A Gold Rush to Nowhere? The Rights-based Approach to Environmental Governance in South Africa's Mining Sector in Question

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Abstract: *In this article we focus on the impact that the mining industry has had, and continues to have, on the environment in South Africa. The country is renowned for its mineral wealth and the mining sector continues to significantly contribute to its gross domestic product. Yet, as we demonstrate, these socio-economic benefits are often short-lived and they frequently come at a high price, especially where mining impacts on the environment and the attendant health and well-being of people. The South African legal regime does, however, provide an explicit environmental right; other environmental-related substantive rights to water, housing and sanitation; as well as a set of procedural rights that should facilitate participative governance and provide means to protect substantive rights-based interests. Flowing from these rights is also a comprehensive and modern environmental law regime that seeks to regulate mining impacts. Collectively, these rights and statutory arrangements should provide for better protection against the adverse environmental impacts of mining. Yet, despite the existence of this rights-based regime, environmental abuses by the mining sector continue to hamper the country's quest for sustainability. The questions that arise in this respect include: are rights in South Africa still mere symbolic statements of intent, instead of meaningful and powerful drivers in environmental governance; and more importantly, is the rights-based approach a viable means of holding mines to account for adverse environmental impacts in South Africa? We attempt to answer these interrelated questions by discussing the impact of mines on South Africa's environment; investigating the underpinnings and meaning of the rights-based approach; and critically analysing some recent instances where the judiciary was called on to adjudicate matters involving mines and their relationship with people and their environment.*

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A. Introduction

South Africa's economy owes much of the robustness to its mining industry. The country is the biggest producer of platinum in the world; the fourth largest producer of gold; and it is renowned for its abundant diamond and coal resources, among others.[1] Its mineral wealth remains a critical resource for use in improving the socio-economic conditions and well-being of people in South Africa. During the dark years of apartheid and the country's consequent crippling political and economic isolation from the world, the mining industry was in many ways the lifeline of a dying economy. While it sustained and perpetuated a system of evil rule at the time, today the mining sector remains a sparkling diamond in the country's economic crown and a viable means of achieving socio-economic progress.[2]

At the same time, however, the mining industry is turning on itself in a possibly self-destructive and unsustainable proverbial "gold rush", which could very well leave a few people with bags full of wealth, while the majority of the country's people have little to show for this exploitation other than some short-term gains and unfulfilled promises of long-term prosperity, a degraded environment and a depleted mineral resources base. There is often a high price to pay for the socio-economic benefits that result from mining,[3] including environmental, health and other costs which are usually not borne by mining companies, but by society.[4]

For example, the costs of addressing pollution as a result of acid mine drainage (AMD) from historic mining activities in South Africa would include, among others, the cost of preventing, remediating and minimising pollution, the loss of infrastructure, the resettlement of people, and health-related costs. This cost was recently estimated to be a staggering ZAR 30 billion (approximately Euro 20 648 474);[5] almost three times the gross domestic

1 For example, mining is an excellent foreign exchange earner with gold comprising approximately one third of exports. See *Department of Environmental Affairs and Tourism,* State of the Environment Report, Pretoria 2006, p. 35.

2 Its importance has recently again been highlighted by the renewed talk of the nationalisation of mines by the ruling African National Congress and its Youth League. See among others *Palash Gosh*, South Africa Minister Warns Against Nationalization of Mining Industry, http://www.ibtimes.com/articles/110115/20110208/south-africa-mining.htm (last accessed on 7 January 2014); and *Margie Inggs*, Mine Nationalisation will be Disastrous for South Africa's Economy, http://www.miningweekly.com/article/mine-nationalisaton-will-de-dsastrous-for-south-africas-economy-2010-09-10 (last accessed on 20 May 2014).

3 *Andy Whitmore*, The Emperor's New Clothes: Sustainable Mining?, Journal of Cleaner Production 14 (2006), pp. 309-314.

4 *Whitmore*, note 3, pp. 309-314.

5 *World Wildlife Fund*, Financial Provisions for Rehabilitation and Closure in South African Mining: Discussion Document on Challenges and Recommended Improvements, http://awsassets.wwf.org.za/downloads/summary_mining_report_8aug.pdf (last accessed on 21 August 2014). See also *Terence S McCarthy*, The Impact of Acid Mine Drainage in South Africa, South African Journal of Science 107 (2011), pp. 1-7.

product of Zimbabwe.[6] While it is unclear how the funds will be generated and by whom, it is particularly worrying that the Minister of Finance has set aside only a paltry ZAR 150 million in the 2013/2014 budget to contribute to this cost.[7] Clearly South Africa's public financial system is unable to cope with the extent of the AMD crisis; let alone any other damages caused by mining generally.

The impact of mining on long-term sustainability is evident: environmental pollution is at the order of the day; in many instances communities do not share in the financial benefits of mining; peoples' health and well-being are often negatively affected by pollution and nuisance (especially mine employees and those living at or nearby mines); and where new mines are established and existing ones expanded, people are often excluded from the making of decisions which invariably affect their interests.[8] On balance, it appears as if despite its benefits, myriad environmental and related socio-economic interests continue to be trampled on by mining companies in the interest of enriching a few at the expense of millions of others and to the detriment of the environment. As Humby states:

> *While the more than 50 kilotonnes of gold wrenched from the hard quartzite of the Witwatersrand undoubtedly generated wealth for both the private mining industry, its investors and the South African state, the costs of this adventure – for the indigenous and foreign African labourers without whom a deep mining industry would never even have existed, for the social and economic resources of the African "reserves" where the migrant labourers lived and above all for the receiving natural environment – were enormous. As regards the environment, the impacts of mining have emerged slowly over time and are only now becoming full blown.*[9]

While much of the mining–related environmental damage was caused at a time prior to South-Africa's constitutional democracy, today the South African legal regime advances a comprehensive rights-based approach to environmental governance; an approach which is given detailed effect to by a statutory framework that contains, among other things, environmental, water and mining legislation. Collectively, these rights and statutory arrangements should provide for better environmental protection while simultaneously enhancing socio-economic conditions; a notion which is expressed by the term "sustainability" and

6 Zimbabwe Country Report, Global Finance, http://www.gfmag.com/global-data/country-data/zimbabwe-gdp-country-report (last accessed on 21 August 2014).

7 South African Treasury: Budget Review 2013 http://www.treasury.gov.za/documents/national%20budget/2013/review/FullReview.pdf (last accessed on 21 August 2014).

8 See more generally, *HA Strydom and ND King* (eds.), Fuggle and Rabie's Environmental Management in South Africa, Cape Town 2009, pp. 294-339, 425-454, 513-576, 630-692; *Gavin Hilson and Barbara Murck*, Sustainable Development in the Mining Industry: Clarifying the Corporate Perspective, Resources Policy 26 (2000), pp. 228-229.

9 *Tracy Lynn Humby*, The Spectre of Perpetuity Liability for Treating Acid Water on South Africa's Goldfields: Decision in *Harmony II*, Journal of Energy and Natural Resources Law 31 (2013), p. 454.

which is a foundational part of South African environmental law.[10] Has this rights-based approach to environmental governance made any significant contribution to the protection of the environment in the country? Moreover, are rights in South Africa at this point still mere "symbolic statement[s] of intent",[11] instead of serving as the basis for meaningful and powerful remedies? Is the rights-based approach to environmental governance a paper tiger with a lot of roar but with little bite? Most importantly, is the rights-based approach a viable means of holding mines to account for adverse environmental impacts?[12] In this article we seek to answer these questions, even though we accept that a brief analysis of this kind cannot answer them fully.

We conduct this investigation, firstly by introducing the impact of mines on the environment and on peoples' related socio-economic interests in South Africa. In this part we take a broad and inclusive view of "the environment" and consequently of "environmental impacts" which we believe include related socio-economic impacts by virtue of the broad definition of "environment" in the National Environmental Management Act 107 of 1998 (NEMA). NEMA is South Africa's primary environmental framework statute, setting out an umbrella-like definitional, principled and interpretative framework that applies to the entire environmental governance effort in the country. Recognising the interconnectivity between environmental and socio-economic conditions, the anthropocentrically-oriented NEMA provides that the "environment" means:

> *…the surroundings within which humans exist and that are made up of-*
> *(i) the land, water and atmosphere of the earth;*
> *(ii) micro-organisms, plant and animal life;*
> *(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and*
> *(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.*[13]

10 The achievement of sustainability is not only an objective of South Africa's environmental right (see section 24 of the Constitution of the Republic of South Africa, 1996); but also of the country's environmental framework law, the National Environmental Management Act 107 of 1998 (NEMA). See below for a more detailed discussion.

11 *Allan Andrew*, A Comparison between the Water Law Reforms in South Africa and Scotland: Can a Generic National Water Law Model be Developed from these Examples?, Natural Resources Journal 43 (2003), pp. 482-483.

12 Mindful of the possible injustice that a selective discussion might entail, and in the light of space limitations, we deliberately restrict our focus to include only a discussion of the rights-based approach as such. As a result, we focus on the Constitution of the Republic of South Africa, 1996 and constitutional provisions, and not on the entire statutory framework that aims to give effect to the environmental and other rights in the South African context.

13 Section 1 of NEMA.

Our inclusive approach to the "environmental" impacts of mining is further warranted by the environmental right's emphasis on "human health and well-being" (see below for a detailed analysis).

The second part of the paper investigates the underpinnings and meaning of the rights-based approach as it manifests in South African law. In order to comment on the effectiveness and usefulness of this approach, we critically analyse some recent instances where the judiciary was called on to adjudicate matters involving mines and their relationship with people and their environment (part three).[14] The paper concludes with the fourth part, which comments on the perceived limitations of the rights-based approach to protect peoples' environmental rights, interests, and entitlements where the latter are adversely affected by the mining industry.

B. South Africa's gold rush to nowhere?

Although this view is domain dependent, from the perspective of environmental law and governance the phrase "sustainable mining"[15] is a misnomer. This is because sustainable development, the notion upon which it is based, is a disingenuous concept, or palliative,[16] often filled with political and neo-liberal capitalist rhetoric which is sometimes used in a context that is biased towards arguments which legitimise socio-economic development at the cost of ecological concerns.[17] Also, mining can *de facto* not be sustainable because the

14 Our focus on the judiciary is because courts are those institutions legitimately and legally endowed with the authority and task, and also those institutions best placed, to rule on the normative meaning of rights and in so doing, to contribute to their realisation and protection, and to interpret their meaning.

15 "Sustainable mining" is a concept said to have initially been coined by the Global Mining Initiative (GMI) and has become a fairly well known concept in the international mining industry. See *Whitmore*, note 3, p 310.

16 *Benjamin J Richardson*, A Damp Squib: Environmental Law from a Human Evolutionary Perspective, http://ssrn.com/abstract=1760043 (last accessed on 21 August 2014).

17 The Department of Mineral Resources (South Africa's lead agent for mining) states that its vision is "World-class minerals and energy sectors through sustainable development". *Department of Minerals and Energy*, Annual Report 2009/2010, Pretoria 2010, p. 5. This wording quite literally suggests that mineral wealth and exploitation will be improved through a process of sustainable development. Mining is therefore portrayed as a justified process which is not necessarily "bad". This view is supported by "sustainability thinking" in the mining industry world-wide, considering, for example, that in 2003 the International Council on Mining and Metals adopted ten sustainable development principles for member companies to implement and measure themselves against. These principles are: implement and maintain ethical business practices and sound systems of corporate governance; integrate sustainable development considerations within the corporate decision-making process; uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by mining; implement risk management strategies based on valid data and sound science; seek continual improvement of mines' health and safety performance; seek continual improvement of mines' environmental performance; contribute to conservation of biodiversity and integrated approaches to land use planning; facilitate and encourage responsible product design, use, re-use, recycling and disposal of mines' products; con-

activity of mining entails a limitation of choice; a limitation which severely affects any possibility of creating a reasonable balance between social, economic and ecological considerations:

> *Mining can only take place where minerals occur, whether that location is environmentally or socially suitable or not. Mineral deposits are finite which means that mining is a temporary land-use and therefore inherently unsustainable. Minerals can further only be mined by means of methods of extraction that usually have as ultimate effect the permanent alienation of the use and aesthetics of the land. The impact of mining on the environment, in turn, poignantly causes social challenges.*[18]

In South Africa, the "limitations of mining", as it were, and the ecological and related socio-economic impacts of mining have been extensively canvassed. The documented estimations are usually set against the backdrop of the following truth:

> *South Africa, like other developing countries around the world, is faced with the task of promoting economic development that meets the needs of its population while ensuring that the environmental systems and services on which people rely are not seriously damaged or destroyed. Striking the balance between these two imperatives of human well-being is arguably the greatest challenge of all.*[19]

tribute to the social, economic and institutional development of the communities in which mines operate; and implement effective and transparent engagement, communication and independently verified reporting arrangements with stakeholders. See International Council on Mining and Metals, Principles, http://www.icmm.com/our-work/sustainable-development-framework/10-principles (last accessed on 21 August 2014). *Hilson and Murck*, note 8, pp. 231-235 propose the following as guidelines for "sustainable mining": improved planning; improved environmental management; improved waste management and implementation of cleaner technology; addressing the needs of communities and stakeholders; formation of sustainability partnerships and emphasis on awareness education at all industrial levels.

18 *Lloyd Christie*, The Constitutional and Statutory Role of Local Government in the Sustainable Development of Communities Affected by Mining, Potchefstroom 2010, pp. 6-7 (on file with authors), citing *MA Rabie et al*, Terrestrial Minerals, in: HA Strydom / ND King (eds.), Fuggle and Rabie's Environmental Management in South Africa, Cape Town 2009, p. 337.

19 *Department of Environmental Affairs and Tourism*, note 1, p. 4. South African mining law and policy also recognises the need for and subsequently define sustainable development as the integration of social, economic and environmental factors into planning, implementation and decision-making to ensure that minerals and petroleum resources development serves present and future generations. As this and other legally entrenched definitions suggest, sustainable development has everything to do with the delicate balancing, over time, of a scale that holds different interests, mostly socio-economic and environmental. The balancing act that is required in this context is particularly difficult for countries in transition; countries pursuing every possible opportunity to ensure local economic development and capital growth. See, among others, section 1 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA). See also *Willemien du Plessis and Anél du Plessis*, Striking the Sustainability Balance in South Africa, in: Michael Faure / Willemien du Plessis (eds.), The Balancing of Interests in Environmental Law in Africa, Pretoria 2011, pp. 413-458.

To what extent is the country living up to the sustainability ideal expressed here? Evidence suggests that sustainability is compromised by environmental damage as a result of mining activities. The 2006 South African State of the Environment Report (SoER) found, for example, that:

- Over 200 000 hectares of natural habitat have been transformed by mining;
- In 1997, approximately 470 million tonnes of mining waste were created; a quantity which today could very well be far higher;
- Mines consume a disproportionate six percent of the total available water in the water-scarce South Africa and mining activities also significantly contribute to water pollution;
- Some of South Africa's largest mines are located in or near the country's most important aquifer (the Transvaal Sequence) and are severely threatening underground water resource quality as a result (notably through AMD);
- The mining sector consumes a significant portion of limited energy resources in the country which is not only disproportionate when weighed against the socio-economic and environmental benefits of mines, but also forces other sectors of the mining industry (the coal sector in particular) to increase output and their polluting impact;
- Methane gas emission and dust contribute to climate change and air pollution; and
- Several examples of severe un-rehabilitated present and historical mining pollution sites exist throughout the country, and the occurrence of AMD is currently the gravest concern.[20]

Where the natural or ecological resource base is affected, people by definition would also be affected, because a degraded natural environment is not conducive to sustaining human health and well-being as we have pointed out above. Thus, in addition to the ecological impacts, mining has several other impacts with respect to environmental health, culture, property, occupational health and safety and access to amenities and infrastructure. Recent accounts suggest the following, among others:

- Communities often suddenly face intrusion and disruption caused by noise, access roads, dangerous equipment, and heavy vehicles when mines are established;
- Despite promises during stakeholder negotiations, communities do not always see or benefit from infrastructure development, employment opportunities, compensation for the loss of grazing lands and for damage to their houses caused by mining;[21]
- Mining activities in some instances result in the relocation of graves within traditional communities through a process that lacks accountability and transparency.[22] In some instances, a mine will fund the relocation of graves but will then subcontract the process. Community members receive a pittance for the relocation of each grave and reports indi-

20 *Department of Environmental Affairs and Tourism*, note 1, p. 35.

21 See *M Shakung*, Protection of the Procedural Rights of Indigenous People Affected by Mining in South Africa, Potchefstroom 2014, pp. 22, 105 (on file with authors).

22 *Stephan Hofstatter*, Dispute over Angloplat Relocation Fund, http://www.businessday.co.za /Articles/Content.aspx?id=57489 (last accessed on 21 August 2014).

cate that very little anthropological research and planning go into the relocation of graves as a consequence of mining activities;[23]
- The tension between prospecting and landowners' rights is sometimes dealt with in a way that lacks procedural soundness and that negatively affects property rights;[24]
- Communities are deeply concerned about conflicting drinking water quality reports;[25]
- Mine activities lead to the loss of land suitable for agriculture and therefore the loss of subsistence and economic livelihoods;[26] and
- Local communities who are precariously dependent on mines are subject to the whims of the global commodities market, the failure of which may result in premature mine closure and attendant job losses.[27]

These impacts are aggravated as a result of governance complexities especially in relation to participative governance and effective compliance and enforcement. Some of these complexities include, that:
- Prospecting licences can be obtained only after the prospecting company has demonstrated that it has consulted with stakeholders. In communal or rural areas, this implies getting an agreement from the local traditional leader (*Kgosi*) acting on behalf of the community and in so doing, subsuming the constitutional rights of the individual to participate and deliberate in decision-making; [28]
- State departments responsible for mining lack the capacity to track the rapidly expanding operations of the mining industry and to enforce compliance with environmental legislation;[29] and
- The financial penalties for non-compliance with environmental and social requirements for prospecting in mining legislation are often insufficient to the extent that it makes financially more sense for companies not to comply.[30]

The foregoing suggests that for various reasons, the financial gains and social progress that usually come with mining are often compromised by the environmental impacts of mining.[31]

23 NGO Report on the Platinum Rich Limpopo Community of Maandagshoek (Maandagshoek Report), p. 74 (on file with the authors); and *South African Human Rights Commission (SAHRC),* Report on Limpopo Community Discussion Forums: Mining-Related Observations and Recommendations, Pretoria 2009, p. 8. See also *Shakung*, note 21, p. 67.

24 *Anonymous*, Mining Case May Set Risky Precedent, http://www.businessday.co.za/ Articles/Content.aspx?id=128555 (last accessed on 21 August 2014).

25 *SAHRC*, note 23, pp. 7, 17.

26 *SAHRC*, note 23, p. 19.

27 *Christie*, note 18, p. 7.

28 Maandagshoek Report, note 23, p. 52 (on file with the authors).

29 Maandagshoek Report, note 23, p. 65.

30 *Humby*, note 9, pp. 453-466.

31 See also the assessment of *Hilson and Murck*, note 8, p. 230 with reference to the work of JM Epps.

C. A Rights-based Approach to Environmental Governance

To what extent does a rights-based approach to environmental governance provide for the protection of environmental interests? Every right creates a duty and in this context, what obligations does a rights-based approach to environmental governance create and on whom do these obligations rest? We attempt to answer these questions in the following sections by discussing the architecture of South Africa's rights-based approach to environmental governance; by investigating the scope of the application of relevant rights against the concept of the public trust; [32] and by postulating what we see as the primary objective of the rights-based approach to environmental governance in the context of a developing country.

I. The Environmental Right

Constitutional transformation in the early 1990s brought with it, for the first time, the constitutional protection of the environment in South Africa.[33] Section 24 of the Constitution of the Republic of South Africa, 1996 (the Constitution) states:

> *Everyone has the right:*
> *(a) to an environment that is not harmful to their health or well-being; and*
> *(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; and*
> *(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*

32 South Africa's environmental laws are based on the public trust doctrine, which reinforces the prominent role of government as bearing the main responsibility for environmental protection in the country. According to section 2(4)(o) of NEMA: "[T]he environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage." The public trust is also reiterated in the National Water Act 36 of 1998 and the Mineral and Petroleum Resources Development Act 28 of 2002. The primary thrust of the public trust doctrine is to ensure that environmental resources are used and these resources protected for present and future generations in the public interest for the benefit of all by placing custodial obligations on government. The doctrine even reaches further than the self-evident obligations on government: by endowing government with this custodial role, it also empowers the government to take all "reasonable legislative and other measures" to force the mining industry to abide by its legal obligations with respect to the environment. See further, *Loretta Feris*, The Public Trust Doctrine and Liability for Historic Water Pollution in South Africa, Law, Environment and Development (2012), pp. 1-22; *Elmarie van der Schyff*, Stewardship Doctrines of Public Trust: Has the Eagle of Public Trust landed on South African Soil?, South African Law Journal (2013), pp. 369-389.

33 The Interim Constitution of the Republic of South Africa, Act. No. 200 of 1993, provided in section 29: "[E]very person shall have the right to an environment which is not detrimental to his or her health or well-being." The Interim Constitution was superseded by the final Constitution in 1996.

Section 24(a) is indistinctively broad and carries considerable potential meaning. When read with section 7(2) of the Constitution, it is evident that the state must "respect, protect, promote and fulfil" peoples' right to live and work in an environment that will not be detrimental to, or have any negative impacts on their physical and mental health or their well-being. This is in line with orthodox rights-formulations globally, which provide for a combination of negative duties to restrain the state from infringing rights, as well as a set of positive duties to force the state to protect, ensure and realise rights.[34] While the duty to respect will include the duty to refrain from interfering directly or indirectly with peoples' enjoyment of the environmental right, the duty to protect includes the duty to prevent private parties from interfering with the enjoyment of the right through the adoption and enforcement of legislative and other measures. The duty to fulfil will include the duty to take positive measures that assist people to gain access to and enjoy the full realisation of the environmental right.[35]

People also have the right to have the environment protected mainly by means of laws and an accompanying state-based regulatory framework consisting of "reasonable legislative measures". The concept of "other measures", however, suggests that non-legal measures could also be employed to protect the environment. These could be measures that are non-legal, but which are derived from or mandated by law (administrative measures, environmental education and capacity building are some examples); or they could be measures that fall entirely in the private domain such as self-regulation through an environmental management system (ISO 14001 is an example). This would mean that: a) the primary duty to ensure the entitlements to health and well-being are observed, rests with "the state" or government, which must "respect, protect, promote and fulfil" these entitlements through the primary means at their disposal, namely laws (legislation, regulations and norms and standards); and b) this duty may be channelled to the private sector, which includes the mining industry.

To this end the question arises of whether or not the environmental right applies vertically *and* horizontally, as is the case for example in Germany.[36] In other words, does it impose direct obligations on both government *and* the private sector (mining companies) to "respect, protect, promote and fulfil" its content? As a point of departure, section 7(2) explicitly provides that the duty to respect, protect, promote and fulfil applies to the state.[37]

34 *Sandra Liebenberg*, Socio-economic Rights Adjudication under a Transformative Constitution, Cape Town 2010, p. 83.

35 *Liebenberg*, note 34, pp. 84-85.

36 Although it must be acknowledged that the German Constitution does not provide for an environmental right per se, but rather for a principle of state policy. See, for example, *Ralf Brinktrine*, The Horizontal Effect of Human Rights in German Constitutional Law: The British Debate on Horizontality and the Possible Role Model of the German Doctrine of '*mittelbare Drittwirkung der Grundrechte*', European Human Rights Law Review 4 (2001), pp. 421-432.

37 It states as follows: "*The state* must respect, protect, promote and fulfil the rights in the Bill of Rights." Own emphasis.

This is confirmed by section 8(1), which provides that "[T]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." However, section 8(2) then extends this application in that: "[A] provision of the Bill of Rights binds a *natural or a juristic person* if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."[38] The section 24 obligations, in addition to the state's measures directed at industry regulation, would thus apply horizontally to mining companies if the nature of the environmental right and the concomitant obligations so allow. "The duties which private actors bear … are the duties it makes sense for them to bear",[39] and we propose that nothing in the nature, objectives, or the wording of section 24 (read with section 8(2)) would preclude the environmental right from applying to mining companies (i.e., horizontally), because as juristic persons, mines have the potential to affect the environment, health and well-being. They could therefore reasonably be expected, morally and legally, to apply environmental care as per the negative duty arising from section 24(a). Admittedly, while the state's custodial duty is an all-encompassing one to manage human relations with respect to the environment and to protect natural resources (positive and negative), the duties flowing from section 24(a) and resting on private actors may be of a slightly more moderate nature in that they are only limited to negative duties to "respect".[40] Mines will therefore probably only be required to respect and protect the environmental right (in a negative sense to desist from infringing it) and not also to "promote" and to "fulfil" the right (in a positive sense).

The horizontal application of rights in certain instances has been confirmed by the courts. In the case of *McCarthy v Constantia Property Owners Association*,[41] the Cape High Court, per Davis J, found that:

> *... the Constitution clearly envisages a generous regime of access to courts. In addition it purports to protect the environment. Section 8(2) provides that the provision in the Bill of Rights binds all natural and juristic persons, if and to the extent, that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. Whatever the interpretation of this opaque phrase, it is clear that its intention was to extend the scope of application of the Bill of Rights. In short, the Bill of Rights was not only designed to introduce the culture of justification in respect*

38 Own emphasis.

39 *Nick Friedman*, The South African Common Law and the Constitution: Revisiting Horizontality, South African Journal of Human Rights 30 (2014), p. 69.

40 See *Feris*, note 32, p. 1-22, arguing that the duty established by s 24(a) of the Constitution creates a shared responsibility, borne by private actors, for the management and conservation of natural resources in the public interest and beyond, in the interest of future generations. Friedman adds: "despite the fact that s 8(2) unambiguously imposes human rights obligations on individuals, it also makes the obvious point that individuals do not bear those obligations in the same way as the state, and not necessarily in respect of all rights-whether they bear duties, and the extent of those duties, depends on the nature of the right involved." *Friedman*, note 39, p. 68.

41 [1999] JOL 5124 (C).

> *of public law but intended to ensure that the exercise of private power should similarly be justified. Accordingly the carefully constructed but artificial divide between public and private law which might have dominated our law prior to the constitutional enterprise can no longer be sustained in an uncritical fashion and hence unquestioned application.*[42]

In other words, the traditional divide between public and private law, public and private relationships and concomitant obligations is increasingly becoming blurred, and in the current South African constitutional rights context, the private and public spheres often overlap, resulting in the creation of a wide net of duties and obligations that rests on the state and the private sector, including in the environmental context. This confirms that the environmental right is enforceable against mining companies and that there rests a duty on mines to respect the environmental right and to run their business in a way that would not compromise the protection advanced by section 24(a) of the Constitution. This duty applies to mines, to the extent that the right imposes the obligation on mining companies to make decisions and to operate in a way that safeguards health and well-being, protects the environment for present and future generations, prevents pollution and ecological degradation, promotes conservation, and secures the ecologically sustainable development and use of natural resources.

To what extent does the environmental right accommodate and provide for sustainability, and how does this apply to mines? By employing phrases such as "present and future generations" and "ecologically sustainable development", the environmental right clearly incorporates the concept of sustainability into the rights-based paradigm, albeit in a limited sense. For example, it is clear from a plain reading of section 24(a) that no one has a right to a clean unpolluted environment; only to an environment not harmful to health and well-being. This limitation is deliberate and has been formulated as it has so as not to militate against or hinder economic growth imperatives espoused by the concept of sustainable development. This limited (or weak) view of sustainability is further underlined by the environmental right in its reference to "*justifiable* economic and social development." While the right explicitly employs the phrase "ecologically sustainable development", which is generally understood to refer to strong sustainability (as opposed to weak sustainability), or an ecocentric view of sustainability instead of an anthropocentric view,[43] the strong, ecocentric sustainability considerations are tempered and diluted by the need and obligation to promote justifiable socio-economic development, which is a distinctly human-centred consideration. The practical implications of this limitation could be that despite its environmental

42 *McCarthy v Constantia Property Owners Association* [1999] JOL 5124 (C), p. 11.

43 See generally on the difference between weak and strong sustainability, *Klaus Bosselmann*, Eigene Rechte für die Natur? Ansätze einer ökologischen Rechtsauffassung, Kritische Justiz 1986, pp. 1-22; *Klaus Bosselmann*, The Principle of Sustainability: Transforming Law and Governance, Aldershot 2008; *Klaus Bosselmann*, Im Namen der Natur: Der Weg zum ökologischen Rechtsstaat, Bern 1992; *Klaus Bosselmann*, Ökologische Grundrechte: Zum Verhältnis zwischen individueller Freiheit und Natur, Baden-Baden 1998.

impacts, mining is allowed insofar as it is justifiable to mine as part of South Africa's efforts to promote socio-economic development. It is thus possible to argue that "justifiable economic and social development", or sustainable development with the environmental, social and ecological dimensions it has in the South African context, acts as an internal limitation of section 24 and its ecological objectives, because the latter would be prioritised only if the limitations to development that they impose are *justifiable* in a socio-economic sense. In a country that heavily depends on the mining sector for its socio-economic prosperity and where millions of people are directly and indirectly dependent on revenue from mines, it could very well be that all mining that leads to economic and social development would be constitutionally justified if it contributes to creating jobs and wealth, and alleviates poverty. By virtue of its reference to ecological sustainability, it thus appears as if section 24 envisions the reconciliation of environmental protection and resource-based economic growth and social development.[44] If this line of argument is followed, it would appear as if the anthropocentric approach to sustainability in South Africa is favourable to mines and that the limited form of sustainability provided for by the environmental right may potentially be used to support mining insofar as it contributes to "justifiable economic and social development". Remedies for ecological and human health protection under the environmental right might be abrogated as a result, as the possibility to counter mining proponents' justification of mining is impeded.

Importantly, the environmental right is fully justiciable; a fact that has been recognised by the Supreme Court of Appeal in *Director: Mineral Development Gauteng Region v Save the Vaal Environment* (see the discussion below).[45] This status imposes an important constitutionally-derived obligatory duty on the judiciary to interpret the right and to consider claims based on the right, to explore appropriate remedies where the right is infringed, and "to develop new and innovative remedies if a breach of the relevant provisions in the Bill of Rights is established."[46]

II. Other Environment-related Substantive Rights

Generally speaking, rights do not operate in isolation. This is also the case with South Africa's Bill of Rights,[47] which is based on the notion of the interconnectivity and interrelatedness of all rights in the Bill of Rights. This means that in some instances more than one right could be applicable to a single subject matter; and/or that rights could be used in a

44 While this approach may seem to promote socio-economic development at the cost of the environment, it is also possible to imagine that section 24 provides the constitutional rationale and foundation for the investment of revenues from resource exploitation (mining) in order to generate benefits for future generations especially where environmental resources have been exhausted, for example.

45 1999 (2) SA 709 (SCA).

46 Liebenberg, note 34, pp. 37.

47 Chapter 2 of the Constitution.

mutually reinforcing way to strengthen claims; and/or that specific rights could be used to enforce related entitlements where no specific rights are provided in a constitution to cover such entitlements. As this is as true for the environmental context as for any other, it would be erroneous to suggest that the environmental right stands alone as the sole provision in the arsenal of the rights-based approach to environmental governance. The interconnectivity of rights in an environmental context is derived not only from the foregoing general rule, but also from the legal nature of a broadly defined environment and the idea that an environment of acceptable quality that is conducive to health and well-being is a prerequisite for the enjoyment of life, dignity, and equality, among other things.

Yet, the effect of applying related rights collectively to any one given situation probably only has a limited supportive role in South Africa. The interdependence of rights is often successfully used in instances where a constitution does not provide for an explicit environmental right. For example, while article 21 of the Indian Constitution only states that "[n]o person shall be deprived of his life or personal liberty except according to procedures established by law", the Supreme Court has recognized that there are some unarticulated liberties implied by this provision. Thus, despite the absence of an explicit constitutional environmental right, the Indian Supreme Court has read the right to life and personal liberty to include the right to a clean environment.[48] But, South Africa has an explicit environmental right and to date the need has not arisen for the courts to rely on other rights to claim environmental entitlements.

Yet, nothing prohibits the courts from using a wide array of rights to enforce environmental and environment-related interests. By virtue of the extended definition of the environment in NEMA (see the discussion above), environmental interests will be protected by the constitutional environmental right and also other rights which have to do with natural and human-made surroundings. In the latter sense, for example, the constitutional property rights clause (section 25) is relevant because it provides that "[N]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."[49] It adds that, "[P]roperty may be expropriated only in terms of law of general application for a public purpose or in the public interest", and that for the purpose of section 25, public interest include "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources,"[50] including equal access to the mineral resources of the country. In the context of land restitution and redistribution of natural resources to previously disadvantaged communities, and with specific reference to the environmental right, the Land Claims Court held in *In re Kranspoort*

48 *Jona Razzaque*, Human Rights and the Environment: the National Experience in South Asia and Africa, in: Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment: Background Paper No. 4. Available at http://www2.ohchr.org/english/issues/environment/environ/bp4.htm (last accessed on 21 August 2014).

49 Section 25(1).

50 Sections 25(2) and (4).

Community[51] that the "risk of unsustainable depletion of renewable resources on the [restituted] farm" was very real: "the effect of such a depletion would be to prevent the younger members of the community from having equitable access to the restored asset in the future."[52] The court believed it was obliged to impose conditions which will ensure equal access to the restored land and natural resources well into the future. The conditions it imposed to eliminate the risk of unsustainable depletion was explicitly based on and derived from the environmental right which was a consideration to "justify the imposition of appropriately formulated conditions in this matter aimed at the sustainable management"[53] of the restituted land.

Various considerations affect human health and well-being, including, among others, the rights to equality, human dignity, life, property, housing and water, and the right to exercise one's own culture. All of these considerations are directly linked to peoples' environmental interests and they also figure as rights in the Bill of Rights. For example, the right to equality prohibits unfair discrimination and provides that "[E]veryone is equal before the law and has the right to equal protection and benefit of the law."[54] Section 10 recognises that "[E]veryone has inherent dignity and the right to have their dignity respected and protected", while section 11 succinctly states that "[E]veryone has the right to life." In an environmental context section 27 also provides that "everyone has the right of access to ... sufficient food and water." The rights to life, equality and human dignity, in particular, have a direct bearing on the environment, including all sustainability considerations by virtue of their being linked with environmental justice. In its most simplified form, environmental justice requires, at a minimum, not only that environmental benefits (which could be socio-economic benefits, and/or good health and wellbeing) should be equally distributed in a given society, but also that everyone should bear an equal burden of environmental harm.[55] Their interconnectivity suggests, when the rights-based approach to environmental governance is used by, for example, a claimant against a mining company, that these rights could be used as mutually-reinforcing and supportive entitlements. The most suitable 'rights mix' in the design of a rights-based claim will depend on the specific facts and circumstances at hand as well as on priorities with respect to the realization of some of the rights as several of the supporting rights (e.g. access to water and housing) have a strong socio-economic

51 2000 (2) SA 124 (LCC) at par. 117.

52 At par. 117.

53 At par. 118.

54 Section 9.

55 That environmental justice is a pertinent concern and objective of the South African environmental law order is evident from the provisions of NEMA, which state that: "[E]nvironmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons"; and "[E]quitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination." See sections 2(4) (c) and (d).

rights character which render their realisation and protection dependent on the availability of state resources.

It is thus clear that depending on the circumstances, a number of substantive rights could act in tandem with the environmental right to guarantee the constitutionally entrenched environment-related entitlements that people have. As is the case with the environmental right, these rights primarily apply vertically by binding the state and creating various obligations for the state.[56] However, as has already been indicated, they could also apply horizontally to the private sector by virtue of section 8(2) of the Constitution, in that the rights bind private entities and create prohibitions and obligations for the private sector, including mines. Where a mining company or mining activities therefore threaten life, human dignity, or equality, for example, this could be an infringement upon one or more substantive constitutional right, and such actions could be deemed unconstitutional and invalid in terms of the Constitution.[57] In sum then, for its actions to survive constitutional muster in an environmental context, a mining company must observe not only the restrictions and obligations imposed by the environmental right *per se*, but also those imposed by any other applicable right or bundle of rights in the Bill of Rights which could impact on peoples' multi-faceted and broadly defined environment.

III. Procedural Rights

Alongside the substantive constitutional rights discussed above, a number of procedural rights also form part of the broader rights-based approach to environmental governance, and they must be used where appropriate to enforce substantive rights-based claims.[58] These include the right to just administrative action; the right of access to information; and clauses relating to the access to courts and the enforcement of rights.[59] As with the environmental right, the state must respect, protect, promote, and fulfil these rights; and the private sector (the mining companies) could also be bound by these rights by virtue of section 8(2) insofar as they are applicable, taking into account the nature of the rights and the nature of the duties imposed by the rights.[60]

56 See also section 8(1) of the Constitution, which is discussed above.

57 Section 2 of the Constitution states that: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

58 *Louis J. Kotzé*, The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence, Potchefstroom Electronic Law Journal, 7(2) (2004), pp. 58-94.

59 Sections 32, 33 and 34 and 38 respectively.

60 See also the discussion above.

Section 32 provides that:

(1) *Everyone has the right of access to-*
   (a) any information held by the state; and
   (b) any information that is held by another person and that is required for the exercise or protection of any rights.

This right implies that people collectively and in their individual capacity have the right of access to some information[61] held by public authorities responsible for regulating mining and/or information in the possession of mining companies where this information is necessary for the protection of their substantive environmental and other rights. This right is given detailed effect to by the Promotion of Access to Information Act 2 of 2000 (PAIA), which, in tandem with the foundational constitutional provision, intends in an environmental context to ensure good, participative, and transparent governance through the provision of access to information relating to matters that affect peoples' health and well-being and environmental protection generally. For our purpose, anyone who feels that his or her environmental right has been infringed or who needs specific information to protect or enforce this right would be able to claim that information from the relevant state department and from a mining company, unless certain types of information such as commercial confidential information are explicitly excluded.[62] Information could, for example, include pollution and emission data, environmental monitoring information and/or any other relevant information pertaining to any process in the lifecycle of a mine.[63]

Section 33 of the Constitution provides that:

(1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

The right to administrative justice has been codified by the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and in tandem the right and the Act comprehensively aim to "promote an efficient administration and good governance; and create a culture of accountability, openness and transparency in the public administration."[64] These provisions are

61 The right and concomitant statutory provisions do not grant unrestricted access to all types of information and certain categories are specifically excluded. Information may be refused if it relates to: mandatory protection of the privacy of third parties; records of the South African Revenue Service; commercial confidential information; mandatory protection of the safety of individuals and protection of property; information used in legal proceedings; defence, security and international relations of South Africa; economic interests, financial welfare and activities of public bodies; research information; operations of public bodies; and manifestly frivolous and vexatious requests. Sections 33-45 of PAIA.

62 See Chapter 4 of PAIA for grounds for the refusal of access to certain categories of information.

63 See also *Shakung*, note 21, pp. 32-33.

64 Preamble of PAJA.

complementary to those of access to information and could be used by those who feel that their environmental interests, as protected by the Constitution, have been adversely affected by an administrative action. In the environment and mining context, it would typically be the state (government departments) that decides on a whole range of authorisations which a mining company would need before it commences its mining activities. In doing so, the state would be performing an administrative action.[65] If, for example, a community would be affected by the outcome of the decision, as it invariably is, that community would have the right to demand that all administrative decisions and actions related to the authorisation applications be lawful, reasonable and procedurally fair.[66] In addition, they would have the right to claim that they be given reasons for any decision; a provision which is meant to ensure accountable and justifiable decision-making.[67]

Rights, as with other legal provisions, would be of scant practical value and use if they could not be enforced. Section 34 of the Constitution recognises this by providing that:

> *[E]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*

The principal test to gain access to a court seems to be that the dispute must be such that it can be settled by the application of law; the threshold set by this test is clearly not very high. The provision on access to courts is complemented by the Constitution's provisions on standing. In sharp contrast to the narrowly defined and restricted *locus standi* provisions which were regulated by the common law in the apartheid era, sections 34 and 38 of the Constitution now generously provide for virtually unrestricted standing.[68] Anyone has the right to approach a competent court, alleging that one or more rights in the Bill of Rights has been infringed or threatened, including: "anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members."[69] Importantly, the provisions on access to courts and standing work collectively to reinforce the justiciability of the environmental right (see the discussion above).[70]

65 Section 1 of PAJA defines an administrative act as any decision taken or any failure to take a decision by an organ of state when exercising power or performing a public function in terms of the Constitution or legislation which adversely affects the rights of any person and which has a direct external legal effect. A number of exclusions are listed.

66 See *Shakung*, note 21, pp. 34-36.

67 Conversely, as with the right of access to information, a mine, like any other person, would similarly be entitled to claim the remedies under section 33 and PAJA.

68 *Ian Currie and Johan De Waal*, The Bill of Rights Handbook, Cape Town 2005, pp. 703-736.

69 Section 38.

70 *Currie and De Waal*, note 68, pp. 79-96.

It should be clear that, at least on paper, very little stands in the way of aggrieved or simply interested individuals and/or groups of people to settle a dispute or to ask a court for appropriate relief where a right or rights in the Bill of Rights have been infringed, in which case the court may "grant appropriate relief, including a declaration of rights."[71]

D. Judicial Appraisal

We now turn to a discussion of those instances where legal disputes have arisen and been adjudicated by South African courts in the mining context. The purpose of this overview is to determine and comment on the degree to which the rights-based approach to environmental governance in the mining sector seems to have been acknowledged and endorsed in mining related jurisprudence in recent years. The scope and depth of our analysis are delineated by the following caveats: a) the overview that we present does not allow us to dissect in detail all aspects of the judgments we discuss and we focus on the most important issues for the purpose of the article's general theme; and b) there are several other environment-related judgments and judgments that deal with environmental rights, including especially procedural rights in the environmental context, but due to space limitations we only focus on mining related judgments.[72]

I. The Environmental Right and Administrative Decisions

In *Director: Mineral Development Gauteng Region v Save the Vaal Environment*,[73] (hereafter *Save*), a voluntary environmental interest group (Save the Vaal Environment), objected to the granting of a mining licence for open-cast mining in an environmentally highly sensitive area.[74] More specifically, this case before the Supreme Court of Appeal dealt with the question of whether or not an environmental association consisting of concerned members of society is entitled to raise environmental objections and be heard by the state authority (the Director Mineral Development Gauteng Region) when the latter has to decide on granting a mining licence.

Save the Vaal Environment based its claim on its entitlements to administrative justice. At the time the constitutional right to administrative justice already existed, but PAJA had

71 Section 38.

72 For a more comprehensive discussion of these, see, *Louis J. Kotzé and Anél du Plessis*, Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa, Journal of Court Innovation, 3(1) (2011), pp. 101-120.

73 1999 (2) SA 709 (SCA).

74 Save the Vaal was described as being "united in their opposition to the development and exploitation of the coal reserves by open-cast mining in the area under discussion [and] their concerns are primarily of an environmental nature." At par 4. More specifically, the association's environmental concerns related to: possible destruction of a wetland by the proposed mine; threats to fauna and flora; noise, light, dust and water pollution; loss of water quality; and decreased value of properties. At par 6.

not been promulgated, and they subsequently relied on the common law doctrine of *audi alteram partem*; a doctrine which was later also incorporated into the provisions of PAJA. The association argued that: "[T]he [*audi*] rule comes into operation whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting a person in his or her liberty or property or existing rights or interests."[75] Save the Vaal contended that it was its substantive environmental rights and interests deriving from section 24 of the Constitution that were prejudicially affected insofar as the association was not given the opportunity to be heard during the application for the mining licence.[76] The court confirmed that the issue before it dealt with "environmental matters about which the respondents have legitimate concerns."[77]

Save the Vaal's claims and arguments were countered by the appellant (the Director) who argued that "[T]he mere issuing of a mining licence ... can have no tangible, physical effect on the environment"; that "[F]or this reason no rights are infringed and there is no case for a hearing",[78] and as a consequence, the *audi alteram partem* rule would not apply. The court disagreed and found that the issuing of the licence would allow the mine to commence with mining, an activity that could have severe environmental impacts. The administrative decision of the authority could therefore have severe consequences which might in future affect environmental interests and the interests people have in the environment:

> *... the application of the [audi] rule is indicated by virtue of the enormous damage mining can do to the environment and ecological systems. What has to be ensured when application is made for the issuing of a mining licence is that development which meets present needs will take place without compromising the ability of future generations to meet their own needs (the criterion proposed in the Brundtland Report: World Commission on Environment and Development, 'Our Common Future' Oxford University Press 1987). Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.*[79]

This decision, and more specifically the foregoing dictum, is instructive with respect to the rights-based approach to environmental governance as far as mines are concerned. On balance, the judgment suggests that the environmental right provides sufficient entitlements to aggrieved persons to enable them to voice their concerns where the environment is threat-

75 At par 9.
76 At par 9.
77 At par 13.
78 At par 16.
79 At par 20.

ened by mining (development). As a point of departure, it is important that the court took judicial notice of the fact that mining has the potential to cause "enormous damage" to the environment and ecological systems. Because mining can harm the environment and, per implication, the environmental interests of people, any government decisions regarding the activity of mining cannot be made willy-nilly. Public governance and decision-making in an environmental context could have severe environmental implications. For this reason, sustainable development should provide the criteria for testing the environmental impact of a decision: the decision must be such that it would allow development which meets present needs without compromising the ability of future generations to meet their own needs. The consideration of sustainability is made obligatory by means of the environmental right, because it is this right which requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in South Africa. It thus seems as if the court views the environmental right in tandem with sustainable development to be a means to an end; namely the incorporation of environmental considerations into government decisions that concern development.

The value of the right furthermore lies in the recognition by the court that it must influence decision-making and other administrative procedures which, for their part, have an influence on the sustainability of any development in South Africa. Administrative justice and the accompanying procedural matters in environmental governance cannot therefore be separated from substantive environmental rights considerations. Substantive and procedural considerations are inherently linked and have a direct bearing on each other. The court's view also suggests that the environmental right, through the incorporation of environmental considerations into decision-making, could be used to "green" decision-making in a sense; an idea which adds tremendous practical value to the use of environmental rights in environmental governance.

II. Liability for Historical Environmental Damage

In *Bareki v Gencor*[80] (hereafter *Bareki*), the High Court had to decide if the liability provisions of South Africa's environmental framework law, NEMA, placed retrospective obligations and liability on mines to address pollution they had caused before the commencement of the Act.[81] The facts were simple: asbestos was mined by Gencor (the defendant) at the Bute Asbestos Mine in the North West Province, but the mining operations were discontinued between 1981 and 1985. The mine was not rehabilitated and asbestos dumps, a benefi-

80 2006 (1) SA 432 (T).

81 Section 28 of NEMA at that time stated among other things, that:

"Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment."

ciation plant and a haul road between the mine and beneficiation plant remained on the land. The plaintiffs' claims (the Bareki indigenous community) were based on the alleged environmental degradation caused by these mining activities, and more specifically, that the mining activities "caused significant pollution in the mining area and the surrounding area by the distribution of asbestos fibres, thereby contaminating the mining area and causing pollution of the surrounding area."[82] The plaintiffs further claimed that there was a legal duty on the mines, in terms of section 28 of NEMA, to "take reasonable measures to rectify such pollution and/or degradation of the environment in the mining area and the surrounding area [and that they] remain responsible to take these steps despite the fact that NEMA only commenced in 1999, after the acts of pollution and degradation had been caused or commenced."[83] It was furthermore averred that Gencor (among other parties to the dispute) did not take the requisite reasonable measures in terms of this duty and that the unlawful or negligent failure caused damage or loss. Gencor excepted to these claims, arguing among others that NEMA commenced on 29 January 1999 and that it was, as a matter of legal interpretation, not retrospective in nature. This would mean that the obligation to take the measures referred to in section 28(1) of NEMA did not apply in the case of pollution that occurred prior to 29 January 1999. It was thus a classical case where liability for historical pollution had to be determined.

In a brief statement, the court recognised that, in interpreting the provisions of NEMA, it had to "promote the spirit, purport and objects of the Bill of Rights" and that NEMA was enacted to give effect to section 24 of the Constitution.[84] This interpretive guidance and obligation derived from section 39 of the Constitution.[85] Despite this cursory statement at the commencement of its *ratio*, the court strangely never again referred to or relied on the constitutional environmental right. Turning its back on the constitutional approach, the court instead exclusively focused its attention on the common law presumption against retrospective application of statutes. It reasoned that a *prima facie* rule of construction exists

This provision has recently been amended by the National Environmental Management Amendment Act 14 of 2009 to explicitly apply retrospectively, and thus to provide for liability for historical pollution.

82 At para 434J.

83 At paras 434D-435A.

84 At paras 436E-436H.

85 Section 39 states that:

(1) "When interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) *When interpreting any legi*slation, and when developing the common law or customary law, every court, tribunal or forum *must promote the spirit, purport and objects of the Bill of Rights*."

(Own emphasis).

in South African common law that a statute should not be interpreted as having retrospective effect. This presumption against retrospectivity may, however, be rebutted either expressly or by necessary implication, by provisions or indications to the contrary in the statute itself. Notably, this presumption will apply in those instances where unfairness can be inferred, or where there is or will be an encroachment on the rule of law. The court then proceeded to investigate the nature of the duty imposed by section 28 so as to establish whether either unfairness or an encroachment on the rule of law existed. The duty to take reasonable corrective measures in terms of section 28(1) was so widely formulated, according to the court, that it created not only strict liability, but could even imply absolute liability which may have no monetary limit: "liability can potentially be a very heavy one".[86] The court added that, despite the obvious justification of the rationale behind this duty in light of NEMA, the duty extends much further than the polluter, since even an owner or possessor of land who has not been responsible for pollution or degradation will then have an obligation to take reasonable corrective measures. It eventually concluded that the mine in this instance could not be held liable for the damage caused by its historical pollution activities because the provisions of the South African framework law on liability had no retrospective effect and it would be wholly unreasonable to place strict or absolute liability on the mine which would force it to remediate the environmental damage.[87]

In its decision, the court paid scant attention to the environmental interests of the claimants and was evidently more concerned about the liability (financial) implications for the mining company, were it to be held liable for its historical pollution activities. The court's positivistic and at times seemingly erroneous interpretation of South African environmental law has been subject to severe scholarly criticism.[88] While there are various aspects to the judgment, for present purposes, it is difficult to say whether the court would have reached a different decision if it had properly considered the environmental right and interpreted NEMA in the light of this right. What is clear, though, is that the court did not in any explicit way promote the spirit, purport, and objects of the Bill of Rights when it interpreted NEMA, because it failed to rely on and apply the constitutional environmental right in interpreting the environmental obligations of mining companies. This is surprising since the court deviated from the obligatory rules that the Constitution itself provides when interpreting legislation and the common law. Moreover, it also deviated from the well-established *stare decisis* or law of precedent rule that applies in South Africa. At the time *Bareki* was heard, there already existed sound precedent that emphasised the importance of the environmental right and the constitutional obligation to consider this right in environ-

86 At paras 440H-I.

87 At paras 442C-D.

88 For a discussion see *Willemien du Plessis and Louis J Kotzé*, Absolving Historical Polluters from Liability through Restrictive Judicial Interpretation: Some Thoughts on Bareki NO v Gencor Ltd, Stellenbosch Law Review 18 (2007), pp. 161-193; *Tracy Field*, Liability to Remedy Asbestos Pollution [Case Law Analysis of Bareki NO v Gencor Ltd 2006 (1) SA 432 (T)], Journal of Environmental Law 18 (2006), pp. 479-494.

mental governance generally, and by courts in resolving environmental disputes, specifically. This precedent was set in, for example, the *Save* case (see above), which was decided seven years earlier, as well as the landmark decision in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs*,[89] two years prior to *Bareki.* In the latter decision, the High Court infamously held:

> *Pure economic principles will no longer determine in an unbridled fashion whether a development is acceptable. Development, which may be regarded as economically and financially sound, will in future be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration inter alia socio-economic concerns and principles.*[90]

The court in *Gencor* neither attempted to either reflect on these precedents, nor to investigate section 24 more closely. Field is correct when she notes that apart from its token reference to section 24, the Constitution seems to have had little, if any effect, on the court's further reasoning.[91] Its reluctance to apply the environmental right is especially alarming considering that mining activities, and certainly those relating to asbestos, negatively affect the health and well-being of people and impact adversely on the entire array of interests safeguarded by section 24 and other rights. The court did not consider any of these issues. It is also clear that constitutional provisions override all considerations and laws; even a presumption against retrospectivity where necessary. That is the whole point of constitutional provisions/protection and one of the primary motivations to elevate environmental protection to a constitutional level. One of the features of constitutional environmental protection is to provide a "safety net", as it were, in those instances where legislative and regulatory regimes are incomplete or unenforceable for the sake of optimum environmental protection that accords with the minimum guarantees set by the Constitution and the environmental right. The court neither provided the Bareki people with this protection, nor did it "promote the spirit, purport and objects of the Bill of Rights".

It is thus possible to suggest that if the court had not ignored this duty it could very well have been influenced by the dictates of the environmental right and followed a different line of interpretation which would have been potentially more sensitive to the right of the

89 2004 5 SA 124 (W).

90 At paras 33-34.

91 *Tracy Field*, Letting Polluters off the Hook: The Impact of Bareki no v Gencor Ltd 2006 (1) SA 432 (T) on the Reach of s 28 of the National Environmental Management Act 107 of 1998?, South African Journal of Environmental Law and Policy, 14(1) (2007), pp. 105-123.

Bareki people to a protected environment not harmful to health and well-being. What this decision illustrates is that ignorance of the rights-based approach to environmental governance may in some instances lead to the absolution of mines from those environmental liabilities that they carry in terms of the prevailing laws and to situations where vulnerable people do not receive the constitutional and statutory protection that is rightly theirs to enjoy.

The recent decision by the Supreme Court of Appeal in *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs,*[92] however, suggests a promising change in legal reasoning, as is discussed in the following section.

III. Corporate Social Responsibility

The High Court in *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Ltd*[93] (hereafter *Stilfontein*), followed a significantly different approach when compared to *Bareki*. In this case, South Africa's lead state water authority (the Department of Water Affairs and Forestry, as it was then called), sought an order to compel several interconnected mines to abide by statutory administrative directives issued by the authority under water protection legislation. More specifically, the purpose of the order was to force the mines to take several anti-pollution measures,[94] to hold them liable in terms of these directives, and to force them to comply with the directives. The gold mines were required in terms of the directives to continue pumping water from their shafts. Failure to do so would result in a situation where the underground water would, if not raised to the surface and treated appropriately, become polluted and as a consequence affect valuable water resources.[95] At the time the directives were issued and before the commencement of the proceedings before the present court, the directors of the mines involved, resigned *en masse*.

The respondents (the directors of the mines in question), based their defences on, *inter alia*, the following grounds: the mines were due to their precarious financial status unable

92 (971/12) [2013] ZASCA 206 (4 December 2013).

93 2006 (5) SA 333 (W).

94 Section 19 of the National Water Act 36 of 1998 (the NWA) states that:

(1) An owner of land, a person in control of land or a person who occupies or uses the land on which-

(a) any activity or process is or was performed or undertaken; or
(b) any other situation exists,
(c) which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.

(2) A catchment management agency may direct any person who fails to take the measures required under subsection (1) to-

(a) commence taking specific measures before a given date;
(b) diligently continue with those measures; and
(c) complete them before a given date.

95 At par 2.

to comply with the directives; and they had resigned as directors from the mining companies and could therefore not comply with the anti-pollution measures set out in the directives as they were no longer in control of the mines and thus liable. The court found, among other things, that the mines were in fact capable, financially, of complying with the directives and of contributing to the anti-pollution measures.[96] As regards the resignation of the mines' directors, the court considered this a "most unusual occurrence".[97] In the words of the presiding judge, Hussain J:

> *I have not come across a case, in the corporate history of this country, where all the directors of a listed company resigned at once. Not surprising then that I could find no case law in this country that dealt with this situation, nor was I able to find such a state of affairs in the English case law. This is probably because this is simply not done within the corporate world.*[98]

The timing of the directors' resignation, i.e., after the directives were issued and immediately before the commencement of the proceedings before the present court, also came under fire: "[T]he timing of the resignations was rushed in order to meet the hearing date of this application. One does not expect, within the corporate environment, that the entire board of a public company suddenly resigns. There should, at the very least, be some form of notification."[99] It is true that "[A] company, being an artificial legal entity, can function only through human agencies. At any point in time, that human agency is ultimately the board of the company's directors";[100] in this instance, the company had been abandoned by the directors in an effort to escape liability. This is "unacceptable and the [directors] cannot be allowed to merely walk away because it is convenient for them to do so. They accepted appointments as directors of a listed company and they thereby accepted the duties and obligations that go with it",[101] and although this was not stated explicitly by the court, by implication arguably also their obligations towards the environment. With reference to the 2002 *King Report on Corporate Governance for South Africa*, Hussain J explained that the directors' resignation "flies in the face of everything recommended in the code of corporate practices and conduct recommended by the King Committee,"[102] and that they had demonstrated their social irresponsibility by doing so. Quoting the King Report's provisions and guidelines on environmental, social and human rights obligations of corporations, the court found:

96 At par 15.
97 At par 16.1.
98 At par 16.1.
99 At par 16.4.
100 At par 16.5.
101 At par 16.6.
102 At paras 16.6-16.7.

> *The object of the directives is to prevent pollution of valuable water resources. To permit mining companies and their directors to flout environmental obligations is contrary to the Constitution, the Mineral Petroleum Development Act [sic] and to the National Environmental Management Act. Unless courts are prepared to assist the State by providing suitable mechanisms for the enforcement of statutory obligations, an impression will be created that mining companies are free to exploit the mineral resources of the country for profit, over the lifetime of the mine; thereafter they may simply walk away from their environmental obligations. This simply cannot be permitted in a constitutional democracy which recognises the right of all of its citizens[103] to be protected from the effects of pollution and degradation. For this reason too, the second to fifth respondents cannot be permitted to merely walk away from the company, conveniently turning their backs on their duties and obligations as directors.[104]*

Most instructive for our present purposes, and in sharp contrast with the court's approach in *Bareki,* the present court argued that it had the constitutional duty "to ensure that adequate and effective mechanisms are provided to the State for the proper enforcement of environmental obligations imposed by statutes such as the National Water Act."[105] It derived this duty from the "environmental imperatives contained in s 24 of the Constitution, as supplemented by s 39(2), which enjoins a court interpreting any law to have due regard to the spirit, purport and objects of the Bill of Rights Chapter."[106] The court, as a result, found in favour of the state department; ordered that the mining directors were in contempt of an order that forced them to comply with the directive; and that they, as a consequence, had to pay a fine or be imprisoned upon failure to do so.[107]

Not surprisingly, the order was appealed by the directors in *Kebble v Minister of Water Affairs and Forestry* (hereafter *Kebble*).[108] In a much criticised decision,[109] the Supreme Court of Appeal overturned the earlier order of the *court a quo* (per Hussain J) on the ground that the order to "comply with the directives of the Department was unclear because the directives themselves were unintelligible in several respects and to some extent also incapable of implementation."[110] Fortunately, while this was a disappointingly weak and un-

103 For reasons unknown, the court erroneously restricts the application of the environmental right here to South African citizens only. This is incorrect by virtue of the wide ambit and scope of application implied by the word "everyone" in section 24.

104 At par 16.9.

105 At par 17.3.

106 At par 17.3.

107 At par 22.

108 2007 JDR 0872 (SCA).

109 See for example, *Louis J. Kotzé and N Lubbe*, How (not) to Silence a Spring: the Stilfontein Saga in Three Parts, South African Journal of Environmental Law and Policy 16 (2009), pp. 49-77.

110 At par 23.

justified argument for overturning Hussain's order, the decision of the Supreme Court of Appeal changed nothing of the jurisprudence established in *Stilfontein*. What is evident from the *Stilfontein* judgment is that the court considered the environmental right as a prohibition for mining companies to flout their social and environmental corporate responsibilities. Clearly, South Africa's constitutional democracy raises the bar and sets the standard for compliance to which mining companies and their directors must adhere.

These sentiments were confirmed in a related matter which arose later before the Supreme Court of Appeal in *Harmony Gold Mining v Regional Director: Free State Department of Water Affairs and Forestry*[111] (hereafter *Harmony*). *In casu*, the court held that anti-pollution measures in terms of water legislation must be interpreted in the context of the environmental right.[112] Such an interpretation suggested that anti-pollution measures applied not only to the mine's land, but also to land other than the property of the mine that is affected by its pollution. Anti-pollution measures in terms of South African water law can therefore not be limited territorially:

> *On the facts here it was in my view a reasonable anti-pollution measure to take steps to prevent groundwater from the defunct mines reaching the active ones. The constitutional and statutory anti-pollution objectives would be obstructed if the measures required of the persons referred to in s 19(1) were limited to measures on the land mentioned in that subsection. If the choice were between an interpretation confining preventive measures to one's own land and a construction without that limitation it is clear that the latter interpretation would be consistent with the purpose of the Constitution and the Act and the former not.*[113]

It is laudable that the court used the environmental right in this context to construe anti-pollution measures as having a very wide application that extends beyond the traditional geographically limited borders of the property of the mine.

These measures were even further extended in a recent appeal case before the Supreme Court of Appeal. The appeal in *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* (hereafter *Harmony Gold Mining Company*)[114] has arisen out of a directive issued by the Department of Water Affairs in November 2005 in terms of section 19(3) of the NWA, and it is part of the saga that played out in the cases discussed above. The directive was issued to Harmony Gold Mining Company Limited and

111 2006 JDR 0465 (SCA).

112 At par 17.

113 At par 33.

114 (971/12) [2013] ZASCA 206 (4 December 2013). The appeal was based on the High Court decision in *Harmony Gold Mining Co Ltd v Regional Director, Free State Department of Water Affairs and Others* Unreported Decision, North Gauteng High Court, Case No 68161/2008, 26 June 2012. In February 2014 the Constitutional Court dismissed Harmony Gold Mining Company Ltd's application for leave to appeal, which means that in effect, all judicial avenues have now been exhausted by Harmony.

to a range of other gold mining companies that undertook gold mining operations in the Klerksdorp-Orkney-Stilfontein-Hartbeesfontein (KOSH) area in the North West Province. As in the case above, the directive required the companies to take anti-pollution measures in respect of ground and surface water contamination caused by their gold mining activities. Harmony, however, ceased to be engaged in mining operations in the KOSH area on 27 February 2008. It then asserted that it no longer had any connection to the land in question and argued that the directive as a result became invalid or unenforceable against it; a view not shared by most of the respondents, including the Department of Water Affairs and the other mines. The question, therefore, was if the duty of care was temporally delimited to the actual time of landholding.[115] The court explained that the rationale behind section 19(3) of the National Water Act 36 of 1998 (NWA) was to direct landholders to address pollution or the risk of pollution "however long it takes to do so" and that the "rationale does not fall away when the landowner ceases to own, control, occupy or use the land".[116] The court argued that Harmony's restricted interpretation of section 19(3) of the NWA contradicts NEMA's principles[117] and that it would result in "the absurdity that a polluter could walk away from pollution caused by it with impunity, irrespective of the principle that it must pay the costs of preventing, controlling or minimising and remedying the pollution [or the polluter pays principle]."[118] The court explicitly stated that this provision in the NWA "gives expression and substance to the constitutionally entrenched right of everyone to an environment that is not harmful to health or well-being and to have it protected through reasonable measures that amongst others prevent pollution and ecological degradation."[119] The Supreme Court of Appeal dismissed Harmony's appeal on the basis that the Minister's powers under section 19(3) of the NWA are not subject to the limitation that he or she may direct a "landholder" to take anti-pollution measures only for as long as it (the "landholder") remains a person who owns, controls, occupies or uses the land.[120]

IV. Community rights and interests versus corporate interests

Recently the Constitutional Court was required to deal with the thorny issue of the lawfulness of granting a mining company a prospecting right on the land of an indigenous community, in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources*[121] (hereafter

115 *Humby*, note 9, p. 460.

116 At par 24.

117 Namely that pollution be avoided or minimised and remedied and that the costs of preventing, minimising, controlling or remedying pollution be paid for by those responsible for the environmental harm. See section 2 of NEMA and par 25 of the judgment.

118 At par 24.

119 At par 25.

120 At par 26.

121 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (CCT 39/10) [2010] ZACC 26 (30 November 2010). It must be noted that a prospecting right is a limi-

Bengwenyama). This was a classical case of an indigenous community which had mining aspirations in relation to its own land, (land from which it had been disowned during apartheid years, but which was subsequently returned to it), while competing with a big mining company which had similar interests in the land. *In casu*, both the indigenous community (through Bengwenyama Minerals (Pty) Ltd) and the mining company (Genorah Resources) simultaneously applied for prospecting rights on the community's land in terms of the provisions of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).[122] The state granted Genorah Resources the prospecting rights and subsequently informed the community that its application has failed as a result. It is the lawfulness of this decision which the community appealed before the Constitutional Court.

In a revealing statement which was evidently meant to set the scene for the judgment, the court, per Froneman J, remarked *obiter* that the legal issue at stake, namely the lawfulness of the state's decision to grant prospecting rights to the mine as opposed to the community:

> *...explains little of the invasive nature of a prospecting right on the ordinary use and enjoyment of the property by its owners. Second, it says nothing about the profoundly unequal impact our legal history of control of and access to the richness and diversity of this country's mineral resources has had on the allocation and distribution of wealth and economic power. Lastly, it does little to illuminate the effect of past racial discrimination on the ownership of land.*[123]

It is the issue of equality and redressing past injustices by enabling equal access to South Africa's mineral wealth within the context of sound environmental governance which was the leitmotif of the judgment: "[E]quality, together with dignity and freedom, lie at the heart of the Constitution ... The Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the natural resources of the country."[124]

The community argued, *inter alia*, that the award of the rights to the mine was defective because of irregularities in the required consultation process, lack of compliance with environmental requirements, and unjust administrative procedures. The Constitutional Court decided the matter on the basis of whether or not the decision to allocate the prospecting rights constituted just administrative action (see the discussion above). The court held in this respect that the granting and execution of prospecting rights could entail a grave inva-

ted real right in respect of the mineral and the land to which it relates and therefore does not constitute a right to mine. Nevertheless, a prospecting right usually is the first of a series of rights and authorisations which must be obtained before mining, mostly inevitably, commences, and is therefore as important as the granting of the actual mining right in terms of the MPRDA.

122 This is allowed in South African law as long as the applicant properly consults with the person or community who owns the land that is the subject of the prospecting right application. The position-incorrectly separated in the Pdfdocument. is regulated by the MPRDA.

123 At par 1.

124 At par 3.

sion of a property owner's rights, and that the purpose of consultation with landowners, as required by South African law, was to provide them with the opportunity to present their views and to obtain information necessary to make an informed decision.[125] It concluded that the mine had not consulted with the community as required by legislation,[126] and that government had not given the community a hearing or complied with the procedural fairness requirements of PAJA:[127]

> *I think it is necessary and apposite to make some general remarks on the treatment of Bengwenyama Minerals and the Community by the Department. They were not properly assisted in what was obviously an effort to acquire prospecting rights on their own property. Genorah was allowed to lodge financial guarantees late; they were not. They were not told of the grant of the prospecting rights to Genorah, which effectively put paid to their own application. Their internal appeal was responded to only after four months had elapsed [128]*

As well, in the light of the reality of inequality discussed above, according to the court, it would seem as if mineral and mining legislation created a special category of rights for the previously disadvantaged community, "in addition to their rights as owners of the land, namely to apply for a preferent right to prospect on their land."[129] In the eyes of the court (which was sympathetic to issues of environmental justice), this "special category of preferential rights" to South Africa's mineral resources seemed to be wholly justified by the need to redress inequalities in respect of access to the natural resources of the country.

The court further found that the MPRDA environmental requirements when submitting an application for a prospecting right had not been satisfied by the government and Genorah Resources:

> *It is one of the objects of the Act [MPRDA] to give effect to the environmental rights protected in section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.[130]*

Section 24 of the Constitution thus provided context in this matter, and in terms of section 17 of the MPRDA, the prospecting right could be granted only if the issuing authority was convinced that prospecting would not result in unacceptable pollution, ecological degrada-

125 At par 63.

126 At par 68.

127 In fact, the court took a dim view of the manner in which the government and relevant authorities had engaged with the community in the present matter, as is evidenced by the following statement: "This is not the way government officials should treat the citizens they are required to serve." At par 80.

128 At pat 79-80.

129 At par 73.

130 At par 75.

tion, or damage to the environment: "[A]pproval of the prospecting operation is dependent on an assessment that the operation will not result in unacceptable pollution, ecological degradation or damage to the environment."[131]

In casu, there was nothing to suggest that the mine satisfied this requirement – a requirement which reflects the objective of section 24(b) of the Constitution.[132] This line of reasoning, coupled with the court's belief that the community's right to administrative justice has been infringed, led it to find in favour of the community and to set aside the decision by the government to grant Genorah Resources a prospecting right.[133]

E. Conclusion

The South African government's resistance to recent calls by the ANC Youth League for the nationalisation of the mining sector (which has always been on the ruling party's agenda) proves that the country is far from decoupling its economic growth from mining.[134] In fact, we agree that "it would be disingenuous to ignore the positive socio-economic impacts of mining, which include, among others, the creation of wealth and employment opportunities, access to education, infrastructure development, and earning of foreign exchange."[135] Still, one of the underlying messages that we do attempt to convey in the present analysis is that the might of the mining industry has the potential to erode the gains that have been achieved in terms of more inclusive sustainable development since the advent of democracy in South Africa, with the real possibility to leave irreparable environmental harm in its wake. Ultimately, what would be needed is a balanced approach that rests on the dictates of the three dimensions of sustainability and that seeks to promote long-term socio-economic prosperity while effectively governing the environmental impacts that mining inevitably has.

Achieving the holy grail of sustainability is, of course, easier said than done. Yet one of the regulatory interventions to counter the undesirable environmental impacts of mining is the rights-based approach to environmental governance. We have demonstrated that South African law comprehensively provides for a rights-based approach to environmental governance, an approach which is based upon a constitutional environmental right and a bundle of other substantive and procedural rights, and which is given detailed effect by a statutory framework that contains environmental, water and mining legislation. Collectively, these rights and statutory arrangements should provide for better environmental protection while simultaneously enhancing peoples' socio-economic conditions. It is possible that where the

131 At par 77.

132 At par 76.

133 At par 89.

134 See *Wendell Roelf*, South Africa's Mines Could be Nationalised by 2012, http://www.mineweb.com/mineweb/view/mineweb/en/page72068?oid=105434&sn=Detail&pid=65 (last accessed on 20 August 2014).

135 *Christie*, note 18, p. 8.

rights-based approach is not invoked and utilised to its fullest extent, a very different result from the foregoing will arguably be achieved, a scenario suggested in particular by the *Bareki* decision.

Revisiting then the questions we raised in the beginning: Are rights in South Africa at this point still mere "symbolic statement[s] of intent",[136] instead of serving as the basis for meaningful and powerful remedies? Is the rights-based approach to environmental governance a paper tiger with a lot of roar but with little bite? Is the rights-based approach a viable means of holding mining companies to account for adverse environmental impacts caused by them? What does the rights-based approach to environmental governance presently mean and, considering its appearance before the judiciary, how effective is it really in practice in relation to the mining industry?

While there are no clear answers to these questions that immediately satisfy, we do see some encouraging trends in the South African constitutional, statutory and jurisprudential spheres that suggest that the rights-based approach is playing an increasingly important role in safeguarding environmental interests. Any textual analysis of South African law will score exceptionally well when assessing the existence and scope of a rights-based approach to mining. The jargon is correct and the substantive and procedural constitutional rights are repetitively referred to in the Constitution and in mining, water and environmental legislation, suggesting that the Constitutional Assembly (that wrote the Constitution) and the legislature have gone out of their way to provide a solid rights-based foundation for the protection of socio-economic and environmental interests, both substantive and procedural, on paper. The state's duty to execute its legislative authority and the "legislative measures" called for in section 24 of the Constitution therefore appears to have been satisfied.

As far as the judiciary is concerned, the signs are equally encouraging, since it would appear on balance as if the rights-based approach to environmental governance in the mining sector are fairly widely acknowledged and endorsed in mining related jurisprudence.[137] In all of the mining-related decisions we have analysed in this article, bar the decisions in *Kebble* and *Bareki*, the courts have been more inclined to protect the environmental and related interests of the people than those of the mines. Moreover, and more generally, the responsibility of the courts as guardians of the environment and the rights-based entitlements related to the environment were explicitly mooted in *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* (Fuel Retailers),[138] by the Constitution-

136 *Andrew*, note 11, pp. 482-483.

137 Yet, we realise that whereas the judiciary has to date been confronted by a few mining and environment-related cases, there is likely to be a myriad other cases that is simply never being put up for judicial muster due to the lack of legal information or ignorance of the protective scope of the law, the lack of financial resources to institute judicial proceedings, or because of communities being blinded by the short-term economic and labour related benefits that mining development offers.

138 2007 (6) SA 4 (CC).

al Court. With reference to the Johannesburg Principles adopted at the Global Judges' Symposium during the World Summit on Sustainable Development in 2002, the court stated:

The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the Court to ensure that this responsibility is carried out.[139]

This judicial oversight role bodes well for a constitutional democracy which aims to advance socio-economic development on the base of long-term environmental sustainability.

The objective of any rights-based approach to environmental governance, however, should be to achieve tangible, positive results; results that should have far more depth, reach and effect than reassuring guarantees on paper.

A core agent responsible for social reform and the of the myriad of rights in the Constitution is the executive arm of government. Every executive state organ (i.e. every decision-maker endowed with executive public power) has the duty to respect, protect, promote and fulfil the rights in the Bill of Rights.[140] The executive arm of government has a key role to play in implementing, executing, enforcing and monitoring compliance with the environmental, water and mining legislation (as the more detailed embodiment in law of the substantive and procedural rights that people have). The executive arm of government authorises mining and is responsible for overseeing mining operations generally. This is not a task for the legislature or the judiciary. While we have not comprehensively canvassed the performance of the executive arm of government in this regard, our cursory evaluation suggests that the executive is often prone to prioritizing economic interests over environmental and social interests when it comes to mining. This tendency came starkly to the fore in *Save*, and even in *Bengwenyama*, albeit more implicitly in the latter case.

Importantly, however, the rights agenda in South Africa does not only speak to the state. It also speaks to the mining industry. While the state and all three of its branches will always remain responsible for safeguarding, enforcing and realising environment-related human rights, this fact does not preclude mining companies from also being directly responsible to observe and respect these rights. To be sure, South Africa's Constitution applies and may hence be enforced not only vertically against the state but also *horizontally* against non-state entities such as mines. Yet, while a rights-based approach to environmental governance in the mining context would appear to be less concerned with rights than with duties, it also has to do with the duties of mines to respect the range of relevant rights provided for in the Constitution insofar as this is possible. The recognition of private sector

139 At paras H-I, p. 39.

140 Section 7(2) of the Constitution.

responsibilities in this respect has been confirmed by the courts in *Stilfontein*, *Harmony*, and the most recent appeal in *Harmony Gold Mining Company*. Even in *Bengwenyama,* the court confirmed that a local community's rights and interests in its own land trump those of any mining company, thus recognising that there is a concomitant reciprocal duty on mines to respect the interests that people have in their land. This is an encouraging indication of the growing realisation that mines will not be permitted to encroach as they please upon the environmental related interests of the people.