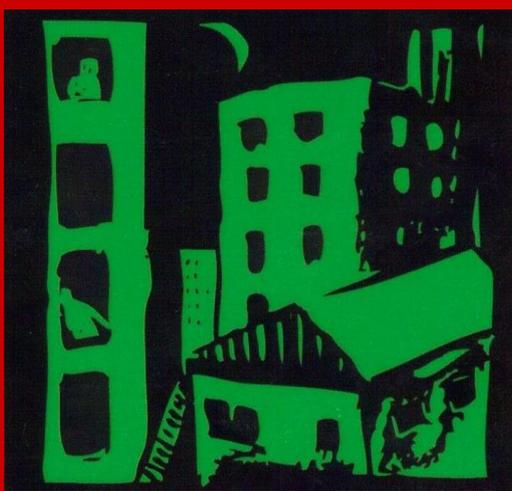


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***“Alone in the Dark”:
How the Current
Mining and Minerals
Legal Regime
Continues to fail
Artisanal and Small-
scale Miners in
South Africa***¹

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ABSTRACT

Since 1994, the South African government has demarcated the artisanal and small-scale mining (“ASM”) sector for the promotion of the economic

¹ This paper is an adaption of my LLM dissertation which explored the above concept in a fuller way. I would be remiss if I neglected to acknowledge the contributions of Professor J.L. Pretorius of the Free State Centre for Human Rights (UFS) and Adv. L. Gerber of the University of Pretoria, as well as the Kimberly office of Petra Diamond Mine (Pty) LTD which granted me a personal interview with their Spokesperson on the topic of ASM. This paper is also dedicated to the scores of artisanal and small-scale miners I had the privilege of interviewing as this matter directly affects them and their families’ livelihoods.

participation of previously disadvantaged persons within the country's broader economy. Various domestic policy documents refer to the ASM sector as one deserving of structural development and adequate regulation. However, to date, the sector still exists and functions on the fringes of the law. This fact has allowed for the under-development of the sector to persist and, out of such under-development, adverse ramifications, including the environmental degradation associated with illegal ASM, the acrimonious relationship between illegal ASM and large-scale mining ("LSM") and its occupational health and safety concerns. It is such negative consequences of illegal ASM that continue to thrive at the expense of the socio-economic and community-development potential of the sector. In light of the above, this paper seeks to explore the current constitutional, legislative and policy framework upon which the development of the sector ought to be founded. Such a developmental foundation consists of the legislative and policy elements which mirror constitutional ideals. Further, under the over-arching theme of rethinking the minerals and petroleum sector, as touted by the Minerals and Petroleum Resources Development Act and the Mining Charter, certain structural and legislative transformations ought to take place if we hope to transform the ASM sector to what it was initially intended to be.

KEYWORDS: Artisanal and small-scale mining; Large-scale mining; previously disadvantaged South Africans; Socio-economic development; Constitution of South Africa; Mining Charter; Minerals and Petroleum Resources Development Act; formalisation; environmental degradation; occupational health and safety.

1 INTRODUCTION

Historically, South Africa's mining sector has always been a dominant source of ripe economic activity due to the nature and abundance of precious minerals and stones.² After 1994, the Reconstruction and Development Programme (RDP), along with the White Paper on Minerals and Mining Policy,³ identified the mining sector to be one of the key areas in which historically disadvantaged persons could participate and be integrated into the country's economy.⁴ More poignant to the role mining could play in the grander role of re-introducing historically disadvantaged persons into the broader sector, the White Paper held that artisanal and small-scale mining (ASM) could contribute a significant deal.⁵

² Gelb S *South Africa's economic crisis* (1991) at 110.

³ See Republic of South Africa "Government Gazette 23 November" (1994) 353 (16086) available at <https://www.gov.za/sites/www.gov.za/files/governmentgazetteid16085.pdf> (accessed 09 September 2019).

⁴ See the *White Paper. A Minerals and Mining Policy for South Africa* (1998) available online at https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperminingmineralspolicy2.pdf (accessed 18 April 2021).

⁵ *White Paper. A Minerals and Mining Policy for South Africa* (1998) (accessed 09 September 2019).

No strict domestic or international definition of ASM exists.⁶ The practice may simply be understood as mineral extraction activities that are subsistence-based, technologically, mechanically and capital poor, comprising a labour-intensive element, and which often operate on the borders of the law.⁷ ASM, as the name suggests, is a variant of small-scale mining but carried out artisanally or using rudimentary tools and mechanics.⁸ This is juxtaposed by the general understanding that small-scale mining also operates on a smaller scale than LSM, but enjoys the differentiating element of being statutorily sanctioned and making use of more sophisticated machinery than ASM.⁹

ASM is complex and wide-ranging, meaning different things to different countries and regions. The first type of ASM occurs in year-round artisanal mining operations, referred to as permanent ASM.¹⁰ Secondly, ASM may also be seasonal in nature, denoting those ASM activities commonly related to farming and occur at select times during the course of the year.¹¹ Lastly, newly discovered resources commonly draw huge numbers of migrants to the mining area; this results in what is known as rush artisanal mining.¹²

ASM also differs in its legal characteristics. Three main legal categories exist - the legal ASM which is characterised by the legislative recognition of the sector by the host country and accommodates artisanal miners with the financial and structural capabilities to participate legally in the sector.¹³ Secondly, there is informal ASM which does not explicitly contravene mineral and mining laws but lacks its own specific regulatory framework.¹⁴ The third kind of ASM is illegal ASM. This type of ASM denotes

⁶ Minerals Council South Africa “Artisanal and Small-Scale Mining: Position Paper” (2019) at 2 available at <https://www.mineralscouncil.org.za/industry-news/publications/position-papers/send/37-position-papers/768-artisanal-and-small-scale-mining> (accessed on 19/01/2021).

⁷ Buxton A “Responding to the challenge of artisanal and small-scale mining. How can knowledge networks help?” (2013) *International Institute for Environment and Development* at 4 available online at <https://womin.org.za/images/impact-of-extractive-industries/women-and-artisanal-mining/IIED%20-%20%20Artisanal%20Mining%20and%20Use%20of%20Knowledge%20Networks.pdf> (accessed 10 May 2019).

⁸ See Minerals Council South Africa (2019) at 2.

⁹ See Minerals Council South Africa (2019) at 2.

¹⁰ See Buxton A (2013) at 4.

¹¹ See Buxton A (2013) at 4.

¹² Mantu S *Constructing and imagining labour migration perspectives of control from five continents* (2016) at 114.

¹³ Ledwaba PF “The status of artisanal and small-scale mining sector in South Africa: tracking progress” (2017) 117(11) *Journal of Southern African Institute of Mining and Metallurgy* at 35.

¹⁴ See Ledwaba (2017) at 35.

the contravention of existing mineral and mining legislation of a host country¹⁵ and is that which largely occurs in the South African context.¹⁶ This type of ASM is the focal point of this paper.

South African mineral law prohibits the prospection, removal, mining, conduct of technical co-operation, reconnaissance, exploration or production of any mineral or petroleum resource without statutory permission.¹⁷ According to the MPRDA, one may also not begin any extractive work or any work incidental thereto on any area without an approved environmental authorisation, reconnaissance permission, prospecting or mining right or the permission to remove, a mining right or mining permit, retention technical co-operation permit, co-operation permit or reconnaissance permit.¹⁸ Generally, the compliance with and satisfaction of the expensive and onerous requirements of mineral rights, such as these listed above, is largely achievable by established mining companies with the necessary financial, administrative and technical expertise.¹⁹ The structural hurdles, such as the lack of access to formal mineral sectors and economies, governmental support and education, facing artisanal miners are of such a challenging nature that the miners perceive them as impossible to overcome.²⁰ Such structural deprivations, compounded by ASM's illegal nature lead those dependent on it to engage in haphazard mining and mineral processing and illegal trading - with negative health, social and environmental consequences.²¹

Even with the regulatory allowance for the application for mining permits, rights and licenses for small-scale and junior miners, there still exists the challenge that the application process and the costs thereof are a steep climb for most of the sector's

¹⁵ Illegal mining is expressly prohibited by S 5A of the Minerals and Petroleum Resources Development Act 28 of 2008 (MPRDA); See Ledwaba (2017) at 35.

¹⁶ See Mineral's Council Paper at 4 (Accessed on 19/01/2021)

¹⁷ S 5A of the MPRDA.

¹⁸ See S 5A of the MPRDA.

¹⁹ South African Government "Apply for a mining right" (2021) at <https://www.gov.za/services/mining-and-water/apply-mining-right#> (accessed 28 January 2021). The Financial and Technical Competence Report which is required according to Item B of Form F, Annexure I of the MPRDA Regulations when applying for a mining permit also lists the nature of costs involved in this onerous process including the land, buildings and infrastructure, operating, processing plant, machinery and environmental costs. It is noted on this form that should an applicant be unable to satisfy these costs, it is reasonable to conclude that the applicant will not be able to afford the rehabilitation costs involved either.

²⁰ SAHRC "Report of the SAHRC investigative hearing on issues and challenges in relation to unregulated artisanal underground and surface mining activities in South Africa" (2015) 6; 11; 24 at <https://www.sahrc.org.za/home/21/files/Unregulated%20Artisanal%20Underground%20and%20Surface%20Mining%20Activities%20electronic%20version.pdf> (accessed 11 September 2019).

²¹ World Bank (CASM) "Mining together: Large-scale mining meets artisanal mining" (2009) available at <http://documents.worldbank.org/curated/en/148081468163163514/pdf/686190ESW0P1120ng0Together0HD0final.pdf> (accessed 21 September 2019).

artisanal entrants.²² This is the struggle of ASM’s feature in a national mining framework which imposes stringent requirements on the sector, thus furthering its existential challenges. The salient difficulty in obtaining mining rights for those without the necessary resources and structural capabilities commonly results in many of what would be legal ASM activities being carried out illegally.²³ This difficulty further entrenches the deprivation of artisanal miners to the support framework they constitutionally and legislatively deserve.²⁴

Notwithstanding the prohibition of illegal mining in South Africa, coupled by the recognition of the ASM sector, illegal ASM has continued to grow since 1994 and research suggests that its expansion is motivated primarily by high levels of unemployment and crippling poverty.²⁵ The blanket criminalisation of all mining which occurs without the statutory licencing, especially according to the strict existing frameworks, has the effect of largely negating the socio-economic potential that could benefit the thousands of South Africans who depend on the ASM sector.²⁶

In light of the above, the following portion of this paper is premised on the constitutional necessitation of the calls to transform the existing statutory framework applicable to the ASM sector. Such a foundational perspective on the proposed development of the sector also functions as an interpretive lens for the balance of the paper which aids the broad mission of beginning to understand South Africa’s mineral wealth through for its constitutional imperatives and function. This will be succeeded by an analysis of the provisions of mining legislation and policy in the third and fourth sections, namely the Mineral and Petroleum Resources Development Act (MPRDA), the Broad-Based Socio-economic Empowerment Charter for the South African Mining and Minerals Industry (Mining Charter) as they apply to the notion of socio-economic transformation within the minerals industry – a mission which ASM is already acknowledged to have the ability to contribute to. The identified provisions are fundamentally in support of the tailoring of a new and unique ASM sector, along with its

²² See Minerals Council South Africa (2019) at 5.

²³ The stringent and difficulties in obtaining mining permits and rights are not the only hurdle potential miners face. According to the Minerals Council Position Paper 2019, available online at <https://www.mineralscouncil.org.za/industry-news/publications/position-papers/send/37-position-papers/768-artisanal-and-small-scale-mining>, other factors at play include the limited resources at the disposal of law enforcement agencies such as police, immigration, border control and prosecuting authorities as well as the presence of illegal mineral syndicates.

²⁴ Africa Minerals Development Centre “South Africa ASM Profile” (2021) available online at <https://knowledge.uneca.org/ASM/sa> (accessed 22 January 2021).

²⁵ See Ledwaba (2017) at 34; Dreschler B “Small-scale Mining and Sustainable Development within the SADC Region” Mining Minerals and Sustainable Development (2001) 84 *Mining, Minerals and Sustainable Development* at 92.

²⁶ Debrah AA, Watson I & Quansah DPO “Comparison between artisanal and small-scale mining in Ghana and South Africa: lessons learnt and ways forward” (2014) 114 *The Journal of The Southern African Institute of Mining and Metallurgy* at 914.

development. Throughout the contents of this paper, a close association will be established connecting the provisions of the Constitution, legislation and policy to the transformation and development of the ASM sector.

Further, the fifth portion of this paper will illustrate how such a lack of implementation of the legislative and policy provisions has the effect of impeding the attainment of government's objectives of redressing historical, social and economic inequalities as mandated by the Constitution.²⁷ Moreover, the last portion will conclude with recommendations as to how the rethinking, transformation and development of the ASM sector can be ushered in, taking into account the complexities that come with the sector.

2 THE CONSTITUTION AND ASM

This part of the paper constructs the constitutional framework upon which the overarching discussion necessitates action towards transforming the ASM sector. Here, reference will be made to constitutional provisions and ideals as they lend pillars upon which this paper's argument is hung. The feature of the Constitution is paramount to this paper as it has commanded a significant impact and influence in matters of social transformation and development throughout South Africa's democratic history.²⁸ Such constitutional impact and influence will be explored as they relate to the nation's mineral wealth and its role in democratic transformation and social development, along with the applicable environmental rights framework. As such, the subsequent discussions of the MPRDA and Mining Charter will occur through the constitutional prism applicable to all calls for community development, transformation and social justice.

2.1 The constitutional foundation for the transformation of the ASM sector

Incontrovertibly, the appropriate point of departure here is section 39(2) of the Constitution which directs that constitutional provisions should be interpreted in accordance with the spirit, purport and objects of the Bill of Rights.²⁹ This point of departure was acutely concretised in the *Affordable Medicines* case which stated that "where possible, legislation ought to be construed in a manner that is consistent with the Constitution."³⁰ This constitutional provision and case reference, duly accompanied by the cardinal rule that all interpretation of the meaning of the words in a statute must occur against the grander context of the statute and its evident purpose, is opportune to initiate the rethinking of the ASM sector.

²⁷ S 2 & 100 of the MPRDA; Preamble of the Constitution of the Republic of South Africa, 1996.

²⁸ Tribe LH & Thomas KL *Reflections on Constitution-Making* (1993) at 628.

²⁹ S39(2) of the Constitution.

³⁰ *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 31 esp. the authorities cited at footnote 31.

The democratic vision of the Constitution is founded partly on the recognition of the legislatively ordained injustices of the apartheid era.³¹ As decreed by the Preamble to the Constitution, an important pillar of the democratic vision is the acknowledgement of the need to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”³² The revolution of the Constitution highlights the transition from national laws whose core purpose was to dehumanise and oppress on the basis of race to a new human-rights disposition thematised by substantive equality.³³ Of particular significance to this paper is the Constitution’s commitment to improving the quality of the life of all citizens and to free the potential of each person, whilst building a united and democratic South Africa to take its rightful place as a sovereign state in the family of nations.³⁴

The above is further echoed in the foundational provisions of section 1 of the Constitution which entrench South Africa as a democratic state, founded on the values of human dignity, the achievement of substantive equality and the advancement of human rights and freedoms.³⁵ The viewpoint by Ackermann J on the notion of substantive equality, in the landmark judgement of *National Coalition for Gay and Lesbian Equality v Minister of Justice*, continues to be a constant threshold for the appreciation of the true meaning of substantive equality. In the judgement, Ackermann stated that it is largely insufficient to for the Constitution to:

“merely ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.”³⁶

Ackermann J touches on the very pulse of this paper in that it encapsulates the understanding that the constraints entrenched by the pre-democratic era have birthed newer and undesirably resilient socio-economic consequences which are not capable of being eradicated by simple strokes of signing democratic legislation into existence. Without constant evaluation of the legal and societal issues and their points of emanation, coupled with the vacuum in innovation and resilience in solution-making, such issues are awarded a platform to exist. The grim embodiment of the continued

³¹ Preamble to the Constitution.

³² See Preamble to the Constitution.

³³ Albertyn K “Substantive Equality of and Transformation in South Africa” (2007) 23 *South African Journal for Human Rights* at 254; Currie I & de Waal J *The Bill of Right Handbook* (2013) at 2.

³⁴ See Preamble to the Constitution.

³⁵ S1 of the Constitution.

³⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* ZACC 15, 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 60.

existence of these issues is ultimately borne by the soaring statistics of unemployment, poverty and lack of education in South Africa.

The Constitution's Section 1 values continue to materialise in the Bill of Rights, which is framed in a manner that gives substance to the transformative vision of the Constitution.³⁷ Brand et al describes the Bill of Rights as:

“a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans - irrespective of colour, race, class, belief or sex.”³⁸

Brand's description of the Bill of Rights preserves the very legacy of the Constitutional Principles I and II attached to the essence and understanding of the Bill of Rights as described in the 1996 Certification of the Constitution which stated that everyone shall enjoy the universal and fundamental rights, freedoms and liberties which are concretised in the Constitution.³⁹ According to the Certification, it is these provisions of the Bill of Rights which were determined and tailored in a manner pursuant to the creation of a new order in which all South Africans will be entitled to, *inter alia*, a democratic constitutional state in which equality across the races and sexes is guaranteed in a way which fosters the enjoyment of all fundamental rights and freedoms.⁴⁰ Since 1996, the notion of substantive equality has been defended and upheld in various court judgements which continue to extend the jurisprudence of this approach to equality.⁴¹ It is exactly in pursuit of the achievement of such a constitutional tradition of substantive equality, the development of opportunities for all South Africans as well as the improvement of the lives of all citizens that this paper contends the use of natural resources and can be harnessed.

2.2 The Constitution and the environment

The environmental clause in the Constitution is another significant point of reference. As van der Bank confirms, the incorporation of an environmental clause in the Bill of

³⁷ De Vos P & Freedman W *South African constitutional law in context* (2015) at 319.

³⁸ Mureinik E “A bridge to where? Introducing the Interim Bill of Rights” (2017) 10(1) *South African Journal on Human Rights* at 31.

³⁹ *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 48.

⁴⁰ See *Certification of the Constitution of the Republic of South Africa* (1996) at para 48.

⁴¹ Some benchmark cases include *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC); *Volks NO v Robinson and Others* (CCT12/04) [2005] ZACC 2; 2005 (5) BCLR 446 (CC); *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); [2004] 12 BLLR 1181 (CC).

Rights represents an important step in the constitutional recognition and protection of certain human rights.⁴² Section 24 of the Constitution confers, on all South Africans, the right to an environment that is not harmful to their health or well-being.⁴³ This right includes the protection of the environment for the benefit of the present and future generations through reasonable legislative and other necessary measures that prevent pollution and ecological degradation, whilst promoting conservation, securing ecologically sustainable development and, most importantly, using of natural resources for the promotion of justifiable economic and social development.⁴⁴ As it will become clear in the coming sections,⁴⁵ the current challenges prevalent within the ASM sector, violate the achievement of substantive equality as well as the underpinnings of the environmental clause in the Constitution.

The implementation of the above provisions, in the way that this paper argues,⁴⁶ would be one that honours the preambles of, not only the Constitution, but also the governing MPRDA and the Mining Charter. In a mining country, such as ours - where poverty has shackled the economic opportunity, potential, capability, security and employment of many disadvantaged - both LSM and ASM mining activities should be thoroughly and uniquely considered when devising poverty reduction strategies. The contribution of these two types of mining can have desirably significant economic effects, thus equipping the government with budgetary resources necessary for the reduction of poverty.⁴⁷

3 THE MPRDA POSITION ON THE DEVELOPMENT OF THE ASM SECTOR

As the central mineral and petroleum legislation, the MPRDA occupies a leading position in all debates regarding the minerals industry and the transformation of this industry enjoys no exception to its application. The MPRDA replaced the Mineral Rights Act of 1991 and essentially established a new paradigm for the mineral laws of South Africa. With this replacement, came a myriad of changes in the management of the industry. The Pretoria High Court referred to the MPRDA, in the case of *Minerals Council South*

⁴² Van der Bank M “Environmental Protection in South Africa: Human Rights Approach” (2014) 23(5) *Mediterranean Journal of Social Sciences* at 2059; Mubangizi JC *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2004).

⁴³ S24(a) of the Constitution.

⁴⁴ S24(b) of the Constitution.

⁴⁵ Part 5 of the paper.

⁴⁶ The substantive interpretation of the contents of the MPRDA were also confirmed in paragraph 29 of the *Chamber of Mines of South Africa v Minister of Mineral Resources and Others* (41661/2015) [2018] ZAGPPHC 8; [2018] 2 All SA 391 (GP); 2018 (4) SA 581 (GP) (4 April 2018) and, further, in paragraph 42 of the case.

⁴⁷ Weber-Fahr M *et al* “Mining and Poverty Reduction” (2001) available online at <http://kambing.ui.ac.id/onnopurbo/library/library-ref-ind/ref-ind-1/application/poverty-reduction/prsp/SourceBook/Min0409.pdf> (accessed 01 February 2019).

Africa v Minister of Mineral Resources and Another,⁴⁸ as “one of a series of interventions by the democratic legislature to give effect to the commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution.”⁴⁹

For the purpose of this paper, the most poignant differences between the MPRDA and its predecessor are the acknowledgements of the socio-economic function of minerals in the development of the people of South Africa, the role of mining in the upliftment of rural communities and its goal to redress the existing ramifications of systematic racial discrimination of the past.⁵⁰ The MPRDA has also revolutionised the nation’s mineral framework and, according to its long title, it was enacted to facilitate equitable access to and the sustainable development of the nation’s mineral and petroleum resources.⁵¹

This undertaking is expressed in the Preamble, as well as the commitments that lie at the heart of the MPRDA, which include the affirmation of the state’s obligation to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development.⁵² Likewise, the MPRDA prioritises the need to promote local and rural development, the social upliftment of communities and also reaffirms the state’s commitment to bring about equitable access to South Africa’s

⁴⁸ *Minerals Council South Africa v Minister of Mineral Resources and Another* (20341/19; 43806/19) [2020] ZAGPPHC 301.

⁴⁹ *Minerals Council South Africa v Minister of Mineral Resources and Another* (2020) at para 12.

⁵⁰ Preamble to the MPRDA; S 3(1) of the MPRDA; Cawood FT “The Mineral and Petroleum Resources Development Act of 2002: A paradigm shift in mineral policy in South Africa” (2004) 104(1) *The Journal of The South African Institute of Mining and Metallurgy* at 58. Another clear paradigm shift in the heart of mineral and mining legislation was the focus by the courts on the constitutional function the sector could serve in realising the mission of transformation. This was clear through the statement by Petse AJ in the *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* judgement where it was held that, despite the mining sector being a source of national economic significance, it was also necessary that the constitutional imperative of Parliament to ensure that communities whose tenure of land is legally insecure due to apartheid’s discriminatory practices are protected through legally secure tenure or appropriate redress. This undoubtedly conveys a shift in the prioritisation of the protection of the marginalised and disenfranchised through various and appropriate means.

⁵¹ Preamble to the MPRDA. The MPRDA also features in a sector context which previously negated and stripped communities of their land rights, which trickled down to mineral rights, held under indigenous law. For context’s sake, this violation occurred to the Richtersveld community of the Khoi and San people of the area Namaqualand. *Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) extensively ventilates the issues, *inter alia*, of dispossession of land and the right of acknowledgement and distinctiveness of indigenous law within the context of the rights and obligations which arise out of the MPRDA legislative framework.

⁵² Preamble to the MPRDA

mineral and petroleum resources through the eradication of all forms of discriminatory practices in the mineral and petroleum industries.⁵³ These fundamentals were appraised to be the cornerstones of the mission of transformation by Jafta J and Moseneke DCJ in *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another*.⁵⁴ It is clear from the above that the state’s obligation, as stated in the Constitution, to take legislative and other measures to redress the results of the past’s racial discrimination was umbilically attached to the underlying values of the MPRDA.⁵⁵

More specific to the purpose of this paper, are the section 2 objects of the MPRDA which recite the very reasons that induced its enactment. Section 2 of the MPRDA calls, amongst others, for the promotion of equitable access to the nation’s mineral and petroleum resources to all the people of South Africa and to substantially and meaningfully extend entry opportunities for historically disadvantaged persons, including women and mining communities, to enter into and actively participate in the sector.⁵⁶ The MPRDA also supports the extension of the benefit from the exploitation of the nation’s mineral and petroleum resources to all people, as well as the promotion of employment and advancement of the social and economic welfare of all South Africans.⁵⁷

The scope according to which the MPRDA ought to be interpreted is set out in section 4 of the Act. It states that “when interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects.”⁵⁸ The interpretation clause of the MPRDA thus establishes the mode through which the MPRDA is featured in this paper, as it places the core objects of the Act as priorities in the interpretation process.⁵⁹ As will also become clearer in the coming parts, the current

⁵³ Preamble to the MPRDA.

⁵⁴ *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* (CCT 51/13) [2013] ZACC 45 at 45.

⁵⁵ Cawood (2004) writes that some of the drastic changes in politics ushered in a new attitude of negotiation; a spirit of reconciliation and a desire to settle disputes peacefully; the globalisation of the South African mining industry in tandem with the opening of domestic mineral resources to foreign capitalists and the introduction of sustainable development as a holistic approach to mineral development in order to replace traditional narrow-minded environmental management.

⁵⁶ S2 of the MPRDA.

⁵⁷ S 2 (d) & (e) of the MPRDA.

⁵⁸ S 4 to the MPRDA.

⁵⁹ The constitutionally-informed interpretation of the MPRDA has been well-adjudicated in the case of *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC) at para 3; 42. This case highlighted the manner in which the courts can apply the constitutional normative framework to progressively interpret the MPRDA. This approach is not only appropriate to the evaluation of the constitutionality of

mode of interpretation of the transformative provisions of the MPRDA under-prioritises the ASM sector and, as a result, the current status of ASM reflects this.⁶⁰

Despite character variations amongst the participants within the ASM sector, research shows the most prevalent is statutorily unauthorised artisanal miners.⁶¹ It is prudent to acknowledge the limitedness of credible research and data on the South African ASM sector, particularly on its illegal participants. As such, it is difficult to confidently determine the numbers of the illegal artisanal miners currently in the sector. However, latest research indicates that an estimate of thirty thousand illegal artisanal miners are active within the sector as of 2015.⁶² What is known is that the common denominator amongst South Africa's illegal artisanal miners is economic redundancy and desperation, the difficult socio-economic climate they exist in as well as the limited resources at the disposal of law enforcement agencies such as police, immigration, border control and prosecuting authorities to police the continuation of the illegal mining.⁶³ Seeing how the rate of unemployment continues to rise, issue which is compounded by the instability of the economy, as well as the onslaught of the Coronavirus pandemic,⁶⁴ many South Africans have had to resort to alternative means of fostering livelihoods. Thus, it would even be reasonable to expect these estimates, and that of other informal and illegal sectors, to be higher today.

It ought not to be deduced from the above discussion that illegal miners are participating in the ASM sector exclusive of any other legal artisanal and small-scale miners; this is not so.⁶⁵ The Minerals Council hosts up to 40% of formalised small and

conduct, but also to the lack of the desired conduct or action against a constitutionally-enforced legislative obligation to act.

⁶⁰ This notion is further discussed in chapter 5 of the paper.

⁶¹ See Ledwaba (2017) at 33. The Minerals Council has also confirmed in their 2019 Position Paper that 90% of those apprehended for illegal mining are undocumented foreign nationals. This information appears available online at <https://www.mineralscouncil.org.za/industry-news/publications/position-papers/send/37-position-papers/768-artisanal-and-small-scale-mining> (accessed 19 January 2021).

⁶² Minerals Council South Africa "Artisanal and Small-Scale Mining: Position Paper" (2019) 4 available at <https://www.mineralscouncil.org.za/industry-news/publications/position-papers/send/37-position-papers/768-artisanal-and-small-scale-mining> (accessed 19 January 2021); See Ledwaba (2017) at 34-35.

⁶³ See Minerals Council South Africa Position Paper (2019).

⁶⁴ Chitiga-Mabugu et al "Economic and distributional impact of Covid-19: Evidence from macro-micro modelling of the South African Economy" (2020) *South African Journal of Economics* at 3.

⁶⁵ Ledwaba (2017) states that the formal ASM sector is made up emerging entrepreneurs with the necessary financial resources rather than disadvantaged and poor communities. As things stand, the current regulatory framework favours those with the financial means and not those from poor backgrounds.

junior mining companies.⁶⁶ Focus should be afforded to the fact that, even with the operation of legal and formalised mining companies within the ASM sector, there is still a great many of those who battle to satisfy the legislative requirements for entry into the sector.

Concomitant to the objects' clause and section 2 of the MPRDA, is section 12 which serves as the empowering provision to the Minister in matters relating to the assistance of historically disadvantaged persons and the mission of broadening access to the mineral industry. The need for the development of the ASM sector in such a way that accommodates even the entrants who are unable to satisfy the entry requirements is directly in sync with the contents of section 12. These state that the Minister has the powers to facilitate assistance to any previously disadvantaged person in order to empower them to conduct prospecting or mining operations, category which should include ASM entrants.⁶⁷ Section 12 also grants the Minister the discretion to tailor these interventions taking into account the terms and conditions he/she sees fit.⁶⁸ The essential factors which the Minister ought to consider when designing such assistance are the need to promote equitable access to the nation's mineral resources, the financial position of the applicant, the imperative to transform the minerals and petroleum sector as well as to what extent the proposed prospecting and/or mining project meets the objects of the MPRDA.⁶⁹

The very wording of section 12, coupled with its congruence with the vision of the Constitution, renders this provision an essential point of orientation for this paper. As history shows, the legal regime during the apartheid era was one which was carefully crafted to cripple the economic advantage of the black populace and leave them without any opportunity to meaningfully participate in the economy.⁷⁰ The nature of the assistance determined by the Minister ought to be one guided by the need to promote equitable access to the nation's mineral resources and the penurious financial position of the applicant. Informal artisanal and small-scale miners would benefit extensively from the effective implementation of this provision, considering the poor financial position that many of the miners find themselves in. Fittingly, the formulation of the assistance should also be guided by the need to transform the ownership structure of

⁶⁶ Minerals Council South Africa “Supporting Junior and Emerging Miners” (2020) available at <https://www.mineralscouncil.org.za/work/supporting-junior-and-emerging-miners> (accessed 27 February 2021).

⁶⁷ S12(1) of the MPRDA.

⁶⁸ S12(2) of the MPRDA.

⁶⁹ S12(3)(a)-(d) of the MPRDA.

⁷⁰ Mariott M & Fourie J “The economics of apartheid: An introduction” (2014) 29(2) *Economic History of Developing Regions* at 114.

the minerals and petroleum industry and the extent to which the prospecting or mining right project will satisfy the objectives stated in the above legislative excerpt.⁷¹

The contents of section 12 of the MPRDA are further in agreement with and also supported by the contents of section 100. Section 100 governs the mission of transformation of the minerals industry. Particularly, section 100(2)(a) of the MPRDA directs the Minister to ensure the attainment of the government's objectives of redressing historical, social and economic inequalities, as held in the Preamble to the Constitution, through the design and development of a broad-based socio-economic empowerment charter.⁷² Such a charter ought to set the framework for targets in relation to the active participation of historically disadvantaged persons in the mining industry and to allow historically disadvantaged persons to benefit from the exploitation of mining and mineral resources.⁷³ Most importantly, according to section 100, the responsibility of such a charter is also to set out how the objects stated in section 2 are to be achieved.

4 THE MINING CHARTER AND ASM

The dialog about the development of the ASM sector cannot occur without the mention of the Mining Charter.⁷⁴ The first Mining Charter was passed in 2002.⁷⁵ The framework of Mining Charters were launched to create an industry that would proudly reflect the promise of a non-racial South Africa.⁷⁶ At the very pulse of the Mining Charter is the transformation of South Africa in such a way that gives effect to section 9 of the Constitution, hand-in-hand with the developmental objective of the MPRDA Preamble.⁷⁷ The Preamble further acknowledged section 100(2)(a) of the MPRDA which encapsulated the heart of the government's objective of historical socio-economic redress which support the vision and objective of the Mining Charter and set the tone for the very purpose of the Mining Charter in the context of the minerals and petroleum sector.

⁷¹ S12 of the MPRDA.

⁷² S100(2)(a) of the MPRDA.

⁷³ S100(2)(a) of the MPRDA.

⁷⁴ For purposes of conciseness and for the avoidance of over-bearing length, I will focus only on the latest Mining Charter. Reference to previous Charters will feature, however, in an attempt to highlight the paper's general argument.

⁷⁵ Preamble to the Mining Charter of (2002).

⁷⁶ Preamble to the Mining Charter of (2002).

⁷⁷ See Preamble to the Mining Charter of 2002 in relation to S9 of the Constitution. The goal of transformation through the Mining Charter was so core to its existence that a Mining Charter Transformation Team was established. This team consisted of departmental staff as well as sector representatives from organised labour and businesses. The *Minerals Council South Africa v Minister of Mineral Resources and Another* (2020) at para 20, recited their mandate as "to re-open discussions and engagements on the Mining Charter with a view to develop a Charter that advanced both growth and transformation within the mining sector".

Against the broader intention encapsulated in its vision, the key purpose of the 2002 Mining Charter was the promotion of equitable access to the nation’s mineral resources to all the people of South Africa, the substantial and meaningful expansion of opportunities for historically disadvantaged persons, including women, to enter the mining and minerals industry and to benefit from the exploitation of the nation’s mineral resources.⁷⁸ The key purposes of the Charter also included the utilisation of the existing skills base for the empowerment of disadvantaged groups, the expansion of the skills base of the same group in order to serve the community, the promotion of employment and advancement of social and economic welfare of mining communities and the major areas providing labour, and the promotion of beneficiation of South Africa’s mineral resources.⁷⁹

In comparison, the Mining Charter’s Preamble also echoed the imperative of redressing historical and social inequalities as held in section 9 of the Bill of Rights, together with the policy objectives of the MPRDA to expand opportunities for disadvantaged persons to enter the mining and minerals industry and benefit from the exploitation of the nation’s mineral resources.⁸⁰ The Preamble was further underlined by the notion of transformative constitutionalism, which Klare illuminated as meaning a long-term project of constitutional enactment, interpretation and enforcement which is committed to transforming a country’s political and social institutions and power relationships in a democratic direction.⁸¹

The ASM sector in South Africa is the opportune instance for the application of the principles of the Mining Charter.⁸² This is true primarily because the symbiotic relationship between the Mining Charter and ASM arises out of the purpose of the Charter relating to redressing historical and social inequalities, expanding opportunities for historically disadvantaged persons to enter the mining and minerals industry and to benefit from the exploitation of the nation’s mineral resources. These objectives also included the effecting of sustainable growth and broad-based and meaningful transformation of the mining sector and the deracialisation of the ownership of the mining industry by redressing the imbalances of the past.⁸³ Thus, it is evident that there

⁷⁸ Department of Mineral Resources and Energy “Broad-Based Socio-Economic Empowerment Charter of the South African Mining Industry” (2002) available online at <https://www.westerncape.gov.za/Text/2004/5/theminingcharter.pdf> (accessed 01 February 2019).

⁷⁹ S3 of the Mining Charter (2002); Van der Schyff E “South African mineral law: A historical overview of the State’s regulatory power regarding the exploitation of minerals” (2012) 64 *New Contree* at 56.

⁸⁰ See Department of Mineral Resources and Energy Preamble to Mining Charter of (2002).

⁸¹ Klare KE “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal for Human Rights* at 150.

⁸² This can also be confirmed by the context of transformation within the context of the Mineral Council’s official statements about the minerals and petroleum sector, the notion of transformation, all hinged on the Department of Mineral Resources and Energy targets. This information is located on <https://www.mineralscouncil.org.za/work/transformation> (accessed 11 March 2021).

⁸³ S1 of the Mining Charter.

is a strong nexus between the intentions of the Mining Charter and the potential role ASM could assume in making this intention a reality in South Africa.

The objectives of the second Mining Charter, published in 2017, mirrored those of the 2002 Charter.⁸⁴ These can be achieved through a structuring of a mutually-beneficial relationship between mining companies and artisanal miners - the formula for which already exists. It is known that LSM companies are attracted to excavation operations which carry significant financial potential gain and most of the mining operations which materialise this are the deep under-ground operations. However, the mine tailings or mine-dumps which remain unattended to for years while the mining processes occur could, and have been, the holy grail for thousands of illegal artisanal miners. In Kimberly in 2018, an artisanal and small-scale miners' association was awarded mining permits to 'mine' diamonds fragments from mine tailings dumps owned by the Kimberley Ekapa Mining Joint Venture after years of illegally forging a livelihood on them and confrontation with police.⁸⁵

Deputy Minerals Resources and Energy, at the time, Minister Godfrey Oliphant, said this joint move by the mining company and the provincial department was "a major milestone for both the mining group and the miners who for a long time have been seen as illegal miners."⁸⁶ The company availed an approximate 400 hectares of land for the use and benefit of the group of artisanal miners. The miners were permitted to use makeshift tools on furrows and mine tailings in search of diamond fragments.⁸⁷ In an effort to promote the safety of both the miners as well and the environment, the permits granted to the artisanal miners was for surface and shallow operations exclusively.⁸⁸ Oliphant also stated that the granting of permits to this group of artisanal miners was also in pursuit of allowing them to openly sell their diamonds on the market and avoid exploitation by third parties.⁸⁹ This was after one of the artisanal miners discovered a 55 carat diamond, which they sold for R6-million on the illegal market. The buyer proceeded to sell the diamond for R33-million, making more than three times what the artisanal miner was able to negotiate.⁹⁰

⁸⁴ See Badenhorst & Mostert (2004) at 9.

⁸⁵ Khumalo S "Thousands of zama zamas receive mining permits" (2018) *Mail and Guardian* available online at <https://mg.co.za/article/2018-06-07-thousands-of-zama-zamas-receive-mining-permits/> (accessed 18 January 2021).

⁸⁶ See Khumalo (2018).

⁸⁷ See Khumalo (2018).

⁸⁸ See Khumalo (2018).

⁸⁹ See Khumalo (2018).

⁹⁰ See Khumalo (2018); This is yet another example of the disadvantages the illegal artisanal miners face as a consequence of the nature of their operations. They are barred from accessing formal market platforms and are not able to access advice and education and are consequentially deal with *mala fide*.

The manifestation of the objectives of the Mining Charter are exceedingly evident in the example provided above. Where mining companies would follow the lead of the Kimberly Ekapa Mining Joint Venture, the socio-economic potential for operating with authorised permits would be significantly realised. The mine tailings and shallow furrow mining presents significant economic potential for artisanal and small-scale miners, who use the most rudimentary of equipment and processes, as the mineral reserves hosted in these tailings are economically attractive on artisanal and small-scale mining standards. Where the artisanal miners would continue to be barred from conducting these operations on such surfaces, mineral reserves would lie dormant and never to be discovered because, again, mine tailings have seldom been of economic interest to large-scale miners.⁹¹ With a strengthening of the socio-economic muscle of artisanal miners through the above measures, the mining companies would effectively be contributing to a trickle-down trend of development and the blossoming of the living conditions of the artisanal miners, which is directly intertwined to the enjoyment of their right to human dignity.

The 2018 Mining Charter was gazetted by Minister of Mineral Resources, Gwede Mantashe, on 14 June 2018. In respect of transformation, as contextualised by this paper, even the 2018 Mining Charter says very little. Instead, this version of the Mining Charter explores highly technical avenues which seeks to case light and understanding on, *inter alia*, the board, executive management and senior management of mining companies,⁹² albeit under the auspice of the imperatives of transformation and development.

It is imperative to note that none of the previous Mining Charters have explicitly named ASM in their visions, missions or provisions. This realisation, on its own, is a significant shortcoming on the part of the DMRE and has the undesirable effect of ignoring the yawning gap between formal small-scale miners and informal artisanal and small-scale miners which presently exists in the sector. The importance of ASM-related matters is already appreciable from the extensive governmental and media attention the topic has garnered and the establishment of a directorate solely for the benefit of small-scale miners.⁹³ The purpose of the Mining Charter and the socio-economic transformation potential offered by ASM are in clear congruence. Therefore, the Charters would have been the ideal policy document through which illegal ASM could be addressed.

⁹¹ Ortiz P “Methodology for a dump design optimization in large-scale open pit mines” (2017) 4(1) *Cogent Engineering* at 1.

⁹² S 2.4 of the Mining Charter (2018).

⁹³ The Small-scale Mining Directorate was established in 2004 for the purpose of integrating small-scale miners into the grander sectoral economy. However, due to hindering factors such as a lack of a deep understanding of the peculiarities of the ASM sector, a limited capacity and under-resourcing in the areas of monitoring and evaluating operations, it was disbanded in 2006.

The final 2018 Mining Charter was implemented by the DMR as from 27 September 2018 and, even in its final form, also neglects to mention ASM. It was stated extensively above that, despite being recognised in early national policy documents for its poverty-reducing potential, again, a large part of ASM still remains illegal as it lacks a sector-specific regulatory framework to govern the structure, conduct and obligations of artisanal and small-scale miners in the ASM sector. The interdependent relationship between the Mining Charter and ASM arises out of the objectives of the Mining Charter is also one which continues to be ineluctable. Its avoidance, as the present context shows, does very little to contain the issues arising therefrom. Again, there is a clear nexus between the intentions of the Mining Charter and the role that ASM already plays in South Africa. However, the foundation of this normative relationship is negated by the fact that, in all of the Mining Charters, the words 'artisanal and small-scale mining' do not appear.

5 THE GRASSROOT RAMIFICATIONS OF THE DISCONNECT BETWEEN LAW, POLICY AND PRACTICE

Bearing in mind the broader picture of the constitutionally-related legislative and policy framework above, this section of the paper seeks to expose the dire actuality of the South African ASM sector as a result of the lack of implementation of the above framework. This dire state of the sector is characterised primarily by the uncontrolled environmental degradation, acrimonious relationship between ASM and LSM and the sector's poor health and safety standards. These symptoms of non-regulation and illegality will continue to prevail at the expense of all the potential of social and economic development until active measures are taken to use ASM as a tool to foster the socio-economic change and empowerment that South Africa so desperately needs.

5.1 The Environmental Degradation associated with ASM

As described previously, the statutory and structural challenges facing artisanal miners are of such a formidable nature that the miners perceive them as impossible to overcome. It was stated that the general lack of sophistication of mechanical technology and other resources within the ASM sector has led those dependent on it to engage in haphazard mining trends which is compounded by inefficient mineral processing and illegal trading. These are the negative socio-economic and environmental consequences which arise as a result. On assessment, the consequences to be discussed herein below are particularly exacerbated by the illegality of ASM operations primarily because, with the absent and necessary regulatory framework, there are no measures to control the extents, areas and consequences of ASM. The adverse implications of illegal ASM on the environment may very well be the most notable. It is also acknowledged that all types of mining have their negative impacts on the environment. Those of illegal ASM are unique and contribute to different societal ills and disorders.

Illegal ASM's cost on the environment is, in general, much higher than that of other types of mining.⁹⁴ Hentschel et al contextualises this point by explaining that illegal ASM is dirtier per unit of output than even the formal mining operations of medium to large-scale companies.⁹⁵ This would be understandable in the context of the actual artisanal mining process. In the South African context of ASM, which largely mirrors many geographical realities,⁹⁶ artisanally mined mineral deposits are washed in flowing rivers which causes toxic minerals and substances to be released into the water, thus amounting to changes in the morphology and the destruction of spawning habitat of fish and macro-invertebrates.⁹⁷ This could spell dire health ramifications where surrounding communities' and livestock drinking water is contaminated. Compounding the issue of pollution by illegal ASM is the high number of its individual polluters and such numbers may be contributed to by the number of ASM operations are not limited to gold, diamond or precious minerals; they also include sand-winning, peat mining, clay and coal.⁹⁸ These unique ASM operations amount to varying consequences for the environment. The most critical environmental impact of ASM is the increased water and food poisoning and pollution from dumped tailings containing arsenic and other chemicals.⁹⁹

Particularly, the presence of arsenic, or the “king of poisons”, in soil and groundwater is not newly brought about by ASM; this may sometimes even be a natural phenomenon.¹⁰⁰ Where this type of natural contamination occurs around the world, environmental concerns grow. What has resulted in intensified environmental concerns is the added association and use of arsenic in the mining of ore deposits. This has the result of elevating the presence of arsenic-related environmental risks. Due to wind dispersal, physical weathering of ore deposits or contact with water bodies, arsenic dust particles spread into the surrounding environments and ecosystems and result in adverse health consequences.

⁹⁴ Hentschel T, Hruschka F & Priester M “Artisanal and small-scale mining. Challenges and opportunities” (2002) at 48 available online at https://www.researchgate.net/publication/274138354_Artisanal_and_Smallscale_Mining_Challenges_and_Opportunities (accessed 31 May 2019).

⁹⁵ See Hentschel, Hruschka & Priester (2002).

⁹⁶ This also happens in Zimbabwe, Ghana, Rwanda, India, the Philippines and the ASM communities of South America.

⁹⁷ Heath R, Moffett M & Bannister S “Water related impacts of small-scale mining: Final report to the Water Research Commission” (2004) ii at <http://www.wrc.org.za/wp-content/uploads/mdocs/1150-1-041.pdf> (accessed 11 March 2021).

⁹⁸ Mulaba-Bafubiandi A & Mamba B “Report to the Water Research Commission” (2009) 13; 19 at <http://www.wrc.org.za/wp-content/uploads/mdocs/KV%20231%20web.pdf> (accessed 19 July 2019).

⁹⁹ See Buxton (2013) at 9.

¹⁰⁰ See Buxton (2013) at 9.

Gauteng's mining communities, which are commonly poor and informal settlements, are affected the most. Abandoned mountains of sandy dirt from LSM and ASM gold mining carry significant particles of arsenic, lead and other dangerous chemicals. Through wind blows, contaminated dust is blown into nearby homes where it settles on roofs, roads, school areas and even where children play.¹⁰¹ The number of people who live in informal settlements around such mining areas are to the excess of 1.5 million.¹⁰² One resident of Snake Park in the Dobsonville Township - Tiny Dlamini - is recorded saying, "The dust itself ... gets into our food. We eat this dust; we drink this dust, so that is why so many people are sick here... This is a silent killer."¹⁰³

On a grander scale, environmental pollution from illegal ASM in South Africa has amounted to deforestation, the severe pollution of water bodies which may be sources of drinking water for surrounding communities and/or their livestock and even soil erosion.¹⁰⁴ The list of environmental pollution from illegal ASM continues to include the siltation of rivers, dust and noise pollution, land degradation, river diversion, mercury and cyanide pollution, the destruction of biodiversity and the poor disposal of mine tailings.¹⁰⁵

The above environmental consequences could be thought of as being a concern common and proportionate to all types of mining. This could be so, however, one ought to consider that where environmental impact assessment plans are conducted in LSM, for instance, should it be determined that the mining operations pose a risk to the surrounding communities' right to a safe and healthy environment, the DMRE has processes and procedures to facilitate the relocation and compensation of such communities, at the mining company's expense.¹⁰⁶ The human suffering associated with the mining operations is thereby mitigated. In the ASM context, no such financial capacity exists and, thus, the concern for the human contact with the harmful environmental elements is that much more prominent. Further, with the absence of an ASM-specific regulatory framework, the opportunity for the government and mining

¹⁰¹ Al Jazeera "Toxic city: The cost of gold mining in South Africa" (2019) available online at <https://www.aljazeera.com/programmes/specialseries/2019/01/toxic-city-cost-gold-mining-south-africa190123160346656.html> (accessed 09 March 2019).

¹⁰² See Al Jazeera (2019).

¹⁰³ See Al Jazeera (2019).

¹⁰⁴ Mkhize MC "New interventions and sustainable solutions Reappraising illegal artisanal mining in South Africa" (2017) 71 *Scientific Electronic Library Online* available online at <http://www.scielo.org.za/pdf/sacq/n61/07.pdf> (accessed 13 August 2019).

¹⁰⁵ See Mkhize (2017).

¹⁰⁶ The latest document DMRE published document speaking to these components is the Draft Mine Community Resettlement Guidelines of 2019 which, inter alia, demanded the applicant of a mining right or permit to consider fundamental principles including meaningful consultation, gender equality, protection of existing rights, conditions relating to meetings and the imperative to avoid and minimise all risks of resettlement where population displacement is unavoidable as well as breaking communities up. This is stated in S5.1(a)-(e) of the Draft Mine Community Resettlement Guidelines.

authorities to mutually demarcate suitable areas exclusively for ASM operations has been missed.

5.2 The potential for acrimonious coexistence: mining companies and local communities

In the current economic pandemic climate, job insecurity, job loss and low earnings are dominant characteristics, not only for South Africa, but for the international community.¹⁰⁷ With the expansion of LSM, coupled with the growth of illegal ASM, particularly in rural and impoverished communities of the developing economies, it is inevitable for mining companies and local communities to cross paths and in the competition for minerals. At the intersection where these two activities meet, past experiences suggest that the interface will be thematised by violent conflict, a lack of trust toward each other and a high probability of aggressive behaviour.¹⁰⁸ Violent clashes between police and private mine security against artisanal and small-scale miners has been a frequent occurrence.¹⁰⁹

The fact that LSM is governed by the mineral laws of South Africa, with illegal ASM lacking its own particularised regulatory regime, amounts to an unfair, imbalanced and chaotic competition between the two groups. ASM is expected to comply with the same requirements as LSM and does not enjoy the benefit of the application of the theoretical framework established in preceding parts of this paper. Below is a brief account of what occurs when such confrontations take place and the negative effect which they have on the desire to develop ASM.

From the on-set, LSM enjoys a stronger position in the competition for mineral rights.¹¹⁰ This is attributed to the fact that, in most countries, the mineral law framework favours LSM over ASM which Fritz, McQuilken, Collins and Weldegiorgis

¹⁰⁷ See Chitiga-Mabugu et al “Economic and distributional impact of Covid-19: Evidence from macro-micro modelling of the South African Economy” (2020).

¹⁰⁸ Minerals Council of South Africa “Artisanal and small-scale mining” (2019) available at <https://www.mineralscouncil.org.za/industry-news/publications/position-papers/send/37-positionpapers/768-artisanal-and-small-scale-mining> (accessed 23 September 2019); See SAHRC “Report of the SAHRC investigative hearing on issues and challenges in relation to unregulated artisanal underground and surface mining activities in South Africa” (2015) available at <https://www.sahrc.org.za/home/21/files/Unregulated%20Artisanal%20Underground%20and%20Surface%20Mining%20Activities%20electronic%20version.pdf> at 27 (accessed 23 September 2019).

¹⁰⁹ Natasha Pretorius “K’dorp Police deal illegal mining a major blow: 63 arrested” (2020) *Krugersdorp News* at <https://krugersdorpnews.co.za/441626/kdorp-police-deal-illegal-mining-a-major-blow-63-arrested/> (accessed 18 March 2021).

¹¹⁰ This is understandable due to the coherence between the MPRDA provisions on mining rights and permits, the legislative requirement to accessing the same and the financial capability of mining companies to satisfy the these.

describe as “leading to significant power imbalances and clashes over claims.”¹¹¹ LSM may also be put in a more desirable position for its extreme financial contribution to a country’s economy and its long-range capacity regarding geological knowledge and sophisticated mining technology.¹¹² Fritz, McQuilkenc, Collins and Weldegiorgis’ description of the power imbalances is generally believable as one considers the financial interest states vest and are able to garner in LSM operations.

The first concern to arise when LSM advances into territory which artisanal and small-scale miners may be interested in or already forging livelihoods from.¹¹³ It may occur that mining rights are granted to LSM companies without consultation with the communities who live and may forge employment at surrounding mining sites.¹¹⁴ In cases where consultation is not executed justifiably, the community might harbour attitudes of apprehension and rejection towards the company, based on the perception that the company is there only to deprive them of their resources.¹¹⁵ This perception stems from the community’s idea that the community, themselves, are the true right-holders of the minerals due to the traditional rights to the homelands.¹¹⁶ By virtue of such a traditional or cultural right to the communal area, the community then believes that they have the right to exploit any mineral potential as a means to generate income towards sustaining their families.¹¹⁷ It is be prudent to note that, under the current regulatory framework, the thought position on mineral ownership held by such local communities is misguided as all mineral wealth vests in the state.

¹¹¹ Fritz *et al* “Global Trends in Artisanal and Small-Scale Mining (ASM): A review of key numbers and issues” (2018) 33 at <https://www.iisd.org/sites/default/files/publications/igf-asm-global-trends.pdf> (accessed 31 October 2019).

¹¹² See Fritz *et al* “Global Trends in Artisanal and Small-Scale Mining (ASM): A review of key numbers and issues” (2018) 33 at <https://www.iisd.org/sites/default/files/publications/igf-asm-global-trends.pdf> (accessed 31 October 2019).

¹¹³ It ought to be clarified that not all of those who attempt to carve out a livelihood from ASM come from local communities. As mentioned in the introduction of this paper, there are instances where the discovery of minerals result in rush-mining, with people flocking from various regions of the country and even neighbouring countries.

¹¹⁴ See Fritz *et al* (2018).

¹¹⁵ See Fritz *et al* (2018). In the case of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* CCT265/17 [2018] ZACC 41, the Constitutional Court decided that a mining company had not properly consulted with the community residing in the area of interest to the mining company. As a result of such an insufficient consultation process, the Constitutional Court also set aside the decision of the court a quo granting the eviction of the community from the said area. This move by the Constitutional Court is a step in the right direction with regards to the requirement of consultation between mining companies and mining communities.

¹¹⁶ World Bank Group “CASM Large-Scale Mining Meets Artisanal Mining: A Guide for Action” (2009) 9 at <https://openknowledge.worldbank.org/handle/10986/12458> (accessed 30 October 2019).

¹¹⁷ See World Bank Group (2009) at 10-11.

Even when LSM companies may be tempted to postpone the consultation and negotiation process with the community until such time as they are convinced of a clear and concrete investment opportunity, Section 22(4)(b) of the MPRDA directs an applicant for a mining right to notify and consult with interested and affected parties within 180 days from having been notified by the Regional Manager of the acceptance of their application.¹¹⁸ The consultation process also serves to eliminate or minimize the possibilities of misplaced expectations, misunderstanding and the fear by the community of any perceived threats that may arise from the LSM operations.¹¹⁹

Also, local communities may perceive an LSM company to be threatening competition for the mineral rights.¹²⁰ This feeling tends to be exacerbated where the community has been deriving economic benefit, albeit on a smaller scale, from the local mineral resource that the mining company is in pursuit of.¹²¹ In such instances, the LSM company boasts the legal and legitimate right to the mineral presence on account of the fulfilment of statutory requirements and application procedures.¹²² This will largely be the case where the local community has not utilised Section 104 of the MPRDA. The company will correctly claim that they have followed the rules and paid fees and levies for the operations and that such operations are of national economic importance for its contribution in the payment of royalties and national production.¹²³ The community, on the other hand, would dispute this because of the perception that they bear no obligation to apply for mining licenses as the minerals belong to them traditionally.¹²⁴ They would also maintain that the traditional claim to the local minerals does not diminish even where the minerals are not accessible to the community due to mechanical and technological deficiency.¹²⁵

On the other hand, when artisanal and small-scale miners progress into LSM property, the risk for violent encounters and halting of mineral production is likely to be realized. The invasions of LSM property pose a safety risk for both the LSM personnel and artisanal miners alike. The presence of artisanal miners in LSM territory is also

¹¹⁸ S 22(4)(b) of the MPRDA.

¹¹⁹ See World Bank (CASM) (2009) at 11 (accessed 21 September 2019).

¹²⁰ S104 of the MPRDA governs the framework for the preferent prospecting or mining rights in respect of communities. This provision allows for the interested community to apply to the Minister, in terms of S16 or S22. According to S104(2)-(a)-(e), should the Minister be satisfied that the legislative provisions are complied with, S2 directs that such a preferent right must be given to the community provided that the end goal is the social upliftment of the community, the community submits a development plan which indicates which rights are going to be exercised and that the benefits accruing from the mining accrue to the community.

¹²¹ See World Bank (2009) at 11.

¹²² See World Bank (CASM) (2009) at 11.

¹²³ See World Bank (CASM) (2009) at 11.

¹²⁴ See World Bank (CASM) (2009) at 11.

¹²⁵ See World Bank (CASM) (2009) at 11.

perceived as a serious risk to property and the work programme management.¹²⁶ In such events, the LSM company spends significant costs in safety and security measures to safeguard against the trespassing and possible aggression from artisanal miners.¹²⁷ To the LSM company, such occurrences bring about disruptions to the normal course of business which amounts to delay and interruption of production and profit, the economic viability of the concession development and the overall industrial activity.¹²⁸

A World Bank report also proposes that the hostile relations between artisanal miners and LSM may be fueled by the fact that government authorities neglect to facilitate fair and transparent dialogues between the two.¹²⁹ With all the necessary stakeholders, the DMR and representatives of LSM companies and ASM groups present, meaningful and transparent dialogues have the potential of transforming the nature of the ASM-LSM relationship into what could be mutually-beneficial arrangements.¹³⁰

Particularly due to the illegality of ASM operations, substantiated by the interest of securing LSM operations, illegal ASM is also heavily policed by the SAPS and mine security. Confrontations between national law enforcement agencies and artisanal and small-scale miners tend to escalate to volatile encounters that have resulted in fatalities. In 2017, over 90 miners were arrested and have been prosecuted with four fatally shot during shootouts with police.¹³¹ In early 2014, some 200 miners who had been trapped in mine shaft were rescued and handed over to the police for questioning.¹³² The Directorate for Priority Crime Investigation¹³³ (DPCI) launched several specialised

¹²⁶ See World Bank (CASM) (2009) at 11.

¹²⁷ See World Bank (CASM) (2009) at 13.

¹²⁸ See World Bank (CASM) (2009) at 13.

¹²⁹ See World Bank (CASM) (2009) at 13.

¹³⁰ There is significant potential that such negotiations may not be perceived to be fair or impartial by artisanal miners, and ultimately successful, should the artisanal miners not feel like their demands or requests in relation to opportunities to artisanally mine are being met. This is the context in which an earlier suggestion of practising on a national scale the example of Ekapa Mining Venture and the DMRE with the Kimberly association of artisanal and small-scale miners which saw open negotiations and mutual benefit realised between artisanal miners and the mining company.

¹³¹ Pindral B "More than 80 zama zamas arrested in West Rand" (2017) available online at <https://citizen.co.za/news/1472130/policearrest-80-illegal-miners-west-rand/> (accessed 01 November 2019); Pijoos I "4 zama zamas shot dead, 15 others arrested after shootout with police" (2017) at <https://www.news24.com/SouthAfrica/News/4-zama-zamas-shotdead-15-others-arrested-after-shootout-with-police-20171123> (accessed 01 November 2019).

¹³² The Telegraph "South Africa's trapped miners being rescued - and arrested" (2017) at <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/10642315/South-Africatrapped-miners-being-rescued-and-arrested.html> (accessed 20 November 2019).

¹³³ The Directorate for Priority Crime Investigation was established as an independent and specialised crime prevention branch within the SAPS. It is established in terms of Section 17C of the South African Police Service Act of 1995 as amended by the South African Police Service Amendment Act, 2008 (Act 57 of 2008). Crimes within the jurisdiction of the Directorate for Priority Crime Investigation include serious organised crime, serious commercial crime and serious corruption.

projects around the country to halt illegal ASM activity, some of these projects included Project Masimong, Project Tarantula, Project Darling and Project Spoc.¹³⁴ The various projects amounted to significant arrests of artisanal and small-scale miners and external actors within the illegal ASM sector.¹³⁵ Between 2015 and 2016, the DPCI made 1830 arrests from a collective 114 of its own operations, with the number dropping between 2016 and 2017 to 210 arrests in ASM-related activities.¹³⁶

5.3 ASM’s occupational and health concerns

Part of the nature of illegal ASM is that no aspect of the practice is regulated, invested in or quality assured and is thus mechanically and technologically poor, relatedly taking place below the generally acceptable employment health and safety standards and occurring in inappropriate and dangerous working conditions.¹³⁷ For the majority of artisanal and small-scale miners, who are self-employed, the use of safety equipment depends almost wholly on their consciousness and financial ability.¹³⁸ Jennings, states that, even where the attitudes towards improving ASM mining safety can be improved and those involved motivated to take and sustain action to achieve desirable standards in illegal ASM, the resources necessary to put everything into effect often lack to a significant degree.¹³⁹ The main reasons relating to occupational health and safety deficiencies in illegal ASM operations have been categorised into five different clusters: the economic challenge, inapplicability of medium to large-scale safety regulations to ASM, unawareness of existence of risk, fast-tracking of mechanisation without implementing complementary safety measures, lack of education, training.¹⁴⁰

Essentially, the five above mentioned challenges of illegal ASM may be described as follows. With regard to the economic situation of artisanal miners, many of them work under marginal economic conditions and bear the duty of providing daily sustenance for themselves and their families.¹⁴¹ Again, the nature of their operations bring about low productivity which locks them in a state of inability to garner earnings enough to

¹³⁴ Parliamentary Monitoring Group “Illegal Mining: Hawks & Department of Mineral Resources briefing” (2017) at <https://pmg.org.za/page/Illegal%20Mining> (accessed 02 November 2019).

¹³⁵ See Parliamentary Monitoring Group (2017).

¹³⁶ See Parliamentary Monitoring Group (2017).

¹³⁷ See Ledwaba (2017) at 38; SAHRC Report (2017) at 6; Hentschel, Hruschka & Priester (2002) at 41 and Debrah, Watson & Quansah (2014) at 916.

¹³⁸ See Hentschel, Hruschka & Priester (2002) at 41.

¹³⁹ See Hentschel T, Hruschka F & Priester M (2002) at 41.

¹⁴⁰ Lu JL “Occupational health and safety in small-scale mining: Focus on women workers in the Philippines” (2012) 13(3) *Journal of International Women’s Studies* at 106-107.

¹⁴¹ See Hentschel, Hruschka & Priester (2002) at 453.

sophisticate their operations and attract investment which could raise safety awareness in artisanal mining.¹⁴²

Also, the stringent and overly-sophisticated and costly safety requirements predominantly designed for medium to LSM tend to discourage compliance from those in ASM.¹⁴³ Thirdly, the overall unawareness of risks, especially those of occupational diseases (dust inhalation, nitrous gases, arsenic and cyanide etc.) due to the miseducation or inadequate training of artisanal miners may increase the risks of chronic occupational diseases.¹⁴⁴ Fourthly, the fast-tracking of mechanisation without implementing complementary safety measures presents unnecessary accidents. Where artisanal miners employ advanced mechanisation and technology, such as blasting rock without training, pneumatic drilling without dust control, electrification in coal mines, mechanical transportation in order to access deeper stopes without approved ventilation, the likelihood of unnecessary accidents increases.¹⁴⁵ Lastly, the education and training of artisanal miners is recognised as being the key to improvement of the occupational health and safety in ASM groups.

The dire state of the health and safety standards of the illegal ASM sector are amongst the core points that the RDP policy sought to address in its call to the government to consider ways and means to promote safe and formalised ASM practices and to enhance support, both in appropriate financial and technical terms, for the sector. The legacy of poor health awareness in mining instances, particularly amongst the black and migrant mining labour, began as far back as 1912.¹⁴⁶ The same health and work-environment safety challenges faced by the mine workers of the pre-constitutional era are the same that face the ASM workers of today. It was these health-related challenges that the early domestic policies, namely the RDP and the Growth, Employment and Redistribution: A Macroeconomic Strategy (GEAR), sought to draw governmental attention to. Despite their ideological differences, these two policies shared the common idea of promoting the operationalisation and support of small local businesses as this would actively contribute to the reduction of unemployment, while boosting an environment in which places of work would be secure and productive.

In theory, the health and safety status of the ASM sector adversely affects the constitutional right to a safe and healthy environment, as envisaged by the Section 24 of the Constitution. The environmental damage, which is borne primarily by the local communities surrounding ASM sites, results from a vacuum of ASM-specific health and

¹⁴² See Hentschel, Hruschka & Priester (2002) at 12.

¹⁴³ See Hentschel, Hruschka & Priester (2002) at 29.

¹⁴⁴ See Hentschel, Hruschka & Priester (2002) at 29.

¹⁴⁵ See Hentschel, Hruschka & Priester (2002) at 83.

¹⁴⁶ McCulloch J "Cutting the cost: Gold-mining and occupational disease in contemporary South Africa" (2009) 108(431) *African Affairs* at 224.

safety regulations and practices along with the inapplicability of LSM health and safety practises and traditions.

Not only does illegal ASM's lack of health and safety standards violate the constitutional right to a healthy environment, it also negates the potential for ecological preservation and sustainable development. The trickle-down effect of the violation of environmental standards also disaffirms the constitutional notion of promoting economic and social development through the cultivation of natural resources. In this regard, the SAHRC noted that the duty to respect environmental rights also entails the identification of the changes in the quality of the environment and to design and produce corrective measures to remedy such negative changes. If the quote of Tiny Dlamini is any reference, this recommendation by the SAHRC has clearly not influenced the health and safety aspects of ASM for the benefit of artisanal miners and communities alike.

The provisions of the MPRDA are also threatened by the current status of ASM occupational health and safety. Despite the fact that many citizens of South Africa live in, or around, an environment that is harmful to their health, this reality still does not retract their fundamental right to live in safe and healthy environment. This is where the state-borne duty to protect, preserve and implement this right becomes important. In the ASM-specific context, the challenges of the harmful health and environmental practices stand to be addressed more efficiently if the root cause was acknowledged.

6 CONCLUSION

ASM is a contentious phenomenon which has continued to stand the test of time. This fact is primarily true because of the socio-economic dependence it has garnered from the thousands who forge livelihoods from it. Despite the sector being realised as important, and even necessary, for community development and the transformation of the minerals industry, the South African government has seemingly failed to design a fitting and unique legal framework which would cater to its many peculiarities. Time and time again, the sector is subjected to stringent legal prescriptions and formalities which are inappropriate for its participants and such a rigid chasm between the legal framework and the reality of the sector continues to give rise to the illegality of the sector, which further leads to the symptoms which cast a negative and criminal light on the sector and its actors.

The bigger existential threat to the sector is the fact that the applicable provisions of the MPRDA and policy documents intended to usher in and guide its transformation have woefully neglected to even acknowledge its existence. Notwithstanding the constant media coverage on illegal ASM throughout the years, the legislative, legal and political avenues have closed their ears to the sector. In a time of crippling and growing unemployment and poverty, the economic support South Africa could have secured from a transformed and developed sector has gone to complete negation. Until such

time as policy-making structures take another careful consideration of the sector, the efforts to suppress it will continue to prevail at the expense of its potential.

The pulse of this paper was to convey the magnitude of a transformed understanding of the sector against applicable constitutional, legislative and policy imperatives. The assignment of harmonising illegal ASM and its environmental, health and social aspects will be a long and multi-faceted one, duly requiring the cooperation of more industry actors than ASM groups and the government. Furthermore, the efforts at transforming the ASM sector will continue to be ill-fitted to the sector until they are tailored to reflect substantive equality as required by applicable constitutional jurisprudence and the original tenets of the MPRDA of using minerals in the promotion of economic and social development, rural development and social upliftment of communities affected by mining.

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