic to Magic? 2016 *Nordic Journal of Commercial Law*; Werksman J. *Publish What You Pay Norway v. The Norwegian Government: From Participatory Democracy to the Rule of Law?* 2016 *Yearbook of International Environmental Law*.

³⁰⁸ *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166.

2.3.4.4. International Council on Mining and Metals

The International Council on Mining and Metals (ICMM), a global industry association, is one of the notable institutions that plays an important role in shaping the concept of CSR in the mining sector. The ICMM is an industry association that represents leading mining and metals companies globally. Its members include some of the largest mining companies in the world, such as BHP, Rio Tinto, and Anglo American.³⁰⁹ Founded in 2001, the ICMM was founded in 2001 to improve the sustainability of the mining and metals industry and to promote responsible mining practices. To this end, the ICMM has developed a set of 10 principles for sustainable mining practices, which include commitments to: Uphold fundamental human rights and respect cultures, customs, and values in dealings with employees and others who are affected by our activities; Implement and maintain ethical business practices and sound systems of corporate governance; Integrate sustainable development considerations into decision-making processes and operating practices; Contribute to the social, economic and institutional development of the communities in which the companies operate; Implement effective and transparent engagement, communication and independently verified reporting arrangements with our stakeholders.³¹⁰

³⁰⁹ By endorsing these principles, International Council on Mining and Metals (ICMM) member companies commit to implementing sustainable practices in their operations and working towards continuous improvement in their social and environmental performance.

³¹⁰ For more discussions on the International Council on Mining and Metals (ICMM) principles, see generally: Lahiri-Dutt and Macintyre. Mining, Corporate Social Responsibility and the 'Community': The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi. 2019 *Journal of Rural Studies* (evaluating the effectiveness of the ICMM principles in addressing community concerns in the context of a mining project in South Africa); Nkala and Musingwini. Corporate Social Responsibility in Mining: A Content Analysis of ICMM Mining Companies' Sustainability Reports. 2017 *Journal of Cleaner Production* (examining the CSR reporting practices of ICMM member companies and evaluates their alignment with the ICMM principles); Driessen and Hinfelaar; Bradshaw, Datta, and Mahajan. Assessing the Adoption of the International Council on Mining and Metals Sustainable Development Framework. 2016 *Journal of Cleaner Production* (evaluating the implementation of the ICMM principles in the mining

Important to note is that even in the absence of direct legal obligations, the ICMM principles as a framework for assessing the social and environmental impacts of mining activities has an influence on operations of mining companies. The principles have been considered important in shaping the development of national and regional legal frameworks for the extractive industries. Further, they have been referenced in key case law or used by the courts as a framework for assessing the social and environmental impacts of mining activities. For example, in the case of *Ok Tedi Mining Limited v. Minister for the Environment and Conservation*³¹¹ the Supreme Court of Papua New Guinea considered the social and environmental impacts of the Ok Tedi mine, which was operated by Ok Tedi Mining Limited. The court referred to the ICMM's sustainable development framework and principles as a relevant standard against which to assess the company's conduct.

In South Africa, for instance, the court in the 2018 case of *Sanderson v. Minister of Mineral Resources*³¹² considered a challenge to the grant of a mining license to a company operating in the Eastern Cape province. The court also referred to the ICMM's principles as one of several relevant frameworks for assessing the company's compliance with social and environmental standards.³¹³ Reference to ICMM's principles was also made in the 2016 case of *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development*³¹⁴ where the High Court had to consider a challenge to the South African government's decision to

industry and identifies factors that contribute to successful adoption); The International Council on Mining and Metals (ICMM) and Sustainable Development in the Mining Industry: An Institutional Approach. 2016 *Journal of Cleaner Production* (analysing the role of the ICMM in promoting sustainable development in the mining industry and evaluates its effectiveness as an institutional mechanism).

³¹¹ *Ok Tedi Mining Limited v. Minister for the Environment and Conservation*

³¹² *Sanderson v. Minister of Mineral Resources*

³¹³ *Sanderson v. Minister of Mineral Resources*

³¹⁴ *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development* 2015 (9) BCLR 1108 (GP) 9.

grant diplomatic immunity to the President of Sudan, Omar al-Bashir, who was wanted by the International Criminal Court for alleged war crimes.³¹⁵

In a nutshell, CSR is a key focus area for the ICMM. In particular, it represents an acknowledgement that mining companies have a responsibility to manage their social and environmental impacts and to engage with stakeholders, including local communities, to build sustainable relationships.

2.4 SUMMARY

Overall, this Chapter demonstrated the origins and evolution of CSR with particular emphasis on mining companies. Further, it evaluated contemporary key elements and norms of CSR, and identified legal, moral and political frameworks for CSR in the mining industry.

Notable is that the concept of CSR serves an important role of ensuring trajectory towards the ideal operational and regulatory requirements of sustainability, not causing harm to local communities, disclosure and adequate participation of all stakeholders affected by mining operations, and local communities expectations. Importantly, in terms of the view taken in this thesis, CSR provides a basis for mining communities to hold mining companies accountable and liable for their socio-economic challenges caused by their operations. It is observed in this thesis, however, that CSR as a global concept is applied differently across social, economic, legal, moral, and political contexts. Further, different countries and regions, cultural and geographic heterogeneities have received CSR in the mining industry differently.

The above said, it is interesting that there is in the mining sector greater recognition of the need for CSR. Further, international law and civil society has

³¹⁵ *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development* 12.

played a significant role in shaping the concept of CSR in the mining sector. In particular, CSR is becoming increasingly important as a tool for companies to manage their social and environmental impacts. What may be lacking is the universally applicable legal frameworks designed to ensure that companies are held accountable for their CSR practices. On the other hand, while the moral and political frameworks underpinning CSR practices in the mining sector remain relevant, their lack of enforceability is their Achilles Heels.

CHAPTER 3.
REGULATORY FRAMEWORK FOR THE MINING INDUSTRY DURING
COLONIAL AND APARTHEID SOUTH AFRICA: AN HISTORICAL
ACCOUNT

3.1 INTRODUCTION

This chapter, takes a historical account of mining in South Africa. In particular, it looks at the question of whether CSR was implemented in South Africa during the Union and the Apartheid era. This chapter will also focus on how the legislation that was enacted and applied to mining and the exploitation of mineral resources and whether some level of CSR was applicable. These legislations will be analysed to identify traces of CSR and the impact of these laws on the development of CSR within the South African context. The starting point will be to investigate the political and legal environment during these periods. These laws and policies had an impact on the development of mining law and the evolution of CSR in South Africa.

Mining has been practised in South Africa since time immemorial. Sites such as the Mapungubwe³¹⁶ historical site are a testament that mining was an integral part of the lives of Southern African people long before Dutch settlers arrived on South African soil. However, the relationship between mining companies and

³¹⁶ Mapungubwe is an archaeological site situated in the Limpopo Province, history of early civilisation and mining were “discovered” on the site in 1932. The discovery of burial sites with gold and gold artefacts at Mapungubwe dates back to the 13th century AD, Miller, Desai and Thorp South African Archaeological Society Goodwin Society 2000 91. Mapungubwe <https://www.sahistory.org.za/article/mapungubwe> Accessed 10 February 2021.

mining communities during the Union³¹⁷ and the Apartheid³¹⁸ era was contentious, with mining companies extracting minerals to the detriment of mining communities and the environment. The concept of CSR was not recognised during these periods and was not even included in legislation that regulated mining.

To understand the evolution of CSR in South Africa, the legal system within which CSR evolved must be investigated holistically. It is imperative to investigate whether the legal systems in these two periods aided or stunted the growth and evolution of CSR. This approach is informed by the fact that before 1994 South Africa was characterised by discrimination and the disenfranchisement of black South Africans. Past discriminatory legislation played a central role in ensuring that black South Africans were kept at the bottom of the food chain when it comes to economic and socioeconomic development. These past discriminatory laws impacted every aspect of Black lives during the Union and the Apartheid era. Discriminatory laws also ensured that black South Africans were kept at the periphery of the then emerging economy, fuelled by mining. Additionally, past discriminatory laws also affected the mining industry. As a result of the implementation and enforcement of these laws, blacks did not benefit sufficiently from mining and mining communities did not reap the benefits of residing in areas where mineral resources were located.

The failure to benefit from the mining industry was all-encompassing; not only were blacks exploited by being paid a small amount of money for the work they did in the mining industry, but it also negatively affected mining communities.³¹⁹

³¹⁷ The Union of South Africa started in 1910 and ended in 1961. Leacock S, *The American Political Science Review* 1910, 498-History Online the Union of South Africa 1910 <https://www.sahistory.org.za/article/union-south-africa-1910> Accessed 10 February 2021.

³¹⁸ Apartheid started in 1948 and ended in 1994-Mhlauli M.B *et al International Journal of Asian Social Sciences* 2015 204- A History of Apartheid in South Africa <http://www.sahistory.org.za/article/history-apartheid-south-africa> Accessed on the 10 February 2021.

³¹⁹ Wilson F *Journal of Economic History of Developing Regions* 2011 8.

Mining communities did not benefit from the mining that occurred in the areas where they were located.

3.2 HISTORICAL ACCOUNT OF THE PRE-1994 MINING INDUSTRY

3.2.1 General

The history of the development of the mining industry and mining law in South Africa is important, as history can explain why the present is as is.³²⁰ As Murombo³²¹ argues, the history of legal developments in South Africa is important, as legal history has not only shaped the legal system, but also distorted the legal system governing land tenure, mineral rights, and how these rights are exercised.³²² Mining has played a role in the South African economy for decades.³²³ It is one of the many sectors where racialized inequalities were and are still glaringly evident.³²⁴

Historically, minerals were used for makeup, cosmetics, and the production of hunting tools.³²⁵ The practice dates back to around 40 000 BC.³²⁶ The historical use of minerals alludes to the fact that mining was used to benefit the community as a whole; therefore, mining had a direct impact on the community at large and

³²⁰ Kleyn D et al *Beginners Guide for Law Students* 19.

³²¹ Murombo 2013 *Law, Environment and Development Journal* 38.

³²² Kleyn D et al *Beginners Guide for Law Students* 19.

³²³ Property Rights From Above and Below: Mining and Distributive Struggles in South Africa. Bernard and Audre Rapaport Centre for Human Rights and Justice. December 2019 2.

³²⁴ Property Rights From Above and Below: Mining and Distributive Struggles in South Africa. Bernard and Audre Rapaport Centre for Human Rights and Justice. December 2019 2. Past mineral and mining laws concentrated mining rights in the hands of the white minority and foreign white-owned firms. Communities that had these minerals located in their backyards were systematically excluded from benefiting from the mineral resources of the country.

³²⁵ Hammel 2000 *the Journal of South African Institute of Mining and Metallurgy* 49.

³²⁶ Hammel 2000 *the Journal of South African Institute of Mining and Metallurgy* 49.

more especially the community where the mining operations were taking place. The full extent of precolonial mining can never be known due to some evidence destroyed by colonial mining and the lack of written history by the indigenous people of South Africa.³²⁷ The rich history of indigenous mining, architecture, and political and religious systems was eroded through conquest and the destruction of indigenous knowledge, reducing indigenous knowledge and progress to mere myths.³²⁸

It is argued that colonisation has had a tremendous impact on the development of South Africa, and that was evident in the communities of different British colonies reflected in Figure 3 below.

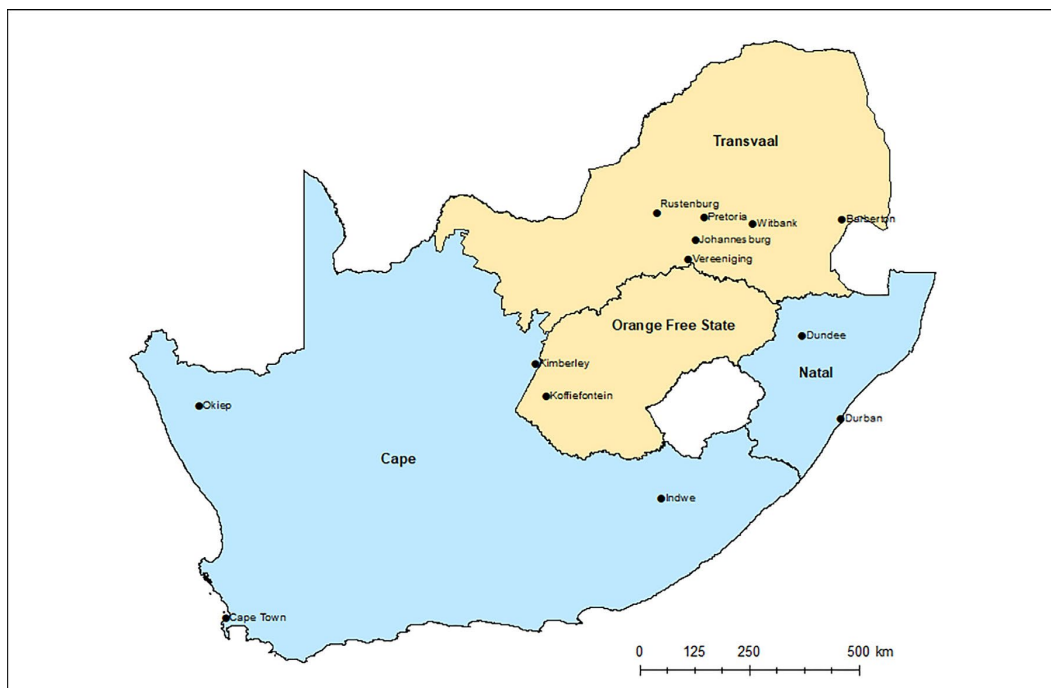


Fig. 3. Map of South Africa's British colonies (shaded blue) and Boer republics (shaded orange), key cities and early mining towns.³²⁹

³²⁷ Hammel A *the Journal of South African Institute of Mining and Metallurgy* 2000 49.

³²⁸ Laterza V and Sharp J 2017 *Review of African Political Economy* 174.

³²⁹ Cole M.J and Broadhurst J.L *The Extractive Industries and Society* 2020 956.

The extractive industry was one of the ways in which both parties, the British and the Boers benefited extensively. Every town where minerals were 'discovered' was either annexed by the British colony or was part of the Boer Republic..³³⁰ These activities were closely related to institutionalised migrant labour systems based on race.³³¹ For example, past discriminatory laws ensured that white miners were housed in well-structured housing, while black miners were housed in single-sex hostels away from their families.³³² Gross economic exploitation, migrant labour, oppression, and Balkanization.³³³ Gross inequalities were deliberately and legally imposed as far as race and also geographical were concerned. Not only were there richer and poorer provinces, there were homelands, which by no stretch of imagination could be seen to have been treated on the same footing as 'white South Africa, in terms of resources.³³⁴

One of the first mining communities in South Africa was established in 1852. Cole and Broadhurst indicate that the colonialists 'discovered' copper deposits in the Namaqualand area in 1852.³³⁵ Commercial copper mining began in 1852 and the first mining town called Springbokfontein was established in 1852.³³⁶ There were previous attempts to mine for copper in the Springbokfontein area, but it was only in 1852 when a company called Phillips & Kings was founded and commenced mining operations in the Springbokfontein area that large-scale copper mining operations took place.³³⁷ Thus, copper mining became the foundation of this new town, additional 'discoveries' of copper within the area led to the establishment of more towns and the area became the richest copper deposit in the world.³³⁸ In

³³⁰ Marais S et al *Land Use Policy* 2018 783.

³³¹ Marais S et al *Land Use Policy* 2018 783.

³³² Marais S et al *Land Use Policy* 2018 783.

³³³ Marais S et al *Land Use Policy* 2018 783.

³³⁴ *Mashava v President of the Republic of South Africa and Others* 2005 (2) SA 476 (CC) 20.

³³⁵ Cole M.J and Broadhurst J.L *The Extractive Industries and Society* 2020 955.

³³⁶ Cole M.J and Broadhurst J.L, *The Extractive Industries and Society* 2020 956.

³³⁷ Cairncross B *Mineralogical Records* 2004 302.

³³⁸ Casey J.P, History of mining in South Africa <https://www.mining-technology.com/features/history-of-mining-in-south-africa/#:~:text=The%20first%20mine%20constructed%20in,in%20the%20North%20Cape%20province>. Accessed 01 January 2022.

general, the growth of Springbokfontein was attributed to the opening of the copper mine.³³⁹ Kostka indicates that the ‘town developed from an assemblage of one mud cabin and a few mud huts to a large mining station.’³⁴⁰ a number of infrastructure developments were also attributed to the mining operations in Springbokfontein. These infrastructural developments included, but were not limited to, stores, wagon makers’ stores, blacksmith stores, and a prison.³⁴¹

Cities were established because of mining. The town of Johannesburg, for instance, was established in 1886 as a result of mining activities in the area. It was initially established to house thousands of people who converged in the area lured by the mining prospects.³⁴² Initially, most of the miners in the area were of British descent. Other towns also developed in the area as a direct result of the mining operations being carried out. An example of such a town is Krugersdorp, which was established in 1887 and served as the central administrative centre for the Witwatersrand gold fields.³⁴³ Alluvial gold was 'discovered' in the Juksie and Crocodile rivers in 1853.³⁴⁴ The city of Magaliesburg was also established after the “discovery” of gold deposits in the area.³⁴⁵

Other mining towns were established, and the discovery of various mining towns led South Africa to become an economic powerhouse and an economic hub in Africa. Despite the variety of minerals 'discovered' on South African soil during the Union and the Apartheid era, the common thread that never changed was that the majority of unskilled workers in this mining industry were predominantly black and lived in deplorable single-sex compounds. The discovery of diamonds in Kimberly led to Kimberly being one of the largest towns in Southern Africa; this

³³⁹ Kostka B *Four Stripped Mouse Time* 2005 10.

³⁴⁰ Kostka B *Four Stripped Mouse* 2005 10.

³⁴¹ Kostka B *Four Stripped Mouse* 2005 10.

³⁴² Durant J.F. *Journal of African Earth Science* 2012 27.

³⁴³ Durant J.F. *Journal of African Earth Science* 2012 26.

³⁴⁴ Durant J.F. *Journal of African Earth Science* 2012 26.

³⁴⁵ Durant J.F. *Journal of African Earth Science* 2012 26.

was fuelled by the large-scale migration of miners in the area.³⁴⁶ The majority of the workforce is made up of black migrant workers.

The various mining companies that benefited from mining operations in these various mining communities played a role in the infrastructure development of the areas where they were operating.³⁴⁷ Mining towns consisted of privately owned houses, which were exclusively reserved for white miners, and single-sex housing (hostels) that were reserved for their black counterparts.³⁴⁸ The mining industry has been characterised as a compound and migrant-based system, which was exploitative. The migrants were housed in compounds, which were often overcrowded and did not provide adequate living conditions for the migrant miners.³⁴⁹ Informal settlements in South Africa began to appear in the 1980s when the apartheid government stopped influx control.³⁵⁰ Migrant workers and their families began to live in areas close to mining operations.

It is hereby emphasised that the arrival of Dutch settlers had a tremendous impact on South Africa's social, economic, political, and legal landscape. It changed the entire legal system and shook the core values and beliefs of the indigenous people of South Africa.³⁵¹ The sovereignty of indigenous peoples was ignored.³⁵² One of the reasons for colonisation and European conquest was the extraction of raw materials to aid the development of metropolitan centers.³⁵³ The extraction of these raw materials came at a cost of human life, domination, dispossession,

³⁴⁶ Cole M.J and Broadhurst J.L, *The Extractive Industries and Society* 2020 955.

³⁴⁷ Cole M.J and Broadhurst J.L *The Extractive Industries and Society* 2020 956.

³⁴⁸ Marais L et al *Land Use Policy* 2020 1.

³⁴⁹ SAHRC National Hearing on Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa. 13-14 September, 26 and 28 September, 3 November 2016 31.

³⁵⁰ Cole M.J and Broadhurst J.L, *The Extractive Industries and Society* 7 2020 955.

³⁵¹ Thomas, Van der Merwe *et al* *Historical Foundations of South African Law* 9.

³⁵² Thomas P.J, Van der Merwe *et al* *Historical Foundations of South African Law* 9.

³⁵³ Laterza V and Sharp J 2017 *Review of African Political Economy* 174.

and the disruption of the autonomy and well-being of African societies.³⁵⁴ The extraction of minerals in South Africa and the growth and expansion of the mining industry were accompanied by a racist system. This racist system ensured that Africans and people not of European descent were excluded from benefiting from the mining sector, while their white counterparts benefitted from the mining industry.³⁵⁵ The law was enacted and developed in such a manner that black people were disadvantaged and their white counterparts enjoyed great advantage.³⁵⁶ Mostert indicates that the period between 1860 and 1910 was characterised by layers of strife and conflicts along racial lines. These disputes and disputes, influenced by race, affected the way South African mining law was developed.³⁵⁷ This was observed during the colonial period, when indigenous communities' claims to land and minerals were ignored and not taken into account. The discovery of diamonds in Kimberly is a classical example of how local community mineral claims were ignored.³⁵⁸ Mostert further opines that when diamonds were discovered, neither the British nor the Boer Republics had territorial rights and ownership over the area where diamonds were discovered. An indigenous tribe claimed ownership and control over that area.³⁵⁹

³⁵⁴ Laterza V and Sharp J 2017 *Review of African Political Economy* 174.

³⁵⁵ Laterza V and Sharp J 2017 *Review of African Political Economy* 174.

³⁵⁶ Humby T *et al* Introduction to Law and Legal Skills 23.

³⁵⁷ Mostert H Minerals Law Principles and Policies in Perspective 2012 30.

³⁵⁸ <https://www.britannica.com/place/South-Africa/Diamonds-gold-and-imperialist-intervention-1870-1902> . Accessed 15/07/2021A chance find in 1867 had drawn several thousand-fortune seekers to alluvial diamond diggings along the Orange, Vaal, and Harts rivers. Richer finds in “dry diggings” in 1870 led to a large-scale rush. By the end of 1871, nearly 50,000 people lived in a sprawling polyglot mining camp that was later named Kimberley. Initially, individual diggers, Black and white, worked small claims by hand. As production rapidly centralized and mechanized, however, ownership and labour patterns were divided more starkly along racial lines. A new class of mining capitalists oversaw the transition from diamond digging to mining industry as joint-stock companies bought out diggers. The industry became a monopoly by 1889 when De Beers Consolidated Mines (controlled by Cecil Rhodes) became the sole producer. Although some white diggers continued to work as overseers or skilled labourers, from the mid-1880s the workforce consisted mainly of Black migrant workers housed in closed compounds by the companies.

³⁵⁹ Mostert H Minerals Law Principles and Policies in Perspective 2012 31.

Large-scale mining for economic purposes by Europeans started in the 1870s with the mining of diamonds in Kimberly.³⁶⁰ Mining operations extended to the Witwatersrand. The British South African Company (BSAC) and Anglo-Americans played a major role in colonial mining.³⁶¹ Mining corporations such as De Beers were the main beneficiaries of colonial mining and the exploitation of black South Africans.³⁶² However, once the digs swamped the areas in search of diamonds, the sovereignty of the local communities was ignored.³⁶³ The Diggers' Mutual Association established rules that prevented black diggers from obtaining digger licenses.³⁶⁴ The Griquas were eventually dispossessed of any claim for land and mineral resources discovered in the area. Other indigenous groups were eventually forced out of the areas to which they had previously unlimited access. The Cape Colony benefitted from the economy that emerged as a result of diamond mining in Kimberly.³⁶⁵

Another classical example of land dispossession and how claims from indigenous groups and communities were handled was reflected in the case of *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC).³⁶⁶ In this case, it was indicated that Richtersveld comprises a large area of land situated in the northwest corner of the Northern Cape Province and was inhabited by the Richtersveld community. One of the relevant questions that the

³⁶⁰ Laterza V and Sharp J 2017 *Review of African Political Economy* 174.

³⁶¹ Laterza V and Sharp J *Review of African Political Economy* 2017 174.

³⁶² Laterza V and Sharp J *Review of African Political Economy* 2017 174.

³⁶³ Mostert H *Minerals Law Principles and Policies in Perspective* 2012 31.

³⁶⁴ Mostert H *Minerals Law Principles and Policies in Perspective* 2012 31.

³⁶⁵ Mostert H *Minerals Law Principles and Policies in Perspective* 2012 31.

³⁶⁶ Mostert H *Minerals Law Principles and Policies in Perspective* 2012 31. *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) 61-62. The Richtersveld community indicates that the whole Namaqualand was placed under British rule through annexation in 1847. The British government did not have an interest in the presence of the Namaland until between 1925-1927 when a rich diamond deposit was found in the area. The community which had undisturbed access to the land they owned and occupied, albeit nomadic community was denied access to the land. This dispossession eventually resulted in the restriction of the Nama people to the reserves. The state owned Alexkor Bay Development Corporation was established and held most of the prospecting and mining rights in the area.

court had to consider in this case was whether the community had a right to the land prior to the British crown acquiring sovereignty over the land in 1847, through annexation.³⁶⁷ The court indicated that the Native Administration Act deprived black South Africans of the right to own land and also limited their rights to enjoy, use and benefit from such land.³⁶⁸ It interrogated the question of whether the community was dispossessed of the land after June 1913 because of past discriminatory laws or practices. The court had to determine the nature and content of the right to the land that the community held before the annexation. It also had to determine whether such rights survived annexation. The court found that the community had the right to exclusive occupation and use of the subject land.³⁶⁹ The community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and below the surface. The annexation of 1847 had the legal consequences of placing all land in the hands of the crown, thus dispossessing the indigenous community of any rights to the land.

Before 1994 South Africa's legal system did not reflect a positive picture. The scourge of racism is the foundation on which the South African legal system is based, it was dedicated to the disenfranchisement of black South Africans.³⁷⁰ A plethora of legislation was enacted during the Union of South Africa and the apartheid era which regulated mining in South Africa. Apartheid was not just a system of segregation between people of different races in South Africa. Humby indicates that apartheid was not just a name given to the segregation of inhabitants of European descent from non-Europeans.³⁷¹ This system catered almost exclusively for a white, Christian, Afrikaans, and patriarchal community.³⁷²

³⁶⁷ *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR1301 (CC) 32.

³⁶⁸ *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) 37.

³⁶⁹ *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) 62.

³⁷⁰ Davis A.J *International Journal on Constitutional Law* 2003 182.

³⁷¹ Humby T *et al* Introduction to Law and Legal Skills 23.

³⁷² Humby T *et al* Introduction to Law and Legal Skills 23.

The interests of other groups, especially black South Africans, were not taken into consideration and did not become priority. The apartheid system was characterised by land dispossession, cultural marginalisation, gross human rights violations and the denial of access to institutions and employment opportunities.³⁷³ Blacks experienced the brunt of the discrimination and segregation of the apartheid era. The South African apartheid state was dedicated to systematically violating the rights of black people and subjected them to social and economic deprivation and disenfranchisement.³⁷⁴

The election of the National Party (hereafter referred to as NP) in 1948 heightened the unjust and discriminatory legislative approaches of colonial and pre-apartheid South Africa.³⁷⁵ The National Party adopted what was previously an uncoordinated succession of practices and administrative measures that made racial segregation and discrimination a fact of colonial and postcolonial South African life.³⁷⁶ The State under the NP became an agent in intensifying and systematising the laws and institutions it had inherited from colonial and postcolonial South Africa and did so to perfection.³⁷⁷ The success of this system is reflected in the fact that the remnants and legacy of apartheid persist in post-1994 South Africa, wealth, education and power remain divided along racial lines.³⁷⁸

The apartheid government was dedicated to segregating every aspect of political, economic, cultural, sporting, and social life.³⁷⁹ The law was central in ensuring that the system of apartheid is established, maintained, and enforced with

³⁷³ Humby T *et al* Introduction to Law and Legal Skills 23.

³⁷⁴ Sarkins J *the American Journal of Comparative Law* 1999 67.

³⁷⁵ Strauss M *Fundamina* 2019 146.

³⁷⁶ Sanders M *Diacritics* 2002 63.

³⁷⁷ Sanders M *Diacritics* 2002 63.

³⁷⁸ Modiri J *SAJHR* 2012 406.

³⁷⁹ Sanders M *Diacritics* 2002 63.

contempt. Sanders describes the apartheid state as the architect and builder of the apartheid system and the law was its main instrument.³⁸⁰

The mining industry, which was the backbone of the South African economy, was not immune to the tentacles and the reach of the apartheid system and it reflected the core principles of the apartheid system of segregation, discrimination, and disenfranchisement. A plethora of laws were passed to regulate the mining industry and promote the interest of whites to the detriment of black South Africans. The concept of CSR was not well developed and the little that was recognised or applied did not apply to black South Africa. The trend of these laws was to ensure that white South Africans and institutions benefitted significantly from the mining sector.

3.2.2 Land Ownership On Racial Lines

Land has always been a contentious issue in South Africa, especially since the arrival of Dutch settlers on South African soil.³⁸¹ It is impossible to exclude the land issue when discussing matters related to rights in and to land. Land, mining, and environmental rights are intricately linked.³⁸² Control over land by settlers was one of the ways in which black people were excluded, exploited, and disenfranchised. The deprivation of land and the denial of rights therein is a central feature of South African history.³⁸³ Mailula states that land dispossession

³⁸⁰ Sanders M *Diacritics* 2002 63.

³⁸¹ Land Dispossession: Resistance and Restitution.
<https://www.sahistory.org.za/article/land-dispossession-resistance-and-restitution>. Accessed 27 April 2022 Accessed 10 February 2021.

³⁸² Section 24 of the Constitution of the Republic of South Africa, 1996 indicates 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 legislative and other measures that (i). Prevent pollution and ecological degradation (ii). promote conservation and (iii) secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.

³⁸³ Miller D.L and Pope A, *Land Title in South Africa* 2000 1.

by Dutch and British settlers was the “actual linchpin of the apartheid policy a few decades ago.”³⁸⁴ Segregation of blacks, who were denied access to land, was one of the most effective ways of suffocating and strangling black growth and development.³⁸⁵ The Native Land Act³⁸⁶ played a role in engineering poverty and the dispossession of land.³⁸⁷ Modise and Mtshiselwa indicate that the economic stability of black South Africans was based on the use of land.³⁸⁸ Thus, it can be said that the Act played a major role in disadvantaging black people economically and led to poverty and land dispossession. Land encroachment was carried out in several ways, including the use of violence, coercion, and deception.³⁸⁹

The Native Land Act was one of the pieces of legislation enacted during the Union of South Africa, which had a tremendous impact in ensuring that dispossession of land was imposed on the non-white and non-European people of South Africa. The Act was enacted to make provisions for the purchase and leasing of land by Natives³⁹⁰ and other persons in several parts of the Union. It was also enacted to make provisions for other issues related to the ownership and occupation of land by Natives and other persons.³⁹¹

Section 1 (1) of the Native Land Act provided as follows:

From and after the commencement of the Act, land outside the scheduled native area shall until parliament acting on the report of the commission appointed in terms of the Act shall have made other

³⁸⁴ Mailula D. *Constitutional Court Review* 2011 80.

³⁸⁵ Davenport TRH *Black Sash* 1983 24.

³⁸⁶ Native Land Act 27 of 1913.

³⁸⁷ Modise L and Mtshiselwa N *Studia Historiae Ecclesiasticae* 2013 359.

³⁸⁸ Modise L and Mtshiselwa N *Studia Historiae Ecclesiasticae* 2013 359.

³⁸⁹ Mngxitama A *Journal of Asian and African Studies* 2006 41.

³⁹⁰ Section 10 of the Native Land Act defined a native as any person, ‘male or female, who is a member of an aboriginal race or tribe of Africa; and shall include any company or other body of persons, corporate or incorporate, if the persons who have a controlling interest therein are natives.’

³⁹¹ The Preamble of the Native Land Act 27 Of 1913.

provisions subject to the following provisions: Except with the approval of the Governor-General:

- a) A native shall not enter into an agreement or transaction for the purchase, hire, or other acquisitions from a person other than a native of any such land or any right thereto, interest therein, or servitude thereover. and
 - b) A person other than a native shall not enter into an agreement or transaction for the purchase, hire, or other acquisition from a native of any land or right thereto, interest therein, or servitude thereover
2. From the commencement of this Act, no person other than a native shall purchase, hire or in another manner acquire any land in a scheduled native area or enter into any agreement or transaction for the purchase, hire or other acquisition, direct or indirect, of any such land or any right thereto, interest therein or servitude thereover.'

This Act is one of the most notorious inventions of the Union of South Africa. The legacy of this Act is still felt in post-1994 South Africa, and the remnants of this Act stubbornly remain a stain that is yet to be removed from South Africa. Generations upon generations of black South Africans have felt the wrath of this Act. One of the clearest stains of this Act is dispossession and blatantly visible inequalities.³⁹² Hall states that the Act played an major role in the dispossession of land from black landowners.³⁹³ The Act was not the first instance in which blacks were dispossessed of their land. The Act merely solidified, culminated, and confirmed such dispossession. The dispossession of land precedes the Act.³⁹⁴

³⁹² Modise L and Mtshiselwa N *Studia Historiae Ecclesiasticae* 2013 359.

³⁹³ Hall R *Scriptura* 2014 1.

³⁹⁴ Hall R *Scriptura* 2014 1. The implementation of the Act had several consequences on the South African landscape, which ranges from political to social. However, for this research and chapter, the focus and delimitation of

Davenport³⁹⁵ indicated that the Native Land Act imposed a policy of territorial segregation with a heavy hand and focused on eliminating characteristics of African land ownership and sharecropping,³⁹⁶ which white farmers regarded as undesirable. It also eased congestion and facilitated the recruitment of labour for the mines.³⁹⁷ The ramifications of the Act were that 80% of the country's population was limited to just 13% of the land and 87 percent of the land was allocated to people of European descent.³⁹⁸ Sol Plaatjie accurately captured the impact of the Act as having turned black South Africans into pariahs on their land. 'Waking on Friday morning, 10 June 1913, the South African Native found himself, not a slave, but a pariah in the land of his birth', argued Sol Plaatjie.³⁹⁹

The Act ensured that most of the land in South Africa was reserved for white South Africans and ensured that Black people were readily available to provide cheap labour for mines and surrounding farms for survival. Therefore, ensuring that blacks became labourers serving the interests of settler colonialists in the development of the South African mining and agriculture industries.⁴⁰⁰ The position in which Black South Africans were placed by past discriminatory laws ensured that they were disenfranchised and exploited to be contributors to the emerging and growing mining industry, but not beneficiaries because they were placed at the periphery of the mining industry as unskilled labourers. They were not beneficiaries of the land on which they worked.

this study will be on the impact of land dispossession of black South Africans and how these issues affected mining communities.

³⁹⁵ Davenport TRH, *South Africa: a Modern History* 4th edition 1992 243.

³⁹⁶ Sharecropping is a legal arrangement between a landowner of an agricultural land and a tenant. The landowner allows a tenant to use a land for agricultural purposes return for a share in the crops produced by the farming Activities of the tenant.

³⁹⁷ Davenport TRH *South Africa: a Modern History* 4th edition 1992 243.

³⁹⁸ Miller D.L and A Pope *Land Title in South Africa* 20.

³⁹⁹ Sol Plaatjie *Native Life in South Africa* 1961 1.

⁴⁰⁰ Mngxitama *A Journal of Asian and African Studies* 2006 42.

Section 2 of the Act further provides that 'no person other than a native may purchase, lease, or in any manner whatsoever acquire land in a scheduled native area or enter into any agreement or transaction for the purchase, lease or other acquisitions directly or indirectly of any such land or any right thereto or any interest therein or servitude therein.' The provisions of Section 1 and Section 2 were an attempt to disguise the meaning of the section. It perpetuated the idea that blacks and whites were subjected to the same limitations, which practically was not the case. The reality was that the Blacks were located on undesirable land.⁴⁰¹ The land allocated to black South Africans was overcrowded and not suitable for agriculture or sustainability. According to Hall, this provided an illusion of parity between races, and the provisions of these sections did not provide any real measure of equality between races.⁴⁰² Instead, the sections and the Act, in general, promoted inequality, segregation, and its cousin discrimination.⁴⁰³ Hall further argued that the Act was designed to serve the claims of and reconcile the tensions among various white mining and farming communities.⁴⁰⁴ There was resentment between field farmers and African purchasers, and this Act was meant to placate white South African farmers and miners. The settlement of black tenants on land owned by mining companies also exacerbated the tension between black and whites, and the dispossession of land through the Act was intended to appease and provide some security to white landowners.⁴⁰⁵

The severe limitation of land ownership imposed on Blacks entailed that they could not own land, and therefore they were excluded from benefitting from the common law principles that applied to landowners. From colonisation, the government of the time applied the common law principle of ownership of property. This common law principle of property ownership is properly captured in the Roman-Dutch law maxim of *cuius est solum ad caelum et ad inferos*, which

⁴⁰¹ Hall R *Scriptura* 2014 2.

⁴⁰² Hall R *Scriptura* 2014 2.

⁴⁰³ Hall R *Scriptura* 2014 2.

⁴⁰⁴ Hall R *Scriptura* 2014 3.

⁴⁰⁵ Hall R *Scriptura* 2014 3.

entails that land ownership includes everything above the property up into the heavens and below to the centre of the earth.⁴⁰⁶ Any hope of benefitting from this common law principle and actively and meaningfully participating in the exploitation of the mineral resources was well and properly extinguished by the provisions of the Act, which prevented black people from purchasing and owning land in certain areas.

Another act that allowed the dispossession of land was the Native Administration Act.⁴⁰⁷ In terms of this Act, the Governor-General (hereinafter referred to as the GG) was the supreme chief of all indigenous people in South Africa. This gave the GG absolute power over black people. The Act empowered the GG to relocate any indigenous community from one area to another. Thus, it was easy to remove blacks from an area that the state considered rich in mineral resources for mining purposes and resettle them somewhere. These removals were forceful and usually violent.⁴⁰⁸ The Native Administration Act became a powerful tool in the implementation of forced removals of black people from areas designated as white areas and suitable for agricultural or mining purposes.⁴⁰⁹

Another act that had a tremendous impact on the land issue in South Africa was the Native Trust and Land Act.⁴¹⁰ The Act provided that the sale of land between whites and blacks with respect to land outside the designated areas was prohibited.⁴¹¹ The land that was reserved for the occupation of natives and within the scheduled areas was vested in trust and occupied by natives.⁴¹² The Act was not to be read in isolation and had to be read with the Native Administration Act

⁴⁰⁶ Van Der Vyver *De Jure* 2012 126. Cawood D & Minnitt R *the Journal of South African Institute of Mining and Metallurgy* 1988. 370.

⁴⁰⁷ Van der Schyff E *New Contree* 2012 133.
⁴⁰⁸ The Native Administration Act 38 of 1927.

⁴⁰⁸ Mngxitama A *Journal of Asian and African Studies* 2006 43.

⁴⁰⁹ *Western Cape Provincial Government and other v Northwest Provincial Government and Another* 2000 (4) BCLR 347.

⁴¹⁰ The Native Trust and Land Act 18 of 1936.

⁴¹¹ Section 2 (1) of the Native Trust and Land Act 18 of 1936.

⁴¹² Section 6 of the Native Trust and Land Act 18 of 1936.

and the Native Authorities Act to fit the colonial and apartheid legislative scheme.⁴¹³ The significance of the Act was that it went a step further in controlling the basis upon which land ownership was granted and held.⁴¹⁴

The land politics in South Africa was structured in such a manner that ensured that the economic benefits were tilted toward one racial group, while the majority of South Africans were deprived of benefiting from the land and in essence the economy of the country. The land politics of the country ensured that the economic playing field was unequal and prejudiced. This inequality made black people pariahs in the land of their birth. Therefore, it is argued in this chapter that the land politics of the country played a role in ensuring that black people do not benefit sufficiently and are excluded from the mining industry and that subsequent legislation and policies were enacted to maintain the status quo.

3.2.3 Mining Laws and Regulations During the Union of South Africa

The Union of South Africa came into being in 1910. The Union consisted of four provinces of South Africa, being the Cape Colony, Natal, the Orange Free State, and Transvaal, which were amalgamated under one government.⁴¹⁵ Leacock stated that the Union was a consummation of what was regarded as a solid basis of harmony between the two groups that were recognised in South Africa at the time, these groups being Afrikaners and English.⁴¹⁶ It was aimed at harmonising the country, and as a result of this need, the South African Act of 1909 was enacted. It is imperative to note that the views of the majority of citizens of South Africa, which were Black South Africans, were not taken into account in the enactment of this legislation. Only Afrikaner and English interests were taken into

⁴¹³ *Tongoane and Others v National Minister of Agriculture and Land Affairs and Others* 2010(8) BCLR 741 (CC).

⁴¹⁴ Miller D.L and Pope A Land Title in South Africa 28.

⁴¹⁵ Leacock S *The American Political Science Review* 1910 498.

⁴¹⁶ Leacock S *The American Political Science Review* 1910 498.

account. The South African Act of 1909 solidified the disenfranchisement of Black South Africans from any meaningful contribution to the Union of South Africa. The law was structured in such a way that it benefitted the interest of white South Africans.⁴¹⁷

Brand opined that a normal white man harbored a certain sentiment towards black South Africans. Brand states that this was the approach by the Union government: "Take away from the native the land which he possesses and there will be more compulsion to work for the white man. Do not educate him, or else he will be more independent. Keep him in his place."⁴¹⁸ The native was viewed as illiberal, unjust, pernicious, and retrograde.⁴¹⁹ The unification of South Africa was aimed at unifying the white races of South Africa, to disenfranchise the black and coloured races. It was not intended to unify the different races of South Africa. Had the native question been addressed before the unification, such negotiations for unification would have failed and the union of South Africa would not have been established.⁴²⁰

This is the background within which South Africans of non-European descent existed and the background upon which mining communities existed. Mining was not immune from the impact of discrimination made concrete during the union. The early mining legislation did not take into account the rights and interests of indigenous communities with respect to mining and mineral development.⁴²¹ This section will focus on legislation that regulated mining during the Union of South Africa while attempting to find traces of CSR in South Africa and the evolution of CSR in South Africa.

⁴¹⁷ The Union <http://www.sahistory.org.za/article/union-south-africa-1910> Accessed on 12 February 2021

⁴¹⁸ Brand R.H *The Union of South Africa* 1910 103.

⁴¹⁹ Brand R.H *The Union of South Africa* 1910 103.

⁴²⁰ Brand R.H *The Union of South Africa* 1910 104.

⁴²¹ Cawood F *The Journal of the South African Institute of Mining and Metallurgy* 1998 369.

3.2.3.1 The South African Act 1909.

Interestingly, and despite the hardships it enabled against black people, the South African Act was regarded the finest constitution in the world.⁴²² The South African Act established the Union of South Africa and came into being in 1910. Although the Action was not very vocal on the issues relating to mining and mineral rights, section 123 of the Act provided that all rights in and to mines and minerals and all rights with regard to searching for, working for, and disposing of minerals or precious stones, which at the establishment of the Union were vested in the government of the colonies, shall be vested in the Governor-General (hereinafter referred to as the GG) in council.

3.2.3.2 Mining Taxation Act of 1910

The Mining Taxation Act 6 of 1910⁴²³ enacted to consolidate and amend laws in the Union that regulated taxation on the profit of mining. In terms of Section 3 of the Act, 10% (10%) was levied on the profits of diamond and gold mining. Other minerals were also taxed in accordance with the provisions of the Act. The profits included a significant part of a mining operation. In terms of Section 4 (1), it included the workings, mining, winning, and disposal of diamonds, gold, and other minerals. The crown was also entitled to a share in the profits of mining. The Act acknowledged that the government of South Africa had to benefit from the mining sector and also that the British government had to benefit from such mining operations but failed to make provisions on how the tax will benefit the mining community. The concept of CSR was not recognised in this Act and is neither taken into consideration nor taken into account.

⁴²² Brand R.H The Union of South Africa 1910 15.

⁴²³ Mining Taxation Act 6 of 1910.

3.2.3.3 The Mine and Works Act of 1911

The Mines and Works Act⁴²⁴ was enacted to consolidate and amend the law, which was in force in the Union, relating to the operation of mines, works and machinery, and to the certificate. Whereas before the coming into being of the Union of South Africa, each colony had its own legislation, regulation, and ordinances, the coming into being of the Mine and Works Act was viewed as a consolidating legislation, meaning that every mining operation will be regulated by the Mines and Works Act within the Union. The Act, however, indicated that different regulations may be made with respect to different provinces.⁴²⁵

The Act indicated that the GG had the powers to make regulations on the granting, cancelation, and suspension of certificates of competency in a number of fields, including mine managers, mine supervisors, mine surveyors, mechanical engineers, engine drivers and miner entitled to blast.⁴²⁶ These skills were specialised and in order for one to practice in these fields, one had to be in possession of a certificate of competency issued by the GG. The Act itself did not explicitly contain any colour bar in relation to who had the right to be certified in any of the fields contained in Section 4 (1) of the Act. It is observed that this Act which was consolidated effort by the Union to regulate mining and its operations within the Union was completely silent on CSR or the interests of communities affected by mining operations. The concept of CSR was even not taken into account in the enactment and application of the Act.

⁴²⁴ The Mine and Works Act 12 of 1911.

⁴²⁵ Section (4) 2 of the Mines and Work Act 12 of 1911.

⁴²⁶ Section 4(1) of the Mines and Works Act 12 of 1911.

3.2.3.4 The Transvaal Mining Lease of 1918

In terms of the preamble of the Transvaal Mining Lease 30 of 1918,⁴²⁷ it was enacted to make provisions for the leasing of the rights to work precious stones and base metals in the Transvaal and for the purposes of amending the Precious and Base Metals Act of 1908. Section 1 of the Act provided for the establishment of a board called the Mining Lease Board. This board was tasked with investigating the application of a lease or the amendment of a lease related to mining operations.⁴²⁸ This board made recommendations on whether or not a lease was to be granted. In terms of Section 2 (2) of the Act, when making an application for a lease agreement, the applicant had to provide the reasons on which the application is based, the proposed scheme of working the joint area, and the proposal for providing capital for the undertaking.

The section further provides that upon receiving a recommendation from the Mining Lease Board and the GG was satisfied that owing to the natural features of the reef, the grant of such a lease is necessary for the purpose of constituting a mynpatch, together with additional area, a working mining proposition, that the applicant had reasonable prospects of being able to provide capital adequate for the undertaking and that the granting of such rights was advisable in the public interest. The public interest requirement is the first instance in the Act where the concept or rather certain aspects of CSR are mentioned. However, taking into account the political and social climate of the Union, it should not come as surprising that the concept of public interest during the Union did not have the same meaning as the public interest that is referred to in the Constitution of South Africa, 1996.

⁴²⁷ Transvaal Mining Lease 30 of 1918.

⁴²⁸ Section 1 (3) of the Transvaal Mining Lease Act 30 of 1918.

3.2.3.5 The Precious Stones Act of 1919

The Precious Stones Act 15 of 1919⁴²⁹ was enacted to amend the precious stone ordinance of 1903 of Transvaal and to provide for the application of certain provisions of the Act relating to alluvial digging in the Transvaal and also provinces of Union. The Act was glaringly silent on CSR and also failed to take into account the interests of communities affected by mining operations. Section 6 of the Act provided that any white man aged 18 and older may, upon payment, obtain from the mining commissioner a licence called a claim licence. This claim licence entitled the holder of such a licence the right to peg, in a manner prescribed by regulations, a portion of alluvial digging for which he held the licence.

Section 9 (2) of the Act provides that every claim holder had the duty to ensure that his peg and trenching were maintained in good order and that all data required by the regulations were written legibly. The provision that indicated that the holder of the right had a duty to keep the working environment in order and maintained alludes to certain aspects of CSR. Those applying for the licence were only required to show the digger's committee that they were of good character and fit and appropriate to hold a digger's certificate.⁴³⁰ The applicant for the digger certificate was not required to take a commitment to take care of the environment and communities affected by the mining operation or the excavation that was to commence on the land related to the application. The interest of mining communities and the concept of CSR were not included or even considered in the enactment of the Act.

⁴²⁹ Precious Stones Act 15 of 1919.

⁴³⁰ Section 11 (a) of the Precious Stones Act 15 of 1919.

3.2.3.6 The Precious Stones Act of 1927

Another legislation was the Precious Stones Act 44 of 1927. The Act was enacted to consolidate and amend the laws in force in the various provinces of the Union relating to the prospecting and mining of precious stones and to amend in certain respects the laws relating to the diamond trade in the Union of South Africa. The Act vested the right to mine and dispose of precious stones such as diamonds, rubies, and sapphires to the state (crown).⁴³¹ Section 1 of the Act provided that the right to mine and dispose of all precious stones vested in the crown.⁴³² Higgs indicates that this reservation to mine for precious stones as indicated by Section 1 was not absolute.⁴³³

Certificates were issued to discoverers, owners, and diggers, to enable them to continue with mining operations and activities related to mining.⁴³⁴ This was indicated by Section 8, which further stipulated that the mining commissioner of the district in which the prospecting was to be carried out by any natural person, who held a dignitaries certificate, shall upon application issue that prospecting permit. The Act did not define the requirements for a digger's certificate. Section 4 of the Act provided that no crown land that was subjected to provisions of the Act is open to prospecting under a prospecting permit. Section 4 (9) of the Act further provides that it is the duty of every prospector on crown land, open to prospecting prior to the abandonment of the prospecting area, to fill up the ground, rock or debris, and level with the surface all dangerous excavations and shafts made by him. Failure to comply with this resulted in the prospector being held liable for conviction or a fine. This indicates a certain level of CSR. In terms of Section 6 private landowners had the right to prospect on their land or authorise others to prospect on their land. In this section an opportunity was missed to

⁴³¹ Mostert H *Minerals Law Principles and Policies in Perspective* 2012 23.

⁴³² Higgs A North West University, Potchefstroom 2017 290.

⁴³³ Higgs A North West University, Potchefstroom 2017 290.

⁴³⁴ Mostert H *Minerals Law Principles and Policies in Perspective* 2012 23.

make a provision for CSR. Section 9 of the Act outlined areas where prospecting was prohibited.

Section 9 provided that the following areas were excluded from potential prospecting:

- a) Surveyed ervens, stands in town, village or township or any public square, street, road, cemetery, or municipal location.
- b) Any railway
- c) Any mine, mining area, or residential area or any alluvial digging or any land held under any licence or other mining titles held by any person under the Act.
- d) Any land used as a garden, orchard, vineyard, nursery, plantation or on land under cultivation or within three hundred feet of any spring, well, water, borehole, reservoir, dam, artificial watercourses, or waterworks, or within six hundred feet of a house, homestead, or building, except with the written permission of the surface owner.
- e) Land that was used or has been formally reserved in connection with any irrigation scheme or any government plantation, delimited forest, or forest reserves without the permission of the minister.
- f) A native location or native reserve or trust land that is crown land, unless the written permission of the minister of native affairs has been obtained.
- g) A native location, native reserve or trust land where the chief of a tribe is the owner unless the written consent of such a chief and tribe has

been attained, as well as the permission of the minister of native affairs.

It is submitted that the abovementioned section has traces of CSR, which seem to focus more on the environmental protection aspects. The section does not make provision for how the mining community was to benefit from the mining operations that were conducted in the area where such communities were based. As indicated, a plethora of legislation was passed during the Union of South Africa to regulate the mining industry in South Africa, however, none of these Acts took into account the interests of the mining communities. Mining benefitted only a few people and corporations during the Union, and mining communities, and black South Africans did not form part of the individuals who benefitted from such operations.

3.2.3.7 The Group Areas Act of 1950

The Group Area Act of 1950⁴³⁵ played a central role in the segregation and dispossession of land during the apartheid era. The issue of landlessness cannot be divorced from the disenfranchisement imposed on black people. It cannot also be divorced from the issue of the inability to benefit sufficiently from the mineral resources of the country. The Group Areas Act was enacted for the establishment of group areas, where people of the same race were grouped together to minimise their access to areas classified or scheduled as white areas. It was also enacted to control the acquisition of immovable property and the occupation of land and premises.

The Act indicated that the GG had the power to declare that an area defined in the proclamation of the Act shall be an area for occupation by members of the

⁴³⁵ Group Areas Act 41 of 1950.

group specified therein.⁴³⁶ The Act made it a criminal offence for non-whites to occupy or own properties in areas set aside for exclusive European residency.⁴³⁷ The Act further provided that no disqualified person was allowed to occupy and no other person was allowed to permit any other person to occupy any land or premises in any area proclaimed or allocated to a certain group.⁴³⁸ The Act further provided that no proclamation was to be issued except with prior approval by both houses of parliament. One of the exceptions to this was that approval was not necessary to attain the approval of parliament if the minister had considered a report by a board and had consulted the administrators of the province concerned.

The approval of the parliament was also not necessary in cases where an area was located entirely or partially on land or where prospecting, digging, or mining operations are carried out.⁴³⁹ Section 7 of the Act indicated that if a minister was of the opinion that an area located in the group areas, other than the white group, which was situated within the area or jurisdiction of the urban local authority, was not properly administered by that local authority, could request the administrators of the province concerned to cause an inquiry to be held and thereafter the said administrator may call upon the local authority to carry out any work which, in the opinion of the minister, was necessary for the proper administration of that area and may reasonably be required to be carried out by that local authority and if such local authority fails to comply with the notice to Act.

The administrator could cause that work to be carried out and may authorise any person to perform any Act or Action which the said the local authority was empowered to perform. Evidently, this Act played an important role in promoting separate development during the apartheid era and promoted segregation. Black

⁴³⁶ Section 3 of the Group Areas Act 41 of 1950.

⁴³⁷ James G *South African Sociology Review* 1992 41.

⁴³⁸ Section 4 of the Group Areas Act 41 of 1950.

⁴³⁹ Section 3 (3)(ii) of the Group Areas Act 41 of 1950.

people were pushed into the areas of the groups that were underdeveloped, overpopulated, and poor. The socio-economic development of these areas was not promoted or even taken into account. CSR is mentioned in none of the cases where mining operations were discovered near areas occupied by black people.

3.2.4 Mining Regulations and Legislation under Apartheid South Africa

3.2.4.1 The Mining Title Registration Act of 1967

This Act was repealed.⁴⁴⁰ It regulated the registration of mining titles and other rights related to prospecting and mining. It also dealt with stand titles, and certain other deeds and documents. The Act did not make reference to anything related to CSR. Although the Act did not specifically make reference to CSR it existed within the context of a social, political and economic setting whereby CSR was not prioritised, more in particular in relation to people of non-European descend.

3.2.4.2 The Precious Stone Act 73 of 1964

The Precious Stone Act of 1964⁴⁴¹ regulated and controlled the prospecting, mining, and dealing in precious stones. Section 2 of the Act reserved the right to mine and dispose of diamonds to the state. It is silent on the interest and development of mining communities. It is also silent on CSR. The Act did not prioritised the interest of communities affected by mining operations related to precious stone, which was fitting for the time, being the apartheid era. The Act did not have provisions that furthered the interest of these communities and ensuring that the precious minerals as defined by the Act benefited those that were affected by mining operations.

⁴⁴⁰ Mining Title Registration Act 16 of 1967.

⁴⁴¹ Precious Stone Act 73 of 1964.

3.2.4.4 The Mineral Act 50 of 1991

The Mineral Act,⁴⁴² which has been repealed, was enacted to regulate the prospecting for, optimal exploitation, processing, and utilisation of minerals, to provide for the safety and health of persons involved in mines and work. The Act regulated the orderly use and rehabilitation of the surface during and after mining operations. The Mineral Act provided that the owner of the land could apply for a certificate of the rights to minerals with respect to the land to which he was the owner. Minerals could also be obtained through cession whereby a third party, through the registration of the notarial deed against the title deed of the land, or a certificate could be issued to a third person. It authorised such a person to explore and mine for minerals.⁴⁴³ The state had the power to issue prospecting permits. The state also had the power to grant the rights to mine for minerals.

The right to exploit mineral resources was granted to mineral rights holders or to a person who had acquired the written consent of the mineral rights holder to explore such minerals.⁴⁴⁴ During the apartheid era, pre and post Union legislation was consolidated into four main legislation, the precious stone Act 73 of 1964, the Mineral Rights Act⁴⁴⁵, the Mining Title Registration Act 16 of 1967 and the atomic energy act 90 of 1967.⁴⁴⁶ Section 2 of the Mineral Rights Act 20 of 1967 indicated that the right to prospect for natural oils and to mine for and dispose of precious metals and natural oils was vested in the state. The right to prospect, mine and dispose of base minerals on any land was vested in the holder of the right to base minerals with respect to that land.⁴⁴⁷ Section 3 of the Act provided that the general power of control and administration of all mining operations was

⁴⁴² Mineral Act 50 of 1991.

⁴⁴³ Van Der Vyver J.D *De Jure* 2012 126.

⁴⁴⁴ Van Der Vyver J.D *De Jure* 2012 127.

⁴⁴⁵ Mining Rights Act 20 OF 1967.

⁴⁴⁶ Van der Schyff E *New Contree* 2012 148.

⁴⁴⁷ Van der Schyff E *New Contree* 2012 148.

vested in the state. This implies that although mineral rights were in the hands of the landowner, the state regulated the exercise of the rights that flow from these rights.⁴⁴⁸

The Mineral Act of 1991, recognised the landowners as owners of minerals unless the mineral rights were severed from land ownership. Landowners had the prerogative to decide if and by whom prospecting and mining activities could take place on their land.⁴⁴⁹ The Act provided that third parties could not conduct prospecting and mining activities without the consent of mineral rights holders.⁴⁵⁰ Section 18 of the Mineral Act of 1991 granted the right to the state to investigate the presence, nature, and extent of minerals on any land. Section 24 of the Act indicated that surface or mineral rights could be expropriated subject to payment of compensation to the person whose right was expropriated. The owner of the land could apply for a certificate of rights to minerals with respect to the land to which he was the owner. Minerals could also be attained through cession whereby a third party. It was also possible by registering the notarial deed against the title deed of the land or a certificate could be issued to a third person, authorizing that such a person could explore or conduct mining operations on the land relating to the application.⁴⁵¹ The state had the power to issue prospecting permits, and it was also empowered to grant the rights to mine for minerals.

This right could be granted to mineral rights holders or to a person who had acquired the written consent of the mineral rights holder to explore such minerals.⁴⁵² Section 5 of the Mineral Act indicated that the holder of the right to minerals, or any person who acquired the consent of such holder, had the right to enter on land for purposes of prospecting or mining and to prospect and mine. No person was authorized to prospect or mine for minerals without obtaining

⁴⁴⁸ Van Der Schyff E *New Contree* 2012 149.

⁴⁴⁹ Van Der Schyff E *New Contree* 2012 149.

⁴⁵⁰ Van Der Schyff E *New Contree* 2012 149.

⁴⁵¹ Van Der Vyver J.D *De Jure* 2012 126.

⁴⁵² Van der Schyff E *New Contree* 2012 148.

permission under the Act.⁴⁵³ The Act also authorised any person mining minerals to which he had mineral rights to mine and dispose of any minerals to which he is not a holder. This was allowed if, out of necessity, it was convenient to mine the minerals together and the person who held rights in respect of the other minerals, the person who was the holder of the rights relating to the other minerals, was compensated.⁴⁵⁴ The Act also provided requirements that had to be fulfilled when applying for a prospecting permit. The Mineral Act of 1991 provided that third parties could not conduct prospecting and mining Activities without the consent of mineral rights holders.⁴⁵⁵ This was indicated by Section 6 (1) (b). Section 6 (2) indicated that a person applying for prospecting permits with the regional director had to provide proof of the right to the minerals in respect of the land concerned. The applicant had to indicate how they planned to rehabilitate the surface disturbance caused by the prospecting operation. This can be viewed as an indication of CSR with respect to environmental rights.

Things that were taken into account regarding mining authorisation were provided for by Section 9 of the Mineral Act. In terms of this section, the regional director could grant a mining authorisation if the regional director was satisfied that the applicant has satisfied him of the manner in which and the scale on which the applicant intends to mine the minerals concerned optimally and safely. The applicant also had to prove how the surface would be rehabilitated. The regional director had to be assured of the applicant's ability and whether he can take the necessary provisions to carry out the operation safely and optimally and repair the surface. Environmental rights were taken into account before authorisation was granted.

The Act did not recognise the interest of the community affected by mining operations. There was mention or indication of consulting communities affected

⁴⁵³ Section 5 (2) of the Mineral Act 50 of 1991.

⁴⁵⁴ Section 5 (3) of the Mineral Act 50 of 1991.

⁴⁵⁵ Van der Schyff E *New Contree* 2012 151.

by the mining operation before the authorisation was granted for prospecting or mining operations. The only aspects of CSR that were mentioned related to the rehabilitation of the surface and the environment and safety issues. The Acts which were enacted during the apartheid era that regulated mining addressed several things relating to mining, however, failed to address issues relating to CSR. The socioeconomic development of mining communities was not taken into account when these Acts were enacted.

It is generally observed herein that the colonial system that was dedicated to the domination and disenfranchisement of black people ensured that the concept of CSR was not applied by the mining cooperation that were extracting mineral resources on South African soil. The nature of the business of these companies is that they are structured in a manner that is aimed at maximising profits for the corporation, therefore, CSR is secondary to why the corporation was conceived in the first place.⁴⁵⁶ The orthodox concept of a company is that a company does not exist to assist those in need. When a system is designed to subjugate and dominate a group that is regarded as inferior, CSR towards that group is not prioritised or even taken into consideration.

South African history presents a unique dynamic on how concepts and laws are interpreted and understood. This emanates from the painful history of colonialism and entrenched discrimination, primarily based on race. Unfortunately, the concept of CSR has not escaped the influence of South Africa's painful past. Hamman indicated that the complex and painful history of South Africa has had a significant impact on how CSR is understood and implemented.⁴⁵⁷ This is more so in the mining sector because mining companies played a role in the introduction of important colonial and apartheid policies.⁴⁵⁸ These companies

⁴⁵⁶ Murombo T, *Law, Environment and Development Journal* 2013 36.

⁴⁵⁷ Hamman R South Africa: The role of History, Government and Local Context 2009 436.

⁴⁵⁸ Hamman R South Africa: The role of History, Government and Local Context 2009 436.

were instrumental in the development of the core elements of South Africa's racist policies to exploit black people. These policies ensured that black people were able to provide cheap labour in mining companies. Therefore, the socioeconomic development of mining communities and mine-affected communities would have interfered with the motive of the apartheid policies of disenfranchisement of non-whites. The exclusion of non-whites from political, respectable, and skilled employment, quality education, and effective participation in the economic system ensured that people of European descent disproportionately benefitted from the resources of South Africa at the expense of their black counterparts.⁴⁵⁹

CSR was formally introduced in South Africa in 1972.⁴⁶⁰ Hamman indicates that it was argued that businesses were not responsible for the apartheid system but that businesses should be responsible for the social issues affecting the community and for the long-term interests of the business. In the late 1970s, discussions around the role of multinational foreign corporations reared their heads and became prominent. It was argued that multinational corporations could play a role in improving social standards within their business activities and by continuous participation, civil society, and state interest.⁴⁶¹ The history of past discriminatory laws has made the relationship between mining companies and mining communities complex.

To understand the concept of CSR within a South African context, in the sense that it relates to the mining industry, one must understand how mines operate and the history of such mining operations. The mining communities who lived on or owned the land where the mining operations took place were usually black and indigent.⁴⁶² The rights to own land and enjoy all the benefits related to such

⁴⁵⁹ Busacca M Clearmont McKenae University 2013 12.

⁴⁶⁰ Hamman R South Africa: The role of History, Government and Local Context 2009 437.

⁴⁶¹ Hamman R South Africa: The role of History, Government and Local Context 2009 437.

⁴⁶² Mitchell A the *Journal of the Mining and Metallurgy* 2012 151.

ownership were severely limited by past discriminatory laws. The common law principle relating to land was that the land and everything attached to the land both on the surface and beneath such land belonged to the landowner. However, due to past discriminatory laws, black landowners could not enjoy this common law right and, therefore, could not enjoy the right to own minerals beneath the soil.

The enactment of laws such as the Native Land Act and the Development Land Trust Act played an important role in ensuring that black access to land and the benefits of such land were limited.⁴⁶³ This limitation had a profound impact on the ability of mining communities to benefit from the exploitation of minerals. The limitation prevented mining communities from benefiting from the mineral wealth beneath the soil, which is practically located in their backyards. This limitation meant that the mining communities did not enjoy adequate protection from the law. Due to the lack of legislative protection, mining communities were unable to administer the exploitation of minerals on their land. Mining communities were exploited by mining companies. The communities also received inadequate compensation for the exploitation of their mineral resources. Communities were also not consulted on transactions and transactions related to their land.⁴⁶⁴ Even in the current democratic system, mining communities are synonymous with poverty, under-development, poor health, high levels of unemployment, adult illiteracy, inadequate housing, social disorganisation, and influx of migrant workers.⁴⁶⁵

One of the ways in which mining communities could have benefitted from the fact that mineral resources are located in their backyard was through the implementation of CSR or some form of social responsibility by mining companies. Colonisation and apartheid have tainted the development of mining

⁴⁶³ Mitchell A the *Journal of the Mining and Metallurgy* 2012 152.

⁴⁶⁴ Mitchell A the *Journal of the Mining and Metallurgy* 2012 52.

⁴⁶⁵ Ramoshabe M University of Limpopo (TGSL) 2019.

communities and have also, in the same breath, tainted the implementation of CSR efforts during both the Union of South Africa and, moreover, during the apartheid era.⁴⁶⁶ Historically, CSR was to some extent regarded as Corporate Philanthropy (CP).⁴⁶⁷ No legislation required companies or corporations to engage in CSR initiatives and endeavours, especially during the Union and for most of the apartheid era. The concept of CSR was not even fully formed during the Union, especially with regard to taking care of the interests of mining communities and mine-affected communities.

The development of the concept of CSR has a long and varied history, Carroll provides an interesting view on the development of the concept of CSR.⁴⁶⁸ According to Carroll, the challenge is to trace the footprints of CSR and how it was developed; however, he indicates that a good case can be made that CSR was developed in the 1950s.⁴⁶⁹ He further alleges that some form of social responsibility or corporation that seeks to help the community can be traced earlier than that.⁴⁷⁰ Carroll provides a review of the evolution of the definition of CSR starting with the 1950s, proceeding to the 1970s, and finally the 1980s.⁴⁷¹ According to Carroll, in an earlier paper on CSR, CSR was simply referred to as Social Responsibility (hereafter referred to as SR).

The concept of SR was conceived in 1953 when Bowen wrote a book titled *Social Responsibilities of the Businessman*.⁴⁷² Bowen's work in the book is based on the view that several businesses were vital centres of power and decision making. The actions of these companies impacted and touched the lives of many people in various ways.⁴⁷³ According to Bowen, SR is the obligation of businessmen to

⁴⁶⁶ Kabir H *et al Problems and Perspectives in Management* 2015 281.

⁴⁶⁷ Kabir H *et al Problems and Perspectives in Management* 2015 281.

⁴⁶⁸ Carroll B *Business and Society* 1999 268.

⁴⁶⁹ Carroll B *Business and Society* 1999 268.

⁴⁷⁰ Carroll B *Business and Society* 1999 269.

⁴⁷¹ Carroll B *Business and Society* 1999 268

⁴⁷² Bowen HR *Social Responsibility of the Businessman* 1953.

⁴⁷³ Carroll B *Business and Society* 1999 269.

pursue those policies, to make decisions, or to follow those lines of action which are desirable in terms of the objectives and values of a society.⁴⁷⁴ The 1950s was the first time that CSR was attended to academically, and there was a need to define what the duties of corporates or businesses were towards the community. This means that mining corporations, as businesses that impacted the lives of the community, especially mining communities, had the duty to ensure that the objectives which were considered desirable by the community within which they operate are taken into account and that there are attempts to achieve such objectives. Mining companies have also played a role in influencing the policies and laws which were in place during the Union as well as the era, therefore, they should have taken the interest of the mining communities into account when influencing such policies and laws.

The concept of CSR continued to evolve in the 1960s. Carroll indicates that in the 1960s there was more effort to formalize CSR.⁴⁷⁵ The author further notes a number of notable authors who contributed towards the development of the concept of CSR. Keith Davis was one of the authors who made a contribution to defining what CSR entailed during the 1960s.⁴⁷⁶ Davis defined SR as businessman's decisions and actions taken partially beyond the firm's economic and technical interest.⁴⁷⁷ He further held the view that the SR of businessmen must be proportionate to the social powers. That SR and power need to be relatively equal and that the avoidance of SR leads to gradual erosion of power.⁴⁷⁸ Unfortunately, this balance was not struck during the Union and the apartheid era. There also seems to be a challenge to strike this balance even in post-apartheid South Africa.

⁴⁷⁴ Carroll B *Business and Society* 1999 270.

⁴⁷⁵ Carroll B *Business and Society* 1999 270.

⁴⁷⁶ Davis K *California Management Review* 1960 70.

⁴⁷⁷ Carroll B *Business and Society* 1999 271.

⁴⁷⁸ Carroll B *Business and Society* 1999 271.

A report by the South African Human Rights Commission (hereinafter referred to as SAHRC) indicated that despite the existence of regulation and legislation, mining communities continue to experience high levels of poverty and systematic inequality, which, in turn, reinforces the notion that mining operations only benefit mining companies and the state, to the detriment of mining communities.⁴⁷⁹ This particular view and opinion were not considered or supported during the Union of South Africa and apartheid South Africa. Davis makes a link between the power of the corporation and the community within which such a corporation conducts its business and alludes to the fact that the community is an integral fibre of the success of a business or the power that a corporation holds. Failure to further the interest of such a community will lead to the powers of the corporation wilting and gradually being eroded. The treatment of mining communities during these two periods indicates that they were not considered important stakeholders in mining companies and were regarded as replaceable. This is probably why there are tensions between mining communities and mining companies.

Another important author was Frederick,⁴⁸⁰ who viewed CSR as entailing that a businessman should oversee the operation of an economic system to fulfil the expectation of society. This implies that the means of production of the economy must be employed in such a way that the economy benefits the socioeconomic well-being of the community and society.⁴⁸¹ CSR implies that there must be a willingness to use the resource of the country to enhance society and not simply benefit a certain person or a particular company.⁴⁸² Another notable author was J.W McGuire. McGuire indicated that the idea of SR is that corporations have not only economic and legal obligations towards the community, but also certain responsibilities to society which extend beyond economic and legal

⁴⁷⁹ National Hearing on the underlying Socio-Economic Challenges of Mining Affected Communities in South Africa. A report by the South African Human Rights Commission 13-14 September 2016 1.

⁴⁸⁰ Frederick W.C *Carlifonia Management Review* 1960 271.

⁴⁸¹ Frederick W.C *Carlifonia Management Review* 1960 271.

⁴⁸² Frederick W.C *Carlifonia Management Review* 1960 271.

obligations.⁴⁸³ McGuire later elaborated that corporations must take an interest in the welfare of the communities in which they operate and conduct their businesses, this includes the political, educational, and employee happiness, in fact, the whole social world of the community, and that corporations must act justly as any citizen should.⁴⁸⁴

It was during the 1960s that the idea that corporations must take into account the interests of the community began to take shape. There was a movement from the philanthropic endeavour to the call for corporations to go beyond their duties and responsibility and take the interests of the community into account. It concerns itself with the contribution that businesses and corporations can make to improve the communities within which they operate and the society at large.⁴⁸⁵

Mining corporations during the Union and Apartheid failed to take into account any of the components of CSR. They addressed some of the economic responsibilities, such as being profitable but failed to take into account the requirements of society. These corporations also took into account legal responsibilities, such as obeying the law and regulations, but did not take into account the interest of the communities or the societies within which they were operating. The ethical responsibility and philanthropic aspects of CSR were completely ignored. The interest of mining communities, as indicated in Carroll's pillars of CSR, was not taken into consideration. Mining companies merely ensured that they were profitable, sometimes at the cost of black lives, black families and black's socio-economic development. Mining companies supported policies and laws that disadvantaged mining communities.

⁴⁸³ Frederick W.C *Carlifonia Management Review* 1960 271.

⁴⁸⁴ Frederick W.C *Carlifonia Management Review* 1960 272.

⁴⁸⁵ Klopper H *PER/PELJ* 2014 716.

3.4. SUMMARY

The legacy of colonisation and apartheid is still visible in present-day South Africa. The Native Land Act and other laws that were enacted from colonisation to apartheid were enacted to disadvantage and disenfranchise black South Africans. Direct and tacit denial and prohibition of access to land during these periods ensured that black South Africans were excluded from benefiting from the mineral resources of the Republic of South Africa. The remnants of discriminatory legislation are still visible today.

The mining law before 1994 did not take into account the concept of CSR. The concept of CSR was developed in the 1960s, and despite these developments, the legislative framework developed after the development of the concept of CSR there was still no inclusion of CSR. There was no political will to ensure that mining communities benefitted from the mining industry. This was primarily due to discriminatory laws imposed before 1994 or before the attainment of a democratic system in South Africa. This means that the concept is a conception of the democratic system in South Africa and there is still much more development that must occur to gain the necessary momentum to ensure the effectiveness of CSR application. This chapter has demonstrated that CSR was not addressed in the pre-1994 legislative framework.

CHAPTER 4
REGULATORY FRAMEWORK FOR THE MINING INDUSTRY UNDER
POST-1994 SOUTH AFRICA

4.1 INTRODUCTION

*'The national wealth of our country, the heritage of all South Africans, shall be restored to the people; the mineral wealth beneath the soil, the banks and the monopoly industry shall be transferred to the people as a whole'*⁴⁸⁶

This chapter investigates the challenges faced by mining communities and communities affected by mining. The rights of mining communities are also be discussed. The Chapter will define what a mining community is, the challenges faced by mining communities, and look at the concept of CSR and the role of CSR in these communities. The definition of CSR is imperative simply because mining communities have legislated rights to benefit from the exploitation and exploration of mineral resources beneath the soil. It is important to define the community. This will enable mining companies to properly identify the mining communities that must benefit from the exploitation and exploration of mineral resources. It will also outline the position of mining communities in the current democratic system and the legislation that regulates mining in South Africa. Statistics will be used to analyse the position of mining communities.

As part of the discussion herein, this thesis will focus primarily on the MPRDA. In particular, special attention will be paid to the relationship between the mining communities and mining companies or holders of statutory prospecting or mining rights. The question that underpins this chapter is: *Which law is the primary normative framework for mining industry in South Africa?* The question will

⁴⁸⁶ The Freedom Charter 1955.

include determining CSR means and how is it regulated within the context of South Africa's mining industry post-1994 dispensation.

Mining communities and mining affected communities are some of the most impoverished communities in South Africa.⁴⁸⁷ The plight of mining communities is multifaceted, and include failure of development, and the violation of human rights that are enshrined in the Bill of Rights.⁴⁸⁸ South Africa is one of the most unequal societies in the world; and the plight of mining communities is made more negatively blatant and vulgar by the fact that the areas within which these communities are located are one of the wealthiest communities in the world in terms of the mineral wealth located beneath the ground.⁴⁸⁹ Despite such mineral wealth, the economic benefits of these mining operations do not seem to trickle down to impoverished mining communities. One of the most recent demonstrations of the squalor within which mining communities and communities affected by mining exist is the Marikana mining community.⁴⁹⁰ What Marikana

⁴⁸⁷ Broughton (24 February 2022) Mines are failing Limpopo communities, says scathing report
<https://www.groundup.org.za/article/report-finds-three-mining-companies-limpopo-not-complying-obligation-uplift-local-communities/> accessed on the 23rd January 2024

Amnesty International (3 February 2020) South Africa: Mining gathering must confront human rights violations
<https://www.amnesty.org/en/latest/news/2020/02/south-africa-mining-gathering-must-confront-human-rights-violations/> Accessed on the 23rd of January 2024

South Africa: How Mining Damages Communities and the Environment

Kendall Rall (27 August 2018) <https://www.hrw.org/news/2018/08/27/south-africa-how-mining-damages-communities-and-environment> Accessed on the 23rd of January 2024

⁴⁸⁸ Oluwatosin B I *African Human Rights Law Journal* (2021) 367.
South Africa most unequal country in the world: Report (9 March 2022)
<https://www.aljazeera.com/news/2022/3/10/south-africa-most-unequal-country-in-the-world-report> accessed on the 25th January 2024.

⁴⁹⁰ Bonile Bam 'Marikana-The Struggle for Breath and Dignity' (2021)
<https://www.dailymaverick.co.za/article/2021-08-16-marikana-residents-struggle-for-their-livelihoods-and-dignity-in-the-dust-and-degradation>.
Accessed 12 January 2022 (reporting on the poverty experienced by the mining community of Marikana. This is not surprising, unfortunately, as poverty is rife in mining communities and in Africa in general. According to See *Aikins ER and Du Toit Mclachlan J. Africa is losing the battle against extreme poverty. ISS Today,*

tragedy highlighted is that mining operations in South Africa tends to generate generated big profits for companies, and little made available for local benefit.

The above picture painted about the plight of mining communities appears to be in contrast to the fact that the mining industry contributes significantly to the economy of South Africa. In 2020, for instance, the industry contributed 11.8 billion towards the payment of royalties, in 2021 it contributed to the employment of 452 866 people, it contributed to R27.2 billion in taxes and contributed 371,9 billion to the Gross Domestic Product (hereafter referred to as GDP).⁴⁹¹ The question is whether this contribution impacts the lives of the South African population, especially the mining communities and communities affected by mines. The fact that mining communities are some of the most impoverished communities in South Africa is a cause for concern.

4.2 INSTITUTIONAL AND NORMATIVE FRAMEWORK RELATING TO MINING INDUSTRY IN SOUTH AFRICA

4.2.1 Institutional Framework

Under the current system, in particular in terms of the MPRDA, the state has the prerogative and duty to manage and control all mining and prospecting rights in South Africa. Section 3(2)(a) of the MPRDA stipulates that:

- (2) As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may— (a)

13 July 2022, available at <https://issafrica.org/iss-today/africa-is-losing-the-battle-against-extreme-poverty>, for example, “when one uses the poverty line of US\$1.90 a day, Africa’s extreme poverty rate of 43.1% in 1981 was almost equal to the average for the rest of the world’s rate of 42.8%. By 2015 though, Africa’s extreme poverty rate of about 35.5% was 6.8 times the average for the rest of the world.”

⁴⁹¹ Mineral Council South Africa Fact and Figures Booklet 2020 2-3.

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.

The above responsibility of the Minister is borne out of the fact that “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”⁴⁹² and the Minister is the nominated custodian on behalf of the State. Interestingly, the role of the Minister as the custodian has not gone unchallenged by those who believe that the relevant section of the MPRDA is unconstitutional and allowing the State to easily interfere with private property rights, particularly when the issue is about expropriation. The case in point is *Agri SA v Minister of Minerals and Energy*.⁴⁹³ In this case 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 contrary to section 25(2)(3) of the Constitution.⁴⁹⁴ In terms of the judgment of the Constitutional Court in *casu*, 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.⁴⁹⁵ Emphatically, the court held that the State is entrusted with administrative authority to equitably distribute mineral resources in South Africa whilst also having a duty to eviscerate Apartheid discriminatory practices in the mining industry.⁴⁹⁶

⁴⁹² MPRDA section 3(1).

⁴⁹³ *Agri SA v Minister of Minerals and Energy*, 2013 (4) SA 1 (CC).

⁴⁹⁴ *Agri SA v Minister of Minerals and Energy para 59-60*

⁴⁹⁵ *Agri SA v Minister of Minerals and Energy para 59-60.*

⁴⁹⁶ *Agri SA v Minister of Minerals and Energy para 68.*

The role of the Minister goes far beyond licensing. By and large, the Minister plays a central and critical role in the regulation of the mining industry in South Africa, and this role is entrenched in several of the MPRDA provisions dealing with varied issues. Without running through the gamut of all the provisions of the MPRDA related to the Minister, the following are examples of some of the provisions creating obligations the minister has. The obligation in terms of section 3(3) of MPRDA ensure that the mining industry adheres to the national and international mining pieces of legislation, policies, norms and standards and promotes economic and social development in South Africa.

The duty of the Minister that needs highlighting herein is the requirement to promote beneficiation, transform the mining industry and deal with past discriminatory practices in the mining sector. As part of promoting beneficiation, for instance, the MPRDA authorises the Minister in terms of section 26 to initiate or prescribe incentives to promote the beneficiation of minerals in South Africa. To this end, the Minister is empowered to implement any legislation deemed necessary to benefit the country economically.⁴⁹⁷ These powers are not untrammelled as he/she must act on the advice of the Minerals and Mining Development Board.⁴⁹⁸ Section 12, it is argued, seeks to introduce economic inclusivity in the South African mining industry by requiring the Minister to assist historically disadvantaged persons interested in prospecting or mining operations. According to the relevant provision, section 12(1)(4), the Minister 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 determine. (3) Before facilitating the assistance contemplated in subsection (1), the Minister must take into account all relevant factors, including—

⁴⁹⁷ This must be done after consultation with the Minister of Trade and Industry.
⁴⁹⁸ The South African Minerals and Mining Development Board was established in terms of section 57 of the MPRDA and its functions set out in section 58.

(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.⁴⁹⁹

It is argued that the significance of section 12 for the purpose of this study is that it is supportive to local communities who would like to be involved in the exploitation of minerals in their communities. It is also submitted that these communities may leverage section 12 to request mining companies to introduce CSR-mediate initiations. Furthermore, those who were previously disposed or driven-out of some of the mineral rich areas may reclaim their stake through conduction prospecting and mining operations in such areas. The court has gone so far as instructing the Minister to assist communities in obtaining prospecting rights. A case in point is *Bengwenyama-ya-maswazi community and Others V Minister for mineral Resources and Others*.⁵⁰⁰ This case involved the community's application for prospecting right that was competing with another private mining company to prospect over minerals resources in the Bengwenyama community two farms. The prospecting right was granted to the private company by a court of first instance awarded the private company prospecting right on the basis first to apply first to be granted. The ruling was overturned on appeal by the Community to the Supreme Court of Appeal (SCA). According to the SCA, there is a special category of right for communities as they are owners of the land to have preferential right to be granted for prospecting right

⁴⁹⁹ Section 12(1)(4) of the MPRDA.

¹⁸³ Section 17(a) of the MPRDA.

⁵⁰⁰ *Bengwenyama-Ya-Maswazi Community and Others V Minister for mineral Resources and Others*, 2015(1) SA 197(SCA).

except only if is already granted to another person.⁵⁰¹ On the basis on this reasoning, the SCA instructed the minister to assist the community with application and award them the prospecting right.⁵⁰²

The provisions of section 100 of the MPRDA contains what can be considered social responsibility requirement, which speaks to CSR. Demanding transformation in the mining industry, section 100(1) provides 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.”⁵⁰³ Further, the Minister has been required, under section 100(1), to enact code of good practice. The Code has since been enacted in 2009 and it provides fundamental principles to transform the mining.⁵⁰⁴ Another important section of the MPRDA that implores the Minister to transform the mining industry and assist previously disadvantaged groups in terms of redressing historical imbalances is section 100(2)(a). 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.”⁵⁰⁵ This

⁵⁰¹ *Bengwenyama-ya-Maswazi Community and others v Minister for Mineral Resources and Others*, 2015(1) SA 197(SCA) para 62.

⁵⁰² *Bengwenyama-ya-Maswazi Community and others v Minister for Mineral Resources and Others*, para 66.

⁵⁰³ Section 100(1) (a)-(b) of MPRDA.

⁵⁰⁴ *The Code 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.

⁵⁰⁵ The framework, which have since established is Mining charter of 2004 with the aim of transforming the mining industry.

framework, the Mining Charter, was gazetted in 2004.⁵⁰⁶ Unfortunately, it has seen some challenges due to the powers it vested in the Minister.⁵⁰⁷ In 2017 the latest Mining Charter was gazetted with the aims of radically transforming the mining industry in South Africa.⁵⁰⁸

4.2.2. The Constitution

4.2.2.1. General: The Concept of “Community” Explained

Mining operations can negatively affect certain constitutional rights of communities, including the right to own property and environmental rights. The socioeconomic development of mining communities is of paramount importance, and should be always be taken into account by the extractive industries. The term community is defined in several pieces of legislation. Section 1 of the MPRDA defines a community as a coherent social group of persons with interests or rights in a particular area of land in which the members have exercised the community in terms of an agreement, custom, or law. The Social Labour Plan Guidelines⁵⁰⁹ echo the same sentiments as the MPRDA in defining what a community is. The Land Rights Restitution Act also defines a community as any group of persons whose land rights are derived from shared rules that determine access to land held in common by such groups and includes part of such a group.⁵¹⁰ Section 1 (iv) of the National Environmental Management Act 107 of 1998 defines a community as a group of persons or parts of such a group who share common

⁵⁰⁶ Broad-Based Socio Economic Empowerment Charter for the South Africa mining industry, notice 1639 of 2004.

⁵⁰⁷ *Scholes and Another V Minister of Mineral Resources (50642/2015) [2017] ZAGPPHC 303 (30 June 2017).*

⁵⁰⁸ It repealed previous Mining Charters. See The Broad Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2017. Clause 2.14. Unfortunately, South Africa seems to be in and out of charters. Already there is on the table. Draft Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2018.

⁵⁰⁹ Guideline for Submission of a Social Labour Plan October 2010.

⁵¹⁰ The Restitution of Land Rights Act 22 of 1994.

interests and who regard themselves as a community.⁵¹¹ The community can also be defined as a group of historically disadvantaged persons with interests or rights in a particular area on which members have to exercise communal rights in terms of agreements, customs, or law provided that where, as a consequence of the provisions of the MPRDA negotiations or consultation with the community are required, the community shall include members of or part of the community directly affected by prospecting or mining on land occupied by members of the community.⁵¹²

Cole and Broadhurst posit that mining communities can be defined as communities where mining takes place and labour supply areas and labour supply areas are areas where the majority of current and historical workers originate or have been obtained.⁵¹³ Mining communities are generally characterised as individual underdeveloped villages rather than towns and cities.⁵¹⁴ In defining what the mining community is, Cole and Broadhurst looked at a number of factors. These factors included the size of the population and the level of influence that the mining operation had on the community,⁵¹⁵ interested and affected parties.

The guidelines by the Department of Mineral Resources (hereafter referred to as DMR) further explain what interested and affected parties include in the consultative process, these interested and affected parties include but are not limited to the following: Host communities; Landowners; Traditional Authorities; Land claimant; Lawful land occupiers; Any other person, including adjacent and

⁵¹¹ National Environmental Management Act 107 of 1998.

⁵¹² Guideline for Consultation with Communities and Interested and affected Parties As Required in terms of Section 10 (1) (b), 16 (4)(b), 22 (4) (b),27(5) and 39 of the Mineral and Petroleum Resources Development Act.

⁵¹³ Cole M.J and Broadhurst J.L, *The Extractive Industries and Society* 2020 958.

⁵¹⁴ Cole M.J and Broadhurst J.L, *The Extractive Industries and Society* 2020 958.

⁵¹⁵ Cole M.J and Broadhurst J.L, *The Extractive Industries and Society* 2020 958.

non-adjacent properties whose socioeconomic conditions may be affected by the proposed prospecting or mining operations; The local municipality; and The relevant agencies and institutions of the Government Department are responsible for the various aspects of the environment and the infrastructure that may be affected by the proposed project.⁵¹⁶

What is apparent from the discussions so far is that the concept of community is difficult to capture in law and as a result of this difficulty, there have been a number of amendments to the definition of community.⁵¹⁷ According to Heyns, the concept of community as defined by the legislative framework is problematic, as it is ambiguous, resulting in uncertainty.⁵¹⁸ Heyns further argues that the legislative system defines a community as a group of persons sharing customs, traditions, and ethnicity. It is a notoriously difficult term to define, and it is complicated by a number of factors.⁵¹⁹ These factors include the fact that many residents live in these communities temporarily or part-time, and some residents within the community are temporary workers or immigrants who usually return to their home towns when their employment is terminated or the mine ceases to exist.⁵²⁰ This poses the question of where does a community begin and where does it end? Additionally, it poses the question of who qualifies as a community member and who is entitled to benefit from mining operations as a member of a mining community or a mine-affected community.

It is submitted that the difficulty in identifying mining communities entails that mining companies must be able to identify and define the concept of mining communities so that the appropriate individual can benefit from mining

⁵¹⁶ Guideline for Consultation with Communities and Interested and affected Parties As Required in terms of Section 10 (1) (b), 16 (4)(b), 22 (4) (b), 27 (5) and 39 of the Mineral and Petroleum Resources Development Act (Act 28 of 2002) 5.

⁵¹⁷ Heyns A *Development Law Journal* 2019 10.

⁵¹⁸ Heyns A *Development Law Journal* 2019 10.

⁵¹⁹ Heyns A *Development Law Journal* 2019 10.

⁵²⁰ Littlewood D *Journal of Business Ethics* 2014 49.

operations. As Henry argues, they must be able to conceptualize mining communities, and such companies must be guided by the legislative and policy framework such as the MPRDA and the mining charter.⁵²¹ It is argued that the right beneficiaries of mining operations must be limited to individuals and families who have permanent roots in the community affected by mining. Socioeconomic development must first and foremost focus on permanent residents of mining communities as these are individuals and families who will endure the negative effects of mining communities. The people considered a community are those whose access to land is permanently affected by the mining operations, these can be considered host communities. The Mining Charter identifies the concept of a host community. It identifies the host community as a community within a local or metropolitan municipality adjacent to the mining area as defined by the MPRDA.⁵²²

The question should therefore be: Are the concepts “mining communities” and “host communities” interchangeable. The response in the context of this study is an emphatic ‘no’. It is submitted that a "host community" refers to the group of people who live in an area where a particular activity or industry is taking place. Therefore in the context of mining the host community would be the people who live in the vicinity of a mine, and who are affected by its operations. These people may or may not be directly involved in the mining industry, but they are impacted by it in various ways, such as through environmental impacts, changes to their way of life, and economic effects. A "mining community," on the other hand and in light of the MPRDA and the Mining Charter, should refer to a group of people who are directly involved in the mining industry. This could include workers at the mine, their families, and other support services that are required for the mine to operate. Indeed the two concepts may have some overlap but they are distinct concepts. The distinctive feature comes from the fact that the mining community is a subset of the host community, consisting of those who are directly involved

⁵²¹ Henry A and H Mostert H *Law and Development Review* 2018 824.

⁵²² Broad-Based-Economic Empowerment Charter For The Mining and Mineral Industry 2018.

in the mining industry, while the host community is a larger group that includes all those who are impacted by the mining operations, whether or not they are directly involved in the industry.⁵²³

It is important to note that there is no single universal definition of the concept of community; however, international policies have a common thread of what a community is and further what a community is entitled to. The definitions of mining community as defined in the MPRDA and the Mining Charter are insufficient to guide mining companies in conceptualising the concept of mining communities. Failure to properly conceptualise what a mining community entails is problematic and detrimental to the socioeconomic development of mining communities. The legislation and policy framework make it the prerogative of mining companies to determine and define what a mining community is, this is detrimental as individuals who should benefit from mining operations are excluded while they should be included. This causes discord and tensions between included and excluded.⁵²⁴ It also perpetuates inequality within mining communities.

By way of demonstration, certain studies have identified the different types of mining communities. Cole and Broadhurst, for instance, assert that the first were cities that were developed from mining. Some are no longer dependent on mining and host other industries and sectors that contribute to the socioeconomic development of such areas, after been in close proximity to mining operations for

⁵²³ World Bank. (2017). *Mining and host communities: Understanding the impacts of mining on host communities*. Washington, DC: World Bank Group. <https://openknowledge.worldbank.org/handle/10986/28335> (discussing the various impacts that mining can have on host communities, and highlights the importance of understanding the differences between the mining community and the larger host community); Amponsah, E. Y., & Mensah, S. O. 2021 *Journal of Cleaner Production* 2021, 293 (examining the relationship between mining companies and the host communities in which they operate. Further, arguing that while the mining community and the host community are often used interchangeably, they are distinct concepts that require different approaches from mining companies in order to build effective relationships.) See also Kneen, J. *Development* 2010, 53(4), 541-547.

⁵²⁴ Henry A and Mostert H *Law and Development Review* 2018 828.

many years.⁵²⁵ The second type of community identified by the authors was large towns, where mining led to the establishment of the town and mining still dominates the local economy even though there are other industries and sectors.⁵²⁶ The third type of community identified is small villages or small mining towns that exist primarily for mining operations and are dependent on the existence of such mines for economic benefits, including, but not limited to, employment.⁵²⁷ It is in these small communities where underdevelopment is most prevalent and visible. The fourth type of mining communities identified were the diverse communities. These communities were established before the mining operations commenced, and as a result, these communities are now located near mining operations.⁵²⁸

4.2.2.2. Analysis of Relevant Constitutional Provisions

The Constitution is the supreme law of the Republic, it demands that any law or conduct must be consistent with it, failure of which will result in that law or conduct being declared as invalid.⁵²⁹ Constitutional supremacy places the highest authority in the legal system on a constitution.⁵³⁰ This entails that the constitution binds everyone within the Republic including mining companies. It is thus submitted that the conduct of mining companies must give meaningful expression to and promote the rights and principles contained in the Constitution. Notable for the purpose of this study include the right to human dignity,⁵³¹ environmental rights,⁵³² the right to housing,⁵³³ and the right to health care, food, water and social security.⁵³⁴

⁵²⁵ Cole M.J and Broadhurst J.L, *The Extractive Industries and Society* 2020 958.

⁵²⁶ Cole M.J and Broadhurst J.L, *The Extractive Industries and Society* 2020 958.

⁵²⁷ Cole M.J and Broadhurst J.L, *The Extractive Industries and Society* 2020 956.

⁵²⁸ Cole M.J and Broadhurst J.L, *The Extractive Industries and Society* 2020 958

⁵²⁹ Section 22 of the Constitution, 1996.

⁵³⁰ Limbach J *The Modern Law Review* 2001 1.

⁵³¹ Section 10 of the Constitution, 1996.

⁵³² Section 24 of the Constitution, 1996.

⁵³³ Section 26 of the Constitution, 1996.

⁵³⁴ Section 27 of the Constitution, 1996.

In the observation of Malan, Constitution is actively regulating not only the law outside the Constitution but also the social reality.⁵³⁵ Mining, in the quest for development can have a negative impact.⁵³⁶ The negative impact involve social, environmental and ecological complications such as pollution, deteriorating agricultural products, degradation of both physical and mental health, involuntary displacement, breakdown of communities and social networks.⁵³⁷ The industry is by its nature invasive and it leaves a considerable footprint on the environmental, social and economic makeup of the communities within which they operate. It is this not surprising when mining communities are fearful of the dangers posed by the exploitation of mineral resources. The Constitution is a stepping stone towards ensuring that the cost of mining is not too great to an extent that it compromises the human rights of mining communities. The violation of one right can affect other constitutionally enshrined rights. For example the harm that mining companies has on the environment can have the domino effect of impact the right to life as contained in section 11 of the Constitution. Mining releases toxic substances into the environment, which can lead to health complication, more in particular for those residing near the mining companies or mining operations. The Constitution is the first instrument that corporation must take into account when engaging with mining operations and mining communities. In the case of *Standard Bank Ltd V Dlamini*⁵³⁸ the court held that large corporations such as Bank, that invest in CSR must be aware of relevant legal frameworks. These institutions should welcome frameworks bridging socioeconomic inequalities substantively and reforming industry. Failures to do this can lead to sustained inequality, unrest and social instability, which will negatively affect the business.

⁵³⁵ Malan K PER/PEJL (18)4 2015 1224.

⁵³⁶ Das N National Institute of Technology Rourkela, Odisha, India 2015 4.

⁵³⁷ Das N National Institute of Technology Rourkela, Odisha, India 2015 4.

⁵³⁸ *Standard Bank td v Dlamini* (2012) ZAKZDHC 64 (77).

In light of the above discussion, it is noted that the MPRDA, which is to be discussed hereunder, is one of the laws and regulations implemented by the government to give effect to specific constitutional provisions. The Constitution is also an enabling law that provided a frame for several legislation relevant to this study such as laws on the protection of the rights of workers and communities affected by mining activities.⁵³⁹ Also, the legislation that provides for the protection of the environment and the management of natural resources.⁵⁴⁰ As the Supreme Law of the country, any law or conduct inconsistent with it is invalid.⁵⁴¹ This is a very invaluable provision for stakeholders in the mining industry as, for instance, a conduct by a mining company that violates their rights in the Constitution will be considered unconstitutional. It is argued that these constitutional safeguards for the mining communities provides the much needed protection against actions of mining companies. Further, and as noted in *South African Broadcasting Corporation v. National Director of Public Prosecutions*,⁵⁴² the Supremacy Clause is important in ensuring that all government actions are consistent with the Constitution.⁵⁴³ Thus, actions of the government with regard to mining should not violate or cause the violation of the rights of mining stakeholder.

⁵³⁹ For example, the Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act 75 of 1997 which set out minimum standards for wages, working conditions, and other employment-related matters.

⁵⁴⁰ See, for example, NEMA and the National Water Act 36 of 1998.

⁵⁴¹ See section 2 of the Constitution.

⁵⁴² *South African Broadcasting Corporation v. National Director of Public Prosecutions* (2006) ZACC 1. See also, *Doctors for Life International v. Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) dealing with the constitutionality of the Choice on Termination of Pregnancy Act, in which the court emphasized the importance of the Supremacy Clause in ensuring that all laws are consistent with the Constitution.

⁵⁴³ Maphumulo M. "The Supremacy of the Constitution and the Rule of Law." 2018 *South African Journal on Human Rights* 34, no. 2: 299-318; Bosch C. "Constitutional Supremacy in South Africa." 2017 *Journal of Constitutional Law* 19, no. 1: 6-31; Govender K. "The Supremacy of the Constitution in the South African Constitutional Order." 2019 *De Jure Law Journal* 52, no. 1:1-25; Mondli, L. "Constitutional Supremacy and the Separation of Powers in South Africa." 2016 *Journal of Public Administration* 51, no. 1:1-13; and Nhlapo T. "The Supremacy of the Constitution and its Implications for the Judiciary in South Africa." 2015 *South African Law Journal* 132, no. 4: 772-793.

Thought not explicitly, the South African Constitution recognizes the importance of mining for the country's economy, and the need to protect the environment and the rights of communities affected by mining activities through section 24.⁵⁴⁴ Section 24 of the South African Constitution recognizes the right of all citizens to an environment that is not harmful to their health or well-being, and it places a duty on the state to protect and improve the environment. This is one of the much written on section because of the critical subject of sustainability it deals with.⁵⁴⁵

Another constitutional guarantee is worth consideration in the context of CSR and the liability of mining companies is the recognition of the right of people to own property, including mineral rights, and not be arbitrarily be deprived of these rights. For example, section 25(2) of the Constitution provides that property may be expropriated only in terms of law of general application for a public purpose or in the public interest and the expropriation must be accompanied with the payment of compensation.⁵⁴⁶ According to Mostert and Pope,⁵⁴⁷ expropriation takes place when the state takes away private property without the permission of the owner to serve a public purpose, and the action is accompanied by the payment of compensation.⁵⁴⁸ The *Expropriation Act*¹⁵⁸ (hereafter the *Expropriation Act*) provides for the expropriation of land and other property for public purposes, but it must be kept in mind that the provisions set out in section 25 of the Constitution are still part of the supreme law of the Republic. The *Expropriation Act* in fact determines or prescribes the manner in which

⁵⁴⁴ Mabiletsa M and Du Plessis W SAJELP 2001 186.

⁵⁴⁵ See for example, Bohler-Muller, N and Toxopeüs M. "Environmental rights and the South African Constitution." 2005 *Potchefstroom Electronic Law Journal* 8, no. 1: 13-49; Glazewski, J and Humby T. "Implementing the right to an environment in South Africa." 2007 *Journal of Environmental Law* 19, no. 1 : 49-72; Kotzé, L.J. "The role of environmental governance in achieving sustainable development in South Africa." 2014 *South African Journal on Human Rights* 30, no. 2: 157-187; Low, A and Kidd M. "Section 24 of the South African Constitution: The Right to an Environment Not Yet Fully Realized." 2017 *Fordham Environmental Law Review* 28, no. 17: 39-80; and Muna, NL. "The impact of section 24 of the Constitution of South Africa on environmental protection." 2012 *Journal of Energy and Natural Resources Law* 30, no. 3: 323-342.

⁵⁴⁶ Section 25(2) of the Constitution. 158 *Expropriation Act* 63 of 1975.

⁵⁴⁷ Mostert and Pope (eds) *The Principles of the Law of Property* 120.

⁵⁴⁸ Mostert and Pope (eds) *The Principles of the Law of Property* 120.

expropriation should be effected, while section 25 of the Constitution determines the legal principles underlying a valid expropriation. In *Harksen v Lane NO* 1998 1 SA 300 (CC)⁵⁴⁹ (hereafter the *Harksen-case*) the court defined expropriation as the attainment of rights in property by the state.⁵⁵⁰

4.2.3 Main Legislation : MPRDA

4.2.3.1 Objectives of the MPRDA, and Obligation of Mining Rights Holders

The reader is reminded that this thesis is mainly concerned with the responsibilities and liabilities of mining companies in South Africa, focusing on sustainable mining and CSR to mining communities. The MPRDA is a comprehensive piece of legislation that provides a legal framework for the exploration and exploitation of mineral and petroleum resources in South Africa. Its articles set out clear procedures and guidelines for the acquisition, management, and transfer of mineral and petroleum rights, and ensure that these resources are exploited in a sustainable and responsible manner that benefits all South Africans.

This part of the thesis is not aimed at providing a critical appraisal of all MRDA. Rather, it deals with those provisions that speak to responsible mining and can form the basis for CSR for mining companies. Be that as it may, where necessary incidental provisions will be referred. From the beginning, the MPRDA makes reference to the importance of CSR by mining companies. It recognises that mining companies have a duty to take CSR initiatives to improve South Africa and the communities affected by mining. Section 2 (f) of the Act provides that the object of the Act includes, but is not limited to: Promote employment and advance the social and economic well-being of all South Africans; Give effect to Section

⁵⁴⁹ *Harksen v Lane NO* 1998 1 SA 300 (CC).

⁵⁵⁰ *Harksen-case* par 32.

24 of the Constitution⁵⁵¹ by ensuring that the mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and Ensure that the holder of mining and production rights contributes towards the socioeconomic development of the area or communities in which they operate.

Before delving into discussions about selected provisions of the MPRDA, it is important to indicate that South Africa has a mining Charter that has the MPRDA as its foundation legislation and critical to discussions of rights and responsibilities in the extractive industry. As stated already, the MPRDA was enacted in 2002 to regulate the exploration and exploitation of minerals and petroleum resources. Article 3: This article outlines the objectives of the MPRDA, which include promoting equitable access to the country's mineral and petroleum resources, and ensuring that these resources are exploited in a sustainable manner that benefits all South Africans. In terms of Section 3 (1) of the MPRDA, the mineral and petroleum resources of the country are the common heritage of the people of South Africa. The Minister⁵⁵² is empowered by the Act to grant or refuse rights relating to the exploitation and exploration of mineral resources.⁵⁵³ In exercising these powers and duties, the Minister must ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policies, norms, and standards and promoted, while promoting economic and social development at the same time.⁵⁵⁴ This section advocates for the rights of mining communities to economic and social development in a sustainable manner.

⁵⁵¹ Section 24 of the Constitution deal with environmental rights. It provides that (a). Everyone has the right to an environment that is not harmful to their health or wellbeing.(b)To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
(i) prevent pollution and ecological degradation (ii) Promote conservation
(iii) Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

⁵⁵² Section 1 of the MPRDA defines Minister as the Minister of Minerals and Energy.

⁵⁵³ Section 3 (2) of the MPRDA.

⁵⁵⁴ Section 3 (3) of the MPRDA.

The following are some of the key provisions of the MPRDA, which are relevant in this thesis:

- Section 4: Defines the types of minerals and petroleum resources that are covered by the MPRDA, and specifies the ownership of these resources. According to the act, all minerals and petroleum resources in South Africa are the property of the state.
- Section 5: Outlines the procedures for applying for mineral and petroleum rights. It specifies the information that must be included in a mining or exploration application, as well as the criteria that will be used to evaluate applications.
- Section 10: Establishes the Mining and Petroleum Resources Development Fund, which is used to finance the promotion and development of the mining and petroleum industries in South Africa.
- Section 16: Sets out the requirements for the granting of mining and exploration rights. It specifies the conditions that must be met by applicants, including their technical and financial capacity, and their commitment to environmental and social responsibility.
- Section 38: Outlines the procedures for the expropriation of mineral and petroleum rights. It specifies the conditions that must be met before expropriation can take place, as well as the compensation that must be paid to the affected parties.

It is argued that in the context of CSR, and the rationale of this thesis, section 25 of the MPRDA is important as it provides duties and obligations to those who have mining rights. The duties include, but are not limited to, the following:

- a) The duty to comply with the provisions of the MPRDA and any other relevant legislation.

- b) The duty to comply with the requirements of the approved environmental management plan.
- c) The duty to comply with the requirements of the social and labour plan (SLP).
- d) Pay state royalties
- e) The duty to submit prescribed annual reports detailing their compliance with the SLP.

It is submitted that the requirement on SLP fosters CSR. The SLP is a requirement under the act for mining companies to implement CSR initiatives in the communities in which they operate. There are several cases in South Africa that have dealt with the relationship between MPRDA and CSR. In *Xstrata Alloys (Pty) Ltd v SFF Association and Others*,⁵⁵⁵ for example, Xstrata mining company was challenged for failing to comply with its obligation to develop and implement SLP under the MPRDA. The court ruled that Xstrata had not complied with its obligations under the MPRDA and ordered the company to revise its SLP and implement the necessary CSR initiatives. This must be read with the case of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Others* where the court considered the obligation of mining companies under the MPRDA to consult with affected communities before starting operations, and concluded that the mining company in question had failed to consult adequately with the affected communities and had not implemented sufficient CSR initiatives to address the concerns of the communities.

⁵⁵⁵ *Xstrata Alloys (Pty) Ltd v SFF Association and Others* 2011 JDR 0407 (GSJ)

Despite the case law and provisions on SLP above, a report by ActionAid South Africa paints a very grim picture of the conditions of mining communities.⁵⁵⁶ The report indicates that 91% of the community members interviewed did not know what an SLP is. About 85 percent did not know of any community structure that engaged mining companies on matters relating to SLP. Almost 95 percent of the community has never seen an SLP.⁵⁵⁷ The report gets worse by indicating that 79 percent of the population in the mining communities involved in the study was of the view that mining has been a negative endeavour in their community and they have not received any rewards.⁵⁵⁸ A further 8% indicated that mines only brought negative benefits, which included sickness, dispossession of their land, and damage to their environment.⁵⁵⁹ Only 13% were of the view that there were some positive benefits in having mines in their communities.⁵⁶⁰ Such benefits included roads, clinics, and employment. The most prudent question is where the problem lies. The post-democratic position of mining communities remains virtually the same as pre-democracy. Environmental damage, lack of socioeconomic development, and sickness remain the order of the day. According to the report, an estimate of 5.9 billion dollars that was earmarked for the development of mining communities did not reach the community.⁵⁶¹

Mining communities also have the rights to SD. The concept of sustainable development is defined by Section 1 (xxix) of NEMA, which provides that sustainable development is an integration of social and economic and environmental factors into planning, implementation, and decision-making to

⁵⁵⁶ Mining in South Africa 2018 “Whose Benefit and Whose Burden”. ActionAid South Africa Social Audit Baseline Report 12.

⁵⁵⁷ Mining in South Africa 2018 “Whose Benefit and Whose Burden”. ActionAid South Africa Social Audit Baseline Report 12.

⁵⁵⁸ Mining in South Africa 2018 “Whose Benefit and Whose Burden”. ActionAid South Africa Social Audit Baseline Report 13.

⁵⁵⁹ Mining in South Africa 2018 “Whose Benefit and Whose Burden”. ActionAid South Africa Social Audit Baseline Report 13.

⁵⁶⁰ Mining in South Africa 2018 “Whose Benefit and Whose Burden”. ActionAid South Africa Social Audit Baseline Report 13.

⁵⁶¹ Mining in South Africa 2018 “Whose Benefit and Whose Burden”. ActionAid South Africa Social Audit Baseline Report 13.

ensure that development serves the present and future generations. It has also been defined as a concept that is multipolar, multidimensional, and multiscalar.⁵⁶² SD includes several competing factors, such as economic development, environmental protection, and equity.⁵⁶³ Therefore, the mining community has a right to sustainable development. In terms of Section 5 (4) (c), no person may prospect for or remove, mine or conduct a technical cooperation operation, reconnaissance operation, explore or produce any mineral or petroleum resources or the commencement of any work incidental thereto in any area without notifying or consulting with the landowner or the lawful occupiers of the land in question. This requirement is echoed in several sections of the MPRDA. The preamble of the Mining Charter indicates that the primary objectives of the MPRDA are to ensure the achievement of the government's objectives to address historical socioeconomic inequalities, to ensure broad economic empowerment and meaningful participation of historically disadvantaged people (HDP) in the mining industry. The Act provides for equitable access to the mineral resources of the country and sustainable development of South Africa's mineral resources. These rights were viewed as a transformative constitutional object of advancing equality, dignity, and freedom.⁵⁶⁴

4.2.3.2 Mining Communities Rights to Consultation and Participation

Though focus herein will be on MPRDA and the Constitution, it is worth noting that other legislation such as NEMA and other sector-specific legislation⁵⁶⁵ deals with the issue of public participation and broad consultation in environment-related activities. Worth noting from the onset is the Constitutional Court's

⁵⁶² Du Plessis A Environmental Law and Local Development in South Africa. 2015 7.

⁵⁶³ Du Plessis Environmental Law and Local Development in South Africa 2015 7.

⁵⁶⁴ Humby T *PER/PEJL* 2012 (15) (14) 168.

⁵⁶⁵ For example, the National Water Act 36 of 1998; the National Environmental Management Waste Act 59 of 2008; Biodiversity Act 10 of 2004; the National Environmental Management: Protected Areas Act 57 of 2003; and the Air Quality Act 39 of 2004.

appreciation of consultation and participation in environmental issues or matters that affect communities and their environment when it's stated that:

'One of the more positive features of our nascent democratic order is vibrant, vigilant and vociferous civil society participation in public affairs. In a truly broad based participatory democracy characterised by that kind of active participation, our Constitution's aspirations and values find meaning in the lives of the populace for whose benefit the Constitution was ultimately enacted. voices is that of the environmental interests lobby.⁵⁶⁶

The MPRDA has granted the State the custodianship of mineral resources in the Republic of South Africa.⁵⁶⁷ This means that the State has the right to grant the rights to exploit the mineral resources of the country to individuals and corporations who apply and meet the requirements as provided by the MPRDA. One of these requirements is that mining companies must have the consent of landowners and those affected by mining operations before such rights are granted. Mining companies must have the consent of the mining communities before engaging in mining operations.⁵⁶⁸ Section 3 of the MPRDA ensured that

⁵⁶⁶ *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* [2022] ZACC 37 1. See generally Zongwe, DP. (2021) "Mineral Sand Resources (Pty) Ltd and Another v Redell and Others and Two Related Cases 2021 SA 268 (WCC)," *SAIPAR Case Review*: Vol. 4: Iss. 2, at 1 - 9.

⁵⁶⁷ Section 3 of the MPRDA.

⁵⁶⁸ See section 5(4)(c) of the MPRDA ,which provide that "no person may prospect for or remove, mine, conduct technical co-operation, reconnaissance operations, explore for, and produce any minerals or petroleum or commence with any work incidental thereto on any area without... notifying and consulting with the land owner and lawful occupiers of the land in question" Section 10 of the MPRDA which provides that "within 14 days of accepting an application lodged in terms of section 16, 22 or 27, the Regional Manager must in a prescribed manner_ (a) Make known that an application for a prospecting right, mining right or mining permit - has been received in respect of the land in question and (b) Call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of notice". Section 16 (4)(b) provides that "any person who wishes to apply to the Minister for a prospecting right must lodge the application.. If the Regional Manager accepts the application, the Regional Manager must within 14 days from

the state can achieve broad access to the mineral resources and exploitation thereof without transferring property rights to the state.⁵⁶⁹ The section regulates mineral resources in such a way that the state is responsible for administering rights related to the exploitation of minerals to the benefit of the nation and the people of South Africa.⁵⁷⁰

The concept of consultation is defined as two-way communication between the applicant and the community or the interested parties and affected, where the first seeks, listens, and considers the response of the latter, allowing openness in the decision-making process.⁵⁷¹ Consultation begets consensus and/or consent. The concept of consent is considered problematic within the context of an international law that was framed from colonial lenses.⁵⁷² Aumosu-Ayanu argues that there must be free, prior, informed consent before mining operation commences within a community, including indigenous communities. The right to give free, prior, informed consent talks about the rights of indigenous people to self-determination. This right is recognised by international law. It has the potential to ensure that the rights of mining communities are protected and not violated.⁵⁷³

The consultative process requires a good faith standard. The consultation takes into account the fact that mining leads to a grave and considerable invasion of

the date of acceptance, notify the applicant in writing... to notify in writing and consult with the land owner and land occupier and any other affected party and submit the results the consultation within 30 days from the date of notice." Section 22 (4)(b) of the MPRDA indicates that "if a Regional Manager accepts the application, Regional Manger must within 14 days from the date of acceptance notify the applicant in writing to notify and consult with interested and affected parties within 180 days from the date of the notice.

⁵⁶⁹ Mostert H *Mineral Law Principles and Policies* 2012 Juta 133

⁵⁷⁰ Mostert H *Mineral Law Principles and Policies* 2012 Juta 134

⁵⁷¹ Guideline for Consultation with Communities and Interested and Affected Parties As Required in terms of section 10 (1) (b), 16 (4) (b), 22 (4) (b), 27 (5) (b) and Section 39 of the Mineral and Petroleum Resources Development Act (ACT 28 OF 2002) 3.

⁵⁷² Odumosu-Ayanu T *AJIL Unbound* 109 (2015-2016) 220.

⁵⁷³ Odumosu-Ayanu T *AJIL Unbound* 109 (2015-2016) 220.

the use and enjoyment of the land on which the prospecting or mining operations are about to begin.⁵⁷⁴ The different notices and consultation requirements are indicative of the serious concern for the rights of the occupiers in the process of granting the rights. Humby indicates that in the case of Bengwenyama for the Constitutional Court's (hereinafter referred to as the CC) affirmation of a good faith standard for public participation was important.⁵⁷⁵ Unfortunately, mining companies view the consultative process as a mere formality to be removed as soon as possible so that they can begin to exploit the mineral resources lying beneath the soil.

Good-faith consultation should require that mining applicants invest more time and money in the public participation process. Notable is that the process used in the Bengwenyama⁵⁷⁶ case was grossly insufficient.⁵⁷⁷ This failure to properly consult with mining communities is all too common. The SAHRC has identified some of the challenges faced by mining communities during the consultative process.⁵⁷⁸ The Commission found that there are inconsistencies with the consultative processes performed by mining companies in various communities. The commission found that in some instances, the mining companies disregarded the duty to secure meaningful participation. The consultative processes were described as lacking legitimate representation, as not being sufficiently inclusive, did not accommodate the community, the information provided was not sufficient and key stakeholders were not included.⁵⁷⁹

⁵⁷⁴ Humby T *PER/PEJL* 2012 177.

⁵⁷⁵ Humby T *PER/PEJL* 2012 177.

⁵⁷⁶ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC).

⁵⁷⁷ Humby T *PER/PEJL* 2012 177.

⁵⁷⁸ SAHRC National Hearing on Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa. 13-14 September 26 and 28 September, 3 November 2016 59.

⁵⁷⁹ National Hearing on Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa. 13-14 September 26 and 28 September, 3 November 2016 59.

The MPRDA does not have guidelines on the consultation process that mining companies must comply with before embarking on mining operations. DMR provides guidelines for the consultative processes that mining companies must comply with when conducting communities and interested or affected persons.

Mining and mining operations harm land, which is sometimes irreversible. The harm includes environmental harm and also affects the rights that landowners have to that property and how they relate and interact with such land. Therefore, the consultation process has to be rigorous to ensure that all stakeholders are aware of the plans of the mining companies and how they will benefit from the mining operations on their land. Taking into account the seriousness of mining operations, the DMR established guidelines for the consultation that mining companies who have an interest in mining or prospecting operations must comply with. It indicates that the rationale of the consultative process is to provide parties with information about the proposed prospecting or mining projects so that they can make informed decisions and to see whether some accommodation can be made if possible in so far as it relates to their rights to use and enjoy the affected properties is concerned. Consultations under the MPRDA require that engagements relating to the application for prospecting or mining rights must be in good faith to reach accommodations that both parties find satisfactory.⁵⁸⁰

The post-1994 mining sector and mining law, as indicated by the MPRDA and the Mining Charter, promote the participation of communities and parties affected by mining operations.⁵⁸¹ The SAHRC has required that mining companies must provide proof of the following to prove that there was a consultative process: i. Proof of notification; ii. Record of attendance; iii. List of issues raised by the parties ; iv. How such issues were addressed?; v. A list of affected and interested parties, vi. Identification of landowners; vii. Existence of a land claim on the

⁵⁸⁰ Guideline for Consultation with Communities and Interested and Affected Parties As Required in terms of section 10 (1) (b), 16 (4) (b), 22 (4) (b), 27 (5) (b) and Section 39 of the Mineral and Petroleum Resources Development Act (ACT 28 OF 2002) 6.

⁵⁸¹ Huizenga D *The Extractive Industries and Society* (6) 2019 711.

property to be affected by mining operations; viii. Description of information provided by interested and affected parties, and x. Existing status of the cultural socioeconomic and biophysical environment and anticipated impact.⁵⁸²

According to the SAHRC, one of the issues in relation to the consultative process is that sometimes stakeholders are not involved in the consultation process. One of these challenges was that municipalities are not adequately consulted, and sometimes companies have predetermined SLP before consulting the interested and affected parties and getting information on the needs of the communities.⁵⁸³ The SAHRC observes that although sometimes municipalities incorporate these SLPs into their Integrated Development Plans (hereinafter referred to as IDP), they do not always play an active role in ensuring that mining companies comply with their duty in terms of the MPRDA and that mining companies must consult with them. Sometimes communities are not even aware of the existence of SLPs.⁵⁸⁴ Another challenge identified by the SAHRC was that sometimes mining companies only consult a small portion of the community or traditional authority.⁵⁸⁵ This leads to the identification of projects that might not be in line with the needs and development goals of the community. The exclusion of a certain portion of the community caused discontent and discord within the mining community.

Murombo and Valentine, citing the case of *Petro Props (Pty) Ltd v Barlow* 2006 (5) SA 160 (W), had the following to say about the fragile nature of consultation

⁵⁸² SAHRC National Hearing on Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa. 13-14 September 26 and 28 September, 3 November 2016 61.

⁵⁸³ SAHRC National Hearing on Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa. 13-14 September 26 and 28 September, 3 November 2016 62.

⁵⁸⁴ SAHRC National Hearing on Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa. 13-14 September 26 and 28 September, 3 November 2016 62.

⁵⁸⁵ SAHRC National Hearing on Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa. 13-14 September 26 and 28 September, 3 November 2016 62.

and attempts to deny communities and interested parties exercise of their right to consultation:

Some legal battles bearing the brand of SLAPP (Strategic Litigation Against Public Participation) suits have already gone before South African courts. In these cases, some developers are ostensibly testing the boundaries of acceptable public participation and asking the judiciary to balance the need for environmental protection, the right to freedom of expression and public participation on the one hand, and their rights to carry on business, use their property or their reputation on the other. The court of public opinion, on the other hand, is asking whether this litigation is not simply corporate hard ball to suppress meaningful, public interrogation of new development activities and their effects on fragile ecosystems, and deter future opposition to similar projects.⁵⁸⁶

The contentious relationship between mining companies and mining communities was more evident in the long-running R14.25 million defamation before the Constitutional Court by Australian mining interests against six South African environmentalists and social activists. In this case, *Mineral Sands Resources Propriety Limited and Another v Christine Reddell and Others*,⁵⁸⁷ the Constitutional Court had to deal with an appeal by the plaintiffs⁵⁸⁸ against the

⁵⁸⁶ Murombo T & Valentine H *South African Journal on Human Rights*, 2011 27:1 85.

⁵⁸⁷ *Mineral Sands Resources Propriety Limited and Another v Christine Reddell and Others* CCT66/2.

369. The plaintiffs were mining company Mineral Commodities Ltd (MRC), its South African subsidiary Mineral Sands Resources, previous MRC executive chairperson Mark Caruso and MRC's black empowerment partner Zamble Qunya – are suing six South African defendants: environmental lawyers Christine Reddell, Tracey Davies and Cormac Cullinan, social worker John GI Clarke, and community activists Mzamo Dlamini of the Wild Coast and Davine Cloete from Lutzville on the West Coast.

finding by Western Cape Deputy Judge President Patricia Goliath in 2021 who ruled that the Australian mining interest defamation case constituted a so-called SLAPP (Strategic Litigation Against Public Participation) “initiated against the defendants because they have spoken out and had assumed a specific position in respect of the plaintiffs’ mining operations.” SAPP is described as “meritless or exaggerated lawsuits intended to intimidate civil society advocates, human rights defenders, journalists, academics and individuals as well as organisations acting in the public interest”.⁵⁸⁹The claims in this case were based on the Activists’ critique of the Mining Companies’ operations and activities in the Tormin and Xolobeni Minerals Sands Projects, on various mediums and platforms.

Though the main issues before the Constitutional court was “whether the common law doctrine of abuse of process currently provides for a SLAPP suit defence and, if not, whether the law ought to be developed – fell within the extended and constitutional jurisdiction of the Court in terms of section 167(3)(b) of the Constitution” and the Constitutional Court upheld the appeal and set aside the order of the High Court in favour of mining companies, the case is used in this study to demonstrate the challenges and controversies in the extractive industry.⁵⁹⁰

⁵⁸⁹ *Mineral Sands Resources Propriety Limited and Another v Christine Reddell and Others*, para 43 Masjiedt said: “A common feature of SLAPP suits is that the primary aim of the litigation is not to enforce a legitimate right. The objective is to silence or fluster the opponent, tie them up with paperwork or bankrupt them with legal costs. Therefore, the hallmark of a SLAPP suit is that it often (but not necessarily always) lacks merit, and that it is brought with the goals of obtaining an economic or other advantage over a party by increasing the cost of litigation to the point that the party’s case will be weakened or abandoned. They are primarily legal proceedings that are intended to silence critics by burdening them with the cost of litigation in the hope that their criticism or opposition will be abandoned or weakened. In a typical SLAPP suit, the plaintiff does not necessarily expect to win its case, but will have accomplished its objective if the defendant yields to the intimidation, mounting legal costs or exhaustion and abandons its defence and also, importantly, its criticism of and opposition to the project or development.”.

⁵⁹⁰ The “Constitutional Court held that the SLAPP suit defence forms part of South African law and the defence requires more than what the Activists pleaded. The Court also held that the Mining Companies’ exceptions held good, as the

It is submitted that it is concerning that SLAPP suits may become favoured approach to silence mining communities and environmental protection interest groups.⁵⁹¹ As convincingly stated by Murombo and Valentine, consultation and participation is an essential tool to ensure that decisions that may significantly affect the environment are scrutinised and made from an informed point of view that is “recognised internationally as a core component of sustainable development.”⁵⁹²

When mineral resources are discovered in an area, the quality of life of the community is generally expected to be affected by the mining operation in the area.⁵⁹³ However, the opposite seems to be the case. Mining communities are synonymous with poverty, marginalization, and exclusion from the formal economy.⁵⁹⁴ Many mining and mining-affected communities are plagued by several issues. Makua and Odeku state that mining can have the impact of devastating local ecosystems and destroying the culture and livelihood of mining communities.⁵⁹⁵ A growing body of research indicates that mining investments have minimal impact on surrounding communities, often affecting livelihoods and exacerbating poverty⁵⁹⁶ and inequality.⁵⁹⁷ Large-scale mining operations have the ability to change the communities within which they operate.⁵⁹⁸

Activists’ special pleas lacked the necessary averments to make out the SLAPP suit defence.”

⁵⁹¹ Murombo T and Heinrich V *South African Journal on Human Rights* 2011 27:1, 82-106.

⁵⁹² Murombo T and Heinrich V *South African Journal on Human Rights* 2011 27:1 86.

⁵⁹³ Mtero F *Resources Policy* 53 (2017) 190.

⁵⁹⁴ Heyns A *Law and Development Journal* 2019 3.

⁵⁹⁵ Makua M and Odeku K *Environmental Economics* 2017 14.

⁵⁹⁶ Striking the balance Volume I World Bank Group and Extractive Industries The Final Report of Extractive Industries Review December 2003 3.

Defines poverty as a multi-dimensional phenomenon, encompassing inability to satisfy basic needs, lack of control over resources, lack of education and skills, poor health, malnutrition, lack of shelter, poor access to water and sanitation, vulnerability to shocks, violence and crime, lack of political freedom and voice.

⁵⁹⁷ Mtero F *Resources Policy* 53 (2017) 190

⁵⁹⁸ Farrell L et al *Resource Policy* 37 2012 194.

Farrell *et al.* identified several issues that seem to be a common thread in mining communities.⁵⁹⁹ The authors mentioned above conducted a study on a specific mining community, which is located in Mogalakwena, in Limpopo Province South Africa. There is a platinum mine operating in the area, under the RPM Mogalakwena section, which is owned by Anglo Platinum.⁶⁰⁰ In 2009 the mine gained profits to the tune of four billion South African Rand, while the community affected by mining operations has a socioeconomic context of poverty and historical exclusions, the remnants of the segregation perpetuated during apartheid South Africa are still glaringly obvious in the area.⁶⁰¹ The area is characterized by a lack of social facilities, a high unemployment rate, and a lack of infrastructure development.⁶⁰² The major mining operations in the area began in 1993 when the mine entered into a lease agreement with the community that was signed by the traditional leaders of the community.⁶⁰³ The terms and conditions of the lease agreement included but were not limited to the provision that, in exchange for the right to use the surface portion covered by the lease for mining operations, the mine will pay an initial lump sum amount, establish a trust for community development with an amount to the tune of ninety-five million Rands and that the workforce must comprise 30% of the local population.⁶⁰⁴

It was found that none of these promises have been complied with, despite the existence of legal frameworks that require mining companies to contribute to the socio-economic development of the areas in which they operate.⁶⁰⁵ There were allegations that if Anglo Platinum paid the money into the trust account, then these funds were used to enrich traditional leadership, as the community did not enjoy the benefits of the money, leading to tensions between the community and

⁵⁹⁹ Farrell L et al *Resource Policy* 37 2012 194.

⁶⁰⁰ Farrell L et al *Resource Policy* 37 2012 196.

⁶⁰¹ Farrell L et al *Resource Policy* 37 2012 196.

⁶⁰² Farrell L et al *Resource Policy* 37 2012 196.

⁶⁰³ Farrell L et al *Resource Policy* 37 2012 197.

⁶⁰⁴ Farrell L et al *Resource Policy* 37 2012 197.

⁶⁰⁵ Farrell L et al *Resource Policy* 37 2012 197.

tribal leaders.⁶⁰⁶ The 30% employment rate was also not achieved, this was blamed on the low education levels in the Mogalakwena area.⁶⁰⁷

An investigation by the SAHRC found that one of the challenges related to mining was that mining operations often begin before formal land use agreements are concluded. This has several disadvantages for the mining communities. The mining community loses bargaining power amongst others. In other instances, the mining communities withheld payment for surface rentals, while others paid the communities pending approvals.⁶⁰⁸ Therefore, there is no consistency, and this disadvantages mining communities. Another challenge in mining communities is the issue of housing. SAHRC indicated that mining operations attract an increased number of people to mining communities and mining towns, specifically mine workers and those seeking employment opportunities in mines.⁶⁰⁹ The provision of inadequate housing or no housing in certain instances leads to the development of informal settlements. As a direct result of this many miners live in shacks with no lighting or electricity, no refuse collection, no water, and no adequate sanitation.⁶¹⁰

Challenges affecting mining communities, especially customary communities, were identified in the case of *Baleni and Others v Minister of Mineral Resources and Others 2019 (2) SA 453 (GP)* whereby the court indicated that customary communities such as the applicant tend to suffer disproportionately from the impacts of mining activities as they are directly affected by environmental

⁶⁰⁶ Farrell L et al *Resource Policy* 37 2012 197.

⁶⁰⁷ Farrell L et al *Resource Policy* 37 2012 197.

⁶⁰⁸ SAHRC National Hearing on Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa. 13-14 September, 26 and 28 September, 3 November 2016 14.

⁶⁰⁹ SAHRC National Hearing on Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa. 13-14 September, 26 and 28 September 3 November 2016 31.

⁶¹⁰ SAHRC National Hearing on Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa. 13-14 September, 26 and 28 3 November 2016 31.

pollution, air pollution, airborne diseases, loss of their farmland and grazing land, forced displacement and the loss of community amongst other things.⁶¹¹ What happened in the case of Baleni is that the court was confronted with a matter relating to the rights of interested and affected parties as contemplated in the MPRDA. The issues related to the rights of mining community located in an area with vast mineral resources, applicant, which was the community, held informal rights to the land in question under the Interim Protection of Informal Land Rights Act 31 of 1996. The Applicants approached the Court seeking amongst others, an order declaring the community as “interested and affected parties” in terms of the Act and therefore, the Applicants being entitled to receive of a copy of the Application as envisaged in sections 10(1) and 22(4) of the Act. It also sought an order prohibiting the South African Government, from awarding Respondents mining rights, until such time that the application has been furnished to the applicants and the required consultation, consultation and objection as provided in section 10(1) and 22(4) of the Act. Makhubele J held that the applicants held rights in respect to the land and they were entitled to consultation before the mineral rights were awarded to the mining company.

The issue of challenges faced by mining communities was addressed in the case of *Bengwenyama*.⁶¹² A notable challenge, for example, was that the DMR and the Regional Manager had failed to grant the community and the interested and affected parties’ adequate notice of Genorah’s application for a prospecting right, as required in terms of s 10 of the MPRDA. Another issues were that Genorah had failed to consult with the community in accordance with the provisions of s 16(4) of the MPRDA

⁶¹¹ *Baleni and Other v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP).

⁶¹² *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 133 (CC).

Several procedural and substantive issues were raised in this case, which has established an important precedent when it comes to the consultative process that mining companies must undertake before commencing mining operations. The case notes the historical context within which the mining sector in South Africa is set. Access to natural resources of the country, such as land, water, and mineral resources, was subjected to the racial politics of the country. This discrimination took place in various forms, including but not limited to corporate ownership, discriminatory practices in labour, and unequal distribution of the costs of mining pollution.⁶¹³

It is apposite to note herein also that the relationship between mine communities and mining companies has always been a tumultuous one.⁶¹⁴ The Marikana⁶¹⁵ incident is the most recent and one of the deadliest mining-related conflicts between the working force and the mining companies after 1994. The Marikana Massacre was an incident whereby thirty-four miners were killed by the South African Police Services on the 16th of August 2012. The cause of the dispute was the fact that the miners were unhappy with their socio-economic development and their salaries. This conflict also brought to light the challenges that affect mining communities and the deplorable conditions of mining and communities affected by mining.

The discussion of this relations is better contextualised through the frame of stakeholder theory. There is a link between ST and CSR. ST is based on the view that the intrinsic nature of a business lies in building relationships and creating value for all its stakeholders.⁶¹⁶ Stakeholders include employees, customers,

⁶¹³ T Humbly PER/PELJ 2012 (15) 167.

⁶¹⁴ Matebesi S and Marais L *Resource Policy* 372.

⁶¹⁵ The Marikana Massacre 16 August 2012
<https://www.sahistory.org.za/article/marikana-massacre-16-august-2012>
Accessed on 12 January 2022.

⁶¹⁶ Freeman RE and S Dmytryev S *Emerging Issues in Management* 2017 10.

communities, suppliers, and financiers.⁶¹⁷ It includes all people who have a material interest in the business or mining operation that takes place in the area.⁶¹⁸ This theory places all stakeholders as important in the success and running of a business, therefore companies must strive to find a way to balance the interests of all these stakeholders. The mining industry deals with issues related to aggregated social costs and benefits and also the distribution of these costs and benefits, therefore a balance must be found in the distribution of these costs and benefits.⁶¹⁹

4.3 SUMMARY

From the discussions in this Chapter is that the MPRDA is the principal piece of legislation that regulates the exploration and exploitation of mineral and petroleum resources in South Africa. Key provisions include the stipulations that mining operations must be conducted in a socially and environmentally responsible manner and that mining companies must contribute towards the socio-economic development of the communities in which they operate. However, the legislation, in particular the MPRDA, has not been without criticism. Amongst others, the MPRDA has been criticized for its lack of clarity and consistency, particularly with regards to the granting of mining rights and the role of the Minister of Mineral Resources. The ambiguity in the legislation can lead to confusion, delay, and disputes among stakeholders. Further, MPRDA is viewed as imposing numerous administrative requirements on mining companies, which can be time-consuming and expensive. This can create significant barriers to entry for small and emerging mining companies, which may not have the resources to comply with these requirements. There has also been criticism that the MPRDA lacks adequate protection for local communities and the environment. Mining activities can have significant negative impacts on

⁶¹⁷ Freeman RE and S Dmytryev *S Emerging Issues in Management* 2017 10.

⁶¹⁸ Gragg W and Greenbaum *A Journal of Business Ethics* 2002 320.

⁶¹⁹ Gragg W and Greenbaum *A Journal of Business Ethics* 2002 320.

communities and the environment, including displacement, pollution, and degradation of natural resources. Notable in the context of this thesis is that the MPRDA lacks transparency and accountability, particularly with regards to the granting of mining rights. The concern is that application the process of granting mining rights is opaque and subject to corruption, and that mining companies may be able to obtain rights through political connections rather than through a transparent and fair process.

It is submitted that the MPRDA may not be an effective tool for regulating the mining industry in South Africa, and that there may be a need for reforms to ensure that mining activities are conducted in a socially and environmentally responsible manner. However, overall the MPRDA and related legislation and regulations has introduced an improved environment in the mining industry, that has as its central yardstick the transformation of the industry and dismantling of past discriminatory practises.

CHAPTER 5
IMPLEMENTATION AND ENFORCEMENT OF CSR IN THE MINING
SECTOR IN AUSTRALIA AND BOTSWANA: A COMPARATIVE
INVESTIGATION

5.1. INTRODUCTION.

Chapter 5 deals with the implementation and enforcement of CSR in the mining section from a comparative perspective. The Chapter answers the following question: *What lessons can be learned from international law and other jurisdictions with regard to mining communities and CSR?* The comparative approach is employed specifically to help identify similarities and differences in CSR practices and strategies in different contexts and under different regulatory framework. Thus, this chapter aims to explore the range of particular CSR practises, principles and the modes of implementation, enforcement, and monitoring in selected countries. It is submitted such an enquiry will help examine the viability and success of such measures, including the extra-legal parameters of extractive companies to adhere to. Two countries have been identified for this comparative analysis with South Africa, they are Australia and Botswana. The experiences of these countries could contribute to ongoing discussions on how CSR can be applied effectively and efficiently in South Africa, in a manner that protects the interest of mining communities and the socio-economic development of these areas.

Several countries in the world also rely on the mining industry to grow their economy, and some of the challenges faced by both mining companies and mining communities in these areas might be similar to the challenges faced by mining companies in South Africa. A comparative analysis between these different countries and South Africa will be conducted. It will be concerned with a comparative analysis between South Africa's position on CSR and the experience

of other countries on how such countries implement and enforce CSR in the mining sector. The lessons to be learned will be highlighted.

The Constitution of the Republic of South Africa, 1996, provides that when interpreting the Bill of Rights, a court, forum, or tribunal must consider international law and foreign law.⁶²⁰ International law is a body of law created in one country, by multiple countries, used collectively by many countries at an international level, to regulate supranational or international matters.⁶²¹ International law is a normative body of rules and principles which are binding on States in their relationships with each other.⁶²² The Constitution further states that when interpreting any legislation, every court must prefer any reasonable interpretation of legislation that is consistent with international law⁶²³ and that customary international law is considered the law of the Republic unless it is inconsistent with the Constitution.⁶²⁴

5.2. COMPARATIVE ANALYSIS

5.2.1. General Background

First it needs to be clarified that the Commonwealth of Australia constitutionally consists of six federated states viz., New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia) and ten federal territories viz., the Australian Capital Territory, the Jervis Bay Territory, the Northern Territory) Ashmore and Cartier Islands, the Australian Antarctic Territory,[a] Christmas Island, the Cocos (Keeling) Islands, the Coral Sea Islands, Heard Island and McDonald Islands, and Norfolk Island). This thesis deals primarily with

⁶²⁰ The Constitution of the Republic of South Africa, 1996 section 39 (1) (a)-(b).

⁶²¹ Madlingozi T et al Introduction to Law and Legal Skills in South Africa 225.

⁶²² Dugard et al Dugard's International Law: A South African Perspective 2018 1.

⁶²³ Section 233 of the Constitution of the Republic of South Africa, 1996.

⁶²⁴ Section 232 of the Constitution of the Republic of South Africa, 1996.

federal legislation with western Australia mining legislation considered to give further context to the study.

The Australia's legal system, which according to the investigation done is characterized amongst others by a strong emphasis on the rule of law and a commitment to protecting individual rights and freedoms is based on the common law system inherited from the United Kingdom, with some influences from the civil law system. The legal system, based on the Australian Constitution of 1901, operates at both the federal and state/territory levels.⁶²⁵ The court system in Australia is divided into two main categories: federal courts and state/territory courts.⁶²⁶ The federal courts include the High Court of Australia, which is the highest court in the country and has jurisdiction over constitutional matters, as well as the Federal Court of Australia and the Family Court of Australia.⁶²⁷ Like South Africa, Australia also has a system of tribunals making provision for specialized bodies that handle disputes in specific areas, such as consumer affairs, etcetera.

Evidently, the Australian legal system shares a few similar traits with the South African legal system, for example the sources of Australian law comprises of both written, being legislation and unwritten law, which include case law. The major difference is that is that Australia is a federal government. The Constitution of Australia gives certain powers to the federal government or what is referred to as the commonwealth government. The Australian Constitution binds the commonwealth government and the parliaments of each State.

⁶²⁵ See Blackshield, T., & Williams, G. (2014). *Australian constitutional law and theory: Commentary and materials*. Federation Press. (providing an in-depth analysis of the Australian Constitution and the principles that underpin the legal system. Relevant provisions include separation of powers, federalism, and the protection of rights and freedoms).

⁶²⁶ See Giddings, J., & Lester, T. (2017). *An introduction to the Australian legal system*. LexisNexis Butterworths (providing, amongst others, an overview of the Australian legal system, including its history, structure, and key institutions, sources of law, the court system, and the role of lawyers and judges).

⁶²⁷ State and territory courts include supreme courts, district courts, and magistrates' courts, among others.

Despite Australia being a federal State, it shares some similarities with South Africa, one of these similarities are contained in the Commonwealth of Australia Constitution (hereinafter referred to as the Australian Constitution) which states that the Australian Constitution and all laws made by the parliament of the commonwealth shall be binding on the courts, judges and the people of every state and of every part of the commonwealth. Constitutional supremacy is one of the key principles in both the countries. The commonwealth parliament has legislative powers.

5.2.2. Institutional and Normative Framework: Australian Mining Law

5.2.2.1. Institutional Framework

Exploration of natural resources in Australia and protection of local communities and land owners has been a subject of many scholarly writing,⁶²⁸ and in this thesis focus will be on the normative framework for CSR in Australia as this will inform appropriately the comparative analysis of legal frameworks in Australia and South Africa.⁶²⁹ The Commonwealth of Australia presents a complex legal framework for environmental and mining regulation, which involves federal, state, and local

⁶²⁸ See, for example G J Heath, "A Commentary on Security of Title", [1990] AMPLA Yearbook 322; "Reform of the Registration Provisions of the Mining Act 1978(WA)", (1992) 11(3) AMPLA Bull 115; K Domansky, "Dealings and Registration", (2001) 20 AMPLJ 36; M Gerus & D Allison, "Intention to Create Legal Relations – Memorandum of Understanding, Mining Act, section 119", (2002) 21 AMPLJ 140; R Bartlett, "Mining Act Amendment Bill 2004(WA)", (2004) 23(3) ARELJ 234; R S Granang, "When is a Mining Royalty a Caveatable Interest in Western Australia", (1994) 13(1) AMPLA Bull 17; M Gerus & A Ellis, "Equitable Interests in Mining Tenements – Resulting and Constructive Trusts – Rebuttable Presumption – s.119 Mining Act 1978 (WA) and s.34 Property Law Act 1969 (WA)", (2000) 19 AMPLJ 115; T Warman, "Transfers of, and Dealings in, Titles Under the Petroleum (Submerged Lands) Act 1967 (Cth) Within Western Australian Adjacent Area", (2000) 19 AMPLJ 54.

⁶²⁹ See Ncube C. The liability of mining companies for environmental harm caused by their operations: A comparative analysis of legal frameworks in Australia and South Africa. 2016. *Journal of Energy & Natural Resources Law* (comparing legal frameworks in Australia and South Africa regarding the liability of mining companies for environmental harm caused by their operations).

laws and policies. The Mining Act 1971 (Cth) is the federal law that provides a framework for the regulation of mining activities and the management of mineral resources. Another important legislation is the Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act) alongside the various state-based environmental and mining regulations. However, it is important to highlight that each state and territory in Australia has its own mining laws and regulations that apply in addition to the federal law. Mining laws can vary between Australian states and territories, and there are other relevant legislation and regulations that apply to mining activities, such as environmental and workplace health and safety laws.⁶³⁰ But for the purposes of this thesis incidental and related legislation will not be addressed in detail.

5.2.2.2. Legislative Framework : Federal Laws

5.2.2.2.1. Australian Mining Act of 1971

The ongoing importance of the Australian Mining Act 1971 (Cth) in regulating mining activities in Australia, and the role of the courts in interpreting and applying

⁶³⁰ For instance in Southern Australia the Mining Act 1971 (SA) is the primary legislation for regulating mining activities in South Australia. The Act provides for the granting of mining leases and licenses, and sets out requirements for environmental protection and rehabilitation. It also includes provisions for the compensation of landowners and native title holders. In Western Australia the Environmental Protection Act 1986 (WA) is the main environmental legislation that establishes a framework for the assessment and management of the environmental impacts of activities, including mining. It also provides for the protection of air and water quality, and the conservation of biodiversity. The Environmental Protection Act Mining Act 1978 (WA) is the primary legislation for regulating mining activities in Western Australia. The Act provides for the granting of mining tenements, including prospecting licenses, exploration licenses, and mining leases. It also sets out requirements for environmental protection and rehabilitation, safety, and compensation for landowners. In Victoria, the Mineral Resources (Sustainable Development) Act 1990 (Vic) is the main legislation for regulating mining activities in Victoria. The Act establishes a framework for the granting of mining licenses and sets out requirements for environmental protection and rehabilitation, safety, and compensation for landowners.

its provisions has seen some of the interesting cases in court, which will be referred as certain key provisions of the Act are discussed hereunder.⁶³¹

Section 15, for instance, sets out the eligibility requirements for obtaining a mining lease. It specifies that the applicant must be a person, company or body corporate, and must have sufficient financial resources to carry out the mining activities. It is argued that the requirement for financial sustainability is important given financial implications that can be borne as a results of the mining operation. Consider, for example, the need to rehabilitate the mine which will need adequate financial reserves.

Section 23 sets out the requirements for obtaining an exploration license. It specifies that the applicant must demonstrate a reasonable prospect of discovering minerals, oil, gas or coal in the area covered by the license. In section 81 provision is made is made for the payment of royalties to the Crown on minerals, oil, gas or coal mined in Australia. The sections specifies the rates of royalty payable and the method of calculation. Other notable provisions are contained in section 73A, which sets out the environmental protection requirements for mining activities. According to section 73A, the holder of a

⁶³¹ For more on the Australian Mining Act 1971 (Cth), see Ratnapal S. "The Australian Mining Act 1971: A Case Study of the Regulation of Natural Resources" (1994) (providing an overview of the Mining Act and its regulatory framework, and examines the legal and policy issues surrounding the Act's implementation); and Farrier D "Legal Regulation of Mining in Australia: The Impact of the Mining Act 1971" 2016 (providing an overview of the Mining Act and its regulatory framework, and examines the legal and policy issues surrounding the Act's implementation, with a particular focus on recent developments and reforms); Strelein L "Negotiating Native Title in the Mining Industry: The Impact of the Australian Mining Act 1971" by Lisa Strelein. 2006 (analysing the native title provisions in the Mining Act and their impact on the negotiation and resolution of native title claims in the mining industry) Lin J. "The Environmental Protection Regime for Mining in Australia: An Analysis of the Australian Mining Act 1971 (Cth)" 2011 (examining the environmental protection provisions in the Mining Act and their effectiveness in protecting the environment from the impacts of mining activities); and Magallanes CI "Royalties and Indigenous Participation in Mining: An Analysis of the Australian Mining Act 1971 (Cth)" 2014 (analysing the royalty and native title provisions in the Mining Act and their impact on Indigenous participation and benefits in the mining industry).

mining lease or exploration license has to comply with all relevant environmental protection laws and regulations.

Important to note because it involves native communities is section 29 of the Act, which sets out the requirements for negotiating with native title holders. It requires the holder of a mining lease or exploration license to negotiate in good faith with native title holders and obtain their consent before carrying out any mining activities on land subject to native title. In *Yanner v Eaton*,⁶³² the case involved a dispute between an Indigenous landowner and a mining company over access to land for mining purposes, the High Court of Australia held that native title rights - the right to hunt animals - could not be extinguished by a mining lease unless the lease expressly provided for it.⁶³³ Section 223 of the Native Title Act provides (in part) that "The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters." Important emphasise from the court noted with approval the Supreme Court of Queensland holding that:

Native title rights and interests must be understood as what has been called "a perception of socially constituted fact" as well as "comprising various assortments of artificially defined jural right". And an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land. Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent). That is, saying to a group of Aboriginal peoples, "You may not hunt or fish without a permit", does not sever their connection with the land

⁶³² *Yanner v Eaton* [1999] HCA 53 - 201 CLR 351.

⁶³³ The *Yanner v Eaton* court, at para 159, upheld the majority of the Court of Appeal of Queensland as correct and the appeal dismissed with costs.

concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing.⁶³⁴

This decision is important as far as it clarified the legal rights of Indigenous landowners and the obligations of mining companies under the Mining Act. It is argued that the court impressed on the need for social sustainability which could not be extinguished by mining operations, even under license.

Australian courts have impressed on the duty of mining companies to consult native mining communities. A case in point is *Ngaliwurru v Minister for Resources*⁶³⁵, which involved a challenge to a mining lease granted by the Northern Territory government, on the grounds that it failed to adequately consider the impact of the mine on Indigenous cultural heritage. In this case, the Ngaliwurru and Nungali peoples, represented by the Central Land Council, challenged a decision made by the Minister for Resources to grant exploration licenses over areas of land in the Northern Territory. The Ngaliwurru and Nungali peoples argued that the Minister failed to properly consider the impact of the exploration activities on their native title rights and interests. In brief, that they were not adequately consulted in the process to adjudicate and award the license. Indeed, the Federal Court found that the Minister had not properly considered the impact of the exploration activities on the native title rights and interests of the Ngaliwurru and Nungali peoples, as required by the Native Title Act 1993 (Cth). Consequently, the Court set aside the decision to grant the exploration licenses and ordered that the Minister reconsider the matter in accordance with the Native Title Act and the Court's findings. A take away from this case is that proper consideration of native title rights and interests and the public interest in decision-making processes relating to the grant of exploration licenses over areas of land subject to native title cannot be ignored. It is submitted that this case provides a good reference point for the complexity in legal and

⁶³⁴ *Yanner v Eaton* [1999] HCA 53 - 201 CLR 351, para 38.

⁶³⁵ *Ngaliwurru v Minister for Resources* (2004) FCA 97.

ethical issues involved in mining and corporate social responsibility in Australia, particularly in relation to Indigenous rights, cultural heritage protection, and environmental impact. Evident from the myriad of cases in Australia relating to mining operations is that there exist a robust legal frameworks and effective stakeholder engagement processes to ensure that mining activities are conducted in a socially and environmentally responsible manner. For the purposes of buttressing the importance of this decision for mining communities in Australia, the following ruling statement by the Court is worth mentioning:

Having regard to the foregoing reasons, I am satisfied that the decision of the Minister should be set aside because the Minister failed to properly consider the impact of the exploration activities on the native title rights and interests of the Ngaliwurru and Nungali peoples, as required by s 223 of the Native Title Act. Further, the Minister failed to properly consider the public interest in the grant of the exploration licences. For these reasons, I will make orders in accordance with the submissions made by the parties.⁶³⁶

Section 39 - This section provides for the rehabilitation of land disturbed by mining activities. It requires the holder of a mining lease or exploration license to develop and implement a rehabilitation plan for the land once mining activities have ceased. Specifically, section 39 provides as follows:

- (1) Where a person suffers damage to any estate or interest in land as a result of mining operations carried out on that land or on any other land, that person is entitled to compensation.
- (2) Compensation is payable by the holder of the mining tenement under which the operations were carried out.
- (3) Compensation may be determined by agreement between the parties or failing agreement, by a court.

⁶³⁶ *Ngaliwurru v Minister for Resources* (2004) FCA 97, at para 84.

(4) Compensation may include both monetary compensation and the carrying out of remedial work to mitigate or repair the damage caused.

(5) The right to compensation is not affected by any other liability in relation to the mining operations, whether under the law of torts, contract or otherwise.

Section 29 demonstrates the importance of ensuring that compensation is available to those who suffer damage as a result of mining operations, and that mining companies are held responsible for the damage they cause. It is argued that this is a critical component of CSR. *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd*,⁶³⁷ and *Nelson v West Coast Council*.⁶³⁸ provides a clear demonstration of how section has been enforced in the court. In *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd* a compensation was made under under section 29 of the Mining Act 1978 (WA) (which is similar to section 29 of the Australian Mining Act 1971 (Cth)) for damage caused to a pipeline as a result of mining operations. The court found that compensation was payable by the holder of the mining tenement. In particular, the court noted that the purpose of section 29 is to provide a statutory right to compensation for those who suffer damage as a result of mining operations, and that this right is not affected by any other rights or liabilities the claimant may have. Important to note is that the court observe dthat section 29 imposed strict liability, which is liability no dependent of fault. The relevant paragraph of the decision reads: "Section 29 of the Mining Act establishes a statutory liability in the holder of a mining tenement to pay compensation for damage to any estate or interest in land arising from mining operations. The liability is strict and does not depend on fault. The purpose of the section is to ensure that those who suffer damage as a result of mining operations are compensated."⁶³⁹

⁶³⁷ *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd* [2015] WASCA 152

⁶³⁸ *Nelson v West Coast Council* [2018] TASSC 38.

⁶³⁹ *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd* at para 14. The Court further held, at para 67, that "The holder of the mining tenement is not the operator of the mining operation for the purposes of s 29(1). The holder of the mining tenement is liable to pay compensation for any damage caused by mining

The issue of liability of mining companies for damages caused was later confirmed in *Nelson v West Coast Council*. The Court particularly stated that “Section 29 of the Mining Act provides a statutory right to compensation for damage suffered to any estate or interest in land as a result of mining operations carried out on the land or on any other land. The right to compensation is not affected by any other liability in relation to the mining operations, whether under the law of torts, contract or otherwise.”⁶⁴⁰ *Nelson v West Coast Council* case concerned a claim for compensation under section 29 for damage caused to a house as a result of mining operations. The facts are that the plaintiff owned a house in Queenstown, Tasmania, which was damaged by underground mining operations carried out by a mining company. The mining company held a mining lease under the Australian Mining Act 1971 (Cth) which allowed it to carry out mining operations on a nearby property. The alleged damage, according to the plaintiff, included cracks in the walls and foundation, damage to the roof and floors, and damage to the plumbing and electrical systems. The court found that the claimant was entitled to compensation, and ordered the mining company to pay the cost of repairing the damage. It is argued, however, that in terms of CSR legislative provisions relating to CSR the MPRDA seem to fare much better than its Australian counterpart.

5.2.2.3. Environmental Protection and Biodiversity Conservation Act 1999

Another important legislation, though speaking to environmental protection and not mining specifically, EPBC Act. The EPBC establishes a framework for assessing and managing the impacts of activities that may have significant environmental effects, including mining. In particular, EPBC Act requires that certain mining projects be subject to an environmental impact assessment (EIA) to assess the potential impacts of the project on matters of national environmental

⁶⁴⁰ operations carried out on the land the subject of the mining tenement, irrespective of who carries out the mining operations.”
Nelson v West Coast Council para 34, read with para 51.

significance⁶⁴¹, such as threatened species, World Heritage areas, and wetlands.⁶⁴² Worth noting from the point of liability of mining companies is that the EPBC Act provides for enforcement measures to ensure compliance with the Act, including civil penalties, injunctions, and criminal sanctions. Section 475 of the Act sets out the maximum penalties for various offences, which include: For individuals, up to \$555,000 or 10 years' imprisonment, or both; and for corporations, up to \$11.1 million or 10% of the annual turnover of the corporation, whichever is greater. According to the EPBC Act civil penalties that can be imposed by the Federal Court or Federal Circuit Court for contraventions of certain provisions of the Act include fines of up to \$555,000 for individuals and \$1.11 million for corporations. It is submitted that compare to South Africa, Australia has in place deterrent system of sanctions and penalties. This is laudable in the context of CSR if a good progress is to be made in instilling responsibility in mining companies.

Under the EPBC Act, mining companies are required to obtain environmental approvals before starting a mining project. These approvals assess the potential environmental impact of the project and set conditions to mitigate or offset any harm caused. The approval process is overseen by the federal Department of Agriculture, Water and the Environment, and failure to comply with conditions can result in fines and prosecution.

As noted earlier, federal law has been applied in States through varies legal instruments. In Western Australia, for example, state-based mining regulations also impose liability on mining companies for environmental harm. For example, the Mining Act 1978 (WA) is a state-based law that governs the exploration, mining, and production of minerals in Western Australia. By and larger, this is one of the oldest legislation in Australia in the mining industry, and its operation may

⁶⁴¹ For Environmental assessments and approvals, see Part 4 of the Act read with Part 5 (Biodiversity conservation) and Part 6 (Heritage protection).

⁶⁴² Section 5 provides key principles of ecologically sustainable development.

to a certain degree not adequately cover developments in the sector over time. In 1989, for instance, the Western Australian branch of the Australian Mining and Petroleum Law Association (“AMPLA (WA)”) asked Alex Gardner to review the relevant law as the foundation for recommending reforms to the State Government⁶⁴³ and making the law more simpler with certainty.⁶⁴⁴

The Mineral Act framework sets out the requirements for obtaining and holding mining tenements, including exploration licenses, prospecting licenses, and mining leases. It also establishes the rights and obligations of miners, landowners, and the government in relation to mining operations. There are key provisions in the Act regulating the mineral resources industry, which read jointly and severally are relevant to dealing with the socio-economic responsibility and liability of mining companies in Australia. The approach in this thesis is therefore not to deal with them as mutually exclusive.

The following provisions are the highlighted: Section 115, which sets out the requirements for obtaining an exploration license, including the application process and the fees payable; Section 40 that provides for the granting of prospecting licenses, which allow the holder to search for minerals in a specific area; Section 74, which establishes the requirements that must be met for obtaining a mining lease, and extracting and processing minerals from a specified area.⁶⁴⁵ Section 115A deals with how mining lease holders must prepare and

⁶⁴³ See A Gardner, “Security of Title”, [1990] AMPLA Yearbook 284-313 and A Gardner, “Reform of the Registration Provisions of the Mining Act 1978 (WA)”, presented at the AMPLA (WA) annual conference in November 1990.

⁶⁴⁴ See Report and Recommendations by AMPLA (WA Branch): “Reform of the Registration Provisions of the Mining Act 1978 (WA)”, (1992) 11(3) AMPLA Bull 115. Several legislative reforms have been unsuccessful. For example: the Mining Amendment Act 1996 (WA) was considered to obtain a number of serious deficiencies. The Mining Amendment Act 2004 (WA) enacted to address the deficiencies of the 1996 proposal the supporting Mining Amendment Regulations (No. 2) 2005.

⁶⁴⁵ This section must be read with several other sections of Mining Act that provide for a number of mechanisms by which conditions are, or may be, imposed on the grant of an exploration licence. For instance, Section 57(1) gives the Minister a power to grant an exploration licence 'on such terms and conditions as the Minister may determine'; Sections 24, 24A and 25 provide for the Minister to give his written consent to carry out mining in certain areas such as reserves subject

submit a mining proposal to the Department of Mines, Industry Regulation and Safety. Also, it requires certain details in the proposal must set out the details of the proposed mining operations and the measures that will be taken by the mining company to minimize the impact on the environment.

Section 115A of the Minerals Act is particularly relevant of interest in this study because it also relates to the imposition of a penalty for breach of a condition of a mining tenement or any other law or regulation relating to mining. In short, it speaks to the issue of liability. The penalty may be imposed by the Minister of Mines⁶⁴⁶ or a court, and may be in the form of a fine or other remedy. Interestingly, the law allows for the penalty to be imposed retrospectively even breaches that occurred before the section came into effect. In *Neumann Contractors Pty Ltd v Department of Mines and Petroleum*⁶⁴⁷ there was a contest against the imposition of a penalty under Section 115A for a breach of the Mining Act. Ultimately, the Court held that the imposition of the penalty was justified, as the breach had caused environmental harm. The case of *Neumann Contractors Pty Ltd v Department of Mines and Petroleum*, is an example of how section 115A of the Minerals Act provides a mechanism for imposing penalties for breaches of mining tenement conditions or other mining-related laws and regulations. The interconnectedness of Australian law in this regard is commendable as issues that relates to mining industry and mining communities are not dealt with in clinical isolation.⁶⁴⁸

to such terms and conditions as the Minister may specify in his consent; Section 62 requires the holder of an exploration licence to comply with prescribed expenditure conditions; and Section 63 deems every exploration licence to be subject to the condition that the holder will explore for minerals and will comply with specified reporting and environmental requirements.

⁶⁴⁶ See *Golden River Resources Pty Ltd v Minister for Mines and Petroleum* [2016] WASC 113; *Scenic Acres Pty Ltd v Minister for Mines and Energy* [2017] NTSC 54.

⁶⁴⁷ *Neumann Contractors Pty Ltd v Department of Mines and Petroleum* [2018] WASC 172.

⁶⁴⁸ In 2019, the Federal Court of Australia in the case of *McArthur River Mining Pty Ltd v Northern Territory of Australia* [2019] FCA 757 found that the operators of the McArthur River Mine, Glencore and its subsidiary McArthur River Mining Pty Ltd, had breached their environmental approvals by allowing toxic waste to flow into a nearby river. According to the Court, the company had failed to properly manage and contain the waste and had allowed it to enter the river, which posed

Closely related to section 115A, and speaking to CSR of mining companies in Australia, is Section 121 that requires the requirements for obtaining permission from the landowner before carrying out mining operations on their land.⁶⁴⁹

Section 328 of the Act addressed criminal liability by establishing the offence of unlawful mining and provides for fines and imprisonment for offenders. Unfortunately, section 328 of the Mining Act 1978 (WA) does not exist in the current Australian Mining Act. The section established the offence of unlawful mining in Western Australia. In terms of the section 328 of the Mining Act 1978 (WA), it is an offence for a person to carry out mining operations without the necessary authorisation or approval, or to contravene any of the conditions or restrictions imposed on their mining tenement or licence. Those found have committed the offence could face penalties, which may include fines and imprisonment, for persons found guilty of unlawful mining.⁶⁵⁰

Section 155 of the West Australia Mining Act provides for the power of authorized officers to require information and documents related to mining operations. Under this section, authorized officers may require a person who is carrying out mining operations or who holds a mining tenement to provide any information or document that is relevant to the administration of the Act. The information or document that may be required under Section 155 includes information about the

a risk to the health of the river's ecosystem and potentially to human health. The court court ordered the company to pay a penalty of \$1.05 million and to undertake measures to rectify the environmental harm caused by the breach.

⁶⁴⁹ See, *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30 where the High Court of Australia considered the validity of a mining lease granted under the Mining Act 1978 (WA). The court found that the lease was invalid because the company that applied for the lease did not meet the requirements of the Act regarding the ownership of the land. In particular, the Court (at 122) “the primary judge was correct to hold that the Minister was not bound by the Act to consider any information about the financial resources available to Cauldron other than that contained on the statement accompanying the applications for exploration licences and contained in the warden's report and accompanying materials.”

⁶⁵⁰ The maximum penalty for the offence varies depending on the nature and severity of the breach, and whether it is a first or subsequent offence.

location and extent of mining operations, the nature and quality of minerals being mined, and any other matter that is relevant to the administration of the Act. Authorized officers who exercise their power under Section 155 must provide a written notice to the person requiring the information or document, and must specify the time and place at which the information or document is to be provided. It is submitted that section 155 speaks to beneficiary of and profit-sharing with mining communities in that it provides for the payment of royalties to the government on the production of minerals.

The issue of meeting the requirement is very critical as it also ensure that the relevant ministry continues to exercise oversight in the public interest. The Supreme Court of Western Australia in *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd*,⁶⁵¹ for instance, a considered the consequences of not obtaining consent to a transaction dealing with a Mining Lease including the possibility of rendering the transaction being void. Ipp J, with whom Pigeon J ruled that the failure to comply with a condition of the title to obtain ministerial consent will result a breach of the Mining Lease condition, which would, render the title holder subject to the forfeiture of title pursuant to section 82(1)(g) of the Act.⁶⁵² In *Yilka Pty Ltd v Minister for Mines and Petroleum*⁶⁵³ there was a challenge to a decision by the Western Australian Minister for Mines and Petroleum to refuse to grant a mining lease under the Mining Act 1978 (WA). The court upheld the Minister's decision, finding the applicant had not met the requirements of the Act.

Overall, the Australian legal system places a significant responsibility on mining companies. For instance, the law requires mining companies to mitigate and remediate environmental harm caused by their operations, and failure to do so can result in significant financial and reputational costs. It also permits objections to proposed mining operation which, it is argued, provides one of the safeguards in favour of mining communities. The Mining Act, for instance, provides the

⁶⁵¹ *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2000) 22 WAR 101.

⁶⁵² *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2000) 22 WAR at 30.

⁶⁵³ *Yilka Pty Ltd v Minister for Mines and Petroleum* [2017] WASC 152.

opportunity for an applicant for, and objector to, the grant of a mining tenement to put forward and respond to information at the hearing of the application before the warden. This is important as it ensures procedural fairness and opportunity for mining communities as interested parties to object at that stage of the decision-making process by presenting credible, relevant and significant information.⁶⁵⁴

5.2.3. The relationship between mining companies and communities in Australia

Mining is the backbone of the Australian economy.⁶⁵⁵ The mining industry in 2020, for example, contributed record exports of about \$273 billion, which the Mining Council of Australia regards as the “highest wages in Australia with an average of \$141,000 a year, ongoing supply chain opportunities in regional areas, leading edge innovation, respectful engagement with Traditional Owners and significant tax and royalties contributions of \$31 billion annually to underpin national prosperity and vibrant regional communities”.⁶⁵⁶ The Minerals Council of Australia (MCA) is a body that represents Australia's exploration, mining and minerals processing industries at the national and international levels. Generally, the MCA drives advocates for public policy and operational practice for the mining industry ‘that is safe, profitable, innovative, environmentally and socially responsible, attuned to community needs and expectations’ in particular, it is concerned with socially responsible development and effective environmental management by the mining industry.

⁶⁵⁴ See, for example, see *Minister for Immigration v WZARH* [2015] HCA 40; (2015) 256 CLR 326 at [28] - [30]),

⁶⁵⁵ *Bice S Rural Society* 2013 138.

⁶⁵⁶ Mineral Council of Australia. 2020. Minerals Council of Australia Pre-budget Submission 2020-21 at 3. See further For more details, see Minerals Council of Australia, Submission on Attorney-General's discussion paper on project life greenfields agreements, 1 November 2019, MCA, Canberra.

However, the picture has not always been as rosy as it is painted above. Australia has some similarities with South Africa concerning mining. These include colonisation, and dispossession of land and discrimination against the indigenous people of Australia. Much like South Africa, mineral resources have contributed to shaping the history of Australia and continue to be an integral part of the Australian landscape in today's Australia.⁶⁵⁷ Unlike South Africa, Australia was colonised in 1788.⁶⁵⁸ Historically, indigenous people of Australia used minerals for cultural, technological, and trade purposes.⁶⁵⁹ Economically, precolonial indigenous people engaged in trade exchanges of land, mining, and quarry material.⁶⁶⁰ Land ownership was not privatised, it was owned communally and indigenous people attached sacred value and immense respect to the land, they were spiritually connected to the land.⁶⁶¹ This was changed by colonisation.⁶⁶²

The mining industry was based on gold, coal, silver and base metals. Australia was rapidly transformed by mining.⁶⁶³ The gold rush that began in 1851 led to the development of new towns, saw an increase in population and the establishment of a skilled workforce.⁶⁶⁴ Profits from large-scale mining have also led to industrial developments and an increase in the employment rate.⁶⁶⁵ There was also a rapid and instant increase in the immigrant population of Australia.⁶⁶⁶ Like South Africa, mining saw the development of mining towns and mining communities and townships of companies.⁶⁶⁷ Eklund indicates that mining towns were distinctive

⁶⁵⁷ E Eklund *The Extraction Industries and Society* 2015 177.

⁶⁵⁸ E Eklund *The Extraction Industries and Society* 2015 177. P Genger Decolonising Through a Peace and Conflict *Studies Lens* 2018 3. Australia was colonised by Captain Arthur Philips in 1788, upon his arrival on Australian shores he rapidly began the colonisation of Australia.

⁶⁵⁹ E Eklund *The Extraction Industries and Society* 2015 177.

⁶⁶⁰ P Genger Decolonising Through a Peace and Conflict *Studies Lens* 2018 5.

⁶⁶¹ P Genger Decolonising Through a Peace and Conflict *Studies Lens* 2018 3.

⁶⁶² E Eklund *The Extraction Industries and Society* 2015 177.

⁶⁶³ Schnieder *et al The Anthropocene Review* 2022 3.

⁶⁶⁴ E Eklund *The Extraction Industries and Society* 2015 178.

⁶⁶⁵ E Eklund *The Extraction Industries and Society* 2015 178.

⁶⁶⁶ Schnieder *et al The Anthropocene Review* 2022 3.

⁶⁶⁷ E Eklund *The Extraction Industries and Society* 2015 178.

communities that shared economic and social characteristics despite their diverse experiences.⁶⁶⁸

A distinction was made between mining communities and company towns. Mining communities were a series of social structures that grew near the fringes of mining operations; these communities were not planned by the owners or mine managers.⁶⁶⁹ The town of the company, on the other hand, was well-planned and significantly more developed. It needs to be emphasised for the purposes of this comparative section that the mining industry in Australia was dominated by colonial authorities, minerals were available for private exploitation, subject to state royalties.⁶⁷⁰ Interestingly, the crown also encouraged, either directly or tacitly, the dispossession of land by the indigenous people of Australia. The settler had privileged access to Australia's resources while indigenous people were denied the opportunity to be their own. The arrival of settlers also destabilised the way of life of indigenous people.⁶⁷¹

In summary, Australia like South Africa has a history of unfair advantage being granted to white people to the detriment of their darker-skinned counterparts. Despite the existence of CSR initiatives and mechanism in Australia, mining communities that are meant to benefit from these initiatives are forgotten, misunderstood, and insufficiently researched.⁶⁷²

5.2.4 Australian Mining Industry and the Promotion of CSR

To start with, mining has played an important role in Australia since its establishment. According to Punnoose, the “Australian mining industry was established at the end of the 19th century with the discovery of coal reserves.

⁶⁶⁸ E Eklund *The Extraction Industries and Society* 2015 179.

⁶⁶⁹ E Eklund *The Extraction Industries and Society* 2015 179.

⁶⁷⁰ E Eklund *The Extraction Industries and Society* 2015 181.

⁶⁷¹ E Eklund *The Extraction Industries and Society* 2015 181.

⁶⁷² Bice S *Rural Society* 2013 138.

Since then this industry has played a pivotal role by being a main source of the nation's export income and providing for the nation's industrial requirements."⁶⁷³ The contribution of the mining over decades contributed \$billion to the Australian economy. Just like in South Africa, "the mining industry ha/s been responsible for the building of 26 towns, 12 ports, 25 airfields and more than 2000 kilometres of railway line" ⁶⁷⁴ and dominated by the private sector. The 1851 discovery of alluvial gold near Bathurst in New South Wales and the rich Victorian fields saw the mining sector gaining more strides in terms of development. ⁶⁷⁵ Notable is that "this invariably led to more search and discovery through the rest of Australia. The generation of wealth from the early mine discoveries was responsible for the shift from the agricultural and pastoral economy to a largely mining based economy."⁶⁷⁶ Punnoose notes that "the period from the 1950s to the 1970s saw the emergence of world class mining industry in Australia".⁶⁷⁷

Clearly, mining is one of those industries that forms the backbone of Australian economy. What is interesting is the social responsibility of these mining companies to their mining communities, and most importantly how the issue of community right and environmental protection was affected by mining operation. For instance, there was a time that the Aboriginal people had no title to the lands on which they lived and this lacuna was exploited by mining companies. The aboriginal communities found protection in the 1992 the decision by the Australian High Court that ruled that "native title is recognised by the common law and that indigenous inhabitants do have rights to their traditional lands."⁶⁷⁸ What this meant is that mining companies had to consult with the affected communities before they could explore or mine the lands. In this regard, what in Australia is considered the License to Mine become a protective barrier for mining communities. "Some of the challenges facing the Australian mining sector are conducting its operations in an environmentally responsible manner and

⁶⁷³ Punnoose D MAS Thesis 2009 at 24.

⁶⁷⁴ Punnoose D MAS Thesis 2009 at 24.

⁶⁷⁵ Punnoose D MAS Thesis 2009 at 23.

⁶⁷⁶ Punnoose D MAS Thesis 2009 at 23.

⁶⁷⁷ Punnoose D MAS Thesis 2009 at 24.

⁶⁷⁸ Punnoose D MAS Thesis 2009 at 24.

increased stakeholder engagement”, noted Punnoose.⁶⁷⁹ The existing research suggest that the Australian mining industry has had to content with corporate, social and environmental responsibility and increased stakeholder accountability requirements and concerns.⁶⁸⁰ Involving community representatives in decision making and forming strong relationships with the community mining companies has been the hallmark of the success of their operations.

Interestingly, Bice in her 2013 study reported that CSR remains a relatively unregulated practice at the coalface. Apart from, say, anti-bribery or anti-corruption laws or OHS regulations which indirectly affect how funds are donated or infrastructure is built, there are no specific laws to govern mining companies’ CSR programmes per se.⁶⁸¹ However, as von Neesen notes, Australia despite the absence of CSR-specific legislation encouraged corporations to act in socially responsible manner, and to show more accountability and transparency.⁶⁸²

An observation following investigation in this study is that CSR is a growing concept and Australia is not separated from the growing trend of interrogating what CSR means to different countries.⁶⁸³ It is viewed as a solution to the social and environmental problems associated with the mining industry and that plague some mining communities.⁶⁸⁴ CSR is a broad concept that encapsulates the notion that companies have obligations that go beyond shareholders or investors of the company.⁶⁸⁵ Cronin described it as a meeting, within reason, of the expectations of all social stakeholders to maximize the positive impact of the company on its social and physical environment, while providing a competitive

⁶⁷⁹ Punnoose D MAS Thesis 2009 at 25.

⁶⁸⁰ Punnoose D MAS Thesis 2009 at 26.

⁶⁸¹ Bice S *Rural Society*, 2013 150.

⁶⁸² Von Neesen P. 2009 *UCLA Pacific Basin Law Journal*, 2009 27(1) 1.

⁶⁸³ Trustcott R Corporate Social Responsibility in Australia: Constructing Reputation in Processing Australia and New Zealand Marketing Academy Conference. ANZMAC, New Zealand 2007 1.

⁶⁸⁴ Bice S No More Sun Shades, Please; Experiences of Corporate Social Responsibility in Remote Australian Communities. *Rural Society* 2013 138.

⁶⁸⁵ Cronin C Research and Social Policy Team Background Paper no 3 2001 1.

return to its financial shareholder.⁶⁸⁶ One of the important components of CSR applicable in Australia is Corporate Community Involvement (hereinafter referred to as CCI).⁶⁸⁷ Some of the key components of CCI are considered financial investments, the grant of inkind gifts, voluntary programs of employees, and partnerships.⁶⁸⁸ CSR and CCI are seen more as philanthropic endeavours than compulsory legislative provisions.⁶⁸⁹

It is submitted that a philanthropic endeavour is not a preferred model within the South African system and that legislative and judicial force might be necessary to ensure that mining companies comply with their duties in a manner that ensures that the community benefits from the mining operations. Philanthropy may also fail to take into account the need-based approach and the anti-essentialistic approach by allowing companies to give what they think communities need without necessarily taking into account the fact that communities are different and have different experiences.⁶⁹⁰ Companies and communities have interwoven interconnected relationships, and companies consider these philanthropic expressions as part of their core values, and they consider it to be part of their profit-driven strategies.⁶⁹¹ What constitutes philanthropy is unclear and vague. It relies on the company to decide what the community needs and do it out of its moral duty or moral obligation.

According to Cronin, the relationship between companies and communities can be affected by several things, including the failure of the community to provide adequate services to employees or if the company ruins or harms the environment.⁶⁹² A balance can be struck in which community involvement creates

⁶⁸⁶ Cronin C Research and Social Policy Team Background Paper no 3 2001
⁶⁸⁷ Cronin C Research and Social Policy Team Background Paper no 3 2001 5.
⁶⁸⁸ Cronin C Research and Social Policy Team Background Paper no 3 2001 5.
⁶⁸⁹ Cronin C Research and Social Policy Team Background Paper no 3 2001 5.
⁶⁹⁰ Modiri J M
⁶⁹¹ Cronin C Research and Social Policy Team Background Paper no 3 2001 5.
⁶⁹² Cronin C Research and Social Policy Team Background Paper no 3 2001 5.

an environment that benefits both its economic needs and social needs in surrounding communities.⁶⁹³ Social investment is usually funded by charity, tax, strategic social investments, and regulations; these measures require the participation of all stakeholders, and include activities that are not closely linked to the business of companies, activities directly linked to the core values of a company, community or government control, and regulation of the contributions of these companies by the community as well as the government.⁶⁹⁴ This is an issue in South Africa because, as already established in Chapter 4, consultation and participation of communities is one of the biggest challenges in South Africa's mining industry; therefore, the community might not be empowered to regulate mining companies.

Australian companies are said to be in a position whereby they have begun to articulate more strategic views about CSR and CCI whereby their contribution forms an integral part of their strategy and operation.⁶⁹⁵ The concern with CSR in Australia is how far the government could or should shift certain functions to the private sector, which might result in the government relegating their duties to the private sector. This challenge or concern of companies highlights why a philanthropic endeavour approach might not work for South African CSR. One of the biggest issues concerning CSR in South Africa is not necessarily whether the government can shift some of its responsibilities to companies, but its primary concern relates to corruption and the involvement of mining companies in local politics.

As far as legislated regulation of CSR is concerned Australian regions seem to have varying approach, and the reception of CSR by corporations is differing. For example, Broderick in a 2015 study argued that "The embedded nature of mining in Western Australia, the reliance on its economic benefits and the dominant

⁶⁹³ Cronin C Research and Social Policy Team Background Paper no 3 2001 5.

⁶⁹⁴ Cronin C Research and Social Policy Team Background Paper no 3 2001 5.

⁶⁹⁵ Cronin C Research and Social Policy Team Background Paper no 3 2001 11.

neoliberal ideology of successive state governments makes the regulation of social responsibility unlikely”.⁶⁹⁶

There have been court rulings in Australia, it is submitted, that are critical toward promoting CRS in Australia. Notable is the case of *Gloucester Resources Pty Ltd v Minister for Planning*.⁶⁹⁷ The case was about an appeal in the Land and Environment Court of New South Wales against the Minister’s refusal of a State significant development application for consent for the Rocky Hill Coal Project for a new open cut coal mine, in the Gloucester Valley in New South Wales. The proposed mine required planning approval under the *Environmental Planning and Assessment Act 1978 (NSW)* (hereafter “the EPA Act”).

In determining whether to grant or refuse consent, court had to take into consideration the likely impacts of the development, including but not limited to environmental impacts on both the natural and built environments, and social and economic impacts in the locality, submissions made, the public interest and any environmental planning instruments. One of the instruments, the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2009 (“Mining SEPP”). Clause 12 of the Mining SEPP requires a consent authority to amongst others to evaluate and compare the public benefits of the development and those land uses; to consider any ways in which the proposed mining development may be incompatible with existing, approved or likely preferred land uses; and determine the feasibility of any measure proposed to avoid or minimise any incompatibility.

It must be noted, however, that Mining SEPP should not be considered to mean that CSR has been legislated in Australia for mining companies in general. Legislative attempts to introduce a Corporate Code of Conduct in 2000 that leans

⁶⁹⁶ Broderick, G. L. (2015). Boundaries of governance: Social responsibility in mining in Western Australia. MSC Thesis.

⁶⁹⁷ *Gloucester Resources Pty Ltd v Minister for Planning* [2019] NSWLEC 7 (8 February 2019) available at <https://www.caselaw.nsw.gov.au/decision/5c59012ce4b02a5a800be47f>

strongly in favour of CSR and sought to penalise unacceptable and harmful conduct occurring outside Australia has been unsuccessful. Currently, CSR compliance and reporting in Australia is limited to investment firms and listed companies.⁶⁹⁸ In fact, the Australian Law Reform Commission has reported that there have been two inquiries into CSR by the Parliamentary Joint Committee on Corporations and Financial Services ('Joint Committee') and by the Corporations and Markets Advisory Committee ('CAMAC').⁶⁹⁹

Reasons given by the Chief Judge in *Gloucester Resources Pty Ltd v Minister for Planning* to refuse consent for the Project included the following:

- The Project, by reason of its visual, amenity and social impacts, will be incompatible with the existing, approved and likely preferred uses in the vicinity, and the measures proposed by the applicant will not avoid or minimize this incompatibility.
- Visual impact of the Project will be high—the proposed mine will have a high visual contrast with the surrounding landscape, and this will not be ameliorated by the proposed amenity barriers or the revegetation of the amenity barriers, permanent overburden emplacements or rehabilitated post-mining landforms.
- Noise impacts and air quality impacts were expected to fall within acceptable standards but there could still be social impacts arising from those impacts.
- Social impacts were assessed across nine categories, and it was found that the Project has significant negative social impacts on people's way of life, community, access to and use of infrastructure,

⁶⁹⁸ See Section 1013 D (1) of the Corporations Act 2001 (Cth).

⁶⁹⁹ Australian Law Reform Commission, Corporate Social Responsibility, Reform Issue 87 (2005/06).

services and facilities, culture, health and well-being, surroundings and fears and aspirations.

- The Project will also cause distributive inequity. While the Project has potential for positive social benefits, including for the local economy and employment, these benefits are outweighed by the significant negative impacts. The proposed mitigation measures will not be effective in mitigating these impacts. The significant net negative social impacts are a justification for refusing consent.
- The aggregate greenhouse gas (“GHG”) emissions over the life of the Project are sizeable, and a refusal of consent would prevent a meaningful amount of GHG emissions.
- The GHG emissions and their likely contribution to adverse impacts on the climate system, environment and people adds a further reason for refusal.
- Proposed net economic benefits of the Project as determined by a cost benefit analysis and a local effects analysis are not significant and do not outweigh the negative impacts. As a result, the Project is contrary to the public interest.

Exercising the functions of the Minister as the consent authority, the Court on, per Chief Judge Preston dismissed the appeal, and determined the application by refusal of consent. The primary reasons for Preston’s decision are summarised at para. 695 of his judgment, as follows:

In this case, the exploitation of the coal resources in the Gloucester Valley would not be a sustainable use and would cause substantial environmental and social harm. The Project would have high visual impact over the life of the mine of about two decades. The Project would cause noise, air and light pollution that will contribute to

adverse social impacts. The project will have negative social impacts on people's way of life; community access to and use of infrastructure, services and facilities; culture; health and wellbeing; surroundings fears and aspirations. The project will cause distributive inequity, both within the current generation and between the current and future generations.⁷⁰⁰

It is submitted that the reasons stated above simply translate into a requirement that proposed mining projects must demonstrate significant net benefits to all stakeholders, including mining communities or communities to be affected by such a project in the spirit of CSR.

With rulings such as that in *Gloucester Resources Pty Ltd v Minister for Planning*, notwithstanding, it is interesting to note that in March 2022 the full bench of Australian Federal Court overturned what has been hailed as a ground-breaking ruling in 2021 that "required the country's environment minister to consider harm to children from climate change as part of the approval process for a coal mine."⁷⁰¹ The previous court rules that Environment Minister had a duty of care to avoid harming children when weighing approval for a coal project. However, the Federal Court ruled "the duty should not be imposed upon the Minister."⁷⁰²

⁷⁰⁰ The Court, at 270, noted that mining project "will have social impacts, both positive and negative. The social impact which may occur, in terms of the *Social Impact Assessment Guideline* (Department of Planning and Environment, 2017), include way of life; community; access to and use of infrastructure, services and facilities; culture; health and wellbeing; surroundings; personal and property rights; decision-making systems; and fears and aspirations. For more on these social impact sees the case at paras 270 – 419).

⁷⁰¹ Sonali P. Australian court overturns ruling requiring mine approvals to weigh climate harm (15 March 2022) available at <https://www.reuters.com/world/asia-pacific/australian-court-overturns-ruling-requiring-mine-approvals-consider-climate-harm-2022-03-15/> accessed 20 October 2022.

⁷⁰² This case was brought by eight school children and a nun seeking to require Australia's environment minister to protect children from future harm caused by climate change due to the proposed mine.

5.3 Botswana

5.3.1. General Background

Much like South Africa and Australia, Botswana did not escape colonialism and much like its counterparts, South Africa and Australia, colonialism had an impact on the political, economic and social landscape of Botswana. Before colonization in 1885, Botswana was occupied by the Bantu and non-Bantu people and the land was communally owned and perpetual.⁷⁰³ Land ownership was based on a tripartite land use system, whereby members of the community had access to land for residential, agricultural and livestock grazing purposes.⁷⁰⁴ Colonization changed this and promoted a private land ownership system, which specifically excluded the black and indigenous people of Botswana.⁷⁰⁵ This was the modus operandi of the colonialists. The same traits are observed in the colonization of Australia and South Africa. The dispossession of land of the indigenous peoples of the colonized country was the order of the day. Under colonisation, the government of the time perpetuated discrimination, inequality, and the exploitation of blacks.⁷⁰⁶

Botswana attained its independence in 1966.⁷⁰⁷ It has been lauded as one of Africa's success stories after independence as it managed to maintain peace, stability and economic growth.⁷⁰⁸ Botswana's legal system is based on the common law system, with elements of Roman-Dutch law and customary law. The country gained independence from Britain in 1966 and its legal system has evolved since then. The Constitution of Botswana is the supreme law of the land and provides the framework for the legal system. As a parliamentary democracy with a unicameral legislature, the National Assembly of Botswana has the power

⁷⁰³ Molebatsi C *Modern Era Dispossession Town and Regional Planning* 2019 46.

⁷⁰⁴ Molebatsi C *Town and Regional Planning* 2019 46.

⁷⁰⁵ Molebatsi C *Modern Era Dispossession Town and Regional Planning* 2019 46.

⁷⁰⁶ Marobela M.N *Labour, Capital and Society* 2010 144.

⁷⁰⁷ Robinson J.A *Botswana as a model for Country Success* Oxford 2013 188.

⁷⁰⁸ Robinson J.A *Botswana as a model for Country Success* Oxford 2013 188.

to make laws. Botswana's legal system is generally regarded as fair and efficient, with a high level of respect for the rule of law. The country has a good reputation for enforcing contracts and protecting property rights, which has helped to attract foreign investment. The judiciary is independent and consists of a hierarchy of courts, the highest court is the Court of Appeal, followed by the High Court, the Industrial Court, and the Magistrates' Courts. However, Botswana also has customary courts that deal with traditional matters such as land disputes and family law.⁷⁰⁹

Despite being lauded as one of the shining lights in Africa, the realities on the ground relating to the development of this country cannot be ignored. Molebatsi indicates that several issues appear to be a blight on Botswana as one of the shining examples of independence on the African continent, these issues include the poor record of poverty, violation of human rights, especially the rights of the San people, lack of accountability and transparency on the part of the government and disguised land dispossession of mining communities.⁷¹⁰ One of the challenges associated with this was highlighted by Marobela, who contends that the post-independence government of Botswana is in the business of accumulation, as the government not only provides the infrastructure necessary for mining, but is also a participant in gaining profits from the mineral sector.⁷¹¹ The government has been observed to have conducted itself in a manner that might mimic how a multinational company would handle issues as opposed to how a government should handle issues.

Botswana, arid and landlocked as it is, has an economy highly dependent on the exploration, processing, and export of mineral resources. In fact, Botswana's mining industry is one of the best and most lucrative in the world, especially diamond mining by production and value of the diamonds. The economy is driven by mining or mining-led, and by diamond mining in particular, since the discovery

⁷⁰⁹ See Kufuor KO *Journal of African Law* 2014.

⁷¹⁰ Molebatsi C *Town and Regional Planning* 2019 44.

⁷¹¹ Marobela M.N *Labour, Capital and Society* 2010 144.

of diamonds in Botswana in 1967.⁷¹² However, diamonds are not the only minerals in the Botswana extractive industry. It has been reported that even prior to discovery of diamonds in 1967, “archaeological and other scientific evidence points to mining activities from as far back as the Middle and Late Stone Ages, with modern mining starting with the re-discovery of gold around the present-day Francistown in 1865” and that “coal, soda ash & salt, gold, nickel, cobalt, silver, uranium, manganese and iron also add to the mining contribution to the economy.”⁷¹³ Not only does the minerals mining sector contribute significantly to the country's export⁷¹⁴ and the overall gross domestic product (GDP), the sector mining sector has historically accounted for about 35% to 45% of GDP at the turn of the century, and provided employment to more than 5% of Botswana. But the country has since 2021 seen a dwindling contribution to the GDP, which varied between 12% and 16.7%.⁷¹⁵

The indigenous people of Botswana have been mining since time immemorial.⁷¹⁶ The mining sector is the backbone of the Botswana economy.⁷¹⁷ The industry is

⁷¹² See Address by his excellency Dr Mokgweetsi Masisi, President of the Republic of Botswana at the Investing in African Mining Indaba 2022, see Macnamara S. Untapped mineral prospects to drive investment in Botswana, *Africa Mining* 1 February 2023 available at <https://www.africanmining.co.za/2023/02/01/untapped-mineral-prospects-to-drive-investment-in-botswana/>.

⁷¹³ “The overall progressive nature of Botswana’s mineral policy and laws, together with its investment climate, makes Botswana competitive for the next investment dollar in the mineral space,” said His Excellency Dr Mokgweetsi Masisi, President of the republic of Botswana at the Investing in African Mining Indaba 2022.

⁷¹⁴ According to the Botswana Geoscience Institute (BGI), from all the mined mineral commodities in Botswana, diamonds, gold, and soda ash & salt are exported. Diamonds are the largest export earning commodity, with most exports going to Asia, then the United Arab Emirates (UAE), European Union, South African Custom Union countries in Africa, United States, Switzerland, Canada, and the rest of the world. See Botswana Geoscience Institute. 2021. *The 2018/19 Botswana Mineral Accounts Technical Report 2021*, 9 and 23.

⁷¹⁵ See Macnamara S. Untapped mineral prospects to drive investment in Botswana, *Africa Mining* 1 February 2023 available at <https://www.africanmining.co.za/2023/02/01/untapped-mineral-prospects-to-drive-investment-in-botswana/>. The decline in the mining industry’s to the GDP can be attributed to global demand that was hard hit during the COVID-19 pandemic and to increased costs especially in the diamond industry.

⁷¹⁶ De Wit *Minerology and Petrology* 2018 7.

⁷¹⁷ Bismarck B.K and Darkoh MBK, *EASSRR* 2001 1.

responsible for providing a large number of skilled and unskilled jobs; it is a fertile ground for training, skills development and opportunities in Botswana.⁷¹⁸ The sector contributes significantly to GDP and almost 80% of export earnings are attributed to the mining sector.⁷¹⁹ In 2018 Botswana was the second largest diamond producer in the world.⁷²⁰

5.3.2 Institutional and Normative Framework Related to the Mining Industry in Botswana

5.3.2.1 Institutional Framework

Sound policy objective in any mining-led economy will determine the success of the industry vis-à-vis the interest of local communities. In Botswana, the mineral policy objective and regulatory environment is designed in particular to maximise the national economic benefit from the development of mineral resources.

The Ministry of Mineral Resources, Green Technology & Energy Security in Botswana is responsible for overseeing the country's energy and mining sectors. It was established under the Mines and Minerals Act of 1999 and the Energy Act of 2006. The Mines and Minerals Act of 1999 is the primary legislation governing the mining sector in Botswana, which under section 3 of establishes the Ministry of Minerals, Energy and Water Resources (now known as the Ministry of Mineral Resources, Green Technology and Energy Security). Unlike South Africa, the Act provides that all rights to the ownership of minerals are vested in the Republic and the Minister shall ensure in public interest that the mineral resources of the Republic are investigated and exploited in the most efficient, beneficial, and

⁷¹⁸ Bismarck B.K and Darkoh MBK, EASSRR 2001 2.

⁷¹⁹ Conradie A The Mining sector in Botswana
<https://www.whoownswhom.co.za/report-store/mining-sector-botswana-2020/>
Accessed 20 October 2022.

⁷²⁰ Conradie A The Mining sector in Botswana.
<https://www.whoownswhom.co.za/report-store/mining-sector-botswana-2020/>
Accessed 20 October 2022.

timely manner.⁷²¹ The Ministry is the competent authority on all matters concerning minerals policy and is in charge of implementing the legislation. Its powers and functions overseeing the exploration and development of mineral resources in the country, with a focus on promoting sustainable and responsible mining practices; developing and implementing policies to ensure the availability, affordability, and sustainability of energy resources in Botswana. This includes promoting the use of renewable energy sources such as solar and wind power; regulating the energy and mining sectors in Botswana, ensuring compliance with relevant laws, regulations, and standards; promoting the use of green technology in the energy and mining sectors to reduce the impact of these industries on the environment and promote sustainable development; undertaking research and development activities in the energy and mining sectors to improve efficiency, sustainability, and competitiveness. The other two powers and functions specifically relevant to this thesis is that Ministry is to engage with local communities to promote the benefits of the energy and mining sectors and to ensure that the interests of communities are taken into account in the development of these industries. The Ministry is also providing training and capacity building programs to stakeholders in the energy and mining sectors to improve skills and promote knowledge transfer.

The Diamond Hub was established in 2008, to transform Botswana into a competitive diamond center emphasizing rough and polished diamond trading. Also, to co-ordinate the different activities related to the diamond sector such as: the trading of rough and polished diamonds, cutting and polishing, and the manufacturing of jewellery. In addition to the 50:50 joint venture mining company Debswana, the Diamond Trading Company Botswana⁷²² (DTCB) was set up by Botswana Government and De Beers as another 50:50 joint venture which processes and sorts rough diamonds in preparation for their sale. The Minerals

⁷²¹ Part II, Section 3 of the Mines and Minerals Act CAP 66:01.

⁷²² Diamond Trading Company Botswana (DTCB) has the capacity to value 45 million carats per year. There is also the Okavango Diamond Company (ODC) sells up to 15% of Debswana's diamond production to facilitate secondary rough trading.

Development Company Botswana (MDCB) was established to manage GoB interests in mining companies and to seek out new investment opportunities.

5.3.2.2 Normative Framework

Botswana mining law is complex. In 1999, the government replaced the old mining code of 1977, with a mining law that is in tune with prevailing economic philosophies. The new, through which like under the code the government does not subscribe to privately owned minerals rights, attempts to balance the interests of mining stakeholders. The mining policy in Botswana, therefore, is that all the mineral wealth of the country is entrusted to the state, irrespective of who the owner of the land is. The rationale behind this policy, is that all citizens of Botswana as a whole have a common stake in the mineral wealth and they must enjoy common benefits of this wealth from mineral Revenues received or generated by the government. This is a different approach to South Africa where mining industry business operations are dominated largely by foreign MNC.⁷²³

The Botswana mineral wealth ownership policy position was in 2019 explicated by Her Excellency Dr. Athaliah I. Molokomme Ambassador and Permanent Representative, Permanent Mission of the Republic of Botswana to the United Nations Office and other international organizations in Geneva in her address to United Nations Conference on Trade and Development in Geneva. She noted that the policy “is based on a memorandum of understanding signed in 1967 in which the chiefs of the various groups ceded all mineral rights in their respective territories to the state”⁷²⁴ which influenced the Minerals Rights in Tribal Territories Act of 1967⁷²⁵ that is still applicable this day. An in terms of this agreement mineral rights were transferred from specified tribes and tribal authorities to the State of Botswana. This agreement, it is argued, founded what can be considered

⁷²³ This can be traced back to Apartheid laws such as the Precious Stones Act (PSA) 73 of 1964, prohibited the blacks, Indians and coloured from owning the mineral resources in South Africa.

⁷²⁴ At 11th multi-year expert meeting on commodities and development 15-16 April 2019, Geneva

⁷²⁵ Botswana, Mineral Rights in Tribal Territories Act 31 of 1967

one of the most successful communal and state-entrusted ownership of mineral wealth that has so far prevented the exploitation of mineral wealth by few families or companies based on their ownership of the land.⁷²⁶

As one of the key legislation in the mining industry the Mines and Minerals Act⁷²⁷ contains many sections and provisions, and only a few sections are addressed herein. Matters relating to the mineral rights and incidental matters are addressed under the provisions of section 5, which provides for the acquisition, retention, and transfer of mineral rights, including prospecting licenses, mining licenses, and mineral concessions. Section 23 speaks to how mining operations must be conducted, including the requirement for mining companies to obtain environmental clearances, submit mining plans, and comply with health and safety regulations. Related to CSR is section 40, which requires mining companies to engage with local communities and establish community development agreements, which outline the benefits and responsibilities of mining companies towards local communities. Promoting sustainability and environmental protection is very important in Botswana. To this end, section mining companies to implement measures to protect the environment, including the reclamation of disturbed areas, and to submit environmental management plans. The Act also makes provision in section 90 for enforcement measures by establishing penalties and sanctions for non-compliance with the provisions of the Act, including fines, imprisonment, and the forfeiture of mineral rights.

Worth noting is section 5 providing that nothing in this Act shall prevent members of any tribe from taking, subject to the conditions and restrictions that may be

⁷²⁶ But see in South Africa the Mining Rights Act 20 of 1967, that in section 3, gave general power of control and administration of all mining operations to the State but still left the ownership mineral rights in the hands of landowners. See cases of In the case of *Geduld Proprietary Mines Ltd v Government Mining Engineer*, 1932 AD 214, and *Turffontein Estates Ltd v Mining Commissioner of Johannesburg* 1917 AD 419 on the issue of state custodianship the mining industry and apportionment of mineral rights to landowners.

⁷²⁷ Botswana, Mines and Minerals Act 17 of 1999.

prescribed, minerals from any land from which it has been the custom of members of that tribe to take minerals and to the extent permissible under the customary law of that tribe.⁷²⁸ The provision is different from the MPRDA as the MPRDA does not make provisions for members of indigenous tribes to remove minerals, in a manner that is in line with the customary law of that tribe.

The Mine and Mineral Act provides instances wherein mineral concessions may not be granted, these include the following: Individuals under the age of 18 years; Individuals who are not or have not ordinarily resided in Botswana for a period of four years; An individual who is or becomes an undischarged bankrupt having adjudged or otherwise declared bankrupt, whether under the laws of Botswana or elsewhere; and An individual who has been convicted within the previous 10 years of any offence relating to dishonesty.⁷²⁹

Companies that can be excluded from obtaining mineral concessions are companies that, for instance, have not established a *domicilium citandi et executandi* in Botswana unless in the case of a mining licence, such company is incorporated under the Companies Act and intends to carry on the sole business of mining under that mining licence.

As already stated, the government of Botswana is involved in the mining industry, not just as a host state and a custodian of the mineral resources of Botswana in the interest of the people, but is also a participant in the actual mining business. This is contained in Section 51 of the Act which provides that any application for the issuing, renewal, transfer, or amendment of a licence to mine diamonds shall initiate a negotiation process in good faith between the government and the applicant, covering all technical, financial and commercial aspects of proposed projects, including Government's participation. Should negotiations fail to lead to an agreement within 6 months, the application shall fail. The provision of Section 51 of the Act is different from the provisions of the MPRDA whereby the

⁷²⁸ Part II, Section 3 of the Mines and Minerals Act CAP 66:01.

⁷²⁹ Part II Section 6 of the Mine and Minerals Act CAP 66:01.

government does not enter into negotiations with the applicants for the right to be a participant in the mining industry.

Botswana has set an example that the State can be a participant in the exploration and exploitation of its mineral resources without the fear of chasing off investors or discouraging investments. Botswana's GDP and the contribution of the mining and mineral industry to GDP are on the rise. This is demonstrated in the table below:

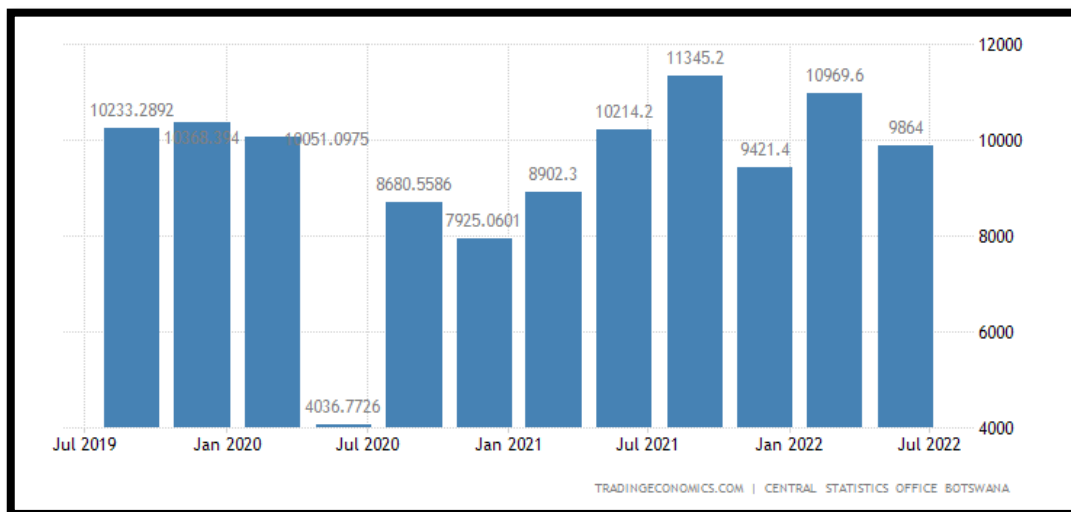


Figure 6: The GDP of Botswana. ⁷³⁰

In addition to the Mines and Minerals Act, Botswana has a number of other laws and regulations that are relevant to the mining industry. These include: Mineral Rights in Tribal Territories Act, discussed above; Mines and Minerals (Demarcation of Mining Lease Areas) Regulations;⁷³¹ Mines and Minerals (Prospecting and Leasing Charges) Regulations;⁷³² Precious and Semi-Precious Stones (Protection) Act of 1969;⁷³³ Mines, Quarries, Works and Machinery

⁷³⁰ Botswana GDP from Mining <https://tradingeconomics.com/botswana/gdp-from-mining#:~:text=GDP%20from%20Mining%20in%20Botswana%20averaged%206446.17%20BWP%20Million%20from,the%20first%20quarter%20of%202009> Accessed 25 October 2022.

⁷³¹ Botswana, Mines and Minerals (Demarcation of Mining Lease Areas) Regulations [CAP 66:01].

⁷³² Botswana, Mines and Minerals (Prospecting and Leasing Charges) Regulations [CAP 66:01].

⁷³³ Botswana, Precious and Semi-Precious Stones (Protection) Act 3 of 1969.

1973;⁷³⁴ Unwrought Precious Metals Act of 1999;⁷³⁵ and the Environmental Impact Assessment Act.⁷³⁶ The Environmental Impact Assessment Act sets out the requirements for conducting environmental impact assessments for mining projects. It thus encourages companies to take into account the environmental impact of their activities and to engage in environmentally sustainable practices.

5.3.3 The Status and Promotion of CSR in Botswana

Even though there are no specific laws mandating CSR in Botswana, the country's legal framework encourages companies to engage in socially responsible practices through various laws and policies. For example, the Companies Act of 2003⁷³⁷, which requires all companies to have a board of directors that is responsible for the management and control of the company. The board is required to act in the best interests of the company, which includes considering the impact of the company's actions on the environment and the community in which it operates. In summary, the Company place on the directors the duty of care, skill, and diligence in the performance of their duties;⁷³⁸ a duty to act in the best interests of the company, and not to use their position for personal gain or to the detriment of the company;⁷³⁹ and to ensure that the company complies with all applicable laws and regulations.⁷⁴⁰ It is argued that these provisions of the Companies generally obligates the company to act in the best interest of all stakeholders, including conducting itself in a socially responsible manner. Directors can be held personally liable under section 218 of the Companies Act if they fail to act in the best interests of the company or if they engage in any conduct that is detrimental to the company. And this has been demonstrated in some court decisions where the importance of directors

⁷³⁴ Botswana, Mines, Quarries, Works and Machinery Act 20 1973;

⁷³⁵ Botswana, Unwrought Precious Metals Act 11 of 1999.

⁷³⁶ Environmental Impact Assessment Act (Cap. 65:07), Revised Edition 2019, Laws of Botswana.

⁷³⁷ Companies Act, 2003 (Act No. 10 of 2003), Revised Edition 2019, Laws of Botswana.

⁷³⁸ Companies Act 2003, section 96.

⁷³⁹ Companies Act 2003, section 97.

⁷⁴⁰ Companies Act 2003, section 101.

understanding their fiduciary duties and the potential consequences of breaching them have been highlighted.⁷⁴¹ Section 218 of the Act requires companies to disclose information about their social and environmental policies and practices in their annual reports. This, it is further argued, may include introducing CSR-mediated initiatives for local communities.

In addition, the Botswana Environmental Impact Assessment Act of 2011 requires companies to conduct environmental impact assessments before undertaking any project that may have a significant impact on the environment. This encourages companies to take into account the environmental impact of their activities and to engage in environmentally sustainable practices.

Furthermore, the Botswana Government's National Policy on Corporate Social Responsibility of 2008 encourages companies to engage in socially responsible practices. The policy outlines the principles of CSR, including respect for human rights, protection of the environment, and support for the development of local communities. While the policy is not legally binding, it is intended to guide companies in their efforts to engage in socially responsible behavior.

It is observed that Botswana Government's National Policy on Corporate Social Responsibility of 2008 encourages companies to engage in socially responsible practices.⁷⁴² The policy outlines the principles of CSR, including respect for human rights, protection of the environment, and support for the development of local communities. Unfortunately, the policy is not legally binding, and merely intended to guide companies in their efforts to engage in socially responsible behaviour.

⁷⁴¹ For example, *Motsumi and Others v Sebina and Others (2013)* in the High Court of Botswana that involved allegations of mismanagement and breaches of fiduciary duty by the directors of a company and the plaintiffs brought an action against the directors under section 218 of the Companies Act of 2003. The court found that the directors had breached their fiduciary duties and were liable for misfeasance. The directors were ordered to pay damages to the company and also to disgorge any profits made as a result of their wrongful actions.

⁷⁴² Government of Botswana. National Policy on Corporate Social Responsibility. Gaborone, Botswana: Ministry of Minerals, Energy and Water Resources, 2008.

Mining and CSR have been important topics in Botswana's economy and society largely. The investigation in this thesis reveals that the government has sought to ensure that mining companies operating in the country adhere to high eratin of CSR, including measures to protect the environment, promote social development, and respect human rights. For instance, in 2019, the Botswana government launched a new framework to guide the implementation of CSR practices in the mining sector. The framework, called the Mineral Development Policy,⁷⁴³ is designed to provide a framework for sustainable development in the mining sector, taking into account environmental, social, and economic factors.⁷⁴⁴ How the Policy deals with or espouses sustainability comes in varied way. For instance, one of its key goals is to promote local procurement and employment in the mining sector. To this end, the policy requires mining companies to prioritise the use of local goods and services, and to employ and train local workers wherever possible. The positive spin-off of this requirement is that the socio-economic of development of local communities and businesses is supported. Further, job opportunities are created for local communities. It is submitted that the positive aspect of this Policy fro CSR point of view is that its emphasises the importance of local procurement and employment. Furthermore, it promotes skills development and training for local workers.

Admittedly, the Policy will not be worth the paper it is written on if there is no implementation, monitoring and the long term impact of this policy in the mining

⁷⁴³ See Botswana's Mineral Development Policy at <https://www.mining-technology.com/features/botswanas-mineral-development-policy-aims-promote-sustainable-mining/>

⁷⁴⁴ For more information on Botswana Mineral Development Policy, see Botswana's Mineral Development Policy: A framework for sustainable development, *Mining Review Africa* available at [https://www.miningreview.com/coal/botswanas-mineral-development-policy-a-framework-for-sustainable-development/\(Discussing the Policy's focus on promoting sustainable development, supporting local businesses and communities, and ensuring responsible environmental management.\)](https://www.miningreview.com/coal/botswanas-mineral-development-policy-a-framework-for-sustainable-development/(Discussing%20the%20Policy's%20focus%20on%20promoting%20sustainable%20development,%20supporting%20local%20businesses%20and%20communities,%20and%20ensuring%20responsible%20environmental%20management.))

sector is yet to be fully experienced.⁷⁴⁵ Beyond the sense of pessimism regarding the Policy, a notable fact is that in order to ensure compliance with the Mineral Development Policy, the government requires mining companies to submit annual reports on their CSR activities. The reports must include information on the company's environmental performance, community engagement initiatives, and contributions to social development programs. This is an important step towards promoting responsible mining practices in Botswana, and it reflects the government's commitment to sustainable development in the mining sector.

The Botswana Code of Corporate Governance, first introduced in 2008 and revised in 2016, is designed to promote good corporate governance practices and ethical behavior among companies operating in Botswana. The Botswana Code of Corporate Governance is a set of principles and guidelines developed by the Botswana Stock Exchange (BSE) in collaboration with various stakeholders, including regulators, industry associations, and corporate governance experts. The Code includes guidelines on issues such as board composition, risk management, and CSR.⁷⁴⁶ In terms of CSR and sustainability the Code recommends that companies should have policies and practices in place to address these issues. In particular, that companies should consider the environmental and social impact of their operations, and should take steps to

⁷⁴⁵ See Botswana's Mineral Development Policy is laudable, but implementation key, 2019 *Mining Weekly* available at <https://www.miningweekly.com/article/botswanas-mineral-development-policy-is-laudable-but-implementation-key-2019-11-01> (Discussing the launch of Botswana's Mineral Development Policy and highlights comments from industry experts on the importance of implementing the policy effectively in order to promote sustainable development in the mining sector).

⁷⁴⁶ For more on Botswana Code of Corporate Governance, see generally Tumelo, R. Corporate Governance and Financial Performance: Evidence from Botswana. 2019 *Journal of Accounting, Finance and Auditing Studies*, 5(4), 135-146; Nkobi, M., & Steyn, H. The Impact of the Botswana Code of Corporate Governance on the Financial Performance of Listed Companies. 2018 *Journal of Economic and Financial Sciences*, 11(1), 1-10; Radipere, L. The Effect of Corporate Governance Practices on Firm Performance in Botswana. 2017 *International Journal of Business and Management*, 12(7), 152-161; and Keikothlaile, O., & Baleseng, B. M. Corporate Governance and Its Impact on Financial Performance: Empirical Evidence from Botswana. 2016 *Journal of Finance and Investment Analysis*, 5(3), 61-78.

mitigate any negative effects. Clearly, the principles and best practices outlined in the code are relevant and could be used across the mining industry even for companies that are not listed with BSE. Properly enforced and monitored, the Code will help promote good governance practices and ensure that mining companies are acting responsibly and liable for their operations.

Another important framework in Botswana is the Botswana Government National Strategy for Sustainable Development (NSSD), which outlines the country's long-term vision for sustainable development. The NSSD sets out a comprehensive and integrated approach to sustainable development, with the aim of promoting economic growth, social development, and environmental sustainability.⁷⁴⁷ The strategy is based on five pillars, namely: (1) *Economic Sustainability*: focusing on promoting economic growth, diversification, and competitiveness, while also addressing poverty and inequality; (2) *Social Sustainability*: Aims to promote social development and well-being, with a particular focus on improving access to quality education, healthcare, and social services; (3) *Environmental Sustainability*: Focusing on protecting and managing natural resources, including land, water, and biodiversity, and mitigating the impact of climate change; (4) *Governance and Institutional Sustainability*: Focusing on promoting good governance, transparency, and accountability, and strengthening institutional capacity for sustainable development; and (5) *Cross-Cutting Issues*: Addressing issues that cut across all of the other pillars, including gender equality, youth empowerment, and the use of science, technology, and innovation to promote sustainable development.

⁷⁴⁷ For general discussion of the National Strategy of Sustainable Development (NSSD), see Kgathi, D. L. The Botswana National Strategy for Sustainable Development: A critical analysis. 2018. *Botswana Journal of Economics*, 15(1), 1-14 (critically analysing the Botswana National Strategy for Sustainable Development, focusing on its strengths and weaknesses); and Moepeng, P., & Musonda, I. Promoting sustainable development in Botswana through community-based natural resource management. 2019 *Journal of Sustainable Development in Africa*, 21(2), 116-131 (critically analysing the role of public-private partnerships in promoting sustainable development in Botswana, in line with the country's national strategy).

From the perspective of the mining industry and mining communities, the NSSD is important because it provides a comprehensive and integrated framework for promoting sustainable development in Botswana. The pillars of the NSSD construed collectively and individually, speaks to the core of CSR in that they recognise the interdependence of economic, social, and environmental factors in achieving sustainable development, and provides a roadmap for addressing the identified challenges.

Much still to be done in Botswana to improve the enforcement and monitoring of CSR. Already, at least. An investigation in this study revealed that there is critical case law that directly or incidentally grappled with the issue of CSR of mining companies. Notable in particular is that these cases demonstrate how important CSR is in the mining sector in Botswana, and the need for it to be given proper prominence and articulation given the impact mining activities on local communities. In *Basarwa People vs. Botswana Government and De Beers*, for example, the Basarwa people (also known as the San people) brought a lawsuit against the Botswana government and mining company De Beers for violating their human rights and forcibly relocating them from their ancestral lands in the Central Kalahari Game Reserve. The case raised issues related to the social and environmental impact of mining activities in Botswana, as well as the responsibility of mining companies to respect the rights of local communities. After several years of legal wrangling, the case was heard by the High Court of Botswana in 2006. In its ruling, the court found in favour of the Basarwa people, declaring that the government's actions were unconstitutional and a violation of their human rights. The court ordered that the Basarwa people be allowed to return to their ancestral lands in the Central Kalahari Game Reserve. It is argued that the case is landmark victory for indigenous peoples' rights in Botswana, and has been cited as an important example of how legal action can be used to hold governments and companies accountable for their actions. The case also highlighted the importance of corporate social responsibility in the mining sector, and the need for companies to take into account the social and environmental impact of their activities on local communities.

5.2.3.1. CSR as Part of Mining Industry Responsibility Towards Mining Communities

The government plays a central role in the exploitation of the most valuable mineral resource in Botswana, diamond. The key question to ask in this section is whether, as a government and key shareholder in the diamond industry, Botswana is able to enforce and implement CSR in mining communities and communities affected by mining. The question can further be posed of whether there might be a conflict of interest concerning the government as a business entity. The disparities between the image of Botswana as a success story and the poverty and lack of development in the country are a demonstration that something is amiss. The mining communities in Botswana continue to be impoverished. Communities include the Basarwa, commonly known as the San people of Botswana, who continue to live in poverty and underdevelopment.⁷⁴⁸ This state of affairs for these communities puts into question the promotion of CSR at government level in Botswana.

Certain provisions of the Act such as the provision on rehabilitation do work towards promoting CSR. Traditionally, the rehabilitation of mines deals with a wide variety of issues including remedying the physical, environmental and structural damage to the ground and surrounding areas from mining, is provided for in the Mines and Minerals Act. Part IX of the Mines and Minerals Act, for example, places a responsibility of the holder of a mineral concession to ensure that their concession area is rehabilitated from time to time and reclaimed as far practically possible to the satisfaction of the Director of Mines.⁷⁴⁹ It is submitted that rehabilitation should be looked at broadly to look at matters such as the

⁷⁴⁸ Marobela M.N Labour, Capital and Society 2010 144.

⁷⁴⁹ In South African law, mining companies to set aside funds at the beginning of the mining project for rehabilitation of the local area when the mine closes. Unused fund after after mine closure will be forfeited to the government for it to carry out the rehabilitation work itself.

effects of closure on mining employees and mining communities. For these stakeholders mining companies might be their only hope for employment and other social considerations like community development, education, health and housing. Rehabilitation is not something to consider only on the closure of a mine. It must also be properly planned prior to the opening of a mine, and continuously carried out during mining operations.

CSR is viewed as a philanthropic endeavour in Botswana, and the Mines and Mineral Act does not make express provisions for CSR. It has been reported, for instance, the Minister of Resources, Green Technology and Energy Security has stated that the introduction of mandatory or legislated CSR is too risky for Botswana.⁷⁵⁰ But the horse for the Minister might have bolted a long time ago with cases such as *Mosetlhanyane and others v. Attorney General of Botswana*⁷⁵¹ as enforcement for rights of mining communities and nudging mining companies to be responsible towards their communities. The case involved an appeal by Basarwa community of the decision by the High Court and challenging the Government's refusal to allow members of the Basarwa (San or Bushmen) community access to a borehole in the Central Kalahari Game Reserve (CKGR). This is a borehole that was drilled in 1985 by the De Beers mining company for prospecting purposes and supplying some of the water to settlements in CKGR. Unfortunately, the Government of Botswana later evicted and resettled the Basarwa outside of the CKGR arguing that human settlements were incompatible with the conservation of wildlife in the preserve. The appeal was upheld and the Court ordered that the Applicants be able to re-commission and freely use the borehole for their domestic needs. The Gem Diamonds Company, which was thereafter given mining rights on the CKGR committed to drilling of more

674 Mokoena N Legislated CSR too risky for Botswana <https://www.pressreader.com/botswana/botswana-guardian/20220318/281547999375594> Accessed 25 October 2022.

⁷⁵¹ *Mosetlhanyane and others v. Attorney General of Botswana*, Civil Appeal No. CACLB-074-10. The case of *Mosetlhanyane* followed on an earlier decision in *Sesana and Others v Attorney-General* (2006) AHRLR 183 (BwHC 2006), in which the Court found the relocation of the Basarwa community off of the CKGR unconstitutional.

boreholes part of the community water project. This gesture, it is submitted, speaks to CSR.

Mining companies in Botswana seem to have embraced the need to curtail the effects⁷⁵² of their operations through CSR and related initiatives. For example, Debswana Mining Company has come up with innovative corporate social responsibility in the mining industries in Botswana. Solís and Moroka point out that in 2006 Debswana re-launched its Corporate Social Investment (CSI) Policy with more focus and commitment on issues that are geared towards safeguarding public interest: “with a stronger commitment this time, to create a legacy of prosperity, sustainability and empowerment for the communities in the country.”⁷⁵³ The following has been noted as the declared intention of Debswana at the unveiling of CIS:

It is in line with the Corporate’s desire not only to be a sustainable, profitable company, but also a direct contributor to the development and well-being of the communities in which it operates. The policy, also unveiled to Non-governmental organizations and local press, is expected to balloon from the current budget of P6.7 million (P is standing for Pula, the Botswana monetary currency) to an undisclosed figure with a twin approach of supporting the national vision 2016 and the program within communities in which they operate. It has been influenced in the short to medium term by the United Nations Millennium Development Goals, as well as supporting governance structures. Debswana will consider favorably community projects that not only assist the underprivileged and the deprived, but those that result in job creation, on-the-job training, health and education in general. In

⁷⁵² Ntsabane, I. P., Darkoh, M. B. K., Gwebu, T. D., & Totolo, O. (2010). *Botswana Journal of Southern African Studies* 2010 24, 159–179.

⁷⁵³ See Solís JRST and Moroka M. Innovative corporate social responsibility in Botswana: The Debswana mining company study case *Contaduría y Administración*, 2009 No. 233, enero-abril 2011: 85-98, at 93.

2006, Debswana disbursed over P3 million of the committed P5 million out of a budget of P6.7million to various country projects and organizations. These included P800 000.00 towards various centers for the disabled, P800 000.00 towards various sports organizations, P150 000.00 towards environment organizations, P500 000.00 towards education and many other community projects.⁷⁵⁴

5.4. LESSONS FROM BOTSWANA AND AUSTRALIA

Several lessons can be derived from the experiences of Botswana and Australia. By comparing these countries with South Africa, common traits were observed regarding mining communities. The suffering of these communities is linked to past laws and practices of colonisation, which relegated the mining communities to the status of nonentities in the land of their births. The law was central, in the three countries compared, in ensuring that the indigenous people of the colonized countries are disadvantaged and exploited.

The findings from this comparative study showed how the three countries influences mining operations. Compared to South Africa, Botswana plays an active role in the industry.⁷⁵⁵ The Botswana model of incorporation of the government as a key player and shareholder in one of its prized commodities is important to ensure that the mineral resources of the country benefit the people on the ground. The growth in the GPD of the country has demystified the myth that the involvement of the government in the mining industry will lead to investor flight. The law, in the case of Botswana, has shown the important role it can play in placing key players in the mining industry.

⁷⁵⁴ Solís JRST and Moroka M. Innovative corporate social responsibility in Botswana: The Debswana mining company study case. 2009. *Contaduría y Administración* at 93.

⁷⁵⁵ Sepo IM, University of the Witwatersrand 2016.

South Africa can also adopt a similar model which will require the government to amend the MPRDA, to enable the government to obtain a stake in the mining industry. As a pilot project, the state can identify one of the minerals in South Africa and obtain a stake in the exploitation of that mineral resource. As indicated in the case of Australia, it is imperative that the role of the government and the role of the mining companies must be clearly defined to avoid vagueness, by which the government can shift some of its duties to mining companies. Of significance is that the policy for regulating mining in South Africa must be clear. Taking into account the interest of the mining community and promoting the development of these communities. Mining companies must be informed about what constitutes CSR and the fact that the granting of their licenses is dependent on this.

It is submitted that there is no perfect application of CSR simply because each country defines and interprets CSR in its own way and this concept works differently for different countries. Also, one can never have in place a single blanket approach that can be suitable for all, therefore, CSR must be adopted to fit. South Africa must adopt CSR that is suitable for its specific situation and the challenges faced by mining companies. This requires evolution and a revolution of the mining regime in South Africa.

5.5. CHAPTER SUMMARY

Mining must be for the benefit of the people of the country whose mineral resources are being extracted and exploited. The MPRDA is different from the mining legislation regulating mining in Botswana and Australia, but there are notable similar weaknesses in these jurisdictions. Botswana makes provision for State participation in diamond mining. This said, it is argued that Botswana and Australian mining industry have made great strides with regard to operating in a socially responsible manner that benefits the mining communities and contributes to their overall well-being. The mining industry in both Botswana and Australia is a major contributor to the country's economy, and has a significant impact on the

surrounding communities. While there may not recent legislation at the time of writing that has drawn attention to CSR in the mining sector in Botswana, the government's ongoing efforts to promote responsible mining practices suggest that this is an important issue for the country's economic and social development.

Still, it is argued that none of the comparator countries analysed provides a perfect model that South Africa can adopt. A hybrid model that is further developed to suit a South African context is preferred. South Africa must attempt to be a participant in the mining industry, without losing its identity as a State and hold companies not complying with CSR accountable.

<p style="text-align: center;">CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS</p>

6.1 INTRODUCTION

The mining industry is still one of the most important economic sectors in the Republic. The study has shown that mining communities are still some of the most impoverished communities in the country despite the existence of legislation regulating this profession, which was explored in Chapter 3 of this study. The study found that CSR was one of the concepts that can be used to ensure that mining the contribution of mining companies trickles down to mining communities. The concept of CSR was investigated by looking at the experiences of South Africa and the various theoretical approaches that can be looked at when interpreting the concepts and interpreting the legislation relating to mining in the South African context. The international law conception of CSR was also looked at, and the experiences of other countries as far as CSR was concerned were looked at.

CSR was adapted in ways that attempted to resolve the challenges faced by these countries in so far as CSR was involved. It is argued as a point of departure that the current definition of CSR in the South African situation is not sufficient to address the challenges the country faces in the country in the sense of resolving the challenges faced by the mining community. There is a need for a radical change and evolution in how legislation and policy regulating mining are enacted and interpreted in South Africa.

South Africa has a challenge with the implementation of its policy and mining companies, aided by rampant corruption and the lack of political will to enforce legislation relating to CSR and the enforcement of SLPs do the barest minimum.

Mining communities, most of which are underprivileged, are rarely empowered to defend their rights, and they can rarely afford the legal representation necessary to take on well-resourced and well-funded mining companies to court. This chapter aims to provide legal tools and mechanisms to ensure that there is a clear definition of what CSR is and how it should be implemented in mining communities. It also recommends the establishment of a mining court, which will deal with matters relating specifically to mining issues, and the development of an Alternative Dispute Resolution (hereinafter referred to as ADR) to resolve disputes relating to mining issues and mining communities in a rapid and cost-effective manner. These legal tools and mechanisms must be readily available to mining communities.

6.2 OVERVIEW OF THE STUDY AND SOME REFLECTIONS

Chapter 6 is foregrounded by data, scholarly information and observations in chapters 1 to 5. The following observations were made:

Chapter 2 investigated the historical background on CSR and its application in South Africa. It was found that CSR was not applicable in both the Union and Apartheid era. This was changed by the advent of democracy and the enactment of the Constitution of the Republic of South Africa, 1996.

Chapter 3 looked at some of the rights that mining communities have. The rights include the right to be consulted and the right to socio-economic development. These rights create a duty on mining companies and the state to ensure that these rights are protected and not violated by both the state and the mining companies.

Chapter 4 demonstrated that for CSR to be successfully implemented in the South African mining industry, mining companies must integrate themselves into the communities where they operate. This will require companies to integrate themselves into the community, they must take into account a number of theories which will ensure that they gain favour from the mining communities to ensure the smooth running of mining companies. Mining companies have a duty to fulfil their legislative responsibilities to mining communities. An understanding of the context within which they exist and operate is important

Chapter 5 found that none of the countries analysed in this section provides a perfect model that South Africa can adopt. A hybrid model that is further developed to suit a South African context is preferred. South Africa must attempt to be a participant in the mining industry, without losing its identity as a State and hold companies not complying with CSR liable. This was observed by investigating CSR in Australia and Botswana.

The following reflections are particularly noted:

6.2.1 Reflection on CSR

There is a conundrum in the definition of CSR, some countries, more specifically those much more developed than South Africa and in much better economic positions such as Australia approach CSR as a philanthropic mission than an obligation and a duty of MNEs and companies to contribute to the communities, more specifically mining communities within which they operate. South Africa adopted this concept as it was developed and did not necessarily coin it to fit the South African situation. One might argue that SLPs are sufficient; however, statistics have shown failures and challenges with SLPs.

Some of these challenges were the failure to consult with the relevant people and bodies as provided in the MPRDA and its regulations. However, since the inception of the concept of SLP, they have proven to be unsuccessful, to an extent that a majority of stakeholders in mining communities were not even aware of the existence of SLPs. This failure was not only detected in mining communities, but the local governments that are responsible for including these SLPs in their developmental goals were not aware of their existence and are reduced to merely incorporating SLPs they are not aware of and that could not be based on any needs-based test done by mining companies.

The concept of CSR must evolve to meet the condition and situation of South Africa. There is no universal definition of CSR. Relying on definitions and concepts that are irrelevant or do not speak to the African and, more specifically, the African condition is problematic. The study indicated that mining companies seem to have the impression that CSR is not compulsory. The most common term is by the World Bank, which states that CSR is defined as the commitment of businesses to contribute to sustainable economic development, working with employees, families, local communities, and society at large to improve the quality of life in ways that are good for business and development. The definition does not make it compulsory, but simply states that it is a commitment. This does not impose any duty on mining companies to protect and promote the socio-economic interest of communities within which they operate; it merely states that these companies may commit to CSR. They have to rely on SLPs and the available legislation which are not enforced, in a system that appears to be rampant with corruption and failure to hold companies responsible.

6.2.2 Reflection on the duties of mining companies in relation to CSR

The roles of mining companies or holders of rights related to mining and that are contained in the MPRDS are general. The MPRDA provides that they must

contribute to the development of communities and those who were disadvantaged by past discriminatory laws.

The duties of mining companies must be developed. Clear guidelines on what is expected must be legislated and made compulsory. SLPs have proven to be ineffective in defining the role of mining companies; therefore, extra measures must be put in place through CSR. The role of mining companies must take into account the various theories that apply to CSR in South Africa.

This thesis provides several theories that are aligned with CSR, and these theories are: The Human Rights Theory; The Critical Race Theory; and Stakeholder theory. These theories require that the interpretation of laws or the conduct of anyone in the republic must take into account human rights. It is imperative that the rights lost or affected by mining operations or the grant of mining and prospecting rights and how these rights affect mining communities are taken into account. Mining has a tremendous impact on the rights to access and use of land. This can affect the right to life, property rights, the right to exercise culture, and the right to dignity. The benefits of mining must outweigh the loss suffered, and mining companies must operate with full realisation of the impact that mining has on mining communities and the loss suffered by these communities.

Taking into account the above-mentioned theories, mining companies must have the following duties:

- To be bound by international law principles on human rights. This entails that even in instances whereby the host state is involved in human rights violations, mining companies must not operate in a manner that encourages such violations. They must also not profit from the human rights violations of the host states.

- Before mining rights are granted, the mining companies must provide evidence that they identified all parties affected by the mining operations. They must do this under the supervision of the provincial and local governments. Mining rights must only be granted once it has been established that mining communities and all interested and affected parties were consulted. The consultation process can also involve NGO operations that will assist mining communities where there are gaps in knowledge relating to their rights and interests in relation to human rights affected and mining law.
- Mining companies, after consultation with communities and all affected and interested parties, must develop programs that will impart skills related to the core objectives of the company. For example, if a company deals with gold mining, it must develop a skills transfer program that will teach the community how to process the gold. This goes beyond what might be considered a philanthropic endeavour, and it will empower local communities with skills that will not only ensure that they are employable, but that they are empowered as well.
- Mining companies must report on an annual basis on the progress of their Skills Development Projects. This report must be made available and subject to the approval of the mining communities concerned. Preferably with the assistance of NGOs and NPO.
- Mining companies must conduct need-based tests in the specific communities where they are operating. This will require them to integrate themselves into the communities and to know what the communities need. This will assist in ensuring that whatever project the companies engage in is needed and relevant to that specific community, as there is no single blanket approach to challenges faced by mining communities. Each community is unique and has its challenges.

- Finally, mining companies must comply with the legislative framework of South Africa.

6.3 RECOMMENDATIONS

The following recommendations are made, which take into primary consideration the responsibilities and obligations of mining companies, and the need to equally focus on benefitting mining communities as stakeholders in the mining industry. The South Africa government in taking heed of these recommendations must also align the extractive industry with the Africa Mining Vision⁷⁵⁶ (AMV) and international best practises. The Africa Mining Vision was adopted by Heads of State at the February 2009 African Union (AU) summit following the October 2008 meeting of African Ministers responsible for Mineral Resources Development. Important characteristic of the AMV is that it is holistic approach to governance and regulation of the extractive industry. According to the AMV, not only should States focus on improving mining regimes by making sure that tax revenues from mining are optimized and that the income is well spent, but the States must take into consideration the need for actually ensuring real benefits for mine workers and mining communities. Also, the protection of the environment from large-scale industrial mining.

In terms of the AMV, the shared vision will comprise:

- A knowledge-driven African mining sector that catalyses & contributes to the broad-based growth & development of, and is fully integrated into, a single African market through:
 - Down-stream linkages into mineral beneficiation and manufacturing; Up-stream linkages into mining capital goods, consumables & services industries;

⁷⁵⁶ *African Mining Vision*. Available at <https://au.int/en/documents/20100212/africa-mining-vision-amy> Accessed 27 October 2022.

- Side-stream linkages into infrastructure (power, logistics; communications, water) and skills & technology development (HRD and R&D);
 - Mutually beneficial partnerships between the state, the private sector, civil society, local communities and other stakeholders; and
 - A comprehensive knowledge of its mineral endowment.
- A sustainable and well-governed mining sector that effectively garners and deploys resource rents and that is safe, healthy, gender & ethnically inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities;
 - A mining sector that has become a key component of a diversified, vibrant and globally competitive industrialising African economy;
 - A mining sector that has helped establish a competitive African infrastructure platform, through the maximisation of its propulsive local & regional economic linkages;
 - A mining sector that optimises and husbands Africa's finite mineral resource endowments and that is diversified, incorporating both high value metals and lower value industrial minerals at both commercial and small-scale levels;
 - A mining sector that harness the potential of artisanal and small-scale mining to stimulate local/national entrepreneurship, improve livelihoods and advance integrated rural social and economic development; and
 - A mining sector that is a major player in vibrant and competitive national, continental and international capital and commodity markets

6.3.1 Introduce Explicit Fair Compensation in Favour of Mining Communities Against Companies that Fail in their CSR Obligations.

MPRDA must be amended to include explicit and peremptory provisions on fair and adequate compensation for challenges, damages, or injuries experienced by mining communities due to failure by mining companies to observe CSR and related responsibilities such as the rehabilitation of mines. It is further submitted that the obligation for compensation must also extend to the government into whose coffers mining rehabilitation funds have been forfeited by failed to rehabilitate the mines within a reasonable time leading to negative consequences for the mining communities where the mine operated.

6.3.2 Legislate CSR in the Mining Industry

There is a plethora of legislation that regulate other aspects of CSR, but very few that focus on the socioeconomic development and the protection of the rights of dwellers of mining communities. In terms of regulations to the Companies Act 71 of 2008, for instance, CSR has been placed on companies and boards of directors must seriously take this into account in the company's operations. The overhauled Companies Act requires a juristic entity to appoint a social and ethics committee, and the Companies Act allow the Minister of Trade and Industry to prescribe certain provisions in regulation concerning a social and ethics committee.

One would have expected a strong normative CSR influence over extractive industries in their decision-making and how they relate to mining communities, given mining as the nerve center of the South African economy and the myriad of challenges suffered by mining communities. But that has not been the case. Perhaps it is because the South African environmental law has somewhat been permissive when it comes to duties and responsibilities of corporations towards

the environment. It is here recommended that there must be legislation that regulates the socio-economic development of mining communities through CSR. The legislation must create reflexive law undergird by CSR, which will meaningfully steer the decision-making process of the extractive sector to socio-economic protection and development of mining communities. The reconsidered legislation must make clear provisions on CSR especially with regards to involuntary displacement and relocation as a result of mining activities and the resultant compensation

Therefore, it is recommended that the legislation take the following structure:

CORPORATE SOCIAL RESPONSIBILITY BILL:

A

(PROPOSED BILL)

TO:

Make provision for measures to regulate the socioeconomic conditions of- mining communities through CSR; Recognise that mining communities are some of the most impoverished communities in South Africa, we acknowledge the following, and recognise that previous discriminatory laws negatively affected and continue to affect mining communities; and acknowledge that the mining industry can contribute to the socioeconomic conditions of mining communities.

Section 1. Definition

Corporate social responsibility is defined as the legislative duty of mining companies to contribute to the socioeconomic development of the mining communities where they operate.

A mining community is defined as a community close to mining, established before the mining operation took effect, and which is affected by the mining operation.

Meaningful participation is defined as the consultative process by mining companies with mining communities and interested and affected parties. These parties must be made aware of the following:

- a) The impact that the mining operation will have on the economic, socioeconomic and access to land
- b) The different projects that the mining company will engage in for their benefit

Section 2. Rights of Mining Communities

Taking into account the negative impact that mining has on communities and the environmental impact of mining, mining communities have the following rights:

- (1) To receive adequate compensation for loss of the right to ownership, enjoyment, and use of land
- (2) To be protected from the environmental harms that mining causes.
- (3) To socioeconomic development
- (4) Training or training skills that are aligned with the objective of the core business of the mining company
- (5) To be consulted before mining rights are granted to mining companies and MNEs
- (6) Inspect reports from mining companies on skill development projects undertaken by the mining company.

Section 3. Duties of Mining Companies

Taking into account the financial benefits that mining companies will gain from the mining operations, mining companies have a duty to:

- (1) To contribute to the socio-economic conditions of the communities within which they operate.
- (2) To provide and train the community on skills which form an integral part of the operation of the business.
- (3) To consult with mining communities to identify challenges faced by the community affected by the mining operations.

Section 4. Duty to Prepare and Publish Reports

- (1) It shall be the duty of every company to prepare a report annually containing:

- (a) An assessment of the mining company's policy and performance in regard to the environmental, social and economic impact of any of its operations on the mining community in the preceding year,
- (b) An assessment of the mining company's policies and performance in regards to the environmental, social and economic impact of its proposed activities
- (c) An assessment of the mining company's employment policies of the members of the mining community
- (d) An assessment of the mining company's implementation of corporate social responsibility projects
- (e) Any relevant skills, training, qualifications and experience the mining company provided to the mining community relating to:
 - (i) The environment
 - (ii) Social matters
 - (iii) The core business of the mining company
- (f) Any relevant skills, training, qualifications and experience the company's directors have with regard to:
 - (i) The environment and
 - (ii) Social matters

(2) A company shall take reasonable measures to make the report under subsection (1) publicly available in more than 3 official languages, including a language predominantly spoken in the areas within which they operate.

Section 5. Duty to Identify Communities

- (1) Identify of communities affected or who will be affected by mining operations must be established by the company
- (2) It must be established whether the land is subject to any land claims
- (3) Where applicable the relevant tribal authority in relation to the land must be identified.

Section 6. Duty to Consult

- (1) To consult the relevant government department in:
 - (a) Identifying Parties and Communities Affected by Mining
 - (b) Establish whether the land in question is subject to any land claims.
 - (c) Establishing the socio-economic background of the area where they operate.
- (2) Consult traditional leadership and the community to identify whether the land is used for cultural and spiritual purposes.
- (3) Develop skills development programs that are aligned with the needs of the community affected by mining

Section 7: Remedies of Stakeholders

- (1) If a stakeholder is of the opinion that a company is in breach of the Act they may make a complaint to the Regional manager (or to any appointed body) and the Regional Manager (or any appointed body) shall consider any such complaint.
- (2) The Regional Manager (or appointed body) need not consider a request made under subsection (1) if it considers it to be frivolous and without merit and in any such case the Regional Manager (or any appointed body) shall publish the reasons for that decision in 3 official languages, including the language predominantly spoken in the community affected by the company's business operations.
- (3) Where the Regional Manager (or any appointed body) receives an application under this section the powers given to her/him under section 5 shall apply as if they were powers under this section.
- (4) Any stakeholder shall subject to any provisions of this Act have a right of action against a company to which the Act applies and any director/s of thereof for any breach of duty owed towards the said stakeholder as a result of this Act and the court established in terms of this Act which has the jurisdiction to hear such a case.

Section 8: Penalties and Compensation

- (1) A person who breaches this Act commits an offence.
- (2) An offence under this Act shall as appropriate be punishable by:
 - (a) A person being prohibited from being a director of a company in South Africa for a specified period of years
 - (b) Fine appropriate to the offence
 - (c) The company and/or its directors being required to make redress to any other person or community that suffered as a result of any offence
 - (d) A company being deregistered or suspended from trading in South Africa and on the Johannesburg Stock Exchange (JSE)

Section 9. Establishment of Mining Courts

- (1) For the purposes of this section, the Minister of Justice and Correctional Services shall establish Mining Courts. These courts will be in the capital city where the mining communities are located, and they have the same status as the High Court.
- (2) The Mining Courts have jurisdiction to hear the following matters:
 - a) Disputes related to the failure to consult the mining community where this Act and other related acts require consultation.
 - b) Disputes related to the violation of the human rights of mining communities.
 - c) Disputes related to the community distracting the operation of mines without just cause.
 - d) Failure to develop skills development projects.
 - e) Illegal Mining.
 - f) Failure of communities to provide reasonable and clear guidelines for their needs.

Section 10. Alternative Dispute Resolution in Mining Disputes

This Act established an alternative dispute resolution forum relating to mining communities.

- (1) Disputes will be resolved by arbitration, mediation, and conciliation.
- (2) The mining court will be approached as a court of last resort.

Section 11: Function of the Regional Manager

- (1) The Regional Manager has the powers to:
 - (a) Authorise and approve CSR plans.
 - (b) Ensure that the relevant community was identified and consulted.
 - (c) Ensure that the relevant tribal authority was identified and consulted
 - (d) Hear complaints issued in terms of section 9(2) of the Act.

The recommended enactment of the Act will add something missing from the MPRDA and other mining policies in South Africa, namely empowering the community to be able to fight for the rights where the mining companies and the government fail. The proposed Act will provide mining companies with the ability to resolve disputes amicably through alternative dispute resolution mechanisms. The proposed Act also empowers mining companies to approach the court in instances where the community fails to communicate its needs to mining companies in an attempt to delay the process. The Minister or the relevant authority delegated by the Minister can also be empowered to interfere where the mining community acts arbitrarily against mining companies.

The participation of the community at the beginning of the mining operation will play a role in limiting the influence of the government, which is and can be subjected to corruption. As indicated in the case of Australia, corruption was not the main issue and therefore it was not a primary concern. In countries where corruption is a primary issue, other measures, including legislation, must be taken not only to empower the mining communities but also to empower them, from a legal point of view, to be able to protect their interests where the State fails.

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